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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DAISY JAFFE, DENISE WILLIAMS, and MARGARET BENAY CURTIS-BAUER on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

MORGAN STANLEY & CO. INCORPORATED, f/k/a/ MORGAN STANLEY DW, INC.,

Defendant.

Case No. C 06 3903 (TEH)

DEFENDANT'S RESPONSE TO OBJECTIONS OF PUTATIVE CLASS MEMBERS TO MOTION FOR CLASS CERTIFICATION & PRELIMINARY APPROVAL

DATE: DECEMBER 3, 2007
TIME: 10:00 AM

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I. INTRODUCTION

Defendant Morgan Stanley & Co. Incorporated ("Defendant" or "Morgan Stanley") hereby responds to the objections raised by putative class members Ronald Moore, Morris Allen, Jr., Michael Barnett, Anthony Bell, Patrick Carter, Martin Dixon, Ernest Dorsey, Mary Evans, Janice Grant, Mark Lewers, Maurice Mabon, Brian Roy, Marion Tucker, Carlton McDowell, and applicant Justin Harris (the "Moore group") to the Joint Motion for Class Certification and Preliminary Approval. Because the proposed settlement meets the standard of being fair, reasonable, adequate and free from collusion, this Court should grant the parties' request for preliminary approval. Contrary to the speculations and distortions that comprise the Moore group's objection brief, a review of the record demonstrates that the parties arrived at the settlement after: the initiation of the *Jaffe* plaintiffs' class-wide race claims; arm's-length negotiations between the parties; and agreed-upon settlement terms that are fair and reasonable to resolve the class-wide race claims between the parties.

II. FACTS

After filing an amended EEOC charge alleging class-wide discrimination against minorities in November 2006 and after receiving a Right to Sue Notice in December 2006, Plaintiff Denise Williams ("Plaintiff Williams" or "Ms. Williams") notified Morgan Stanley in January 2007 of her intention to amend her complaint in this action to bring nationwide claims of class-wide discrimination against minorities and offered to enter into a tolling agreement and engage in settlement discussions. Effective January 23, 2007, the parties entered into a tolling agreement and commenced a 10 month negotiation and mediation process which culminated in a settlement agreement which was presented to this Court for preliminary approval on October 22, 2007. On October 23, 2007, Stowell & Friedman faxed a letter to this Court from a number of purported African-American class members (who now have filed a competing class action) objecting to this settlement. By Order of October 29, 2007, this Court permitted members of the proposed class to submit objections by November 9, 2007 and directed that replies be filed by November 19, 2007.

III. ARGUMENT

A. Standards Applicable To Preliminary Approval

The approval of a class settlement is committed to the sound discretion of the trial judge. *See Churchill Village, LLC v. General Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998.) According to the Manual for Complex Litigation, the preliminary approval stage is merely an "initial evaluation" of the fairness of the proposed settlement made by the court on the basis of written submissions and informal presentations by the parties. *See Manual for Complex Litigation* (4th ed., Fed. Judicial Center 2004) at 21.632. The Manual further notes that the preliminary approval stage is one in which the court may "raise questions . . . if there are reservations about the settlement" so that the parties may "have an opportunity to resume negotiations in an effort to remove potential obstacles to court approval," implying that the assertion of objections designed to wholly thwart approval of the settlement should not be determinative at the preliminary approval stage but would be best raised at the final fairness hearing. *See id*. at 21.632; *see also Lucas v. KMart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006) (the purpose of obtaining preliminary approval is to determine whether there is reason not to notify class members of the terms of the proposed settlement and to proceed to the fairness hearing). Thus, "[a]t the stage of preliminary approval, the questions are simpler, and the court is not expected to, and probably should not, engage in any analysis as rigorous as is appropriate for final approval." *Manual for Complex Litigation*, Author's Notes at 465 (citing *Tenuto v. Transworld Sys., Inc.*, 2001 WL 1347235 (E.D. Pa. 2001)) ("In evaluating a settlement for preliminary approval, the court determines whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval.")

The standard by which a proposed settlement is to be evaluated is "whether the settlement is fundamentally fair, adequate and reasonable." *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1027 (N.D. Cal. 1999) (*quoting Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). "The issue is not whether settlement could be better, but

whether it is fair, reasonable, and adequate and free from collusion." *Id*. at 1028-29 (citing *Hanlon*, 150 F.3d at 1027.) Preliminary approval is appropriate where a settlement is sufficiently within the range of *possible* approval (or the "range of reasonableness") to justify notification to the proposed class of its contents and to proceed to a fairness hearing. *Armstrong v. Board of Sch. Directors of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds*, 134 F.3d 873 (7th Cir. 1998); *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 26, 2006.)

A court's "intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 480 U.S. 934; *see also Hanlon*, 150 F.3d at 1027 (same). A court should give preliminarily approval if a settlement is sufficiently within the range of *possible* approval (the "range of reasonableness") to justify notifying the proposed class of its contents and proceed to a fairness hearing. *See Armstrong*, 616 F.2d at 314; *Young*, 2006 WL 3050861, at *5.

Here, the proposed settlement should receive preliminary approval because it was the product of bona fide arm's length negotiations between the parties, not any fraud or collusion. This fact is supported not only by the representations of the parties, but by those of the well-respected, independent mediator who assisted the parties in resolving these claims throughout the lengthy, detailed and contentious process that led to an agreement. (*See generally* Report of Mediator Hunter R. Hughes, III ("Hughes Report") at ¶¶ 3-4.) Moreover, preliminary approval is appropriate because the settlement provides significant monetary relief, as well as substantial, meaningful and innovative programmatic relief designed to foster the careers of African-American and Latino Financial Advisors and Registered Financial Advisor Trainees in Morgan Stanley's Global Wealth Management Group, that is well within the "range of reasonableness" central to the Court's review at the preliminary approval stage. Finally, the strong judicial policy

in favor of the settlement of complex, class action litigation articulated by the Ninth Circuit, and recognized by courts of this District, amplifies the support for preliminary approval here. *See City of Seattle*, 955 F.2d at 1276; *see also San Francisco NAACP*, 59 F. Supp. 2d at 1029 (citing *City of Seattle* with respect to the judicial preference for the settlement of class actions).

