

1 James M. Finberg (SBN 114850)
2 Eve H. Cervantez (SBN 164709)
3 ALTSHULER BERZON LLP
4 177 Post Street, Suite 300
5 San Francisco, CA 94108
6 Telephone: (415) 421-7151
7 Facsimile: (415) 362-8064
8 Email: jfinberg@altshulerberzon.com
9 Email: ecervantez@altshulerberzon.com

6 Kelly M. Dermody (SBN 171716)
7 Daniel M. Hutchinson (SBN 239458)
8 Heather H. Wong (SBN 238546)
9 LIEFF, CABRASER, HEIMANN &
10 BERNSTEIN, LLP
11 275 Battery Street, 30th Floor
12 San Francisco, CA 94111-3339
13 Telephone: (415) 956-1000
14 Facsimile: (415) 956-1008
15 Email: kdermody@lchb.com
16 Email: hwong@lchb.com

Adam T. Klein (pro hac vice)
Piper Hoffman (pro hac vice)
Justin Swartz (pro hac vice)
OUTTEN & GOLDEN LLP
3 Park Avenue, 29th Floor
New York, NY 10016
Telephone: (212) 245-1000
Facsimile: (212) 977-4005
Email: atk@outtengolden.com
Email: ph@outtengolden.com
Email: jms@outtengolden.com

13 *Attorneys for the Plaintiffs*

14 UNITED STATES DISTRICT COURT
15
16 NORTHERN DISTRICT OF CALIFORNIA
17
18 SAN FRANCISCO/OAKLAND DIVISION

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

22 Plaintiffs,

23 v.

24 MORGAN STANLEY DW, INC.,

25 Defendant.

Case No. C 06-3903 TEH

CLASS ACTION

**FURTHER MEMORANDUM OF
PLAINTIFF CURTIS-BAUER IN
SUPPORT OF MOTION FOR
PRELIMINARY SETTLEMENT
APPROVAL AND PROVISIONAL
CERTIFICATION OF SETTLEMENT
CLASS**

1 **I. INTRODUCTION**

2 This memorandum, along with the previously-submitted supplemental declarations of
 3 Adam Klein and Margaret Benay Curtis-Bauer (filed on January 10, 2008, Dkt. No. 132), and the
 4 accompanying modified and corrected settlement agreement, notice, and claim form, are
 5 submitted pursuant to this Court's December 12, 2007 order. The Klein declaration confirms that
 6 the \$16 million in monetary relief provided by the proposed settlement is indeed "a healthy 43%
 7 of the possible recovery" for lost income, assuming plaintiffs were to prevail on liability issues,
 8 including establishing a causal connection between defendant's policies and practices and the
 9 lower earnings of class members.¹ The supplemental Curtis-Bauer declaration, together with this
 10 memorandum, confirm that Ms. Curtis-Bauer will be releasing valuable, timely non-class claims,
 11 and that Ms. Curtis-Bauer was actively engaged as a class representative.² The supplemental
 12 declaration of Ms. Curtis-Bauer also confirms that Ms. Curtis-Bauer understands that the \$25,000
 13 her counsel are requesting as payment for her services to the class is subject to the Court's
 14 approval and discretion, and she will support the settlement even if the Court reduces, or even
 15 denies entirely, that requested sum.³

16 _____
 17 ¹ Since Mr. Klein's declaration contains work product that Plaintiff's counsel would not want to
 18 share with defendant in the event that the settlement is not approved, Plaintiff's counsel have
 19 requested that Mr. Klein's declaration be submitted *in camera*. Defendant does not oppose that
 20 request. Defendant has also agreed that it will not seek to have the Court disqualified from this
 21 action as a result of the Court's *in camera* review of Plaintiff's work product.

22 ² Plaintiff Curtis-Bauer is submitting parts of her declaration addressing solely her personal,
 23 individual, non-class claims under seal, subject to Court approval.

24 ³ This supplemental brief, and accompanying declarations, establish that Ms. Curtis-Bauer is an
 25 adequate class representative. If, even in light of the additional evidence and argument the Court
 26 remains concerned about Ms. Curtis-Bauer serving as the sole representative of the class, counsel
 27 for Ms. Curtis-Bauer submit that they could ask one of the 10 other Class Members who have
 28 reviewed the settlement and submitted letters of support (*see* Exhibits to Reply Declaration of
 Heather Wong in Support of Preliminary Approval, filed November 19, 2007), if they would be
 willing to serve as a class representative. Courts have held that a class representative can be
 adequate even when she first becomes involved post-settlement. *Olden v. LaFarge Corp.*, 472 F.
 Supp. 2d 922, 937-39 (E.D. Mich. 2007) (allowing substitution post-settlement where the prior
 class representatives were inadequate because they opposed the settlement); *Heit v. Van Ochten*,
 126 F. Supp. 2d 487, 495 (W.D. Mich. 2001) (granting Plaintiff's counsel's Motion to substitute
 new named plaintiff post-settlement). In *Olden*, 472 F. Supp. 2d 922, the prior class
 representatives presented evidence raising questions about the new class representatives'
 knowledge of the litigation. Nonetheless, the court held the new representatives to be adequate
 because they were "capable of protecting the interests of the class as the litigation winds down."

