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., d/b/a Metlife, Defendant.
No. 01 CV 2112 (WHP).
April 30, 2003.

Memorandum of Law in Support of Defendant's Opposition to Plaintiffs' Motion for Class Certification

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PRELIMINARY STATEMENT

This lawsuit was originally commenced by five named plaintiffs -- current and former employees of MetLife Financial Services ("MLFS")[FN1] -- who alleged that MetLife engaged in a pattern and practice of gender discrimination in hiring, promotional opportunities, demotions, job assignments, and compensation, and of retaliation in response to complaints of discrimination, in violation of Title VII and the New York State and City Human Rights Laws. (Declaration of Jennifer Gray (hereinafter referred to as "Gray Decl."), Ex. A, ¶¶1, 26, 67). On the basis of these claims, plaintiffs sought to represent a nationwide (as well as a New York State and City) class of all past, present and future female employees of MLFS since August 27, 1999 (the alleged "class period") and all female applicants for MLFS positions "who have been, continue to be, or in the future may be, denied employment opportunities or were deterred from applying for those positions" during the class period. (Gray Decl., Ex. A, ¶19).

FN1. MLFS is an operating division of Metropolitan Life Insurance Company, Inc. ("MetLife"). MLFS is a retail sales organization, engaged in direct sales of financial products (*i.e.,* whole life insurance, term life insurance, variable life insurance, annuities, mutual funds, long-term care insurance, etc.) to individual customers. (Declaration of Anne N. Smith (hereinafter referred to as "Smith Decl."), Ex. A, ¶2).

By virtue of their subsequent amendments of the complaint, plaintiffs have abandoned their class claims of: (i) retaliation; (ii) discriminatory hiring; (iii) discriminatory deterrence of applicants; and (iv) discriminatory demotions.[FN2] (*See generally* Gray Decl., Ex. A, F, G). What remains, therefore, are plaintiffs' class claims of alleged gender discrimination in compensation and promotions.[FN3] Even as so pared down, plaintiffs cannot satisfy the Rule 23 requirements for certification of a class on either of these claims.

FN2. It is hardly surprising that plaintiffs dropped their demotion claim. Plaintiffs' statistical expert, Dr. Richard Drogin, did not examine demotions at all (either in his initial report or his supplemental report). (*See generally* Gray Decl., Ex. B; Ex. C). Defendants statistical expert, Dr. David Evans, found no statistically significant differences in the rates at which men and women were demoted from any position during the class period, except that, with respect to second-line managers, *men* were demoted at a statistically significantly *higher* rate than women. (Gray Decl., Ex. D at 4; Ex. E; Ex. Y at 1).

FN3. Despite the fact that plaintiffs have clearly limited their class claims to these two issues -- promotion and compensation -- they continue to report obviously irrelevant allegations of: (i) retaliation; (ii) inappropriate sexual remarks and conduct; and (iii) "other disparate treatment" (including discipline and termination) in their Summary of Class Member and Female Witness Allegations Regarding Discriminatory Conduct in MLFS. (Pl. App. IV, Part 1, Ex. 1). These anecdotal "reports" have nothing to do with the only two remaining claims as to which plaintiffs seek class certification.

STATEMENT OF FACTS

The MLFS field force is comprised of FSRs, functional managers, second-line managers, and first-line managers. Compensation for -- and promotion into -- each position is determined pursuant to unique policies and practices.

1. *FSRs* FSRs are responsible for selling MetLife's financial products, and are hired to work in particular sales offices.[FN4] (Gray Decl., Ex. H at ML 001414; Ex. I, ¶3). An FSR's commission-based compensation is determined based on his or her sales of financial products pursuant to prescribed formulas set forth in a written compensation plan. (Gray Decl., Ex. I, ¶3). No discretion is exercised by MLFS management in determining an FSR's commission compensation.[FN5] So long as FSRs meet the MLFS-wide minimum production requirements for continued employment, they can decide how much effort they want to expend in generating sales, and ultimately how much income they earn. (Gray Decl., Ex. P; Ex. I, ¶10; Smith Decl., Ex. A, ¶5; Ex. B, ¶4; Ex. G, ¶12; Ex. I, ¶12; Ex. L, ¶2).[FN6]

FN4. The MLFS sales offices are currently distributed among five geographic Zones, each of which is headed by a Zone Vice President. When this lawsuit was commenced, there were three Zones (Atlantic, Central and Western). Certain of the sales offices report directly to a Zone Vice President, while others are part of Regions. A Region is a combination of several sales offices, and is headed by a Regional Vice President who reports to a Zone Vice President. (Gray Decl., Ex. H).

FN5. (*See, e.g.,* Gray Decl., Ex. J; *see also* Gray Decl., Ex. I, ¶3). FSRs joining MetLife are entitled to receive certain non-commission payments, depending upon: (i) whether they come to MetLife with prior insurance industry experience; (ii) the extent of that experience; and (iii) their prior earnings histories. (Gray Decl., Ex. K-O; Ex. I, ¶¶6-9). Plaintiffs do not allege -- and have adduced no evidence -- that these noncommission components of newly-hired FSR compensation are established or implemented in a discriminatory manner.

FN6. Defendant has submitted the declarations of 27 members of the MLFS field force in opposition to class certification. These declarations, which demonstrate the absence of commonality with respect to plaintiffs' claims of discriminatory compensation and promotion, are annexed to the accompanying Declaration of Anne N. Smith.

2. *Functional Managers* Functional managers are FSRs who assume an additional task (such as training, recruiting, or marketing) while continuing to sell MetLife products. (*See infra* at 34). Functional managers are typically selected by the first-line managers in their sales office. (Gray Decl., Ex. Q). The compensation of functional managers mirrors their two different roles: a limited fixed salary[FN7] for the specific managerial task they perform; and commissions from their personal sales production based on the FSR compensation plan. (*See, e.g.,* Gray Decl., Ex. S; *see also* Gray Decl., Ex. I, ¶11).

FN7. As of 2000, the functional manager salary cannot exceed $750/week; it could not exceed $500/week before then. (Gray Decl., Ex. R; Ex. I, ¶12).

3. *First-Line Managers* First-line managers (currently known as managing directors) are responsible for the overall operation and management of the sales offices. (Gray Decl., Ex. T). They are typically selected by Regional Vice Presidents and/or Zone Vice Presidents. (Gray Decl., Ex. U). First-line managers are compensated under a uniformly applied formula called Performance Based Compensation (“PBC”). (Gray Decl., Ex. I, ¶13). PBC is based primarily on objective factors relating to the sales, growth and profitability of the particular sales office. (*See, e.g.,* Gray Decl., Ex. V; *see also* Gray Decl., Ex. I, ¶¶13-14).

4. *Second-Line Managers* Second-line managers are typically selected by and report to their first-line managers. (Gray Decl., Ex. W). Second-line managers perform a wide variety of functions within the sales office. For example, some second-line managers are not licensed to sell MetLife financial products and only handle administrative tasks, such as recruiting or marketing. Other second-line managers are licensed to sell MetLife financial products and are responsible

for training FSRs and/or supervising the sales activity of groups of FSRs. (*See infra* at 29-30).

No fixed compensation scheme exists for second-line managers. (Gray Decl., Ex. I, 116). A second-line manager's compensation is typically established by the first-line manager(s), and generally reflects the types of duties he/she is responsible for performing. (Gray Decl., Ex. I, ¶16). For example, some second-line managers receive a percentage of the sales office's PBC; some receive straight salary; some receive a salary and variable pay based on the attainment of specific business objectives (e.g., a bonus payment for each new FSR recruited); and some are compensated through some combination of these methods. (Gray Decl., Ex. X; Ex. I, ¶16).

ARGUMENT

I. *LEGAL STANDARDS FOR CLASS CERTIFICATION*

Plaintiffs' entire argument proceeds from the mistaken premise that they can sustain a motion for class certification with any statistical evidence -- however attenuated or isolated -- that purports to depict disparities between women and men in connection with compensation or promotion. The *Caridad v. Metro-North Commuter Railroad* decision, 191 F.3d 283 (2d Cir. 1999), *cert. denied,* 529 U.S. 1107,120 S. Ct. 1959 (2000), *vacated on other grounds;* 267 F.3d 147 (2d Cir. 2001), *cert. denied,* 535 U.S. 951,122 S. Ct. 1349 (2002), however, did not alter plaintiffs' burden to offer substantial and credible evidentiary support, both statistically and anecdotally, demonstrating that the Rule 23(a) requirements are satisfied, particularly when the challenged employment practices are decentralized. To the contrary, *Caridad* explicitly recognized that plaintiffs must demonstrate with statistical and anecdotal evidence that "the challenged practice is causally related to a pattern of disparate treatment or has a disparate impact." *Id.* at 292; *see also Gen. Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 157-58, 162-63, 102 S. Ct. 2364, 2370-71, 2373 (1982) (holding that the plaintiffs failed to establish commonality where their statistics revealed no statistically significant disparity in the hiring of Mexican-Americans).

Furthermore, *Caridad,* like previous authorities in this Circuit and elsewhere, recognized that, in order to sustain their evidentiary burden, plaintiffs cannot rely on aggregate data, but rather must demonstrate that the Rule 23 criteria are satisfied for *each position* at each issue.[FN8] *See Caridad* at 292; *see also Sheehan v. Purolator, Inc.,* 839 F.2d 99, 102 (2d Cir.), *cert. denied,* 488 U.S. 891, 109 S. Ct. 226 (1988); *Ross v. Nikko Sec. Co. Int'l. Inc.,* 133 F.R.D. 96, 97 (S.D.N.Y. 1990); *Selzer v. Bd. of Educ. of the City of N.Y.,* 112 F.R.D. 176, 179-80 (S.D.N.Y. 1986); *Donaldson v. Microsoft Corp.,* 205 F.R.D. 558, 567 (W.D. Wash. 2001). This holding is particularly relevant here since the four MLFS positions at issue (*i.e.,* FSR, functional manager, second-line manager, and first-line manager) have substantially different job responsibilities, are compensated in fundamentally different ways and are subject to different promotion criteria and processes.

FN8. For that reason, the *Caridad* Court ruled that, even though plaintiffs' expert had offered statistical evidence of a company-wide racial disparity in the administration of discipline, a class was appropriately certified only for those positions for which this statistical disparity was manifested. *Id.* at 292.

Application of these principles leads to the conclusion that certification is not appropriate because, for both of the remaining claims (compensation and promotion) and for each of the positions at issue, plaintiffs have failed to: (i) provide sufficient (or, in several instances, any) statistical or anecdotal evidence of disparity; (ii) demonstrate that the challenged decision-making has sufficient uniformity to give rise to pattern and practice claims; (iii) demonstrate a causal nexus between the challenged decision-making and the alleged statistical disparities; and/or (iv) account for non-discriminatory factors that would logically explain the alleged disparities.

II. PLAINTIFFS HAVE FAILED TO SATISFY THE REQUIREMENTS OF RULE 23(a) WITH RESPECT *TO THEIR CLASS CLAIMS OF DISCRIMINATORY COMPENSATION PRACTICES*

A. *FSRs*

1. Plaintiffs Have Failed To Demonstrate *Commonality On Their FSR Compensation Claim*

a. *Introduction*

While plaintiffs purport to pursue a claim of disparate compensation on behalf of female FSRs, it is clear that their real claim of discrimination has nothing to do with MetLife's FSR compensation system at all. Plaintiffs concede - as they must -- that any particular FSR's compensation is *not* set by MetLife, but rather is based on a fixed commission schedule (determined by the sales of particular financial services products) that applies, without exception, to *all* FSRs - males and females alike.[FN9] (Pl. Br. at 9). Simply put, defendant does not control the compensation of FSRs; rather, their compensation depends on the products they sell and the quantum of such sales. (Gray Decl., Ex. I, ¶3; Smith Decl., Ex. A, ¶5; Ex. I, ¶12; Ex. L, ¶12).

