2003 WL 21543506
United States District Court,
S.D. New York.

Pamela K. MARTENS, et. al., Plaintiffs
v.
SMITH BARNEY, INC., et al., Defendants.

No. 96 Civ. 3779(JGK). | July 9, 2003.

Female employees of securities brokerage firm brought Title VII gender discrimination action, which was settled. Two employees moved to enforce settlement agreement. The District Court, Motley, J., denied motion, 2000 WL 108831, sanctioned employees' attorneys, 194 F.R.D. 113, and dismissed claim for lack of prosecution, 194 F.R.D. 110. Employees appealed. The Court of Appeals, 273 F.3d 159, reversed and remanded. On remand, the District Court, Koeltl, held that: (1) there was no such thing as motion to enforce; (2) class counsel did not violate settlement agreement by not providing list of alternate counsel available to class members until after filing of initial claims under agreement; (3) class counsel's fee agreement was not breach of any fiduciary duty; (4) class counsel did not violate agreement provision requiring furnishing of statistical data to claimants; (5) class counsel adequately represented individual claimants during claims procedure; (6) class counsel and firm took adequate steps to implement equitable account distribution policy, as required by settlement agreement; and (7) class counsel did not discriminate against claimants electing to use other counsel.

Motion denied.

Opinion

OPINION AND ORDER

KOELTL, J.

***1** In 1996 a class of women employed at Smith Barney, Inc. ("Smith Barney") filed a class action lawsuit against Smith Barney and other defendants alleging gender discrimination and sexual harassment throughout the company. The lawsuit resulted in a settlement agreement approved by Judge Motley of this Court in 1998. Certain named plaintiffs, Patricia Clemente, Marianne Dalton, Lisa Mays, and Teresa Tedesco (the "Moving Plaintiffs"), have now filed a "motion to enforce" the settlement agreement. Before the Court is also a motion to supplement the motion to enforce, a motion to strike the reply brief in that motion, as well as a motion for discovery. The Court will resolve each of these issues below.

I.

This case has a lengthy history that has taken it through the district court and the Court of Appeals, and now places the action in this Court upon reassignment from Judge Motley. Familiarity with the prior opinions is presumed.

This case began as a nationwide class action in which plaintiffs sued their employer, Smith Barney, for, among other claims, gender discrimination, harassment, and retaliation in violation of Title VII. On July 28, 1998, the district court approved an amended settlement stipulation ("Settlement Agreement" or "Stipulation") among the parties. *Martens v. Smith Barney Inc.,* No. 96 Civ. 3779, 1998 WL 1661385 (S.D.N.Y. July 28, 1998). The Settlement Agreement provided for an independent dispute resolution process ("DRP") as means to adjudicate 22,000 potential claims by individual class members and appointed the law firm of Stowell & Friedman as class counsel ("Class Counsel" or "Stowell & Friedman"). *Martens v. Smith Barney,* No. 96 Civ. 3779, 2000 WL 108831, at *1 (S.D.N.Y. Jan. 31, 2000) (hereinafter *Martens I*). The Settlement Agreement also provided named plaintiffs and other class members with the option of employing independent counsel to represent them during the DRP. *Id.* To ensure that a sufficient number of qualified lawyers were available to represent Claimants during the DRP, the Settlement Agreement provided for the creation of an attorney panel of experienced Title VII trial lawyers available to represent the class. *Id.* Finally, the Settlement Agreement required Smith Barney to implement certain diversity initiatives to benefit all current and potential employees. *Id.*

The DRP contained three stages. (*See generally* Settlement Stipulation ("Stip.") § 7.) At the Initial Submission stage, each claimant was required to submit her claim to Smith Barney and Smith Barney was required to respond. (Stip. § 7.12.) Claims that were not resolved at the Initial Submission stage could proceed, at the claimant's request, to Mediation. (Stip. § 7.13.) If Mediation failed, ADR-eligible claims could be submitted to a three-person ADR Panel in a public adversarial hearing. (Stip. § 7.14.)

On November 19, 1999 the law firm of Spriggs & Davis filed a self-styled "motion to enforce" the Settlement Agreement on behalf of two named plaintiffs, Cara Beth Walker and Teresa Tedesco, as well as to substitute

Spriggs & Davis for Stowell & Friedman as class counsel. *Martens v. Thomann,* 273 F.3d 159, 165–66 (2d Cir.2001). The motion accused Class Counsel and Smith Barney of violating the Settlement Agreement and sought to invalidate the DRP. *Id.* at 166. Judge Motley denied the motion in an opinion dated January 31, 2000 "for its gross failure to comply with the page limits of this court's Individual Calendar Rules." *Martens I,* 2000 WL 108831, at *1. Judge Motley stated that the allegations in the motion were "unsupported by affidavits from individuals with personal knowledge, and the relief sought in these motions are quite serious and extensive." *Id.* Judge Motley continued:

> ***2** If Mr. Spriggs elects to refile this motion in compliance with this court's rules relating to motions, he is instructed that any factual allegations regarding improprieties by class counsel or Smith Barney or both in connection with the DRP be properly supported by affidavits, signed by individuals with personal knowledge of the alleged improprieties.

Id. Judge Motley concluded by noting that there was no evidence in the record that Mr. Spriggs, who had signed each motion paper, had been admitted to practice in the Southern District of New York and cautioned him about the possibility of Rule 11 sanctions. *Id.* at *2.

Spriggs & Davis refiled a second motion to enforce on March 28, 2000, which "largely reiterated the allegations made in the original motion to enforce." *Thomann,* 273 F.3d at 167. When Judge Motley held oral argument on the motion on May 15, 2000, she did not hear argument about the merits of the motion to enforce but instead questioned Mr. Spriggs about allegations by Class Counsel of prior professional misconduct. *Id.* at 168. By the end of the hearing, Judge Motley imposed sanctions orally on both Mr. Spriggs and his co-counsel, Mr. Davis. *Id.* at 169. By Order dated May 16, 2000, Judge Motley revoked the pro hac vice status of both attorneys, held that they were each subject to Rule 11 sanctions of $5,000, and denied the motion to enforce without explanation. *Martens v. Smith Barney, Inc.,* 194 F.R.D. 113, 113–116 (S.D.N.Y.2000), *vacated, Martens v. Thomann,* 273 F.3d 159 (2d Cir.2001).

The Second Circuit Court of Appeals vacated Judge Motley's order revoking Spriggs' and Davis' pro hac vice status and imposing sanctions. *Thomann,* 273 F.3d at 183. The Court of Appeals also vacated Judge Motley's denial of the second motion to enforce the Settlement Agreement and remanded for further proceedings not inconsistent with the court's decision. *Id.* In so doing, the Court of Appeals wrote, "We begin our discussion by noting that there is nothing in the Federal Rules of Civil Procedure styled a 'motion to enforce.' Nor is there approval for such a motion to be found in this Circuit's case law, except in situations inapposite to the case before us." *Id.* at 172. The Court of Appeals explained that the parties' failure to clarify what relief was being sought, and under what rule the motion was noticed, rendered the court "severely burdened in our review of the disposition of this 'motion' on appeal." *Id.* The Court of Appeals listed a variety of ways that a party might call the performance of a class action settlement into question before a district court, including in a contempt proceeding, a new action for breach of contract, or in an action for relief from judgment under Federal Rule of Civil Procedure 60. *Id.* The Court of Appeals cautioned that it was not suggesting that any of these mechanisms was appropriate in the case, but rather that the possibilities demonstrated the different procedures and standards for relief and review that made "identification of the precise nature of the motion an essential for our review (and, we believe, for the district court's decision in the first instance)." *Id.*

***3** The Court of Appeals remanded the case to the district court in view of the fact that Judge Motley had denied the motion without explanation and thus the Court of Appeals could not review the decision without engaging in inappropriate speculation. *Id.* at 173. The court concluded by stating that

> Remand will of course also give both parties and the district court the opportunity to clarify precisely what relief is sought and on what grounds (i.e., under what rule(s) the motion is brought). Finally, to the extent that the motion, once properly characterized, requires resolution of disputed factual issues, the district court will have the opportunity on remand to conduct an evidentiary hearing and to allow the parties discovery as appropriate.

