United States Court of Appeals, Ninth Circuit.
Daisy JAFFE and Margaret Benay Curtis-Bauer, Plaintiffs-Appellees,
v.
Jonathan GLOVER, Latrissa Gordon, Marilyn White, Peter Meme, Marshell Miller, Jerome Senegal, Hubert Stalling, Lanta Evans, Carlton McDowell, Sarah Nyamuswa, Theron Cyrus, Objectors-Appellants,
v.
Morgan Stanley & Co., Inc., Defendant-Appellee.
No. 08-17599.
March 4, 2010.

Appeal from Entry of Final Judgment of the United States District Court for the Northern District of California • Entered on October 22, 2008 No. 3:06-cv-03903-TEH • Honorable Thelton E. Henderson

Reply Brief of Appellants

Mary Stowell, Esq., Linda D. Friedman, Esq., Suzanne E. Bish, Esq., Stowell & Friedman, Ltd., 321 South Plymouth Court, Suite 1400, Chicago, Illinois 60604, (312) 431-0888 Telephone, mstowell@sfltd.com, lfriedman @sfltd.com, sbish @sfltd.com; Eric S. Oto, Esq., Law Offices of Eric S. OTO, 1111 South Grand Avenue, Suite 517, Los Angeles, California 90015, (213) 749-7540 Telephone, eso @otoesq.com; Attorneys for Objectors-Appellants, Jonathan Glover, et al.

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***1** Objectors-Appellants ("Appellants") respectfully submit this reply brief in support of their appeal. Appellants submit that the fundamental issue on appeal is a critically important but straightforward legal question about the proper role of plaintiffs and counsel prior to the filing of a class action lawsuit, about which the parties to this appeal have a fundamental disagreement, but which arises from largely undisputed facts.

LEGAL STANDARD

Appellees misstate the standard of review applicable to the issues presented by this appeal. Resolution of these issues largely involves the application of undisputed facts to law, most importantly to the adequacy of representation prong of Rule 23, which is designed to protect the constitutional due process rights of absent class members.[FN1] As such, this Court's review is *de novo*. *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir. 1984) ("The predominance of factors favoring de novo review is even more striking when the mixed question implicates constitutional rights"); *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009)(district court's application of fact to law that requires reference to values that "animate legal principles" or implicate constitutional rights must be reviewed ***2** de novo "as if it were a legal finding"). In addition, as the district court explained, adequacy of representation is a "mixed question of law and fact" (ER 232-233), which also warrants *de novo* review. *EEOC v. UPS*, 424 F.3d 1060, 1068 (9th Cir. 2005).

> FN1. The class was certified under both Fed. R. Civ. P. 23(b)(2) and (3). Class members were bound by and could not opt out of the Rule 23(b)(2) injunctive relief. For this reason, the Court allowed opt-out Objectors who were current employees to object to the settlement, recognizing that the 23(b)(2) settlement would extinguish significant rights of even these class members. ER 247.

Assuming *arguendo* that the review is not *de novo*, Appellants also contend that the district court abused its discretion in denying Objectors discovery and an opportunity to meaningfully participate and present necessary evidence to the

district court; in making factual findings regarding the adequacy of class representation and the resulting class settlement; in failing to conduct the evidentiary hearing it initially deemed necessary; and in certifying and approving the class settlement. Appellants respectfully submit that the district court's findings and rulings are an abuse of discretion and clearly erroneous because they are (1) "illogical," (2) "implausible," or (3) without "support in inferences that may be drawn from the facts in the record." *Hinkson*, 585 F.3d at 1262.

ARGUMENT

Plaintiffs-Appellees' brief speaks eloquently to the parties' vastly different interpretations of the law regarding the duties and rights of clients and counsel seeking to act on behalf of a class prior to the filing of a class action lawsuit or reliance on that lawsuit by putative class members.

***3** Plaintiffs-Appellees' counsel argue that Denise Williams' ("Williams") filing of a representative charge of sex and race discrimination before the Equal Employment Opportunity Commission ("EEOC") rendered them fiduciaries to a class of individuals similarly situated to Williams, an African American. This "fiduciary role" apparently then authorized them to disregard their sole client (Williams) and to accept a settlement on behalf of a class of African Americans and Latinos, although Williams, objected to the settlement and informed them that she would not agree to serve as a class representative for Latino Financial Advisors ("FAs"). *See, e.g.*, P. Resp. at 38-39.[FN2] Plaintiffs-Appellees' counsel claim this fiduciary role despite the fact that no race discrimination class action lawsuit had been filed, no discovery had been conducted, the EEOC had not investigated the claims, and no Latino class member or class representative had been involved in the settlement or as a class representative. Plaintiffs-Appellees' counsel claim they were permitted to solicit a new class representative, Margaret Benay Curtis-Bauer ("Curtis-Bauer") willing to ratify the settlement agreement when Williams objected to the deal. *See, e.g.*, P. Resp. at 39-41. They further find nothing problematic with coupling the search for a new class representative with an offer to Curtis-Bauer that should she agree to serve as a class representative and approve ***4** their settlement, she would receive special payment from the class common settlement fund for her "non-class" and time-barred claims. *See, e.g.*, P. Resp. at 30-32. Finally, the new class representative had not been employed by Morgan Stanley for five years when she supposedly approved the injunctive relief.

