United States Court of Appeals, Ninth Circuit.
Daisy JAFFE; Margaret Benay Curtis-Bauer, Plaintiffs - Appellees,
v.
Jonathan GLOVER; Latrissa Gordon; Marilyn White; Peter Meme; Marshell Miller; Jerome Senegal; Hubert Stalling; Lanta Evans-Mott; Carlton McDowell; Sarah Nyamuswa; Theron Cyrus, Objectors - Appellants,
v.
Morgan Stanley & Co. Incorporated, Defendant - Appellee.
No. 08-17599.
January 28, 2010.

Appeal from Entry of Final Judgment by the United States District Court for the Northern District of California, D.C. No. 3:06-cv-03903-TEH, Entered on October 22, 2008

Brief of Defendant-Appellee Morgan Stanley & Co. Incorporated

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I. STATEMENT OF ISSUES

One. Did Judge Henderson abuse his discretion by finding the Settlement of this class action race discrimination case "fundamentally fair, adequate, and reasonable," where he referenced and applied governing Ninth Circuit precedent and the record supports each of his findings, including that:

(1) the parties' extensive negotiations were conducted at arms' length, without collusion, aided by both a respected neutral mediator and experienced counsel (ER 111; 332);[FN1]

> FN1. Just as citations to "ER" refer to the Excerpts of Record submitted by Objectors on November 25, 2009, citations to "DSER" refer to Morgan Stanley's Supplemental Excerpts of Record, filed simultaneously with this brief on January 28, 2010.

(2) Plaintiffs' counsel conducted "extensive investigation [and] analysis," of claims and evidence before concluding settlement negotiations (ER 111; 332);

(3) the Settlement requires substantial changes in Morgan Stanley's business practices, not achieved in any other case, aimed at enhancing opportunities for African-Americans and Latinos (ER 112-13; 336);

(4) these changes are "substantive, meaningful, and valuable" to the class (ER 113; 336);

(5) these changes will "mitigate any further harm stemming from discrimination during the class period and beyond," (ER 119);

(6) the Settlement's monetary fund of $16 million compares favorably with and often exceeds amounts paid in other, similar cases and will, when distributed, likely provide to class members more than 43% of the alleged "compensation shortfall" associated with their discrimination claims (ER 116-17; 333-34);

(7) the Settlement avoids the complexity, delay, risk, and expense of continuing with the litigation (ER 334); and

(8) the Settlement "produces a prompt, certain, and substantial recovery for the Plaintiff class," which is significant because Plaintiffs "would face considerable risks were they to proceed to trial" (ER 111)?

Two. Did Judge Henderson abuse his discretion by denying discovery to the Objectors and finding, in accord with record evidence, that:

(1) he had enough information to evaluate the Settlement (ER 334);

(2) the requested discovery would have caused "unnecessary delay" (ER 323); and

(3) the Settlement was free of any collusion (ER 332; 350 n.2)?

II. STATEMENT OF THE CASE

From the time the parties filed their joint application for preliminary approval and continuing until the issuance of the final approval order approximately one year later, the Honorable Thelton E. Henderson, relying on his more than 27 years of experience evaluating class action cases and the law (ER 99), carefully considered the parties' Settlement, including twice receiving additional evidence and briefing on substantive points of law and fact. The Settlement ultimately approved by Judge Henderson is a fair, adequate, and reasonable settlement between Defendant-Appellee Morgan Stanley & Co. Incorporated ("Morgan Stanley")[FN2] and Plaintiffs-Appellees ("Plaintiffs"), a class of present and former African-American and Latino Financial Advisors.

> FN2. Morgan Stanley employs Financial Advisors and Registered Financial Advisor Trainees ("Financial Advisors") in its Global Wealth Management Group ("MS-GWMG"). MS-GWMG is now a joint venture between Morgan Stanley and Citigroup Inc., known as Morgan Stanley Smith Barney Holdings LLC ("MSSBH"). Financial Advisors manage client investment accounts and are generally compensated by commissions they earn based on the revenue generated by the investments they manage. DSER 630.

In their Second Amended Complaint, Plaintiffs claim that Morgan Stanley's account distribution practices disadvantage African-American and Latino Financial Advisors, thereby restricting their business opportunities, compensation, and other favorable employment conditions. ER 1182-1189. They allege violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000, *et seq.*, 42 U.S.C. §1981, the California Fair Employment and Housing Act, Cal. Gov't Code §§12940, *et seq.*, and Michigan's Elliot-Larsen Civil Rights Act, M.C.L.A. §§37.201, *et seq*. ER 1182.

In January 2007, Plaintiffs' counsel informed Morgan Stanley that Plaintiffs were prepared to file a class action complaint on behalf of African-American and Latino Financial Advisors. ER 848. The parties entered into settlement negotiations and after five months of extensive, and at times very contentious negotiations, under the guidance of an experienced mediator, the parties agreed on a settlement in principle which provides for extensive and comprehensive programmatic relief and very substantial monetary relief. ER 849-50.

After a full year of extensive evaluation of the terms of the parties' Settlement and of the negotiation process, and thorough consideration of the objections raised by the Objectors, the district court approved of the Settlement's monetary and programmatic relief addressing Plaintiffs' allegations.

A. The Settlement Approval Process

1. Preliminary Approval of Settlement of Second Amended Complaint And Class Certification.

Following the parties' joint application for preliminary settlement approval on October 22, 2007 (DSER 1140; DSER 977), the district court heard testimony from Settlement advocates and opponents, received evidence in written form, and considered both extensive briefings and oral arguments. ER 1-103. Before ruling, Judge Henderson ordered further briefing "from the parties only" and sought additional evidence directed at the involvement of the class representative, Margaret Benay Curtis-Bauer, in the litigation, settlement, and negotiation process, and substantiating the court's perception that the Settlement represented a healthy percentage of the monetary losses claimed by the class in the case. ER 347. Further briefs were filed, including privileged and confidential attorney work product filed under seal, regarding Plaintiffs' expert analysis of Morgan Stanley's workforce data, and details of Curtis-Bauer's individual claims. ER 778; ER 325-26.

Objectors to the Settlement represented by the same counsel for the Objector-Appellants here, submitted briefs, testimony and evidentiary materials before the court held its hearing on the issue of preliminary approval. *See* ER 948-1180; DSER

686. Both counsel for Objectors and some Objectors themselves orally addressed the court regarding their opposition to the Settlement.[FN3] ER 30-63; ER 86-92; ER 97-99.

FN3. Objectors to the Settlement also appeared, through counsel and in person, and addressed the court with arguments against final approval of the Settlement. ER 248-64; ER 282-306; ER 316.

More than a month after Judge Henderson requested supplemental briefing from the parties, and after both parties had submitted their responses to Judge Henderson's request, Objectors tried to file unsolicited further briefing with extensive attachments. They also sought permission to conduct discovery, including deposing Curtis-Bauer and seeking all data provided to Plaintiffs during the mediation process. ER 481-770; ER 784; ER 787-88. The district court rejected the filing of Objectors' unsolicited brief and its attachments as repetitive of Objectors' earlier filings and arguments, and warned Objectors that "further repetitive submissions may subject them to sanctions." ER 321. Judge Henderson denied Objectors' discovery requests because the court found that it had "sufficient facts before it to intelligently evaluate the settlement"; the requested discovery "would cause unnecessary delay"; and the Objectors, who had appeared through counsel and gave testimony themselves at the preliminary hearing, already had "meaningful participation in the settlement proceedings." ER 323.[FN4]

FN4. Despite the fact that the district court rejected the unsolicited brief and attachments, and in direct contravention of Fed. R. App. 10(a)(1), Objectors included the rejected brief and attachments in their Excerpts of the Record and relied extensively on the rejected materials in their Opening Brief. Plaintiffs and Defendants have moved to strike the brief and attachments from the Excerpts of the Record and have asked the Court to strike the arguments in Objectors' Opening Brief which are based on this rejected material. *See* Morgan Stanley's Motion to Strike, filed simultaneously with this brief on January 28, 2010.

After considering these submissions, the district court provisionally granted certification, approved Curtis-Bauer as the representative, and granted preliminary settlement approval, finding at that time that the Settlement was "the result of extensive, arms' length negotiations" with "no evidence of collusion between the Parties during the settlement process." ER 332.[FN5] The court found that "the involvement of an experienced mediator in the settlement process and the submission of supplemental evidence concerning Plaintiffs' analysis of workforce data it received from Morgan Stanley confirm that the settlement was not collusive." *Id*.