Id.

Spriggs & Davis subsequently filed a third motion to enforce on behalf of named plaintiffs Lisa Mays, Patricia Clemente, Marianne Dalton and Teresa Tedesco and Judge Motley heard oral argument on the motion on May 1, 2002. At argument, Mr. Spriggs dismissively stated the following:

> [M]uch has been said about the procedural vehicles under which the motion to enforce is brought....

> First, the language in the Court of Appeals opinion concerning whether there exists something called a motion to enforce was briefed by neither party and it appeared in the opinion. That was the first time it appeared in the case. It was not discussed at oral argument, it just appeared for the first time. *It clearly is not necessary to the decision and we regard it as dicta.*

(May 1, 2002 Hearing Tr. ("May 2002 Tr.") at 40–41 (emphasis added).) Similarly, at the initial conference before this Court, Mr. Spriggs characterized the Court of Appeals as having "commented upon" the prior motion to enforce before remanding the case to the district court. (June 18, 2002 Hearing Tr. at 6.) The third motion to enforce was virtually a refiling of the Moving Plaintiffs' earlier motion that the Court of Appeals found improper, and that motion is now before this Court having been transferred from Judge Motley.

II.

[1] In addition to the motion to enforce, the Moving Plaintiffs filed a motion to supplement the motion to enforce. The Court has granted the motion in the interest of completeness to the extent that the Court has considered all of the evidence and arguments. The material in the Moving Plaintiffs' papers, however, could have been included in one of the three preceding motions to enforce and the Moving Plaintiffs should have done so. This is the equivalent of a fourth motion to enforce. Class Counsel has filed a motion to strike the reply brief and declarations filed by the Moving Plaintiffs in connection with the motion to supplement on the ground that the documents raise new bases to overturn the Settlement Agreement that are inappropriate at this stage in the briefing. Class counsel is correct and reply briefs are not the appropriate place to raise new arguments. *See, e.g., Judge v. New York City Transit Auth.,* No. 99 Civ. 927, 1999 WL 1267462, at *3 (S.D.N.Y. Dec.29, 1999); *Irish Lesbian and Gay Org. v. Giuliani,* 918 F.Supp. 728, 731 (S.D.N.Y.1996). However, the motion to strike is denied in so far as the Court will consider only those portions of the reply papers that are truly responsive and which do not raise new arguments.

***4** The moving plaintiffs have simply refiled a third and fourth motion to enforce despite the Court of Appeals' statement that there is no such thing in the Federal Rules of Civil Procedure or Second Circuit case law except in situations inapposite to this case. *Thomann,* 273 F.3d at 172. The Moving Plaintiffs argue, however, that a motion to enforce does exist. Mr. Spriggs told Judge Motley at oral argument, "We went out and did some research, and found some cases that appeared to indicate that in point of fact, in Second Circuit jurisprudence there are motions to enforce that have been the basis of adjudications by the Court of Appeals...." (May 2002 Tr. at 41.) The Moving Plaintiffs cite *Pena v. New York State Division for Youth,* 708 F.2d 877 (2d Cir.1983) (per curiam), and *Sanchez v. Maher,* 560 F.2d 1105 (2d Cir.1977), as examples. Class counsel is correct, however, and these cases differ from the one before this Court in that the enforcement at issue in those cases was against a party to a class action whereas, in this case, the Moving Plaintiffs seek to enforce the Settlement Agreement against Class Counsel, which is not a party to the litigation.

Moreover, in so arguing, the Moving Plaintiffs merely contradict the Court of Appeals' finding that a motion to enforce is inappropriate in this case. The Moving Plaintiffs are bound by the Court of Appeals' decision. Furthermore, "a trial court cannot reconsider on remand an issue decided by an appellate court." *Rezzonico v. H & R Block, Inc.,* 182 F.2d 144, 148–49 (2d Cir.1999). If the Moving Plaintiffs sought to dispute the Court of Appeals' decision, the appropriate mechanism to do so was through a motion for reconsideration, which Mr. Spriggs did not file. The Moving Plaintiffs cannot simply ignore the Court of Appeals' binding decision and cavalierly invite this Court to do the same.

Nor have the Moving Plaintiffs attempted to file any of the three types of actions suggested by the Court of Appeals: a contempt proceeding, and action for breach of contract, or a Rule 60(b) motion for relief from judgment. In fact, Mr. Spriggs conceded at oral argument before Judge Motley that the Moving Plaintiffs were unable to bring a motion under these mechanisms. (May 2002 Tr. at 44–45.) Instead, the Moving Plaintiffs cite other provisions and Rules of Civil Procedure as bases for their motion that are equally inapposite.

The Moving Plaintiffs rely on Federal Rule of Civil Procedure 70 as a basis for their motion. Rule 70 states, in part, "If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done...." The Second Circuit Court of Appeals has stated that Rule 70 "deals with the enforcement of judgments relating to property" and is thus not a proper procedural basis for this motion. *See Vacco v. Operation Rescue National,* 80 F.3d 64, 67 n. 3 (2d Cir.1996) (finding Rule 70 inapplicable to an attempt to hold a party in contempt for violating an injunction issued against abortion protesters). Moreover, Rule 70 is directed at parties, rather than counsel, and thus does not apply in this case.

***5** The Moving Plaintiffs also cite Rule 23 of the Federal Rule of Civil Procedure. However, Rule 23 merely provides a basis for class action litigation and does not create a procedural basis for a "motion to enforce." Finally, the Moving Plaintiffs's purport to rely on § 16.9 of the Settlement Agreement in their motion to supplement as a basis for bringing their motion. Raising that basis in motion to supplement is tantamount to raising a new argument in a reply brief and is improper. Furthermore, Section 16.9 provides:

> In the event of any dispute or disagreement with respect to the meaning, effect or interpretation of this Settlement Stipulation or any Exhibit thereto, or in the event of a claimed breach of the Settlement Stipulation or an Exhibit hereto, the Parties agree that such dispute will be resolved and adjudicated only in and by the District Court, unless otherwise provided in this Settlement Stipulation. The District Court shall retain jurisdiction over all matters related to this Settlement Stipulation for purposes of administering, effectuating and enforcing the Settlement and resolving any dispute under this Settlement Stipulation.