> FN2. Reference to Plaintiffs-Appellees' Response brief in this appeal will be made as "P. Resp. at X." Similarly, references to Defendant-Appellee Morgan Stanley's ("Morgan Stanley") Response brief in this appeal will be made as "D. Resp. at X."

After hearing Objectors' arguments, the district court initially ruled that an evidentiary hearing was necessary to explore the circumstances that led to the settlement and whether the class had been adequately represented. *See generally* ER 222-235. For reasons unclear to Appellants, the district court reconsidered that decision. In finding that the class was adequately represented, the district court accepted Plaintiffs-Appellees' approach, apparently agreeing that the role of the client in a pre-filing class action civil rights settlement is subordinate to counsel. *See, e.g.*, ER 108-109.

Thus, this appeal presents important legal questions about the role of both Plaintiffs and lawyers pre-filing and prior to any notice to or reliance by similarly situated persons. It also raises questions about the proper legal standard for review of such agreements under Rule 23. Appellants respectfully submit that their position meets Rule 23 and due process and better serves the interests of both the legal community and civil rights litigants.

***5 I. The District Court Was Correct To Order An Evidentiary Hearing In Its July 7, 2008 Order**

The district court conducted a fairness hearing on final approval of the settlement. *See generally* ER 236-320. Prior to the hearing, although the Court denied their request for discovery, Objectors submitted argument and evidence that the

class had not been adequately represented and the settlement was insufficient. *See* Dkt. 161;[FN3] ER 412-476.[FN4] Named plaintiff Denise Williams also submitted a detailed declaration that explained her exclusion from and lack of meaningful involvement in the settlement negotiations, principled refusal to represent Latino class members, and objection to the settlement. *See* ER 412-418. At the hearing, the district court heard argument from Objectors' counsel regarding, among other things, Curtis-Bauer's inadequacy as a class representative and other flaws and inadequacies of the settlement. *See generally* ER 248-64; 282-307. At the close of ***6** these proceedings, the court expressed concern about "whether there was adequate representation at crucial stages of litigation," and hesitancy regarding "whether Miss Curtis-Bauer's involvement as a representative was sufficient to cure any due process problems." (ER 317-319)

FN3. Citations to the lower court docket will be referred to as "Dkt. X." Citations to the Appellate Court docket will be referred to as "App. Dkt. X."

FN4. Objectors incorporated by reference into their final objections their previous objections and submissions to the court, including a supplemental brief and exhibits (Dkt. Nos. 145 - 147), that the court initially denied them leave to file. The district court accepted, considered, and even relied on these incorporated filings. Indeed, in the order that followed the hearing on final approval, the district court cited directly to documents originally submitted as part of the supplemental briefing, but incorporated by reference in the final Objections. *See* ER 231, n. 10, citing to the declaration of Michael Barnett, Dkt. 145-6 at paragraphs 18-28. The supplemental briefing is included in Appellants' Excerpts of Record at 481-770, which Appellees have moved to strike. App. Dkt. Nos. 33, 36. As in Appellants' response to Appellees' motions (App. Dkt. 53), these documents are properly part of the appellate court record, and should be considered, not stricken, by this Court.

In a July 7, 2008 Order, the district court repeated its concerns and referred the case to a magistrate judge for an evidentiary hearing into whether the class had been adequately represented. The court explained that "there are some cases in which having a class representative's personal knowledge of the factual circumstances, and aid in rendering decisions' . . . at crucial stages of the litigation is necessary to ensure due process and adequate representation of absent class members." (ER 232-33) (internal citations omitted).

The district set forth a list of nonexhaustive factors it deemed relevant to the question of whether the class representative was adequate:
• how crucial the state of litigation is to the outcome of the case
• whether the case is seeking to remedy objectively measurable harm or harm that can easily be monetized, as opposed to harm or conditions involving more subjective or complex issues where critical facts lie exclusively or primarily within the knowledge of class members alone;
• the likelihood that the decisions or outcomes at the stage of the litigation in question would have been different had class members ***7** been more involved by, for example, providing personal knowledge of critical facts;
• whether any class member was involved at the stage of litigation at issue, and if so, to what extent; and
• whether any decisions or outcomes from a stage of litigation in which an adequate representative did not participate were approved or ratified by a subsequently added representative and, if so, whether that approval was meaningful--in other words, whether it involved genuine scrutiny and a willingness and/or ability to revisit the earlier decision or outcome or cursory and perfunctory review. (ER 233)

Finally, the district court referred the case to a Magistrate Judge for a hearing to include testimony on the degree to which any class member, including Ms. Williams, was involved in settlement negotiations, developing settlement terms, or discussing settlement options; and on Ms. Curtis-Bauer's involvement in the suit and the settlement, her knowledge of the conditions and practices challenged in the suit and on her understanding of the terms of the Settlement Agreement and its consequences. *See id*.

