EXPERT REBUTTAL REPORT OF WILLIAM T. BIELBY, PH.D.

George McReynolds et al. v. Merrill Lynch, Pierce, Fenner & Smith, Incorporated

February 23, 2009

I have been asked by Stowell & Friedman, Ltd., attorneys for the plaintiffs in a race discrimination lawsuit against Merrill Lynch & Co., Inc. ("Merrill" or "Merrill Lynch") to respond to criticisms Merrill's experts have made of my report submitted in June of 2008 ("Bielby Expert Report" or "Expert Report"). Merrill has submitted the reports of eight experts: Dr. Ali Saad ("Saad Report"), Dr. Roberto Fernandez ("Fernandez Report"), Dr. James Outtz ("Outtz Report"), Dr. Eugene Ericksen ("Ericksen Report"); Dr. Christopher Winship ("Winship Report"), Dr. Philip Tetlock ("Tetlock Report"), Ms. Olivet Jones ("Jones Report"), and Dr. Jerome Williams ("Williams Report"). It is not possible for me to respond to each and every issue and criticism in the reports of these eight experts, each of whom spent up to a year or longer to do their work, and who collectively billed nearly thirteen million dollars.[1] Instead, my response will focus on certain criticisms related to issues that are central to the opinions addressed in my Expert Report, including: (1) how bias in the allocation of resources in Merrill's cumulative advantage ("success breeds success") system creates and sustains racial disparities in earnings; (2) how Merrill implemented its multicultural marketing efforts in a way that created racialized jobs and career paths; (3) how the lack of focus and accountability in Merrill Lynch's

[1]Dr. Saad, who billed nearly $11 million for his work on this case, began computer analyses as early as February, 2007, according to computer backup files he produced. Dr. Erickson began his work in October or November of 2006 (Ericksen Report Appendix D, BATES ERICKSEN 00005), and Dr. Outtz, who billed over $900,000, began interviewing Complex Directors in September of 2007 (Outtz Report, footnote 8, p. 9). Ms. Jones, who billed over $250,000, began her interviews in October of 2007. The experts other than Dr. Saad collectively billed just over $1.9 million. Assuming conservatively that half of the amount is for expert services, billed at an average of $500 per hour, the seven reports apart from Dr. Saad's represent about 1900 hours of expert time.

EEO and diversity efforts allowed racial bias to persist; and (4) how Merrill's system for promotion into management creates barriers for African American FAs who aspire to management careers and is likely to promulgate or perpetuate racial stereotypes and promote uniformity in personnel practices and the firm's culture. Team participation and the allocation of accounts are important resources affecting FAs' production and compensation, and in my original report I relied upon the expert report of Dr. Janice Fanning Madden and Dr. Alexander Vekker, among other items in the record. Here, I rely on the responses contained in their expert rebuttal report ("Madden and Vekker Report") to Dr. Saad's criticisms regarding racial disparities in team participation account allocation. I have done no independent analysis of those disparities. Finally, Merrill's experts criticize me for opinions I did not express and analyses I did not conduct. It is difficult to respond with substance to criticisms of opinions and analyses that *do not* appear in my expert report, but to the extent such criticisms are relevant to the key opinions and conclusions in my Expert Report, I will do so briefly.

Moreover, I understand that this case is in the class certification stage and that discovery to date has focused on issues relevant to class certification. I understand that should the class be certified, additional merits discovery may occur. I reserve the right to conduct additional analyses and offer additional conclusions should this class be certified and/or should additional record materials become available to me.

DEFENDANT'S EXPERTS BELIEVE THAT AFRICAN AMERICANS ARE UNABLE TO SUCCEED AT MERRILL LYNCH BECAUSE THEY LACK ACCESS TO WEALTHY WHITES, BUT THEIR REPORTS FAIL TO SUPPORT THAT ASSERTION

"Dry Bones:" Linkages Among the Reports of Drs. Saad, Outtz, and Fernandez

Dr. Saad believes that being an FA at Merrill Lynch is no place for an African American, at least for one who wishes to build a successful career in the financial services industry. He believes that the reason African Americans, on average, earn considerably less than whites at Merrill Lynch is because as African Americans they cannot gain the same access to wealthy individuals that white FAs have. In Dr. Saad's view, this is a deficiency that African Americans bring with them to Merrill Lynch and not something caused or exacerbated by Merrill Lynch. According to Dr. Saad, because of this alleged deficiency, from the very start of their careers at Merrill Lynch the value of accounts brought to the firm by African American FAs will be less than that of the accounts of their white counterparts. In Dr. Saad's view, this deficiency in the capabilities of African Americans will hold them back throughout their careers at Merrill Lynch, so that most of them will be destined to second class (fourth or fifth quintile) status in Merrill Lynch's FA workforce.

Dr. Saad's opinion relies on the expert reports of two other of Defendant's experts, Dr. Fernandez and Dr. Outtz.[2] Dr. Fernandez presents evidence showing that in the United States, African Americans, as a whole, have less wealth on average than do whites and that personal social networks tend to be segregated by race.[3] Dr. Outtz interviewed non-African American FAs, and he reports that most told him that early in their careers they relied upon methods

[2]Saad Report, p. 7, 16-19. 25-26.
[3]Fernandez Report, p. 1-15, 17-23.

involving networks and referrals as effective ways for developing their business.[4] Dr. Saad also relied upon his own spatial analysis, which he claims shows that African American FAs do not do business with clients in wealthy white neighborhoods.[5]

There is a "knee bone connected to the thigh bone" logic[6] to these reports. The first asserts general racial disparities in wealth and segregation in social networks in the United States. The second asserts that social networks are key to success as an FA. The third asserts that African Americans are not doing business with wealthy white clients. If the conclusions drawn from any of these reports are incorrect, then the premise for Dr. Saad's analysis and conclusions are also faulty. In this report, I first assume that this logic is correct and that the opinions in the reports are scientifically sound. Then I address the shortcomings of the experts' analyses and discuss what kinds of conclusions are and are not supported by them.

Implications Assuming the Reports are Accurate and Reliable

If Dr. Saad is correct, Merrill Lynch hires African Americans as FAs, knowing that because of their race they cannot be as successful as whites. Merrill Lynch knowingly places African Americans in a training program in which many resources are allocated based on "productivity," so that by the end of the training program, racial disparities will be greater than at the beginning. This system continues once they become FAs, which can only serve to magnify the disparities by race. And, according to Merrill's experts (but contrary to Merrill documents), Merrill Lynch takes a hands-off approach to teaming, leaving the formation of teams to the discretion of individual FAs. According to Dr. Outtz, among other factors, FAs consider "record of success " and "approach to the business" in deciding with whom to team.[7] Dr. Saad refers to

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[4]Outtz Report, p. 20-22.
[5]Saad Report, p. 17-20 and Exhibits 6 through 9.
[6]"Dry Bones," traditional, based on Ezekiel 37: 1-27.
[7]Outtz Report, p. 17-18.

this as "positive assortative matching." FAs with high value household accounts tend to pair with other FAs with high value accounts.[8] Under this hypothesis, because they are less successful at gaining access to wealthy white households, African American FAs will be viewed by whites as undesirable team members. And if they take the same approach to the business as whites, they will be viewed as likely to fail because of their lack of access to white wealth.

If Dr. Saad and the experts he relies upon are correct, African Americans who choose to enter careers at Merrill Lynch as FAs: (1) are naïve and unaware that because of their race they will face hurdles to accessing wealthy white households; (2) recognize that they are unlikely to achieve the same level of success as their white counterparts and do not aspire to excel or are reconciled to their fate; or (3) proceed with the (usually) misguided belief that theirs will be among the few instances in which an African American can overcome the disadvantage that comes from not having access to white wealth. It is unclear why Merrill Lynch would choose to hire any African Americans under these circumstances, unless its hiring procedures are sophisticated enough to identify those African American applicants in the third category who really do have strong prospects for transcending the "access to white wealth" barrier. Of course, in that circumstance, Dr. Saad's conclusions regarding the inferior productivity of African American FAs would not apply.

Limitations of Dr. Fernandez's Report Regarding the "Access to Wealth" Supposition

Beginning with Dr. Fernandez's report, the reports of defendant's experts do not provide a reliable basis for Dr. Saad's belief about the deficiencies in African Americans' capacity to succeed at Merrill Lynch. Dr. Fernandez's conclusions that African Americans have, on average, less wealth than whites is well established in research literature, as I noted in my Expert Report (at p. 16). Dr. Fernandez also presents results of analyses of a survey of adults in the U.S.

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[8]Saad Report, p. 45-46.

showing that personal social networks tend to be segregated by race. When asked to identify the people with whom they "discuss important matters," African Americans name mostly African Americans and are unlikely to have whites among their discussion partners. And, to an even greater extent, whites name mostly whites, and they are unlikely to have African Americans among their discussion partners.[9] As Dr. Fernandez notes, this is consistent with research literature on race and social networks,[10] although, as he points out, other approaches to measuring networks with social surveys show a greater degree of interracial contact than does his approach.[11] Dr. Fernandez did *not* directly study whether African Americans in the general population or in the college-educated population are less able than whites to enter into business relationships with wealthy white individuals. And, of course, he did not study racial differences in the ability to do business with wealthy white individuals in the population of people who choose to enter careers as FAs at Merrill Lynch, the class members here, or other large Wall Street firms. Nor did Dr. Fernandez study whether Merrill Lynch clients, including institutional clients (such as pension funds or businesses), are less likely to associate with or do business with African American FAs.

Limitations of Dr. Outtz's Report Regarding the "Access to Wealth" Supposition

Dr. Outtz's conclusion that network access to wealthy white individuals early in one's career is essential to being a successful FA at Merrill Lynch[12] is based on an unreliable analysis that is largely irrelevant to the issues involved in this litigation. For reasons he never explains, Dr. Outtz chose not to interview any African American FAs. Dr. Outtz simply asserts that his

[9]Fernandez Report, p. 20, 22 (Table 5), 25 (Table 6), 27 (Table 7), 30-31.
[10]Fernandez Report, p. 17.
[11]Fernandez Report, Appendix G.
[12]Outtz Report, p. 27-28.

interviews with four African American Complex Directors and his review of plaintiffs' deposition testimony is "consistent with" what he learned from non-African American FAs. He cites to no deposition testimony or interview materials in support of this conclusion.[13] This is especially puzzling since one of his main findings is that Merrill Lynch FAs have autonomy in choosing methods and techniques for client development, and that they can and do choose those that work best for themselves.[14] If, as Defendant's experts maintain, African American FAs do indeed face barriers to accessing wealthy white individuals because of their race, it is reasonable to expect that successful African American FAs rely on methods, techniques, and strategies devised to overcome the limits of racially segregated social networks. And it would be reasonable to expect that as a result, their approaches to building a business differ systematically from those taken by white FAs. Indeed, there is substantial social science literature on the various, and often different, strategies that successful African Americans take to survive in white-dominated business and professional contexts.[15] Rather than conducting a systematic study of African American FAs' approach to client acquisition, Dr. Outtz seems to assume that they passively accept the barriers they face in building careers due to their (assumed) inability to access networks of white wealth.[16]

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[13]Outtz Report, p. 10-11.

[14]Outtz Report, p. 15-16, 18-20, 27.

[15]See, for example, K. R. Lacy, *Blue-Chip Black: Race, Class, and Status in the New Black Middle Class*, University of California Press, 2007; M. Lamont and C. M. Fleming, "Everyday Antiracism: Competence and Religion in the Cultural Repertoire of the African American Elite," *Du Bois Review*, Vol. 2, 2005, p. 29-43; E. Anderson, "The Social Situation of the Black Executive: Black and White Identities in the Corporate World," p. 405-435 in *Problem of the Century: Racial Stratification in the United States*, edited by E. Anderson and D. Massey, Russell Sage Foundation, 2001; P M. Cobbs and J. L. Turnock, *Cracking the Corporate: The Revealing Success Stories of 32 African-American Executives*, AMACOM, 2003*; D. A. Thomas, Breaking Through: The Making of Minority Executives in Corporate America*, Harvard Business School Press, 1999; D. Carbado and M. Gulati, "Race to the Top of the Corporate Ladder: What Minorities Do When They Get There," *Washington and Lee Law Review*, Vol. 61, 2004, p. 1643-1691.

