

1 IN THE UNITED STATES DISTRICT COURT  
 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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 5 MARGARET BENAY CURTIS-  
 BAUER, et al.,  
 6  
 7 Plaintiffs,  
 8 v.  
 9 MORGAN STANLEY & CO., INC.,  
 10 Defendant.

NO. C 06-3903 TEH

ORDER GRANTING  
 RECONSIDERATION OF  
 COURT'S JULY 7, 2008 ORDER,  
 CONFIRMING FINAL CLASS  
 CERTIFICATION, AND  
 GRANTING FINAL APPROVAL  
 TO CLASS ACTION  
 SETTLEMENT

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 12 Plaintiffs move for reconsideration of this Court's July 7, 2008 Order, which declined  
 13 to grant final approval to the parties' settlement and instead referred this matter to a  
 14 Magistrate Judge for an evidentiary hearing. For the reasons set out below, the Court grants  
 15 reconsideration, withdraws its July 7, 2008 Order, and grants final class certification and  
 16 approval of the settlement.  
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 20 The relevant factual and procedural background are by now familiar. This action was  
 21 originally filed in June of 2006 as a Title VII gender discrimination class action against  
 22 Morgan Stanley. A competing gender class action, *Augst-Johnson v. Morgan Stanley DW,*  
 23 *Inc.*, Case No. 06-C-01142 RWR, was filed in the United States District Court for the District  
 24 of Columbia on the same day. In October, 2006, the Plaintiffs amended the Complaint,  
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1 adding named plaintiff Denise Williams, an African-American financial advisor at Morgan  
2 Stanley who also asserted individual race claims.  
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4 In January, 2007, this Court stayed this action pending resolution of *Augst-Johnson*.  
5 In February, 2007, the Augst-Johnson parties announced they had reached a settlement,  
6 which the court preliminarily approved in July, 2007.  
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8 In the interim, the Plaintiffs had informed Morgan Stanley of their intent to add class  
9 race discrimination claims to this action. The parties began negotiating a possible settlement  
10 of race claims. On July 23, 2007, the parties reached agreement in principle on settlement.  
11 On August 2, 2007, the Parties sought to file a Second Amended Complaint, adding Margaret  
12 Benay Curtis-Bauer as a named plaintiff and asserting class discrimination claims on behalf  
13 of a “minority” class of African-American and Latino current and former financial advisors  
14 (“FAs”) and financial advisor trainees at Morgan Stanley. They simultaneously announced  
15 settlement of those claims.  
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18 In October, 2007, the Parties sought provisional class certification and preliminary  
19 approval of the settlement. The Court was aware that Ms. Williams was dissatisfied with the  
20 settlement and planned to opt out, but found that Ms. Curtis-Bauer adequately represented  
21 the plaintiffs, even though she had become involved late in the settlement process. Order  
22 Preliminarily Approving Class Action Settlement, filed February 7, 2008 (“2/7/08 Order”), at  
23 5-9.  
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1 Objectors opposed final approval of the settlement. They submitted, for the first time,  
2 a declaration that Denise Williams, the sole African-American named Plaintiff in the suit  
3 until August, 2007, had never been involved in advising class counsel on Plaintiffs' class  
4 race discrimination claims. Declaration of Denise Williams, Exh. A to Objector's Objections  
5 to Approval of Proposed Class Settlement, filed April 28, 2008. As this Court observed, her  
6 declaration suggested that  
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9 she had no opportunity to offer her "opinions and experiences" in negotiating  
10 settlement of the race claims. *Id.* ¶ 10. She was never "invited to attend any  
11 mediation sessions or allowed to participate in the negotiations of the class  
12 settlement," *id.* ¶ 5, even though Plaintiffs' counsel were negotiating a settlement of  
13 race claims with Morgan Stanley from March, 2007 until they reached settlement in  
14 July, 2007. At the time the settlement was announced to the Court on August 2, 2007,  
15 she was unaware of its terms, and was "furious" when she learned the details of the  
16 settlement. *Id.* ¶¶ 6-7. She received the settlement documents only in October, 2007.  
17 *Id.* ¶ 9. She says she was pressured to serve as a class representative. *Id.* ¶ 12. She  
18 rejected the settlement because she believed "the monetary relief was insufficient and  
19 that there was not any chance that the programs would fix the problems facing  
20 African-Americans at Morgan Stanley." ¶ 11.