> FN9. Indeed, as we demonstrate below, there are no statistically significant gender disparities in the commission income received by any female FSRs in *any* year within the class period. (*See infra* at 18-21).

Plaintiffs purport to address this inherent flaw in their legal theory by contending that MetLife is engaged in a "pattern and practice" of gender discrimination with respect to the provision of "business development resources" that *may* lead to increased sales: the distribution of "leads"; the distribution of "books of business"; the provision of informal training and mentoring; and the establishment of partnering relationships with managers and/or more experienced FSRs.

Plaintiffs cannot demonstrate that their "grievances share a common question of law or of fact." *Latino Officers Ass'n City of N.Y. v. City of N.Y.,* 209 F.R.D. 79,88 (S.D.N.Y. 2002) (quoting *Marisol A. v. Giuliani,* 126 F.3d 372, 376 (2d Cir. 1997)). To the contrary, plaintiffs do nothing to demonstrate that their vague assortment of claims are class-wide. First, plaintiffs fail to offer a shred of statistical evidence supporting their theory that "business development resources" are disparately allocated by gender, as they must in order to establish commonality. The absence of such evidence is alone fatal to their certification motion.[FN10]

> FN10. "[S]ignificant statistical disparities are relevant to determining whether the challenged employment practice has a class-wide impact" and, in fact, presents a common question among class members. *Caridad,* 191 F.3d at 292-93.

Second, plaintiffs fail to demonstrate that resources are allocated in any common fashion; their moving brief fails to even: (i) explain what a lead is or how various types of leads are distributed; (ii) explain the various types of leads programs or how they are administered; (iii) explain what an orphan "book of business" is, how a book becomes orphaned, or how orphan books are assigned; and (iv) explain what they mean by "informal training and mentoring" and "partnering with a manager and/or more experienced FSRs." (Pl. Br. at 9). This failure is telling; once these missing explanations are provided, they make plain the absence -- indeed, the impossibility - of commonality with respect to plaintiffs' FSR compensation claim. To the contrary, practices with respect to the distribution of certain leads and books of business, for example, vary from sales office to sales office, and depend upon a number of nondiscriminatory factors; and those practices that do not vary from sales office to sales office are not subject to managerial discretion.

Third, plaintiffs fail to demonstrate any quantitative nexus between these resources and FSR compensation. Because plaintiffs have not demonstrated a direct causal link between the receipt of these resources and compensation, their statistical evidence of alleged disparities in compensation (even if credited) is meaningless for purposes of establishing commonality. Finally, plaintiffs' own statistical analyses of FSR compensation demonstrate that with respect to the vast majority of FSRs, when adjusted for the most basic experience and qualification variables (which plaintiffs concede are valid), there are no statistically significant gender disparities in compensation - again, demonstrating the absence of any common compensation claim.

b. Plaintiffs Conflate Alleged Disparities In Compensation With A Showing Of A Common Practice Of Disparate *Allocation Of Business Resources To FSRs*

Plaintiffs do not challenge as discriminatory MetLife's commission-based FSR compensation system; rather, plaintiffs contend that MetLife is engaged in a pattern and practice of discrimination in connection with the distribution of business development resources -- a claim that none of the named plaintiffs individually asserts. Although plaintiffs proceed on this theory, they have offered no statistical support whatsoever for the assertion that there are class-wide disparities in the distribution of these resources.[FN11] (*See generally* Gray Decl., Ex. B; Ex. C). Instead, plaintiffs attempt to bridge the "wide gap" between their allegation that business development resources are allocated disparately and "the existence of a class of persons who have suffered the same injury," *see Gen. Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 157-58, 162-63, 102 S. Ct. 2364, 2370-71, 2373 (1982), with a statistical analysis of FSR compensation data.[FN12] In essence, plaintiffs conclusorily allege -- but never demonstrate statistically - that "resources" are disparately allocated; they then attempt to use alleged compensation differences to prove the class-wide disparities in the distribution of resources that they are otherwise unable to demonstrate. Since, as plaintiffs concede, FSR compensation is based on commissions derived from the sale of financial products and that the same commission structure applies uniformly to all FSRs in MLFS regardless of their gender, their argument is entirely circular. (Pl. Br. at 9).

FN11. This failure is fatal to plaintiffs' class claims. As the *Robinson* Court observed, "[t]he heavy reliance on statistical evidence in a pattern-or-practice disparate treatment claim distinguishes such a claim from an individual disparate treatment claim .... *Robinson v. Metro-North Commuter R.R.,* 267 F.3d 147, 158 n.5 (2d Cir. 2001), *cert. denied,* 535 U.S. 951, 122 S. Ct. 1349 (2002).

FN12. This defect in plaintiffs' offer of proof distinguishes this case from *Caridad.* In *Caridad* the Second Circuit ultimately recognized class claims of discriminatory discipline and promotion based on plaintiffs' theory that Metro-North engaged in class-wide "overdelegation" of decision-making responsibility, which allegedly enabled individual managers to make discriminatory decisions. The statistical evidence offered by plaintiffs directly supported this claim insofar as it depicted race-based disparities in the challenged discipline and promotion decisions. 191 F.3d 283, 288 (2d Cir. 1999), *cert. denied,* 529 U.S. 1107, 120 S. Ct. 1959 (2000), *vacated on other grounds,* 267 F.3d 147 (2d Cir. 2001) *cert. denied,* 535 U.S. 951, 122 S. Ct. 1349 (2002). Here, in contrast, plaintiffs concede that they are challenging decision-making concerning the distribution of business resources, yet they provide no statistical evidence of disparities among women and men with regard to those decisions. (*See generally* Gray Decl., Ex. B; Ex. C).

Unlike the salary-based (or salary plus bonus based) pay structures encountered in much of corporate America, and which are based on the exercise of managerial discretion, the FSR compensation system is a meritocracy in the truest sense of the word - the more an FSR sells, the more money the FSR makes. (Smith Decl., Ex. A, ¶5; Ex. I, ¶12; Ex. L, ¶12). In sum, FSR compensation is determined neither by objective nor subjective managerial judgment, but instead by the magnitude of an FSR's sales; the possession of requisite licenses to sell the full range of MetLife's financial services products (including various forms of life insurance, annuities and mutual funds); the mix of products sold; the skill, experience and product knowledge of each individual FSR; and, of particular importance, his or her intensity of sales effort. (Smith Decl., Ex A, ¶5; Ex. I, ¶12; Ex. L, ¶12). Thus, for example, so long as FSRs meet the company's minimum production requirements for continued employment, they (and they alone) decide how much effort they want to expend in generating sales, and consequently how much commission income they ultimately earn. Named plaintiff Hwa-Mei Gee's deposition testimony is illustrative:

Q: How much have you earned in compensation from your personal production this year?
A: So far?
Q: Yes.
A: Let's see. How much is my income total earnings? Let's see. I probably in total earning about 70-some-thousand by now year to date, the gross. So if you minus, I maybe earned about 60,000, roughly, on my personal production.
Q: Are you on target to qualify for a conference?[FN13]

FN13. Conference qualification is determined by reaching certain designated levels of sales. (*See, e.g.,* Gray Decl., Ex. Z).

A: I'm not interested in conference.
Q: You're not interested --
A: No, I'm not interested in conferences. I don't have my goal set for any conferences myself.
Q: How many hours a week do you work on personal production?
A: Well, so far I spent a lot of time this year to complete my master's degree, so I wouldn't say I spent that much time on production.
(Gray Decl., Ex. AA).

Declarant Kleopatra Kazakias, an FSR, testified at deposition about the balance she tried to strike between time at work and time with her family:

Q: Given your desire to spend time with your family, what was your expectation about how much you would be working as a rep for MetLife on a weekly basis?
A: This is also hard to put in a specific definition because I would work, if it was necessary and if I had appointments, one week I might put 40 hours but the next week put only 20 hours. It's hard to say so many hours a day. Depending on the appointments, depending on the time of the year, depending --
(Gray Decl., Ex. AB).

Plaintiffs' unproven presumption that an FSR's compensation is directly related to the business development resources he/she receives (and that any disparities in compensation are the direct consequence of disparities in the distribution of such resources) flies in the face of MetLife's formulaic commission system which permits FSRs to control their own earnings, and ignores the most obvious factors that determine FSR compensation: effort, expertise, experience and quantity and mix of products sold. (Smith Decl., Ex. A, ¶5; Ex. I, ¶12; Ex. L, ¶12).

c. Plaintiffs Cannot Demonstrate Any Common Practice Of Disparate Resource *Allocation*

Plaintiffs have not - and cannot -- demonstrate that "resources" are allocated in any common fashion, or that there is any direct correlation between the resources plaintiffs identify and commission income actually earned by FSRs.[FN14] Since plaintiffs' papers say precious little about the "resources" they complain about, the following factual description may help illustrate the flaws in plaintiffs' commonality argument.

FN14. Plaintiffs' claim of discrimination in business resource allocation is inherently inconsistent with the financial incentives of the managers allegedly allocating these resources. First-line managers have strong financial incentives to allocate resources in a manner that maximizes their revenue. First-line management compensation - PBC - is directly dependent upon the sales and retention of the agency's FSRs. (Gray Decl., Ex. I, ¶¶13-14). If FSRs - male or female - are successful in their sales efforts, first-line managers are directly rewarded. (Gray Decl., Ex. I, ¶¶3-14; Smith Decl., Ex. A, ¶15). Correlatively, if FSRs -- male or female -- leave the company because they have not met minimum production requirements (or because they are dissatisfied with their sales results), first-line managers are directly penalized economically. (Gray Decl., Ex. I, ¶14; Ex. V at ML 0110578).

Plaintiffs' theory is also incompatible with overall MLFS sales office operations. Indeed, the same managers who are accused of discriminating against female FSRs hired those FSRs in the first place. (Gray Decl., Ex. AC). *See Rodriguez v. Am. Friends of Hebrew Univ., Inc.,* No. 96 Civ. 0204, 2000 WL 1877061, at *5 (S.D.N.Y. Dec. 26, 2000) ("As the Second Circuit has noted, it is difficult to impute bias against plaintiff's protected class(es) where the person who made the adverse employment decision also made a recent favorable employment decision regarding plaintiff.").

(i) *Leads* Plaintiffs claim that MetLife managers discriminate on the basis of gender in the allocation of "leads." Curiously, plaintiffs never define what they mean by a "lead"; in fact, a lead is nothing more than a piece of information about a MetLife customer or potential customer that provides a basis for contact between that person and an FSR. (Smith Decl., Ex. A, ¶6). Regardless of the method by which it is distributed, a lead is not a sale.[FN15] And, in the vast majority of situations, a lead will never result in a sale. (Smith Decl., Ex. A, ¶16; Ex. H, ¶6; Ex. I, ¶7; Ex. L, ¶8; Ex. M, ¶8, Ex. O, ¶6; Ex. U, ¶9). It is for this reason that many FSRs, such as named plaintiff Persaud, have no interest in obtaining "leads," preferring instead to build their business by prospecting in a niche market, and receiving referrals from existing satisfied clients.

FN15. For example, "leads" can include the most simple requests for service on a policy; a policyholder calling MetLife's service center to request an address change for a beneficiary generates a "lead." That call holds little promise of a sale; indeed, innumerable variables separate a "lead" from a sale, including: the nature of the "lead"; the relative interest (or lack of interest) of the policyholder in a further purchase; the financial means of the policyholder or prospective policyholder; what other coverage the policyholder has; the "relationship" between the FSR and the policyholder; the FSR's skill, product knowledge and sales ability; and the availability of (and access to) competitive companies and products. (Smith Decl., Ex. A, ¶¶7-8; Ex. I, ¶5; Ex. L, ¶6; Ex. M, ¶6, Ex. P, ¶7).