[16]Research on differences by race, sex, and other demographic characteristics on the results of job analysis is mixed. Some studies show no racial differences, others show differences; see F. P. Morgeson and M. A. Campion, "Social and Cognitive Sources of Potential Inaccuracy in Job Analysis," *Journal of Applied Psychology*, Vol. 82, 1997, p. 627-655 (at p. 629-630). Given the issue of FA autonomy and the emphasis by Defendant's experts on racial

Dr. Outtz's analysis suffers from several other methodological shortcomings. First, Dr. Outtz asked existing FAs about the most effective methods for obtaining clients *during their first two years* at Merrill Lynch.[17] Approximately one-third of his 111 FA interviewees had been working at Merrill Lynch for two decades or longer at the time of the interview, and 50 of them had been with Merrill Lynch for at least a decade. These FAs are reporting on client acquisition strategies in the 1970s, 1980s, and early 1990s, prior to the shift in emphasis from transaction-based securities sales with revenues based on trading to fee-based financial planning.[18] Descriptions of effective book-building strategies from those eras are likely to have little relevance to the period in which the majority of proposed class members joined Merrill Lynch. Also, Dr. Outtz assumes that his interviewees can accurately recall details about how they built their businesses years (and for many, decades) after the fact. The difficulty of obtaining accurate reports of past behaviors and experiences is well established in the methodological literature on surveys and interviews.[19] Dr. Outtz similarly assumes that interviewees fairly and honestly recounted how they built their books, be it the product of their own efforts or an admission that they inherited or benefited from favoritism or privilege. Dr. Outtz does not appear to have conducted any analysis of the interviewees' statements to determine whether their recitations were accurate.

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differences in access to white wealth, the Merrill Lynch context is certainly one that requires attending to potential racial differences.

[17]Dr. Outtz also does not interview any former Merrill Lynch FAs, including those who failed, in order to determine whether there is any difference in the way that these FAs built their books.

[18]See citation to deposition testimony and documents at footnote 14 of Bielby Expert Report, p. 14; also see "Global Private Client: Momentum for Growth" 2006 Credit Suisse Financial Services Conference Robert J. McCann, Vice Chairman and President of Global Private Client Miami, February 8, 2006 (www.ml.com/media/64310.pdf is the pdf, retrieved 2/1/2009, also at BATES MLE 00117 - 001857-1881).

[19]R. M. Groves, F. J. Fowler, M. P. Couper, J. M. Lepkowski, E. Singer and R. Tourangean, *Survey Methodology*, Wiley, 2004, p. 213-218; R. A. Singleton and B. C. Straits, *Approaches to Survey Research*, Fourth Edition, Oxford, 2005, p. 291-293; R. F. Belli, "The Structure of Autobiographical Memory and the Event History Calendar: Potential Improvements in the Quality of Retrospective Reports in Surveys," *Memory*, Vol. 6, 1998, p. 383-406; N. N. Schwarz and S. Sudman (eds.), *Autobiographical Memory and the Validity of Retrospective Reports*, Springer Verlag, 1994.

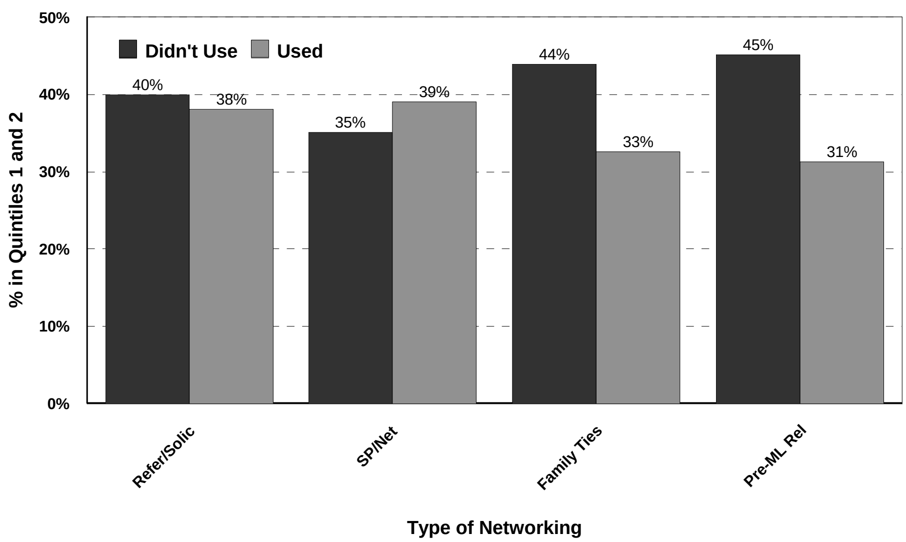
Dr. Outtz claims that based on his job analysis he was able to "identify specific skills, abilities and personal characteristics that an FA must possess *in order to build a large book of business*."[20] Dr. Outtz also claims that he determined that social networking was superior to other strategies for building a book of business[21] and that "it is critical to either have a social network containing significant wealth or have the ability to build such network ties."[22] Yet Dr. Outtz made no attempt to see if there is any association between relying upon social networks and success as indicated by quintile rankings. Dr. Outtz lists four types of social networking that the non-African American FAs he interviewed identified as effective in building their books of business during their first two years with Merrill Lynch: "referral solicitation;" "social prospecting/networking;" "family ties;" and "building on relationships formed prior to Merrill Lynch." None is associated with quintile ranking. Figure 1 shows the percentage of FAs who are in quintiles 1 and 2 for those who did use and did not use each of the four social networking strategies. None of the disparities is statistically significant. For each type of social networking, FAs who named it as an effective strategy used to build their book were no more likely to be in the top two quintiles than those who did not utilize it.[23]

In contrast, whether or not an FA reported participating in a team is strongly related to quintile ranking. As can be seen in Figure 2, individuals in the lowest quintiles are substantially less likely to participate on teams than those in the highest quintiles. This pattern is statistically

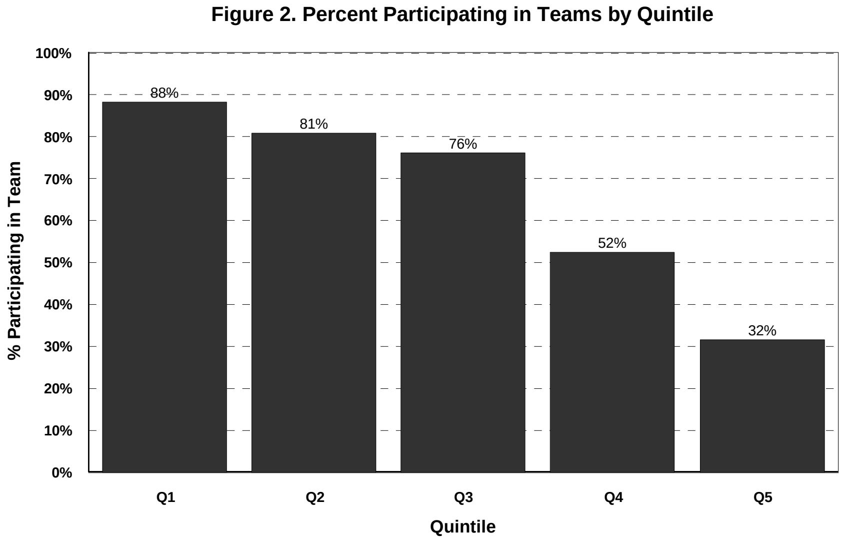
[20]Outtz Report, p. 19-20 (emphasis added).
[21]Outtz Report, p. 20-25, 27, 41.
[22]Outtz Report, p. 27.
[23]My analysis is based on the databases supplied by Dr. Outtz to Dr. Ericksen. I compared the entries in the databases supplied to Dr. Ericksen to the interview forms and discovered three errors in the data. According to Dr. Outtz's notes, interviewee 25 reported using cold calling but was coded as not using that strategy. Interviewee 55 was recorded in the notes as using referral solicitation but was coded as not using that strategy. And Interviewee 103 was recorded in the notes as using call-ins but was coded as not using that strategy. My analysis is based on using corrected data (only the correction for interviewee 55 affects the results reported in Figure 1). Analyses are unweighted, but the results are almost identical when weighted to account for FAs who were sampled multiple times. I also find no significant differences when comparisons of use and nonuse of specific network strategies are made across all five quintiles (i.e. a crosstabulation of the five quintile categories by whether or not a given type of network strategy was used).

significant, and here it is consistent with Dr. Outtz's own conclusion about the impact of teaming on an FA's compensation.[24] In sum, for the FAs in Dr. Outtz's sample, participating in teams, an activity that is known to affect production, is strongly associated with quintile rank, and reported reliance on various kinds of social networks to build a book is not associated with quintile rank.

Figure 1. Percent in Top 2 Quintiles by Use of Social Networking



[24]Outtz Report, p. 17. Again, results are based on unweighted data, but almost identical results are obtained from the weighted data. Team participation was determined from responses to question number 3 as recorded in Dr. Outtz's interview notes. A different form was used for the first nine interviews conducted by Dr. Outtz (all in the same complex), and that form did not have the question about Team participation. Team participation for those nine individuals was determined from company records on production on pooled accounts.



Dr. Outtz reports that the correlation coefficient relating quintile rank to his own subjective ranking at the conclusion of the interview about whether the FA interviewee was an "outstanding performer" is .42, which he describes as "strong."[25] What the correlation really indicates is that 17.6% of the variance in his subjective rating can be explained by quintile rank, and the remaining 82.4% of the variance in his subjective rating is explained by factors other than quintile rank. Since he made his subjective judgment rating after speaking to the FA at length about his or her career at Merrill Lynch, it is not surprising that Dr. Outtz picked up some information that relates to the individual's success at Merrill Lynch as measured by quintile rank. Indeed, there is nothing in Dr. Outtz's description of the interview process that indicates an interviewee would not be able to directly tell Dr. Outtz his or her quintile rank or some other measure of productivity highly associated with quintile rank. That his subjective rating bears some relation to quintile rank tells us nothing about the reliability or validity of Dr. Outtz's

[25]Outtz Report, p. 10-11. Actually, Dr. Outtz reports the correlation to be .40, but Dr. Ericksen submitted an Amendment to his expert report that states that after making corrections to his analysis the correlation is actually .42 (Amendment to the Expert Report of Eugene P. Ericksen, p. 1).

quantitative analysis. And as my analysis above shows, one fact we do know is that FAs' reports of use of various kinds of social networking to build their business is *not* related to productivity or career success as indicated by quintile rank.

Dr. Outtz also emphasizes that the traits needed to succeed financially as an FA at Merrill Lynch include having an "entrepreneurial spirit" and job-related experience, along with the ability to gain the trust of potential clients, to take risks, and to face rejection.[26] He also emphasizes that all prospecting methods require the FA "be able to interact well with other people," "possess strong oral communication skills," and "be able to listen actively and respond appropriately to verbal and non-verbal cues."[27] However, nowhere in his report does he present evidence or suggest that compared to whites, African American FAs are less entrepreneurial, lack relevant experience, are untrustworthy or lack the ability to gain the trust of others, are more risk averse, are less resilient in the face of rejection, or are less effective in social interaction due to poor verbal and nonverbal communication skills. As I noted in paragraph 19 of my original report, Merrill Lynch managers have testified that African Americans do not differ from other FAs in the relationship-building skills emphasized by Dr. Outtz.[28]

Because they avoid addressing the issue explicitly, it is unclear whether Dr. Outtz and Dr. Saad believe that an unwillingness of wealthy white individuals to interact with African American FAs and trust them in financial matters is a component of the alleged difficulty African American FAs have in gaining access to wealthy white individuals. As I noted in paragraph 20 of my original Expert Report, several high ranking Merrill Lynch executives raised the issue of "crossing cultural boundaries" as a hurdle African American FAs face in doing

[26]Outtz Report, p. 1, 15, 20, 25-26.
[27]Outtz Report, footnote 27 on p. 22.
[28]Bielby Expert Report, p. 14.

business with clients who are not African Americans.[29] This could be interpreted as implying that racial prejudice or bias on the part of Merrill Lynch customers is a barrier faced by African American FAs that does not exist for FAs who are not African American.

In a footnote to his report, Dr. Outtz notes that he ignores other factors that may impact compensation, including account transfers, because they were "beyond the scope of his assignment."[30] This is surprising, given that his assignment included doing a job analysis to determine "what are the drivers of an FA's levels of productivity?"[31] and that plaintiffs allege that account transfers not only drive FA productivity but also create and sustain differences by race in productivity. Dr. Outtz states that it is his understanding that "other experts have examined such factors,"[32] but his understanding is incorrect. Dr. Saad performs an analysis of racial disparities in account transfers (as do Drs. Madden and Vekker), but he does not perform a job analysis or any other kind of analysis of the impact of account transfers on productivity or compensation. In my Expert Report, I specifically identified racial bias in the distribution of accounts as a factor contributing to the cumulative disadvantage of African American FAs.[33] Dr. Outtz apparently has no opinion one way or another whether account transfers are one of the "drivers" that contribute to FA productivity and compensation and whether racial disparities in account distributions comprise one of the factors that needs to be taken into account in understanding racial disparities in compensation.