21 Order of Reference, filed July 7, 2008, at 3.

22 The allegation that no named plaintiff had been involved in reaching the settlement  
23 raised serious due process and representation concerns for the Court. Noting that there are  
24 limits to what actions and decisions class counsel can undertake on behalf of the class  
25 without involvement of a class member, the Court held that "there are some cases in which  
26 having a class representative's 'personal knowledge of the factual circumstances, and aid in  
27 rendering decisions' at crucial stages of the litigation is necessary to endure due process and  
28 adequate representation of absent class members." *Id.* at 11:17-20 (citation omitted). The

1 Court went on to set out a non-exclusive list of factors relevant to whether due process and  
2 representation requirements had been satisfied in a particular case, *id.* at 12, and referred the  
3 case to a Magistrate Judge for an evidentiary hearing to explore whether, in light of those  
4 factors, there had been sufficient involvement by an adequate representative. *Id.* at 12-13.  
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6         On reconsideration, the Court concludes its Order was ill-advised. The unfortunate  
7 and likely unique procedural history of this case (such as simultaneous expansion of the  
8 claims and settlement, and Ms. Curtis-Bauer’s late involvement) had already raised hard  
9 questions extensively catalogued in this Court’s earlier Orders. Ms. Williams’ declaration  
10 charged that fact-intensive employment discrimination class claims had been settled by  
11 Plaintiffs’ attorneys alone -- before a class complaint had even been filed, let alone before a  
12 class had been certified. The Court had to investigate whether the Objectors’ allegation was  
13 true; as a practical matter, its factual exploration had to be guided by criteria for what could  
14 constitute adequate representation. The Court was required to forge into largely uncharted  
15 doctrinal territory to articulate standards relevant in this unique situation – where claims had  
16 shifted, there had been successive named representatives, and there was no concern  
17 whatsoever that the plaintiffs’ attorneys were sacrificing the interests of class members to  
18 their own.  
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24         The Court’s analysis of what due process and representation requirements demand  
25 has proved unnecessary, however. As set out more fully below, Plaintiffs have submitted  
26 evidence for *in camera review* which assures the Court that Ms. Williams was involved  
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1 litigation and settlement process. Counsel spent many hours communicating with her. Her  
2 involvement, and that of Ms. Curtis-Bauer, were adequate by any standard to satisfy  
3 representation and due process requirements.  
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6 Under these circumstances, the Court chooses to withdraw its Order rather than make  
7 law where none is needed. The Court's Order of July 7, 2008 is hereby WITHDRAWN.  
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11 The Parties in this action have entered into a Settlement Agreement attached hereto as  
12 Exhibit 1.<sup>1</sup> After the Court granted preliminary approval of the settlement and conditional  
13 class certification, the Court ordered that notice of the settlement, its terms, and applicable  
14 procedures be provided to class members. All class members were given an opportunity to  
15 comment on the settlement at the final Fairness Hearing held on June 16, 2008.  
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18 The Court now grants final approval to the Settlement Agreement pursuant to Fed. R.  
19 of Civil Procedure 23(e).  
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21 This Court must review the propriety of class certification under Fed. R. Civ. Pro.  
22 23(a) and (b) in order to preliminarily approve a settlement under Fed. R. Civ. Pro. 23(e).  
23 *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). As set out in this Court's February  
24 7, 2008 Order preliminarily approving the settlement, the proposed classes satisfy the  
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28 <sup>1</sup> This Settlement Agreement ("SA") was revised during the pendency of the litigation and is the one submitted to this Court on June 13, 2008.

1 numerosity, commonality, and typicality requirements of Rule 23(a)(1), (2), and (3), and are  
2 appropriate for certification under Rules 23(b)(2) and (b)(3). *See* 2/7/08 Order at 4-5, 10-11.  
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4 The Court also finds that the representation requirement of Rule 23(a)(4) has been met here.

5 Margaret Benay Curtis-Bauer is an adequate representative. *See* 2/7/08 Order at 5-9.

6 Moreover, Plaintiffs presented abundant evidence for *in camera* review to refute Ms.  
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8 Williams' allegation that she was not involved in the litigation or settlement. After

9 reviewing the declarations of Plaintiffs' counsel, their time records, and other supporting  
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11 evidence, the Court is satisfied that Plaintiffs' counsel interviewed Ms. Williams thoroughly

12 about her experiences at Morgan Stanley, gaining knowledge that informed their ability to

13 craft an appropriate settlement. The Court is also convinced that counsel discussed  
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15 settlement terms with Ms. Williams before even entering into settlement discussions. Ms.

16 Williams was kept informed of and consulted about the settlement process; even though the  
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18 parties contradict each other about her evolving reaction to the settlement terms. Even  
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20 though Ms. Williams ultimately rejected the settlement and her relationship with class  
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22 counsel broke down, the extent of her involvement was sufficient, particularly given the  
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24 subsequent review and approval of the settlement by Ms. Curtis-Bauer.

25 Fed.R.Civ.P. 23(e) also requires the district court to determine whether a proposed  
26 class action settlement is fundamentally fair, adequate, and reasonable. *Staton*, 327 F.3d at  
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28 959, *citing Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). In making this

determination, the court may consider any or all of the following factors, if applicable:

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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 v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982); *National Rural Telecommunications Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D.Cal. 2004), citing *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998)(same). This list is not intended to be exhaustive; the court must consider the applicable factors in the context of the case at hand. *See Officers for Justice*, 688 F.2d at 625.<sup>2</sup> In some cases, one factor alone may prove determinative in finding sufficient grounds for court approval. *See, e.g., Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

Where, as here, the parties agree to settle the dispute prior to certification of the class, the court must be particularly vigilant in its scrutiny of the settlement. *Hanlon*, 150 F.3d at 1026. Yet despite the importance of fairness, the court must also be mindful of the Ninth Circuit’s policy favoring settlement, particularly in class action law suits. *See, e.g., Officers for Justice*, 688 F.2d at 625 (“Finally, it must not be overlooked that voluntary conciliation