FN5. The court's rulings appear in two orders: an initial order filed December 12, 2007 (ER 345-53), that addresses most of the issues raised by the motions, and a second order filed February 7, 2008 (ER 321-44), after the court received from the parties the further evidence and briefing it had solicited.

As for the Settlement terms, the district court found that the "substantial injunctive relief provided by the settlement is an expansion, rather than a dilution, of the relief provided in" any other case, and that the injunctive relief is "comparable to that found to be substantive and meaningful" in other race discrimination cases. ER 334-35. Regarding the Settlement's monetary relief, the court found, based on Plaintiffs' expert analysis of "extensive data," that monetary payments under the Settlement represent approximately 43% of the total race-based compensation disparities claimed by the Plaintiff class and that it was reasonable for Plaintiffs and their counsel to focus in settlement negotiations on recovering money for such pay disparities. ER 334-35.

2. Final Settlement Approval

Notice of the settlement was sent to the class. DSER 426. "Of the over 1,300 class members, nine [chose] to remain class members but lodge objection, and only 24 [] opted out. By the close of the claim period, 422 class members had submitted claims, a participation rate of approximately 31%." ER 112. These are "very high" levels of positive participation in the Settlement, as admitted even by Objectors' counsel. ER 59.

The parties then sought final settlement approval, and on June 16, 2008, Judge Henderson held a lengthy hearing, again allowing the parties and Objectors to participate. ER 236-320. Thereafter, Judge Henderson entered an order finding that

Curtis-Bauer had adequately represented the class (ER 222-23), but the court directed a magistrate judge to hold an evidentiary hearing to examine the level of involvement of other class members, including Denise Williams, in the settlement negotiation process before Curtis-Bauer became the class representative. ER 233. This order was in direct response to Objectors' counsel's (who at the time had assumed representation of Williams) submission of a declaration claiming that Williams had no meaningful participation in the settlement negotiations. ER 223-24.

In response, Plaintiffs' counsel moved for reconsideration of the order appointing a magistrate judge and submitted further evidence, including privileged communications between Plaintiffs' counsel and their clients, including Williams, filed under seal. ER 109; ER 1372; DSER 116; DSER 121. The district court then vacated as "ill-advised" its referral of proceedings to the magistrate judge, and granted final settlement approval. ER 107.

The district court's final approval order found that the parties "arrived at the terms of the settlement after months of active involvement in the case... and with the involvement and advice of class representatives." ER 112. It also found that "[t]he plaintiffs would face considerable risks were they to proceed to trial" and that both the "thoughtful assessment of the terms of the settlement" by experienced class counsel, "particularly their considered and strong support for the efficacy of the proposed injunctive relief," and the positive response of class members to the proposed Settlement "weigh[ed] in favor of approval." ER 111-12. However, the "most important" factor for the court was "the strength of the injunctive and monetary relief the Settlement provides." ER 112.

Judge Henderson found that "the Settlement Agreement provides substantial injunctive relief" that "represents an expansion of the relief provided in the settlement of a parallel gender discrimination case against Morgan Stanley, *Augst-Johnson*, []and is substantive, meaningful and valuable to the class." ER 112-13.[FN6] Likewise, the court determined that the monetary relief was substantial. The district court found that the monetary relief "represent[ed] over 40% of the predicted disparity in compensation which Plaintiffs sought as damages," and was "comparable to that approved by the District Court for the District of Columbia in settlement of the parallel *Augst-Johnson* case," as well as to the settlement in another parallel gender discrimination case against Smith Barney. ER 116-17. Accordingly, Judge Henderson granted final certification to the class, final approval to the proposed Settlement, issued the Settlement Agreement as an order of the court, and entered final judgment. ER 123-28.

> FN6. On the same day Plaintiffs filed their initial Complaint in this case alleging class-wide gender discrimination claims, separate plaintiffs also brought a gender class action in the United States District Court for the District of Columbia (*Augst-Johnson v. Morgan Stanley*, Case No. 06-1142). The gender claims in this case were stayed because of the 18 months of pre-filing settlement negotiations in the *Augst-Johnson* case, which eventually resolved the class-wide gender claims in both litigations. ER 855-58.

B. Race-Based Class Action Claims Have Long Been Part Of This Case and Were Settled After Extensive Negotiations.

As the district court recognized, class action race discrimination claims were part of this case before efforts were made to settle such claims. ER 104-105. When Denise Williams, an African-American, was added, on October 12, 2006, as a named plaintiff and as an additional representative of the proposed class of women challenging Morgan Stanley's policies on the allotment of business opportunities, she also alleged *individual* claims of race discrimination. ER 1256-59.[FN7] Williams then submitted to the EEOC an amended Charge of Discrimination, asserting *class-wide* discrimination by Morgan Stanley against minorities, and she received a right-to-sue on December 5, 2006. DSER 1312-17.[FN8]

> FN7. Williams' individual Title VII race claims were dismissed due to the failure to obtain an EEOC right-to-sue letter regarding those individual claims prior to filing of the complaint. DSER 1318-20.

FN8. Under the heading "IV. Class Claims," Williams' amended EEOC charge 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.
DSER 1313.

Shortly thereafter, in January 2007, Plaintiffs' counsel advised Morgan Stanley that Plaintiffs would seek to amend their Complaint and allege class-wide race claims on behalf of "minorities." ER 848. Thereafter, the parties agreed to toll the statute of limitations,[FN9] and Plaintiffs agreed to defer filing their class-wide race claims in court until after the parties attempted to negotiate a class-wide settlement. ER 848-49. They engaged Hunter Hughes, a well-respected and highly experienced mediator. ER 849.

FN9. As the January 2007 tolling agreement recognized, "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 all other similarly situated minority employees of MSDW." ER 848-49; ER 854-58.

Lengthy and difficult in-person mediation sessions were conducted in February, March, May, and July of 2007 (ER 849-50), along with scores of telephone conferences and other mediation communications. ER 850; DSER 624-25. In advance of the mediations, Plaintiffs' counsel requested, and Morgan Stanley provided, detailed and confidential information about its policies and practices, as well as extensive Morgan Stanley compensation and workforce data, and detailed information regarding its Power Ranking formula and diversity initiatives. ER 849-50; ER 784. Plaintiffs engaged experts to analyze this data, and investigated the strength of their claims. ER 849; DSER 624.

The rigor of the negotiation is shown by the fact that the parties nearly reached impasse on several occasions due to seriously conflicting settlement positions. DSER 625. Indeed, Plaintiffs cancelled a previously scheduled June 2007 mediation session as a result of their dissatisfaction with settlement terms proposed by Morgan Stanley. ER 849-50. 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.

DSER 625.

At the conclusion of the mediation session with Mr. Hughes, on July 23, 2007, the parties reached a settlement in principle, which was then documented.[FN10] The Second Amended Complaint (ER 1181-1206) and subsequently the proposed Settlement were presented to the district court for approval. ER 850.[FN11]

FN10. The settlement agreement initially submitted to the district court was revised by the parties and resubmitted to the district court. References in this brief to the "Settlement Agreement" refer to the revised Agreement to which the district court granted final approval on October 22, 2008. ER 130-87.

FN11. Following the public announcement of the settlement of the *Augst-Johnson* case, Morgan Stanley's managers and Human Resources representatives received numerous inquiries from employees seeking information about that settlement, each of which they had to direct to plaintiffs' counsel in that case. DSER 628-29. In anticipation of and to alleviate the burden of responding to numerous individual requests 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 informing them of the Settlement, reminding them of Morgan Stanley's non-retaliation policy and telling them

that they could direct any "inquiries ... regarding participation in this settlement" to Plaintiffs' counsel. DSER 632. Contrary to the allegation by the Objectors, there was nothing inappropriate or unusual about this email, and it certainly does not support the allegation that there were not arms' length negotiations between the parties. This communication occurred after the public announcement of the Settlement, which had already identified Plaintiffs' counsel.