At paragraph 31 of his report, Dr. Outtz explains that FAs have "significant organizational clout" because, for example, those with profitable books of business can leave the

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[29]Bielby Expert Report, p. 18.
[30]Outtz Report, footnote 1 on p. 6.
[31]Outtz Report, p. 5.
[32]Outtz Report, footnote 1 on p. 6.`
[33]Bielby Expert Report, p. 33-34.

firm and take their books of business to a competitor.[34] The highest earning FAs, who are disproportionately white men, will be the ones with the greatest "clout" at Merrill Lynch, and Dr. Outtz ignores the implications of this for the "drivers of success" of other FAs, especially African Americans. As I explain in my Expert Report at paragraph 83, top executives at Merrill Lynch have noted that senior FAs were resisting efforts to introduce diversity CFOs and to remove discretion and bias from the account distribution system.[35] The kind of "clout" described by Dr. Outtz could also be exercised by forming a team for the purpose of "pre-selling" one's book of business prior to retiring from Merrill Lynch, especially before the implementation of the Account Distribution Policy ("ADP"), but even afterwards as I described at paragraph 36 of my Expert Report.[36] Finally, FAs with "clout" are more likely to be on teams than those without it (which disproportionately includes African American FAs). And as I describe in paragraph 32 of my Expert Report, given the extremely low representation of African Americans and their low rate of team participation, this can set up a process of "opportunity hoarding" in which those with "clout" devise ways to see that valuable resources are distributed to those with whom they are

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[34]Outtz Report, p. 16-17.

[35]Bielby Expert Report, p. 67-69. Also see, for example, BATES MLEE 018 063469, "Review of Additional Potential Changes" regarding potential changes to the account distribution policy. One item, "elimination of the 'best ball' stipulation for the Growth Component of the Revenue Criteria" is accompanied by the recommendation: "Proceed with caution in eliminating the quintile stipulation for growth component - will cause a stir among high performing white males." Also see e-mails on this issue from August 2005. In BATES MLEE 020 - 008133, to Marvin Balliet, Jay Feuerbacher, and Mac Gardner from David Lessing, Mr. Lessing states that it has "been a longstanding concern of our large producers" that they are not getting their "fair share" of high net worth account, which are instead going to smaller and less experienced producers under the recently implemented Account Distribution Policy." Mr. Lessing goes on to describe changes to the policy that will allow directors to depart from the rankings in order to give accounts to FAs who have served large clients in the past. Also see MLEE 020 - 008134, e-mail from Jay Feurbacher to Gardner, Balliet, and Lessing, reporting that a large producer in his office was complaining about distributions to an LOS 4 small producer under the new policy instead of to a large producing team. Mr. Feuerbacher wrote: "It seems to me that we are bending over backwards to follow some sort of policy designed by the lawyers instead of making a judgment as how we could best serve the client." He added: "This is an issue that has come up repeatedly during my tenure on the Council yet no one has been able to resolve it *to the satisfaction of our senior FA's*. (emphasis added)

[36]Bielby Expert Report, p. 28-29.

personally connected.[37] Dr. Outtz has ignored each of these ways in which "clout" can be a driver of success for other FAs.

Limitations of Dr. Saad's Report Regarding the "Access to Wealth" Supposition

Dr. Saad claims to have conducted an analysis that demonstrates African American and white FAs are "tapping into different sources" of wealth. His analyses purport to show that African American FAs tend to transact business with less wealthy individuals who live in predominantly African American neighborhoods and, unlike their white counterparts, do not have clients where wealthy white people live.[38] In fact, his report does nothing of the sort. As Drs. Madden and Vekker describe in their Rebuttal Report, Dr. Saad based his analysis on unreliable information about the home addresses of Merrill Lynch clients, inappropriately combined business and household accounts in his analysis, and apparently made numerous coding and data processing errors that produced inconsistent and contradictory results.[39] And, as Drs. Madden and Vekker point out, for both African American and white FAs, the proportion of accounts held by African American clients is so small as to have hardly any bearing on whether there are substantial differences by race in access to wealth.[40]

The other piece of Dr. Saad's effort to attribute racial disparity in earnings to differences in access to wealth is his regression analysis that purports to use "self generated assets" (assets acquired by FAs at the very start of their careers, which he assumes is unaffected by Merrill Lynch's treatment of FAs) as a proxy for productivity that is untainted by racial bias. Dr. Saad assumes that if African American and white FAs differ on his measure of "self generated assets," this can only be due to factors outside of Merrill Lynch, presumably differences in access to

[37]Bielby Expert Report, p. 32.
[38]Saad Report, p. 24-27.
[39]Madden and Vekker Rebuttal Report, p. 27-33.
[40]Madden and Vekker Rebuttal Report, p. 33-34.

wealth. He purports to show that once this "untainted" measure of productivity is taken into account, the large and statistically significant differences in compensation between African American and white FAs become small and not statistically significant.[41] In their Rebuttal Report, Drs. Madden and Vekker report that Dr. Saad's proxy for productivity was not based solely on self-generated assets but was instead generated from a regression analysis that included self-generated assets *and race* (and LOS).[42] In other words, the racial disparity in production that exists over and above that due to self-generated assets is *built into* Dr. Saad's proxy measure, not purged from it. Thus, his regression analysis of compensation and race controlling for the proxy measure is virtually guaranteed to show no significant racial disparity in earnings, even when one exists. Drs. Madden and Vekker show that when Dr. Saad's analysis is interpreted correctly, it shows that differences by race in self-generated accounts *do not* account for the large racial disparities in FAs compensation.

Conclusion Regarding Access to Wealth: The Knee Bone is NOT Connected to the Thigh Bone

In conclusion, Dr. Fernandez presented analyses that are consistent with a large body of social science research: African Americans, on average, have less wealth than whites, and in the United States today, social networks remain segregated by race to a substantial degree. Dr. Fernandez did not study (or claim to study) whether African Americans in the financial services industry face insurmountable barriers to accessing and doing business with wealthy individuals who are not African American. Dr. Outtz did not establish that reliance on social networks is essential to succeeding as an FA at Merrill Lynch, and he did not even attempt to study whether African American FAs are able to rely on social networks to gain access to wealthy white

[41] Saad Report, p. 30-32.
[42] Madden and Vekker Rebuttal Report, p. 6-9.

individuals, or whether they devised other effective strategies to overcome the presumed limitations of social networks, such as professional networking or community activities. Dr. Outtz's job analysis also failed to address account transfers as a potential "driver" of FA success that could be vulnerable to racial bias. Dr. Saad's flawed study of the spatial distribution of African American households, wealthy white households, and the residential location of the clients of African American FAs did not establish that African American FAs do not and cannot do business with wealthy white clients who live in white communities. And finally, Dr. Saad's effort to show that racial disparities in productivity and compensation are due to pre-existing differences in access to wealth (as measured by self-generated accounts in the early career) in fact showed just the opposite. There is no reliable evidence in the reports of Drs. Fernandez, Outtz, and Saad that racial differences in access to wealth or access to wealthy white individuals accounts for most or even part of the substantial racial difference in compensation among FAs at Merrill Lynch.

WHICH DECISIONS BY MERRILL LYNCH ARE VULNERABLE TO RACIAL BIAS?

Dr. Saad incorrectly attributes to me the opinion that any decision by Merrill Lynch that involves an element of judgment or discretion will be biased against African Americans, and he then faults me and Drs. Madden and Vekker for not studying decisions that he asserts are both discretionary and, according to his analyses, free of bias. My emphasis has been on the decisions about resources that are discretionary, can have a substantial impact on an FA's earnings, and which have a "zero-sum" quality to them, making them potentially subject to opportunity hoarding as described in paragraph 32 at page 25 of my Expert Report.

For example, a decision about distributing the book of business of a departing FA is very different from one about initial pay. The latter is one that is identified by Dr. Saad as both discretionary and free of bias,[43] but there are fundamental differences between the two. The book of a departing FA is a scarce resource - what gets allocated to one person or team cannot also be allocated to another. Servicing those accounts generates production for the inheriting FA and it provides "access to wealth" of both the account holder and of his or her social network. Who does and does not get the accounts of departing FAs matters to successful FAs with "clout" in a way that starting salary of a POA trainee does not. The starting salary of a new POA has no bearing on any other FA's ability to generate production. Furthermore, as a result of the *Cremin et al. v. Merrill Lynch* gender class action litigation and resulting settlement, Merrill was aware of bias in starting salaries, and a report prepared in January 2002 provided further evidence that disparities by gender and race needed to be addressed.[44] By 2003, national guidelines had been introduced governing the setting of starting salary of newly hired POAs that reduced management discretion in setting salaries and required approval to depart from these guidelines.[45] In short, regarding starting salaries, Merrill Lynch had awareness and motivation to address bias from the start of the class period, it imposed national written guidelines shortly thereafter, and the level at which salaries were set for new POAs had no impact on the earnings capacity of successful FAs, so they had no incentive to oppose or resist any policies that would equalize starting salaries by race.

Dr. Saad identifies decisions about LOS adjustments, or "rollbacks," as another area where local managers have discretion and where he finds no evidence of bias. Dr. Saad fails to

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[43] Saad Report, p. 55-56.
[44] USPC Diversity Analysis Presentation Book, January 2002 (BATES MLE 00003 000154)(showing racial disparities in starting salaries in favor of whites).
[45] Tamara Cassidy 30(b)(6) depo., p. 42-43 (BATES MLE 00053 - 001320).

acknowledge that managers' discretion in such decisions is limited by a variety of company policies. Pursuant to the *Cremin* settlement, Merrill Lynch was required to establish guidelines for LOS adjustments relating to maternity leaves and other leaves of absence, and policies were put in place specifying the amount of LOS reduction permissible for various kinds of leaves and for competitive recruitment.[46] Similarly, Dr. Saad identifies title changes as a decision potentially subject to discretionary local decision-making, yet he goes on to concede that recognition title guidelines specify revenue thresholds and other objective criteria that managers must abide by in awarding titles.[47] In short, there appears to be little if any discretion in such title changes.

Dr. Saad identifies two decisions that pertain to FAs who are doing poorly in their careers at Merrill Lynch and therefore are at risk of separation from Merrill Lynch. FA terminations, and forgiveness of excess compensation. For each, the apparent aim of Dr. Saad's analysis is to assess whether African American POAs or FAs are more likely to experience an adverse outcome than a similarly situated white POA or FA.[48] For example, his analysis of FA terminations examines whether African Americans are more likely to be terminated than whites with the same LOS and production.[49] Framed narrowly in this way, there is no reason to expect Merrill Lynch's decisions on terminations and excess forgiveness to be adverse towards African Americans, and I have not expressed the opinion that I expect that they would be. In making comparisons between African Americans and whites who are similarly situated at the margins of

[46]Stipulation of Settlement, *Marybeth Cremin, et al. v. Merrill Lynch, Pierce, Fenner & Smith, Inc, et al.*, Northern District of Illinois, Eastern Division, No. 96 C 3773, June 17, 1998, p. 59. Also see, for example, Amended USPC National Sales Leave of Absence Policy; Revised Length of Service Adjustment Process, July 19, 1999 (BATES MLE 00031 - 000827-832); Leave of Absence Basics, July 29, 2003 (BATES MLE 00010 - 000537); Leave of Absence Basics, November 2, 2005 (BATES MLE 00105 - 000803-805); Leave of Absence Basics, 2006 (BATES MLE 000308 - 000184).
[47]Saad Report, p. 65.
[48]Saad Report, p. 58-61, 62-63.
[49]Saad Report, p. 60-61.

failure, the cumulative disadvantages that impact African American POAs and FAs have already taken their toll -- the Merrill Lynch success breeds success system has already placed proportionately more African Americans than whites at this margin. It is not particularly surprising that after controlling for the consequences of disadvantages in the allocation of assets, access to teams, and so on, one finds that marginally performing African Americans are treated similarly to marginally performing whites, but this is surely not evidence that the larger system that placed proportionately more African Americans than whites on the brink of failure is free of bias.