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<sup>2</sup> Another list of factors, for example, recently endorsed in *In re Lupron Marketing and Sales Practices Litigation*, 228 F.R.D. 75, 93 (D.Mass. 2005) comes originally from *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir.1974), *overruled on other grounds by Missouri v. Jenkins*, 491 U.S. 274 (1989). The *Grinnell* factors are:

- (1) the complexity, expense and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the risks of establishing liability;
- (5) the risks of establishing damages;
- (6) the risks of maintaining the class action through the trial;
- (7) the ability of the defendants to withstand a greater judgment;
- (8) the range of reasonableness of the settlement fund in light of the best possible recovery;
- (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

*Grinnell*, 495 F.2d at 463 (citations omitted).

1 and settlement are the preferred means of dispute resolution. This is especially true in  
2 complex class action litigation ....”).  
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4 These factors show that the settlement is fair, adequate and reasonable.

5 The Plaintiffs would face considerable risks were they to proceed to trial. Their  
6 action alleges that Morgan Stanley’s nationwide account distribution policies and practices  
7 and other policies and practices denied or restricted the availability of business opportunities,  
8 compensation, and other favorable employment conditions on the basis of race. *See* Second  
9 Amended Complaint, filed August 17, 2007, ¶¶ 2, 5, 37-32. Plaintiffs would likely face a  
10 vigorous defense, and difficulties proving that Morgan Stanley’s objectively neutral policies  
11 and procedures caused the disparities in compensation and other harm, such as terminations  
12 based on low production. The uncertainty and complexity of proceeding to trial would be  
13 substantial. Settlement avoids the complexity, delay, risk and expense of continuing with the  
14 litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.  
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19 The settlement was reached after extensive investigation, analysis, and arm’s-length  
20 negotiation. *See* Order, filed December 12, 2007, at 6 n.2, 2/7/08 Order at 12. The Court  
21 finds that collectively, Plaintiffs’ counsel have extensive expertise and experience not only  
22 with class action discrimination cases, but in litigating employment and discrimination cases  
23 against defendants in the financial services industry, including Morgan Stanley. Their  
24 thoughtful assessment of the terms of the settlement – particularly their considered and  
25 strong support for the efficacy of the proposed injunctive relief – weighs in favor of  
26 approval. *See, e.g.*, Reporter’s Transcript of Preliminary Fairness Hearing (“RT PFH”),  
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1 November 3, 2007, at 11-17, 67-70, and Reporter’s Transcript of Final Fairness Hearing  
2 (“RT FFH”), June 16, 2008, at 73-75. Moreover, as the Court observed on preliminary  
3 approval of the settlement, they arrived at the terms of the settlement after months of active  
4 involvement in the case, and after receiving and analyzing compensation data extracted from  
5 Morgan Stanley’s human resources database, 2/7/08 Order at 14, and with the involvement  
6 and advice of class representatives. *See discussion, supra*, and 2/7/08 Order at 7.  
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9         The reaction of the class members also weighs in favor of approval. Of the over 1,300  
10 class members, nine have chosen to remain class members but lodge objections, and only 24  
11 have opted out. By the close of the claim period, 422 class members had submitted claims, a  
12 participation rate of approximately 31%.<sup>3</sup> Plaintiffs submitted numerous letters and  
13 declarations in support of the settlement, both from African-American and Latino class  
14 members as well. *See* Letters of Nathan Lewis, Anthony Baker, Beverly Bishop, Steve  
15 Cota, and Eric Berry, Exhs A, B, F, I, and J to Declaration of Heather Wong, filed November  
16 19, 2007, and Declarations of Daniel Correa, Erick Ibarra, Christian Iglecias, Edward  
17 Jiminez, Mark Morales, and Stanley Sykes, filed July 23, 2008.  
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21         Most important, however, are the strength of the injunctive and monetary relief the  
22 Settlement provides. This Court has already found, on preliminary approval of the  
23 settlement, that the Settlement Agreement provides substantial injunctive relief to the  
24 Plaintiff class. 2/7/08 Order at 14-16. The relief represents an expansion of the relief  
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27         <sup>3</sup> At the Preliminary Fairness Hearing, Objectors’ counsel called the 31% participation rate  
28 in a discrimination case against Merrill Lynch, *Cremin v. Merrill Lynch*, United States District Court  
for the Northern District of Illinois Case No. 96-C 3773 (“*Cremin*”) “a very high percentage in our  
view.” RT PFH at 59.

1 provided in the settlement of a parallel gender discrimination case against Morgan Stanley,  
2 *Augst-Johnson, supra*, and is substantive, meaningful, and valuable to the class. 2/7/08 Order  
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4 at 14-16. The Court will not revisit its analysis here.