1 The changes and corrections to the settlement agreement and notice (1) confirm that,
 2 under the plan of allocation, class members will recover based on an earnings regression analysis,
 3 time served in a Class position during the class period, and claimants' reported emotional distress
 4 or production-related termination or constructive discharge – not on the release of non-class
 5 claims or service to the class; (2) confirm that this Court will retain jurisdiction to enforce the
 6 terms of the settlement; (3) confirm the amounts of attorneys' fees sought by counsel; and (4)
 7 inform this Court that Fred Alvarez, a former Commissioner of the Equal Employment
 8 Opportunity Commission, will serve as Diversity Monitor. The revised claim form deletes the
 9 requirement that class members state they believe that they were victims of discrimination.

10 As to the value of the injunctive relief, counsel for plaintiff Curtis-Bauer submit that the
 11 value of the injunctive relief should be measured by what it accomplishes. Morgan Stanley may
 12 submit a further declaration regarding the cost of providing the required programs and making the
 13 required changes. Regardless of the cost to Morgan Stanley of providing these programs and
 14 making these changes (which does not go directly to the fairness, reasonableness, and adequacy
 15 of the settlement, but instead to whether the statements in the notice are accurate), the injunctive
 16 relief provided in this settlement, which the Court has found “represent[s] a genuine expansion
 17 rather than a dilution of relief already ordered in Augst-Johnson” Dec. 12, 2007 (Order at p. 6),
 18 will foster equal employment opportunity at Morgan Stanley, to the benefit of Class Members.

19 **II. ARGUMENT**

20 **A. Ms. Curtis-Bauer satisfies Rule 23(a)(4)'s Adequacy Requirement.**

21 **1. Ms. Curtis Bauer, Unlike Other Class Members, Is Releasing** 22 **Valuable, Timely, Non-Class Claims.**

23 Ms. Curtis-Bauer's supplemental declaration describes the factual basis for her non-class
 24 claims. Those claims are beyond the scope of the limited class release. Those claims include
 25 claims for race harassment, wrongful termination, and breach of contract. Supp. Curtis-Bauer
 26 Decl., ¶¶ 3-9. Ms. Curtis-Bauer's declaration describes how she was subjected to ongoing race
 27 harassment. She was subject to derogatory language in the workplace and racially offensive

28 _____
Id. at 939.

1 comments from both co-worker and management. *Id.*, ¶¶ 3-4. Despite Ms. Curtis-Bauer's
2 complaints to Morgan Stanley's management, Ms. Curtis-Bauer states that Morgan Stanley did
3 not address these issues; instead Morgan Stanley failed to respond to Ms. Curtis-Bauer's several
4 complaints. Following her legitimate complaints about offensive racially-based conduct and
5 comments, Morgan Stanley terminated Ms. Curtis-Bauer. *Id.*, ¶¶ 3-5. As a result of Morgan
6 Stanley's conduct relating to matters not covered by the class claims or release, Ms. Curtis-Bauer
7 lost income and suffered emotional distress damages. Supp. Curtis-Bauer Decl.

8 Contrary to the arguments of objectors, Ms. Curtis-Bauer has valid grounds for arguing
9 that her non-class claims were timely when settled. Those claims arise under, among other
10 statutes, California Business and Professional Code Section 17200 (for terminating someone in
11 violation of public policy); the California Civil Code provisions regarding contract; and Section
12 1981 – all of which have four year statutes of limitation. Since Ms. Curtis-Bauer did not leave
13 Morgan Stanley until November, 2002, all of those claims were still timely in October 2006.
14 Those claims were thus alive and preserved in August 2006 when Morgan Stanley signed a
15 tolling agreement with the Moore Group regarding claims of race discrimination. In addition,
16 Ms. Curtis-Bauer has a legitimate argument that her claims should relate back to the filing of the
17 *Jaffe* case in June 2006, or its first amendment to include race claims in October 2006.