The standard set forth by the court was thoughtful and constructive, and presented an analytical framework designed to

"hew to the Constitution and laws, and not to common practice." (ER 225, n.4) After Plaintiffs-Appellees filed a motion for reconsideration and submitted materials *in camera*, the district court reversed this order. *See* ER 104-129. Because the submissions demonstrated ***8** additional issues of disputed facts relevant to representation, it was error for the district court to reverse its order. Plaintiffs-Appellees' appellate brief again demonstrates that Plaintiffs-Appellees do not meet the district court's standards.

II. The Class Did Not Meet The Standards Set Forth In The District Court's July 7, 2008 Order Or In Rule 23 For Adequate Class Representation

A. The Class Was Not Adequately Represented When A Settlement Was Reached Without The Knowledge and Over The Objection Of Plaintiff Denise Williams

Denise Williams submitted sworn testimony that she was prevented from meaningful involvement in her own lawsuit and objected to the actions of counsel, including the settlement they reached without her consent. (ER 413-18; ER 1344-48) Williams also refused to serve as a class representative for Latino FAs and objected to her inclusion in a draft complaint sent to her on July 30, 2007. *See* ER 415. As a result, Plaintiffs-Appellees' counsel then admittedly went in search of a new class representative plaintiff who would agree to represent Latinos and approve the settlement counsel had reached without Williams' knowledge or consent. (ER 1374-75; ER 1375 at ¶13)

Rather than attempting to establish that Williams approved the Settlement, Plaintiffs-Appellees' counsel contend that adequate representation does not require a class representative to approve the terms of the settlement because class counsel owe their duties to the class and are not bound to abide by the class ***9** representative's instructions.[FN5] Dkt. No. 223 at 13-14. In the context of this case, however, when the settlement was negotiated and reached, *there was no class counsel*. A race discrimination class action had not been filed, and the district court had not appointed class counsel. Plaintiffs-Appellees had a single client, Denise Williams. No class members were relying upon the action to preserve or protect their rights, and counsel had no duty, or rights, to the class.

> FN5. In claiming the right to simply replace Williams, Plaintiff-Appellant cites *Olden v. LaFarge*, 472 F.Supp.2d 922 (E.D.Mich. 2007) and wrongly argues that wrongly argues that the "the only distinction ... is that the settlement [in *Jaffe*] was negotiated before the complaint was amended to include class-wide claims of race discrimination." P.Resp. at 40. Unlike here, in *Olden* and their other cases, discovery had been conducted, classes had been certified; and litigation had been ongoing for years prior to settlement negotiations. *Olden*, 472 F.Supp.2d at 926-927 (class certified and litigation ongoing for over seven years pre-settlement); *Heit v. Van Ochten*, 126 F.Supp.2d 487, 488 and 491 (W.D.Mich. 2001) (class certified, "substantial discovery ... suggest [ing] that the parties arrived at a fair compromise based on their full understanding of both the factual and legal issues surrounding the case"); *Fleury v. Richemont*, No. C-05-4525, 2008 U.S. Dist. LEXIS 64521, *64 (N.D.Cal. 2008)(same). Nor are these employment cases, which the district court acknowledged require "a representative with certain knowledge and involvement." Dkt. 206 at 10. Plaintiff-Appellees have not argued that Williams was not adequate, nor did they seek her removal as a class representative, unlike counsel in *Olden* and *Heit*. Indeed, Appellees did not make their concerns about Williams known to the district court until their motion for reconsideration. P.Resp. at 11; ER 1375-1376. Any claim that Williams was inadequate during the most crucial settlement negotiations period must result in a finding that the class was not adequately represented. *See* ER 222-235; ER 104-109 (linking Curtis-Bauer's adequacy to Williams' perceived involvement in settlement negotiations).

Thus, Plaintiffs-Appellees' argument is premised on its assertion that counsel assumes the duties and rights of class counsel as soon as it files a ***10** representative charge of discrimination with the EEOC. This contention is unsupported by any law or common sense. Filing an EEOC charge is a confidential action that does not trigger notice to class members or reliance by any putative class. At that stage of the proceedings, the interests of absent class members are

protected by the EEOC. Importantly, the authority cited by Plaintiffs-Appellees involves fiduciary duties that may arise *after* filing of a class action lawsuit. None involve pre-filing activity or the filing of representative EEOC charges. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003)(consolidated employment discrimination class action, where class certified prior to settlement discussions); *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001)(toxic tort class action filed in state court, along with various individual federal suits which overlapped state class claims); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1245-46 (N.D. Cal. 2000)(securities class action, consolidated from 53 separate class action complaints).

