United States District Court, S.D. New York.
Stella MITCHELL, Hwa-Mei C. Gee, Durpatty Persaud, and Janet Ramsey, on behalf of themselves and all others similarly situated, and Barbara LaChance, individually, Plaintiffs,
v.
METROPOLITAN LIFE INSURANCE COMPANY, INC., dba Metlife, Defendant.
No. 01-Civ-2112 (WHP).
February 28, 2003.

Memorandum of Law in Support of Plaintiffs' Motion for Class Certification

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I. INTRODUCTION

Representative plaintiffs Stella Mitchell, Hwa-Mei C. Gee, Durpatty Persaud, and Janet Ramsey (“plaintiffs”)[FN1] seek certification, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), of a class defined as:

FN1. Plaintiff Barbara LaChance is proceeding in her individual capacity only and not as a representative of the class. Plaintiffs will file a motion seeking leave to file a Second Amended Complaint, reflecting this change in Ms. LaChance's status and dismissing her class claim, prior to the hearing on their Motion for Class Certification, which is scheduled for June 4, 2003.

All female past, present and future sales representatives and sales agency managers employed within the Financial Services (“MLFS”) division of defendant Metropolitan Life Insurance Company (“MetLife”), or its successor group, if any, in any state outside New York State, or since August 27, 1999, in New York State since March 13, 1998.

Plaintiffs allege class wide gender discrimination under both disparate treatment and disparate impact theories of Title VII and analogous state and local laws. Specifically, plaintiffs claim MetLife discriminates against them and members of the proposed class because of their gender in the following ways:

1. MetLife maintains a “glass ceiling” throughout MLFS by denying qualified female sales representatives and agency managers equal opportunities for promotion to or selection for agency management positions, and instead, predominantly male decision makers in MLFS favor less qualified men for such positions. As a result, men hold nearly 90% of MLFS agency level management positions and all MLFS management positions above the agency level.

2. MetLife compensates female sales representatives throughout MLFS less than similarly situated men by denying these women equal access to discretionary business development resources, including training, mentoring, and assignment of sales leads and books of business. As a result, female sales representatives in MLFS earn, on average, thousands of dollars less than their male counterparts each year. Stated another way, in 2001, female sales representatives earned, on average, 87% of what similarly situated males earned.

3. MetLife compensates female agency managers throughout MLFS less than similarly situated men by (a) denying these women

equal access to discretionary business development resources such as training, mentoring, and discretionary funding, and (b) relying on subjective criteria, exercised with gender bias, to determine the allocation of agency profits among agency managers. As a result, the few female agency managers in MLFS earn, on average, tens of thousands of dollars less each year than their male counterparts. In 2001, female agency managers earned, on average, 54% of what similarly situated male managers earned.

4. MetLife failed to respond effectively to known gender inequities in MLFS. A February 1999 internal analysis, "The Women of MetLife Report," analyzed the number of women in sales representative and manager positions in MLFS sales agencies and concluded that "MetLife does not place high value on the promotion of women to management positions in our [sales] organization.... Men are several times more likely to be chosen for management positions [than women]." Women of MetLife, p. 77 at Appendix ("App.") I, Declaration of Lisa Dungan ("Dungan Dec."),[FN2] Ex. 2. Despite this knowledge, MetLife chose to ignore the Report and took few, if any, effective steps to address systemic barriers that disadvantage women in MLFS.

FN2. Documents, deposition testimony and expert reports cited herein are appended to the Declaration of Lisa Dungan. Plaintiffs rely on the following evidence to support their motion for class certification: (1) 31 declarations and 72 administrative charges, court complaints and internal complaints from class members and female witnesses alleging gender discrimination in sales agencies in 21 states throughout MLFS; (2) declarations from male managers who observed gender discriminatory conduct in MLFS; (3) MetLife documents and the testimony of 18 MetLife managers[FN3] that establish that MetLife's personnel practices are highly discretionary, based on subjective decision making and uniform throughout MLFS; and (4) reports of expert witnesses Richard Drogin, Ph.D., a statistician, and William T. Bielby, Ph.D, a sociologist, describing, respectively, the statistical indicia and mechanisms of MetLife's discriminatory practices.

FN3. A chart identifying the 18 MetLife managers by name, title and office location is attached to the Declaration of Lisa Dungan as Ex. 1.

The class wide nature of plaintiffs' claims, the factual questions and legal issues they raise, and the evidence supporting them meet the requirements of Rules 23(a) and (b)(2) for class certification under *Robinson v. MetroNorth Commuter R.R.,* 267 F.3d 147 (2d Cir: 2001), *cert. denied,* 122 S.Ct. 1349 (2002), which controls here. Accordingly, this Court should certify a Rule 23(b)(2) class.