Citing § 16.9 does not, however, solve the problem identified by the Court of Appeals by providing a basis for the motion that makes clear the standards by which this Court could decide the motion or by which the Court of Appeals' could review a decision of this Court. Section 16.9 provides no assistance to the Moving Plaintiffs because despite their extensive briefing, the Moving Plaintiffs fail to identify a provision of the Stipulation that Class Counsel or Smith Barney actually breached. If there were such a breach, the Moving Plaintiffs could have proceeded by a motion for contempt or action for breach of the Settlement Agreement.[1]

[1] The Moving Plaintiffs similarly claim to rely on Paragraph 34 of Judge Motley's July 24, 1998 Order as a basis for jurisdiction. Paragraph 34 states:

> Without affecting the finality of this Final Order and Judgment, this Court retains jurisdiction over the implementation and enforcement of this Final Order and Judgment. Smith Barney, the Named Plaintiffs and Class Representatives, and each member of the Class are hereby deemed to have submitted irrevocably to the exclusive jurisdiction of this Court for any suit, action, proceeding or dispute relating to this Final Order and Judgment or the Settlement Stipulation, except to the extent remitted by the Settlement Stipulation for resolution in a different forum.

Paragraph 34 does no more to provide a basis for this motion than does § 16.9.

Spriggs & Davis have ultimately filed two more briefs on behalf of the Moving Plaintiffs that seek to undo the Settlement Agreement agreed to by the parties and approved by Judge Motley. Spriggs & Davis wish to reopen the settlement, to resolicit members of the class in hopes of finding new claimants to support their efforts, and to declare the individual settlements and releases voidable. This is not an attempt to "enforce" the Settlement Agreement but to vacate a final judgment without complying with the types of stringent requirements that would apply to a motion for contempt, a motion to vacate under Rule 60, or an action for breach of contract. Indeed, the Moving Plaintiffs could not meet those standards. The parties are entitled to finality and the Court will not reopen the Settlement Agreement without a showing of need that has not been made.

Moreover, this was a case with approximately 23,000 class members. (Declaration of Nathan Vogt dated Dec. 7, 1999 ("Vogt Decl.") ¶ 3.) Roughly 1,900 initial submissions were filed with Smith Barney. (Supplemental Declaration of Nathan Vogt dated Apr. 17, 2000 ¶ 3; Declaration of Mary Stowell dated Dec. 6, 1999 ("Stowell Decl.") ¶ 10.) Of these, over ninety-five percent have been resolved. As of December 2002, fewer than 100 claims remained to be resolved, and, of those, 30 to 35 had completed Mediation. (Second Supplemental Declaration of Mary Stowell dated Dec. 6, 2002 ("2d Supp. Stowell Decl.") ¶ 2.) A review of the scope and success of the settlement in this case indicates that the efforts by the Moving Plaintiffs to undo the settlement should be rejected in the same way that motions to intervene to upset settlement have been denied where they have been untimely and prejudicial to other parties in the litigation. *See D'Amato v. Deutsche Bank,* 236 F.3d 78, 84 (2d Cir.2001); *Farmland Dairies v. Comm'r of New York State Dep't of Agriculture and Markets,* 847 F.2d 1038, 1044–45 (2d Cir.1988); *In re Nasdaq Market–Makers Antitrust Litigation,* 184 F.R.D. 506, 514–15 (S.D.N.Y.1999).

III.

***6** [2] Despite the fact that the Moving Plaintiffs have failed to identify an appropriate procedural vehicle for their motion, the Court has examined the merits of the Moving Plaintiffs' claims.[2] In so doing, it is apparent that Spriggs & Davis, on behalf of the Moving Plaintiffs, seek to undo a multi-year settlement that has resolved a

significant number of claims, bringing deserved closure to a great many parties. Out of 23,000 members of the class, and despite their participation as lawyers for individual class members, Spriggs & Davis has produced supporting complaints from less than fifteen class members. The Moving Plaintiffs' arguments are wholly without merit. There is nothing in the terms of the Settlement Agreement or in any fiduciary duties owed by Class Counsel that supports the Moving Plaintiffs' claims.

[2] Despite finding that the Moving Plaintiffs had failed to articulate a valid procedural mechanism for their complaints the Court of Appeals did note that the Moving Plaintiffs had raised various concerns about the performance of Class Counsel that should be addressed on remand. *Thomann,* 273 F.3d at 172 and n. 9. The Court therefore allowed the parties to submit extensive documentation and affidavits to provide a factual record. Despite the fact that the Moving Plaintiffs have disregarded instructions of the Court of Appeals to pursue a procedural mechanism other than a "motion to enforce," it is appropriate to address the factual assertions of the Moving Plaintiffs and to address the concerns specifically raised by the Court of Appeals.

A.

The Moving Plaintiffs argue that Class Counsel breached unspecified covenants by failing to make quality counsel available to all class members. Section 7.6 of the Stipulation, on which the Moving Plaintiffs rely, governed the creation of an Attorney Panel to aid class members in resolving their claims. Section 7.6 of the Stipulation states, in part:

> All parties may be represented by legal counsel at any or every stage of the Dispute Resolution Process. Class Counsel shall identify and select a panel of additional attorneys who will be available, upon the request of any Claimant, to represent such Claimant in her individual Mediation and/or ADR ("Attorney Panel"). All members of the Attorney Panel shall be skilled and experienced in Title VII litigation....

(Stip. § 7.6.) The panel was created to address Judge Motley's concern that there be a sufficient number of qualified lawyers available to represent class members. Section 7.6A of the Stipulation provides, in part:

> As provided in the Settlement Stipulation, the Dispute Resolution Process begins with the filing of an Initial Submission. Class Counsel will be available to prepare all Initial Submissions without any charge to the Claimant(s) or the Firm.
>
> It is anticipated that many claims will be resolved at the Initial Submission Stage. Class Counsel intend to represent as many Claimants as is reasonably practicable through the Mediation and ADR phases of the DRP.
>
> Class Counsel will also maintain and oversee an Attorney Panel consisting of attorneys willing to represent Claimants in the Mediation and ADR phases of the DRP in the event that Class Counsel are not able to represent Claimants or Claimants desire other representation.
>
> Because it is not known at this time how many Claimants will file claims or how many of those Claimants who file claims will proceed to Mediation and ADR phases of the DRP, it is difficult to determine how many attorneys will be needed for the Attorney Panel. Accordingly, within 30 days of the Effective Date, Class Counsel will designate an initial Attorney Panel comprised of no fewer than 25 attorneys based in different parts of the country. Class Counsel shall thereafter appoint additional attorneys to the Attorney Panel, if necessary.

***7** (Settlement Stip. §§ 7.6A(1)(a)-(d).) The panel was timely established and eventually grew to approximately 75 attorneys. (Declaration of Linda D. Friedman dated Dec. 7, 1999("Friedman Decl .") ¶ 5.)

The Moving Plaintiffs allege that Class Counsel violated an unspecified covenant by failing to provide a list of members of the Attorney Panel during the Initial Submission stage although the Moving Plaintiffs admit that § 7.6A(1)(f) of the Stipulation, which states that "Claimants will be given the list of attorneys on the Attorney Panel from which they may select an attorney," does not specify a date by which this must happen. There is no evidence that Class Counsel failed to provide the Attorney Panel to class members in a timely manner or in any way sought to undercut the usefulness and availability of the list. Instead, Spriggs & Davis continue to make the same type of unsupported allegations for which they were reprimanded by Judge Motley.