C. Defendants' Separate Mediation Of Individual, Non-Class Claims With The Moore Group.

Morgan Stanley never negotiated a possible settlement of class-wide race discrimination claims with any other group of Financial Advisors or their counsel. Three months after the Plaintiffs informed Morgan Stanley of their intent to bring class-wide claims and nearly two months after the parties began mediation sessions with Hunter Hughes, Morgan Stanley began separately mediating the *individual, nonclass* claims of a different group of current and former African-American Financial Advisors, represented by counsel for Objectors here ("the Moore Group"). ER 850-51; DSER 628. The mediation with the Moore Group concerned possible settlement of the *individual, non-class* discrimination claims of that group; it did not focus on a class-wide settlement. ER 851. These individual negotiations broke down over money (ER 851; DSER 628), well before the Settlement was reached in this case on July 23, 2007 (ER 850). The Moore Group members eventually filed suit in the Northern District of Illinois. *Moore v. Morgan Stanley*, No. 97C 5606, 2008 U.S. Dist. LEXIS 88300, *2-3, *14 (N.D. Ill. May 30, 2008). Although the Moore Group initially attempted to bring class claims,[FN12] the *Moore* litigation proceeded and each plaintiff settled on an individual basis. RJN Exh. A-D.

FN12. The class claims brought in the *Moore* case were alleged to be broader than those in this case, but the *Moore* case proceeded based on individual claims, and eventually settled on individual monetary bases, abandoning any class claims. *Moore*, 2008 U.S. Dist. LEXIS 88300 at *2-3, * 14; *see* Morgan Stanley's Request for Judicial Notice ("RJN") Exh. A-D, filed simultaneously with this brief on January 28, 2010.

***12 III. STANDARD OF REVIEW**

This Court will reverse a decision approving a class action settlement "only upon a strong showing that the district court's decision was a clear abuse of discretion." *Linney v. Cellular Alaska P'ship.*, 151 F.3d 1234, 1238 (9th Cir. 1998). A "strong judicial policy ... favors settlements, particularly where complex class action litigation is concerned" (*ibid); Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026-27 (9th Cir. 1998) (review of class action settlement is "extremely limited"); *Officers for Justice v. Civil Serv. Comm'n* 688 F.2d 615, 626 (9th Cir. 1982) (upholding the district court's approval of class settlement and noting the appellate court's "limited" review).

When a settlement is offered for approval at the same time a class is proposed for certification, courts require heightened judicial scrutiny to assure fairness. *Hanlon*, 150 F.3d at 1026. But if the record shows that the district court explored relevant factors and thereby approved a settlement, the appellate court will not overturn that decision even if it thinks settlement terms might have been better, or that it might have weighed the relevant settlement approval factors differently. *Officers for Justice*, 688 F.2d at 626; *see also In re Pacific Enterprises Sec. Litig*., 47 F.3d 373, 378 (9th Cir. 1995) (affirming settlement approval because judge "applied a proper legal standard and his findings of fact were not clearly erroneous").

Thus, the judicial task on appeal "is a very limited one." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). "Factual findings supporting the order approving the decree [or settlement] are accorded 'great weight,' and the appellate court will not substitute its notions of fairness for those of the district judge and the parties to the agreement." *Davis v. City & County of San Francisco*, 890 F.2d 1438, 1445 (9th Cir. 1989). A district court's factual findings are reviewed for clear error; if ***13** those findings fall within "any of the permissible choices the court could have made" based on the record, the court's findings are not clearly erroneous. *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

If a district court has identified and applied the correct legal rules, it abuses its discretion only if its "application of the

correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) 'without support in inferences that may be drawn from facts in the record.' " *Hinkson*, 585 F.3d at 1262 (quoting *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 577 (1985)).

Furthermore, the district court has discretion to limit both the discovery or presentation of evidence by a settlement objector "to that which may assist it in determining the fairness and adequacy of the settlement." 4 *Newberg on Class Actions* §11:57, at 184; *see also Glicken v. Bradford*, 35 F.R.D. 144 (S.D.N.Y. 1964); *Manual for Complex Litigation (Fourth)* §21.643, at 328 (2002) ("Discovery [by objectors] should be minimal and conditioned on a showing of need, because it will delay settlement, introduce uncertainty, and might be undertaken primarily to justify an award of attorney fees to the objector's counsel"). The district court's decision to deny discovery requests should not be overturned absent an abuse of discretion. *UAW v. CMC*, 497 F.3d 615, 625 (6th Cir. 2007) (affirming settlement approval, including district court's denial of additional discovery requested by objectors); *see also United States v. Oregon*, 913 F.2d 576, 582 (9th Cir. 1990) ("[I]f the district court had sufficient facts to approve the plan intelligently, then 'there is no reason to ... give appellants authority to renew discovery.") (citing *City of Detroit v. Grinnell Corp*, 495 F.2d 448, 463 (2d Cir. 1974)).

IV. SUMMARY OF ARGUMENT

1. Judge Henderson did not abuse his discretion and was justified in concluding that the terms of the Settlement are fair, adequate and reasonable. For approximately one year, the district court reviewed the terms of the Settlement holistically, balancing the strength of the Plaintiffs' case; the risk, complexity and likely duration of further litigation; and the stage of the proceedings. Judge Henderson considered the experience and views of counsel, the reaction of class members to the proposed Settlement, and carefully considered the arguments of the Objectors before approving the Settlement. This Court should not disturb the district court's sound decision.

2. Judge Henderson did not abuse his discretion, as the record supports the finding that the programmatic relief is substantive, meaningful, and valuable to the class. The programmatic relief provides for unique and innovative programs geared specifically towards African-American and Latino Financial Advisors and extends the programmatic relief already provided to women under *Augst-Johnson* gender settlement to African Americans and Latinos. As a result of the settlement negotiations, changes were made to the Power Ranking formula originally negotiated in *Augst-Johnson*, to place even less emphasis on historical factors such as assets under management, specifically to address the concerns of African-American and Latino Financial Advisors.

To further support the soundness of its finding that the Settlement was meaningful and valuable to the class, the district court compared the programmatic relief to settlements in similar cases. The programmatic relief in this case exceeds that achieved in other race discrimination class action settlements by not only implementing new programs, but also by establishing a system for continuous evaluation of the programs and for recommending appropriate revisions to the programs to ensure their ongoing effectiveness.

3. The record fully supports the district court's exercise of discretion in deciding that the monetary award adequately compensates class members. To reach this conclusion, the district court compared the Settlement amount to Plaintiffs' estimated compensation if they prevailed at trial and determined that the amount was commensurate with the risk of proceeding. The court also compared the monetary Settlement amount to the amount awarded in similar cases, finding this Settlement to provide more relief than many other comparable cases. Finally, the record supports the district court's finding that the monetary award was fair to both African-American and Latino class members.

4. The district court properly exercised its discretion in denying Objectors' request for further discovery. The district court found that it had sufficient facts before it to intelligently approve the Settlement. Objectors have no absolute right to review all of the confidential materials provided to the court in chambers. The only questions are whether the court

had sufficient facts to evaluate the Settlement and whether Objectors were able to meaningfully participate in the settlement approval process without the information. Because the district court determined the answer to both questions to be affirmative, it properly denied Objectors' requests for further discovery. The district court's exercise of discretion should therefore not be disturbed.

*16 V. ARGUMENT

A. Objectors Impermissibly Submit In Their Excerpts And Rely On In Their Opening Brief Documents That Are Not Part Of The Record.

Objectors improperly offer and rely upon almost three hundred pages of documents (ER 481-770) that are not part of the district court record. ER 321. For the reasons discussed in the accompanying Motion to Strike, the Court should strike the documents improperly included in Objectors' Excerpts of Record as well as the referenced factual allegations they supposedly count on, and ignore those parts of Objectors' brief that rely on them.[FN13]

> FN13. Improper excerpt materials are cited in support of arguments in Objectors' Opening Brief concerning: (1) Ms. Curtis-Bauer's role in settlement negotiations; (2) the Moore Group's supposed knowledge about Morgan Stanley and its policies; (3) the respective experiences of African-Americans and Latinos at Morgan Stanley (an assertion made in the declaration of one African-American employee in a South Florida Morgan Stanley office who "did not witness racial discrimination against Latinos"); and (4) the fairness of the Settlement's components.

B. The District Court Justifiably Concluded That The Terms Of The Settlement Are Fair, Adequate, And Reasonable; There Was No Abuse Of Discretion.

Judge Henderson applied Ninth Circuit precedent and took full and proper account of the record when he found, within his discretion, that this Settlement is "fair, adequate, and reasonable." ER 111.

Objectors' arguments on appeal are legally erroneous, devoid of record support, inconsistent with the standard of appellate review, and reflect Objectors' preferences for different settlement terms rather than showing that this Settlement fails the test governing settlement approval. There is no basis to find any abuse of discretion by the district court.