II. STATEMENT OF FACTS

MetLife is a financial services company that sells individual and group insurance, annuities, investment products, and retirement and savings financial products and services throughout the United States. *See* App. I, Dungan Dec., Ex. 3. The plaintiffs and the proposed class members have been employed as sales representatives and agency managers in MLFS, the division of MetLife responsible for selling insurance and financial services products to individuals and small businesses. *See id.*

A. *The Corporate Structure and Organization of MetLife and MLFS Are Centralized and Standardized.*

MLFS sales operations are uniform across the country. MLFS sales operations in the United States are carried out through approximately 138 sales agencies. *See* App. I, Dungan Dec., Ex. 4. MLFS' hierarchy and job titles are the same in all agencies and for managers above the agency level. *See* Dungan Dec., Ex. 5. Although the precise staffing of an agency can be affected by its size, managers and sales representatives must fulfill the same functions in all agencies. *See* App. I, Dungan Dec., Ex. 6.

MLFS sales operations are dominated by men. Nearly 90% of the agency managers and 80% of FSRs were men as of the end of 2001. *See* Declaration of Dr. Richard Drogin ("Drogin"), Tbl. 1 at App. I, Dungan Dec., Ex. 7; App. V, Declaration of Scott Grimes ("Grimes Dec."), ¶ 3. In 1998, the beginning of the liability period, 93.4% of agency managers and 77.6% of FSRs were male. *See id.* MLFS agencies are run by first line managers called Managing Directors ("MDs"). MDs are responsible for the overall management of their agencies, including sales, marketing, finance, recruiting, training, administration, and compliance functions. *See* App. I, Dungan Dec., Ex. 8. The average compensation for MDs was $272,261 in 2001.[FN4]

FN4. The statistics cited are for 2001, because that is the most recent year for which MetLife produced full year employee data to plaintiffs.

Agency Directors ("ADs") are the second line agency managers who report to MDs. ADs' responsibilities include recruiting, training, and developing their agencies' sales forces. *See* App. I, Dungan Dec., Ex. 9. The average compensation for ADs in 2001 was $106,798. *See* App. V, Grimes Dec., ¶ 4. Next in line are the Financial Service Representatives ("FSRs") who sell MetLife's individual insurance and financial services products. *See* App. I, Dungan Dec., Ex. 10. Average FSRs' compensation in 2001 was $69,937. *See* App. V, Grimes Dec., ¶ 4. Some FSRs also hold the title of Functional Manager ("FM") and are assigned recruiting or training responsibilities for which they receive additional compensation. *See* App. I, Dungan Dec., Ex. 11. The average pay for FMs in 2001 was $117,727. *See* App. V, Grimes Dec., ¶ 4.

Prior to 1998, MetLife organized MLFS sales agencies geographically into regions, regions into territories, and territories into zones. MDs reported to Regional Vice Presidents ("RVPs"), who reported to Territorial Vice Presidents ("TVPs"), who in turn, reported to Zone Vice Presidents ("ZVPs"). *See* App. I, Dungan Dec., Ex. 12. In 1998, MetLife implemented a systemic initiative, called "segmentation," to reorganize MLFS sales operations. MetLife eliminated the territories and the TVP position and is phasing out the regions and the RVP position, so that eventually every MD will report directly to a ZVP. *See* App. I, Dungan Dec., Ex. 13. There currently are five geographic zones in MLFS - Northeastern, North Atlantic, South Atlantic, Central, and Western - each headed by a male ZVP, who reports to MetLife's President of North American Sales, who is male, and who in turn reports to MetLife's President and Chief Executive Officer, who is male. *See* App. I, Dungan Dec., Ex. 14. As a result of segmentation, the number of agencies, MDs, FMs and FSRs in MLFS decreased. *See* App. I, Dungan Dec., Ex. 15.

B. *MLFS Operations Are Governed by a Centralized Personnel Management System and Uniform Personnel Policies and Practices.*

Sales agencies throughout MLFS operate under a uniform and highly integrated system of personnel policies and practices. MetLife's Human Resource ("HR") Department assigns HR generalists, who report to MetLife's Assistant Vice President for Human Resources, to each MLFS zone. They assist MLFS agency managers with performance management and employee relations. *See* App. I, Dungan Dec., Ex. 16. The HR generalists also provide training regarding MetLife's personnel policies and procedures, and investigate MLFS employee complaints, including complaints of discrimination and harassment. *See id.* HR generalists meet with each other periodically to ensure uniform implementation of MetLife's personnel policies and practices across MLFS zones. *See id.*