For example, Class Counsel presented information concerning the Attorney Panel at information sessions in fourteen cities between April and June of 1999 before the Initial Submissions were filed. (Vogt Decl. ¶ 10.) Class Counsel later sent a letter on November 15, 1999 to every claimant who had not signed a contingency agreement with them before Smith Barney responded to the Initial Submissions which read:

> As Class Counsel, we are available to counsel you regarding Smith Barney's response to your claim at no charge to you, or you may select a private attorney. For your convenience, we have enclosed a list of attorneys from whom you may choose. These attorneys were invited by Class Counsel to serve on the panel and have attested that they meet the standards for representation approved by Judge Motley. You may, of course, select any other attorney you wish.

(Ex. A to Vogt Decl.; Vogt Decl. ¶ 5.) Class Counsel also took steps to advise class members of the Attorney Panel at later stages of the DRP, including sending a letter to claimants who Class Counsel could not represent at Mediation recommending that they obtain counsel and transmitting a copy of the Attorney Panel. (Second Supplemental Declaration of Linda D. Friedman dated Mar. 29, 2002 ("2d Supp. Friedman Decl.") ¶ 5; Ex. B to 2d Supp. Friedman Decl.) There is no evidence that Class Counsel failed to live up to any of its responsibilities with regard to forming or transmitting the Attorney Panel.

B.

[3] The Moving Plaintiffs next claim that Class Counsel's contingent fee agreements and the terms of Class Counsel's retainer breach Class Counsel's unspecified fiduciary duties to the class pursuant to Federal Rule of Civil Procedure 23. The Moving Plaintiffs argue, first, that the contingent fee system approved by Judge Motley is inherently contrary to the fiduciary obligations of Class Counsel. Plainly, this could not be part of a motion to enforce the Settlement Agreement approved by Judge Motley. It is an effort to overturn the settlement without satisfying the stringent requirements of Rule 60. In any event, there is no support for this argument.

***8** Section 7.A6(1)(i) of the Stipulation specifically provides, "Nothing in the Settlement Stipulation will prohibit any attorney (including Class Counsel) from entering into a fee agreement with any Claimant." Panel attorneys were required, however, to agree in writing not to charge a fee to any plaintiff who did not prevail at either of the latter two stages of the DRP. (Stip. § 7.6A(2).) The Stipulation thus explicitly authorizes contingent fee agreements with Claimants.[3]

[3] The cases cited by the Moving Plaintiffs, in addition to having been decided outside this Circuit, entail wholly different facts and do not apply to this case. In *Dunn v. H.K. Porter Co., Inc.,* 602 F.2d 1105, 1109 (3d Cir.1979), the Third Circuit Court of Appeals found that "When a contingent fee contract is to be satisfied from a settlement fund approved by the trial judge ... the court has an even greater necessity to review the fee arrangement...." No such common fund is at issue in this case from which the Claimant's awards and Class Counsel's fees must be settled. Any contingent fee would be paid out of any amounts paid by Smith Barney in the DRP and would not be paid out of a common settlement fund. Similarly, in *Alexander v. Chicago Park District,* 927 F.2d 1014 (7th Cir.1991), an attorney also sought reimbursement from a common fund. When the attorney then sought to enforce contingent fee agreements in contravention of the district court's disbursement order, the district court found the attorney in contempt and this ruling was upheld by the Seventh Circuit Court of Appeals.

> In this case, contingent fees in this complex settlement were appropriate. There was basic work for which Class Counsel were paid including its successful resolution of the class action and obtaining systemic relief for the class. For the late stages of the individualized DRP, contingent fees, which could be paid either to Class Counsel or to outside counsel, provided a measure to assure continued quality representation for the individual Claimants.

Moreover, there is no evidence supporting the Moving Plaintiffs' claim that Class Counsel's 25% contingent fee was excessive, especially as compared with the firm's customary charge of 33 1/3%. (Ex. E to 2d Supp. Friedman Decl.; 2d Supp. Friedman Decl. ¶ 10.) The fact that Class Counsel is to receive additional compensation from Smith Barney, (*See generally* Stip. § 11.1), as approved by Judge Motley, does not effect the fairness of the contingent fee agreement. Moreover, Claimants were apprised of Class Counsel's additional compensation via the Stipulation. (*See* Stip. § 11.1.)

The additional 10% fee that Class Counsel would receive was payable by Smith Barney. The amount was calculated on the total damages (excluding attorneys' fees and costs) recovered in the DRP. It was specifically disclosed to the class members in the Stipulation at ¶ 11.1 and was part of the fee arrangement approved by Judge Motley. It was not misleading for Class Counsel to tell class members that it would take their cases for 25% rather than their customary 33 1/3% because that was true. Class Counsel would have gotten the 10% fee irrespective of their work or an individual class member's DRP case, and the 10% was a reasonable way of compensating Class Counsel for having obtained a settlement with the DRP feature. The payment was wholly contingent on the success of the DRP process. With respect to working on an individual class member's case in the latter two stages of the DRP, Class Counsel would be performing work (and possibly

foregoing the opportunity to do other work) at a rate of 25% which was less than its customary rate for that representation.

The Moving Plaintiffs also take issue with ¶ 10 of the Contingent Fee Agreement that Class Counsel entered into with those class members who Stowell & Friedman agreed to represent after the Initial Submission phase of the DRP. (*See* Contingent Fee Agreement Through Mediation ("Contingent Fee Agreement") attached as Ex. E to 2d Supp. Friedman Decl.) The Moving Plaintiffs allege that ¶ 10 is unfair because it allows Class Counsel to collect a 25% contingent fee award from class members who Class Counsel represented at the Mediation stage but who, after reaching an impasse, chose to go to ADR with new counsel after discharging Stowell & Friedman. The Court of Appeals directed the Court to examine this contention on remand. *See Thomann,* 273 F.3d at 172 n. 9.

Class Counsel is correct, however, and ¶ 10 does not award Stowell & Friedman a 25% contingent fee should the Claimant succeed at ADR with other counsel but merely awards Class Counsel a fee calculated on the firm's prevailing hourly rates and costs incurred should that class member prevail at the Third Stage of the DRP. (Contingent Fee Agreement ¶ 10.) Stowell & Friedman agreed to file a Fee Petition with the Hearing Panel and to seek to require Smith Barney to pay these fees, and any such fees recovered from Smith Barney would be deducted from the amount owed by the Claimant. (Contingent Fee Agreement ¶ 10.) Should the Claimant settle her case after releasing Class Counsel but before the case proceeded to judgment, Class Counsel would be entitled to receive the contingent fee. (Contingent Fee Agreement ¶ 10.) This provision was included in the Contingent Fee Agreement in order to prevent Claimants from releasing Class Counsel after the attorneys obtained a satisfactory settlement offer and then accepting that offer and avoiding paying Class Counsel their deserved fee. (2d Supp. Friedman Decl. ¶ 11.) The provision did not apply if the Claimant actually took her case to judgment in the ADR in which event Class Counsel would be limited by the fee calculated at the firm's regular hourly rate. If the Claimant did not prevail at ADR and Smith Barney paid no fee, then Class Counsel would receive no fee except for costs.

***9** These provisions are both fair and clearly explained in the Contingent Fee Agreement. Class Counsel does not seek any double recovery for work performed by other attorneys but merely seeks to ensure payment for work done. The provision makes clear that Class Counsel will seek fees and costs from Smith Barney. Class Counsel would only receive the contingent fee from a Claimant who Class Counsel did not currently represent if Class Counsel had represented the Claimant and was released from representing the Claimant and the Claimant thereafter resolved the claim. This protects Class Counsel and does not unduly burden the Claimant.