***17** When reviewing a proposed class settlement, the courts must evaluate it as a whole. *Hanlon*, 150 F.3d at 1026. The district court "balance[s] a number of factors: the strength of the Plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Id*. No one factor need be determinative though; sometimes, one factor alone will merit a settlement approval order. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 376 (9th Cir. 1993).

1. The Record Supports The District Court's Findings That The Settlement's Programmatic Relief Is "Substantive, Meaningful, And Valuable To The Class".

In approving the settlement, Judge Henderson did not abuse his discretion when he found that the programmatic relief provided is "substantive, meaningful, and valuable to the class" (ER 335-36), and does not duplicate relief obtained by the plaintiffs in the *Augst-Johnson* settlement. ER 350. As expressed in Judge Henderson's final appeal order:
[T]he injunctive relief package is not simply a carbon copy of the relief Morgan Stanley had already agreed to in the

Augst-Johnson settlement. The programmatic relief set out in sections VII.B, VII.C, VII.D.2.d, VII.E and VII.G appears to represent a genuine expansion rather than a dilution of relief already ordered *in Augst-Johnson*. Counsel clarified that the industrial psychologists and diversity monitor provided for in the settlement will be devoting additional time, analysis, and resources to addressing race issues, and not displacing relief already agreed to *in Augst Johnson*.

ER 350.

***18** The record fully sustains such determinations. Thus, the district court did not abuse its discretion in approving the settlement based on these and other findings. As detailed below, the Settlement Agreement expands and provides relief distinct from the *Augst-Johnson* settlement. Further, the substantial value of the programmatic relief is evidenced by the declarations of Industrial Psychologists retained to assist in the administration of the settlement and Morgan Stanley's counsel. Moreover, the injunctive relief of the Settlement Agreement exceeds the injunctive relief approved by courts in similar cases.

a. The Programmatic Relief Goes Beyond The Relief Obtained By Plaintiffs In Morgan Stanley's Gender Class Action Settlement.

Objectors attempt to mislead this Court by claiming that the relief of the *Jaffe* Settlement Agreement is duplicative of and previously mandated by Morgan Stanley's settlement in the *Augst-Johnson* case, when in fact the *Jaffe* Settlement expands and extends the relief provided in the *Augst-Johnson* settlement of gender discrimination claims to a different class of persons - Latinos and African American Financial Advisors. The programmatic relief in *Augst-Johnson* addressed an entirely different group - women - and was specifically aimed at increasing female participation and performance in Morgan Stanley's workforce. ER 862-914. Nothing in the *Augst-Johnson* settlement bound Morgan Stanley to undertake any initiatives with respect to African-Americans or Latinos (ER 862-914); only this Settlement Agreement commits Morgan Stanley to do that. ER 130-218.

Specifically, the *Jaffe* Settlement provides for the development and implementation of unique and innovative policies and programs geared towards attracting and benefiting African-American and Latino Financial Advisors during all ***19** phases of their careers with MS-GWMG. ER 151-67. These policies, programs, and initiatives address the recruitment, hiring, development, success, and retention of African-American and Latino Financial Advisors in meaningful ways. *Id*.

One way this settlement benefits minorities is by extending to them some programs and initiatives created for women in the *Augst-Johnson* settlement. But that fact does not make this settlement duplicative of the relief in the *Augst-Johnson* settlement. For example, as the *Augst-Johnson* settlement did for women, this Settlement provides for the use of the two Industrial Psychologists, Dr. Kathleen Lundquist and Dr. Irwin Goldstein, who were also retained as part of the *Augst-Johnson* settlement, to develop programs to aid African-American and Latino Financial Advisors. Specifically, as a result of the *Jaffe* Settlement, they are to:

- identify and develop programs to attract qualified African-American and Latino Financial Advisors (ER 152);
- recommend ways to increase African-American and Latino representation in the receipt of retiring Financial Advisors' books of business (ER 158);
- provide advice for increasing participation of African-American and Latino Financial Advisors in partnerships with other Financial Advisors (ER 158);
- develop workplace initiatives designed to retain African-American and Latino Financial Advisors and enhance their success (ER 161);
- identify ways to increase the participation of African-American and Latino Financial Advisors in development opportunities (ER 161).

***20** Programs created for women in *Augst-Johnson* are extended through the *Jaffe* Settlement to African-Americans and

Latinos.

Beyond these extended initiatives, the *Jaffe* Settlement contains numerous provisions that have no counterpart whatsoever in the *Augst-Johnson* settlement. The *Jaffe* Settlement mandates Morgan Stanley to utilize the Industrial Psychologists to review annually the account distribution system, related compensation data, and the rankings of African-Americans and Latinos on each individual factor considered in the Power Ranking formula. ER 155-56; ER 171. Under the *Jaffe* Settlement, the Industrial Psychologists are also tasked with the new and unprecedented task of conducting *a job analysis*. ER 164. At the preliminary approval hearing, Plaintiffs' counsel explained the importance of this job analysis to decreasing turnover-an issue particularly applicable to African-American and Latino Financial Advisors. ER 16. The Industrial Psychologists have the additional task of recommending ways to increase the number of minority Financial Advisors, improve Series 7 passage rates, and decrease attrition. ER 164-65; ER 16. In fact, the Industrial Psychologists must study and recognize the differences encountered by African Americans, Latinos and women in the workplace, study Morgan Stanley programs and their *differing* effects on these diverse groups, and recommend changes that will increase access to opportunities for each separate group. ER 165-66.

In an effort to recruit more African-American and Latino Financial Advisors, Morgan Stanley will undertake targeted recruiting efforts, build relationships and network with many different organizations and schools, offer internships, and sponsor other programs. ER 151-52. Plaintiffs' counsel explained to the district court that their focus on Morgan Stanley's recruiting efforts was specifically geared to ***21** counteract the decrease in the African-American trainee workforce. ER 15. At the preliminary approval hearing, class counsel elaborated on the value of these new recruiting provisions:
The job analysis and the analysis of recruiting sources where you're likely to find people of color who are likely to be successful are very important components of this injunctive relief, that are above and beyond *Augst-Johnson* and will cost the company more, [and] regardless what it cost them, it will benefit these class members.

ER 16-17. Morgan Stanley confirmed that "the recruiting function is [a] whole new area not part of the *Augst-Johnson* case." ER 27. Under the *Jaffe* Settlement Agreement, Morgan Stanley will *dedicate a position* within its 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. ER 151-52. In order to provide more opportunities for African Americans and Latinos to move into management, Morgan Stanley will develop a computerized system to provide email notifications of new managementy *job postings*. ER 152. Morgan Stanley must conduct *exit interviews* and devote additional resources to *assist trainees* to obtain Series 7 registration. ER 161; ER 153. Also as a result of this Settlement alone, Morgan Stanley's *diversity training* will incorporate elements of the Implicit Association Test - an awareness building tool with respect to implicit bias. ER 153. These significant and meaningful programmatic relief provisions are far more than fair, adequate and reasonable - they are far reaching and, in many respects, ground breaking and innovative within the financial services industry.

***22** Furthermore, this Settlement provides for the appointment of a Diversity Monitor to perform additional tasks related to African Americans and Latinos. The Diversity Monitor, Fred Alvarez, Esq., will provide monthly reports to Plaintiffs' Counsel regarding complaints of race discrimination, the investigations of those complaints and their resolution; receive quarterly reports regarding offices where branch managers have filed exception reports reflecting deviations from the account distribution process; monitor account distribution data, exception reports, and any complaints related thereto; inform Morgan Stanley and Plaintiffs' counsel of areas of non-compliance; audit branch activities by reviewing documents and asking branch managers to provide explanations; review the diversity-related self assessment process for field sales management and the diversity component of branch manager compensation; monitor the bi-annual training of company management on equal employment opportunity policies; review how the Human Resources department handles investigations; and review annual results of exit interviews of African Americans and Latinos. ER 163-64. Given that these programs are distinct forms of programmatic relief associated with the *Jaffe* Settlement, the district court's decision that the settlement is not duplicative of *Augst-Johnson* is amply supported by the record and was not an abuse of discretion.

