

United States District Court, S.D. New York.
Stella MITCHELL, Hwa-Mei C. Gee, Durpatty Persaud, and Janet Ramsey, on behalf of themselves and all others
similarly situated, and Barbara LaChance, individually, Plaintiffs,
v.
METROPOLITAN LIFE INSURANCE COMPANY, INC., dba Metlife, Defendant.
No. 01-Civ-2112 (WHP).
July 30, 2003.

Plaintiffs' Memorandum of Law in Support of Motion for Certification of Settlement Class, Preliminary Approval of
Consent Decree and Award of Attorneys' Fees and Costs, and Approval of Class Notice

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT ...	1
II. FACTUAL BACKGROUND ...	2
III. LEGAL STANDARD ...	4
IV. THE SETTLEMENT SATISFIES THE REQUIREMENT FOR PRELIMINARY APPROVAL ...	5
A. The Settlement Falls Within the Range of Possible Approval ...	5
1. Injunctive Relief ...	5
a. Monitoring Compliance ...	6
b. Increase in Human Resource Support and Internal Complaint Procedure ...	6
c. Benchmarks ...	7
d. Job Analyses ...	7
e. Training/ Evaluation ...	7
f. Recruitment ...	8
g. Management Development Program ...	8

h. Assignments of Business and Development Funds ...	8
i. Reporting and Recordkeeping ...	8
2. Monetary Relief ...	8
3. Attorney's Fees and Costs ...	9
B. The Settlement is the Product of Arm's Length Negotiations by Experienced, Qualified Attorneys ...	9
C. The Consent Decree Treats All Class Members Fairly ...	10
D. Attorney's Fees do Not Come Out OF the Class Recovery and Are Fair and Reasonable ...	11
V. CERTIFICATION OF THE SETTLEMENT CLASS PURSUANT TO FED. R. CIV. P. 23(A) AND (B)(2) IS PROPER ...	13
A. Fed. R. Civ. P. 23(a) ...	14
1. Numerosity ...	14
2. Commonality ...	14
3. Typicality ...	15
4. Adequacy if Representation ...	15
B. Rule 23(b)(2) ...	16
VI. THE CLASS ACTION SETTLEMENT NOTICE PROCEEDURE ...	17
VII. CONCLUSION ...	18

TABLE OF AUTHORITIES

CASES

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997). ... 4, 10, 13, 14, 15

Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81 (S.D.N.Y. 2001). ... 15-16

Butler v. Home Depot, 1996 WL 421436 (N.D. Cal. 1996). ... 16

Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999). ... 15

Cromer Finance Ltd. v. Berger, 205 F.R.D. 113 (S.D.N.Y. 2001). ... 15

In re Holocaust Victim Assets Litig., 105 F. Supp. 2d 139 (E.D.N.Y. 2000). ... 5

In re Ivan F. Boesky Secs. Litig., 948 F.2d 1358 (2d Cir.1991). ... 4

In re Michael Milken & Assocs. Secs. Litig., 150 F.R.D. 46 (S.D.N.Y. 1993). ... 4

In re Nasdaq Market-Makers Antitrust Litig., 176 F.R.D. 99 (S.D.N.Y. 1997). ... 5

In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001). ... 14, 15

M.A.R. Oil, S.A. v. Morrissey, 982 F.2d 830 (2d Cir. 1993) ... 13

Marisol A. v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996). ... 16

Marshall v. State of New York Div. of State Police, 31 F. Supp. 2d 100 (N.D.N.Y. 1998). ... 13

Martens v. Smith Barney, Inc., 1998 WL 1661385 (S.D.N.Y. July 28, 1998). ... 11

Newman v. Stein, 464 F.2d 689 (2d Cir. 1972). ... 4

Parker v. Time Warner Entm't Co., 331 F.3d 13 (2d Cir. 2003). ... 16

Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982). ... 11

Polar Intern. Brokerage Corp. v. Reeve, 187 F.R.D. 108 (S.D.N.Y. 1999). ... 13

Roberts v. Texaco, 979 F. Supp. 185 (S.D.N.Y. 1997). ... 11, 12

Robinson v. Metro-North Commuter R.R., 267 F.3d 147 (2d Cir. 2001). ... 14, 15, 16, 17

Selzer v. Board of Educ. of New York, 1993 WL 42787 (S.D.N.Y. Feb. 16, 1993). ... 11

Sheppard v. Consolidated Edison Co. of New York, Inc., 2002 WL 2003206 (E.D.N.Y. Aug. 1, 2002). ... 11