The Moving Plaintiffs also allege that the cover letter sent along with draft Claim Forms prepared by Class Counsel was misleading. The letter stated, in part, "We do not advise you to attend the mediation without an attorney. You have the right to select your own attorney, one from the attorney panel compiled by Class Counsel or to continue to use the firm's services." (Draft of Claim Form Representation in Mediation dated June 15, 1999 ("cover letter") attached as Ex. E to Stowell Decl.) Specifically, the Moving Plaintiffs claim that Stowell & Friedman's statement that Claimants could "continue to use the firm's services" is misleading because Stowell & Friedman never had a contractual attorney-client relationship with class members and Claimants and were instead being asked to execute a contingent fee retainer for the first time.

The phrase "continue to use the firm's services" is neither improper nor misleading. Class Counsel had just completed the Initial Submission stage for virtually all Claimants and represented the entire class on the merits and during the negotiation of the Settlement Agreement that created the DRP and set in place certain diversity initiatives at Smith Barney. Each member had in fact been represented by Stowell & Friedman and the letter makes clear that if such a relationship were to continue on an individual level the relationship would involve a contingent fee agreement. The letter is accurate and is not misleading.

Finally, the Moving Plaintiffs argue that Class Counsel breached their fiduciary duty by failing to represent all Claimants throughout the course of the DRP and "cherry picking" those who Class Counsel agreed to represent. The Stipulation made clear, however, that Class Counsel would be unable to represent all Claimants throughout the DRP. (Settlement Stip. §§ 7.6A(1)(b)-(c).) Furthermore, there is simply no evidence that Class Counsel chose to represent only those women whose cases could be easily resolved. For example, Class Counsel persuasively argue that Stowell & Friedman agreed to represent over fifty women at Mediation who had already signed general releases with Smith Barney, thus making it markedly more difficult for Class Counsel to convince Smith Barney to pay the Claimants additional money during the DRP. (Third Supplemental Declaration of Linda D. Friedman dated Dec. 8, 2002 ("3d Supp. Friedman Decl.") ¶ 13.)

***10** In sum, there was nothing improper about the contingent fee agreement approved by Judge Motley. Nor does Smith Barney's additional payments to Class Counsel undercut the validity of the agreement. The facts of the agreement and of Smith Barney's payments to Stowell & Friedman were communicated to class

members in the Stipulation. There was nothing improper about Class Counsel receiving payment for the work they performed even if they did not represent a successful Claimant through the close of her negotiations with Smith Barney or about the cover letter sent to class members. Finally, there is no evidence that Class Counsel chose to represent only those cases that Class Counsel believed could be easily resolved at the later stages of the DRP.

C.

[4] The Moving Plaintiffs argue that Class Counsel violated their duties under the Settlement Agreement by failing to complete additional statistical analyses before the Initial Submission phase and by accepting inadequate electronic data from Smith Barney. Section 11.1 of the Stipulation provides for payment by Smith Barney to Class Counsel in exchange for Class Counsel providing a number of services, including "preparing statistical evidence for Class use." Nothing in the Stipulation states that such evidence had to be available prior to the Initial Submission stage or at any other specific time during the DRP.

The Moving Plaintiffs contend that they could not make a "knowing choice" about settlement without these statistics. Extensive amounts of information were obtained and analyzed during discovery in a form designed to "protect the personal privacy interests of Smith Barney's employees and job applicants as well as the overall confidentiality and competitive sensitivity of the information." (Stip.¶ 1.6.) Prior to reaching a settlement, Class Counsel completed a comprehensive statistical analysis of occupational segregation and wage disparity at Smith Barney. (Supplemental Declaration of Linda D. Friedman dated Apr. 17, 2000 ("Supp. Friedman Decl.") ¶ 4.) The data was presented at informational meetings across the country in the Spring of 1999, prior to completion of the Initial Submission stage. (Supp. Friedman Decl. ¶ 4.) A report and statistical analyses on discrimination and harassment at Smith Barney was presented at mediation sessions in July 1997. (3d Supp. Friedman Decl. ¶ 6d.) The moving plaintiffs participated in the sessions either in person or by phone. (3d Supp. Friedman Decl. ¶ 6d.) There is no evidence that the statistical analyses were intended to be fully prepared by the time of the Initial Submission phase, or that Moving Plaintiffs were harmed by the lack of such data. Moreover, although the Court of Appeals expressed concern that the analyzed data related only to the years 1994 and 1995, *Thomann,* 273 F.3d at 172, Class Counsel in fact analyzed a broader range of data collected during both pre-and post-settlement discovery. (3d Supp. Friedman Decl. ¶¶ 6b, 6e.)

***11** Moreover, the Moving Plaintiffs argue that Class Counsel should have developed specific statistical analyses for individual damage claims rather than class-wide data. The data prepared for the national class as a whole was consistent with Class Counsel's theory of liability in which Smith Barney had employed a nationwide policy of unfettered discretion. (3d Supp. Friedman Decl. ¶ 6g.) This is consistent with the terms of the Stipulation. (*See* Stip. § 11.1.) Class Counsel also prepared sample Excel grids regarding damages, conducted training sessions for other attorneys, and offered to share their method of calculating individual damages with individual Claimants and their counsel. (3d Supp. Friedman Decl. ¶ 6g.) Furthermore, Claimants engaging in ADR had the opportunity to seek disaggregated data. (3d Supp. Friedman Decl. ¶ 6h; Stip. § 7.14(8).)

The preparation of a nationwide statistical analysis as completed by Class Counsel was consistent with Stowell & Friedman's obligations under the Settlement Agreement. Class Counsel did not violate any fiduciary duty by failing to disseminate information prior to the Initial Submission stage or by preparing nationwide data rather than analyses aimed at individual claims. Class Counsel has fulfilled its obligations to provide useful and timely data in this case.

D.

[5] The Moving Plaintiffs allege that Smith Barney inappropriately communicated with class members by sending a May 21, 1999 memorandum to Smith Barney Branch Managers. The memorandum stated, "This is a reminder that all registered employees in the Private Client Division must obtain prior approval from the General Counsel's Office before instituting a *securities-related lawsuit or arbitration,* or before appearing voluntarily as a witness in such a proceeding, whether or not Smith Barney is named a party." (May 21, 1999 Memorandum attached as Ex. A to Declaration of Gary Phelan dated Nov. 17, 1999 ("Phelan Decl.") (emphasis added).) This is another allegation that could not be viewed as part of a motion to enforce the Settlement Agreement because the Moving Plaintiffs do not explain what provision of the Settlement Agreement was allegedly violated. In any event, the charge of impropriety has no merit.

The Moving Plaintiffs allege that the memo, by its terms, clearly covers the act of participation in the DRP and was an effort by Smith Barney to discourage participation in the DRP process. The Court disagrees. The memo, which was directed solely at Branch Managers, clearly applies to "securities-related" litigation and arbitration and not the

type of Title VII suit at issue in this case. Despite this fact, when the issue was raised in the course of the litigation, Smith Barney sent a corrective notice on June 18, 1999 that stated:

> This is to clarify that the [policy requiring approval to institute securities-related litigation or arbitration], which was republished in the May 21, 1999 edition of the *Weekly Branch Announcements,* only applies to lawsuits or arbitrations in which there are securities-related issues. Clearly, it does not apply to employees bringing a discrimination claim or any other employment claim against Solomon Smith Barney or any other broker-dealer.