For example, female FSR Evangeline Cook explained in her declaration that she -- as a successful FSR -- prefers to develop her own leads and service her own book of business, and that she believes that to be a better use of her time than "wasting time" on the leads given out by MetLife. (Smith Decl., Ex. E, ¶5). Similarly, female FSRs Abigail Kerr and Mee Kim explained that they do not want to receive leads that are not from their own book of business because they do not find them to be a productive use of their time. (Smith Decl., Ex. H, ¶4; Ex. I, ¶¶4-6; *see also* Smith Decl., Ex. A, ¶14; Ex. R, ¶9; Ex. Y, ¶4). Female second-line manager Patricia Mathias believes that "based on [her] many years of working with and developing FSRs, that an FSR does not succeed based on the business leads provided by the Company. Generally, the more successful FSRs are those who think like a business owner and take responsibility and initiative for developing, cultivating and investing in their own markets." (Smith Decl., Ex. K, ¶9). Mary Zheng -- another female FSR -- agrees. According to Zheng, "I have worked hard to reach this level of success and do not owe it to the leads or books of business that MetLife has given me. The majority of my business has come from my own networking and client referrals and my own hard work." (Smith Decl., Ex. Y, ¶7). In short, the desire to obtain leads is hardly "common" to the class. (Gray Decl., Ex. AD).

Further, the distribution of most leads does not implicate the exercise of managerial discretion. (Smith Decl., Ex. A, ¶¶6-13). Indeed, many leads are forwarded *directly* to the FSR who sold the policy to which the lead relates. (Smith Decl., Ex. A, ¶6; Ex. B, ¶5; Ex. D, ¶6; Ex. P, ¶7; Ex. S, ¶9; Gray Decl., Ex. AE). Other leads are obtained directly by individual FSRs as a result of their expenditure of their own funds; others result from similar agency expenditures and are allocated to any FSRs interested in them on a pro rata basis.[FN16] (Smith Decl., Ex. A, ¶¶7-8; Ex. I, ¶5; Ex. L, ¶6; Ex. M, ¶6; Ex. P, ¶7; Ex. U, ¶7). And some FSRs participate in various target market lead generation programs. (Smith Decl., Ex. A, ¶9; Ex. Q, ¶5). To cite just one example: named plaintiff Persaud participated in a program together with the American Association of Physicians of Indian Origin whereby she paid a fee in order to attend, and have a booth at, national conferences of Indian and Pakistani physicians. (Gray Decl., Ex. AF). In order to encourage the physicians to stop by the MetLife booth (operated by FSRs -- including Persaud), the company would run raffle contests. The names of the raffle contestants were treated as leads for the participating FSRs. (Gray Decl., Ex. AF). There are scores of similar leads programs, all of which have their own individualized characteristics -- their own participation criteria; distribution mechanisms; target market; geographic scope; and level of specialization. (Smith Decl., Ex. A, ¶9).

FN16. For example, an individual FSR (or a sales office) can purchase mailing lists (such as occupational or other niche group lists) and do targeted mailings to those lists. The returns from such mailings - a category of "leads" -- are provided to the FSR who purchased the list or, in the case of a sales office expenditure, distributed on a pro-rata basis. (Smith Decl., Ex. A, ¶¶7-8; Ex. I, ¶5; Ex. L, ¶6; Ex. M, ¶6; Ex. P, ¶7; Ex. U, ¶7).

Many other leads are distributed through several MLFS-wide leads programs, entry to which is governed by objective written criteria. For example, in order to be eligible to participate in MetAdvice (a program through which current and former employees of MetLife's institutional (business) customers are approached as potential retail customers), FSRs must have at least five years of experience in the insurance industry; production at 50% of the Leaders Conference production requirement; hold life and health licenses and NASD Series 6 or 7 registrations; have no negative feedback from clients or sales management; and have compliance clearance. (Smith Decl., Ex. A, ¶10). To be eligible to participate in another significant leads program, Deliver the Promise (a program through which the proceeds of insurance policies are personally delivered to the beneficiaries of a deceased policyholder), FSRs must have at least five years of experience; have their NASD Series 6 and be working towards their Series 7; have no more than a 10% first year lapse rate; qualify for Leader's Conference; have no more than two customer complaints within a year; and have prior experience handling death claims. (Smith Decl., Ex. A, ¶10). With respect to these leads programs, managers likewise are not engaged in the exercise of discretion in the assignment of leads; rather, such leads are distributed to program participants on a rotating basis. (Smith Decl., Ex. A, ¶10).

Still other leads involve call-ins or walk-ins to a particular branch; often these leads are distributed to FSRs on a rotating basis based on a voluntary "rep of the day" schedule open to all FSRs who choose to participate. (Smith Decl., Ex. L, ¶5; Ex. N, 114; Ex. P, ¶7; Ex. U, ¶5).

Lost amidst the conclusory allegations of subjective decision-making, repeated in plaintiffs' papers in a *Caridad*-inspired mantra -- and which deliberately lump together the literally scores of different ways FSRs can and do receive "leads" that do not implicate *any* managerial discretion or involve the application of purely objective standards -- are two simple facts: (i) plaintiffs have never made *any* showing that there is a common mechanism of leads distribution to FSRs[FN17]; and (ii) plaintiffs have never made *any* quantitative showing that there exists a common leads distribution mechanism which discriminates against (or disparately affects) female FSRs.

FN17. Plaintiffs' own testimony confirms that there is no common practice regarding the distribution of leads that could give rise to a class claim. For example, Ramsey testified that when she was a first-line manager, leads were distributed on a "round-robin" basis among her FSRs or to the "Rep of the Day" when that system was in place. (Gray Decl., Ex. AG at 211, 216-217). At other times, Ramsey gave leads to high-producing FSRs as a "perk" for their higher production, and at still other times she considered geography, trying to match potential clients with FSRs who lived near them. (Gray Decl., Ex. AG at 211-213, 216). Ramsey also testified that she probably gave leads to FSRs to help them validate (*i.e.,* meet their minimum production requirements for continued employment). (Gray Decl., Ex. AG at 218). In contrast, Gee testified that when she was a firstline manager, FSRs took turns receiving leads, but that she also tried to match the language spoken by the FSR with that spoken by the client (a concern that was particular to Gee's Flushing office, which served an ethnic market). (Gray Decl., Ex. AH). Mitchell testified that when she was a manager, she considered the FSR's work ethic, geography and language spoken by the client. (Gray Decl., Ex. Al at 280-281). She also testified that walk-in leads were given to whomever was in the office at the time. (Gray Decl., Ex. Al at 275; *see also* Smith Decl., Ex. A, ¶11; Ex. I, ¶4).
Not only is there no commonality with respect to how leads are distributed, there is also no commonality with

respect to who distributes them. Plaintiffs' theory of discrimination is premised on their belief that male managers use gender biased stereotypes in the allocation of business development resources. (Pl. Br. at 10). Here again, plaintiffs have blindly ignored the record on this subject. In many sales offices, leads are distributed by second-line managers or clerical and administrative staff, many of whom are female. (Gray Decl., Ex. AJ; Smith Decl., Ex. A, ¶17; Ex. D, ¶6; Ex. G, ¶5; Ex. M, ¶7; Ex. W, ¶7).

(ii) *Orphan Books Of Business* Orphan books of business -- which consist of policies sold by an FSR who has left MetLife - are not assigned based on any common policy or practice. Nor does their assignment guarantee any additional compensation to an FSR; unless a new sale is made, the FSR receives no sales commissions from an assigned book of business. Indeed, since assigned books can be a burden to an FSR who is obligated to service the book of business with no necessarily corresponding financial benefit, many FSRs don't want them (Smith Decl., Ex. A, ¶17; Ex. E, ¶7; Ex. I, ¶6; Ex. V, ¶6; Ex. Y, ¶6; Ex. Z, ¶4) and several sales offices do not distribute them. (Smith Decl., Ex. D, ¶7; Ex. L, ¶7; Ex. U, ¶9).

There are various and dissimilar criteria used by MetLife managers in determining how to distribute orphan books of business. Some managers assign books of business to new FSRs to train them or get them started (Gray Decl., Ex. AK; Smith Decl., Ex. L, ¶7; Ex. O, ¶7; Ex. U, ¶8); other managers assign books of business to FSRs after they have acquired some experience (Gray Decl., Ex. AL); still others distribute them based on other factors such as market, geography, work ethic, and the level of service they believe the FSR will provide. (Gray Decl., Ex. AM). Illustrating the highly individualized nature of the distribution process, named plaintiff Mitchell testified that, as a first-line manager, in order to determine who among her FSRs should be assigned a book of business, she needed to know and consider the profile of each FSR -- what the FSR's market was; where the FSR lived; what products the FSR sold; whether the FSR had customer complaints; whether the FSR had a high lapse rate; whether the FSR was ethical; and how the FSR sold products. (Gray Decl., Ex. AN).

Further, many FSRs are not interested in having books of business assigned to them at all. (Smith Decl., Ex. A, ¶17; Ex. E, ¶7; Ex. I, ¶6; Ex. J, ¶5; Ex. V, ¶6; Ex. Y, ¶6). Pursuant to MetLife's compensation plan, FSRs are not compensated with respect to books of business assigned after January 1, 2001.[FN18] (Gray Decl., Ex. AO; Smith Decl., Ex. A, ¶17; Ex. D, ¶7). Thus, the service work on orphan books of business can be quite burdensome, with no offsetting financial benefit, unless these existing policyholders seek to purchase additional financial products that earn additional commissions. For this reason, many FSRs don't seek -- and are not interested in receiving -- books of business.[FN19] (Smith Decl., Ex. A, ¶17; Ex. D, ¶7).

FN18. Although FSRs could receive commissions on books assigned to them before January 1, 2001; their compensation could also be negatively impacted by those books if the assigned policies had poor persistency (*i.e.,* high lapse rates). (Gray Decl., Ex. AO). Accordingly, even when service commissions were paid on assigned books, it would require a case-by-case inquiry to determine if an FSR's compensation was positively or negatively affected on a net basis.

FN19. Here again, in many sales offices, books of business are distributed by second-line managers or clerical or administrative staff, many of whom are female. (Smith Decl., Ex. A, ¶17; Ex. D, ¶16; Ex. M, ¶7; Ex. W, ¶7).

In sum, where, as here: (i) no showing of disparate allocation has been made by plaintiffs; (ii) books of business are not distributed pursuant to any common plan or practice; and (iii) many members of the purported class are not even interested in receiving the “business resource” alleged to have been discriminatorily allocated - plaintiffs' proof of commonality is non-existent.

(iii) *Informal Training, Mentoring And Partnering* Plaintiffs' ill-defined claim that females, as a group, were denied informal training, mentoring and partnering relationships is, by definition, uncommon.[FN20] Concededly, such "informal" training exists solely at the branch level, and is provided by hundreds of managers under circumstances unique to each branch, to each manager and to each FSR. How much informal training and mentoring an FSR receives depends upon numerous factors, including: (1) the FSR's sales experience, skill, and product knowledge; (2) the degree of managerial resources available in the branch; (3) the level of FSR interest in joint sales calls; and (4) the number and commitment of experienced FSRs in a particular branch. (Smith Decl., Ex. D, ¶8; Ex. E, ¶9; Ex. F ¶¶5-6; Ex. K, ¶¶4-6; Ex. L, ¶¶9-10; Ex. U, ¶11; Ex. V, ¶7; Ex. W, ¶9; Ex. X, ¶7). For example, with respect to the more experienced FSRs, Ramsey testified that when she was a manager, she did not go on sales calls with FSRs in her agency who were successful. (Gray Decl., Ex. AQ). In fact, some FSRs do not want their managers to go on sales calls with them. (Smith Decl., Ex. V, ¶7). Mitchell likewise admitted at deposition that she concentrated her efforts in terms of attending sales calls on those FSRs who, in her view, needed more work on sales technique. (Gray Decl., Ex. AR). Gee testified that when she was a manager, she met with new FSRs once a week and experienced FSRs once every 2-3 weeks. (Gray Decl., Ex. AS). Many FSRs choose not to attend regular meetings with their managers. (Smith Decl., Ex. L, ¶9; Ex. O, ¶8) Declarant Rollero testified that she does not mentor or train FSRs who, in her view, do not need it. (Gray Decl., Ex. AT).[FN21] Indeed, many FSRs, such as named plaintiff Mitchell, do not seek training or mentoring from their managers and do not even come to the sales office regularly. (Gray Decl., Ex. AW; Smith Decl., Ex. A, ¶11; Ex. U, 111). As declarant Kazakias stated in her declaration, the FSR career promises the opportunity for someone to operate independently and "be [your] own boss." (Pl. App. IV, Part 1, Ex. 21, ¶3). In short, there is nothing common at all about the need for or an FSR's desire to receive -- "informal training or mentoring."