A lawyer's fiduciary duties to the class arise when a class action is filed, and class members rely upon the action. *See Staton*, 327 F.3d at 960 ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed"); *see also* 2 NEWBERG & CONTE § 11.65 ("The general rule is that the named ***11** plaintiff and counsel bringing the action stand as fiduciaries for the entire class, commencing with the filing of a class complaint").[FN6]

> FN6. Moreover, most courts hold that an attorney-client relationship is not established until the class is certified. *See, e.g., In re McKesson HBOC, Inc. Secs. Litig., 126 F. Supp. 2d 1239, 1245 (N.D. Cal. 2000)("The leading California case [Atari v. Superior Court*, 166 Cal. App. 3d 867, 212 Cal. Rptr. 773 (1985)] makes clear that putative class members are not 'represented,' " and "[w]hile lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with each and every member of the putative class"); *see also Castaneda v. Burger King Corp., No. C 08-4262 WHA, 2009 U.S. Dist. LEXIS 69592 *19-20 (N.D. Cal. July 31, 2009); see also Babbitt v. Albertson's Inc.*, No. C-92-1883 SBA, 1993 U.S. Dist. LEXIS 18801, *10 (N.D. Cal. Jan. 28, 1993);.

The district court erred in finding that Williams' role in this litigation was sufficient to meet Rule 23(a)(4)'s adequacy standards. *See Saylor v. Lindsley*, 456 F.2d 896, 904 (2nd Cir. 1972) (reversing court's approval of settlement when class representative did not authorize the settlement and objected after learning its terms). Nothing in either parties' briefs demonstrates otherwise. Worse, the approach endorsed by the district court will encourage defendants to seek out and negotiate favorable settlements with lawyers, who could then go find a class member after the fact. *See, e.g., In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1974) (explaining "attorney-shopping" as among dangers of unauthorized settlement negotiations). As such, this Court should determine the class was not adequately represented.

***12 B. Curtis-Bauer Is Not An Adequate Class Representative Because Of Her Late And Limited Involvement and Post-Hoc Ratification Of The Settlement Agreement**

Likewise, Curtis-Bauer was not an adequate class representative. In an attempt to recast history, Plaintiffs-Appellees suggest that Curtis-Bauer approached plaintiff's counsel in May 2007 with her interest in becoming a class representative for minority FAs. (P. Resp. at 11) This is demonstrably false and contrary to testimony by Curtis-Bauer and other record evidence. In May 2007, no race discrimination lawsuit had been filed, as the *Jaffe* lawsuit was still a putative gender discrimination class action. *See, e.g.*, Dkt. 25. As such, plaintiffs' counsel had set up a case website, entitled *www.genderlawsuitagainstmorganstanley.co*, to solicit information from potential female FA class members. See PSER 420. Curtis-Bauer's only "contact" with plaintiff's counsel in May was to submit contact information and a few lines in a form accessible on the case website on May 31, 2007 regarding the gender discrimination lawsuit. (ER 838 at ¶2; PSER 420; Dkt. 138 at 4.)

Plaintiffs-Appellees' counsel did not contact Curtis-Bauer nor discuss any potential race discrimination claims with her until late July at the earliest, only days before the case was converted to a race discrimination case and the settlement was presented to the district court, and only *after* the class settlement agreement had been reached by counsel for plaintiff Denise Williams without her knowledge ***13** or approval of its terms. *See* Dkt. 138 at 4-5, ¶15 (Curtis-Bauer stating that

her own "direct contributions" were made "no more than a week before the agreement in principle had been finalized"); see also ER 838, 415-416, 1346-47; *see also* ER 347 (district court finding that Curtis Bauer became involved "presumably at least a few days before" public announcement of the settlement).

Although counsel reached a settlement agreement on July 23, 2007, (ER 850; ER 1374), Williams was not informed of the terms of the settlement prior to the agreement being reached nor did she approve them. (ER 415, 1346-47; 1374-75) On July 30, 2007, Williams' counsel sent her a draft complaint that did not include Curtis-Bauer as a named plaintiff because she was not then in the case. (ER 415, 420-21, 424) After Williams informed her lawyers that she would not serve as a representative for Latinos, she was told that they "had found someone else." (ER 415 at ¶8, 1346) Even at that late date, Plaintiff's counsel did not inform Williams of the monetary settlement they had reached without her input, involvement or consent. (ER 414-15, 1347, 1374-75)