Additionally, the Power Ranking formula that governs the account distribution of departing Financial Advisors' books of business was significantly altered as a result of concerns raised by the Plaintiffs in this case. Although one version of the Power Ranking formula in the *Augst-Johnson* settlement was submitted for preliminary approval in that case, Morgan Stanley made changes to the formula as a direct result of the *race-based* concerns raised by the *Jaffe* Plaintiffs. ER 115. The formula ***23** negotiated in *Jaffe* was the formula given final approval *in Augst-Johnson*. ER 851. Plaintiffs' counsel testified both at the preliminary and final approval hearings that Plaintiffs insisted on modifying the new Power Ranking formula to place less emphasis on historical factors, such as assets under management, specifically to address the concerns of African-American and Latino Financial Advisors. ER 12; ER 63; ER 265-66. *See also* ER 22-23. Morgan Stanley confirmed that Morgan Stanley agreed to a "meaningful change" in the Power Ranking formula as a result of settlement negotiations in this case. ER 93.

Based on the testimony of Plaintiffs' counsel and counsel for Morgan Stanley, the district court found, within its discretion, that in response to the race discrimination claims in *Jaffe*, Morgan Stanley changed the Power Ranking formula to de-emphasize past performance, tested the revised Power Ranking formula to see if it would have an adverse impact on minorities, and concluded that it did not. ER 115; ER 851; DSER 665-66.

b. The Record Supports The District Court's Finding That The Settlement's Programmatic Relief Is Highly Valuable.

Judge Henderson's settlement approval findings are supported by the testimony of Dr. Lundquist, one of the Industrial Psychologists who provided expert testimony that the programmatic relief would improve productivity, retention, and hiring of African-American and Latino Financial Advisors. ER 335-36, DSER 615. In addition, Judge Henderson recognized that Morgan Stanley estimates that it will spend *$7.5 million* on "diversity initiatives that are aimed squarely at class members in this case" as a result of the Settlement. ER 335-36; DSER 621; DSER 629.

***24 c. The Court's Settlement Approval Decision Is Supported By Comparison To Other Settlements That Achieved Less Significant Programmatic Relief.**

The programmatic relief in the Settlement Agreement is comparable to or exceeds that achieved in other race discrimination class action settlements, which underscores the appropriateness of Judge Henderson's approval order. ER 335-36. *See Thomas v. Christopher*, 169 F.R.D 224, 232-33 (D.D.C. 1996) (approving settlement in race discrimination case which had far fewer innovative programs designed to enhance opportunities for class members); *Plummer v. Chem. Bank*, 579 F.Supp. 1364, 1374 (S.D. N.Y. 1984) (approving settlement and finding significant injunctive relief was provided by accelerating affirmative action goals, implementing dispute resolution procedure, and appointing a special master to hear complaints); *Lums v. Russell Corp.*, 604 F.Supp. 1335, 1337 (D. Ala. 1984) (settlement that provides for backpay fund, scholarships, minority vendor program, and substantially increased opportunities for hiring, training, transfer and promotion, recruiting efforts and hiring goals provides for "broad and substantial benefits to class members").

Each of the above cited settlements, upon which the district court properly relied as comparable race discrimination cases (ER 335-36), involved the implementation of programmatic changes for their employees. However, none of them went as far as the settlement in this case, which not only implements new programs, but also establishes a system for continuous evaluation and for recommendation of revisions to the programs, to ensure their effectiveness to meet the ongoing goal of successful employment for African American and Latino Financial Advisors. *See also Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 615-16 (N.D. Cal, Aug. 22 1979) (approving race discrimination class settlement providing for *no* ***25** programmatic or injunctive relief and approximately $106 dollars in monetary relief per class member, assuming full participation).

The court also took judicial notice of the *Amochaev et al. v. Citigroup Global Markets Inc*. gender discrimination settlement approved by the Northern District of California (Case No. C-05-1298-PJH, August 13, 2008) as a settlement "which provided similar injunctive relief as this case. ER 117. And, as discussed above, while this settlement differs in many material respects from the one in *Augst-Johnson*, the court's approval of the *Augst-Johnson* settlement is further evidence of the adequacy of the programmatic relief provided for here. ER 862-914; ER 916-20; ER 938-47.

Even though Objectors assert that the court-approved settlements in two retail brokerage industry cases (*Cremin v. Merrill Lynch*, 371 F.3d 950 (7th Cir. 2004) (upholding a settlement reached in 1998) and *Martens v. Smith Barney*, 1998 U.S. Dist. LEXIS 17666 (S.D.N. Y. 1998)) were more favorable than the *Jaffe* Settlement Agreement, they actually provide far *less* extensive injunctive relief than the Settlement Agreement. To begin with, both *Martens* and *Cremin* require that the defendant implement and enforce the programmatic relief over a three-year period only, two years less than the five-year period to which the parties agreed in this case.

More significantly, the Settlement Agreement provides for the joint appointment of Industrial Psychologists who shall work with Morgan Stanley to develop innovative, meaningful, novel, state-of-the-art programs; monitor the implementation of the policies and initiatives that Morgan Stanley is obligated to undertake; and, on an annual basis, monitor the representation rates of African Americans and Latinos in the Registered Financial Advisor Trainee and Financial ***26** Advisor positions. ER 164-67. The Settlement Agreement also requires the appointment of a Diversity Monitor with various and extensive monitoring and reporting duties. ER 162-64. *See* pages 17-23, *supra*.

By comparison, neither *Cremin* nor *Martens*, which were both negotiated by Objectors' counsel, include the appointment of industrial psychologists or external, independent monitors. See DSER 125-401. Thus, through both the Industrial Psychologist and Diversity Monitor appointments in the instant Settlement, there is far more participation and reporting by independent third parties than Objectors' counsel has previously required in their prior class action settlements.

d. The Record Supports The District Court's Finding That The Settlement Properly Addresses Issues Related To Teams And Partnerships Among Financial Advisors.

The district court found that teaming arrangements and partnerships among Financial Advisors are not controlled by Morgan Stanley, meaning Plaintiffs' counsel could properly conclude, as they did, that Plaintiffs would be unlikely to obtain any relief changing these teaming and partnership agreements even if they prevailed at trial. Despite this, the court also found that the settlement requires Morgan Stanley to make efforts to increase minority participation in teaming and partnership relationships among Financial Advisors. ER 115-16. Specifically, the Court stated:
Even if the exclusion of minorities from teams and partnerships were attributable to Morgan Stanley, the fact that the Settlement Agreement still allows assets to transfer and credits to accrue through partnership is not fatal to the settlement. Again, the standard is not whether the settlement "could be better," but whether it is fair, reasonable and adequate. The Settlement Agreement provides for some efforts to increase minority representation on teams and partnerships. Given the extensive programmatic and monetary relief the settlement provides to class members, the Parties' decision to focus on other issues is acceptable.

***27** ER 116.

As the record supports each of the district court findings, there is no basis to find an abuse of discretion. The court properly credited Plaintiffs' counsels' assessment, based on their factual investigation, that Plaintiffs would be unlikely to obtain any relief directed at teams and partnerships, even if successful at trial. ER 69-70, 81.

In addition, the Settlement itself addresses minority participation in teaming and partnership arrangements among

Financial Advisors. The Industrial Psychologists are to study these arrangements and develop ways to increase African-American and Latino participation. ER 158.

The Settlement requires that accounts be distributed through the revised Power Ranking formula which is subject to the various safeguards described above. An exception to this procedure exists for the accounts of departing or retiring Financial Advisors that were the subject of a teaming arrangement among Financial Advisors which had been in effect for more than twenty-four months. ER 158. This narrow exception is justified because Morgan Stanley is legitimately interested in distributing accounts to the colleagues of departing Financial Advisors who already have established business relationships with account holders.

Objectors' arguments that teams and the distribution of departing and retiring Financial Advisors are not fairly taken into account by the settlement rely on materials that are not part of the record (ER 481-770) and, thus, should be disregarded. Even if this Court considers these arguments, it should find that Objectors' position ignores that the Settlement Agreement does indeed address teams and account distributions, as referenced above.