***12** (June 18, 1999 Memorandum attached as Ex. E to Phelan Decl.)

Moreover, Smith Barney argues persuasively that the Moving Plaintiffs have put forth no evidence that any class member was discouraged from participating in the DRP as a result of the May 21, 1999 Memorandum. Smith Barney is correct that the declaration of Guita Bahramipour, a former Smith Barney employee in California, stating that she did not file a claim in the lawsuit because of a threat from her Branch Manager, does not support Class Counsel's argument. (Declaration of Guita Bahramipour dated July 11, 2002 ("Bahramipour Decl.") ¶¶ 3, 10–12.) Bahramipour does not claim to have seen the May 21, 1999 Memorandum or that its existence in any way influenced her decision not to file an Initial Submission. While she accuses a Regional Sales Manager of having intimidated her, there is no assertion that the Regional Sales Manager used the memo as a means of harassment or intimidation.

Finally, the Moving Plaintiffs allege that Class Counsel was remiss in failing to bring the improper contact between Smith Barney and the Class to the Court's attention. Upon learning of the May 19, 1999 Memorandum from a Claimant's attorney, Class Counsel contacted Smith Barney and conducted an investigation into the alleged distribution of the memorandum and its potential effects on class members. (Friedman Decl. ¶ 30.) Class Counsel later worked with Smith Barney to distribute the clarifying memorandum. (Friedman Decl. ¶ 30.) In view of the fact that there was simply nothing inappropriate about the May 19, 1999 memorandum, Class Counsel certainly cannot be faulted for its efforts and the Moving Plaintiffs' allegations that Class Counsel failed to take necessary measures in response to the memorandum's distribution are without merit.

E.

[6] The Moving Plaintiffs argue that the Mediation stage of the DRP has not been carried out in accordance with the Settlement Agreement and that Class Counsel's performance has been inadequate with regard to the Mediation stage. However, as of December 6, 2002, less than 100 of the initially filed 1,900 claims had not been resolved, and of those, 30 to 35 had already completed Mediation. (2d Supp. Stowell Decl. ¶ 2.) The fact that some women have not yet participated in the Mediation stage of the DRP does not, contrary to the Moving Plaintiffs' argument, undercut the validity of the entire process. The Moving Plaintiffs' attempt to have this Court declare the releases of those class members who were represented by Class Counsel at Mediation declared "voidable" cannot succeed. There is nothing in the Moving Plaintiffs' argument demonstrating that Class Counsel violated the Stipulation or any fiduciary duty to the class.

The Moving Plaintiffs' arguments are unpersuasive and are not properly before this Court. Section 16.9A of the Stipulation specifically states that the Court will not review individual claims pursued through the DRP. Moreover, the arguments advanced by the Moving Plaintiffs regarding the experiences of five women at the Mediation stage of the DRP present no justification for the Court to void other resolutions obtained by Class Counsel during Mediation.

i.

***13** The Moving Plaintiffs allege that Class Counsel "abandoned" Bette Laswell as a client. The evidence does not support the allegation but rather shows a breakdown in the attorney-client relationship. Under the circumstances Class Counsel urged Ms. Laswell to obtain new counsel and did not charge her for their services. In any event, Ms. Laswell's situation would not be a basis for voiding the Settlement Agreement. Ms. Laswell's case does not support a claim of any class-wide defects in the Mediation process given the fact that Ms. Laswell was not a member of the class because she was never employed by Smith Barney. (2d Supp. Stowell Decl. ¶¶ 4–5.) She was, however, a party to the lawsuit and was represented by Stowell & Friedman. (2d Supp. Stowell Decl. ¶¶ 4–11.) In view of her unique circumstances, the Settlement Agreement provided for binding mediation solely for Ms. Laswell, (Stip. § 12.5), and for her to receive a $50,000 incentive payment. (Stip. § 12.2.) Moving Plaintiffs

simply show no breach of the Stipulation with regard to Ms. Laswell and her case offers no reason to set aside the Mediations performed on behalf of class members.

ii.

Laura Sweezey was represented by Class Counsel in Mediation with Smith Barney in approximately November 2000. (Declaration of Laura Sweezey dated May 23, 2002 ("Sweezey Decl.") ¶ 18; 3d Supp. Friedman Decl. ¶ 2.) After a lengthy mediation, Sweezey determined that the parties had reached an impasse and rejected what she considered to be Smith Barney's inadequate offer despite Class Counsel's advice to continue negotiating. (Sweezey Decl. ¶¶ 22–28; Friedman Decl. ¶ 2.) Sweezey subsequently hired two successive new counsel and was in arbitration as of May 2002. (Sweezey Decl. ¶¶ 22–28; Friedman Decl. ¶ 2.) Although Class Counsel did not achieve the result Sweezey wanted at Mediation, nothing in the record demonstrates a breach of Class Counsel's fiduciary duty or responsibility under the Settlement Agreement with regard to their representation of Ms. Sweezey.

iii.

Cynthia Van Lammeren was represented at Mediation by Class Counsel after having been represented by another attorney at the Initial Submission stage. (Declaration of Cynthia Van Lammeren dated May 16, 2002 ("Van Lammeren Decl.") ¶¶ 2, 8–15; 3d Supp. Friedman Decl. ¶ 3.) Ms. Van Lammeren has several complaints about her representation at the Mediation, one of which was that a piece of allegedly damning evidence about sexual harassment was never mentioned at the Mediation with Smith Barney. (Van Lammeren Decl. ¶¶ 18–20.) Class Counsel counter that they did not consider the claim credible in view of the Claimant's failure to include the inflammatory allegation in her initial submission where she purported to lay out the whole story. Class Counsel chose not to raise the issue at the Mediation for strategic reasons. (3d Supp. Friedman Decl. ¶ 3c.) Under the Stipulation, the strategic decisions in individual Mediations are not a proper basis for review in this Court, and there is nothing about this incident that would justify voiding the Settlement Agreement.

iv.

***14** Jean Carpenter rejected an allegedly substantial award offer from Smith Barney after the Initial Submission stage before Smith Barney, in Class Counsel's opinion, realized that important aspects of Ms. Carpenter's claim occurred prior the class period. (3d Supp. Friedman Decl. ¶ 4a; Declaration of Jean Severson Carpenter dated June 2002 ("Carpenter Decl.") ¶ 5.) Smith Barney subsequently realized its mistake and informed Class Counsel that Mediation was unnecessary. (3d Supp. Friedman Decl. ¶ 4a.) At Mediation, Smith Barney's offer did not change. (3d Supp. Friedman Decl. ¶ 4a; Carpenter Decl. ¶ 11.)

The Moving Plaintiffs argue that Class Counsel should have initiated an impasse process for Ms. Carpenter pursuant to § 7.13(5) of the Stipulation. Class Counsel claim not to have done so because Class Counsel believed that the best resolution for Ms. Carpenter could be won through continued negotiation rather than by seeking a Mediator's Proposal which Class Counsel felt would likely recommend a lower settlement amount. (3d Supp. Friedman Decl. ¶ 4b.) After releasing Stowell & Friedman in January 2002 and hiring new counsel, Ms. Carpenter eventually accepted Smith Barney's pre-Mediation offer. (Carpenter Decl. ¶¶ 19–20.) Whether to seek an impasse is a strategic decision left to Class Counsel and their clients in each individual case. The adequacy of Class Counsel's representation is supported by the fact that Ms. Carpenter hired counsel and got the same result that Class Counsel had been able to achieve. In any event, the Settlement Agreement did not contemplate that this Court would review the results in individual Mediations or ADR proceedings and Ms. Carpenter's case provides no basis for vacating the Settlement Agreement or the individual awards.

v.