AFRICAN AMERICAN REPRESENTATION IN THE FA WORKFORCE AND PARTICIPATION IN THE MANAGEMENT ASSESSMENT CENTER

In my Expert Report, I expressed the opinion that to understand the barriers faced by African American FAs, it is important to consider their representation in the Merrill Lynch workforce. I relied on Merrill Lynch's own documents, including EEO-1 reports, and I presented three tables showing workforce representation of African American FAs and POAs at Merrill Lynch, based on tabulations done by Dr. Vekker at my request, based on Merrill Lynch data.[50] I summarized the results of my analysis as follows:

> In sum, African American FAs and FA trainees at Merrill Lynch are literally "few and far between." African Americans are outnumbered by more than 70 to 1 in the FA workforce. As recently as 2006, the vast majority of Merrill Lynch offices had no African American FAs, and the majority of African American FAs who work at Merrill Lynch do so in offices in which there are no other FAs of the same race. Hiring of African American trainees over the six-year period from 2001 through 2006 was confined

[50]Bielby Expert Report, p. 7-11.

> to 123 of the 551 offices that did any hiring. Over this period, a newly hired African American trainee was unlikely to have another African American trainee peer, and he or she was likely to be hired into an office that had no African American FAs or at most token African American representation.[51]

Dr. Saad does not dispute my statistics or this summary. Instead, he criticizes an opinion I *did not* express: that Merrill Lynch's hiring and representation of African Americans is low relative to an externally defined relevant labor market.[52] Again, the facts that I presented in my Expert Report and in the passage quoted above are not disputed, and they comprise an important part of the organizational context that shapes the experiences of African American POAs and FAs. Whether Merrill Lynch's hiring statistics are above or below the relevant labor market standard, the fact remains that African American FAs and FA trainees are "few and far between" at Merrill Lynch, exactly as I described in my Expert Report. And it does not change the fact (not disputed by Dr. Saad), that among the non-trainee workforce, African American representation among FAs remained virtually unchanged from 2001 through 2006 at 1.3% to 1.4%.[53]

Regarding the consequences of the sparse representation of African Americans in the FA workforce, Dr. Saad offers a reasonable summary of my opinion:

> I understand his theory to be as follows: whites constitute an overwhelming majority of FAs and Merrill managers of FAs. They exert their influence over various employment practices to the detriment of African American FAs. That is, they treat similarly situated African American FAs worse than they treat whites FAs, and in so doing, restrict access of African American FAs to the inputs to production. In addition, Dr. Bielby opines that due to their "very low" representation, African American brokers

[51] Bielby Expert Report, p. 11-12.
[52] Saad Report, p. 51-52.
[53] Bielby Expert Report, Table 2, p. 9.

> are "isolated" within the Merrill culture – leading to their inability to participate in the mainstream of FA and POA life at Merrill. He asserts that this leads to lower performance, higher attrition rates, and lower pooling rates.[54]

However, I take issue with Dr. Saad's assertion that if my view is correct, there should be statistically significant disparities by race after controlling for production when looking at terminations, account distributions, pooling, LOS rollbacks, etc. Production is clearly a "tainted variable," impacted by the very barriers that Dr. Saad's proposed statistical test is supposed to assess. I have already addressed this above in the context of terminations, and I have also pointed out above that some of the outcomes Dr. Saad chooses to examine, such as LOS rollbacks and starting pay, are not highly discretionary. But the general point is that plaintiffs allege that Merrill Lynch has control over the allocation of resources that affects an FA's ability to generate production, and when bias affects the distribution of those resources in a success breeds success system, the resulting disparities in production become inputs into subsequent resource allocation decisions, which sustains and reinforces racial bias in career outcomes.

Dr. Saad also criticizes me for not analyzing the consequences of variability in the social isolation of African Americans across offices.[55] The reason is that there is hardly any variation in the degree of isolation of African Americans at Merrill Lynch. In any given year, fewer than four percent of Merrill Lynch's offices have more than one African American FA (from 21 to 28 offices in each year from 2001 to 2006), and in each year at least 85% of the offices have no African American FAs (from 132 to 148 offices in each year from 2001 to 2006, statistics that Dr. Saad has not disputed).[56] In short, there is a persistent pattern of either no or solo

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[54]Saad Report, p. 69. I do dispute Dr. Saad's characterization of this opinion as "my theory." As I explain in my Expert Report at pages 18-19, this opinion is based on decades of social research.
[55]Saad Report, p. 70-72.
[56]Bielby Expert Report, Table 2, p. 9.

representation of African American FAs in the vast majority of Merrill Lynch offices. This fact, coupled with the high degree of turnover among African American FAs, makes it unlikely that snapshot comparisons of offices with one African American to those with two or more capture any meaningful differences in the climate faced by African Americans in those two kinds of offices.[57] And, of course, given the small numbers involved, it would be difficult to detect statistically significant differences when they do exist.

Dr. Saad raises critiques similar to those addressed above relating to attendance at the Management Assessment Center ("MAC") and success at the MAC, and his assertions and analyses are unpersuasive for the same reasons. Given the low overall representation of African Americans at Merrill Lynch and their concentration in fourth and fifth quintiles (which plaintiffs allege is due to bias), the number of African Americans "expected" to attend the MAC each year according to Dr. Saad ranges from four tenths of a person in 2001, to two tenths of a person in 2002 to one tenth of a person for each year from 2003 to 2006. By this standard, *any* African American participation at the MAC would be taken by Dr. Saad as evidence of success in promoting diversity in management. In fact, given the small numbers involved, in any given year, zero African American participation in the MAC would be evidence of such success, or at least not evidence of bias, according to Dr. Saad. That is, if Merrill Lynch had a policy of banning African Americans altogether from the MAC, that outcome of his statistical tests would still meet Dr. Saad's standard of fairness. In short, as a technical matter, Dr. Saad's statistical tests are not probative of anything relevant to this litigation.[58]

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[57]Also, given that there are very few offices with two or more African American FAs, it is hardly surprising that Dr. Saad finds that when African Americans participate in pools, the pools usually involve FAs of different races (Saad Report, p. 71.

[58]W. T. Bielby and P. Coukos, "'Statistical Dueling' with Unconventional Weapons: What Courts Should Know about Experts in Employment Discrimination Class Actions," *Emory Law Journal*, Vol. 56, 2007, p. 1563-1612.

Substantively, the issue is the mirror image of what I described above regarding terminations. By comparing African Americans and non-African Americans who have LOS of three or more and are not in quintiles 4 and 5, Dr. Saad has already removed much of the effect of the barriers African Americans face in obtaining account distributions, joining teams, and so on. Not captured in an analysis like Dr. Saad's is what the relative prospects for attending and succeeding at the MAC of two equally capable African American and non-African Americans who entered the POA at the same time and were equally likely to aspire to a career in management at Merrill Lynch.

The same issue applies to Dr. Saad's analysis of success at the MAC. Over the six year-period from 2001 to 2006, only five African Americans from the FA ranks participated in the MAC, and just one of those five individuals succeeded. While that is not a statistically significant shortfall, the reality is that despite a stipulation of settlement requiring Merrill Lynch to invite all eligible minority FAs to apply to the MAC, and despite all of Merrill Lynch's diversity programs, over a six year period it was able to develop just one manager out of the ranks of African American FAs.

MS. JONES' REPORT ON MERRILL LYNCH'S DIVERSITY PRACTICES IS NOT GROUNDED IN SOCIAL SCIENCE RESEARCH AND IS LARGELY IRRELEVANT TO MY EXPERT OPINIONS

There is No Scientific Basis for Ms. Jones' Opinions

Ms. Olivet Jones, the diversity consultant who prepared a report about the Defendant's diversity practices, is not a social scientist, does not have a graduate degree in any social science field or any other field, and has not published any of her work in any social science journal.[59] Apart from one article in the *Harvard Business Review*, she makes no reference to any of the extensive body of social science literature I cite in the section of my Expert Report on Merrill's diversity practices. Apart from two articles in the *Harvard Business Review*, her report does not cite to any peer-reviewed scientific research. Ms. Jones includes a "bibliography" as Appendix A, but it includes no peer-reviewed social science research and consists mainly of unscientific "best practices" diversity reports. Moreover, none of the publications listed in her bibliography is cited in the footnotes to her report. The bibliography appears to be "window dressing." In short, Ms. Jones makes no claims to having a scientific basis for her opinions about Merrill Lynch's diversity efforts or for her criticisms of my report, and she is not qualified to make any such claims.

To reach her conclusions, Ms. Jones appears to rely exclusively on her employment experience being retained as a diversity consultant for largely Fortune 500 employers such as Merrill Lynch.[60] Ms. Jones offers only conclusory statements and produces no underlying documentation regarding this experience, however, including the experience and companies to which she appears to compare Merrill Lynch. As a result, I cannot fully investigate or respond to her report.

Ms. Jones' "methodology" section provides no rationale for how she selected her 15 interviewees other than that they were "relevant Merrill Lynch personnel" who had "intimate knowledge" of various practices and programs.[61] Seven of those she interviewed are not mentioned anywhere in her report, including Subha Barry, who played a key role in Merrill

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[59]The CV included as Appendix D does not include information on Ms. Jones' field of undergraduate study, and there is no information about educational credentials at her company's website (http://www.felicitygroup.com/index.htm).
[60] See, e.g., Jones Report, p. 3.
[61]Jones Report, p. 5.

Lynch's diversity initiatives, and W. Phillip Sieg, one of Merrill Lynch's top executives during the relevant period. Two other interviewees are mentioned just once in her report. Ms. Jones relies mainly on her interviewees with Maura Gallagher, Tamara Cassidy, Catherine Kapferer, and Keith Henry, but she provides no explanation for why these were her key informants. Ms. Jones does not explain why she believes each is able to provide accurate and unbiased accounts in interviews done during and in the context of high-profile litigation. Nor does she explain why she thinks her interviewees can report accurately on events, policies, and practices as many as seven years removed from start of the class period.[62]

Ms. Jones reports that she reviewed the deposition testimony of nine Merrill Lynch executives and managers, including Ms. Cassidy, Ms. Barry, and Mr. Sieg, but she cites to none of this deposition testimony. Of her four key informants, only one, Ms. Cassidy, has given testimony subject to cross examination, and that only in the limited capacity of a corporate representative designated by Merrill Lynch to testify as to POA compensation. Ms. Jones does not explain why she chose not to interview individuals who played important roles in Merrill Lynch's diversity and human resources functions, including: Kim Pillar, who headed human resources for Global Private Client ("GPC"); Don Schneider, who also held that position; Colbert Narcisse, former head of the GPC Office of Diversity; Jyoti Chopra, who replaced Subha Barry as head of Multicultural Marketing; Bob McCann, who headed GPC; or others whose testimony or written documents were cited in the passages of my Expert Report dealing with Merrill Lynch's diversity efforts. Nor does she cite to their deposition testimony.

Finally, Ms. Jones does not explain why, with the exception of Ron Meraz, she barely relies on the eight interviews conducted after her interview with Ms. Gallagher on March 14,

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[62]Names and titles of interviewees and dates of interviews are listed in Appendix B of the Jones Report.

2008. It appears that Ms. Jones had formed her conclusions at the point when her data collection was only half completed.

Ms. Jones' Report Adds Nothing to My Analysis of Merrill Lynch's Diversity and EEO Efforts From the Beginning of the Class Period to the Filing of the Lawsuit, 2001-2005 and Mischaracterizes Diversity Efforts in the Period Since That Time Period

Ms. Jones' substantive analyses of Merrill Lynch's diversity efforts appears on pages 13 to 36 of her report. She devotes just 7 of 24 pages to the years 2001 to 2005, the period of greatest interest, from the beginning of the class period to the filing of the *McReynolds* litigation. Two pages are devoted to years prior to the class and discovery period, and the most space, 10 pages, is devoted to describing Merrill Lynch's practices since 2006, including events that appear outside of the discovery period and about which I lack access. She then argues that actions taken by Merrill Lynch *after* the filing of a highly visible lawsuit, and after Merrill Lynch had entered into discussions with plaintiffs about remedial actions, can be used to gauge Merrill Lynch's commitment to and effectiveness of its diversity efforts *prior to* the litigation.[63] Ms. Jones places considerable weight on corporate pronouncements and program descriptions but little, if any, emphasis on the impact of diversity efforts on the actual results of these programs or the careers of African American FAs at Merrill Lynch.

For example, Ms. Jones devotes two pages to descriptions of "core" diversity programs[64] in place after 2006, which, in her opinion demonstrate a "shift from a programmatic approach to a more strategic approach with concrete benefits outlined for both the Firm as a whole and FAs in specific demographic groups."[65] In fact, the document she relied upon does not describe "core programs" in place after 2006, but instead "best practices and ideas" from a *proposed* community

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[63]See Bielby Expert Report, paragraphs 76 and 77, p. 63-64.
[64]Jones Report, p. 33.
[65]Jones Report, p. 34.

development initiative from 2001.[66] Clearly, a proposed initiative that apparently was never implemented cannot be a reliable indicator of effective strategic approaches to diversity.