***28** Objectors also misstate both an EEOC Determination and a district court summary judgment ruling in the single-plaintiff case of *Dodson v. Morgan Stanley*. Neither decision found a pattern or practice of discrimination with respect to teaming and partnership practices among Financial Advisors at Morgan Stanley. The EEOC only found "reasonable cause" to believe that *one* particular plaintiff *may* have been denied a potential partnership based on her sex because *one* senior colleague made that choice. The EEOC made no finding of discrimination and determined nothing about teaming practices in general. ER 463. When these events became the subject of judicial review, the district court dismissed the plaintiff's pattern and practice and disparate impact discrimination claims based on teaming practices among Financial Advisors, finding no evidence of a policy, pattern or practice of discriminatory teaming. *See Dodson v. Morgan Stanley DW, Inc.*, No. C06-5669RJB, 2007 WL 3348437, *10, *12 (W. D. Wash. Nov. 8, 2007):
Plaintiff provides no statistical support for her pattern and practice claim, including any evidence reflecting percentage comparisons of male and female partners with "lucrative" joint production agreements.... Plaintiff has offered no evidence supporting her claim that Morgan Stanley's policy of allowing financial advisors to subjectively choose partners discriminates against women.

Id.

Given the difficulties in obtaining any relief regarding teaming among Financial Advisors, and the fact that this Settlement nonetheless addresses minority participation on teams, the district court did not abuse its discretion in finding that the Settlement is fair and adequate.

***29 2. The Settlement's Monetary Relief Is Substantial And Meaningful.**

a. The Monetary Award Adequately Compensates Class Members Based On Potential Damages And The Court's Proper Finding That Plaintiffs Face Substantial Risks That They Would Not Prevail At Trial.

Judge Henderson's settlement approval findings are sustained by the evidence that the amount of the Settlement bears a reasonable relationship to potential damages and the substantial risks Plaintiffs would face if they attempted to prevail at trial on their claims. ER 334.

Plaintiffs and their expert witnesses estimated that Plaintiffs' claims were worth, at most, $36 million in lost compensation if they prevailed at trial;[FN14] that means, as Judge Henderson concluded, that the settlement represents a "healthy 43%

of possible recovery." ER352. Plaintiffs' counsel, well experienced in these matters, testified at the preliminary and final approval hearings that they believed the settlement was a "respectable number" compared to "many settlements" and taking into account the "risk of litigation." ER 13.

> FN14. This is based on Plaintiffs proving that the entire average compensation difference is attributable to race discrimination.

Courts may properly rely on plaintiffs' counsel's assessment of the strength and value of their case, especially when the court has found counsel to be highly experienced and to have conducted appropriate investigation of the claims at issue. *See In re Mego Fin. Corp. Securities Litig*, 213 F.3d 454, 459 (9th Cir. 2000) (approving district court comparison of settlement amount with parties' estimate of recoverable damages in the event of litigation success, and approving of settlement representing only one sixth of the estimated total potential recovery).

***30** In determining whether the settlement is fundamentally fair, adequate and reasonable, the court may consider any or all of the following factors, if applicable:
the strength of Plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Officers for Justice, 688 F. 2d at 625.

The district court also found that Plaintiffs "would face considerable risk were they to proceed to trial." ER 111. The record supports that assessment. Plaintiffs, who were employed as Financial Advisors, were not compensated by wages determined by Morgan Stanley; their compensation was based on commissions they earned from the financial services they provided to customers. *See* ER 1188. Plaintiffs would have difficulty proving that Morgan Stanley's "objectively neutral policies and procedures" improperly denied them equal access to accounts or business opportunities or caused them harm in compensation, terminations, or any other manner. *Id*. Among Plaintiffs' principal claims is that they were disadvantaged by Morgan Stanley's account distribution policy. However, as Plaintiffs' counsel explained at the preliminary approval hearing, it would be "very difficult" to prove causation because the account distribution policy is "objectively neutral." ER 13; ER 267. Furthermore, "the percentage that we could have attributed to the account distribution formula was a highly debatable and contentious issue that would have been at the forefront of this litigation." ER 13. Without a settlement, Plaintiffs would face the "substantial uncertainty and complexity" of trial and a "vigorous defense." ER 111. Insofar as individual class members claimed lower compensation, or even ***31** termination of employment, based on low revenue generation, they would each encounter the high hurdle of proving that these losses were caused by the discriminatory, adverse effects of Morgan Stanley policies, as opposed to their own personal performance and other related issues. ER 115-16 (citing to ER 69, 73, 81).

Acknowledging that Plaintiffs' counsel "have extensive expertise and experience not only with class action discrimination cases, but in litigating employment and discrimination cases against defendants in the financial services industry, including Morgan Stanley," the court considered the terms of the Settlement in light of Plaintiffs' counsel's well-reasoned and substantiated determination that the issues in the litigation are complex and expensive:
The factual and legal issues are complex, as demonstrated by the parties' years of hard-fought litigation and the terms of the Settlement Agreement itself. Any liability phase trial of plaintiffs' claims - which involve thousands of class members employed throughout Morgan Stanley would also be complex and would require substantial additional preparation and many fact and expert witnesses. Remedial phase proceedings would add to this complexity. All of the complex proceedings would be expensive and would result in significant delay before any potential recovery.

DSER 468. Plaintiffs' counsel also determined that further litigation would involve substantial risks to recovery. Litigating the case to trial also presents substantial risks ... it is clear that Morgan Stanley would put on a vigorous defense, and it would ultimately be up to the fact-finder to determine, for example, whether Morgan Stanley acted with a prohibited discriminatory impact that cannot be defended on job relatedness or business necessity grounds.

Id. In contrast to the complexity, delay, risk and expense of continuing litigation, the settlement "will yield a prompt, certain, and substantial recovery for class members." *Id*. The amount of the Settlement properly "reflected the risk that plaintiffs would ***32** lose at one or more stages of the proceeding or receive less in damages than they requested at trial." DSER678.

Plaintiffs' counsel's evaluation of the claims was further buttressed by economic experts. In analyzing the claims, Plaintiffs' counsel had access to computerized compensation, as well as account distribution data, promotion, turnover, hiring and incumbency action ("HPJS data") (ER11) from Morgan Stanley relating to Financial Advisors. Plaintiff engaged the services of a professional labor-economics firm, Econsult, to conduct an extensive analysis of all of the claims in this case, including whether African-American and Latino Financial Advisors were systematically disadvantaged by policies and practices. DSER 665.

Objectors claim Plaintiffs' counsel undervalued potentially recoverable damages by focusing on earnings disparities for current employees rather than potential front pay, emotional distress, denial of promotions, termination of employment, and punitive damages. But in making those arguments, Objectors never address the district court's findings that Plaintiffs would face significant hurdles at trial; that establishing wrongful termination claims would be especially difficult; and that it is appropriate for counsel to focus on the strongest claims when negotiating a settlement. ER 333. Furthermore, Plaintiffs' experts' predicted compensation disparity assumes that all of the disparity is attributable to discrimination and none of it attributable to class members' individual performance and success. Any objector was free to opt out of the settlement, sue, and go to trial if he or she believed a better outcome could thereby be achieved. What objectors may not do is deny class members the chance to participate in a fair and reasonable settlement based on their idiosyncratic beliefs that it could be better.

***33** Objectors further claim that they should have been granted access to all of the materials Plaintiffs' counsel analyzed to value potentially recoverable damages. Objectors, however, have no right to view all documents supporting the settlement. *See In re Wireless Tel. Fed. Cost Recovery Fees Litig*., 396 F.3d 922, 930-31 (8th Cir. 2005) (upholding class settlement and holding that the district court acted within its discretion by denying objectors access to materials viewed *in camera* by the court). As discussed further below, Judge Henderson acted within his discretion to protect confidential and privileged information and ruled that, consistent with applicable discovery standards, he had sufficient information before him (including Plaintiffs' expert analysis) without the Objectors' interpretation of Morgan Stanley's confidential data. ER 323. Furthermore, he found that the Objectors were able to meaningfully participate in the settlement approval process without access to the confidential data. *Id*. Indeed Objectors were able to, and did, express their concerns to the district court at both preliminary and final approval stages. ER 358-69; ER 382-411; DSER 686.

b. The Monetary Award Is Even More Favorable to the Class Than Settlements In Other Comparable Cases.

Judge Henderson's settlement approval findings are supported by court-approved settlements in other similar cases, most notably, those alleging the same type of discrimination and employment claims on behalf of Financial Advisors, with less favorable monetary terms than those here presented. Class members do better under this Settlement than their counterparts do in other cases. At least $14 million, plus accumulated interest, of the $16 million settlement fund in this case is available to be distributed to class members who submit claims, which, assuming full participation by all 1,300 class members, would award each class member on average a payment of ***34** approximately $12,000.00. ER 168; ER 117. The actual average amount per claimant, given the 422 claimants and approximately $15.5 million fund, including interest, is over $36,000.