FN20. Plaintiffs' claim concerning the disparate allocation of informal training and mentoring ignores the numerous formal training and sales assistance programs that are available to all FSRs regardless of gender, and the existence of the MLFS formal mentorship program. (Smith Decl., Ex. C; ¶4; Ex. D, ¶8; Ex. K, ¶¶4-5, 7; Ex. L, ¶10; Ex. U, ¶10; Ex. W, ¶10; Gray Decl., Ex. AP).

FN21. It is impossible to discuss these facts without observing the antithetical interests of female managers who allocate certain business development resources and make promotional decisions and the female FSRs, functional managers and second-line managers that are impacted by them. *See Sheehan v. Purolator, Inc.,* 103 F.R.D. 641, 655 n.12 (E.D.N.Y. 1984 (named plaintiff who was responsible for approving promotion decisions and setting salaries could not adequately represent those who claimed that they were adversely affected by the implementation of these practices). This actual tension is illustrated acutely by the contradictory viewpoints of named plaintiff Hwa-Mei Gee and plaintiffs' declarant Carol Rollero. Gee claims that in 2002, "MetLife selected a less qualified man over [her] for an AD position." (Pl. Br. 21). Ms. Rollero -- who is Gee's manager -- holds an entirely different view on this subject. Indeed, at deposition, Ms. Rollero testified as follows with respect to the appointment of Anthony Sciraggi, the male identified by Gee:

Q: What was your reaction [to having Sciraggi join your office]?

A: Well, my reaction was positive...

Q: Why couldn't you do that with Mai Gee?

A: I didn't think Mai Gee or I shouldn't say I don't think. Jay and I did not think Mai Gee wanted to become a manager again.

Q: Was that what she told you?

A: I guess just not really telling me. Just by manner of action and what we needed in -- another thing that we needed in Garden City was somebody that was really willing to run with the reps, go out on appointments, work with the new people more.

(Gray Decl., Ex. AU).

It is clear that Rollero did not, in her judgment, view Gee as a viable candidate for the role assumed by the male who was actually appointed.

Ms. Rollero also made decisions about the allocation of resources to named plaintiffs Mitchell and Gee. When asked at deposition whether she had mentored Mitchell or Gee, Ms. Rollero replied that she did not need to mentor them. (Gray Decl., Ex. AV). Indeed, Ms. Rollero testified that there were a number of FSRs in her agency who did not need help from her and did not ask to be mentored. (Gray Decl., Ex. AV at 517-518).

Even among FSRs, there are bound to be conflicts about the allocation of resources. Some managers' allocation systems favor new, inexperienced FSRs, while others favor senior, experienced FSRs. *See supra* at 13-14.

> Given all the competing individualized interests unique to this case, it is impossible for the named plaintiffs who held managerial positions (Gee, Ramsey and Mitchell) to satisfy the adequacy of representation requirement for class certification.

Once again, plaintiffs have offered no quantitative or statistical showing that informal training, mentoring or partnering is provided on a disparate basis. Instead, their purported showing is entirely anecdotal - and, as demonstrated *infra* at 21-24 - hardly of the quality or quantity to sustain a showing of commonality. In order to succeed on a pattern-or-practice claim, plaintiffs "must prove more than sporadic acts of discrimination; rather, they must establish that intentional discrimination was the defendant's 'standard operating procedure.' " *Robinson v. Metro-North Commuter R.R.,* 267 F.3d 147,158 (2d Cir. 2001), *cert. denied,* 535 U.S. 951, 122 S. Ct. 1349 (2002), (quoting *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 336, 97 S. Ct. 1843, 1855 (1977)). While the liability phase should be "largely preoccupied with class-wide statistical evidence directed at establishing" the alleged pattern-or-practice (*see Robinson,* 267 F.3d at 168), here plaintiffs have proffered no statistics concerning the distribution bf any of the "resources" they identify.

In sum, because the practices pursuant to which each of the business development resources that plaintiffs allege is discriminatorily distributed are so varied in nature, an evaluation of whether there is a pattern of discrimination could not be made based on the adjudication of the claims of a handful of FSRs who themselves have completely different experiences with respect to the availability, interest in, receipt and use of these resources. Rather, to determine liability on a class-wide basis, the distribution of every book of business in every branch would have to be examined; every leads program would need to be separately reviewed to see if it implicates management discretion at all and, if so, whether the distribution mechanism is objective or subjective (or both). Ultimately, the individualized practices of every branch would need to be examined to see how leads are *actually* distributed (category-by-category) within *each* branch, and why; and ultimately each lead assignment would need to be examined to determine how it was assigned, to whom it was assigned, and why. Absent such an evidentiary showing, there would be no basis to determine whether any differences in the distribution of resources are common to the class.

Since plaintiffs allege that there are significant gender differences in FSR compensation *because* of the disparate allocation of resources, a whole different set of triable issues would be implicated: the relationship, if any, between the receipt (or non-receipt) of a "lead" or "book of business" and the actual receipt of commission income. How will this issue be tried (other than on a case-by-case basis) when, concededly, there is only the most attenuated relationship between the receipt of a lead (or a book of business) and the consummation of a sale?[FN22] As a result, none of these claims reflect a sufficient (indeed, any) degree of commonality to justify class treatment.

FN22. *See* Smith Decl., Ex. A, ¶16; Ex. H, ¶6; Ex. L, ¶8; Ex. M, ¶8; Ex. O, ¶6; Ex. U, ¶9.

d. Neither Plaintiffs' Statistical Analysis Nor Anecdotal Evidence Demonstrates A Common Claim With Respect To The *Allocation Of Resources*

(i) Plaintiffs' Statistical Analysis Sheds No Light Whatsoever *On Alleged Disparities In Resource Allocation*

There is no dispute that plaintiffs have offered no statistical analysis whatsoever of gender disparities in resource allocation. The Second Circuit has made clear that "class certification would not be warranted absent some showing that the challenged practice is causally related to a pattern of disparate treatment or has a disparate impact ...." *Caridad v. Metro-North Commuter R.R.,* 191 F.3d 283, 292 (2d Cir. 1999), *cert. denied,* 529 U.S. 1107, 120 S. Ct. 1959 (2000), *vacated on other grounds,* 267 F.3d 147 (2d Cir. 2001), *cert. denied,* 535 U.S. 951, (2000) 122 S. Ct. 1349 (2002). Where, as here, the decision-making process at issue is alleged to be based on subjective determinations, significant statistical disparities are relevant to determining whether the challenged employment practice has a class-wide impact. *Id.* Plaintiffs have proffered no such statistical disparities; instead, plaintiffs infer the existence of sex-based disparities in the distribution of business development *resources* from alleged statistical disparities in *compensation* between male and female FSRs. This inferential leap is justified neither by logic nor the facts.

Moreover, even plaintiffs' statistical analysis of FSR compensation is so fundamentally flawed as to permit no finding of class-wide gender disparity sufficient to justify certification of a class on the FSR compensation claim. Dr. Drogin's first statistical analysis of FSR compensation is insufficient as a matter of law to justify a pattern or practice of gender discrimination because he did not "control[] for various factors that one would expect to be relevant to the likelihood of [increased compensation]" as required by the *Caridad* Court. *Id.* at 293.[FN23] Indeed, Dr. Drogin did not consider FSR qualifications or experience in any respect in his initial report. (Gray Decl., Ex. B at 8-10). Instead, he lumped together FSRs with and without prior insurance industry sales experience and those who hold and do not hold relevant insurance licenses, without any regard to the statistically significant impact that these factors have on compensation.[FN24] (Gray Decl., Ex. B at 8-10).

FN23. *See also Cruz v. Coach Stores, Inc.,* No. 96 Civ. 8099, 1998 U.S. Dist. LEXIS 18051, at *13 n.3 (S.D.N.Y. Nov. 17 1998), *aff'd in art, vacated in part on other grounds,* 202 F.3d 560, 573 (2d Cir. 2000) district court found plaintiff's expert analysis was fatally flawed because it made "no distinctions for education, prior job history or job level.") (citation omitted).

FN24. In a commission-based compensation system in which an FSR's compensation is directly attributable to the amount of his or her sales, both licensing and prior experience are obviously controlling factors since: (i) the range of products an FSR can sell is limited by what licenses he or she holds; and (ii) knowledge of insurance products and previous experience selling such products directly impacts on the magnitude of an FSR's sales. (Smith Decl., Ex. A, ¶5; Ex. I, ¶12; Ex. L, ¶12; Ex. Y, ¶7).

In contrast, the analysis performed by defendant's expert, Dr. Evans, which controls for the possession of requisite licenses,[FN25] prior industry sales experience, and other qualifications, demonstrates the deficiencies in Dr. Drogin's initial approach and the statistical significance of these non-discriminatory, business-related factors that Dr. Drogin ignored.[FN26] (Gray Decl., Ex. D at 25-31, Tables 4a-4d). When these concededly significant qualification and experience variables are included in the analysis, the difference between total compensation for male and female FSRs employed in that position for a full year is *statistically insignificant* in *each* year of the class period. (Gray Decl., Ex. D at 25-31, Tables 4a-4d).

FN25. A variable life license (or a variable annuity license) is required to sell variable life insurance products, variable annuities and mutual funds. (Smith Decl., Ex.A, ¶5). Thus, the small group of FSRs (approximately 6 percent of the total) who do not hold such licenses have distinctly different compensation prospects than those who do hold such licenses. (Gray Decl., Ex. D at 30).

FN26. As explained above (*supra* at n.5) and in the Declaration of Thomas J. Regan (annexed as Gray Decl., Ex. I) certain FSRs come to MetLife with considerable insurance sales experience, while others come to MetLife with no prior insurance sales experience whatsoever. (Gray Decl., Ex. I at ¶¶6-9). Clearly, the earnings prospects of these two groups are fundamentally different.

Faced with clear evidence that there were no statistically significant gender differences in the compensation of male and female full-year FSRs once the most basic qualification variables were factored in, plaintiffs felt compelled to submit a supplemental report from Dr. Drogin.[FN27] In his supplemental report, Dr. Drogin found that the variables used by Dr. Evans were, in fact, statistically significantly related to FSR compensation. The only modification to the Evans model that Dr. Drogin made was to expand the FSR group being analyzed; Dr. Evans had analyzed FSRs who held that position for a full year only; Dr. Drogin added FSRs who worked less than a full year (but a minimum of 13 weeks) *and* who were active as of year-end. In so doing, however, Dr. Drogin excluded: (i) FSRs who were hired in a particular year (and worked a minimum of 13 weeks) but were inactive at the end of that year; and (ii) FSRs who were employed in a particular year (and worked a minimum of 13 weeks) but were inactive at the end of that year. Thus, in this gerry-rigged sample, which purported to *include* part-year FSRs, Dr. Drogin in fact *excluded* between 55 and 62 percent of them! (Gray Decl., Ex. Y at 7-9).