B. Class-Wide Race Discrimination Claims Were Raised By The *Jaffe* Plaintiffs In The Normal Course And Were Not The Product Of Collusion Between The *Jaffe* Plaintiffs And Morgan Stanley.

1. The *Jaffe* Plaintiffs Indicated That They Were Going To Add Class-Wide Race Discrimination Claims In Late 2006 and Early 2007, Leading To Settlement Discussions To Resolve Those Claims.

Central to the Moore group's attack on this settlement is the assertion that the *Jaffe* case was a class action gender discrimination case that the parties colluded to artificially convert into a class action race discrimination case after Morgan Stanley reached a settlement in another class action gender discrimination case – the *Augst-Johnson* case. This is simply false. Allegations of class-wide race discrimination were initiated by the *Jaffe* plaintiffs entirely independent of Morgan Stanley. In fact, such claims were asserted by Plaintiff Williams in an amended Title VII charge of discrimination filed in November 2006 – long before: (a) Morgan Stanley began to discuss the possible settlement of individual claims of race discrimination with counsel for the Moore group, (b) Morgan Stanley and the *Jaffe* plaintiffs initiated settlement discussions and mediation to address their class claims of gender and race discrimination, or (c) Morgan Stanley reached a settlement with the plaintiffs in the *Augst-Johnson* gender discrimination class action. As shown below, the relevant language of the charge of discrimination by Ms. Williams is not subject to interpretation—it is express and clear in asserting a "class claim" of race discrimination on behalf of "minorities."

Shortly after the *Jaffe* Complaint was amended on October 12, 2006 to add the individual claims of race discrimination asserted by Ms. Williams pursuant to Section 1981 (*Jaffe* Doc #25), Ms. Williams filed an amended charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that Morgan Stanley had engaged in class-wide race

discrimination in violation of Title VII. Her amended charge, filed on November 2, 2006, under the heading "Class Claims," expressly stated:

> It is my understanding and belief that MSDW has engaged in a continuing pattern and practice of discrimination against female and minority Financial Advisors with respect to compensation, business allocation, and other terms and conditions of employment in the Detroit, Michigan office and in other MSDW facilities.

Jaffe Doc. # 81, Ex. B. Because the filing of a charge of discrimination is a legal prerequisite to the filing of a Title VII lawsuit alleging class-wide race discrimination, the language in Ms. Williams' amended charge could only reasonably be understood by Morgan Stanley to mean one thing—that Ms. Williams intended to amend the complaint in *Jaffe* to assert class claims of race discrimination. That alone would have been sufficient basis for Morgan Stanley to engage in settlement discussions with the *Jaffe* plaintiffs to resolve class-wide race discrimination claims. Thereafter, on December 5, 2006, Ms. Williams received a 90-day Notice of Right to Sue from the EEOC with respect to her amended charge of discrimination. (*Id.*) This increased the likelihood that Morgan Stanley would face such claims in *Jaffe*.[1]

In January 2007, counsel for the *Jaffe* plaintiffs notified Morgan Stanley that Ms. Williams had received a Notice of Right to Sue from the EEOC on her Title VII class charge and that she intended to file a *second* amended complaint to include class-wide claims of race discrimination on behalf of herself and a class of *minority* Financial Advisors. (Declaration of Mark S. Dichter ("Dichter Decl.") at ¶ 3.) Counsel for Ms. Williams specifically informed Morgan Stanley that Plaintiffs intended to amend the *Jaffe* complaint to assert claims that minority Financial Advisors were afforded fewer business opportunities than comparable Caucasian Financial Advisors and that they experienced race discrimination with respect to various terms and conditions of their employment. (Id.)

In response to the *Jaffe* plaintiffs informing Morgan Stanley of their intent to amend the Complaint by adding class-wide race discrimination claims, the parties agreed to a Tolling and

[1] *See* Second Amended Complaint filed August 17, 2007. Ms. Williams filed an initial charge of race discrimination on October 10, 2006, and amended her to charge to add class-based allegations of race discrimination on November 2, 2006. (*See* Jaffe Doc. # 81, Ex. B).

Standstill Agreement, effective January 23, 2007, to allow them time through mediation to negotiate a resolution of the class claims of race discrimination. (*Id.* at ¶ 4 and Ex. A (Standstill Agreement)). This Standstill Agreement was reached approximately three months before Morgan Stanley's first mediation session with the Moore group on April 24, 2007. (*Id*. at ¶¶ 4, 15.) Moreover, contrary to the suggestion that class-wide claims of race discrimination were concocted on the eve of settlement by Morgan Stanley and the *Jaffe* plaintiffs, the Standstill Agreement entered into by the parties – approximately eight months *before* the terms of the settlement agreement in this case had been reached – itself expressly referenced Ms. Williams' intention to assert class-wide claims of race discrimination against Morgan Stanley. (*See id.*, Ex. A, at 1) ("Denise Williams asserts, and MSDW denies, that she has certain causes of action for race discrimination against MSDW, individually *and on behalf of herself and other similarly situated minority employees of MSDW*.") (emphasis added). In fact, the Standstill Agreement went even farther and expressly noted the desire of the parties to engage in settlement discussion with respect to those claims. The Standstill Agreement stated:

> WHEREAS, Williams and MSDW desire at this time to take no action regarding Williams' individual and class claims of race discrimination and instead wish to pursue settlement discussions.

(Id.)

Thus, the timeline associated with the class-wide race claim by the *Jaffe* plaintiffs and Morgan Stanley's settlement discussions with both the *Jaffe* plaintiffs and the Moore group, do not support the conclusion that the parties in this case colluded to create a class-wide race claim where none otherwise existed just on the eve of settlement in August 2007.