Along the same lines, Ms. Jones relies on various programmatic statements to conclude that by 2006, company leadership "had begun to articulate the focus and purpose of diversity and inclusion as an organizational competency in a more crisp, concise, and relevant manner."[67] And, she added: "The line of sight between diversity and inclusion and Merrill Lynch's business objectives is much more clearly stated in documents created during this latter timeframe."[68] She then goes on to quote the diversity mission statement from a September 2006 document which is almost identical, word-for-word, to the mission statement appearing in Merrill Lynch's "Diversity at Work: A U.S. Progress Report" document published in *1999*.[69] Similarly, other language she quotes from the 2006 document as evidence in support of her conclusion closely parallels language in documents from years earlier.[70] Contrary to her claim, what Ms. Jones has actually demonstrated in her analysis is that as early as 1999, Merrill Lynch was embracing the symbolic language of diversity rhetoric that is disconnected from substantive efforts and results. She also demonstrates that from the late 1990s to the present, Merrill Lynch was aware of its difficulties regarding equal employment opportunities and authorized various diversity offices,

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[66]E-mail message from Heather McHale to Jeff Humber, dated May 7, 2001 and transmitting as an attachment the document relied upon by Ms. Jones (BATES MLMRE 13 - 002086). Also from the same document, see BATES MLMRE 13 - 002094, Community Relationship Management Plan - Best Practices. Also see BATES MLE 00258 - 00087-106, which includes an Executive Summary that states that the community development toolkit offers "some suggestions of potential community development initiatives" (BATES MLE 00258 - 00088). Also see BATES MLMRE 012 - 010861, "...Merrill Lynch *intends to adopt* community development initiatives as appropriate" and "these initiatives *could be applied* to key firm-wide business drivers" (emphasis added). I was unable to find any documents indicating that the "best practices and ideas" identified as "core programs" by Ms. Jones were ever implemented.
[67]Jones Report, p. 27.
[68]Jones Report, p. 27.
[69]Jones Report, p. 27, citing BATES MLE 01367 – 000503; compare BATES MLE 00121 – 000155.
[70]For example, the document from 2006 relied upon by Ms. Jones includes a page describing "A Focused Strategy to Achieve Our Vision" for the GPC Office of Diversity (BATES MLE 01367 – 000505). The "focused strategy" has three components: workforce, clients, and community. The bullet points for each are similar to language that appears in previous Merrill Lynch documents. For example, the "workforce" and community" language in the 2006 document is similar to what appears in Merrill Lynch's 1998 Strategic Plan for Workforce Preparation and Development (BATES MLE 00060 - 00289-300).

task forces, and committees to develop proposals and initiatives. But her analysis does not provide any understanding of the implementation and substantive impact of these diversity efforts. And even she acknowledges that as recently as the Fall of 2006, nearly a year after the filing of the McReynolds litigation, and after seven years of various diversity initiatives, offices, and programs, Merrill Lynch was only beginning to develop a focused approach to diversity.

Ms. Jones' analysis of Merrill Lynch's diversity dashboard is another example of her flawed reasoning. She approves of the content and form of the diversity dashboard at the time of her interview with Mr. Henry in late 2007, and she draws the conclusion that Merrill Lynch was developing appropriate and effective accountability for diversity as early as 2004.[71] But even if one accepts Ms. Jones backwards causal reasoning, the facts she relied upon do not support her conclusion. Ms. Jones acknowledged that when the dashboard was developed in 2004, it was a "static spreadsheet."[72] What she does not describe in her report is information she obtained from her interview with Ms. Cassidy about the limitations of the diversity measurements intended for use by field management prior to October 2007. Ms. Jones' notes indicate that she was told that, prior to October 2007, the use of diversity information by field managers was discretionary and was not used proactively. Reports would be created by the Office of Diversity's analytics group only when asked. According to her notes, the original design assigned too much reliance upon managers to seek out data and integrate it into office business development plans.[73] In her report, Ms. Jones only hints at what appears in her interview notes. She states: "Until 2007, managers worked with Dashboard independently. In 2008, Division Diversity Managers will work with managers to ensure that they are apprised of the full capabilities of Dashboard as a

[71]Jones Report, p. 36.
[72]Jones Report, p. 26.
[73]Notes of interview with Tamara Cassidy (BATES NOVATIONS 00060-68). Also see BATES NOVATIONS 00056.

management response tool."[74] In short, although Merrill Lynch had developed measures and mechanisms to monitor equal employment opportunity for FAs, as recently as late 2007 they were not being used for that purpose.

Ms. Jones emphasizes Merrill Lynch's Critical Few Objectives ("CFOs") in the area of diversity as an important indicator of its commitment to diversity and as an effective mechanism for achieving diversity goals.[75] In fact, company executives testified that a CFO focusing exclusively on diversity was introduced in January 2006, after the filing of the *McReynolds* lawsuit. For two or three years prior to that, diversity contributions were one "subjective" component of a CFO on leadership.[76] And around the same time (2004 and 2005, and perhaps in 2003), a portion of local managers' compensation was based on changes in the representation of diverse FAs in their offices.[77] As I noted in my Expert Report, the 2006 CFO, which was based on the growth in the percentage of an office's production generated by diverse FAs, was met with resistance from some managers and senior FAs, and very few Merrill Lynch managers met this goal.[78] And as I also noted in my Expert Report, the CFO like other of Merrill Lynch's diversity assessment measures aggregates across categories of diversity. Since African Americans comprise such a small fraction of the FA workforce, this aggregation substantially limits the incentive managers have to improve the career circumstances of African Americans.[79]

Ms. Jones identifies Merrill Lynch's Associate Financial Advisor Program ("AFA"), initiated in 2006, as another example of Merrill Lynch's effort's to "go above and beyond basic

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[74]Jones Report, p. 26.
[75]Jones Report, p. 11, 13-14, 23-24.
[76]Pillar depo., p. 259-260, 266; Gardner depo., p. 253-254; Sieg Dec. 1, 2006 depo., p. 193-194; McCann depo., p. 108-109, 145-146.
[77]Pillar depo., p. 260, 266; Sieg depo., p. 193-194, 206-211.
[78]Bielby Expert Report, paragraph 83, p. 68-69. Also see McCann depo., p. 114-115.
[79]Bielby Expert Report, p. 69-70.

efforts to support the unique development needs of its FAs of color."[80] Ms. Jones accurately describes the program, which was designed to improve performance and retention of African American FAs.[81] During the program's first year, 2006, thirty African American candidates, one from each region, were to be hired directly onto established FA teams, and were to remain in the program for five years. The program had its own salary and incentive structure and was designed to support the Associate FAs in building a business practice around affluent households.[82] Again, it appears that Ms. Jones relied solely on documents announcing the launch of the program,[83] and made no attempt to assess whether and how it was implemented. Materials that I have reviewed indicate that in its initial year, only eleven individuals participated, coming from just eight regions.[84] Senior executives were aware of managers' failures to recruit African Americans to meet the program's goal. In an e-mail that was apparently distributed to regional managers, Dan Sontag commented that "given our continued emphasis on diversity" he was "surprised and disappointed that we have not taken full advantage of this one."[85] Thus, even when given a fully funded initiative and CFOs seemingly designed to promote behavior consistent with diversity objectives, Merrill Lynch's managers were not willing or able to recruit African American candidates.

In my Expert Report I explained how shifting, ambiguous, and diffuse lines of authority, responsibility, and accountability for diversity and equal employment opportunity ("EEO")

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[80]Jones Report, p. 32-33; quote is from p. 30.
[81]"AFA Performance Tracking System, Associate FA Program for African Americans, Business Requirements Specification, Version 1.0" (BATES MLE 00178 - 001398).
[82]AFA Performance Tracking System, Associate FA Program for African Americans, Business Requirements Specification, Version 1.0" (BATES MLE 00178 - 001395-1403); Associate FA Pilot Program Rollout, e-mail from Dan Sontag, Kim Pillar, and Phil Sieg to regional directors, April 24, 2006 (BATES MLE 00178 - 001342-1343); Associate FA Program for Women and Minorities (BATES MLE 00178 - 001439-1442); E-mail from Tamara Cassidy to Pao-Ling Yu, subject "New Associate FA Program, January 9, 2006 (BATES MLE 00178-001416).
[83]In the section of her report discussing this program Ms. Jones does not cite to any interviews, testimony, or documents that she relied upon.
[84]E-mail from Dan Sontag, October 26, 2006, forwarding an e-mail from Tamara Cassidy on the same date with subject "List of Current Associate FAs" (BATES MLEER 021 021105-6).
[85]Sontag e-mail (BATES MLEER 021 021105-6).

contributed to the ineffectiveness of company efforts to minimize bias and allowed discriminatory barriers to persist. Relying on deposition testimony and substantial company documents, I showed that individuals who were central to Merrill Lynch's diversity and EEO efforts gave inconsistent and contradictory testimony about lines of responsibility and accountability, and that the organization and leadership of the offices responsible for diversity and EEO were in a state of constant flux.[86] Ms. Jones claims that Merrill Lynch deliberately created this state of affairs as part of their matrixed organizational structure.[87] According to Ms. Jones, Merrill Lynch deliberately decentralized accountability for diversity to the divisional or operating unit level in order to avoid the shortcomings of centralized reporting relationships.[88] Ms. Jones leaves the incorrect impression that only highly bureaucratic, centralized organizations have established lines of authority and accountability. In fact, it is especially important for large, decentralized, matrix organizations to have clearly delineated lines of authority and responsibility, both horizontal and vertical, in order to avoid the kinds of ineffectiveness and lack of focus that has characterized Merrill's EEO and diversity efforts.[89] Ms. Jones makes no effort to explain what those lines of authority and responsibility are regarding EEO and diversity at Merrill Lynch. In her report, Ms. Jones includes a "Timeline of Merrill Lynch Diversity Efforts" covering the period from 1987 through 2007," which notes the start dates of various diversity announcements, initiatives, and programs, but makes no attempt whatsoever to describe which

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[86]Bielby Expert Report, paragraphs 63 through 81, p. 51-67.
[87]Jones Report, p. 6, 11.
[88]Jones Report, p. 6, 11.
[89]W. R. Scott and G. F. Davis, *Organizations and Organizing: Rational, Natural and Open Systems Perspectives*, Prentice Hall, 2006; L. R. Burns and D. R. Wholey, "Adoption and Abandonment of Matrix Management Programs: Effects of Organizational Characteristics and Interorganizational Networks," *Academy of Management Journal*, Vol. 36, 1993, p. 106-138.

offices and individuals have responsibility for Merrill Lynch's non-discrimination and diversity policies and practices, nor does she examine their effectiveness, or lack thereof.[90]

Ms. Jones touches upon reporting relationships in one passage of her report, stating that in the private sector, "the highest level of commitment is what one reports to the Board of Directors."[91] Her evidence that such a reporting relationship exists on diversity matters at Merrill Lynch is a single document from a presentation to the Board in 2001. As she notes, in later years, presentations were made to the Board's Public Policy Committee and not to the full Board of Directors.[92] Had Ms. Jones reviewed the deposition testimony and documents thoroughly, she would have learned that in preparing their presentation for the Board's Public Policy Committee in 2004, Merrill Lynch executives responsible for diversity made a decision to modify the document prepared for top management, which showed statistical information on representation, promotion, and retention reported separately for African Americans, and other specific minority groups, and instead present to the Committee a version with information aggregated into a single "minority" category.[93] A presentation to a subcommittee of the Board that happens at most once annually, and evidence that high level managers took deliberate action to withhold relevant information about African Americans and other minorities from the Board are hardly indicators of commitment to diversity at the highest level, even by Ms. Jones' definition.

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[90]Jones Report, p. 15, 18. Ms. Jones timeline includes the recruitment of Mr. Meraz to head the Office of Diversity, but it does not show that he was the third person to head the office. It is my understanding that Mr. Meraz is no longer with Merrill Lynch (FINRA BrokerCheck Report for Ronald J. Meraz, Report #63708-62102, dated as current as of January 05, 2009).
[91]Jones Report, p. 20.
[92]Jones Report, p. 20. Also see McCann depo., p. 75-76; Pillar depo., p. 194-196; Barry depo., p. 302-303.
[93]See McCann depo., p. 21-35 and the two versions of the report which are Exhibits 3 and 4 to that deposition, and Exhibit 5, an e-mail from Maura Gallagher to Kim Pillar dated July 7, 2004, stating that a modified document withholding the breakout by specific racial categories had been prepared for the Committee. Also see Pillar depo., p. 193-209.