FN27. Defendant has included Dr. Drogin's supplemental report as an exhibit to its opposition papers (as Gray Decl., Ex. C) because it was prepared and provided to defendant after plaintiffs filed their moving papers. Plaintiffs have indicated to defendant that they intend to submit it as part of their reply submission; it is addressed in the supplemental report of Dr. Evans, which is likewise submitted herewith. (Gray Decl., Ex. Y).

It is clear that the experts do not “duel” on the following propositions:[FN28]

FN28. The analyses in Dr. Evans' supplemental report utilize the exact model found in Appendix 4 of Dr. Drogin's supplemental report. (Gray Decl., Ex. Y at 9).

• There are a number of variables (including possession of requisite insurance licenses and prior industry sales experience) which significantly affect FSR compensation; these variables were omitted from the analytical model presented by Dr. Drogin in his first report.
• There is no *statistically significant* gender difference in the compensation of FSRs employed for a full year with respect to *any year* during the class period.
• There is *no statistically significant* gender difference in the compensation of part-year FSRs (who worked a minimum of 13 weeks, but who were not active at the end of the year).
• The full-year FSRs and the part-year FSRs not active at year-end together represent approximately 80% of the total FSR group during the class period. (Gray Decl., Ex. Y at 7-9).

It is simply inconceivable that plaintiffs could contend that there exists a “common” pattern of FSR compensation discrimination, when there are no significant gender disparities during the class period with respect to FSRs who have worked a full year. Nor can plaintiffs demonstrate a “common” pattern of compensation discrimination by selectively including only certain part-year FSRs in their analysis, when it is clear that there are no such disparities with respect to the substantial majority of part-year FSRs. Indeed, to argue a “pattern” of discrimination from such a showing would require an absurd theory of discrimination which disfavors female FSRs -- but *only* in their first year of employment and *only* if they remained active at the end of that year.

Finally, plaintiffs' theory of FSR compensation discrimination rests on the contention that female FSRs have received unequal “business development resources.” Such an assertion, however, would manifest itself only in an FSR's *commission* compensation (and not in the non-commission components of pay). Accordingly, Dr. Evans isolated and analyzed FSR commission income to see if there were gender based disparities in such income. Dr. Evans (using Dr. Drogin's precise model and running it on Dr. Drogin's own data set) found that there are no *statistically significant* gender disparities in FSR commission earnings for any full year within the class period (*i.e.,* 1999-2001).[FN29] (Gray Decl., Ex. Y at 10-12).

FN29. Even if the part-year FSRs excluded by Dr. Drogin were added into the analysis, there are still no statistically significant gender differences in commission income for any years within the class period. (Gray Decl., Ex. Y at 12). Further, if one isolates the group that Dr. Drogin added to his Appendix 4 regression (new hires active at year end), there are no statistically significant gender differences for any year within the class period; in one of the four years, women earned more than men. (Gray Decl., Ex. Y at 12).

(ii) Plaintiffs' Anecdotal Evidence Is Neither Quantitatively *Nor Qualitatively Sufficient To Demonstrate Commonality*

In the absence of *any* statistical showing demonstrating a common claim with respect to the allocation of business development resources, the isolated complaints of a few FSRs who contend that their compensation suffered from the manner in which business resources were distributed comes nowhere near what is required, either quantitatively or qualitatively, to sustain the Rule 23(a) commonality requirement. Even though there are almost 3,000 female FSRs in the purported class (Gray Decl., Ex. D at 9, 10 n.5), plaintiffs, by their own accounting, have identified only 56 FSR class members who they contend were denied business development resources on the basis of gender. (Pl. Br. at 9). Of these 56, only 30 supplied this Court with declarations. (Pl. App. IV, Part 1, Ex. 1). For the other 26, plaintiffs rely on internal complaints (*i.e.,* complaints submitted to MetLife's Human Resources Department) and/or external complaints (*i.e.,* EEOC or litigation complaints), most of which only deal tangentially with the distribution of resources. (Pl. App. IV, Part 1, Ex. 1).

Together, the 56 statements offered (regardless of their source, or substance) represent less than 2.0% of the aggrieved class of FSRs, a percentage that falls well below the acceptable benchmark for anecdotal evidence under any of the relevant authorities.[FN30] This already inadequate sample is significantly eroded upon removing: (i) the 16 submissions that contain allegations that fall well outside the class period (Declaration of Jonathan E. Sachs (hereinafter referred to as "Sachs Decl."), ¶2);[FN31] and (ii) the vast majority of declarations that were impeached, or proven baseless or wholly conclusory at deposition.[FN32]

FN30. In *Ross v. Nikko Securities Co. International, Inc.,* where plaintiffs sought to certify a class comprised of nearly 200 women, Judge Patterson found that the submission of four affidavits (2%) was insufficient to satisfy commonality. 133 F.R.D. 96, 98 (S.D.N.Y. 1990); see *also Bishop v. N.Y. City Dep't of Hous. Pres. & Dev.,* 141 F.R.D. 229, 237 (S.D.N.Y. 1992) (holding affidavits from 12.5% of the class statistically significant and sufficient to establish an aggrieved class); *Churchill v. IBM, Inc.,* 759 F. Supp. 1089, 1103 (D.N.J. 1991) (holding testimonial proof from 2.14% of the proposed class insufficient to establish an aggrieved class).

FN31. Because claims outside the class period are not actionable, *see United Air Lines, Inc. v. Evans,* 431 U.S. 553, 558, 97 S. Ct. 1885, 1889 (1977), the Court should not consider them in determining whether -- in the absence of a statistical showing -- plaintiffs have mustered sufficient anecdotal support to demonstrate commonality. If the Court does consider such claims in determining commonality, then the sample against which the number of anecdotal witnesses must be compared is much larger than 3,000 members.

FN32. In the exhibits annexed to the accompanying Declaration of Jonathan E. Sachs we identify various allegations included in plaintiffs' declarations that were impeached, or proven baseless or conclusory at deposition. Each exhibit contains the following: (i) a summary of the declarant's allegation with respect to the business resource at issue and her deposition testimony; (2) a table comparing the declarant's allegation with respect to the business resource at issue and her excerpted deposition testimony on that specific subject; (3) the portion of the declaration from which the declarant's allegation was excerpted (which has been underlined); and (4) the page(s) of the deposition transcript from which the declarant's testimony was excerpted.
Focusing on the particular types of "resources" that plaintiffs claim FSRs were deprived of: at most 24 -- or less than 1% of the purported class - allege they were deprived any *particular* resource (in this case, leads). Further, of the 24 declarants who claim they were denied leads, the allegations of 10 were impeached or proven wholly conclusory (Sachs Decl., ¶4; Ex. A-J) and another 4 were time-barred (Sachs Decl., ¶5); of the 22 declarants who claim they were denied orphan books of business, the allegations of 16 were impeached or proven wholly conclusory (Sachs Decl., ¶7; Ex. K-Z) and another 3 were time-barred (Sachs Decl., ¶8); of the 6 declarants who claim they were denied partnering relationships, the allegations of 3 were impeached or proven wholly conclusory (Sachs Decl., ¶10; Ex. AA-AC) and another 2 were time-barred (Sachs Decl., ¶11); and of the 9 declarants who claim they were denied training, the allegations of 2 were impeached or proven wholly conclusory (Sachs Decl., ¶13; Ex. AD-AE) and another 2 were time-barred. (Sachs Decl., ¶14).

Due to space limitations, we cannot summarize here each of the liberties plaintiffs have taken with the record, in attempting to demonstrate anecdotally that FSRs were denied “resources” on a sufficiently broad basis to meet their burden of demonstrating commonality. Instead, we summarize these in the exhibits annexed to the Declaration of Jonathan E. Sachs, and simply offer here the following illustrative examples:

• Declarant Diana Malec swore in her declaration that “[men] received all of the sales leads. As much as 80% of their income was generated from these leads.” (Pl. App. IV, Part 1, Ex. 25, ¶35). At deposition, she demonstrated that her assertion was a complete fabrication:

Q: Do you know whether these reps make any sales off these leads? Have they made any sales off these leads?

A: I have no idea.

Q: Do you know how much compensation they have earned off these leads?

A: I have no idea.

(Sachs Decl., Ex. F).

Declarant Candice Hearn swore in her declaration that “after my hire, I was given only nonlucrative, stagnant accounts or ‘books of business.’ In contrast, it is my understanding that new male Account Reps were routinely given the most lucrative books of business and leads to accounts that increased their compensation and ability to succeed.” (Pl. App. IV, Part 1, Ex. 15, ¶5). At deposition, Hearn, demonstrated that her allegations concerning the impact leads and books of business had on the compensation of male FSRs were entirely conclusory:

Q: Do you know if other financial services reps in the agency were assigned books of business?

A: Do I know if other, yes, I do.

Q: Do you know the number of policyholders in any of the other reps' books of business?

A: No, I do not.

Q: Do you know if other account reps in the agency were able to make sales off of their policyholders?

A: I do not know.

(Sachs Decl., Ex. Q).

Declarant Elizabeth Schaudel swore in her declaration that “[f]rom the time I began at MetLife, I have been denied the business support that other male Account Reps were given. For example, one function of a Managing Director is to encourage and train new Account Reps in sales techniques by accompanying them on sales calls. Mr. Rossi never accompanied me, or any other female Account Reps, to these visits with potential clients, or ‘XL5s.’ However, Mr. Rossi did accompany male Account Reps, such as C.G. Wattamwar, on their XL5s.” (Pl. App. IV, Part 1, Ex. 36, ¶4). Yet, Schaudel testified at deposition that she: (i) did not know whether or not Mr. Rossi went on any sales calls with other female FSRs; (ii) did not know of any male FSRs other than C.G. Wattamwar who went on a sales call with Mr. Rossi; (iii) knew of only *one* instance in which Mr. Rossi accompanied C.G. Wattamwar on a sales call; and (iv) had no information whatsoever, concerning how it came to be that Mr. Rossi attended that *one* sales call with C.G. Wattamwar. (Sachs Decl., Ex. AC).

Declarant Judy Insinga swore in her declaration that “[a]lthough I know that business leads do come into the office, I have never been given any....” (Pl. App. IV, Part 1, Ex. 18, ¶7). At deposition, Insinga provided the following contradictory testimony:

Q: You are currently participating in a new lead program with the Samis P&C office, is that correct?

A: Correct.

Q: Okay. And you have received leads from this program, is that correct?

A: Yes.

Q: Approximately how many leads have you received?

A: To date, approximately 800.

Q: How many sales have you made from any of these leads?

A: Six.

(Sachs Decl., Ex. D).[FN33]

FN33. In fairness to plaintiffs, Insinga did not begin to participate in the Samis P&C lead program until after her declaration was signed. Plaintiffs, however, never withdrew or amended the declaration, even after Insinga's deposition.

MetLife recognizes that this motion is not an occasion for the Court to evaluate the merits of plaintiffs' claims. At the same time, the Court is obliged to take a sufficiently critical view of the evidence to determine whether the challenged practice satisfies the commonality requirement. *See Caridad* at 292; *see also Gen. Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 159 n.15, 102 S. Ct. 2364, 2371 (1982); *In re Livent, Inc. Noteholders Sec. Litig.,* 211 F.R.D. 219, 222 (S.D.N.Y. 2002); *Daniels v. City of N.Y.,* 198 F.R.D. 409, 413 n.5 (S.D.N.Y. 2001). When measured by this standard, it is clear that plaintiffs' anecdotal evidence is quantitatively and qualitatively inadequate, and cannot serve as a basis for finding commonality.[FN34]

FN34. The report of plaintiffs' sociological expert, Dr. Willaim T. Bielby, likewise does nothing to advance plaintiffs' certification motion. Dr. Bielby does not find that discriminatory practices have, in fact, occurred within MLFS. Rather, he opines that the subjective elements of certain decision-making processes in MLFS with respect to the allocation of certain resources and promotion decisions leave room for the exercise of discretion and gender stereotyping (Pl. App. II, Ex. 26 at 6), thus ignoring (among other things) the fact that the compensation systems for FSRs and first-line managers (and most resource distribution mechanisms) are not subjective at all. (*See supra* at 2-3, 8-9; *infra* at 26-27). For this reason, and the other reasons set forth in the report of Dr. Christopher Winship (Gray Decl., Ex. AX), which reviews Dr. Bielby's methodology and analysis, Dr. Bielby's report should be disregarded.