MetLife has comprehensive and detailed policies and procedures governing equal employment opportunity, workplace behavior, office procedures, recruitment and selection of FSRs, training, performance management, and compensation. MetLife, through its HR, Training, and Compensation Departments, formulates, distributes and enforces these policies and procedures throughout MLFS. *See* App. I, Dungan Dec., Ex. 17. MetLife ensures uniform personnel management policies and practices by promulgating and distributing policies, procedures and instruction manuals that are applicable throughout MLFS.[FN5]

FN5. Examples of the comprehensive policy and procedure and instruction manuals include: (1) "InForm Ready Reference Manual for Representatives - General Responsibilities," a six volume reference resource containing information on MetLife products, policies, procedures and business conduct guidelines; (2) "A Manager's Guide to HR Policies and Procedures," a self-described "place to go when [managers] need timely, up-to-date information about [MetLife's] current HR and related policies;" (3) "Manual of Instructions for Sales Management," a 500-page guide on managing an MLFS agency, that includes copies of MetLife's personnel policies and procedures; (4) "Leading Change by Managing Performance" and the companion "Performance Management" website, which provide information and instructions for conducting staff and manager performance evaluations; (5) annually issued FSR compensation plan manuals, which describe MLFS' uniform and company wide FSR compensation formula; and (6) annually issued MLFS agency management compensation plans, which describe MLFS' uniform and company wide agency management compensation formula. *See* App. I, Dungan Dec., Ex. 18-23.

MetLife also provides training on these personnel policies and procedures to MLFS ADs, MDs, RVPs and ZVPs to ensure the policies and procedures are implemented uniformly throughout MLFS. *See* App. II, Dungan Dec., Ex. 24. Additionally, ZVPs and RVPs meet regularly with each other and with the MDs who report to them to discuss staffing, performance, productivity, recruiting, training, and other agency personnel issues to ensure MLFS wide compliance with company policies and practices. *See* App. II, Dungan Dec., Ex. 25.

C. *MetLife Gives MLFS Managers, Who Are Overwhelmingly Male, Broad Discretion to Select Agency Managers and Allocate Business Development Resources to FSRs and Agency Managers.*

1. *Selections for MLFS agency management positions are made at the discretion of MLFS managers who use highly subjective and gender-biased criteria.*

MetLife delegates nearly unfettered discretion to MLFS managers, who are overwhelmingly male, to select individuals for agency management positions. *See* Report of William T. Bielby, Ph.D. ("Bielby"), p. 22 at App. II, Dungan Dec., Ex. 26. This highly discretionary and male-dominated decision making operates both at the initial selection and approval levels. RVPs and ZVPs, who are all men, select MDs and often approve the MDs' selections of lower level managers for their agencies. *See* App. II, Dungan Dec., Ex. 27. MDs, nearly 94% of whom are male, select individuals for AD and FM positions. *See* App. II, Dungan Dec., Ex. 28; App. V, Grimes Dec., ¶ 5.

MetLife does not have formal, written procedures for selecting MLFS agency management personnel. *See* Bielby, pp. 20-21 at App. II, Dungan Dec., Ex. 26, 29. There is no uniform application process or effective system for interested candidates to apply or express interest in MLFS agency management positions. *See id.* Although MetLife has had a computerized job posting system since 2001, MetLife does not require MD and AD positions to be posted on the system. *See* Bielby, pp. 20-21 at App. II, Dungan Dec., Ex. 26, 30. Thus, MLFS managers are free to decide for themselves whether to post available positions. Few managers see the value in posting such positions. *See* App. II, Dungan Dec., Ex. 31. Consequently, MD and AD positions are posted inconsistently. *See* Bielby, pp. 20-21 at App. II, Dungan Dec., Ex. 26, 32. Additionally, FM positions are never posted. *See* App. II, Dungan Dec., Ex. 33. In the absence of formal application and selection procedures, MLFS managers at the MD, RVP and ZVP levels use an informal and highly discretionary "tap on the shoulder" system to identify and select candidates for MD, AD and FM positions. *See* Bielby, pp. 20-21 at App. II, Dungan Dec., Ex. 26, 34.

MLFS managers use highly subjective criteria to make selections for agency management positions. MetLife does not provide MLFS managers with written criteria or standards to guide them in exercising their discretion to select individuals for MD, AD, and FM positions. *See* Bielby, pp. 20-22 at App. II, Dungan Dec., Ex. 26, 35. Selecting managers thus rely on a range of selection criteria, many of which are highly subjective and/or vague. ZVPs, RVPs, and MDs testified that the criteria they use to select individuals for agency manager positions include such subjective factors as: "overall success," "leadership," "affinity" or the "ability to fit in the marketplace [and/or] with the FSRs in the agency" where there is an opening, "vision," "management style," and "integrity". *See* Bielby, p. 21 at App. II, Dungan Dec., Ex. 26, 36. MetLife has offered no evidence to show that the selection criteria used by MLFS managers has been validated or determined to be job related.