5         Objectors’ arguments to the contrary are unavailing. They argue that the Settlement is  
6 inadequate because it does not include Court supervision or actually require Morgan Stanley  
7 to remedy racial disparities in compensation, retention, hiring, teaming or promotion by  
8 setting goals and timetables for decreasing those disparities (Objections No. 1 and 2). But  
9 the Parties explained at the Preliminary Fairness Hearing that goals and timetables can  
10 backfire, because employers quickly hire minorities to meet goals, and then they “just fall out  
11 of the system again.” RT PFH at 68, 80. Instead, the parties have chosen to stress  
12 programmatic change and diversity and inclusion programs that will encourage managers to  
13 attract and retain individuals who are likely to succeed. *Id.*<sup>4</sup> The Settlement provides  
14 ongoing monitoring, analysis, and review by an independent Diversity Monitor who will  
15 report to both Morgan Stanley and class counsel. Monitoring will allow Plaintiffs’ counsel to  
16 track the effectiveness of the Settlement, and provide data which Plaintiffs can use to enforce  
17 the general nondiscrimination provision of the Settlement Agreement. SA § VII.H (African  
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23         <sup>4</sup> The Court also rejects Objectors’ unsupported claim that the industrial psychologist chosen  
24 to study race issues and make proposals, Kathleen Lundquist, is inappropriate because she has been  
25 a defense expert on numerous occasions. Although Objectors state that Lundquist was a defense  
26 expert in “*McReynolds v. Sodexo*,” (no citation) referred to in a web article, and *Employees*  
27 *Committed For Justice v. Eastman Kodak Co.*, 407 F.Supp.2d 423 (W.D.N.Y. 2005), a case where  
28 the EEOC found rampant discrimination, Objections, filed April 28, 2008, at 10-11, neither source  
mentions Lundquist. Objectors state she was a defense expert “supporting employer’s policies and  
culture” in *Employees Committed for Justice* and “*Puffer v. Allstate*, Case No. 04-5764 (N.D. Ill),”  
*id.*, without proffering a declaration, document, or even docket number of a filing in support.  
Lundquist declares that she was *not* a defense expert in *McReynolds*, testified about limited matters  
in *Employees Committed for Justice*, and did not testify about company culture in *Puffer*. Lundquist  
Declaration, filed June 3, 2008; *see also* RT FFH at 38-39.

1 American and Latino financial advisors and trainees “will enjoy terms and conditions of  
2 employment comparable to” those of their white counterparts); RT FFH at 72-73.  
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4 Particularly where Plaintiffs’ counsel can turn to the Court to enforce the nondiscrimination  
5 provision, the absence of Court monitoring does not render the settlement inadequate.<sup>5</sup>  
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7 Objectors’ also argue that the Settlement Agreement improperly strips the Court of  
8 jurisdiction, forces the parties into confidential, binding arbitration, and unfairly precludes  
9 “third parties” other than class counsel – including class members – from enforcing the  
10 terms of the Settlement Agreement. (Objections Nos. 1 and 13). The parties revised the  
11 Settlement Agreement to reflect their shared understanding that although disputes about the  
12 settlement initially go to arbitration, the Court retains jurisdiction to review the arbitrator’s  
13 decisions. SA § X at 47. No other claims are precluded or forced into arbitration by the  
14 Settlement Agreement. Finally, the provision limiting enforcement of the Settlement  
15 Agreement to class counsel is not unusual; in fact, the settlements that Stowell and Friedman  
16 negotiated in two financial services discrimination cases, *Martens, supra*, and *Cremin, supra*,  
17 contain the same limitation. *See* Supplemental Declaration of Mark S. Dichter, filed June 3,  
18 2008, Exh. A and B (settlement agreements).  
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27 <sup>5</sup> The Court notes that although Objectors argue reporting and monitoring are crucial,  
28 neither the *Cremin* settlement nor that negotiated by Objectors’ counsel in *Martens v. Smith Barney*,  
United States District Court for the Southern District of New York Case No. 96 Civ. 3779  
 (“*Martens*”) require reporting to or monitoring by the court. *See* Supplemental Declaration of  
Mark S. Dichter, filed June 3, 2008, Exh. A and B (settlement agreements).

1           Objectors next argue that because the Power Ranking<sup>6</sup> system rewards those who  
2 already have bigger books of business as a result of discrimination, it perpetuates and  
3 institutionalizes existing bias (Objection No. 4). The Power Ranking formula is already in  
4 place as part of the *Augst-Johnson* settlement. As a result of concerns raised by counsel for  
5 the Plaintiffs in this action, Morgan Stanley changed the Power Ranking formula to de-  
6 emphasize past performance, tested the revised Power Ranking formula to see if it would  
7 have an adverse impact on minorities, and found that it did not. Declaration of Mark Dichter,  
8 filed November 19, 2007, ¶ 19; RT PFH at 65. Moreover, the Settlement Agreement  
9 provides for annual review of the Power Ranking formula so that it can be adjusted if the  
10 revised version turns out to have a disparate impact. SA § VII.D.2.d, at 22-23; RT FFH at  
11 31-32.