In sum, Ms. Jones opinions are based on a flawed methodology, a convoluted, flawed logic, a misreading of documents and testimony, and a tendency to draw conclusions from pronouncements, proposed initiatives, and descriptions of programs instead of substantive analysis of the impact of Merrill Lynch's diversity efforts on actual or potential discriminatory barriers faced by African Americans. Ms. Jones makes no reference to, nor expresses an opinion about the scientific literature I cite as the basis of my opinion, and she provides hardly any citations to scientific research to support her own opinions.

THE EXPERT DOTH PROTEST TOO MUCH: DR. WILLIAMS' REPORT ON MULTICULTURAL MARKETING IS IRRELEVANT TO THE OPINIONS EXPRESSED IN MY EXPERT REPORT

In my Expert Report, I described how Merrill Lynch linked its workforce diversity and human resources efforts to its multicultural marketing function. I also explained how that function was structured along racially defined market segments. I then explained how that relationship between Merrill Lynch's diversity/EEO function and it's racialized approach to multicultural marketing lead to and reinforce a kind of typecasting of African American FAs. Their career trajectories at Merrill Lynch became associated with the servicing of markets defined by race, thereby creating a kind of "racialized job."[94] The key point relevant to the *McReynolds* litigation is that African American FAs' opportunities were limited by a business strategy built on the assumption of race matching between Merrill Lynch's employees and the customers it serves. Dr. Williams chose to ignore this point altogether. He expresses no opinion one way or another about whether Merrill Lynch's employees' opportunities were shaped and constrained by Merrill Lynch's multicultural marketing strategies.

[94]Bielby Expert Report, paragraphs 44 through 55, p. 35-46.

Dr. Williams' report addresses largely three questions: (1) whether Merrill Lynch's approaches to multicultural marketing by using race as a way of defining market segments constituted racial profiling "as generally defined in the marketing and criminal justice literature;" (2) whether Merrill Lynch's approach to multicultural marketing is comparable to those of other firms who professionals in his field agree have programs of high quality; and (3) whether Merrill Lynch discriminates against its customers on the basis of race.[95]

I have not expressed an expert opinion on whether Merrill Lynch engages in racial profiling as understood by marketing and criminal justice professionals. The term "racial profiling" appears just once in my report, and the word "profiling" appears just four times, and two of those instances are quotations from documents produced by Merrill Lynch. I have not expressed any opinion about whether Merrill Lynch's use of race as a marketing strategy is similar to or different from how it is used by other companies that choose to use race to define market segments.[96] And finally, I have expressed no opinion about whether Merrill Lynch discriminates against its customers on the basis of race. This appears to be a legal opinion that is within the purview of the court and which I have not been asked to investigate. I do note, however, that documents broadly disseminated by the multicultural marketing group contain and could foster or perpetuate harmful stereotypes about African American clients and potential clients, which may well inform attitudes and affect the treatment of African American clients as well as FAs.[97]

Dr. Williams could be correct on all three questions - Merrill Lynch's use of race in its marketing strategies could be different from what racial profiling is assumed to mean to criminal

[95]Williams Report, p. 2.
[96]Dr. Williams has not produced some of the information he appears to rely upon to reach his conclusion regarding Merrill's and other companies' use of multicultural marketing, which would make it impossible to fully respond even were this relevant to class certification.
[97]Should this case proceed past class certification, I may further study and opine upon Dr. Williams' conclusions and Merrill's multicultural marketing program but do not think these issues are necessary at this juncture of the litigation.

justice scholars and to marketing professionals; its use of race in multicultural marketing could be similar to what other companies do who are highly regarded by marketing professionals; and Merrill Lynch may not be discriminating against its customers. However, that would not change my opinion that the association of multicultural marketing by race with Merrill Lynch's employment diversity efforts created racialized jobs that limit opportunities for African American FAs. The key here is the linking of the race of the customer to the race of the employee (the FA), and that is the issue that is ignored by Dr. Williams. When that association is forged and built into company documents, training materials, employment diversity programs, and the like, then the kinds of statistical profiles by race and other demographic traits that come out of a multicultural approach to marketing become associated with racial stereotypes about the capabilities and appropriate roles for company employees based on the color of their skin. If Dr. Williams is correct on all three questions, the only alteration I would make to my report is to change my one use of the phrase "racial profiling" to "profiling by race" in order to avoid any confusion between how I am using the term and how it is understood in a different professional realm.

As explained above, my report was not designed to assess the value of multicultural marketing in the abstract but as applicable to the issues raised by this case and as used by Merrill Lynch, where multicultural marketing took on a role that was not limited to the marketing department but expanded to diversity and other business functions and was disseminated in materials and presentations to all FAs in the brokerage workforce. Merrill's multicultural marketing program and materials were designed, led and implemented by personnel who lacked marketing backgrounds or multicultural marketing expertise, including Ms. Barry and Mr. Henry, and who greatly expanded its role in Merrill Lynch, with the approval of senior executives. While Dr. Williams dismisses racial stereotypes in the multicultural materials as unfortunate word choices and even defends some as true, I disagree about the potential impact of such statements or what they reveal about Merrill Lynch. Dr. Williams evaluates Merrill's multicultural marketing program in a vacuum, without taking into account the organizational context, Merrill Lynch's history and culture, or the working conditions of and challenges faced by African Americans.

DÉJÀ VU: THE WINSHIP/TETLOCK CRITIQUE

Drs. Winship and Tetlock cover much of the same ground. They charge that I have not followed a scientific approach in my analysis of Merrill Lynch's personnel policies and practices, that I have drawn selectively from both the research literature and from the evidence in the McReynolds litigation to support my conclusions, and that I have either mischaracterized relevant scientific literature or drawn on scientific research that does not apply to Merrill Lynch. This is not the first time that either Dr. Winship or Dr. Tetlock has been retained to rebut my opinions in a matter related to employment discrimination. Over the past 15 years, Dr. Winship has submitted rebuttal reports or affidavits in eight previous cases (including the Cremin litigation involving Merrill Lynch), and he is frequently retained by defendants as a rebuttal witness to other social scientists who have testified on behalf of plaintiffs in discrimination litigation. For Dr. Tetlock, this is the third time in four years that he has submitted a rebuttal report criticizing my opinions in litigation regarding employment discrimination. He too is frequently retained by defendants as a rebuttal witness to other social scientists who have testified on behalf of plaintiffs in discrimination litigation.

The Winship Report

Dr. Winship criticizes me for not writing my Expert Report in exactly the same format one would use to submit a manuscript for review to a peer-reviewed scientific journal.[98] To Dr. Winship, in forming an expert opinion about allegations of racial discrimination in any given organization -- we will call it organization X where it is alleged that policy P is responsible for disparities in career outcomes by race, it is not enough to rely upon a well-established body of scientific knowledge to gain understanding of the mechanisms at work that are likely to have created disparities by race at organization X. In addition, according to him, one must approach the task and describe it in exactly the same way as one would if he or she were conducting basic scientific research, testing hypotheses, and generating new theoretical knowledge. But to Dr. Winship, even that would not be enough. In his view, the expert would not be able to rely on the empirical and theoretical findings of existing scholarship unless that scholarship had been conducted in organizational settings identical to organization X but differing in whether they use policy P. If that is not the case -- and it hardly ever is -- Dr. Winship would require the expert to analyze empirical materials for organization X *and* comparable materials from two other samples of organizations: U, V, W, and Z that use policy P and A, B, C, D, and E that do not use policy P.

In the context of the *McReynolds* litigation, because there is not an extant body of scientific literature based on a representative sample of large financial services firms, some with multicultural marketing functions and diversity practices organized like Merrill Lynch's and others with multicultural marketing functions and diversity practices organized in a different manner, there is no basis for applying existing, reliable scientific knowledge to the facts of the case. Instead, before drawing any conclusions, the expert must collect and analyze the same

[98]Winship Report, p. 8-18.

kinds of empirical materials that are available for Merrill Lynch from a large sample of financial services firms that differ among themselves in how they use multicultural marketing and structure their diversity practices. It costs many millions of dollars to compile and analyze those materials for Merrill Lynch, and unless the expert has the budget and access to compile and analyze the same kinds of materials from dozens, if not hundreds of other large financial services firms, he or she must refrain from expressing a scientifically-grounded opinion about Merrill Lynch. And that is precisely Dr. Winship's position. To him, it is impossible to assemble the data necessary to reliably apply the findings from social science research to Merrill Lynch or to any other large organization in a litigation context. Moreover, by his standard, doing such an expert analysis will never be possible; social scientists have no business expressing opinions about the impact of organizational policies and practices in any litigation context.[99]

But science is more than compiling empirical findings and applying them to new circumstances only when those circumstances can be linked precisely to the range of circumstances and settings covered by existing research. Scientists gain a level of abstract understanding of how the world works, and in a disciplined and empirically grounded way, scientists develop concepts, models, and theories that reflect our understanding of the world. Scientists then rely on those concepts, models, and theories to understand how the empirical world is patterned in novel contexts and settings that may never have been subject to empirical scientific study before. That is precisely what I have done in the *McReynolds* litigation, as I explained in paragraph 8 in my Expert Report and it is the same approach I have taken in the fifty or so reports I have done in litigation contexts over the past eighteen years. And while the format I use in writing for the court is not the same as what I would use in writing for a peer

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[99]W. T. Bielby, "Can I Get a Witness? Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation," *Employee Rights and Employment Policy Journal*, Vol. 7, 2003, p. 377-400.

reviewed journal or academic book, my approach to empirical materials and my use of existing scholarship is identical to what I use when I publish in scientific venues.

The organizational case study, the approach I use, has a long and distinguished history in organizational sociology and management studies.[100] Normally, social scientists who do organizational case studies face formidable obstacles to gaining access to official organizational records and data. Equally difficult is gaining access to high level executives. Obviously, one advantage of doing organizational case studies in a litigation context is the access one has to organizational documents and data, and to sworn deposition testimony of high level executives who have responsibility for formulating and overseeing company policies. The McReynolds litigation is no exception. In fact, in my eighteen years of doing case studies in the context of litigation, I cannot think of a single instance where I have had more complete access to relevant data and documents. Unique to this litigation is access to all of Merrill Lynch's documents concerning personnel practices, diversity, and equal employment opportunity with respect to Merrill Lynch's FA workforce in digital and text-searchable format. As a result, contrary to the claim of Dr. Winship that I took a selective and biased approach to choosing the documents I relied upon, for every topic I addressed in my report I was able to (and did) search through the entire database of documents with the Concordance Database (e.g. on terms such as "office of diversity," "multicultural marketing," "account transfers," etc. and with Boolean operators applied to combinations of terms), as well as the entire database of depositions, to get a full and balanced view of what appears in the evidentiary record.

[100]On the case study method, see, for example, D. Vaughan, "Theory Elaboration: The Heuristics of Case Analysis," p. 173-202, in *What is a Case? Exploring the Foundations of Social Inquiry, edited by* C. Ragin and H. S. Becker, Cambridge University Press, 1992 and M. Burawoy, "The Extended Case Method," Sociological Theory, Vol. 16, 1998, p. 4-33. Perhaps the best known and most highly regarded organizational case study in sociology is R. M. Kanter, *Men and Women of the Corporation*, Basic Books, 1977.

There are, of course, several limitations to doing organizational case studies in a litigation context. Experts, especially those retained by plaintiffs, normally cannot do on site observation at the organization and therefore are unable to benefit from the in-depth insights that come from ethnographic approaches to life in organizations, and any statement by a current or former employee of the organization can be colored by that person's stake in the outcome of the litigation. But being mindful of the tendency for self-serving accounts is an issue that organizational sociologists must attend to in any kind of case study, so the issue in a litigation context is a matter of degree, and not kind.[101] And, of course, the major limitation for scientific purposes is that much more often than not, especially when cases do not go to trial, documents, data, and testimony generated through discovery are covered by protective orders or other kinds of confidentiality agreements that prohibit their use for scientific research and ultimate publication in journals or other academic outlets. In the context of the *McReynolds* litigation and Dr. Winship's criticism of the format of my report, if Merrill Lynch was willing to waive the confidentiality agreements, I would welcome the opportunity to recast the analyses I did for my Expert Report into a format suitable for submission to a peer-reviewed scientific journal.

In the last substantive section of his report, Dr. Winship criticizes me for analyses I did not conduct that he feels I should have conducted.[102] Dr. Winship does not report any independent analysis of the case materials himself, and everything that he writes about in Section VIII of his report is duplicative of arguments by Dr. Saad that I have responded to above.