Williams' counsel then issued a mandate to the legal team to sign up a new plaintiff willing to ratify the agreement Williams would not approve or support. (ER 1375 at ¶ 13) Only then and for the first time did Plaintiffs' counsel contact Curtis-Bauer. (ER 1375) During this frantic search for a class representative, on ***14** August 1, 2007, the same counsel contacted Moore Group member and Morgan Stanley manager and FA Mary Evans as well. (ER 1061-62; PSER 442)

Thus, as Curtis-Bauer affirms and her counsel concedes, Curtis-Bauer was involved in this lawsuit for less than one week before she was presented to the district court as a new plaintiff and class representative and advocate of the settlement. Dkt. 138 at 4-5, ¶15; ER 838.[FN7] During this time, Curtis Bauer claims that she carefully assessed counsel and their competency, was fully interviewed regarding her claims, agreed to become a plaintiff, learned and accepted the duties a class representative, reviewed counsel's negotiations and bases for resolving the lawsuit, reviewed the settlement agreement, made suggestions to that agreement that were then negotiated with Morgan Stanley, negotiated a substantial payment for herself, and approved the settlement agreement. (ER 838; Dkt. 138 at 4-5; ER 327-38) It is simply not credible that she performed all of these tasks in less than one week. The district court acknowledged that Curtis-Bauer "had not been participating all along" and was likely involved for "a few days." ER 347-48. The district court's findings that Curtis Bauer could adequately perform these important ***15** tasks in just a "few days" (ER 348) are "illogical" and "implausible" and as such an abuse of discretion. *Hinkson* at 1261-62.

> FN7. This timeline is entirely consistent with the statements Ms. Curtis-Bauer made to Moore group members that she was contacted on a Friday and told she had only three days to think about her decision to serve as a class representative. By Tuesday of the following week, her name had been added to the Second Amended Complaint and her $125,000 special payment secured. *See* Ex. 2, ER 842-844, Roy Dec., Ex. 3, ER 448-458, Evans Dec., Ex. 4, Dkt. 161-7; ER 532-535. Mabon Dec.

The evidence squarely demonstrates that Curtis-Bauer is not an adequate representative because during the "no more than a week" of her "direct contributions to the negotiations," Curtis-Bauer not only ratified the common fund, she and class counsel also secured a special payment of $125,000 to be paid to her from that fund for her "non-class claims." These facts raise conflict and adequacy issues, and the law prevents Curtis-Bauer from being deemed an adequate representative.

In addition, Curtis-Bauer admitted during conversations with Moore Group members that she had little or no knowledge, involvement, or interest in the race discrimination class action. On the evening of November 27, 2007, Curtis-Bauer spoke twice by telephone with her friend, Mary Evans, and told her that she

- did not know much about the *Jaffe* case and thought it involved a statewide rather than a nationwide class;
- learned of a race discrimination case against Morgan Stanley when a Lieff Cabraser attorney contacted her on a Friday and told her she had to decide by the following Monday whether to become a class representative;
- was pressured by the attorney to become a class representative;
- felt that the remedies in the settlement did not go far enough, and

• was not told Curtis-Bauer about the Moore Group's objections or negotiations with Morgan Stanley.

***16** (ER 450-452) During lengthy phone conversations with other members of the Moore Group, Curtis-Bauer repeated the statements she had made to Evans. (ER 842-844) She told Maurice Mabon that she had "only one month" in the class period and had never filed a charge or claim of discrimination against Morgan Stanley. (Dkt. 1161-7 at 4; ER 534) As Curtis-Bauer told Brian Roy, she "was willing to lend her name" to the lawsuit, "but did not want to be actively involved" and "wanted to stay at arm's length." (ER 844; ER 51-54)

Curtis-Bauer attended neither the preliminary nor the final settlement approval hearings. Instead, she submitted two declarations -- but neither of them denied the facts stated above. *See* ER 837-839; Dkt. 138 Curtis-Bauer admitted that her own contributions to the settlement negotiations "were probably no more than for the week before agreement in principle was finalized" (Dkt. 138 at 4-5) on August 2, 2007. Curtis-Bauer first spoke with a Lieff Cabraser attorney sometime in July 2007. (ER 838; Dkt. 138 at 4)

Plaintiffs-Appellees dismiss this evidence as hearsay that was excluded by the trial court and contradicted by other declarations submitted below. (P. Resp. at 35-36) Plaintiffs are incorrect on all counts. *First*, neither Curtis-Bauer nor any other party presented evidence to controvert the testimony by Evans, Roy, and Mabon recounted above. (*See e.g.*, ER 837-39; Dkt. 138)

***17** *Second*, the trial court did not, in fact, exclude Roy's oral testimony or the declarations of Evans, Roy, or Mabon, and Objectors re-submitted the three declarations, without challenge by the parties, as part of their objections to final approval of the settlement. (ER 448-458; Dkt. 161-4; Dkt. 161-7), ER 532-535; ER 842-844, Dkt. 161-6. Without question, the testimony of these witnesses is properly part of the record on appeal.