In sum, plaintiffs have provided no statistical, and wholly insufficient anecdotal, evidence to support their claim that alleged disparities in FSR compensation are attributable to a pattern and practice of discrimination in the distribution of business resources. Accordingly, no class should be certified in respect of such claim.

2. Plaintiffs Have Failed To Demonstrate *Typicality On Their FSR Compensation Claim*

The Second Circuit has defined the typicality requirement to be “satisfied when each class member's claims arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.” *Marisol A. v. Giuliani,* 126 F.3d 372, 376 (2d Cir. 1997) (emphasis added); *see also Robinson v. Metro-North Commuter R.R.,* 267 F.3d 147, 155 (2d Cir. 2001), *cert. denied,* 535 U.S. 951, 122 S. Ct. 1349 (2002). Although plaintiffs try to mask their typicality deficiency by lumping together all four MLFS positions, the simple -- and undisputed -- fact is that none of the three named plaintiffs who held an FSR position during the class period (Ramsey, Mitchell and Persaud)[FN35] claims that she was discriminatorily denied “informal training and mentoring, assignment of sales leads and books of business, and partnering with managers and/or more experienced FSRs.” (Pl. App. IV, Part 1, Ex. 2, 5, 6). Ramsey testified that she was not the subject of *any* discrimination during the time (within the class period) that she was an FSR. (Gray Decl., Ex. AY). Mitchell testified that she was not discriminatorily denied any of these resources. (Gray Decl., Ex. AZ). Persaud explicitly admitted in her deposition that, not only did she never ask for leads, she did not even want to receive them. (Gray Decl., Ex. BA). Persaud likewise admitted that she was never denied any training that she requested; to the contrary, she attributed her 1999 successes to the training and support she received from MetLife's Financial Planning Unit. (Gray Decl., Ex. BB).[FN36]

FN35. Only three of the named plaintiffs (Ramsey, Mitchell and Persaud) held an FSR position during the class period. (Gray Decl., Ex. G, ¶¶27-60).

FN36. The *only* complaint that Persaud makes with respect to her status as an FSR during the class period is that she was denied a private office during a four month period in her agency, which she believed she was entitled to because she had achieved a certain level of sales production. (Pl. App. IV, Part 1, Ex. 5, ¶¶4-5).

In short, the absence of a representative plaintiff whose claim "arise[s] from the same course of events" alleged in support of the FSR compensation claim proves fatal to plaintiffs' assertion of typicality.

B. *Functional Managers*

1. *Commonality* Plaintiffs fail to satisfy the commonality requirement with respect to their functional manager compensation claim because they have not submitted *any* statistical evidence whatsoever concerning the allocation of business development resources to -- or the compensation of -- functional managers. To the contrary, both Dr. Drogin and Dr. Evans agree that there are *no* statistically significant gender disparities in the compensation of functional managers in *any year* since the position was created in 1997. (Gray Decl., Ex. D at 33-37, Table 7a-7d; Ex. Y at 14). To the contrary, in 1998 and 2000 female functional managers, on average, earned *more* than males. (Gray Decl., Ex. C, App. 8).

2. *Typicality* Plaintiffs cannot satisfy the typicality requirement with respect to their functional manager compensation claim because there is no named plaintiff with a representative claim. (*See supra* at 25). The only named plaintiff who has held the position of functional manager -- Gee -- does not assert any disparate compensation claim with respect to this position. (Gray Decl., Ex. G, ¶¶37-45).

For the foregoing reasons, no class should be certified with respect to plaintiffs' functional manager compensation claim.

C. *First-Line and Second-Line Managers*

In addition to suffering from the flaws identified below, plaintiffs' compensation claim with respect to first-line and second-line managers fails to satisfy Rule 23(a)'s requirements because it is premised on a statistical analysis that amalgamates the data for the two groups. The compensation data cannot be lumped together in this fashion because the two positions are compensated in fundamentally different ways. (Gray Decl., Ex. I, ¶¶13-16).

As previously noted, MetLife does not directly determine the compensation of first-line managers within MLFS. Rather, first-line managers are compensated based on Performance Based Compensation ("PBC") -- an elaborate and complex formula which considers a variety of objective measures of branch performance, including headcount, retention of FSRs, FSR productivity and agency expenses. (Gray Decl., Ex. I, ¶¶13-14). In contrast, second-line managers are compensated by a variety of methods: some are paid a straight salary; some receive variable pay (in essence, bonuses) based on designated responsibilities within the branch, such as recruiting; some are paid a pre-determined percentage of branch PBC; and some are compensated based on a combination of these methodologies. (Gray Decl., Ex. I, ¶16; Ex. X). Accordingly, plaintiffs' insistence on lumping together both positions in carrying out their compensation analysis alone defeats any showing of commonality.

1. *First-Line Managers*

a. *Commonality* As with their FSR compensation claim, plaintiffs do not attack as discriminatory the compensation system for first-line managers, which they admit "is largely determined by a common performance based compensation plan ('PBC') that considers the agency's FSR production, recruiting, retention, sales growth, profitability, ethics, and compliance." (Pl. Br. at 10). Instead, plaintiffs contend - in the vaguest and most conclusory terms -- that MetLife has discriminated against female first-line managers in the allocation of "training, mentoring and discretionary funds." (Pl. Br. at 10). Plaintiffs, however, fail to specify: (i) what they mean by "training, mentoring and discretionary funds" as these terms relate to first line managers; or (ii) how these resources are allocated (or, more precisely, misallocated). Most importantly, plaintiffs have not provided the Court with any statistical evidence that these resources have been disparately allocated on the basis of gender.[FN37] Thus, they have not established commonality under the rigors of *Caridad. See Caridad v. Metro-North Commuter R.R.,* 191 F.3d 283, 292 (2d Cir. 1999), *cert. denied,* 529 U.S. 1107, 120 S. Ct. 1959 (2000), *vacated on other grounds,* 267 F.3d 147 (2d Cir. 2001), *cert. denied,* 535 U.S. 951, 122 S. Ct. 1349 (2002).

FN37. The anecdotal evidence supplied by plaintiffs does not support a finding of commonality either. Although plaintiffs claim that "11 [female witnesses and class members] allege that as agency managers they were denied business development resources and support that similarly situated men received, resulting in lower compensation," (Pl. Br. at 21) plaintiffs' Summary of Class Member and Female Witness Allegations Regarding Discriminatory Conduct in MLFS (Pl. App. IV, Part 1, Ex. 1) demonstrates that only three of these women held managing director (*i.e.,* first-line manager) positions (Jackie Brinson, Judy Insinga and Carol Rollero); the others held lower level managerial positions. Of the three referenced women who held first-line manager positions, only *one* (Rollero) held a first-line manager position during the class period and she is the only one who alleges "unfair distribution of business resources" as a first-line manager. (Pl. App. IV, Part 1, Ex. 12, ¶ ¶11-12, 17-19; Ex. 18, ¶¶5, 7; Ex. 34, ¶¶18-24). Thus, plaintiffs' meager (indeed, virtually nonexistent) "anecdotal" showing hardly compensates for the total absence of any statistical evidence of gender based disparities in the allocation of resources to first-line managers or gender based disparities in first-line manager compensation.

Even assuming that evidence of disparities in earned compensation could substitute for evidence of disparities in the distribution of certain resources, plaintiffs (based on their *own* expert's submissions) still have failed to satisfy the commonality requirement because they have shown no gender disparities at all! It is undisputed that, with respect to first-line managers, there is no statistically significant gender disparity in compensation for any full year within the class period - *i.e.,* 1999, 2000, or 2001.[FN38] (Gray Decl., Ex. D at 31-32, Table 5; Ex. Y at 14). Indeed, in 1997, 1998, 2000 and 2001 female first-line managers earned, on average, *more* than their male counterparts. (Gray Decl., Ex. C, App. 8). Thus, the statistical evidence offered by plaintiffs: (i) makes plain that no claim of compensation discrimination can be certified with respect to the firstline managers; and (ii) substantially undermines plaintiffs' theory of a discriminatory pattern or practice of gender discrimination with respect to managerial compensation.

FN38. Conclusions cannot be drawn for 2002 since the 2002 data are part year only and do not include year-end reconciliations of PBC. (Gray Decl., Ex. D at 31).

b. *Numerosity* Numerosity requires a determination that the potential "class is so numerous that joinder of all members is impracticable." Fed. R.Civ.P. 23(a)(1); *see also Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 482-83 (2d Cir.), *cert. denied,* 515 U.S. 1122, 115 S. Ct. 2277 (1995). Plaintiffs correctly observe that in the Second Circuit, numerosity "is presumed at a level of 40 [class] members." *Id.* at 483; Pl. Br. at 15. Measured by this standard, numerosity is not satisfied for first-line managers; during the class period 25 women - fewer than 40 -- held a first-line manager position. (Gray Decl., Ex. I, ¶17). For the foregoing reasons, no class should be certified with respect to plaintiffs' first-line manager compensation claim.

2. *Second-Line Managers*

a. *Commonality* Plaintiffs' argument with respect to second-line manager compensation appears to be that MetLife compensates female second-line managers less than their male counterparts by denying them training and mentoring and "relying on subjective criteria, exercised with gender bias, to determine the allocation of agency profits among agency managers." (Pl. Br. at 2). Plaintiffs, however, have offered virtually no evidence to support this claim. First, plaintiffs have provided no statistical support whatsoever for finding system-wide disparities with respect to the allocation of *any* "resources" to second-line managers. Second, plaintiffs nowhere identify exactly what "training" or "mentoring" female second-line managers have been denied; let alone how such -- as yet unspecified -- "denials" have been discriminatory on the basis of gender. A demonstration of commonality cannot rest on such a bare showing.[FN39]

FN39. Similarly, plaintiffs nowhere explain, let alone document, how second-line managers receive a discriminatory "allocation of agency profits." As noted above, many second-line managers are paid a salary (or salary plus bonus). (*See supra* at 3, 26-27). How such compensation is, in any respect, disparately paid to male and female second-line managers performing similar functions is never explained in plaintiffs' moving papers.

Furthermore, the notion that plaintiffs can group together, in a single statistical analysis, compensation data for all second-line managers across MLFS is plainly inconsistent with the undisputed evidence regarding the heterogeneity of functions performed by the various incumbents in the second-line manager position. For example, some second-line managers run smaller detached offices (Gray Decl., Ex. BC; Smith Decl., Ex. W, ¶2); some are sales managers, responsible for units of FSRs (Gray Decl., Ex. BD); other second-line managers do not supervise FSRs at all, and are instead responsible for certain functional or administrative duties within the sales office such as financial planning, training, marketing or recruiting (Gray Decl., Ex. BE; Smith Decl., Ex. C, ¶2; Ex. T, ¶2; Ex. AA, ¶¶2-3).

The dramatic differences in the functions performed by the various categories of second-line managers is evident from the wide range of their compensation. In order to eliminate any issue of alleged gender bias, we note the differentials in the compensation of *male* second-line managers only: in 2000, for example, approximately 32% of *male* second-line managers earned less than $75,000; approximately 27% earned between $100,000-$150,000; and approximately 13% earned in excess of $150,000. (Gray Decl., Ex. D at 20). These wide compensation ranges alone demonstrate that there is no logical basis for lumping together, for analytical purposes, the compensation of such a diverse group merely because they hold the same generic title, under the faulty assumption that they should all be earning essentially the same thing. Indeed, the only common thread uniting the incumbents performing these various functions is that they each hold the secondline manager designation. There is, in short, no basis in fact or logic for their compensation -- or the methods by which they are compensated -- to be similar; and there is equally no basis in fact or logic to analyze their compensation as if they all performed a unitary function. (*See, e.g.,* Smith Decl., Ex. M, ¶¶3-5; Ex. T, ¶4; Ex. W, ¶6; Ex. AA, ¶¶3-4). Yet, that is precisely what plaintiffs do.[FN40]

FN40. Indeed, as noted above, plaintiffs further compound this error by lumping first-line and second-line managers together in performing their compensation analysis. (Gray Decl., Ex. B at 11, Table 8; Ex. C at 5).