Shores v. Publix Super Markets Inc., 1996 WL 407850 (M.D. Fla. Mar. 12, 1996). ... 16

Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini, 258 F. Supp. 2d 254 (S.D.N.Y. 2003). ... 4

Wright v. Stern, 2003 WL 21543539 (S.D.N.Y. Jul. 9, 2003). ... 16, 17

FEDERAL STATUTES

42 U.S.C. § 1981a *et seq.* ... 1

42 U.S.C. § 2000e *et seq.* ... 1

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23(a) ... 14

Rule 23(a)(1) ... 14

Rule 23(a)(2) ... 14

Rule 23(a)(3) ... 15

Rule 23(a)(4) ... 15

Rule 23(b)(2) ... 2, 5, 13, 16, 18

Rule 23(d) ... 13

Rule 23(e) ... 2, 10

STATE STATUTES

New York Executive Laws §§ 290 *et seq.* ... 1

Title 8 of the Administrative Code of the City of New York ... 1

TREATISES

2 Newberg on Class Actions (3d ed. 1992 and 1996 Cumm. Supp.) § 11.43 ... 10

Manual For Complex Litigation, Third (Federal Judicial Center 1995)

MCL 3d § 30.41 ... 4, 5

MCL 3d § 30.41-43 ... 10

I. PRELIMINARY STATEMENT

Plaintiffs seek certification of a settlement class and preliminary approval of a \$13.4 million settlement on behalf of female employees of defendant Metropolitan Life Insurance Co., Inc.'s (“MetLife”) financial services division (MLFS) as to their allegations that MetLife engaged in a nationwide policy, pattern, or practice of gender discrimination in promotions and other career advancement and business development opportunities, compensation, and other terms, conditions and privileges of employment, in violation of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, 42 U.S.C. § 1981a (“Title VII”), the New York State Human Rights Law, New York Executive Laws §§ 290 *et seq.* (“NYSHRL”), and Title 8 of the Administrative Code of the City of New York (“Title 8”).

Counsel for the parties have executed the proposed Consent Decree submitted concurrently with this motion (provided herewith as Appendix to Memorandum of Law, Exhibit 1) as a full and complete settlement of the action. The proposed Consent Decree identifies the class as: All women who have been employed in a Sales Position or Sales Management Position in MLFS at any time on or after August 27, 1999, through the Preliminary Approval Date.^[FN1]

FN1. “Sales” and “Sales Management” positions are specifically defined in the Consent Decree. *See* App. Exh. 1 at II(A)&(T).

The proposed Consent Decree provides for substantial injunctive relief including: increasing Human Resources staff; requiring diversity and sales management training; increasing recruitment of women for sales and sales management positions; establishing benchmarks for increasing the number of women in sales management positions; developing objective job descriptions and selection criteria for sales management positions, and developing objective criteria for the distribution of sales leads and other business development resources within MLFS; and providing for monitoring of Decree compliance during the three (3) year term. Under the Consent Decree, MetLife expressly dedicates \$5 million to implement these injunctive relief provisions. In addition, the Decree provides for an additional \$5 million to pay the claims of the named plaintiffs and to be distributed to class members pursuant to a claims procedure, and up to \$3.4 million in current and future attorneys' fees and expenses.

The Consent Decree is the product of arm's length negotiations, treats all class members fairly, awards a reasonable amount in attorneys' fees and expenses, and easily falls within the range of possible approval. Therefore, Class Counsel respectfully requests that the Court preliminarily approve the Consent Decree, including payment of plaintiffs' attorneys' fees and costs, pursuant to Fed. R. Civ. P. 23(e), certify a settlement class pursuant to Fed. R. Civ. P. 23 (b)(2), approve the proposed notice, and set a fairness hearing for the week of November 2, 2003.

II. FACTUAL BACKGROUND

On March 13, 2001, five female current and former MLFS employees filed a complaint on behalf of themselves individually and other similarly situated female MLFS employees alleging that MetLife engaged in a nationwide policy, pattern, or practice of gender discrimination in promotions, compensation, and other terms, conditions and privileges of employment, in violation of Title VII, the NYSHRL, and Title 8. Plaintiffs filed a First Amended Complaint on June 13, 2002, and a Second Amended Complaint on April 2, 2003. Plaintiffs and the proposed class members were or are employed by MetLife's MLFS division as Financial Services Representatives ("FSR") and/or one of three MLFS agency manager positions, Functional Manager, Agency Directory, and/or Managing Director (together referred to as "Agency Managers").