Finally, the Moving Plaintiffs make two arguments on behalf of Patricia Clemente. Ms. Clemente is a named plaintiff and class representative in this case. She claims that she should not be bound by her agreement because a provision was omitted in the final draft of the Stipulation whereby a class representative who went to Arbitration could not receive an award lower than that of Smith Barney's last offer. (Declaration of Patricia A. Clemente dated July 15, 2002 ("Clemente Decl.") ¶¶ 13–14.) Class Counsel deny that such a provision was ever included in any draft of the Stipulation. (3d Supp. Friedman Decl. ¶ 5b.) Ms. Clemente, as a class representative, should have known the contents of the final Stipulation and is bound by the Settlement Agreement which contains no such guarantee.

The Moving Plaintiffs also argue that Ms. Clemente was wrongly denied the opportunity to submit statements at

her Mediation from persons supporting her claim that she should be made a securities broker. (*See* Clemente Decl. ¶¶ 16–17.) Class Counsel recalls no such request prior to Mediation. (3d Supp. Friedman Decl. ¶ 5a.) In any event, Smith Barney agreed to accept Ms. Clemente into the broker training program. (3d Supp. Friedman Decl. ¶ 5a.) There is nothing about the allegations made in connection with Ms. Clemente's case that would cause the Court to find any systemic fault in Class Counsel's performance in the Mediation process.

F.

***15** [7] The Moving Plaintiffs allege that Class Counsel's execution of confidentiality agreements for Claimants in the DRP violates an unspecified fiduciary duty to the class as a whole. The Moving Plaintiffs ask that the settlement amounts of each resolved claim be made known to all other Claimants and their counsel. The Moving Plaintiffs also ask the Court to deem all releases voidable.

There is no basis for the Moving Plaintiffs' assertion of an inherent conflict in Class Counsel's dual roles as both counsel to individual plaintiffs and to the class on the ground that Class Counsel has not shared information on individual settlements with all class members. The Settlement Agreement specifically provides that all Mediations shall remain confidential. (Stip.¶ 7.13(4).) Class Counsel argue correctly that they are in no different position from any other attorney representing a client who agrees to be bound by a confidentiality agreement. (3d Supp. Friedman Decl. ¶ 8.) Moreover, Class Counsel argue persuasively that disclosing the settlement amounts for each Claimant would serve as a disincentive for Smith Barney to reach settlements favorable to Claimants.

Moreover, as discussed above, Class Counsel has provided private attorneys with extensive data and training with which to evaluate settlement offers. (*See* 3d Supp. Friedman Decl. ¶¶ 6–7.) As the Moving Plaintiffs concede, Claimants have subpoena power at the ADR stage of the DRP and could, at that time, subpoena witnesses or evidence regarding other settlements reached over the course of the DRP. There is no conflict in Class Counsel's roles as counsel to individual Claimants and to the class in any way, including with regard the confidentiality of settlement information.

G.

The Moving Plaintiffs contend that Class Counsel and Smith Barney have failed to live up to their obligations under § 8.2(1)(1) of the Settlement Stipulation with regard to the establishment of an equitable customer account distribution policy. Section 8.2(1)(1) provides:

> The Firm shall develop and distribute to its retail branch offices non-discriminatory standards for distributing lists of potential customers to Financial Consultants and for distributing to Financial Consultants within a retail branch office customer accounts held by Financial Consultants who leave the Firm. Such standards shall be designed to be fair and equitable to Financial Consultants still employed in the retail branch office while in all events serving the best interests of the Firm's customers. The Office of Diversity shall review such guidelines periodically to make certain they are non-discriminatory.

The Moving Plaintiffs take issue with an Account Distribution Policy distributed in Smith Barney's Walnut Creek, California office in July 2000. (Account Distribution Guideline Memo dated July 7, 2000 ("Distribution Policy") attached as Ex. A to Declaration of Guita Bahramipour sworn July 11, 2002.) This policy was an update of an earlier Distribution Policy and was published in Smith Barney's Weekly Branch Announcements. (Declaration of Kevin McManus sworn Dec. 9, 2002 ("McManus Decl.") ¶ 7.) The Distribution Policy has continued to be updated. (McManus Decl. ¶ 8.)

***16** The Moving Plaintiffs allege that none of the eight factors listed in the Distribution Policy to be taken into consideration for account distribution correct past gender discrimination. The Moving Plaintiffs also argue that the Distribution Policy improperly accounts for subjective factors that provide managers with the opportunity to discriminate.

[8] There is no evidence that Class Counsel or Smith Barney have failed to live up to any obligation under the Settlement Stipulation with regard to the Account Distribution Policy. The Policy has been written and revised numerous times. (McManus Decl. ¶¶ 5–8.) The declaration of Smith Barney employee F. Norm Bahramipour stating that he had difficulty finding the Distribution Policy on the company's internal web site is not persuasive in view of the fact that the document was distributed through the Weekly Branch Announcements and his wife, Guita Bahramipour, made clear that employees were able to obtain copies of the policy upon

request. (Bahramipour Decl. ¶¶ 18, 26.; Declaration of F. Norm Bahramipour dated July 12, 2002 ¶¶ 1–6.)) Smith Barney has satisfied its obligation under the Stipulation to distribute copies of the policy to its retail branch offices.

Moreover, the Moving Plaintiffs arguments as to the substance of the Distribution Policy are unpersuasive. The Distribution Policy is not prohibitively subjective but instead takes into account both objective and subjective components, as Smith Barney argues. The factors include, for example, that the Financial Consultant to receive the account "must have signed, or be ready to sign, the Account Referral/Assigned Lead Agreement"; "must be licensed in the state where the client resides"; "must have a good compliance record and strong work habits." (Distribution Policy.) Also, if the Financial Consultant has recently received accounts through the "Franchise Protection Program" or a partnership agreement, the length of time that the Financial Consultant has serviced the accounts will be taken into account in determining whether that employee should receive other accounts until such time as other employees in the branch have received an equivalent distribution of accounts. (Distribution Policy.) The Settlement Stipulation explicitly provides not only that Smith Barney develop "fair and equitable" account distribution policies, (Stip.¶ 8.2(1)(l)), but also that "[n]otwithstanding any provision to the contrary in the Settlement Stipulation, Smith Barney shall at all times retain managerial discretion...." (Stip.¶ 9.1.) There is nothing discriminatory about the policies and they appropriately limit managerial discretion within the confines of the Settlement Stipulation.

Finally, the Moving Plaintiffs argue that Class Counsel has taken inadequate steps to remedy allegations of gender bias in account distribution in the Walnut Creek office. However, upon learning of complaints to this effect, Class Counsel visited the office and met with office employees and senior Smith Barney officials about the problem. (3d Supp. Friedman Decl. ¶ 9.) Class Counsel subsequently arranged for Smith Barney to audit the office redistribution policy and an independent human resources consultant was appointed to investigate the matter. (3d Supp. Friedman Decl. ¶ 9.) In sum, there is no evidence of any violation of Smith Barney's or Class Counsel's responsibilities as to the implementation of a gender neutral Account Distribution Policy.

H.