2. Following The Standstill Agreement, The Parties In *Jaffe* Engaged In Meaningful, Arm's Length Negotiations Over Several Months.

Morgan Stanley representatives, counsel for Morgan Stanley, and counsel for the *Jaffe* plaintiffs (represented by attorneys from the Lieff Cabraser, Altschuler Berzon, and Outten & Golden firms) met on February 28, 2007 in San Francisco, California. (Dichter Decl. at ¶ 5.) At this meeting, the parties agreed to engage the services of prominent mediator Hunter R. Hughes

III, Esq. ("Mr. Hughes") to assist in the mediation of all claims. (*Id*.) It was also at the February 2007 meeting that counsel for the *Jaffe* plaintiffs requested detailed data and information from Morgan Stanley in connection with their claims. (*Id*.) That data was provided to the *Jaffe* plaintiffs approximately one week after the February meeting. (*Id*.)

In March and May 2007, Morgan Stanley representatives, Morgan Stanley's counsel, and counsel for the *Jaffe* plaintiffs met with Mr. Hughes to attempt to resolve the class-wide race discrimination claims asserted by the *Jaffe* plaintiffs. (*Id*. at ¶¶ 6-7.) Thereafter, however, a third mediation session with Mr. Hughes – scheduled to take place in mid-June 2007 – was cancelled by the *Jaffe* plaintiffs as a result of their dissatisfaction with the settlement terms offered by Morgan Stanley. (*Id*. at ¶ 8.) The parties met again with Mr. Hughes in July 2007 and, during that session, reached an agreement in principle to resolve the class-wide race discrimination claim. (*Id*. at (*Id*. at ¶ 9.) That agreement was later memorialized in a formal settlement agreement, the language of which was negotiated by the parties until it was filed with the Court on October 22, 2007. (Id.) Mediation of the plaintiffs' class claims was difficult and time consuming, and involved multiple in-person mediation sessions, scores of telephonic conferences and settlement calls, significant informal discovery, data collection by the Plaintiffs and expert analyses of collected data over at least a five-month period. (*Id*. at ¶ 10; Hughes Report at ¶ 3.) Far from readily agreeing to a settlement, the parties nearly reached impasse on several occasions due to conflicting settlement positions. (Hughes Report at ¶ 4.)

Notably, Morgan Stanley and the *Jaffe* plaintiffs were engaged in mediation with respect to class-wide race discrimination claims even *before* Morgan Stanley began to engage in mediation with the Moore group regarding their race discrimination claims. As noted below, mediation with the Moore group did not begin until April 24, 2007, three months after the parties in *Jaffe* entered into the Standstill Agreement expressly indicating a desire to mediate class-wide

race discrimination claims, and nearly two months after a private settlement meeting and one month after a mediator-assisted session had already been conducted in *Jaffe*. Significantly, even assuming that Morgan Stanley and the Moore group had been able to commence mediation prior to the Spring of 2007, the focus of Morgan Stanley's settlement discussions with the Moore group was the resolution of the individual claims of race discrimination threatened by members of the group, not settlement on a class-wide basis. (Dichter Decl. at ¶ 16.)

C. Morgan Stanley Also Engaged In Meaningful And Arm's Length Settlement Discussions With The Moore Group With Respect To Their Threatened Individual Race Discrimination Claims.

Contrary to the Moore group's suggestion that Morgan Stanley effectively engaged in sham settlement discussions with them while "orchestrating" a settlement of race discrimination claims with the *Jaffe* plaintiffs, those settlement discussions were also meaningful, protracted, and involved the participation of a respected mediator. However, as reflected in the Standstill Agreement, Morgan Stanley and the *Jaffe* plaintiffs entered into settlement discussions in early 2007 with the express intention of seeking to resolve class-wide race discrimination claims; while, conversely, settlement discussions between Morgan Stanley and counsel for the Moore group focused almost entirely on the resolution of individual claims of race discrimination threatened by members of that group, not a class settlement.[2]

The mediation sessions with the Moore group began after counsel for the Moore group, Mary Stowell, informed Morgan Stanley's in-house counsel that they were willing to consider settlement of the claims of members of the Moore group on an individual, non-class basis.

[2] The suggestion that "Morgan Stanley chose not to negotiate with the Moore group because it was not interested in a fair resolution negotiated at arm's length that would actually benefit African-Americans and result in meaningful change at the Firm," (Objections of Putative Class Members To Motion For Class Certification & Preliminary Approval ("Moore Objs.") at 16), amounts to faulty revisionist history and irresponsible conjecture. Morgan Stanley indisputably engaged in real, arm's length settlement discussions with both the *Jaffe* plaintiffs and the Moore group over many months in 2007. However, negotiations with the Moore group broke down over the amounts of the individual settlement demands during the parties' final mediation session in late June 2007. Until that time, Morgan Stanley earnestly participated in lengthy mediation sessions assisted by a highly respected mediator.

(Declaration of Alexa B. Pappas ("Pappas Decl.") at ¶ 4.) Counsel for the Moore group did threaten to bring a class action, however, if the claims could not be resolved on an individual basis (and now have just filed a competing class action in the U.S. District Court for the Northern District of Illinois). (Id.)

Over the course of three separate mediation sessions in April 2007 (in Chicago, Illinois), May 2007 (Washington, D.C.), and June 2007 (Chicago, Illinois), Morgan Stanley representatives and counsel for Morgan Stanley engaged in settlement discussions addressing individual claims of race discrimination with counsel for the Moore group and almost all of individuals who were part of the Moore group. (Dichter Decl. at ¶¶ 15-16; Pappas Decl. at ¶¶ 7-8.) Because counsel for the Moore group also raised programmatic concerns during the course of the mediation sessions, Morgan Stanley reported to the Moore group the actions Morgan Stanley would be taking in connection with the *Augst-Johnson* gender settlement, as well as the similar types of actions Morgan Stanley would be prepared to take in connection with programmatic relief addressing race issues. (Dichter Decl. at ¶¶ 16, 17.) These planned actions reported to the Moore group were, in fact, based on the programmatic relief actions that Morgan Stanley was discussing with the *Jaffe* plaintiffs. (*Id.* at ¶ 17.)