On March 20, 2002, the Court, upon MetLife's motion, disqualified the law firm of Lieff, Cabraser, Heimann & Bernstein LLP from continuing to represent the plaintiffs and putative class. In April 2002, the law firm of Goldstein, Demchak, Baller, Borgen & Dardarian appeared on behalf of plaintiffs and the putative class as co-counsel with plaintiffs' original counsel, Outten & Golden LLP.

The parties engaged in extensive discovery during 2002 and early 2003. Plaintiffs deposed twenty-three (23) MetLife managers, human resources personnel, and company officers. Declaration of David Borgen (hereafter "Borgen Decl.," ¶ 7); Declaration of Adam T. Klein (hereafter "Klein Decl.," ¶ 5). MetLife deposed all of the named plaintiffs and thirty (30) current or former MetLife employees who had submitted declarations in support of class certification. *See* Borgen Decl. ¶ 7; Klein Decl. ¶ 5. Additionally, the parties deposed each other's statistical and sociological expert witnesses. *See* Borgen Decl. ¶ 6, 8; Klein Decl. ¶ 6, 7. MetLife produced computerized work history, demographic, and earnings data regarding the MLFS workforce and approximately 130,000 pages of documents in response to plaintiffs' discovery requests. *See* Borgen Decl. ¶ 4; Klein Decl. ¶ 4. Likewise, the named plaintiffs produced documents in response to MetLife's discovery requests. *See* Klein Decl. ¶ 4.

Plaintiffs filed their motion for class certification on February 28, 2003. Plaintiffs supported their motion with declarations of thirty-one (31) putative class members and other witnesses, excerpts of deposition testimony of MetLife managers and other personnel, documents obtained from MetLife during discovery, the reports of plaintiffs' statistical and sociological experts, and other evidence. MetLife filed its opposition to plaintiffs' class certification motion on April 30, 2003.

The parties initiated preliminary settlement discussions in November 2002, and continued their discussions while simultaneously litigating the case. The parties reached a tentative settlement in May 2003, at which time they advised the Court of the preliminary agreement and requested the Court postpone the deadline for plaintiffs' reply to MetLife's opposition to the class certification motion and the hearing on the motion. Thereafter, the parties continued to meet to work out the final details of the proposed Consent Decree. Class Counsel also met with named plaintiffs to discuss settlement options on several occasions during the spring of 2003. *See* Borgen Decl. ¶ 14. Class Counsel recommended the settlement to the named plaintiffs as a fair and reasonable resolution of all claims. Four of the five named plaintiffs agreed that the settlement terms are fair. As of the date of this memorandum, named plaintiff Stella Mitchell had not yet decided whether to participate in the proposed settlement. *See* Borgen Decl. ¶ 19.

As stated in the proposed Consent Decree, the parties agree that the extensive formal discovery conducted in this action, including the depositions taken by both sides, and the documents, statistical and other information produced or exchanged during the litigation and settlement discussions, is sufficient to assess the merits of the respective parties' positions and to compromise the issues on a fair and reasonable basis.

III. LEGAL STANDARD

Courts review proposed settlements in light of the strong judicial and public policies that favor extrajudicial resolution of cases. *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003) (citing *In re Ivan F. Boesky Secs. Litig.*, 948 F.2d 1358, 1368 (2d Cir.1991); *Newman v. Stein*, 464 F.2d 689, 692 (2d Cir.1972); *In re Michael Milken & Assocs. Secs. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993)). In the class action context, settlement has become a "stock device," *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618 (1997), where efficiency and certainty are given weighty consideration. The proposed Consent Decree furthers these goals. Class members will receive fair and adequate compensation for their claims, including both monetary and extensive injunctive relief.

The Manual for Complex Litigation, Third (Federal Judicial Center 1995) ("MCL 3d") § 30.41 describes the procedure for judicial review and approval of proposed class action settlements as follows:

Approval of class action settlements involves a two-step process. First, counsel submit the proposed terms of settlement and the court makes a preliminary fairness evaluation. In some cases this initial evaluation can be made on the basis of information already known to the court, supplemented as necessary by briefs, motions, or informal presentations by the settling parties.... If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement. For economy, courts have in appropriate cases permitted the notice under Rule 23(c)(2) to be combined with the Rule 23(e) notice.

This two step process outlined in the MCL 3d has been cited with approval by courts in this circuit. *See, e.g., In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000); *In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997).