Third, Curtis-Bauer's admissions to the Moore Group were admissible for at least three reasons. They are not hearsay because they were "statement[s] offered against a party and . . . the party's own statement[s]." Fed. R. Evid. 801(d)(2)(A); *Fonseca v. Sysco Food Srvcs. of Ariz., Inc.*, 473 F.3d 840, 846 (9th Cir. 2004) (concluding "as a matter of law" that trial court erred in excluding declarations containing admissions by defendant's employees). They also qualify as statements reflecting Curtis-Bauer's "then existing state of mind [or] emotion . . . (such as intent, plan, motive, design, mental feeling . . .)" and as statements against Curtis-Bauer's interests in being approved as a class member and in receiving $125,000 for her time-barred individual claims under Rule 803(3) of the Fed. R. of Evid. 803(e), 804 (b)(3); *United States v. Sayetsitty*, 107 F.3d 1405, 1414-15 (9th Cir. 1997) (holding that statement from which intent could be inferred was admissible under "state of mind" exception to hearsay rule); *United States v. Boone*, 229 F.3d 1231, 1232 (9th Cir. 2000) (holding that inculpatory statements confided privately ***18** to girlfriend carried "the circumstantial guarantee of reliability that underpins the hearsay exception for statements against interest"). The district court presumably acknowledged as much in not excluding the statements, which were submitted on multiple occasions.

Even if Curtis-Bauer's admissions could be deemed inadmissible hearsay, the trial court could and should have cured this defect by permitting the Moore Group to obtain her testimony. Given the extraordinary timing and circumstances under which plaintiffs' counsel recruited Curtis-Bauer as a class representative, the serious questions about her adequacy to serve in that role, and the district court's duty to ensure fairness, she should have informed the district court directly of her role and involvement in the settlement.

C. Curtis Bauer's Post-Hoc Ratification Of The Settlement In Exchange For A Disproportionate Payment From The Common Fund Creates An Irreconcilable Conflict Of Interest With The Class

In exchange for agreeing to ratify the settlement reached by counsel over the objection of the named plaintiff,

Curtis-Bauer will receive a class bonus of $25,000 and another payment of $125,000 to settle her non-class claims. P. Resp. at 9, n.3. The $125,000 payment represents nearly ten times the pro rata award negotiated for nearly 1,400 class members. *See, e.g.*, ER 117. For her "work" of no less than one week in this lawsuit, Curtis-Bauer will receive a windfall for claims that she never pursued in the nearly five years since she left Morgan Stanley. It is clear that ***19** Curtis-Bauer had no intention of pursuing these claims, nor could she, as they are plainly time-barred.[FN8] The district court acknowledged that Curtis-Bauer's non-class claims were likely time-barred and resulted in a substantial settlement as part of this lawsuit, but found no evidence she benefited at the expense of the class. (ER 328-29) This finding is clearly erroneous, as Curtis-Bauer's settlement comes from the common fund established for the class. (P. Resp. at 9, n. 3)

> FN8. Appellees' contention that Curtis-Bauer was able to settle her time-barred claims for a substantial amount because they were race harassment claims that would have resulted in negative publicity for Morgan Stanley is not compelling. Prior to her being recruited as a named plaintiff, there was no risk of adverse publicity because she had abandoned any such rather stale allegations by not pursuing them in the nearly five years since she left Morgan Stanley. More importantly, it is difficult to understand why a committed class representative would agree to keep confidential racial harassment and culture that goes to the heart of the systemic claims of the class she seeks to represent. This, too, casts doubt on her commitment.

In reaching its decision, the district court ignored the line of cases holding that even an apparent conflict of interest is sufficient to defeat the adequacy of a proffered class representative. Under this authority, class representatives are inadequate where a conflict of interest creates "the appearance that they are not able to adequately investigate and prosecute this action on behalf of the absent members of the class." *In re Peregrine Systems, Inc. Securities Litigation*, No. 02-870, 2002 U.S. Dist. LEXIS 27690, *37 (S.D. Cal. Oct. 9, 2002).[FN9] Here, the ***20** disproportionately large, special payment of $125,000 to Ms. Curtis-Bauer relative to her small possible recovery under the class fund formula, in combination with her eleventh-hour assumption of the named plaintiff role, likewise create the appearance of a conflict of interest and bar Ms. Curtis-Bauer from serving as class representative. *See also Swift v. First USA Bank*, No. 98-8238, 1999 U.S. Dist. LEXIS 19474, *17 (N.D. Ill. Dec. 14, 1999) (proposed class representative was inadequate because she was "branded with the appearance of, and potential for impropriety, which is the primary" concern of the court, even though the court did not suppose that she would "change a mere appearance into an actual occurrence"); *accord Kayes v. Pacif. Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir. 1995) (affirming the district court's disqualification of class counsel due to the appearance of divided loyalties).