Finally, even when the compensation of male and female second-line managers is analyzed collectively (and as noted above, erroneously so), plaintiffs' *own* statistical analysis demonstrates that in 1996 and 1997 female second-line managers earned, on average, over $12,000 *more* than their male counterparts and that, in 1998 and 1999, there was no statistically significant gender disparity with respect to second-line manager compensation. (Gray Decl., Ex. C at 5-6, App. 6, 8). From plaintiffs' perspective, only in 2000 and 2001 are there statistically significant compensation disparities between male and female second-line managers.[FN41] (Gray Decl., Ex. C at 5-6, App. 6, 8). These findings, as they apply to such a functionally diverse group, do not support a finding of commonality.

FN41. Because a number of second-line managers receive compensation that is based on annual PBC, or receive annual bonuses, partial-year data for 2002 provides no meaningful basis for analysis. *See supra* n.38. Dr. Evans' analysis of second-line manager compensation was limited to those holding the position for a full year. He found no statistically significant gender disparity in compensation for second-line managers in 2000; (Gray Decl., Ex. D at 32). Dr. Drogin's supplemental report does not dispute this finding.

b. *Typicality* Not only have plaintiffs failed to demonstrate commonality with respect to their second-line manager compensation claim, they have failed to demonstrate typicality as well. Although three of the named plaintiffs -- Gee, Ramsey and Mitchell -- were each second-line managers at some point during their tenure with MetLife, *none* asserts a timely compensation claim, or the type of compensation claim that would be typical of the potential class they seek to represent. Gee asserts no claim of compensation discrimination at all, even though she held a second-line management position from 1995 until June 1999. (Gray Decl., Ex. G, ¶38; Ex. BF). Mitchell's claim is untimely because she ceased being a second-line manager in May 1998 -- well before the commencement of the class period. (Gray Decl., Ex. BG). Furthermore, she too makes no allegations supporting a claim of second-line management compensation discrimination.[FN42]

FN42. Mitchell alleges that there was a large disparity in management compensation between her, as a *second-line* manager, and her *first-line* manager, Sam Kashanchi (Gray Decl., Ex. BH). Even if true, Mitchell's allegation would not support a claim of discriminatory treatment of second-line managers.

Ramsey's claim is also atypical. Her only complaint regarding compensation for the period during which she was a second-line manager was that she had not received a written compensation plan from her first-line manager. (Gray Decl., Ex. BI). This claim -- even if it can be classified as a compensation claim at all - is hardly typical of the class-wide second-line manager compensation claims that plaintiffs assert. In sum, no class should be certified with respect to plaintiffs' second-line manager compensation claim.

III. PLAINTIFFS HAVE FAILED TO SATISFY THE REQUIREMENTS OF RULE 23(a) WITH RESPECT TO THEIR CLASS CLAIMS OF *DISCRIMINATORY PROMOTION PRACTICES*[FN43]

FN43. A federal class may only include persons who are challenging acts that occurred within 300 days prior to the earliest date that a class representative filed a timely charge related to the claim at issue. *See Avagliano v. Sumitomo Shoji Am., Inc.,* 103 F.R.D. 562, 578 (S.D.N.Y. 1984); see also Tolliver v. Xerox Corp., 918 F.2d 1052, 1058 (2d Cir. 1990), *cert. denied,* 499 U.S. 983, 111 S. Ct. 1641 (1991). In this case, plaintiffs' promotion claim was not encompassed within the first timely-filed charge. The first named plaintiff to file a charge of discrimination relating to promotion was Stella Mitchell. (Pl. App. IV, Part 1, Ex. 2, 3, 5, 6). Mitchell's initial charge alleging discrimination in promotion was filed on September 14, 2000. (Pl. App. IV, Part 1, Ex. 2). As such, plaintiffs federal promotion claim should date back to no earlier than November 21, 1999.

The deficiencies in plaintiffs' motion with respect to their promotion claim are different than the deficiencies identified with respect to their compensation claims, but equally fatal. With respect to their compensation claims, plaintiffs fail to demonstrate the existence of any common practice or policy that disparately affected women; instead, they rely on alleged statistical disparities that are irrelevant because they have no demonstrated nexus to the challenged decisions. With respect to promotions, though plaintiffs broadly claim that MetLife maintains a “glass ceiling” across MLFS by denying FSRs and agency managers equal opportunity for promotion (Pl. Br. at 1, 20), plaintiffs' own statistical expert has identified virtually no gender based promotion disparities at all.[FN44] First, Dr. Drogin failed (in either his initial report, or his supplemental report) to analyze the rates of promotion (or gender disparities in the rates of promotion) from *any* MLFS position *other than* FSR.[FN45] (Gray Decl., Ex. B at 5-8; Ex. C at 1-3; Ex. D at 4; Ex. Y at 3). Thus, plaintiffs do not allege any discriminatory failure to promote functional managers, second-line managers or first-line managers.[FN46]

FN44. It should be noted that plaintiffs' selective references to “The Women of MetLife Report” (Pl. Br. at 2, 13) distort the purpose of the report as well as the conclusions stated therein. According to its author, Karen Christensen, the report was not intended as a means of investigating possible gender issues as plaintiffs appear to suggest; rather, it was an effort to record gender data within MLFS as a matter of first impression. (Gray Decl., Ex. BJ; Ex. BK). Ms. Christensen (who is no longer employed by MetLife) made clear, upon questioning by plaintiffs at her deposition, that her purpose was to report the data available to her, not to draw conclusions from such data about possible discrimination. (Gray Decl., Ex. BK).

FN45. Accordingly, at a minimum, any promotion class should exclude individuals who did not hold an FSR position during the class period.

FN46. Although plaintiffs allege that MetLife discriminates against women in promotions to Regional Vice President positions (Gray Decl., Ex. G, ¶6), it is undisputed that: (i) the number of Regional Vice Presidents (a position that is, over time, being eliminated from the MLFS field organization) has dropped from 26 as of January 1999 (Pl. App. I, Ex. 2 at 7) to 7 as of December 2002 (Gray Decl., Ex. BL); (ii) *no one* -- either male or female -- has been appointed or promoted to a Regional Vice President position during the class period (Gray Decl., Ex. D at 7); (ii) plaintiffs' statistical expert offers no findings whatsoever regarding promotion to the Regional Vice President position (*see generally* Gray Decl., Ex. B; Ex. C); (iv) the Regional Vice President position will be completely eliminated in 2003 (Gray Decl., Ex. BM); and accordingly, no class should (or can) be certified with respect to promotions to this position.

Second, even with respect to promotions from the FSR position, Dr. Drogin found no statistically significant gender disparities in promotions to *either* first-line manager (managing director) or second-line manager (agency director) during the class period.[FN47] Dr. Evans' analysis confirmed this conclusion.[FN48] (Gray Decl., Ex. D at 10; Ex. Y at 2-3). Thus, on the undisputed facts, plaintiffs cannot possibly sustain a class claim with respect to promotion discrimination across the entire MLFS organization; to the contrary, their promotion claim is -- by their own admission -- limited to promotions from a single position (FSR) to a single position (functional manager).[FN49] *See Caridad v. Metro-North Commuter R.R.,* 191 F.3d 283, 292 (2d Cir. 1999) (certifying discipline claim only "with respect to those African-American employees who were disciplined while working in one of the 48 positions in which African-Americans are more likely to be disciplined than Whites"), *cert. denied,* 529 U.S. 1107, 120 S. Ct. 1959 (2000), *vacated on other grounds,* 267 F. 3d 147 (2d Cir. 2001), *cert. denied,* 535 U.S. 951,122 S. Ct. 1349 (2002).

FN47. Plaintiffs' contention that "[f]emale FSRs are less likely to move into agency management positions (MD, AD, FM) than similarly situated males" and that, during the class period, "women received 40 fewer job moves into these positions than expected," (Pl. Br. at 11), is a gross distortion of the record; their expert found *no such thing.* It is clear from Dr. Drogin's initial report (Gray Decl., Ex. B at 7, Table 4) that there were no statistically significant gender differences in promotion rates for FSRs into first-line or second-line managerial positions during the class period. Indeed, Dr. Drogin's own analysis found that *more* female FSRs than expected were in fact promoted to second-line manager during the class period. (Gray Decl., Ex. BN). Dr. Drogin's supplemental report does not challenge this conclusion; to the contrary, his entire promotion discussion is limited to promotions from FSR to functional manager. (Gray Decl., Ex. C at 1-3).

FN48. Significantly, during this period, the percentage of female second-line managers has increased from 9.8% to 22.9%. Of the second-line managers hired during this period, over 41% have been female. (Gray Decl., Ex. D at 8, Table 2). It is, therefore, hardly surprising hat plaintiffs' own expert finds that the percentage of women moving into the second-line manger position is *identical* to the percentage of women in the relevant feeder pool. (Gray Decl., Ex. B at 7, Table 4; Ex. D at 10).

FN49. Dr. Drogin's statistical findings with respect to promotions prove the unscientific conjectures of plaintiffs' "sociological" expert - Dr. Bielby - to be all the more ludicrous. Contrary to Dr. Bielby's suggestion Pl. Br. at 8), Dr. Drogin's reports make plain that there is no pattern of gender disparities in promotions across the MLFS organization during the class period. (*See generally* Gray Decl., Ex. B; Ex. C).

Third, even with respect to the single promotion as to which plaintiff claim a statistically significant gender disparity - promotion from FSR to functional manager -- Dr. Drogin's analysis is entirely unpersuasive in supporting a common claim of discrimination for the reasons set forth below.

A. *Plaintiffs' Claim Is Limited To A Single Promotion Category*

As discussed above, the Second Circuit will certify a class only with respect to positions for which there is at least a facial showing of statistical disparity. *See Caridad* at 292. Here, plaintiffs' statistician found an alleged statistical disparity *only* with respect to promotions from FSR into a single title -- functional manager.[FN50] A disparity with respect to movements from the FSR position into one position only (and the lowest level of the non-FSR positions at that) hardly justifies plaintiffs' claim of a pattern and practice of promotion discrimination. *See, e.g., Donaldson v. Microsoft Corp.,* 205 F.R.D. 558, 567 (W.D. Wash. 2001) (no commonality due to absence of a "class-wide pattern of discrimination" where disparate compensation for women found in only 5 of 24 job categories).

FN50. Even with respect to promotions from the FSR position to functional manager, the data fail to demonstrate commonality. Virtually all (*i.e.,* over 99%) observed moves from the FSR position to functional manager were *within* the same sales office, and 47% of female FSRs active during the class period worked in sales offices where *no one* (male or female) moved from FSR to functional manager. (Gray Decl., Ex. D at 14; n.14; Ex. BO). Thus, a substantial proportion of female FSRs have no "promotion" claim to assert (and should not be part of any class asserting such a claim), even with respect to movements to the functional manager position.