At the first stage of the process, the Court does not determine, as a final matter, whether the Consent Decree should be approved. Input from the class, further submissions by the settling parties, and a duly noticed formal fairness hearing are generally completed before the final decision is made. Neither formal notice nor a hearing is required for preliminary approval, which may be made upon an informal application by the settling parties, and conducted either in court or in chambers, in the Court's discretion. *See* MCL 3d § 30.41.^[FN2]

FN2. The Court has previously ordered a telephone hearing to consider preliminary approval to be heard on August 12, 2003, at 4:45 p.m., after submission of the Consent Decree on July 25, 2003.

Plaintiffs request that the Court initiate the settlement approval process recommended in MCL § 30.41 by granting preliminary approval of the proposed Consent Decree, including payment of plaintiffs' attorneys' fees and costs; certifying a voluntary settlement class for injunctive and monetary relief pursuant to Fed. R. Civ. P. 23(b)(2); approving and authorizing provision of the notice submitted by the parties; and setting a formal fairness hearing for the week of November 3, 2003.

IV. THE SETTLEMENT SATISFIES THE REQUIREMENTS FOR PRELIMINARY APPROVAL

A. The Settlement Falls Within the Range of Possible Approval.

The proposed Consent Decree provides extensive injunctive and monetary relief that is fair and reasonable, and supports the Court's preliminary approval of the proposed Consent Decree.

1. Injunctive Relief.

The proposed Consent Decree contains extensive injunctive relief, targeted at ending policies and procedures alleged to be responsible for gender disparities in MetLife's MLFS sales force. Below, plaintiffs summarize the major remedial components of the proposed Decree in the order in which they appear in the Decree.

a. Monitoring Compliance.

The Consent Decree requires MetLife to designate a Decree Monitor who will have overall responsibility for overseeing and monitoring MetLife's implementation and compliance with the terms of the Decree. The Decree Monitor will report on MetLife's implementation and compliance with the Decree to MetLife's Executive Vice President and Zone Vice Presidents on a semi-annual basis, and to Class Counsel on a semi-annual basis during the first year of the Decree and then annually during the next two years.

The Decree also provides for the appointment of a Special Master (Michael Young, Esq.) who is experienced with respect to the resolution of employment law disputes to resolve any disputes regarding interpretation, implementation or compliance that arise under the Decree (*see* resume provided herewith as Appendix to Memorandum of Law, Exhibit 2). The Decree provides for the Court to retain jurisdiction of the case until the expiration of the Decree.

b. Increase in Human Resource Support and Internal Complaint Procedure.

The Decree requires MetLife to hire at least six (6) additional Human Resource Generalists to provide human resources support and assistance to MLFS and to ensure proper investigation of gender discrimination complaints of MLFS employees. The Decree requires MetLife to maintain a written internal complaint procedure for resolving such complaints promptly and through face-to-face interviews with significant fact witnesses where the complaint involves significant credibility determinations or allegations of egregious conduct. The Decree also requires MetLife to continue to publish and enforce through appropriate corrective action, its anti-discrimination and anti-harassment policies.

c. Benchmarks.

The Decree requires MetLife to use "best efforts" to increase the representation of women in Agency Manager positions in each year the Decree is in effect, i.e. 2003-2006.^[FN3] The Decree establishes "Benchmarks" for the representation of women in these positions.

FN3. "Best Efforts" is defined in the Consent Decree, *see* App. Exh. 1 at II(D).

d. Job Analyses.

The Decree requires MetLife to conduct analyses of the skills, knowledge, abilities, and personal characteristics necessary for MLFS Agency Manager positions and to use these analyses to develop and distribute to MLFS employees written job descriptions and selection criteria for these positions.

e. Training/Evaluation.

The Decree requires MetLife to complete diversity training of all incumbent FSRs, Agency Managers, Regional and Zone Vice Presidents in MLFS by December 31, 2005, and to provide such training to newly hired/appointed FSRs, Agency Managers and Regional and Zone Vice Presidents within six months of their hire or appointment.

The Decree also requires MetLife to provide uniform live “Roadmap for Inexperienced FSR Training” to all incumbent Agency Managers responsible for training inexperienced FSRs by July 1, 2005. The “Roadmap for Inexperienced FSR Training” will include modules on technical and soft skills, sales presentations, activity monitoring, setting expectations and coaching techniques.

The Decree also requires MetLife to implement a performance evaluation instrument that assesses the performance of first and second line managers against uniform job-related criteria. Annual performance evaluations of Zone Vice Presidents, Managing Directors, and Agency Directors will include an assessment of the managers' efforts to promote diversity in the workforce and commitment to MetLife's equal employment opportunity goals and policies, including adherence to anti-discrimination and anti-harassment policies.

f. Recruitment.