12           Objectors also contend the Settlement will not bring about meaningful change because  
13 it allows minorities to be excluded from teams and partnerships. There is no real dispute that  
14 partnerships provide important financial benefits for their members. When a member of the  
15 partnership or team leaves Morgan Stanley, that member's accounts pass to other members;  
16 moreover, brokers get credit in the Power Ranking system (and therefore the ability to get  
17 even more business) for assets they accrue as part of partnerships. Although the Settlement  
18 provides that the Industrial Psychologists will try to increase minority representation in  
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28           <sup>6</sup> The Power Ranking formula is the algorithm used to distribute accounts to financial advisors.

1 partnerships, SA § VII.D.4 and 5, at 25, it continues to allow financial advisors to transfer  
2 assets and accrue credit through partnerships and teams. SA § VII.D.5, 5.c, at 25.  
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4 Objectors contend that the policy creates an end-run around any transparent, equitable  
5 account distribution system (Objection No. 5). They contend that African-American FAs are  
6 routinely excluded from teams, and because teams are either formed with the express  
7 approval of management or the direct involvement of managers, Morgan Stanley’s “policy of  
8 allowing established financial advisors to choose partners for lucrative agreements” should  
9 have been treated as an employment practice and addressed in the Settlement. Class counsel,  
10 relying on explanations from counsel for Morgan Stanley, apparently concluded that team  
11 formation was a practice of individual brokers beyond the reach of this lawsuit. *See* RT PFH  
12 at 69, 73 (Plaintiffs’ counsel James Finberg); 81 (Morgan Stanley counsel Mark Dichter).  
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16 Even if the exclusion of minorities from teams and partnerships were attributable to  
17 Morgan Stanley, the fact that the Settlement Agreement still allows assets to transfer and  
18 credits to accrue through partnership is not fatal to the settlement. Again, the standard is not  
19 whether the settlement “could be better,” but whether it is fair, reasonable, and adequate.  
20 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). The Settlement Agreement  
21 provides for some efforts to increase minority representation on teams and partnerships.  
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23 Given the extensive programmatic and monetary relief the settlement provides to class  
24 members, the Parties’ decision to focus on other issues is acceptable.  
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27 The monetary relief provided by the settlement is also fair, adequate, and reasonable.  
28 As set out in the Court’s Order preliminarily approving the settlement, the monetary relief

1 represents over 40% of the predicted disparity in compensation which Plaintiffs sought as  
2 damages. 2/7/08 Order at 13-14. The Settlement Agreement provides for a fund of  
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4 approximately \$16,000,000, approximately \$14,000,000 of which is to be distributed to  
5 claiming class members – a per class member average of approximately \$12,000. The  
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7 monetary relief is comparable to that approved by the District Court for the District of  
8 Columbia in settlement of the parallel *Augst-Johnson* case, which called for distribution of  
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10 approximately \$32 million of a \$46 million monetary fund to claimants in a class of over  
11 2,800 people (a per capita average of less than \$12,000). *See* Declaration of James M.  
12 Finberg in Support of Reply Memorandum, filed November 19, 2007, Exh. A *Augst-*  
13 *Johnson* Second Revised Settlement Agreement (“*Augst-Johnson* SRSA”); Exh. C (October  
14 26, 2007 Order finally approving *Augst-Johnson* settlement); *see also Augst-Johnson*, Docket  
15 No. 33-3, Declaration of Cyrus Mehri In Support of Joint Motion for Final Approval of Class  
16 Action Settlement, filed October 1, 2007, at ¶ 34 (\$32 million of fund goes to class)). The  
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18 Court also takes judicial notice of the settlement in another parallel gender discrimination  
19 case against brokerage firm Smith Barney, *Amochaev et al. v. Citigroup Global Markets Inc.*,  
20 United States District Court for the Northern District of California Case No. C-05-1298-PJH.  
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22 The district court recently found that the settlement agreement there, which provided similar  
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24 injunctive relief and a monetary fund of approximately \$25 million to a class of  
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26 approximately 2,400 plaintiffs, was fair, adequate, and reasonable. *See Id.*, Docket Nos. 194,  
27 filed August 13, 2008 (final approval) and 186, filed July 24, 2008 (memorandum in support  
28 of final approval).

1           Objectors again argue that the monetary relief is inadequate, both in absolute terms,  
2 and to the extent that it compensates Plaintiffs for “compensation shortfall” alone, rather than  
3 all recoverable damages (such as emotional distress, punitive damages, front pay, fringe  
4 benefits, and damages stemming from termination or constructive termination). (Objections  
5 7, 8 and 12). The Court has already rejected these arguments. *See* 2/7/08 Order at 12-14.  
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7 Again, the settlement is not unfair, either overall or to African-Americans as a subgroup,  
8 because it chooses to compensate class members primarily on the basis of their tenure at  
9 Morgan Stanley during the class period, with added compensation for termination.  
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11 Compensation shortfalls can be readily calculated, and the Parties can choose to have  
12 monetary relief focus on pay disparities rather than on constructive or actual terminations as  
13 a means of compromising a complex set of claims. *Id.*