Mediation of the individual claims with the Moore group eventually broke down over the amounts of the individual settlement demands at the final mediation session in June 2007, well before a settlement was ultimately reached in the *Jaffe* case. (*Id*. at ¶ 18.) After settlement discussions with the Moore group ended, Morgan Stanley continued to mediate the class-wide race discrimination claims with the *Jaffe* plaintiffs, just as it had since early 2007, and reached an agreement in principle on July 23, 2007. (*Id.* at ¶ 9.)[3]

[3] Though counsel for the Moore group has alleged that Mark Dichter, counsel for Morgan Stanley, "advised the Moore group's attorneys that if they challenged the lawsuit, they would be 'pariahs of the plaintiffs bar' because between the *Augst-Johnson* and the *Jaffe* lawsuits, five law firms sided with Morgan Stanley on settlement," that statement has been badly distorted and presented without context. The statement actually made by Mr. Dichter was

D. The *Jaffe* Settlement Was The Result of Legitimate, Arm's Length Negotiations Between The Parties.

In assessing proposed class action settlements at the preliminary approval stage, an "initial presumption of fairness [arises] when a proposed class settlement was negotiated at arm's length by counsel for the class." *Murillo v. Texas A&M Univ. Sys.*, 921 F.Supp.2d 443, 445 (S.D. Tex. 1996.) Here, the Moore group brazenly suggests, without any actual factual support, that "the [*Jaffe*] settlement was not negotiated at arm's length. The *Jaffe* lawsuit was filed as a class action gender discrimination lawsuit, and converted to a race and color class case only after the plaintiffs' lawyers lost the gender case to a competing group of plaintiffs and lawyers in the *Augst-Johnson v. Morgan Stanley* case." (Moore Objs. at 13.) The support offered for this conclusion is mere speculation compounded by even more speculation. As explained at length above, there is conclusive, direct evidence that the *Jaffe* plaintiffs and Morgan Stanley began bona fide settlement discussions of the class action race discrimination claims before the settlement of *Augst-Johnson*.[4]

The proposed settlement in this case was reached as the result of well-informed, adversarial, arm's length settlement discussions that spanned many months and many meetings, and which were supplemented by the production of extensive information and data relevant to Plaintiffs' class claims. This is not simply Morgan Stanley's position, but the position of the

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made in response to threats from the counsel for the Moore group that they would challenge the settlements in both the *Augst-Johnson* and *Jaffe* cases, and would claim that the plaintiffs' counsel in both cases had all colluded with Morgan Stanley to reach settlements that were not negotiated at arm's length and were not in the best interests of the respective classes. Mr. Dichter responded to those threats by pointing out that the two settlements were negotiated by five of the most highly-respected plaintiffs' employment discrimination law firms and that attacking the credibility and motivations of those firms and alleging that they engaged in collusive activity and failed to adequately represent their clients by knowingly entering into inadequate settlement agreements would make the Moore group's counsel the pariahs of the plaintiffs' bar. (*Id*. at ¶ 21.)

[4] Contrary to the Moore group's objection, the *Jaffe* counsel were aware of the existence of the claims of the Moore group. *See* Moore Objs. at 17 ("Morgan Stanley did not inform [the *Jaffe*] Plaintiffs or their counsel about the existence of the Moore group or the nature of their claims."); Dichter Decl. at ¶ 7) Thus, the Moore group's suggestion that Morgan Stanley was somehow "unreliable" in the course of its settlement discussions with the *Jaffe* plaintiffs is unfounded. This assertion appears to be yet another example of the Moore group's surprising willingness, in a court filing, to make inflammatory accusations without any factual support.

independent mediator who actually participated in the settlement negotiations. According to Mediator Hunter Hughes:

> [C]ounsel for the parties advocated their clients' positions vigorously and at arms' length. In fact, negotiations almost reached impasse on more than one occasion when one side or the other chose not to negotiate off what I considered principled positions. The proposed settlement that voluntarily was reached was the result of well-informed, non-collusive negotiations.

(Hughes Report at 4.) Though still fueled by speculation, the Moore group's suggestion that negotiations between the *Jaffe* plaintiffs and Morgan Stanley were not at arm's length might appear more credible had the parties carried out their settlement negotiations in a "back room" setting, without neutral third parties present. Here, however, *a neutral third-party* was present for, and was responsible for directing, those negotiations. Curiously, the Moore group fails to disclose Mr. Hughes's role in the *Jaffe* settlement when alleging that the settlement was the product of collusion and was not reached at arm's length. (*See, e.g.*, Moore Objs. at 13-16.)

There is, then, on the one hand, ample evidence of a mediated, arm's length negotiation resulting in a fair and reasonable settlement, and on the other, rampant speculation (with no basis in fact) that the parties reached an unfair, "backroom" settlement. Morgan Stanley suggests that, given the facts at hand, the only conclusion to be drawn is that the settlement in this case was reached at arm's length by willing and educated parties, assisted by a neutral third party. This Court should conclude that the settlement was negotiated at arm's length and, as such, is entitled to a presumption of fairness at the preliminary approval stage.

E. Morgan Stanley's E-Mail To Putative Class Members Was Motivated By Legitimate Business Interests, Not Improper Motives As Alleged By The Moore Group.

The Moore group claims that Morgan Stanley sent an e-mail to putative African-American and Latino settlement class member employees in an effort to assist Plaintiffs' counsel in "garner[ing] support for the settlement." This unsupported conjecture is, again, false.