The Decree requires MetLife to continue to actively seek female recruits for FSR and Agency Manager positions through such means as placing recruiting advertisements in publications geared toward professional women in the financial services industry, developing ongoing partnerships with women's organizations which provide access to potential recruits, use of outside search firms, and conducting career seminars.

g. Management Development Program.

The Decree requires MetLife to establish a management development program for high potential sales personnel with an interest in a management career. The program will include training in setting objectives, evaluation of performance, coaching, conflict resolution, and compliance monitoring. The Decree requires MetLife to utilize “best efforts” to achieve a 30% representation of women in this development program.

h. Assignments of Business and Development Funds.

The Decree, requires MetLife to promulgate and distribute to MLFS managers written criteria for the distribution of business resources and assistance, including sales leads, books of business, and sales office development funds.

i. Reporting and Recordkeeping.

The Decree also requires MetLife to track and report to Class Counsel on a periodic basis during the term of the Decree the total number and the compensation by gender of FSRs and first and second line managers.

2. Monetary Relief.

Under the Consent Decree, MetLife will pay \$5 million into a Qualified Settlement Fund to be used to compensate class members pursuant to a claims procedure. Class members, who do not opt out, will have the right to submit claims to a third party Claims Administrator that has been jointly selected by the parties (Rosenthal & Co., Novato, California). Each qualified claimant will receive a minimum payment of one thousand dollars (\$1,000) and will also be assigned points based on the claimant's years of employment in an MLFS FSR and/or Agency Manager position, the position(s) she held and the time and effort she spent in participating in pre-class certification discovery. Monetary relief will be allocated to each claimant based on her pro rata share of the total points of all claimants. Protections are included in the Decree to prevent windfall payments in the event of low claims participation (below 60% of the eligible class members). Once all claims are paid in full, any residual funds not claimed will be distributed to a non-profit organization to be designated by the parties and subject to Court approval.

3. Attorneys' Fees and Costs

The proposed Decree provides that plaintiffs will move for approval of an award, not to exceed \$3,400,000, for payment of the attorneys' fees, costs and litigation-related expenses incurred by all counsel for plaintiffs and class in this matter. MetLife agrees that it will not oppose the motion. Of this amount, \$3,250,000 represents payment for fees, costs and expenses incurred to date and to be incurred through final distribution of the class monetary settlement fund. The remaining \$150,000 represents payment, at the rate of \$50,000 per year, for Class Counsel's attorneys' fees, costs and expenses for monitoring MetLife's compliance with the Decree over the Decree's three year term.

B. The Settlement is the Product of Arm's Length Negotiations by Experienced, Qualified Attorneys.

The proposed Consent Decree is the result of extensive, informed, arm's length negotiations between attorneys with substantial litigation and trial experience, who are fully familiar with the legal and factual issues of this case, and who have experience in litigation and settlement of complex and/or class action employment discrimination cases. *See* Borgen Decl. ¶ 22-31; Klein Decl. ¶ 8-16. Class Counsel (Outten & Golden LLP, who have been attorneys for plaintiffs during the entire span of the litigation, and Goldstein, Demchak, Baller, Borgen, & Dardarian, who have been attorneys for plaintiffs since April 2002) will continue to represent the class during the three year term of the Consent Decree. Both firms have substantial experience and success in complex and class action litigation, and have successfully prosecuted, tried, and/or settled major employment class actions. *See* Borgen Decl. ¶ 28; Klein Decl. ¶ 15.

C. The Consent Decree Treats All Class Members Fairly.

Preliminary and final approval of proposed class action settlements in federal courts utilizing Rule 23(e) hinges on the fairness, adequacy, and reasonableness of the settlement with respect to all members of the class. *See 2 Newberg on Class Actions* (3d ed. 1992 and 1996 Cumm. Supp.) § 11.43; MCL 3d, § 30.41-43. As the Supreme Court stressed in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), a settlement must fairly provide some benefit or compensation as consideration for the release of class members' claims.

Here, the proposed Consent Decree treats all class members fairly. The injunctive relief, outlined above, provides substantial and comprehensive benefits equally to all current employee class members. Moreover, each member of the

class is entitled to participate in the monetary relief claims procedure, which provides a mechanism for recovery for all class members, including both current and former MLFS employees.