16           Objectors again argue that African-American and Latino class members should be  
17 represented by different subclasses and should not receive compensation according to a  
18 common formula. (Objection 11). The Court rejected the argument that a single class was  
19 inappropriate in its December 12, 2007 Order, finding that the central discriminatory practice  
20 at issue (account distribution) affected both groups in the same way, and there was no  
21 obvious conflict between the two. *Id.* at 4-5. After *in camera* inspection of data provided by  
22 Plaintiffs, the Court also concluded that the differences in compensation were not so great  
23 that compensating African Americans and Latinos according to the same formula was unfair.  
24  
25 2/7/08 Order at 13-14.  
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1 Next, Objectors contend the monetary compensation is inadequate in light of the  
2 Supreme Court’s decision in *Ledbetter v. Goodyear Tire*, \_\_U.S.\_\_, 127 S.Ct. 2162 (2007).  
3  
4 (Objection 15). They argue that now, Morgan Stanley will argue that class members are  
5 releasing all discrimination claims that arose during the class period, even if that  
6 discrimination results in lower wages in the future.  
7

8 But *Ledbetter*, which came down while the parties were negotiating the settlement,  
9 actually makes the settlement *more* favorable. The Settlement Agreement gives class  
10 members approximately 43% of the calculated “compensation shortfall” between minority  
11 FAs and white FAs. Even assuming that the entire disparity in compensation is due to  
12 discriminatory acts such as discriminatory account distribution (a fact that has not been  
13 proven), many of those acts likely took place outside of the limitations period.<sup>7</sup> After  
14 *Ledbetter*, complaints about compensation disparities that stem from acts outside the  
15 limitations period are no longer actionable. So, in effect, the settlement is likely greater than  
16 43% of the *recoverable* compensation shortfall. Plaintiffs will release claims for any  
17 discriminatory conditions occurring during the class period, but that is the nature of any  
18 release. Moreover, the injunctive relief (including changes to the account distribution  
19 formula) will mitigate any future harm stemming from discrimination during the class period.  
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27 <sup>7</sup> Objectors argued that account distribution and access to resources early in a financial  
28 advisor’s career can make an enormous difference in later compensation, as the FA’s book of  
business grows exponentially through referrals and asset growth. *See*, e.g., RT PFH at 42, 46-47  
(testimony of Marian Tucker).



1           The remaining objections to the settlement as a whole have no merit.<sup>8</sup> Objectors  
2 argue that class members have been denied the opportunity to review key components of the  
3 settlement because the proposed Account Distribution Policy and Power Ranking formula  
4 have been filed under seal in this case. (Objection No. 3). The formula was filed under seal  
5 because the parties agreed it was confidential, proprietary business information. *See*  
6  
7 10/24/07 Motion to File Under Seal. The Power Ranking was reformulated as part of the  
8 *Augst-Johnson* case; Plaintiffs’ counsel were already negotiating with Morgan Stanley while  
9 that case was being settled, and they were able to suggest changes to the formula so that it  
10 would not adversely affect minority FAs.  
11

12           Like the Settlement Agreement in this action, the *Augst-Johnson* settlement, approved  
13 in October, 2007 required Morgan Stanley to provide each Financial Advisor with “the  
14 methodology for calculating the Power Rankings... including the name of each factor, an  
15 explanation of each factor, and how each factor is weighted” and to “inform each Financial  
16 Advisor of her or his individual ranking at the time any distribution is made,” along with  
17 information about the actual distribution of each account, and the number of accounts and  
18 assets distributed to each ranked Financial Advisor. *Augst Johnson* SRSA at 21, § VII.C.2.b  
19 and c. As of late April, 2008, the Account Distribution Policy and Power Ranking System  
20 have been available to all current Morgan Stanley employees. RT FFH at 39-42. Although  
21 Objectors argue that the policy was disclosed too late to allow the Plaintiffs here to evaluate  
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28           <sup>8</sup> The Court further finds that objections raised by class member Billy Manning and Marilyn White raise arguments that have already been considered and rejected by this Court.

1 the settlement, they offered no additional arguments based on the formula that could show  
2 that class members were prejudiced.

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4 Objectors next argue generally that they – as African American FAs with a broad  
5 range of experiences with Morgan Stanley – would have been “more empathetic to the  
6 plight” of African-American class members and crafted a settlement more sensitive to their  
7 day-to-day experience. (Objection No. 6). This Court has found, however, that class  
8 members were appropriately and adequately represented, and that Plaintiffs’ counsel received  
9 input and advice about conditions of employment at Morgan Stanley throughout the  
10 settlement negotiations.

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12 Objectors next contend that the settlement improperly requires class members to  
13 release claims for which they are not being compensated, including termination and  
14 promotion claims. (Objection No. 9). But the settlement does give additional monetary  
15 relief to class members who were terminated or suffered extraordinary emotional distress. SA  
16 § VIII.D.2 at 39. Moreover, class members release only termination, promotion, constructive  
17 discharge and harassment claims “arising from” “low production, failure to satisfy position  
18 requirements, failure to satisfy requirements of the training program, production related  
19 reductions in force, or other production based performance related terminations.” *Id.* § V.A  
20 at 15. They do not, for example, release harassment claims arising from use of racial  
21 epithets. RT PFH at 20. The *Augst-Johnson* court approved a settlement in which the  
22 plaintiffs released *all* termination and sexual harassment claims. *Augst-Johnson* SRSA at 15,  
23 § V.A. The release is not overly broad.