> FN9. Plaintiff-Appellee is wrong that Private Securities Litigation Reform Act (PSLRA) cases are irrelevant, as the PSLRA requires courts to determine whether a proposed lead plaintiff is the most adequate representative. *Armour v. Network Assoc. Inc.*, 171 F. Supp. 2d 1044 at 1048. The court must first decide whether the proposed lead plaintiff meets the threshold adequacy requirements of Rule 23, *id.*, so PSLRA cases are applicable outside the PSLRA context insofar as they comment on the application of Rule 23.

Under the apparent conflict standard, the underlying facts concerning Ms. Curtis-Bauer's negotiation of a substantial payment from the class common fund are particularly troubling given that her "non-class claims" are time-barred.[FN10] ***21** Without the class action, she would have no potential recovery on those "non-class" claims.

> FN10. Contrary to Appellees' suggestion (P. Resp. at 31), Curtis-Bauer could not have revived her stale claims by relying on the standstill negotiated by the Moore group. First, neither class counsel nor Curtis-Bauer was aware of the standstill at the time they negotiated a $125,000 payment for her individual claims. In any event, the standstill applies to Moore's class claims, not Curtis-Bauer's non class claims, and does not revive claims that were barred as of August 2006. Finally, if Curtis-Bauer is suggesting that she can intentionally elect to apply the Moore standstill only to herself while not protecting the rest of the class members with a class period that dates back to August, 2006, this is another example of impermissible self-dealing or at least an appearance of impropriety sufficient to disqualify her as a class representative.

Based on a fund allocation formula that is heavily weighted towards tenure, Ms. Curtis-Bauer will likely receive a nominal award for her class claim. *See* ER 171-72. Because of her $125,000 special payment from the common fund, Ms. Curtis-Bauer was not required to stand in the shoes of class members and balance her low recovery from the common fund against the benefits of the diversity initiatives. Indeed, as a former employee, Curtis-Bauer will not benefit from the settlement's injunctive relief. Class members cannot be confident that Curtis-Bauer would support the settlement without this favored treatment. Thus, while Curtis-Bauer has an actual conflict of interest sufficient to disqualify her as a class representative, the appearance of divided loyalties is enough to bar her from serving as a class representative under Rule 23.

The cases cited by Plaintiffs-Appellees do not undercut the conflict presented by the non-class payment to Curtis-Bauer, as they relate to incentive payments for service as class representatives, and not payments for non-class, ***22** time-barred claims from the common fund established for the class.[FN11] Moreover, these payments were made to class representatives in cases resolved after the suit was filed, after discovery occurred, and where there was clear evidence that the class representatives participated meaningfully in the litigation over an extended period of time, as opposed to one week.

FN11. For example, in *Ingrahm v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001), class representatives received substantial incentive awards due to their extraordinary participation in the investigation, prosecution and settlement of the case, a far cry from the $150,000 differential payment to Ms. Curtis-Bauer for the release of her time-barred non-class claims and few days of "work" that she allegedly contributed to the settlement. Moreover, the issue of payment of non-class claims did not specifically arise in *Satchell v. Federal Express*, No. C 03-2659 SI, 2006 WL 3507913, at*1 (N.D.Cal. Dec. 5, 2006).

III. Neither Law Nor Policy Supports the Legal Standard Advocated By Plaintiffs-Appellees Regarding The Pre-Filing Role Of Counsel And A More Limited Role For Class Representatives

Plaintiff-Appellees argue that the duties of class representatives are minimal and largely met by selecting competent counsel. They suggest that permitting class representative plaintiffs a more meaningful role, even in civil rights cases, would lead to a parade of horribles. To the contrary, this participation will ensure real reform fashioned by those who have experienced and understand the defendant's practices firsthand, as well as monetary relief and damages calculated with the assistance of those who suffered the losses.

This case underscores that there is no danger in requiring meaningful participation and approval by civil rights class representatives. This is not a ***23** situation where there was a likelihood that the discrimination would go unremedied absent this case and this law firm. Had Williams' instructions been heeded and the settlement of Latinos and African Americans rejected, there were other class members who stood ready, willing and able to advocate for the class.

Most notably, in August 2006, well before Williams ever filed a representative EEOC charge, a much larger group of 14 current and former Morgan Stanley FAs and managers, the Moore Group, first raised individual and class claims of discrimination with Morgan Stanley. *See* ER 1154-1178. They negotiated a class standstill with Morgan Stanley as of August and worked diligently to address the systemic issues facing African Americans at Morgan Stanley. (ER 1141-52) They traveled across the country to prepare for and meet with Morgan Stanley representatives to discuss the firm's discriminatory practices and devise potential reforms, engaging a nationally respected mediator, Linda Singer of JAMS, to assist in the process. *See, e.g.*, ER 963-964; 966-967. The Moore Group was willing, able and committed to achieving change at Morgan Stanley. Had Morgan Stanley's duplicity not been rewarded with a settlement agreement that was the product of double mediations, the Moore Group stood ready and was well prepared to represent the interests of class members, having filed a putative class action lawsuit in federal court in Chicago. *See* ER 949-992.