***17** [9] The Moving Plaintiffs make unsupported claims that Class Counsel manipulated class members who joined Spriggs & Davis' "motions to enforce". The claims state no violation of the Settlement Stipulation or any fiduciary duty. They are entirely without merit.

The Moving Plaintiffs argue that class members were unsuccessful in obtaining copies of the Initial Submission forms of other class members from Class Counsel in anticipation of Mediations. Class Counsel claims that no such forms were provided to class members because the Initial Submission forms contained highly personal information that other counsel were not entitled to see and which many Claimants explicitly wished to keep confidential. (3d Supp. Friedman Decl. ¶¶ 10–11; Ex. K to 3d Supp. Friedman Decl.) Moving Plaintiffs claim that Class Counsel later offered to share the Initial Submissions with Marianne Dalton, apparently in an effort to keep her from joining the initial Motion to Enforce. However, the Moving Plaintiffs have not submitted a sworn statement from Ms. Dalton and Class Counsel swears that Ms. Dalton was treated in the same way as other clients represented by Class Counsel. (3d Supp. Friedman Decl. ¶ 10.) Similarly, the Moving Plaintiffs' contentions as to Class Counsel's alleged manipulation of Cynthia Van Lammeren aimed at convincing her to remove her name from an amicus brief submitted to the Second Circuit Court of Appeals are inconsistent with Ms. Lammeren's sworn statement submitted to the Court of Appeals. (*Compare* Declaration of Cynthia Van Lammeren dated Oct. 11, 2000 ¶¶ 1–9 attached as Ex. C to 3d Supp. Friedman Decl., *with* Van Lammeren Decl. ¶¶ 4–7.)

There is no evidence that Class Counsel discriminated against those class members allied with Spriggs & Davis. The Moving Plaintiffs have not demonstrated a breach of the Settlement Stipulation or any fiduciary duty of Class Counsel in this regard.

I.

The Moving Plaintiffs claim that Class counsel failed to provide appropriate assistance to class members represented by other counsel. The Moving Plaintiffs cite no provision of the Settlement Agreement that Class Counsel violated in allegedly so doing. Instead, the Moving Plaintiffs merely restate grievances that the Court has previously addressed.

The Moving Plaintiffs claim that there are many things Class Counsel should have done to "level the playing field" between those women represented by Class Counsel and those class members who were either representing themselves pro se or who had retained other counsel. As the Court has explained, Class Counsel have taken repeated steps to assist those class members and their attorneys who were not directly represented by Class Counsel at all steps of the DRP. In addition to the assistance discussed above, Class Counsel submitted an

amicus brief to an ADR Panel that was wrongly refusing to allow a Claimant to submit class-wide evidence and won reversal of the Panel's earlier position. (3d Supp. Friedman Decl. ¶ 12.)

***18** The Moving Plaintiffs merely submit a list of actions that they would have liked Class Counsel to take. This list is nothing more than a baseless attempt to discredit Class Counsel's actions. The Moving Plaintiffs offer only one alleged example of Class Counsel's failure to aid other Claimants and attorneys that is supported by an affidavit from the Claimant. The Moving Plaintiffs claim that Jean Carpenter settled her claim one day after learning that an ADR Panel had rejected statistical evidence offered by Claimant Edna Broyles and that the same fate would befall her should she proceed to arbitration. (Carpenter Decl. ¶ 20.) Both parties agree that Ms. Carpenter was mistaken because Ms. Broyles had stipulated that she would not submit evidence at her arbitration. Ms. Carpenter was represented by her own counsel and there is nothing in the Settlement Agreement that required Class Counsel to disseminate information about Ms. Broyles' arbitration at any point, and certainly not within 24 hours.

J.

The Moving Plaintiffs make a final, catch-all objection to Class Counsel's performance that largely recaps the Moving Plaintiffs' previous arguments that the Court has already rejected. In addition to these arguments, the Moving Plaintiffs complain about Class Counsel's "seeming advocacy" for Smith Barney in connection with hearings before the New York Attorney General. Class Counsel believed, however, that it was in the best interest of the class to work together with Smith Barney at a time when an initial draft settlement had been presented to Judge Motley but a final agreement had not been yet reached. (2d Supp. Stowell Decl. ¶ 3.) In response to the Moving Plaintiffs' allegation that Class Counsel improperly pre-screened class members' comments at the hearing, Class Counsel state that they did so out of concern that any statements by Claimants at the hearing could potentially be used against them if inconsistent with statements made in the DRP. (2d Supp. Stowell Decl. ¶ 3.) In order to protect the best interests of the class and the individual Claimants, Class Counsel thus asked those women who wished to speak to advise them of the content of their statements before appearing at the hearing. (2d Supp. Stowell Decl. ¶ 3.) There is nothing improper in Class Counsel's conduct with regard to the hearing before the New York Attorney General or in any other regard alleged in the final section of the Moving Plaintiffs' Motion to Supplement their Motion to Enforce.

In sum, the motions to enforce, while denied on the ground of being procedurally improper, fails to allege any breach of fiduciary duty on the part of Class Counsel or any breach of the Settlement Agreement by Class Counsel or Smith Barney. The Court has reviewed all of the Moving Plaintiffs' allegations and finds them to be without merit.

IV.

[10] The Moving Plaintiffs seek extensive discovery with which to supplement their arguments. In moving for such discovery, the Moving Plaintiffs rely on the Court of Appeals' statement in *Martens v. Thomann* that, "to the extent that the motion, *once properly characterized,* requires resolution of disputed factual issues, the district court will have the opportunity on remand to conduct an evidentiary hearing and to allow the parties discovery *as appropriate." See Thomann,* 273 F.3d at 173 (emphasis added). The Moving Plaintiffs' failure to properly characterize the motion and, instead, to simply refile two more "motions to enforce" renders their application for discovery moot. There is no reason to allow discovery when the Moving Plaintiffs have failed to file a procedurally proper motion.

***19** Moreover, the Moving Plaintiffs seek particularly invasive discovery that would delve into facts including the identities of class members, their fee agreements with Class Counsel, and individual settlement amounts. There is no reason to provide the Moving Plaintiffs with this information when they have not filed a procedurally proper motion. Even if the Moving Plaintiffs had done so, they have not demonstrated a need to resolve any disputed questions of fact that would merit the requested discovery. Having reviewed the Moving Plaintiffs' third and fourth motions to enforce, the Court finds no argument that would warrant such relief.

It is clear that many of the Moving Plaintiffs' arguments go not toward enforcing the Settlement Stipulation but to overturning it. Courts have denied intervention directed at overturning settlments based on the papers alone where an insufficient basis for such intervention was shown. *D'Amato,* 236 F.3d at 84. In any event, some showing of at least the prima facie validity of the claim which would warrant the relief sought by the Moving Plaintiffs should be needed before imposing the burden and cost of the discovery sought. No such showing has been made in this case.

Allowing the Moving Plaintiffs discovery would merely waste the resources of the parties and of the Court. The parties to the Settlement Agreement are entitled to finality and the Court will not prolong the case through a fifth

motion to enforce. The motion for leave to conduct discovery is therefore denied.

CONCLUSION

Any remaining arguments of the parties are either moot or without merit. For the reasons explained above, the "motion to enforce" is denied. The "motion to supplement" has been granted only to the extent the Court has considered all of the evidence and arguments contained in that motion, but those submissions do not justify granting the relief sought in the motion to enforce. The motion for leave to conduct discovery is denied.

SO ORDERED.

Parallel Citations

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