1           Objectors reassert their argument that payments to named representative Ms. Curtis-  
2 Bauer in settlement of her individual claims and as an incentive payment are improper.  
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4 (Objection No. 10). The Court previously rejected this argument, 2/7/08 Order at 5-6, 8-9,  
5 and will not revisit it here.

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7           Finally, Objectors argue that notice to class members was flawed and inadequate  
8 because the web site listed in the notice malfunctioned and class members were not explicitly  
9 informed about the Moore Group Objectors and their arguments against settlement.  
10 (Objection No. 14). Notice was adequate. Notice was sent to class members in accordance  
11 with this Court’s orders, and access to the web site is not required to make notice adequate.  
12 In any case, although the “racecaseagainstmorganstanley.com” website, to which the notice  
13 referred, was not active until near the end of the claim period, counsel for Plaintiffs explained  
14 that a website was set up under a similar name (“morganstanleyracesettlement”) and that  
15 website was accessed even more times than the site listed in the notice. FFH at 76-78.  
16 Moreover, approximately 33% of the class responded in some way to the notice, and  
17 approximately 31% filed claims – a rate that even Objectors’ counsel considers “very high.”  
18 RT PFH at 59.

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24           In sum, the Court finds that the settlement is fair, adequate, and reasonable under the  
25 criteria set out in *Officers for Justice*, 688 F.2d at 625.  
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THEREFORE, IT IS HEREBY ORDERED, on consideration of the Settlement Agreement attached hereto as Exhibit 1, the briefs, declarations, and oral arguments in support thereof, the submissions of the Objectors, evidence and argument submitted to the Court for *in camera* review, and the proceedings in this action to date,

1. Except as otherwise specified herein, the Court for the purposes of this Order adopts all defined terms set forth in the Settlement Agreement, attached hereto as Exhibit 1.

2. This Court has jurisdiction over the subject matter of this litigation and all matters relating thereto, and over the Representative Plaintiff and the Defendant.

3. The Court confirms as final its conditional certification for the purposes of settlement of the injunctive-relief Settlement Class defined in the Settlement Agreement and in Section IV of the Court’s February 7, 2008 Order as “All African Americans and Latinos employed as Financial Advisors or Registered Financial Advisor Trainees in the Global Wealth Management Group of Morgan Stanley & Co. Incorporated or its predecessor at any time between October 12, 2002 and December 3, 2007” and the monetary relief Settlement Class consisting of “All African Americans and Latinos employed as Financial Advisors or Registered Financial Advisor Trainees in the Global Wealth Management Group of Morgan Stanley & Co. Incorporated or its predecessor at any time between October 12, 2002 and December 3, 2007 who did not timely opt out.”

4. At their request, twenty-four (24) Class Members initially opted out of the

1 monetary settlement class<sup>9</sup> and one (1) has since rescinded his opt-out. The Parties  
2 acknowledged at the final fairness hearing that an additional class member opted out on the  
3 last day of the opt-out period. RT FFH at 10-11. Therefore twenty-four (24) Class Members  
4 have been permitted to opt-out of the monetary settlement class without releasing any of their  
5 monetary claims. They are listed on Appendix A to this Order.  
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8 5. The Court confirms as final the appointment of Margaret Benay Curtis-Bauer  
9 as class representative as stated in Section V of the February 7, 2008 Order.  
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11 6. The Court confirms as final the appointment of the following as Class  
12 Counsel: Lief, Cabraser, Heimann & Bernstein, LLP; Outten & Golden, LLP; and Altshuler  
13 Berzon LLP.  
14

15 7. The distribution of the Class Notice and Claim Form to Class members by  
16 mail delivery, pursuant to this Court's orders, constituted the best notice practicable under  
17 the circumstances, were accomplished in all material respects, and fully met the requirements  
18 of Rule 23 of the Federal Rules of Civil Procedure, due process, the United States  
19 Constitution and any other applicable law.  
20

21 8. Notice was sent on February 26, 2008 to the United States Attorney  
22 General and the Attorneys General of all 50 states and the District of Columbia pursuant to  
23 the Class Action Fairness Act. No objections were received from any federal or state  
24 officials.  
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27 <sup>9</sup> An additional opt-out was submitted, but Morgan Stanley's employment records  
28 establish that, although he was employed by Morgan Stanley, he was neither a Registered  
Financial Advisor Trainee nor Financial Advisor. Thus, he is not a Class Member and his  
opt-out is immaterial.