Under the proposed Decree, the five named plaintiffs will share a liquidated sum of \$235,000, in settlement of their individual claims, recognition of the efforts they have undertaken and the risk they incurred on behalf of the class, and in exchange for a broader release of their individual claims than that given by other class members.^[FN4] The named plaintiffs' efforts on behalf of the class include: filing class discrimination charges with the U.S. Equal Employment Opportunity Commission; actively participating and assisting Class Counsel in the investigation and prosecution of the class claims; preparing for and providing lengthy depositions; and producing documents and other information in response to MetLife's discovery requests. Further, four of the named plaintiffs were current employees of MetLife during the course of the litigation and ran the risk of retaliation and all of the named plaintiffs incurred the risk of being stigmatized as a result of their participation as class representatives in the litigation. Given the named plaintiffs' commitment and active participation throughout the litigation, such payment is proper and routine. *See, e.g., Plummer v. Chemical Bank*, 668 F.2d 654, 660-61 (2d Cir. 1982); *Roberts v. Texaco*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997) (accepting a Special Master's recommendation to approve incentive awards based on the time and effort expended by the class representatives in assisting in the prosecution of the litigation); *Sheppard v. Consolidated Edison Co. of New York, Inc.*, 2002 WL 2003206, *6-7 (E.D.N.Y. Aug. 1, 2002) (approving aggregate incentive payment of \$119,167 for six named plaintiffs in a race discrimination class action); *Martens v. Smith Barney, Inc.*, 1998 WL 1661385, *3 (S.D.N.Y. July 28, 1998) (approving aggregate incentive payment of \$1.9 million for 22 named plaintiffs in gender discrimination class action); *Selzer v. Board of Educ. of New York*, 1993 WL 42787, *4 (S.D.N.Y. Feb. 16, 1993) (approving incentive payments to named plaintiffs in part because of the tremendous amount of time and effort extended by them in prosecuting gender discrimination class).

FN4. Each named plaintiff has been allocated \$45,000, with the exception of Stella Mitchell, who has been allocated \$55,000, in recognition of her efforts and leadership in initiating the investigation and administrative charges that led to the litigation.

D. Attorneys' Fees Do Not Come Out Of the Class Recovery and Are Fair and Reasonable.

The proposed Decree provides that Class Counsel may be paid attorneys' fees and costs in a total amount not to exceed \$3.4 million (\$3,400,000), upon motion approved by the Court. This sum is less than the approximately \$4 million (\$4,000,000) in combined attorneys' fees and out-of-pocket and indirect costs and expenses incurred by all Counsel for plaintiffs in litigating this action to date. The \$3.4 million also includes payment of all fees and costs plaintiffs will incur through final distribution of monetary payments to the class. Finally, the \$3.4 million includes the \$150,000 for fees and expenses for future work Class Counsel will perform in monitoring MetLife's implementation and compliance with the Decree. The \$150,000 will be paid in annual installments of \$50,000 in each of the three years of the Consent Decree. The attorneys' fees, costs and expenses will be paid apart from, and in addition to, the class monetary recovery, so that no funds will be taken from the class or any class member to pay Class Counsel's fees.

The attorneys' fees agreed to by the parties are fair and reasonable, based on the lodestar for services performed and the substantial injunctive and monetary relief obtained for the class. *See Roberts*, 979 F. Supp. at 197. Class Counsel undertook an extensive investigation of the class claims, interviewing close to a hundred putative class members and other witnesses with information relevant to the claims. *See Klein Decl.* ¶ 4. Class counsel conducted lengthy and complex discovery, which included obtaining and reviewing many thousands of pages of documents, conducting and defending over fifty depositions throughout the country, and interviewing class members and other witnesses. *See Borgen Decl.* ¶¶ 4-11; *Klein Decl.*, ¶¶ 4-7. Additionally, Class Counsel retained two expert witnesses to analyze MetLife's statistical workforce data and personnel policies and procedures and provide written opinions. Class Counsel worked with these experts closely to obtain the information necessary for their analyses and then to prepare them for and defend their depositions. Similarly, MetLife designated two rebuttal expert witnesses who produced extensive reports that Class Counsel and their experts reviewed closely and responded to in deposition and/or written form. Class Counsel took the depositions of each of MetLife's expert witnesses as well numerous MetLife managers, officers, and other personnel. *See Borgen Decl.* ¶ 7-9; *Klein Decl.* ¶ 5-7. Class Counsel produced a motion for class certification that was supported by

extensive evidence that had to be culled from the voluminous record in the case. MetLife responded to the motion with an equally substantially supported opposition. Class Counsel were in the process of completing their detailed response to MetLife's opposition when the parties reached agreement in principle on the settlement.

Furthermore, the case proceeded on two tracks - both litigation and settlement negotiations - for over six months. In order to meet the needs and demands of both tracks, Class Counsel dedicated additional personnel and other resources to the case. Moreover, the settlement negotiations were both intensive and exhaustive, in that considerable time was devoted to discussing and reaching compromise on both the general agreement itself and myriad details on each component of the agreement.