18 The settlement of non-class claims by a class representative in exchange for consideration
19 separate from the class settlement does not render a class representative inadequate. 8 Newburg
20 on Class Actions § 24.129 (4th ed. 2002). *See Krensniak v. Cendant Corp.*, 2007 WL 1795703
21 (N.D. Cal. 2007) (citing *In re Activision Sec. Litig.*, 621 F. Supp. 415 (N.D. Cal. 1985); *see also*
22 *Satchell v. FedEx*, 2006 WL 350791 at *1 (N.D. Cal. 2006) (proposed class representatives not
23 rendered atypical by virtue of non-class claims).

24 The proposed service payment of \$25,000 that Ms. Curtis-Bauer's counsel are requesting
25 for her appropriately recognizes the time and effort she expended on behalf of the plaintiff class.⁴
26 "Courts routinely approve incentive awards to compensate named plaintiffs for the services they

27 _____
28 ⁴ Ms. Curtis-Bauer understands that the proposed \$25,000 service payment is subject to Court
approval and supports the proposed Settlement regardless of whether she receives a service
payment. Supp. Curtis-Bauer Decl., ¶ 11.

1 provided and the risks they incurred during the course of the class action litigation.” *Ingram v.*
2 *The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (quoting *In re S. Ohio Correctional*
3 *Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997). *In Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir.
4 2003), the Ninth Circuit reaffirmed that “named plaintiffs . . . are eligible for reasonable incentive
5 payments.” Such awards are particularly appropriate in employment discrimination actions
6 because “the plaintiff is frequently a present or past employee whose present position or
7 employment credentials or recommendation may be at risk by reason of having prosecuted the
8 suit, who therefore lends his or her name and efforts to the prosecution of litigation at some
9 personal peril.” *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 201 (S.D.N.Y. 1997) (approving
10 individual incentive awards of \$85,000 and \$50,000 to plaintiffs who had initiated the class
11 action, and \$25,000 to named plaintiffs who joined lawsuit after its commencement).

12 In this case, Ms. Curtis-Bauer performed important services for the benefit of the plaintiff
13 class. Supp. Curtis-Bauer Decl., ¶¶ 10-16. She provided information to counsel during lengthy
14 interviews, actively worked with Plaintiff’s counsel since she became involved in the case, and
15 took the significant risk of stepping forward on behalf of the class in an industry where
16 challenging the employer can be career ending. *Id.* The valuable efforts of the class
17 representative, her willingness to litigate and pursue her representative claims, and the strength of
18 her claims have resulted in a settlement that will benefit all Settlement Class Members. *Id.* A
19 \$25,000 service payment is appropriate.

20 **2. Ms. Curtis-Bauer Has Been an Active and Engaged Class**
21 **Representative.**

22 Ms. Curtis-Bauer’s December 5, 2007 declaration in support of preliminary approval,
23 and most recent supplemental declaration provides detailed information regarding her
24 participation in this lawsuit. *See* Declaration of Margaret Benay Curtis-Bauer in Support of
25 Preliminary Settlement Approval (“Curtis-Bauer Decl.”); Supp. Curtis-Bauer Decl., ¶¶ 2, 10-16.
26 Ms. Curtis-Bauer’s primary motivation for her involvement in this litigation is to “effectuate
27 systematic change at Morgan Stanley.” Supp. Curtis-Bauer Decl., ¶ 10. She has been an engaged
28 class representative since joining the case, and has vigorously represented the class’ interests

1 pursuant to her fiduciary duties to the class she seeks to represent. *Id.*, ¶ 10-16.

2 Ms. Curtis-Bauer's declarations delineate the timeline over which she participated in this
3 lawsuit, including her first contact with counsel in May 2007. She has monitored and contributed
4 to this case since she became involved; provided all relevant information about Defendant and her
5 claims to her counsel; carefully reviewed drafts of the operative Complaint, all Settlement terms,
6 and other documents before authorizing her attorneys to file them; provided input on these key
7 documents; participated in regular conversations with her counsel; and ensured that the Second
8 Amended Complaint and Settlement submitted to the Court addressed her concerns. Curtis-Bauer
9 Decl., ¶¶ 4-5; Supp. Curtis-Bauer Decl., ¶¶ 2, 10-16. Her Supplemental Declaration details two
10 specific contributions that Ms. Curtis-Bauer sought to have included in the Settlement. Supp.
11 Curtis-Bauer Decl., ¶ 14. She has appropriately ensured that the approach taken by her counsel
12 has been well-informed and well-suited to achieve the goals of this lawsuit. *Id.*

13 The true test of adequacy is measured by the litigation outcomes. Where a class
14 representative has secured a settlement that is fair, adequate and reasonable, like Ms. Curtis-
15 Bauer has done here, she is presumptively adequate. *See Hemphill*, 225 F.R.D. at 622 ("It is,
16 ultimately, in the settlement terms that the class representatives' judgment and the adequacy of
17 their representation is either vindicated or found wanting. If the terms themselves are fair,
18 reasonable and adequate, the district court may fairly assume that representation was adequate.")
19 (quoting *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir. 1981). As
20 demonstrated by the fair, adequate, and reasonable settlement negotiated on her behalf, and her
21 engaged actions on behalf of the class since joining this lawsuit, Ms. Curtis-Bauer is an adequate
22 representative of the class she seeks to represent.