On August 30, 2007, shortly after the public announcement and press reports of the settlement in this case, Morgan Stanley's Human Resources group sent an e-mail to all African American and Latino Financial Advisors and Registered Financial Advisor Trainees informing them of the settlement, reminding them of Morgan Stanley's non-retaliation policy and telling them they could direct any "inquiries . . . regarding participation in this settlement" to Plaintiffs' counsel. (Pappas Decl., Ex. A (8/30/2007 E-Mail). This e-mail was a preemptive measure designed to prevent a problem that arose following the public announcement of the settlement in the *Augst-Johnson* sex discrimination class action, when Morgan Stanley's Managers and Human Resources representatives received numerous inquiries from current employees/potential class members regarding the settlement. (Pappas Decl. at 8/30/2007 ¶ 10). The Managers and Human Resources group, in turn, had to direct each individual caller to contact plaintiffs' counsel in *Augst-Johnson* case so their questions could be answered. (Id.) Thus, Morgan Stanley's motive in sending the email was not collusive – it simply sought to take the most efficient approach possible to direct potential class members to the appropriate sources of information regarding the settlement, just as it did with the sex discrimination settlement.

F. <u>The Proposed Settlement Should Be Preliminarily Approved Because The Terms Of Settlement Agreement Are Within The Range Of Reasonableness.</u>

1. The Proposed Settlement Contains Significant Monetary Relief, And Far-Reaching And Meaningful Programmatic Relief, That Will Greatly Benefit The Settlement Class.

a. Agreed-To Monetary Relief Will Provide Reasonable Monetary Awards To A Significant Portion Of The Settlement Class.

The Moore group attacks the monetary relief portion of the proposed settlement under the general rubric that the proposed $16 Million fund is "grossly inadequate." They specifically argue that (a) a substantial portion of the fund will not be available to class members; (b) "the relief for individual class members will be grossly inadequate"; and (c) the monetary relief is

inadequate in comparison to "other cases in the brokerage industry." (*See* Moore Objs. at 17-20). These objections are completely unjustified.

First, the suggestion that "a substantial portion of the Settlement Fund will not be available to class members," is erroneous. The $16 Million Settlement Fund will increase at an annual percentage rate of 5% from the date of preliminary approval until the funds are transferred once the settlement is finally approved and becomes effective. Thus, the actual amount of the Settlement Fund will be more than $16 Million. The amounts being sought for attorney's fees and costs and the service payment to Plaintiff Curtis-Bauer and payment for the settlement of her non-class claims represent a relatively small percentage of the total fund. Importantly, the amount available to class members will be available to all who do not opt out and who submit a timely and valid Claim Form. That is, unlike class action settlements in which no defined settlement fund is set up and class members are at the mercy of an adversarial claims process (sometimes involving additional litigation or arbitration), valid and timely claimants in this case will receive a monetary award from an already established fund.

Second, the Moore group has compared the settlement in this case to the settlement in a number of cases that bear little resemblance to this case in terms of scope, class size, relevant claims, relevant facts, potential exposure, and the manner in which class members might recover monetary awards. For example, the Moore group, without context, compares the monetary relief portion of this settlement to Morgan Stanley's settlement of a wage and hour case involving Financial Advisors and Financial Advisor Trainees (regardless of race or gender) in California. That settlement, which included a maximum settlement amount (dependent on the number of claims filed) of $42.5 Million (including $10.6 Million for attorney's fees and costs) bears little, if any, resemblance to the *Jaffe* action. Moreover, the class in that case was more than twice as large as the putative class in this case. (Pappas Decl. at ¶ 11.)

The Moore group fails to distinguish the settlement in the directly comparable *Augst-Johnson* sex discrimination class action. That settlement, which has been approved by a highly respected federal judge, Richard W. Roberts of the U.S. District Court for the District of

Columbia, provides for almost identical monetary relief on a per-class member basis.[5] In contrast, reliance on highly distinguishable settlements to illustrate the purported inadequacy of the monetary relief, like its unsupported attack on the breadth of the monetary relief in this case, is deliberately misleading and is of no value to the relevant inquiry here—whether the settlement, taken as a whole, is within the "range of reasonableness" for preliminary approval purposes. Given the significant number of African-American and Latino Financial Advisors and Financial Advisor Trainees who are expected to participate in the non-adversarial claims process, the monetary relief is not simply within the range of reasonableness, but is fair and adequate as well.

b. The Proposed Programmatic Relief Will Significantly Enhance The Recruitment, Development, Success And Retention Of African-American And Latino Financial Advisors.

Contrary to the Moore group's characterization of the programmatic relief in the proposed settlement as "inadequate" and duplicative of the programmatic relief in the *Augst-Johnson* case, the non-monetary relief agreed to in this case will provide for the development and implementation of unique and innovative policies and programs that will attract and benefit African-American and Latino Financial Advisors and Registered Financial Advisor Trainees during all phases of their careers within Morgan Stanley's Global Wealth Management Group. These policies, programs and initiatives will address the recruitment, hiring, development, success and retention of African-American and Latino Financial Advisors in meaningful ways.

[5] Not coincidentally, the Stowell & Friedman firm levied similarly bald assertions and invalid arguments about the adequacy of the monetary relief in the *Augst-Johnson* case on behalf of one of the members of the Moore group, Janice Grant. The observation of the federal court addressing those objections in *Augst-Johnson* applies with equal application here. In relevant part, in rejecting the objection as to the adequacy of the monetary relief raised by Stowell & Friedman, the court observed that "[t]he objection to the adequacy of the monetary awards reflects a misunderstanding of the potential size of an individual award and the means by which an individual's award will be determined. It also attempts to measure the monetary award in this case against awards in cases that are not fairly comparable, and differ in critical ways as to facts, time periods, types and numbers of employees, claims, legal issues, and ease of proof." (*See Augst-Johnson* Final Order Approving Settlement, attached to Dichter Decl. as Ex. B, at ¶ 8.) It does not appear that Stowell & Friedman made any better effort to understand the monetary relief available under this settlement.