***24** Nor is there any reason to believe that even absent the Moore Group, other class members, represented by other law firms, would not have exercised their rights and raised their claims. Since the *Cremin v. Merrill Lynch* gender discrimination lawsuit, there has been no shortage of class lawsuits brought against Wall Street and retail brokerage

firms. African American could have prosecuted their claims to a successful resolution, either by litigation or settlement even without this case and the Jaffe counsel. Latino FAs may have even raised and filed their own lawsuits.

Similarly, the EEOC might have fully investigated and decided to pursue systemic claims against Morgan Stanley had Plaintiffs-Appellees' counsel not requested the right to sue shortly after amending Williams' charge to add representative race discrimination language. Indeed, as Morgan Stanley-Appellee points out, the EEOC had previously brought a groundbreaking class action against Morgan Stanley in the *EEOC/Schieffelin v. Morgan Stanley* matter. *See* Exs. 6 and 7 to Morgan Stanley's Motion Requesting Judicial Notice (App. Dkt. 36) There was therefore no need to rush to settlement over Williams' objection and without filing, without discovery, without the EEOC's involvement, and without the input and involvement of Latino class members.

Finally, the impact of this class action settlement made pursuing their race discrimination claims much more difficult for those who objected to the settlement ***25** and opted out on principle to pursue their own claims. The inadequacy and terms of the settlement left many class members to fend for themselves and without access to any pattern or practice evidence or evidence developed by class counsel. As Morgan Stanley offers to the Court, fourteen of the opt-out plaintiffs were forced to litigate to the eve of trial after defeating summary judgment. *See generally Moore v. Morgan Stanley*, Case No. 07-cv-5606 (N.D.Ill.)(Conlon, J.); ER 1153-1178; Exs. 1-5 of Defendant's Request for Judicial Notice (App. Dkt. Nos. 36 and 39). Morgan Stanley was successful in segregating the claims of four other opt-out class member plaintiffs who filed lawsuits alleging they were harmed by the same firm-wide discriminatory practices challenged by this lawsuit. *See McDowell v. Morgan Stanley*, Case No. 08-cv-2966 (N.D.Ill.); *Cyrus v. Morgan Stanley*, Case No. 09-cv-2811 (N.D.Oh.); *Nyamuswa v. Morgan Stanley*, Case No. 2:09-cv-02288 -- JCM-PAL (D.Nev.); *Evans v. Morgan Stanley*, Case No. 09-cv-03226 (D.Md.).

Appellants respectfully submit that the real danger lies in not requiring meaningful class representative participation in civil rights cases and in authorizing lawyers to control discrimination class actions, particularly pre-filing, rather than clients who are the victims of that discrimination, particularly of race discrimination. Class settlements and the approval process must rely on the structural integrity of the adversarial process and on the role of both putative class ***26** counsel and class representatives. Class members will never know what the outcome would have been of fully informed negotiations between informed, engaged and committed class members and Morgan Stanley. *See, e.g., In Re* GM.[FN12]

> FN12. As the district court noted "at this point I'm simply not seeing the structural assurances of fair and adequate representative representation that I think I need to see to certify a settlement class." The Seventh Circuit explained the importance of adequate class representation during the settlement negotiations process: No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiating (attorney) possessed better information or been animated by undivided loyalty to the cause of the class. The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better terms. The integrity of the negotiating process is, therefore, important.
> *In re GM*, 594 F.2d at 1125 (internal citations omitted).

This was plainly not a case that warranted the extreme of hastily discarding one plaintiff in favor of another to ratify a settlement to which the first objected, as the district court noted that the monetary relief appeared low and the injunctive relief largely the same as what would be implemented in any event as part of the *Augst-Johnson* gender discrimination lawsuit consent decree. ER 6-8, 347, 351-52

CONCLUSION

As set forth in their opening brief, the record before the district court did not permit class certification or approval of a pre-filing settlement class as a matter of fact or law, and the district court's decisions should be reversed. At the least,

however, this case should be remanded to the district court with instructions to ***27** grant Appellants the discovery they sought and to order that the evidentiary hearing contemplated by the district court proceed.

Daisy JAFFE and Margaret Benay Curtis-Bauer, Plaintiffs-Appellees, v. Jonathan GLOVER, Latrissa Gordon, Marilyn White, Peter Meme, Marshell Miller, Jerome Senegal, Hubert Stalling, Lanta Evans, Carlton McDowell, Sarah Nyamuswa, Theron Cyrus, Objectors-Appellants, v. Morgan Stanley & Co., Inc., Defendant-Appellee.
2010 WL 1436243 (C.A.9) (Appellate Brief)

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