Judge Henderson's decision approving the settlement relied on two cases that sustain his exercise of discretion. The monetary relief here exceeds that in *Amochaev v. Citigroup Global Markets, Inc.*, C-05-1298-PJH (N.D. Cal. August 13, 2008), a gender discrimination case, in which female financial advisors complained that their employer, Citigroup Global Markets, used a power ranking compensation system and distributed business opportunities in a manner that unfairly affected women. *See Amochaev* Dkt 186, p. 25. There, another Northern District of California district judge approved a $25 million settlement fund available to 2,400 class plaintiffs. At the time the settlement in *Amochaev* was negotiated and preliminarily approved, and assuming full participation by the entire class, that fund would have distributed to each member an average payment of $10,416.00. *See* ER 117; *see Amochaev* Dkt 186, p. 20.[FN15] Thus, the payment in the instant case exceeds that which was approved in *Amochaev*.

> FN15. See *also Glass v. UBS*, 2007 U.S. Dist. LEXIS 8476, *15 (N.D. Cal. Jan. 26, 2007) (failure to pay overtime settlement; court approved an average per capita payment of *$2,553.00)*.

In the *Augst-Johnson* case, where $32 million of a $46 million fund was available to 2,800 class members, assuming full class participation, the resulting per capita payment would have been approximately $11,400.00. ER 896; ER 939; *see also* ER 117. Thus, the per class member monetary relief in the instant case is higher.

***35** Objectors assert that the *Cremin* and *Martens* cases are comparable and were settled for a greater monetary amount. DSER 261; DSER 125. This is simply not true.

First, the *Cremin* and *Martens* settlements are not proper comparators because they were reached over a decade ago when the employment policies and practices at issue were very different. Moreover, those settlements did not provide automatic or formulaic settlement fund distribution for all class members who submitted claims. Rather, participating class members had to individually prove that they were victims of sex discrimination and/or sexual harassment in order to receive any money. *See* DSER 285-90; DSER 281-85.

Second, Objectors provide no evidence that *Martens* settled for "over $100 million." Objectors' Brief 45. That settlement itself provided no set amount -- only a dispute resolution procedure. *See* DSER 281-85.

Third, even if Objectors' claim is true, that the *Martens* settlement resulted in a recovery of $100 million, that amount would only be $4,545 per class member (given the class of 22,000) (2003 U.S. Dist. LEXIS 11587, *3 (S.D.N.Y. 2003)) -- significantly less than the per capita $12,000 per class member here. *See* ER 112.

The settlement in *EEOC/Schieffelin v. MSDW*[FN16] is also not comparable. First, that case did not involve Morgan Stanley employees who are compensated on the basis of a facially neutral formula, like the commission-based system used for Financial Advisors. Unlike the present case, the highly paid institutional securities traders involved in *EEOC/Schieffelin* receive a salary and discretionary bonus, ***36** determined by Morgan Stanley. *See* RJN Exh. G. Thus, the manner and means of compensation, and therefore the issues in the litigation, cannot be compared to the *Jaffe* Plaintiffs. Furthermore, *EEOC/Schieffelin* also included claims of gender discrimination with respect to promotion to officer positions. The risks in defending *EEOC/Schieffelin* were also far greater, because the compensation system was completely within Morgan Stanley's control and discretion (RJN Exh. G), the EEOC was itself a plaintiff (RJN Exh. E), and there were allegations of actual sexual harassment (RJN Exh. F). Also, the settlement was different because claimants had to have their claims favorably adjudicated by a special master before they could receive anything. RJN Exh. H. Unlike the *EEOC/Schieffelin* class members, clearly the *Jaffe* class members have received a substantial benefit in not having to prove their claims through a Special Master process in order to receive any monetary relief. And, finally, while the intervenor, Schieffelin, received a large payment, she was a successful bond seller, who earned more than $1.3 million a year at the time she first

complained that she had been denied a promotion to managing director because of her sex. She also claimed that she was terminated in retaliation for raising a discrimination claim. RJN Exh. G.

> FN16. Objectors cite only to the docket of *EEOC/Schiefflin*, Case No. 01-cv-8421 (S.D.N.Y.) in their brief, but improperly include in the Excerpts of Record a press release regarding the settlement. ER 589-90. This press release should be stricken and Objectors' argument on this issue ignored. *See* Motion to Strike.

The remaining examples that Objectors cite are not properly before this Court because they are not part of the district court record, and are covered by the accompanying Motion to Strike. But even if these improperly submitted materials are considered, they provide no basis to find that Judge Henderson abused his discretion. The settlements in *Zojaji* and *Zubulake*, and the individual awards in *Cremin*, are not comparable. Each involved the claim of only a single plaintiff. *See* ER 633-73; ER 728; ER 730. Neither the *Zojaji* nor *Zubulake* cases were settled at all. In *Zojaji*, ***37** an arbitration panel awarded a former Merrill Lynch employee $1.6 million after he complained of being fired because of his ethnicity. ER728. In *Zubulake*, a *jury* found sex discrimination and retaliation on the part of defendant UBS and awarded $29 million, including sizeable punitive damages. ER 730.

The individual awards in the *Cremin-class* cases, including the award to Cremin herself, are not comparable because in order for the individual plaintiffs in that class action case to receive settlement money, they had to establish their claims individually, at mini-trials before arbitrators, by presenting evidence. ER 634. No such process or evidentiary standards have been incorporated into the *Jaffe* Settlement. Absence of this extra administrative step requiring individuals to prove their claims benefits the entire class.

c. The Monetary Relief is Fair to All Members of the Class.

Judge Henderson's settlement approval findings are supported by evidence that the settlement treats African-American and Latino class members fairly. For example, the structure of the payment calculation formula under the Settlement supports the district court's decision. Length of employment at Morgan Stanley is a neutral element of the settlement formula, and is logically connected to the idea that those with longer periods of employment likely suffered greater effects from the practices at issue.

With regard to claims that particular African-American or Latino class members have experienced higher attrition rates or termination because of low productivity caused through account distribution disparities, these claimants may seek additional monetary relief through the claims process. ER 172.

***38** In addition, payments to individual class members can be further enhanced by the earnings regression component of the Settlement's monetary relief: additional funds are payable to those class members whose annual earnings during the covered period fell a certain percentage below a formula tied to the mean earnings of white Financial Advisors. ER 171-72. Further still, additional compensation may be awarded to class members who can show extreme emotional distress.

In short, the record supports the district court's decision. Far from establishing any abuse of discretion, Objectors improperly rely upon materials that were not before the district court, like the declaration of their retained expert, Jerry Goldman. Objectors' Brief 38 (citing to ER 511-15). They fail to articulate, even on appeal, why the record materials relied on by the district court do not sustain Judge Henderson's findings in light of the deferential standards of review governing this appeal.

3. The Vast Majority of Class Members Support The Settlement.

Judge Henderson's settlement approval findings are supported by the "reaction of the class members to the proposed settlement," *Hanlon*, 150 F.3d at 1026, and what even Objectors' counsel termed as the "very high" level of acceptance of the settlement among class members. ER 112.

Here, out of approximately 1,300 class members, 422 -- roughly 31% of the class -- submitted claims forms, evidencing their desire to participate in the monetary recovery provided by the settlement, rather than pursue their own claims or seek larger recoveries by way of objection. ER 112. Of the remainder, "nine have chosen to remain class members but lodge objections, and only 24 have opted out." ER 112; *see also* DSER 422.

***39** Just because 24 class members opted out does not mean they all opposed the settlement. People opt out of class settlements for all sorts of reasons, including that they want no part of the litigation of the claims they do not find meritorious. That so few class members have opted-out, objected, or filed individual lawsuits is a factor supporting Judge Henderson's decision and showing he did not abuse his discretion.