Given the foregoing, the amount in payment for Class Counsel's attorneys' fees and costs agreed to by the parties is fair and reasonable compensation for the substantial work Class Counsel already has performed for the class, and will continue to perform during the term of the Consent Decree.^[FN5]

FN5. As part of plaintiffs' motion for final approval of the class settlement, Class Counsel will provide a full accounting of all legal fees and expenses in connection with counsel's prosecution of this litigation for review by this Court. The requested award includes payment to the Lieff, Cabraser firm for work performed and costs incurred prior to its disqualification in March 2002. *See* Borgen Decl. ¶ 37-39. *See also* *Marshall v. State of New York Div. of State Police*, 31 F. Supp. 2d 100 (N.D.N.Y. 1998) (disqualified law firm in civil rights action based on conflict of interest could recover attorneys' fees); *M.A.R. Oil, S.A. v. Morrissey*, 982 F.2d 830, 840 (2d Cir. 1993) ("Under New York law, attorneys may be entitled to recover for their services, even if they have breached their fiduciary obligations.").

V. CERTIFICATION OF THE SETTLEMENT CLASS PURSUANT TO FED. R. CIV. P. 23(A) AND (B)(2) IS PROPER.

The Consent Decree provides for certification of a settlement class pursuant to Fed. R. Civ. P. 23(b)(2). Certification of a settlement only class is routine and proper in circumstances such as these. *See, e.g., Polar Intern. Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 112 - 113 (S.D.N.Y. 1999) (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) ("the 'settlement only' class has become a stock device")). In addition, the Decree provides for notice to the class and the right of class members to opt out of the action. *See* App. Exh. 1 at XII(C) & (D). The Court has discretionary authority to provide such notice and opt out procedures in a Rule 23(b)(2) class action pursuant to Rule 23(d). The proposed Decree contemplates that class members who opt out will still be bound by the class injunctive relief provisions of the Decree, but will not be eligible to participate in the class monetary relief procedure.

A. *Fed. R. Civ. P. 23(a)*.

In determining if class certification is appropriate, a court must first look to Rule 23(a) of the Federal Rules of Civil Procedure. The putative class in question easily meets the standards set forth in Rule 23(a).

1. *Numerosity*.

Under Rule 23(a)(1), the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *see Amchem*, 521 U.S. at 607 n. 8.

Here, the proposed class includes all females who have been employed in a Sales Position or Sales Management Position in MLFS on or after August 27, 1999, through the date of this Court's preliminary approval of the Consent Decree. The

parties estimate the number of potential class members exceeds 3,000. Thus, the proposed class meets the numerosity requirement, as joinder would be impracticable.

2. Commonality.

Under Rule 23(a)(2), there must be questions of law or fact common to the class. *See* Fed. R. Civ. P. 23(a)(2); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir. 2001).

Here, plaintiffs claim that MetLife engaged in a continuing policy and/or pattern or practice of gender-based discriminatory treatment of female MLFS employees as to promotions and career advancement and business development opportunities, including assignment of desirable and lucrative leads and accounts, and other compensation. Plaintiffs contend that this discrimination has been furthered by subjective decision-making by a predominately male supervisory and managerial workforce and MetLife's failure to monitor and ensure equal employment opportunities in MLFS. In this preliminary stage, courts consider whether the statistical evidence demonstrates a class-wide basis for plaintiffs' claims. *See In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001). Plaintiffs' claims do not depend on the terms of employment of individual class members. Rather, plaintiffs rely on statistical evidence supporting their class allegations. Thus, the commonality requirement is satisfied here.

3. Typicality.

Rule 23(a)(3) requires that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). *See Amchem*, 521 U.S. at 607 n. 11. The typicality requirement “is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.” *Robinson*, 267 F.3d at 155 (internal quotation omitted).

There is no requirement that “the factual background of each named plaintiff's claim be identical to that of all class members.” *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999) (internal quotations omitted). Here, the class representatives are all female current or former sales representatives and managers within MLFS who allege that because of MetLife's subjective decision making system they have suffered discrimination in compensation and promotional opportunities as compared to their male counterparts. While the factual circumstances of the class representatives' claims differ slightly, their allegations of disparate treatment and disparate impact based on MetLife's subjective decision making system are typical of the class' claims.

4. Adequacy of Representation.

The adequacy of representation requirement of Rule 23(a)(4) mandates that courts look to whether “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). To establish adequacy of representation, plaintiffs must show that (1) plaintiffs' counsel are competent to handle the case and (2) there are no conflict of interest among class members. *See Cromer*, 205 F.R.D. at 123.