Finally, Dr. Winship opines at length (nearly three pages) about the concept of "social framework analysis."[103] Dr. Winship and I agree that this is a legal concept, not a scientific

[101] Vaughan, *op cit*., p. 198-199.
[102] Winship Report, p. 15-18.
[103] Winship Report, p. 6-8.

concept. Like Dr. Winship,[104] in my 32 years as a professional sociologist, I have not come across the term outside of a legal context. And I believe that Dr. Winship would agree with me that neither he nor I is a legal scholar. Unlike Dr. Winship, I recognize that expressing a legal opinion on the concept is outside my (and his) realm of professional competence. And here, it is Dr. Winship who presents a one-sided review of the literature, relying heavily and uncritically on a single article coauthored by Gregory Mitchell, the collaborator and business partner of Dr. Tetlock.[105]

The Tetlock Report

Dr. Tetlock's opinions overlap substantially with Dr. Winship's. Indeed, their reports are so similar that it is difficult to understand how Dr. Tetlock could have billed more than five times as much as Dr. Winship for what appears to be roughly the same expert services ($312,425 compared to $56, 332), especially since much of what appears in Dr. Tetlock's report is similar to criticisms he has launched at me in prior litigation. Dr. Tetlock's attack on the scientific basis for my opinions is almost identical to Dr. Winship's, so I will not respond in detail to them here. For example, he discounts my analysis of racialized marketing and jobs because the organizations upon which existing literature is based are unlike Merrill Lynch.[106] And, for example, he discounts my application of research on stereotyping because, in his opinion I have not taken into account research on moderating variables such as "individuating information,"[107] and I have failed to take into account what he believes are fatal flaws in the scientific literature on implicit

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[104]Winship Report, p. 6.
[105]Tetlock & Mitchell, LLP (http://tetmitch.net/). A view of social framework analysis that is substantially different from the source Dr. Winship relies upon can be found in S. T. Fiske and E. Borgida, "Social Framework Analysis as Expert Testimony in Sexual Harassment Suits," in *Sexual Harassment in the Workplace: Proceedings of New York University 51st Annual Conference On Labor*, edited by S. Estreicher, Klewer International, 1999. Also see E. Borgida, C. Hunt, and A. Kim, "Research in Sex Discrimination Litigation," *Journal of Law and Policy*, Vol. 13, 2005, p. 613-628.
[106]Tetlock Report, p. 16-17.
[107]Tetlock Report, p. 20-22.

bias.[108] These are criticisms that are almost always raised in employment discrimination litigation in which plaintiffs' experts have relied on stereotyping research, and the issues have been addressed in considerable detail in the social science literature.

Dr. Tetlock's view that a little bit of individuating information -- even irrelevant individuating information -- goes a long way (or all the way) in checking bias is at odds with the consensus among stereotyping researchers who study workplace bias.[109] Social psychologists Laurie Rudman and Peter Glick, each of whom has made important contributions to stereotyping research, have recently summarized both the nature of the relationship between stereotypes and individuating information and the relevance of this research for discrimination litigation. Their chapter, "From the Laboratory to the Bench: Gender Stereotyping Research in the Courtroom,"[110] focuses on gender stereotypes, but their analysis of individuating information is equally relevant to racial stereotypes. In a section titled "Does Individuating Information Eliminate Stereotypes and Discrimination?" they write:

> However, some defense attorneys and expert psychologists have interpreted past research (e.g., Locksley, Borgida, Brekke, & Hepburn, 1980) as indicating that clear, individuating information easily "dissolves" stereotypes (e.g., Barrett & Morris, 1993; Huffman v. Pepsi-Cola Bottling Co., 1994; Jensen v. Eveleth Taconite Mining Co., 1993; Jussim, Eccles, & Madon, 1996; Kunda & Thagard, 1996). Given that individuating information is invariably present in personnel decisions (e.g., hiring and promotions are not determined knowing only a candidate's gender), it is tempting to conclude that stereotyping has negligible effects in the workplace. A considerable body of research shows, however, that this is a false conclusion: gender discrimination has been repeatedly demonstrated in hiring decisions for male-dominated jobs, with male applicants favored over female applicants when individuating information suggests similar qualifications (for comprehensive reviews, see Fiske, Bersoff, Borgida, Deaux, & Heilman, 1991; Fiske, 1998; Deaux & LaFrance, 1998; Eagly & Karau, 2002). As a result, women continue to be underrepresented in managerial and high-status professions (e.g., Bielby &

[108]Tetlock Report, p. 23-24.
[109]I am repeating here my response to an almost identical criticism Dr. Tetlock made in his rebuttal to my expert report in *Nelson et al. v. Wal-Mart Stores*, CONSOLIDATED CIVIL ACTION NO. 2-04CV0000171 WRW.

[110]A. Rudman, P. Glick, and J. E. Phelan "From the Laboratory to the Bench: Gender Stereotyping Research in the Courtroom," p. 84-101 in *Beyond Common Sense: Psychological Science in the Courtroom*, edited by E. Borgida and S. T. Fiske, Blackwell, 2007.

> Baron, 1986; Giele, 1988; Reskin & Ross, 1992). Moreover, even when women break through the glass ceiling, they continue to suffer economic discrimination (i.e., to receive less money for the same position; Babcock & Laschever, 2003; Reskin & Padavic, 2002; Roos & Gatta, 1999). If individuating information trumps stereotypes, such discriminatory effects would be rare and negligible. They are not.[111]

In the same section of their chapter, they note the following under the heading "Stereotypes bias how individuating information is gathered and interpreted":

> The likelihood that perceivers will gather or pay close attention to stereotype-disconfirming information is affected by people's general preference to confirm (rather than disconfirm) their stereotypes (e.g., Cameron & Trope, 2004; Gawronski, Ehrenberg, Banse, Zukova, & Klauer, 2003; Trope & Thompson, 1997; for reviews, see Miller & Turnbull, 1986; Snyder, 1984). Moreover, perceivers use different evidentiary standards to evaluate individuating information, requiring more compelling information to disconfirm than to confirm a stereotypic expectation (Biernat, 2003; Biernat & Ma, 2005). Finally, perceivers with particularly strong stereotypic associations tend to have poor recall for individuating information; they also falsely recall information about the target in a stereotype-consistent manner (Gawronski *et al.*, 2003; Miller & Turnbull, 1986; Snyder, 1984).[112]

Rudman *et al.* conclude their discussion of individuating information and bias with the following statement that is substantially at odds with Dr. Tetlock's view regarding the ease with which stereotyping bias can be checked (emphasis in original):

> In short, individuating information is not likely to undermine stereotypic assumptions unless it is completely unambiguous and specific. For example, female candidates for a managerial position were evaluated as less suitable than male counterparts even when they were described as "successful;" to undermine sex discrimination, the women had to be described as successful managers (Heilman *et al.*, 1995). Based on a comprehensive literature review, Fiske and Taylor (1991) concluded that stereotyping is only likely to be counteracted "when the potentially diluting behavioral information is clearly, unambiguously judgment relevant, *to the point of redundancy with the judgment*" (p. 136, emphasis added).[113]

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[111]Rudman *et al., op cit.*, p. 86.
[112]Rudman *et al., op cit.*, p. 87.
[113]Rudman *et al., op cit.*, p. 88.

Two other leading stereotyping researchers make a nearly identical point about the relevance of individuating information to stereotyping bias in "real world" organizational settings. Here, Madeline E. Heilman and Alice Eagly are responding to an argument put forth by Dr. Frank Landy, whose views on individuating information are almost identical to Dr. Tetlock's. Heilman and Eagly use the example of gender stereotypes, but again their point is equally applicable to racial stereotypes:

> Landy would have us believe that overriding stereotypes is an uncomplicated process and a common event. But neither is the case. Although individuating information can indeed deter stereotyping, there are many circumstances under which it does not have this effect. As well established in research on social cognition, whether stereotypes are activated and applied depends on a complex of cognitive and motivational variables (see Kunda & Spencer, 2003), including whether individuals have the cognitive resources to inhibit stereotyping and whether they are motivated to be accurate. The conditions that deter stereotyping are often absent in work settings because of decision makers' cognitive overload, motivation to maintain the status quo, and limited dependence on subordinates for valued outcomes. Thus, stereotype-based perceptions of lack of fit are likely to take hold despite the availability of additional information. Moreover, the expectations that these perceptions produce can be tenacious and self-sustaining, even in the face of disconfirming information. They can affect what information social perceivers attend to, how they interpret the information, what they remember, and how they engage in social interaction, often in a manner that reinforces their prior expectations. Therefore, the individuating information available to decision makers in organizational settings does not necessarily prevent discriminatory decision making.[114]

In his report, Dr. Tetlock repeats his now infamous critique of research on implicit bias and the implicit association test, even though I cited none of that research in support of my own opinions in this litigation. Again, the criticism has been responded to in detail by researchers in the field, and I will repeat here the response I made to Dr. Tetlock in the *Nelson et al. v. Wal-Mart Stores* litigation. In 2004, the journal *Psychological Inquiry* published Professor Tetlock's critique of the IAT, "Attributes of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit

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[114] A. H. Eagly and M. E. Heilman, "Gender Stereotypes Are Alive, Well, and Busy Producing Workplace Discrimination," *Industrial and Organizational Psychology: Perspectives on Science and Practice*, Vol. 1, 2008, forthcoming. The quoted passage is from pages 7-8 of the manuscript version of their article. Their article is in response to F. J. Landy, "Stereotypes, Bias and Personnel Decisions: Stranger and Stranger," *Industrial and Organizational Psychology: Perspectives on Science and Practice*, Vol. 1, 2008, forthcoming.

Association Test?," as well as a detailed response by IAT researchers,[115] and in the following year his op-ed essay, "We're All Racists at Heart," coauthored with legal scholar Amy Wax, appeared in the *Wall Street Journal*.[116] Since then, Dr. Tetlock and his collaborator Gregory Mitchell -- neither of whom have conducted original research on implicit racial bias -- have published or have had accepted for publication at least four other manuscripts repeating and elaborating their critique of research on racial stereotyping, the IAT, and implicit bias.[117] Collectively, this body of work portrays research on implicit racial bias and the IAT as seriously flawed, highly controversial, and politically motivated by a "statist interventionist" political agenda that advocates "racial quotas" as the only effective intervention for minimizing bias.

The leading scholars who have contributed to research on implicit bias and stereotypes have vigorously contested this portrayal. Most recently, prominent social psychologists John Jost, Laurie Rudman, Irene Blair, Dana Carney, Nilanjana Dasgupta, Jack Glaser, and Curtis Hardin have coauthored a response to Mitchell and Tetlock's forthcoming chapter, "What Must Organizations Do to Check Bias," in the 2008 volume of *Research in Organizational Behavior*. Their response, "The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore," will appear as a chapter in the same volume. Regarding the

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[115]H.R. Arkes and P. E. Tetlock, "Attributes of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?," *Psychological Inquiry*, Vol. 15, 2004, p. 257-278; M. R Banaji, B. A. Nosek, and A. G. Greenwald, "No Place for Nostalgia in Science: A Response to Arkes and Tetlock," *Psychological Inquiry*, Vol. 15, 2004, p. 279-310.

[116]A. Wax and P. E. Tetlock, "We're All Racists at Heart," *Wall Street Journal*, December 1, 2005, p. A16.

[117]G. Mitchell and P. E. Tetlock, "Anti-Discrimination Law and the Perils of Mind Reading, *The Ohio State University Law Review*, Vol. 67, 2006, p. 1023-1121; P. E. Tetlock and G. Mitchell, "Calibrating Prejudice in Milliseconds," *Social Psychology Quarterly*, Vol. 71, 2008, p. 12-16; P. E. Tetlock, G. Mitchell, and T. L. Murray, "The Challenges of Debiasing Personnel Decisions: Avoiding both Under-Correction and Over-Correction," *Industrial and Organizational Psychology: Perspectives on Science and Practice*, Vol. 1, 2008, forthcoming; P. E. Tetlock, G. Mitchell, "Unconscious Prejudice and Accountability Systems: What Must Organizations Do to Prevent Discrimination?," *Research in Organizational Behavior* Vol. 32, 2008, forthcoming.