For example, with respect to hiring and recruitment, the proposed settlement requires Morgan Stanley to focus significant, specific efforts on the recruitment of diverse individuals to fill Financial Advisor positions, including African-Americans and Latinos. These efforts include the maintenance of a dedicated position within Morgan Stanley's Global Wealth Management Group whose primary function will be the "sourcing and recruitment" of qualified diverse candidates, reporting on recruitment efforts, and the identification and development of sourcing alternatives for qualified African-American and Latino Financial Advisors. (*See* Proposed Settlement Agreement at VII.B-C, G). Moreover, under the terms of the settlement agreement, branch managers' compensation will be tied to that manager's performance on diversity issues.

To enhance the success, development and retention of African-American and Latino Financial Advisors, the settlement agreement, among other things, calls for Industrial Psychologists to analyze the Financial Advisor position and, in addition to considering ways to increase representation rates, to consider how Morgan Stanley can decrease the departures of those Financial Advisors. The same Industrial Psychologists will also be tasked with the annual review of "actual account distributions and related compensation data and the rankings of African American and Latino Financial Advisors on each of the individual factors and use such information in considering recommendations, if any, for changes to the Power Ranking Formula." (*Id*. at VII.D.2.d). Moreover, as a result of the negotiations with counsel in this case to address the concerns of African-American and Latino Financial Advisors, specific changes to the new Power Rankings formula used by Morgan Stanley's Global Wealth Management Group to rank Financial Advisors and determine account distributions have been agreed to.

These significant and meaningful injunctive relief provisions are far more than fair, adequate and reasonable—they are far reaching and, in many respects, groundbreaking and innovative within the financial services industry.[6]

[6] The Moore group's blanket criticism that the programmatic relief agreed to in this case is inadequate because it mirrors the programmatic relief agreed to in the *Augst-Johnson* gender settlement demonstrates a lack of understanding of the programmatic relief in both cases. First, the adoption of certain significant and meaningful injunctive relief provisions from another settlement agreement presents no bar to the approval of the settlement in this case. This is particularly true where, as here, the settlement agreement borrows provisions that can enhance the recruitment, development, success and retention of African-American and Latino Financial Advisors in much the same ways that they will enhance the careers of female Financial Advisors. Second, the settlement agreement in this

c. The Moore Group's Criticism Of Morgan Stanley's Expenditure Of Millions Of Dollars On Diversity Efforts Misstates The Facts.

The Moore group's allegation that "The Settlement seeks to double-count the same (inflated) $7.5 Million value the parties placed on the identical relief in the *Augst-Johnson* settlement," (Moore Objs. at 20, 21 n.11), represents another example of uninformed speculation on the part of the Stowell & Friedman firm. As an initial matter, the $7.5 Million referenced in the proposed settlement agreement in this case represents an approximate amount that Morgan Stanley anticipates spending on diversity efforts during the period applicable to the proposed settlement. Far from "double-counting" the cost of diversity efforts required by the *Augst-Johnson* settlement, Morgan Stanley will unquestionably spend millions of additional dollars on diversity initiatives that are aimed squarely at the class members in this case—African-American and Latino Financial Advisors and Registered Financial Advisor Trainees. A portion of the diversity expenditures envisioned by the settlement agreement will involve, among other race-based diversity initiatives, the development and implementation of race-based diversity development programs reflecting its commitment to increase diversity in the Financial Advisor position (including the representation rate of African-American and Latino Financial Advisors and Financial Advisor Trainees), the hiring of diversity recruiters, the implementation of race-specific programs and initiatives recommended by the Industrial Psychologists as a result of the *Jaffe* settlement, scholarship programs, mentoring programs, networking groups, and diversity training. (Pappas Decl. at ¶¶ 12-13.)

The notion posited by the Moore group in an effort to impugn the programmatic relief in this case – that "the [*Augst-Johnson*] initiatives would have to satisfy not only gender concerns but race or color as well" -- is thus false. As a result of the proposed settlement, Morgan Stanley anticipates spending at least $7.5 Million on diversity measures that benefit the proposed class.

case provides for significant programmatic relief that goes beyond what is required by the *Augst-Johnson* settlement agreement and that is focused on issues specifically affecting African-American and Latino Financial Advisors. Finally, nothing in the *Augst-Johnson* settlement agreement bound Morgan Stanley to undertake any programmatic relief initiatives with respect to African-Americans and/or Latinos – those additional initiatives on behalf of African-American and Latino Financial Advisors are mandated only by the proposed settlement in this case.

d. The Moore Group's Criticism Of The Role Industrial Psychologists Will Play In The Settlement In This Case Is Misplaced.

The Moore group also attacks the proposed programmatic relief on the grounds that both the approved *Augst-Johnson* settlement and the proposed settlement in this case call for the same Industrial Psychologists, Dr. Kathleen Lundquist and Dr. Irwin Goldstein, to play integral roles in the development of policies and programs, among other things. This argument fails to recognize: (a) the distinct roles that the Industrial Psychologists will play in connection with the programmatic relief agreed to in this case; (b) the advantages inherent in having the same Industrial Psychologists develop and recommend programs and initiatives as to both gender and race at the same firm; and (c) the unique qualifications of Drs. Lundquist and Goldstein to serve in this proposed capacity in connection with a class-wide race discrimination settlement.