23 **B. The Supplemental Declaration of Adam Klein Confirms That the Monetary**
24 **Relief Provided by the Proposed Settlement is a "Healthy 43% of the Possible**
25 **Recovery" of Lost Earnings, Assuming Plaintiff Were To Prevail on Liability,**
Including Establishing Causation.

26 In its Order, the Court invited Plaintiff to submit evidence in support of Plaintiff's
27 counsel's statement at the hearing that Plaintiff estimated the value of the lost earnings claims of
28 the class, if the class were to prevail at trial, at \$36,000,000. The Supplemental Declaration of

1 Adam Klein, and the contemporaneous e-mail report from Plaintiff’s counsels’ independent
2 statistical expert provide evidentiary support for Plaintiff’s counsels’ statement at the hearing, and
3 confirm that the monetary relief provided is “fair, reasonable, and adequate.”

4
5 **C. Regardless of its Precise Cost, the Injunctive Relief Provided by This
6 Settlement Has Great Value to Class Members.**

7 This Court has already found that “[t]he programmatic relief set at in Sections VII.B,
8 VII.C, VII.D.2.d, VII.E, and VII.G appears to represent a genuine expansion rather than a dilution
9 of the relief already ordered in Augst-Johnson.” (Dec. 12, 2007 Order at p.6). Regardless of the
10 precise cost to Morgan Stanley of making the required changes and providing the required
11 programs, the injunctive relief afforded by this proposed settlement will foster equal employment
12 opportunity at Morgan Stanley, and benefit Class Members.

13 The “value” of the programmatic relief is not the same as the \$7.5 million estimate listed
14 in the Settlement Agreement and Notice. The \$7.5 million estimate merely describes the
15 estimated “cost” of implementing programs for the benefit of the Class, not their “value” to the
16 Class. The true “value” of the Settlement’s programmatic relief is likely significantly greater than
17 the amount that Defendant will pay to implement these changes. The true “value” of the
18 proposed Settlement will include the increased earnings to African Americans and Latinos who
19 secure employment, receive support to succeed, and enjoy greater accounts and compensation due
20 to enhanced opportunities and fair distributions.

21 Counsel for Plaintiff Curtis-Bauer understand that Morgan Stanley may make a further
22 submission regarding the cost of the injunctive relief, which really bears more on the accuracy of
23 the notice than on the fundamental fairness of the relief provided.

24 **D. The Parties Have Modified the Settlement Agreement to Correct Certain
25 Errors Noted By, and Make Certain Modifications Suggested By, the Court.**

26 Filed together with this brief, attached to the Revised [Proposed] Preliminary Approval
27 Order, are a revised settlement agreement, notice, and claim form.
28

1 The revised settlement agreement (1) confirms this Court will retain jurisdiction to
2 enforce the terms of the settlement agreement; (2) confirms the plan of allocation – based on the
3 earnings regression analysis, time served in a Class position during the class period, and
4 claimants’ reported emotional distress or production-related termination or constructive discharge
5 – not on the release of non-class claims or service to the class; (3) confirms the amount of
6 attorneys’ fees sought by counsel; and (4) informs the Court that Fred Alvarez will serve as the
7 Diversity Monitor. Counsel have also corrected typographical errors where they were observed.

8 The changes to the notice and claim form track those changes to the Agreement. In
9 addition, the claim form no longer requires a claimant to state that he or she believes he or she
10 was discriminated against in order to recover.

11 **II. CONCLUSION**

12 For all of the foregoing reasons and those presented in Plaintiff’s pleadings filed on
13 October 22, 2007 and November 19, 2007 and the arguments made at the December 3, 2007
14 hearing, Plaintiff respectfully requests that the Court preliminarily approve the settlement and
15 provisionally certify a settlement class.

16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: January 14, 2008

LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP

By: /s/ Kelly M. Dermody
Kelly M. Dermody

Kelly M. Dermody
Daniel M. Hutchinson
Heather H. Wong
LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

James M. Finberg
Eve H. Cervantez
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064

Adam T. Klein
Piper Hoffman
Justin Swartz
OUTTEN & GOLDEN LLP
3 Park Avenue, 29th Floor
New York, NY 10016
Telephone: (212) 245-1000
Facsimile: (212) 977-4005

Attorneys for Plaintiffs