Class Counsel are competent to represent the class in this case. As acknowledged by other courts in this district, Outten & Golden LLP has extensive experience in representing plaintiffs in both individuals and class employment cases. *See Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 87 (S.D.N.Y. 2001). Likewise, Goldstein, Demchak, Baller, Borgen & Dardarian has extensive complex and class action litigation experience and has been acknowledged as competent and well qualified class counsel by numerous courts. *See Shores v. Publix Super Markets Inc.*, 1996 WL 407850, *8 (M.D. Fla. Mar. 12, 1996); *Butler v. Home Depot*, 1996 WL 421436, *3 (N.D. Cal. 1996). Moreover, no

conflict of interest can be found to exist among the class members. Accordingly, the Court should find that plaintiffs have satisfied the requirements of Rule 23(a).

B. Rule 23(b)(2).

The proposed settlement class may be certified under Rule 23(b)(2), which provides for certification if “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Fed. R. Civ. P. 23(b)(2).

Because Rule 23(b)(2) was intended to assist litigants seeking wide-spread institutional reform through injunctive relief, courts within this circuit have found that the Rule is satisfied in cases where injunctive relief is sought and would benefit the entire class. See *Marisol A. v. Giuliani*, 929 F. Supp. 662, 692 (S.D.N.Y. 1996) (citing *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994)), *aff'd*, 126 F.3d 372 (2d Cir. 1997) (per curiam).

Where plaintiffs seek monetary damages as well as injunctive relief, certification is appropriate when the equitable relief sought predominates over the claims for monetary relief. See *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 20 (2d Cir. 2003) (citing *Robinson*, 267 F.3d at 164); *Wright v. Stem*, 2003 WL 21543539, *8 (S.D.N.Y. Jul. 9, 2003).

Here, the injunctive relief is comprehensive, thorough and far-reaching. The injunctive relief provisions address each of the practices plaintiffs allege are responsible for gender disparities in promotions and compensation within MLFS' sales operations, and accordingly, the relief obtained advances the interests of the entire class. Moreover, the notice and opt out procedures contemplated by the Consent Decree will adequately protect the interests of any class member who wishes to pursue her individual discrimination claims in a forum of her choosing.^[FN6] Therefore, the fact that plaintiffs also seek monetary damages for the class does not preclude class certification under Rule 23(b)(2). See *Robinson*, 267 F.3d at 164-65; *Wright*, 2003 WL 21543539 at *8.

FN6. The Decree includes a standard “blow-up” provision that permits MetLife to void the settlement agreement in the event that 30 or more class members opt out. See App. Exh. 1 at XII(D)(3)(a).

VI. THE CLASS ACTION SETTLEMENT NOTICE PROCEDURE.

The notice procedure proposed by the parties provides for the Claims Administrator to mail the notice, in the form attached as Exhibit G to the Decree, to all class members via first class U.S. Mail to their last known addresses as obtained from MetLife's personnel records and as updated using the National Change of Address System.^[FN7]

FN7. Should any notices be returned as undeliverable, the Claims Administrator will utilize a computer database to search for a more current address, and will re-mail the notice to any additional address found.

The proposed notice identifies the settlement class, sets forth a summary of the terms of the Consent Decree, including the procedures for filing a claim for monetary relief, informs class members of their right to be heard regarding the settlement, including the right to object to the settlement and/or to opt-out of the monetary relief provisions of the settlement and the deadlines and procedure for objecting or opting-out, identifies the date, time and location of the final approval hearing, provides the names and addresses of counsel for the parties, provides a toll-free 800 telephone line so that class members may ask any questions they may have, and invites class members to contact Class Counsel with any questions regarding the settlement.

In sum, the notice provisions more than adequately meet due process requirements and should be approved by the Court.

VII. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court grant plaintiffs' motion for preliminary approval of the Consent Decree, including an award of plaintiffs' attorneys' fees and costs in the amount of \$3.4 million, certify a settlement class for injunctive and monetary relief pursuant to Fed. R. Civ. P. 23(b)(2), approve the proposed notice for mailing to the class, and set a fairness hearing, as the Court's calendar permits, for the week of November 3, 2003.

Stella MITCHELL, Hwa-Mei C. Gee, Durpatty Persaud, and Janet Ramsey, on behalf of themselves and all others similarly situated, and Barbara LaChance, individually, Plaintiffs, v. METROPOLITAN LIFE INSURANCE COMPANY, INC., dba Metlife, Defendant.