1           9. Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, this Court  
2 grants final approval to the Settlement Agreement attached hereto as Exhibit 1 and to the  
3 terms of the settlement set forth therein. The Court finds that the Settlement Agreement is  
4 fair, reasonable, and adequate in all respects. The Court finds that the Settlement Agreement,  
5 revised after Court review and a hearing on December 3, 2007, was the culmination of more  
6 than a year of ongoing discussions and negotiations between the parties. This Court also  
7 finds that the Settlement Agreement is the result of arms-length negotiations between  
8 experienced counsel representing the interests of the Plaintiff and Defendant, after thorough  
9 factual and legal investigation, with the assistance of an experienced, professional mediator.  
10 *Staton*, 327 F.3d at 960; *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268,1291 (9th Cir.  
11 1992). The Court specifically finds that the settlement is rationally related to the strength of  
12 Plaintiff's and Class members' claims given the risk, expense, complexity, and duration of  
13 further litigation. The mechanisms and procedures set forth in the Settlement Agreement by  
14 which payments are to be calculated and made to class members filing timely claims are fair,  
15 reasonable and adequate. Individual Class Members' monetary awards shall be determined  
16 in accord with the procedures set forth in the Settlement Agreement.

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22           10. By operation of this Order and the Final Judgment, all released Class  
23 member and named Plaintiff claims are fully, finally and forever released, relinquished and  
24 discharged, pursuant to the terms of the Settlement Agreement, as to all monetary-relief  
25 Settlement Class members other than those listed in Appendix A hereto, who timely opted  
26 out pursuant to the terms of the Court's February 7, 2008 Order and the Settlement  
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1 Agreement. The Court has reviewed the release provisions in the Settlement Agreement, and  
2 the Court finds the releases to be fair, reasonable, and enforceable under applicable law. Each  
3 member of the Settlement Class, including any member who makes an irrevocable election to  
4 exclude himself or herself from the monetary relief Settlement Class, is hereby enjoined from  
5 commencing, prosecuting or maintaining in any Court other than this Court any claim, action  
6 or other proceeding that challenges or seeks review of or relief from any order, judgment,  
7 act, decision or ruling of this Court in connection with the Settlement Agreement. The Court  
8 further enjoins all members of this Settlement Class except those listed in Appendix A, who  
9 have timely opted out of the monetary-relief Settlement Class, from commencing,  
10 prosecuting or maintaining, either directly, representatively or in any other capacity, any  
11 claim that is subsumed within the Settlement Agreement and from asserting any and all class  
12 and other claims that were released pursuant to the Settlement Agreement.

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17       11. The Settlement Agreement attached hereto as Exhibit 1 is hereby approved  
18 and incorporated herein and shall become effective according to its terms. The allocation  
19 plan for individual Class Members' monetary awards procedures as set forth in the  
20 Settlement Agreement is approved.

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23       12. The Second Amended Complaint shall automatically be dismissed with  
24 prejudice ten business days after the Effective Date, as that term is defined in the Settlement  
25 Agreement, except that the Court shall retain continuing jurisdiction, pursuant to the terms of  
26 the Settlement Agreement.

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28       13. Neither the Settlement Agreement, nor this Order, nor the certification of

1 the Class, nor any communication or action by the parties in connection with the Settlement  
2 constitutes or shall be deemed to constitute an admission by Morgan Stanley of any liability  
3 or wrongdoing whatsoever, or to constitute a finding by this Court as to the merits of any  
4 claim or defense asserted or that could have been asserted in this action, or as to any  
5 wrongdoing by Morgan Stanley. Neither the Settlement Agreement nor this Order is or shall  
6 be used or deemed to be an admission in any action or proceeding of any fault, liability or  
7 wrongdoing by any person or entity; and neither the Settlement Agreement, nor any  
8 negotiations or proceedings related thereto, nor this Order, nor any related document or  
9 communication, shall be offered or received in evidence against any person or entity in any  
10 action or proceeding as an admission, concession, presumption or inference as to the merits  
11 of any claim or defense; however, the Settlement Agreement or this Order may be received in  
12 evidence in any proceeding in this Court as may be necessary to consummate or enforce the  
13 Settlement Agreement or this Order.  
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19           14. The Court hereby enjoins disclosure to third parties of the documents and  
20 information discussed or exchanged during the parties' confidential settlement negotiations  
21 and mediation to any third party not specified in the Parties' confidentiality agreements.  
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15. The Court retains jurisdiction over this matter, pursuant to the terms of the Settlement Agreement.

**IT IS SO ORDERED.**

Dated: October 22, 2008



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THELTON E. HENDERSON, JUDGE  
UNITED STATES DISTRICT COURT

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**Appendix A  
Timely Opt-Out Requests**

<b>Last Name</b>	<b>First Name</b>
Rivera Cruz	Juan Luis
Tucker	Marion J
Roy	Brian Keith
Moore	Ronald Eugene
Mcdowell	Carlton Thomas
Mabon	Maurice Gene
Lewers	Mark
Grant	Janice
Evans	Lanta Larnett
Carter	Patrick Eugene
Bell	Anthony T
Barnett	Michael Leon
Allen Jr.	Morris
Owens	James Dewitt
Stalling	Hubert
Howard	Jacqueline D
Montes	Joseph F.
Gordillo	Oscar Jose
Williams	Denise Lavern
Lowell	Carlos
Nyamuswa	Sarah Sarayi
Cyrus	Theron
Dixon	Martin
Griffin	Vincent

**Rescinded Opt-Out Request**  
John Peter Greer, III