Despite the overwhelming support the Settlement received from the majority of the class members, Objectors attempt to attack the fairness of the negotiations leading to the Settlement, by speculating that Morgan Stanley manipulated the process by conducting sham negotiations with the Moore Group regarding class claims, while also negotiating with Plaintiffs. There is simply no evidence to support this unfounded allegation. As counsel for Plaintiffs informed the court, Williams filed an amended EEOC Charge in November of 2006, received a right-to-sue letter in December of 2006 and informed Morgan Stanley of class-wide claims in January of 2007. This chain of events led to the entry of a tolling agreement by the parties and the beginning of the mediation process in February of 2007, months prior to Morgan Stanley's negotiations with the Moore Group. ER 848. The record is further clear that Morgan Stanley agreed to mediation of only individual claims for each of the Moore Group members. ER 850-51. Morgan Stanley never mediated a class-wide settlement with the Moore Group. Indeed, the Moore/Morgan Stanley settlement negotiations centered around individual monetary relief only. ER 271-72. As the district court properly concluded upon review of this record evidence:

[I]'m certainly at this point satisfied that the settlement is not the product of fraud or collusion. I base this conclusion on the declarations of the *Jaffe* parties' counsel, on the statement of the mediator Mr. Hughes and on the timing of the EEOC Charge and subsequent tolling agreement for class race discrimination claims.

***40** ER 6-7. Thus, the Moore Group is without a basis to challenge the court's finding or to invalidate this settlement by conjuring scenarios in which they claim to have been misled during settlement negotiations. None of Morgan Stanley's interactions with the Moore Group call into question the district court's findings regarding the fairness of the settlement.

Objectors also highlight the opt out of class representative Denise Williams as a reason the settlement is purportedly unfair. However, objections by class representatives do not automatically invalidate a settlement or call for its disapproval. *See, e.g., Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 (4th Cir. 1975) (no abuse of discretion in approving sex discrimination class action settlement where *three of the original five plaintiffs objected); Olden v. Gardner*, 294 Fed. Appx. 210, 216 (6th Cir. 2008) (affirming district court-approved settlement even though original class representatives did not oversee settlement negotiations and all were removed as representatives at class counsel's request); *Heit v. Van Ochten*, 126 F.Supp.2d 487, 494 (W.D. Mich. 2001) (proposed settlement approved *after original class representative objected)*. In fact, the court in *Martens v. Smith Barney*, 190 F.R.D. 134 (S.D.N. Y. 1999), a case in which the class was represented by Objectors' counsel, approved the settlement agreement even after the named Plaintiff opted out of the class and challenged the settlement agreement. *Id*. at 138-39. For Objectors to point to Williams' objection as indicative of this settlement's unfairness is meritless.

C. The Record Supports The District Court's Exercise Of Discretion To Deny Further Discovery.

"The fundamental question" when deciding whether to permit settlement objectors to conduct discovery as part of a class action settlement approval process "is ***41** whether the district judge has sufficient facts before him to intelligently approve or disapprove the settlement." *Hemphill v. San Diego Assoc. of Realtors, Inc.*, 225 F.R.D 616, 619-620 (S.D. Cal. 2005) (citing *In re General Tire*, 726 F.2d at 1084 n.6). When, as here, the existing record equips the district court to assess the proposed settlement, this Court will not disturb a decision to deny discovery to objecting parties. *United States v. Oregon*, 913 F.2d 576, 582 (9th Cir. 1990). As *Hemphill* explains, 225 F.R.D. at 619-620:

Class members who object to a class action settlement do not have an absolute right to discovery; the Court may, in its discretion, limit the discovery or presentation of evidence to that which may assist it in determining the fairness and adequacy of the settlement." *Id*. (citing, *e.g., In re Domestic Air Transp. Antitrust Litig*., 144 F.R.D. 421, 424 (N.D. Ga. 1992)). Objectors "are not automatically entitled to discovery or 'to question and debate every provision of the proposed compromise.' " *Id*. (quoting *In re General Tire & Rubber Co. Sec. Litig*., 726 F.2d 1075, 1084 n.6 (6th Cir. 1984)). They should be allowed "meaningful participation in the fairness hearing without unduly burdening the parties or causing an unnecessary delay." *Id*. (quoting *In re Domestic Air*, 144 F.R.D. at 424).

See also 4 *Newberg on Class Actions* §11:57 at 184 (4th ed. 2002) (when a class-member objector to a proposed settlement requests discovery, "it is within the Court's discretion to limit the proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision") (quoting *Glicklen v. Bradford*, 35 F.R.D. 144, 148 (S.D.N.Y. 1964)).

Objectors have no right to view all documents supporting settlement. In *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 930-31 (8th Cir. 2005), the court upheld the class settlement and held that the district court did not abuse its discretion by denying objectors an opportunity to review sensitive materials provided to the court in chambers.

***42** Discovery was properly denied based on Judge Henderson's findings that he had sufficient facts to evaluate the settlement and that the Objectors were already able to meaningfully participate[FN17] in the settlement approval process without more information. ER 323.[FN18] In fact, Judge Henderson permitted extensive testimony from the objectors at both the preliminary and final approval hearings.[FN19]

FN17. Of the pages of hearing transcript substantively addressing the settlement and settlement approval process, testimony on behalf of the Objectors accounts for nearly 40% of the preliminary approval hearing (ER 103) and approximately 60% of the final approval hearing (ER 236-320).

FN18. Objectors sought access to Morgan Stanley's confidential workforce and HRIS data (which was provided to Plaintiffs as part of the settlement negotiations); other confidential information regarding Morgan Stanley's diversity initiatives, details of its Power Ranking formula, and internal adverse impact studies; as well as the ability to cross examine Curtis-Bauer regarding her participation as a class representative and the details of her individual claims. ER 795-96.

FN19. After hearing Objectors' concerns, he determined not to entertain a discovery fishing expedition. At the preliminary approval stage, Objectors expressed that they could not articulate their objections to the settlement, but that they needed all discovery obtained by Plaintiffs' counsel in order to determine if they had any objections. ER 97-99. In his 27 years on the bench, Judge Henderson had never been asked by class settlement objectors, as he was in this case, to first provide them with all discovery obtained by class plaintiffs and then wait to hear the actual reasons for objection to the settlement. ER 99.

These issues are properly considered against the backdrop of the district court's findings: lack of a collusive settlement; arms'-length negotiation; and a class represented by able and experienced counsel. ER 331-32.

Based on declarations from Plaintiffs' counsel and the court's *in camera* inspection of the Plaintiffs' experts' analysis, the court reasonably found that the Objectors had no right to Morgan Stanley's confidential data. ER 333. Despite Objector's alleged need for the information in order to attack the Settlement Agreement's inclusion of both African Americans and Latinos in a settlement class, the court reasonably concluded that the groups were affected similarly enough with ***43** respect to compensation to be fairly represented in one provisional settlement class. *Id*. It also evaluated the Settlement Agreement's provisions for awards to individual class members and concluded that they account for earnings differentials and potentially higher rates of terminations among African Americans as compared to Latinos. *Id*.

The district court also found, as discussed above, *no* evidence suggesting collusion during the settlement negotiations process to necessitate discovery regarding the details of the negotiations process. ER 321; ER 332. As a result of determining that it could evaluate the Settlement without the requested discovery, the court reasonably concluded that the discovery "would cause unnecessary delay" to the proceedings. ER 323.

VI. CONCLUSION

Judge Henderson properly exercised his discretion when he fully considered the fairness of the settlement negotiations, the competency of Plaintiffs' counsel, the risk of proceeding with the case to trial, and the reaction of class members to the Settlement terms before approving the Settlement Agreement. The record supports the district court's decision that the Settlement terms were reached as a result of a fair and adversarial process.

The district court thoroughly reviewed the programmatic relief, finding it to be substantive, meaningful and valuable. The record supports the district court's determination that the Settlement provides substantial and meaningful relief to African-American and Latino Financial Advisors, the benefit of which they would not have without this Settlement. The court carefully reviewed the monetary terms of the Settlement, comparing it to the amounts in similar cases and ensuring that the ***44** recovery amount was proportionate to the maximum possible recovery. The record also fully supports the district court's decision that the monetary terms were fair and adequate to all class members, African Americans and Latinos alike.

Finally, Judge Henderson properly exercised his discretion in denying further discovery to Objectors who had meaningful participation in the settlement approval process, as the district court had sufficient facts before it to intelligently approve the Settlement. For these reasons, this Court should affirm Judge Henderson's decision in the district court.

Daisy JAFFE; Margaret Benay Curtis-Bauer, Plaintiffs - Appellees, v. Jonathan GLOVER; Latrissa Gordon; Marilyn White; Peter Meme; Marshell Miller; Jerome Senegal; Hubert Stalling; Lanta Evans-Mott; Carlton McDowell; Sarah Nyamuswa; Theron Cyrus, Objectors - Appellants, v. Morgan Stanley & Co. Incorporated, Defendant - Appellee.
2010 WL 685873 (C.A.9) (Appellate Brief)

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