That Drs. Lundquist and Goldstein would be retained in connection with both the *Augst-Johnson* gender settlement and the settlement of race claims in this case raises no obstacle to preliminary (or final) approval because the proposed settlement agreement details specific race-related tasks they are to perform. For example, under the terms of the proposed settlement agreement, Drs. Lundquist and Goldstein will, among other things:

- work with Morgan Stanley's Global Wealth Management Group to "identify and develop sourcing alternatives for qualified Latino and African-American Financial Advisors;
- review annually the actual account distributions and related compensation data and the rankings of African-American and Latino Financial Advisors on each of the individual factors;
- use information gathered in the course of their review of actual African-American and Latino account distributions and related compensation data to consider recommendations for changes to the Power Rankings;
- make recommendations for increasing African-American and Latino representation in the receipt of retiring Financial Advisor's books of business, in partnerships, and in development opportunities;
- review Morgan Stanley’s hiring practices and exit interviews; and
- make recommendations for increasing Series 7 passage rates for African-American and Latino Financial Advisor Trainees.

These tasks are specific to the race aspect of this case and are separate and distinct from responsibilities Drs. Lundquist and Goldstein have via the *Augst-Johnson* settlement.

Moreover, there are significant advantages and important efficiencies inherent in having the same team of Industrial Psychologists addressing issues affecting both gender and race issues at Morgan Stanley. This notion is endorsed by the very Industrial Psychologists to be retained in the connection with the *Augst-Johnson* and *Jaffe* settlements. (*See* Declaration of Kathleen K. Lundquist ("Lundquist Decl.") at ¶¶ 5-10; Declaration of Irwin Goldstein ("Goldstein Decl.") at ¶¶ 5-9.) As Dr. Lundquist has noted:

> While the programmatic relief provisions of the settlements in the race and gender settlements differ, there is substantial overlap in the HR processes addressed in those settlements. These overlaps include: EEO and Problem Resolution; Posting and selection for Branch Management positions; Diversity training; Compensation for management to reinforce diversity efforts; Account Distribution; and Development, Training and Mentoring. Because of this overlap, Dr. Goldstein and I can leverage the knowledge already gained in connection with the gender case and apply it to develop programs to be designed for the race case. It will be more effective and efficient to have the same industrial psychologists reviewing these processes.

(Lundquist Decl. at ¶ 6; *see also* Goldstein Decl. at ¶ 6.)

Utilizing the same Industrial Psychologists in connection with both settlements will result in a built-in coordination of the settlement efforts. The work that these experts have already performed and will perform in connection with the gender discrimination settlement will undoubtedly enhance the work they perform in connection with this race discrimination settlement; a different set of Industrial Psychologists would come to Morgan Stanley without the base of knowledge about the firm's policies, practices and initiatives that Drs. Lundquist and Goldstein will already have and would need to just begin educating themselves on issues critical to their work.

Finally, in challenging the role that Drs. Lundquist and Goldstein would play in connection with this class-wide race discrimination settlement, the Moore group ignores the

unique qualifications of each to handle such a commitment. There are, in fact, perhaps no two other Industrial Psychologists with the relevant experience in such matters as Drs. Lundquist and Goldstein. For example, Drs. Lundquist and Goldstein both served as designated Joint Experts for the *Coca-Cola* Discrimination Task Force, a designation approved by the court and the plaintiffs representing a class of minorities in a class action lawsuit against Coca-Cola. (*See* Lundquist Decl. at ¶ 2.) For her part, Dr. Lundquist has also served (and thus was approved by the court and plaintiffs) as the designated Industrial Psychologist in connection with class action race discrimination settlements involving Ford, New Jersey State Troopers, Sodexho, and Pepco, a class action gender discrimination settlement involving the FBI, and class action race *and* gender discrimination settlements involving Abercrombie & Fitch and Woodward Governor. (*Id.* at ¶¶ 3-4.) Dr. Goldstein has served as an expert in numerous matters involving human resources practices in the context of alleged race and/or sex discrimination, and is currently a court-appointed member of the task force providing oversight to the federal Drug Enforcement Agency on Human Resources best practices and, in that capacity, advises the African-American Monitoring oversight group. (Goldstein Decl. at ¶ 4.) Both thus have extraordinary credentials and experience to draw from in carrying out the roles proposed for them in the *Jaffe* settlement. Their role in this settlement, if anything, provides great support for the fairness and reasonableness of the programmatic relief provisions of the *Jaffe* settlement.

e. The Power Rankings, As Changed Pursuant To The Proposed Settlement, Are Not Adverse To African-Americans.

The Moore group also attacks the programmatic relief in this proposed settlement by challenging, without any factual basis, the "concept of a Power Ranking," and suggests that "awarding points based on commission generated or assets under management only institutionalizes and perpetuates the bias." Neither of those assertions has any basis in fact. As counsel for the Moore group is well aware (because they raised the same claim in their challenge

to the *Augst-Johnson* settlement), before finalizing the changes to the Power Rankings formula in connection with the *Augst-Johnson* settlement, Morgan Stanley: (a) made changes to the formula originally negotiated with the *Augst-Johnson* plaintiffs as a result of race-based concerns raised by the *Jaffe* plaintiffs and (b) tested the final formula for an adverse impact on minority Financial Advisors. (*See Augst-Johnson* Final Approval Order, attached to Dichter Decl. at Ex. B, ¶ 8) ("The objector's contention that none of the proposed injunctive relief was studied for possible unfair disparate impact upon African-American employees is countered by Morgan Stanley's uncontradicted response that revised factors for account distributions were examined for such adverse impact and that no such adverse impact was shown."); *see also* Pappas Decl. at ¶ 14.) Race-based concerns touching on the Power Rankings formula were extensively discussed and addressed in the course of the negotiations that led to the *Jaffe* settlement and the concerns expressed by the Moore group as to the Power Rankings, based on nothing more than false speculation, should give way to the judgment of counsel for the *Jaffe* plaintiffs, who personally addressed those issues.[7]

2. Settlement Provisions Providing For Opt-Out Credits and Morgan Stanley's Option To Terminate The Agreement Are Standard In Class Agreements And Do Not Provide A Basis To Deny Approval.