B. Movements From FSR To Functional Manager Are *Inherently Unsuited To Class Treatment*

Plaintiffs' effort to group together, in a single statistical analysis, nationwide data regarding promotions from FSR to functional manager is wholly inconsistent with the undisputed evidence regarding the diversity of the functional manager position and the decentralized appointment process. The appointment of functional managers is made at the sales office (district) level by first-line managers. (Gray Decl., Ex. Q). Whether any functional managers will be appointed (as noted *supra* at n.50, almost half of female FSRs during the class period worked in sales offices in which no functional managers, either male or female, were appointed); and the type of functional support required of functional managers in a particular sales office (and hence the skill and experience levels required) is dictated at the sales office level and varies widely based upon each office's unique needs. For example, a sales office may appoint a functional manager to perform training; joint fieldwork; or recruiting. Some sales offices need functional managers who are product specialists, or who can assist with marketing, financial planning or estate planning, or to handle special projects. (Gray Decl., Ex. BP-BR). Given the heterogeneity of functionality, it is hardly surprising that the skill sets and experience of FSRs appointed to functional manager positions will vary widely. This alone renders plaintiffs' functional manager promotion claim unsuited to class treatment. *See Caridad* at 292; *Donaldson* at 567-68.

C. Plaintiffs' Statistical Analysis Is Not Probative Of Class-Wide *Disparities In Movement Of FSRs To Functional Manager*

Apart from the inherent lack of commonality in functional manager appointments, the statistical analysis on which plaintiffs' motion for class certification relies cannot serve as a basis for certifying a functional manager promotion class. Even if fully credited, Dr. Drogin's supplemental report makes plain that a maximum of 30 female FSR's - out of a total of 3127 putative class members -- could have suffered a discriminatory denial of assignment to functional manager during the *entire* class period. (Gray Decl., Ex. C, ¶8; Ex. D at 9). By plaintiffs' own account, this amounts to approximately 7 promotions per year during the class period and involves less than 1% of the putative class -- hardly a showing from which a common practice of promotion discrimination can be divined.[FN51]

FN51. Dr. Evans found an even smaller disparity. Dr. Evans divided the FSR group into two segments: (i) those who were hired by MetLife with prior insurance industry sales experience *or* who held an MLFS management position prior to becoming an FSR; and (ii) those FSRs without such pre-MetLife insurance sales experience or prior MLFS management experience. This differentiation was clearly warranted: FSRs hired with prior insurance industry sales experience are over three times more likely to move to a functional manager position than those without such experience. (And since computerized data on pre-MetLife sales experience has been kept only since the end of 1998, the differences are likely substantially higher.) FSRs who were former managers in MLFS were more than eleven times more likely to move to functional manager than those without such managerial experience. FSRs with previous insurance industry sales experience or prior MetLife managerial experience received nearly 75 percent of job moves from FSR to functional manager during the class period. (Gray Decl., Ex. D at 13).

Dr. Evans found that, for the "experienced" group of FSRs (which accounted for approximately 75 percent of job moves from FSR to functional manager during the class period), there was no statistically significant difference between the expected and actual number of job moves by women to the functional manager position. (Gray Decl., Ex. D at 17, App. C at 39). For the "inexperienced group", the difference in the likelihood of movement to functional manager between males and females was one-half of one percent; while this difference for the inexperienced FSR group is statistically significant due to the large sample size, it would have taken only *seven* more female job moves to reduce even this slight difference to zero -- approximately two-tenths of one percent of female FSRs in the putative class! (Gray Decl., Ex. D at 17-18, App. C at 40).

In his supplemental report, Dr. Evans redid this analysis, this time utilizing the same data set and the same statistical model (including interaction terms) utilized by Dr. Drogin in his supplemental report. Dr. Evans again found that there was *no statistically significant* gender difference in the likelihood of promotion of experienced FSRs to functional manager. Since, according to Dr. Drogin's *own* data, experienced FSRs are 3.5 times more likely to be promoted to functional manager than inexperienced FSRs, and since 75 percent of FSR promotions to functional manager came from the experienced group, it is simply impossible to contend that MetLife engaged in a pattern and practice of gender discrimination in promotions even with respect to job moves from FSR to functional manager. (Gray Decl., Ex. Y at 4-5).

In sum, because: (i) Dr. Drogin reports no gender disparities during the class period in promotions from functional manager, second-line manager or first-line manager into any other MLFS position; (ii) there are no gender disparities during the class period in promotion from FSR to first-line manager; (iii) there are no gender disparities during the class period in promotions from FSR to second-line manager; (iv) almost half the putative class members were in branches in which there were no promotions to functional manager at all; and (v) the alleged "shortfall" in promotions of female FSRs to functional manager amounts -- on the evidence most favorable to plaintiffs - to less than 30 promotions during the entire class period, there is no basis for finding a "pattern and practice" of gender discrimination. Plaintiffs' motion to certify a promotion claim should, therefore, be denied. *See Donaldson* at 567-68.

IV. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A BASIS FOR CERTIFYING *A CLASS BASED ON A CLAIM OF DISPARATE IMPACT*

The deficiencies in plaintiffs' statistical evidence that preclude class certification of their disparate treatment claims are likewise fatal to their disparate impact claims. In order to make out a *prima facie* showing of disparate impact, a plaintiff must: "(1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two." *Robinson v. Metro-North Commuter R.R.,* 267 F.3d 147, 160 (2d Cir. 2001), *cert. denied,* 535 U.S. 951,122 S. Ct. 1349 (2002).

First, as previously noted (*see supra* at 7-17, 27-30) plaintiffs have offered *no* statistical showing that the distribution of business development resources has *disparately* impacted women; nor have they demonstrated any *causal* connection between the allocation of those resources and FSR compensation. *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 657; 109 S. Ct. 2115, 2125 (1989); *see supra* at 7-17. As *Robinson* makes plain, "the statistics must be of a kind and degree sufficient to reveal a causal relationship between the challenged practice and the disparity." 267 F.2d at 160. As plaintiffs concede, such statistical evidence is "crucial," as it occupies "center stage" in a disparate impact claim. *See* Pl. Br. 19, citing *Robinson,* 267 F.3d at 160. Allegations which contend only that there is a bottom line imbalance are insufficient. This shortcoming is fatal to plaintiffs' disparate impact claim with respect to compensation.

Second, with respect to their compensation discrimination claim, plaintiffs have not identified a "particular employment practice" that they contend is facially neutral yet has a discriminatory impact on women. 42 U.S.C. § 2000e-2(k).[FN52]

FN52. To the extent that plaintiffs argue that their compensation claim is derived from the discriminatory distribution of business development resources, they have likewise failed to identify the facially neutral policy they are challenging. For example, although plaintiffs suggest that females in MLFS are deprived of "*informal* training and mentoring," they do not identify what facially neutral policy governing the distribution of such informal training and mentoring disparately impacts women. Indeed, plaintiffs' own description of the claim (as involving *informal* training) suggests the absence of any policy.

Finally, sheer logic dictates that the isolated "disparities" alleged in this case (*i.e.,* second-line manager compensation and promotion from FSR to functional manager) are not indicative of the systemic impact required to sustain a disparate impact claim. *See Robinson,* 267 F.3d at 160. For example: how is it that MLFS first-line managers are alleged to discriminate against women in the appointment of functional managers (which is only a part-time managerial position with limited managerial compensation (*see supra* at 2-3)), when these same managers are not - concededly - discriminating in the promotion of women to the full-time secondline management position (for which the average female earnings exceeds $75,000 during every year in the class period), and when these same allegedly biased, overwhelmingly male managers are demoting men at a higher rate than women? *See supra,* n.2. Why would first-line managers allegedly discriminate against women in the allocation of second-line manager compensation, but not functional manager compensation? Why would first-line managers allegedly refuse to allocate resources to female FSRs when they hired these FSRs in the first instance; when their own compensation is based on the success of all FSRs; and where they are financially penalized if FSRs - both male and female -- do not succeed? (Gray Decl., Ex. I, ¶¶13-14; Ex. H at ML 001414). In short, based on the totality of the record, the incidental and unpatterned promotion and compensation "disparities" plaintiffs allege cannot possibly serve as an evidentiary basis for a class-wide disparate impact claim. *See Rodriguez supra* at n.14.

V. PLAINTIFFS HAVE FAILED TO SATISFY THE REQUIREMENTS OF *RULE 23(b)(2)*

Plaintiffs seek certification of the proposed class under Rule 23(b)(2), which provides that a class action may be maintained where "the party opposing the class has acted or refused to act on grounds *generally applicable* to the class, thereby making appropriate final injunctive relief... with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2) (emphasis added). *Robinson v. Metro-North Commuter Railroad,* 267 F.3d 147 (2d Cir. 2001), *cert. denied,* 535 U.S. 951, 122 S. Ct. 1349 (2002)[FN53] holds that, when presented with a motion for (b)(2) class certification of a claim that seeks both injunctive relief and non-incidental monetary damages, a district court must assess the "relative importance of the remedies sought, given all of the facts and circumstances of the case," id. at 164, (citation omitted) and determine whether: (1) the positive weight or value of the injunctive or declaratory relief sought is *predominant,* even though compensatory or punitive damages are also claimed; and (2) class treatment would be *efficient and manageable,* thereby achieving an appreciable measure of judicial economy. *Id.* (emphasis added).[FN54]

FN53. Contrary to plaintiffs' assertion (Pl. Br. at 23), the Second Circuit in *Robinson* did not reverse the district court for having denied certification under (b)(2) with respect to the disparate treatment claim, but rather vacated and remanded the case for reconsideration in light of its newly-created standards. *Id.* at 172.

FN54. Defendant respectfully submits that the Second Circuit was incorrect in declining to follow the analysis of *Allison v. Citgo Petroleum Corp.,* 151 F.3d 402, 415 (5th Cir. 1998) and wishes to respectfully reserve the right to raise this contention in the event that the issue is addressed by the Supreme Court during the pendency of this litigation.

With respect to the first consideration, *Robinson* clarified that an evaluation of predominance requires ad hoc balancing that will vary from case to case, and that (b)(2) certification should not be granted unless the court determines that *reasonable* plaintiffs would have brought suit to obtain the injunctive or declaratory relief sought, even in the absence of a possible monetary recovery. *Id.* Applying these considerations here, there are several factors demonstrating that this case is primarily driven by *monetary* incentives, rather than a desire to obtain injunctive relief. First, approximately 60 percent of the putative class -- as well as named plaintiffs Persaud and Ramsey - are *former* MetLife employees (Gray Decl., Ex. D at 9; Pl. Br. at 11) and, as such, have no personal stake in the pursuit of injunctive relief. Exclusively monetary relief is clearly of primary importance to them, and to the overwhelming number of purported class members.

Second, for the reasons set forth in the sections of this brief addressing commonality with respect to the compensation and promotion claims, class treatment in this case would not be "efficient and manageable." *See supra* at 5-17, 26-30, 34-36. Plaintiffs' proposed solution to this problem-- bifurcation and certification of a liability phase -- is really no solution at all. (Pl. Br. at 24). *Robinson's* foundation for the partial certification framework was the fact that the "liability phase [was] largely preoccupied with class-wide statistical evidence," and that the anecdotal evidence merely provided "texture" to those statistics. *Robinson,* 267 F.3d at 168. Here, however, plaintiffs' proof concerning their distribution of business resources claim (the claim that masquerades as an FSR discriminatory compensation claim) is based *exclusively* on anecdotal evidence. The parade of anecdotal witnesses that would necessarily be involved in determining liability on this claim alone would severely undermine the manageability of the action and would result in a lengthy series of individualized mini-liability trials under the guise of a single trial -- exactly the result the *Robinson* Court intended to avoid.[FN55] *Id.* The same would be true with respect to the second-line manager compensation claim and the functional manager promotion claim: each would require, at a minimum, case by case determinations of the nature of the duties and responsibilities being performed (in the case of the second-line manager compensation claim); and the nature of the duties to be performed, and the relevant skills and experience of potential candidates (in the case of the functional manager promotion claim).

FN55. In order to test the efficiency and manageability of the distribution of business resources claim, we respectfully submit that plaintiffs should be asked to provide a detailed trial plan, specifying precisely how they would propose to try the liability phase of such a claim.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for class certification should be denied.

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., d/b/a Metlife, Defendant.