"controversy" over research on implicit bias and its status in the scientific community, Jost *et al.* wrote:

> But reading the critique by Tetlock and Mitchell (this volume)—or any of the other highly similar, predominantly overlapping critiques of research on implicit prejudice that Tetlock has previously co-authored (Arkes & Tetlock, 2004; Mitchell & Tetlock, 2006; Tetlock & Arkes, 2004; Tetlock & Mitchell, 2008) —one is likely to come away with a sense that the discipline of social psychology itself is in disarray and that its constituents are deeply divided over the question of whether implicit bias really exists. This impression would be false. The fact of the matter is that the field of social psychology has not seriously doubted the existence of implicit stereotyping and prejudice since at least the early 1990s, if not earlier.[118]

Regarding charges leveled by Tetlock and Mitchell that consensus among implicit bias researchers is based on shared political and moral judgments rather than sound scientific principles,[119] Jost *et al.* write:

> To be sure, individual researchers can be mistaken. However, the history of science suggests that, though there may be plenty of room for misconceptions at the margins, it is rare (though not entirely unheard of) for the huge preponderance of scientists within a well-established discipline to be utterly and spectacularly wrong. This seems to be what Tetlock and Mitchell (this volume) are suggesting—that the near-consensus among social psychologists concerning the discovery of implicit bias reflects some kind of collective folly or perhaps a hoax or in any case the regrettable result of a blinding ideological commitment to the doctrine of "statist interventionism" (see also Wax & Tetlock, 2005). The fact of the matter is that, as we will endeavor to illustrate, the existence of implicit bias is beyond reasonable doubt. There are not "islands of consensus in a sea of controversy," as Tetlock and Arkes (2004) claimed; rather, it is very much the other way around.[120]

Jost *et al.* go on to review the vast body of peer-reviewed research on implicit bias published over the past decade and its grounding in older traditions of stereotyping research that have had widespread acceptance in the scientific community for decades. They conclude with a summary

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[118]J. Jost, L. Rudman, I. Blair, D. Carney, N. Dasgupta, J. Glaser, and C. Hardin, in the 2008 volume of "The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore," *Research in Organizational Behavior*, Vol. 30, 2008, forthcoming, p. 3. Pages numbers cited here are to the manuscript version of the chapter, not those that will appear in the published chapter.
[119]Mitchell & Tetlock, 2006, *op cit.*, p. 1029, 1032.
[120]Jost *et al.*, *op cit.*, p. 5.

of ten studies that demonstrate validity of measures of implicit bias, most dealing with measures of implicit bias as predictors of discriminatory behavior towards racial and ethnic minorities, including studies relating to workplace racial discrimination. No doubt the Jost *et al*. review and others similar to it[121] are not sufficient to convince Dr. Tetlock of the scientific integrity of this important line of research and its applicability to understanding racial and gender bias in organizational settings. I cite it here as evidence for the Court to use in evaluating whether the stereotyping research I have relied upon has met peer-review standards of acceptability in the scientific community.

Dr. Tetlock shares Dr. Winship's view that I have systematically misrepresented documents and testimony, but here he goes beyond Dr. Winship by presenting an appendix, Appendix C to his report, where he presents what he describes as 36 examples of the numerous "descriptive errors" made by me.[122] I have reviewed all 36 examples, and with minor exceptions they are either wrong, trivial, and in one instance, a matter of interpretation where he and I come to different conclusions from the same words. I will give examples of the former and specifically mention the two latter here.

Dr. Tetlock criticized me for citing to Subha Barry's testimony for my statement that as of December, 2005 Merrill Lynch had no African American FAs in 28 states because the question posed to Ms. Barry was whether she knew that there were no "tenured African-Americans working in them"[123] (she answered yes). Ms. Friedman, plaintiffs' counsel, did not define what she meant by "tenured" in posing the question to Ms. Barry, but she did when posing the same question to Mr. Gardner. Asked by Mr. Gardner to define "tenure," she stated "people

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[121]See, for example, M. R. Banaji *et al.*, *op cit.*; and L. Quillian, "Does Unconscious Racism Exist?" *Social Psychology Quarterly*, Vol. 71, 2008, p. 6-11.
[122]Tetlock Report, p. 8.
[123]Tetlock Report, Appendix C, p. 68.

who hold the title of FA as opposed to trainees." I was interpreting it in precisely the same way, that is, there were no African American FAs in 28 states, not including trainees. To my knowledge no one has disputed that fact (indeed, Defendant's expert Dr. Saad seemed to have no difficulty interpreting my statement[124]).

Dr. Tetlock takes issue with my statement that company analyses for the first part of 2005 showed that "over 25% of FA-to-FA account transfers happened within two weeks prior to the sending FA's separation from the firm."[125] The document I relied upon (BATES MLE 00178 - 000214) states "through Sept 05, $1.3 billion of the total $4.8 billion transferred was moved from FAs who terminated within 2 weeks of the account transfer." By my calculation, that turns out to be 27.08%.

Dr. Tetlock criticizes me for the following statement: "Race-matching was an explicit criteria for selecting the heads of each of marketing group: an African American was selected to head the African American group, a South Asian to head the South Asian group, and so on."[126] Here is a the testimony of Ms. Barry that I cited:

Q. Who was the person in your
organization who headed the effort with
respect to the Hispanic market?
A. The African-American market leader
was Keith Henry.
Q. I asked you about Hispanic; who was
the Hispanic leader?
A. Mario Paredes.
Q. Mario Paredes. Is that
P-A-R-E-D-E-S?
A. Yes.
Q. Is he Hispanic?
A. Yes.
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[124]Saad Report, p. 55).
[125]Tetlock Report, Appendix C, p. 71.
[126]Tetlock Report, Appendix C, p. 74-75

Q. And Keith Henry, you said, was the
person who led the effort on the
African-American. Is Keith Henry
African-American?
A. Yes.
Q. Who were the people that did the
South Asian market?
A. Jyoti Chopra.
Q. What is her race or ethnicity?
A. She is South Asian.
Q. Who oversaw the LGBT?
A. We did not have a separate person,
but Caroline Gundek, who was head of the
women's market, also took responsibility for
that market.
Q. Was there someone over native
American?
A. Yes. It was Dawson Her Many Horses.
Q. What is her race or ethnicity?
A. Dawson is a male. He was native
American.
Q. Was there a person who headed up the
disabilities?
A. Chris Sullivan, who is disabled
0066
himself.
Q. What is his disability?
A. He has a hearing impairment.
Q. Was there a reason, for example,
that the person who headed out the
African-American market was African-American?
A. I believe that having a market
leader that was a domain expert in that market
was critical at the beginning.
Q. Was race a factor in the selection
of those people to lead each market?
A. Yes.

Note that in my Expert Report I stated that race-matching was "an explicit criteria" (sic), not the *only* criterion. I cannot see how Ms. Barry's testimony could be read to imply anything different.

Dr. Tetlock criticizes me for citing to an online article in my Expert Report to support my statement that the Office of Diversity had three different heads in its short existence.[127] Dr. Tetlock notes correctly that the article is about Mr. Meraz being appointed to replace Colbert Narcisse. Dr. Tetlock finds fault in my use of this source because it mentions two heads of the Office, not three. But in another footnote to my report, a few pages earlier, I cite to deposition testimony by Ms. Chopra that when Mr. Narcisse stepped down as Chief Operating Officer in May, 2007, his replacement, Navtej Nandra, also succeeded him as head of the Office of Diversity.[128]

Dr. Tetlock accuses me of making small changes to language in documents but still using quotation marks.[129] Although he does not say so, he leaves the impression that I am misrepresenting documents in a way that changes meaning in a manner supportive of the plaintiffs' litigation position. The example he cites is below. First, I present the language from my report, which I have electronically cut and pasted from my Expert Report to avoid any chance of misquoting myself. The only alteration I have made from the original report is to show the passages quoted from the document in bold italics and to remove the footnote superscripts. Then I present the language from the document, which I also have cut and pasted.

> 54. It is perhaps not surprising that the racialized approach to multicultural marketing lead to the development of assumptions that to be successful, African American FAs needed to possess unique talents not identified as success factors for non-African American FAs. For example, the 2001 Multicultural Business Plan included guidance for training those who hire into the FA training program ***"to be adept in identifying these skills/characteristics found in successful diverse FAs"*** which included ***"ability to build relationships with individuals they are not comfortable with," "thick skin, fearless," "ability to thrive in an environment where they are the minority,"*** and "***associated with circles of wealth via prior education and employment."*** When asked

[127]Tetlock Report, Appendix C, p.80.
[128]Bielby Expert Report, footnote 171, p. 64. I cited to the online article about Mr. Meraz's appointment because it did not appear in any of the deposition testimony or documents produced by Merrill Lynch. And, as I noted above, it is my understanding that Mr. Meraz is no longer with Merrill Lynch. So the Office of Diversity is either leaderless or it has a fourth head as of February 2009.
[129]Tetlock Report, Appendix C, p. 76.

how the list of skills was developed, Ms. Barry, who headed the multicultural marketing unit at the time, testified that "it could have been [her own] personal insights." (emphasis added and footnotes omitted)

- Train members of the sourcing and selection process to be adept in identifying these skills/characteristics commonly found in successful diverse FAs including.
  - Ability to build relationships with individuals that they are not comfortable, familiar with
  - Mentally tough, emotionally tough, thick skin, fearless
  - Ability to thrive in environment where they are minority
  - Associated with circles of wealth via prior education, employment (Ivy League Schools, Military Academy, etc.)
  - Leadership role in extra-curricular activities (Philanthropic, Religious, Non-Profit, etc.)

It should be obvious from comparing the two that the differences are trivial. The biggest difference is that I inadvertently quoted the words "they are not comfortable, familiar with" as "they are not comfortable with."

Dr. Tetlock charges that I mischaracterized Ms. Barry's testimony that I cite in support of this statement from my report: "Ms. Barry did not believe that Merrill Lynch branch managers were interested or capable of successfully managing minority employees and that they lacked 'affinity' with diverse markets." Dr. Tetlock is correct that the pages I cite do not specifically refer to branch managers' capabilities to manage diverse employees.[130] However, additional testimony by Ms. Barry does indeed support the conclusion I have drawn. I should have added a citation to additional passages from her deposition. At page 106, she testified:

> Q. Under weaknesses for the alternative diversity model, you have -- the first one is "little to no affinity for field management within diverse markets." What does that mean?
>
> A. That our field managers did not have, or had very low affinity, because, at that point in time, many of them were still white men, that they did not have the affinity or the connection to was diverse communities.
>
> Q. Why was that a weakness?

[130] Tetlock Report, Appendix C, p. 79.

A. Because we viewed that having that connection to be an important factor that could contribute to success.

And at page 134-135 of her deposition she testified:

134

Q. Little to no manager/ diverse FA turnover -- what does that mean -- as a criteria for market hand-off?

A. I mentioned that in the previous slide, where I talked about, when you talked about the risks and the way to solve for them.

You know, if you have a manager that comes in, managers move from office to office, and when the movement happens, if you have a manager that is not as adept at, with either the knowledge about the diverse communities in his or her market, or with respect to their FA population, that really creates the need for somewhat of the cycle to start again, because there is a re-education process that needs to

135

S. Barry - Confidential

go on.

Q. During the time that you were heading out the multicultural and diverse business development group, you saw that happen where the manager would change and you would need to start over again?

A. Um, in some cases, yes. Yes.

In addition, typewritten notes produced by Ms. Jones of the interview with Subha Barry, under the heading "biggest challenges," state: "preoccupied with their 'real jobs' and don't think they have the time to focus on D&I [Diversity & Inclusion]."[131] .Clearly, Ms. Barry is testifying about her opinion regarding local managers and the FAs they manage, not just the clients that they serve.[132]

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[131]BATES NOVATIONS 00005.

[132]Also see the notes of Ms. Jones' interview with Ms. Barry

The one example where there is a reasonable possibility of a different interpretation pertains to footnote 156 of my Report, where I make reference to an e-mail that I interpreted as evidence of concern by some in Merrill Lynch over unclear relationships about individuals responsible for diversity. In the quoted e-mail, Mary Allyn states "Please handle!!! Since when is Keith Henry Head of Diversity for Global Private Client???" Dr. Tetlock interpreted the e-mail as expressing concern for a typographical error, namely, that Mr. Henry should have been listed as head of diversity for *U.S.* Private Client.[133] He could be correct, but, it does not change my conclusions about the shifting and unclear lines of authority and responsibility for diversity and equal employment opportunity at Merrill Lynch.

Given that Dr. Tetlock has billed over $300,000 for his services, I believe it is reasonable to assume that considerable time and effort was devoted by Dr. Tetlock, or individuals working under his direction, on checking all of my citations to testimony and documents. The 187 footnotes in my Expert Report cite to thousands of pages of documents and hundreds of pages of deposition testimony. I made every effort to be as accurate as possible in those citations, and a careful analysis of Dr. Tetlock's Appendix C indicates that with just a few minor exceptions I succeeded in that task.

CONCLUSION

For the reasons stated above, the 13 million dollar effort by Defendant's eight experts has produced nothing that leads me to modify the opinions I expressed in my Expert Report.

[133] Tetlock Report Appendix C, p. 79.

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February 23, 2009