The Moore group also suggests that terms in the proposed settlement allowing Morgan Stanley to (1) take a credit against the Settlement Fund for class members who opt out and (2) elect to terminate the settlement agreement should a certain number of class members opt out requires that the settlement not be approved. They provide, however, no authority to support that notion. Such "opt out credit" and so-called "bust-up" provisions are commonly included in class action settlement agreements to protect defendants from situations where the number of opt outs

[7] The Moore group also falsely alleges that Morgan Stanley has "shut out the class members in *Augst-Johnson* and *Jaffe* from challenging the Power Ranking" by protecting them from public disclosure. To the contrary, Morgan Stanley has merely acted to protect its strong proprietary interest in maintaining the confidentiality of its Power Rankings system and formula since it would be at a competitive disadvantage if its competitors in the financial services industry were able to access the Power Rankings formula and to use the formula for their own competitive advantage. The legitimacy of this proprietary interest as a basis for protecting against the public disclosure has been recognized by each of the two federal courts, including this Court, that approved the sealing of the Power Rankings formula associated with the respective settlement agreements in *Augst-Johnson* and *Jaffe*. (See Dichter Decl. at ¶20, Exs. C and D). Moreover, the counsel and class representatives in *Augst-Johnson* and *Jaffe* cases were given full opportunity to review and request changes to the formula in the course of settlement negotiations.

is so high that, despite agreeing to pay significant monetary relief, the defendant is unexpectedly exposed to many individual claims asserted in private actions by opt outs. Both provisions fairly protect Morgan Stanley from such a scenario and should not impede settlement approval.

The inclusion of such provisions is common and settlement agreements that include them are regularly approved by the federal courts. For example, similar provisions are present in the *Augst-Johnson* settlement agreement that has already been approved by the U.S. District Court for the District of Columbia. Moreover, courts in this District and others have routinely approved proposed class action settlement agreements containing language providing for an "opt-out credit" or allowing a party to terminate the agreement given a particular number of opt-outs. *See, e.g., Gonzalez, et al. v. Abercrombie & Fitch*, Case Nos. 03-2817 SI, 04-4730 and 04-4731 (N.D. Cal.) (containing an "opt-out credit" provision); *Satchell, et al. v. Federal Express Corp.*, Case No. 03-CV-02659 (N.D. Cal) (same); *Abdallah v. The Coca-Cola Company*, Case No. 98-CV-379 (RWS) (N.D.Ga.) (containing an opt-out related termination provision).[8] These provisions are reasonable and fair, and should not impede preliminary approval.[9]

3. The Exclusion Of Branch Managers From The Settlement Class Does Not Undermine Conditional Class Certification.

Finally, the Moore group's argument that the exclusion of Financial Advisors with management responsibilities from the class is "unfairly restrictive" ignores conflicts of interest that would arise from the presence of both Financial Advisors and those who supervise and manage them in the same class. Though the Moore group attempts to artfully limit the managers

[8] Such terms are also recognized by the Manual for Complex Litigation. *See Manual for Complex Litigation* at 21.652 ("The parties sometimes propose a precertification settlement that permits the settling parties to withdraw from the settlement if a specified number of persons opt out of the class or settlement. . . An alternative approach is to provide that the benefits paid to the class will be reduced in proportion to the number of opt outs . . . ").

[9] In addition, the Moore group objects on the grounds that the proposed settlement does not contain language through which Morgan Stanley agrees to "continue to provide employees access to court, and not mandatory arbitration of their civil rights claims, for the duration of any consent decree." (Moore Objs. at 22-23.) The foundation for this objection is unclear, though, since Morgan Stanley does not require employees to arbitrate civil rights claims, nor does it currently plan to do so. *See Augst-Johnson* Final Approval Order, attached to Dichter Decl. at Ex. B, ¶ 8 (addressing the same argument raised by Stowell & Friedman in the *Augst-Johnson* case and stating that "[C]ontrary to the objector's fear, the Settlement Agreement does not bar a Class Member from pursuing in court any legal claim not released under the Settlement Agreement if she is otherwise entitled to do so.")

at issue to "assistant" managers, the fact remains that the *Jaffe* plaintiffs have put at issue alleged discrimination against African-American and Latino Financial Advisors by branch management, assistant or otherwise. One member of the Moore group, Mary Harris Evans, claimed in a submission to this Court that, in her capacity as an Assistant Branch Manager, she performs the duties of a Branch Manager. (*See* Ex. 3 to Moore Objs.). Having both Financial Advisors and the managers/decision-makers accused of engaging in race discrimination would create a conflict of interest that would prevent class certification under Fed. R. Civ. P. 23. (*See, e.g., Augst-Johnson* Final Approval Order, Dichter Decl., Ex. B, at ¶ 8) (rejecting the same objection when raised by the Stowell & Friedman firm in the *Augst-Johnson* case because "The objection that the Class should include management personnel does not take account of the fact that including management personnel would present possible conflicts of interest with Class Members.").

IV. CONCLUSION

As demonstrated above, the Moore group's objections to the preliminary approval of this proposed class action settlement are premised on misstatements of fact, unjustified and unsupported allegations of collusion, baseless conjecture regarding the actions and motives of the parties to the settlement, and baseless speculation as to the effect of this settlement. These types of objections should not impede the preliminary approval of this settlement where the factual record before the Court demonstrates that the proposed settlement was negotiated at arm's length by the parties with assistance from experienced and knowledgeable counsel and a highly respected and skilled neutral mediator and is fundamentally fair, adequate and reasonable. Far from preventing preliminary approval, a presumption of fairness should arise under the circumstances presented. Contrary to the allegations levied by the Moore group, the proposed settlement provides significant monetary relief, as well as meaningful and innovative programmatic relief, that is well within the "range of reasonableness" for approval purposes.

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For these reasons, and those stated above, Defendant Morgan Stanley & Co. Incorporated respectfully requests that the Court reject the objections filed by these putative class members and issue an order preliminarily approving the proposed settlement agreement in this case.

Dated: November 19, 2007

By: /s/ *L. Julius M. Turman*

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