MetLife fails to provide oversight of MLFS manager selections, thereby allowing decisions to be made based on gender stereotypes. MetLife has "[n]o policies or procedures in place to ensure that [MLFS managers'] assessment of subjective factors is done in a systematic, reliable and valid manner." *See* Bielby, p. 22 at App. II, Dungan Dec., Ex. 26, 37. MetLife provides no oversight or systematic analysis of MLFS manager selection decisions or their gender impact. Moreover, a MetLife senior HR manager testified that he does not believe such monitoring is necessary. *See* Bielby, pp. 20-22 at App. II, Dungan Dec., Ex. 26, 38. These deficiencies are especially consequential in workplaces like MLFS where "the highly discretionary and subjective system for making selection decisions ... is set in a historically male-dominated work context where men predominate in positions of status and authority ... [t]hat is the kind of decision-making context that is vulnerable to gender stereotyping and gender bias." Bielby, p. 22 at App. II, Dungan Dec., Ex. 26.

The record is replete with testimony from many witnesses demonstrating that MDs, RVPs, and ZVPs, unrestrained by formalized selection procedures or articulated criteria, make agency manager selections based on gender stereotypes. Testimony from both male and female witnesses depicts the gender biased attitudes and conduct of male managers in MLFS. For example, one male AD testified that RVP Edward Garger routinely made discriminatory selection decisions and sexist remarks, once saying he would "never make [a female FSR] a manager. She would get married, have a kid, and then I'm screwed." Declaration of May Rafanan ("Rafanan Dec."), Ex. 22.[FN6] Katherine Fredericks-Bowen, who served temporarily as an acting RVP, was told by ZVP Richard Tartre, who refused to place her in the position permanently, that he would never make a woman an RVP. *See* App. II, Dungan Dec., Ex. 39. Declarant Jana Pierce testified that MD David Mansfield responded to her inquiry about why there were so few female managers in his agency by stating "[w]hy should I make a woman manager when I have ten men who are qualified?" *See* App. IV, Rafanan Dec., Ex. 31. All of the plaintiffs and 28 class members and witnesses have alleged they were not selected for agency management positions for which lesser qualified men were selected due to an informal "good old boy network" in MLFS that disadvantages women. *See* App. IV, Rafanan Dec., Ex. 1, 16, 28, 31.

FN6. Information regarding incidents of discriminatory conduct cited herein, which was obtained from declarations, administrative charges of discrimination, court complaints, and internal MetLife complaints are summarized in and appended to the Declaration of May Rafanan.

2. *MetLife affords MLFS managers unfettered discretion to allocate business development resources in a manner that negatively affects female FSRs' and agency managers' compensation.*

FSR compensation is, in large part, determined by a formula, based almost entirely on commissions on an FSR's personal sales production, that applies uniformly to all FSRs in MLFS. *See* App. II, Dungan Dec., Ex. 40. However, MDs and ADs provide FSRs with business development resources and assistance, such as informal training and mentoring, assignment of sales leads and books of business, and partnering with managers and/or more experienced FSRs, that impact FSRs' sales and income. *See* Bielby, pp. 19-20, 22 at App. II, Dungan Dec., Ex. 26, 41. MetLife gives its male MDs and ADs broad discretion to allocate these business development resources to FSRs. MetLife does not give managers written guidelines or criteria on how to allocate these business development resources. *See* Bielby, pp. 19-20, 22 at App. II, Dungan Dec., Ex. 26, 42. As a result, managers allocate such resources using subjective criteria and gender biased stereotypes that disadvantage female FSRs. Class members and witnesses repeatedly alleged the unequal and gender biased distribution of these resources. Plaintiff Persaud and 55 FSR class members and witnesses allege they were denied resources and opportunities, which affected their compensation, that similarly situated men in their agencies received. *See* App. IV, Rafanan Dec., Ex. 1.

MLFS agency manager compensation 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. The PBC formula applies uniformly to all agencies. *See* App. III, Dungan Dec., Ex. 43. However, MetLife affords RVPs and ZVPs, all of whom are male, broad discretion to make decisions that impact agency management compensation to the detriment of female MDs and ADs. These decisions encompass allocation of resources, such as training, mentoring and discretionary funds that can increase MDs' and ADs' compensation. *See* App. III, Dungan Dec., Ex. 44. Plaintiffs and former MDs Mitchell, Gee, and Ramsey, and class member and former MD Carol Rollero all testified that MLFS senior managers denied them discretionary funding and/or other business development support for their agencies that similarly situated male MDs received. *See* App. IV, Rafanan Dec., Ex. 1. Additionally, MetLife delegates uncontrolled authority to MDs, 90% of whom are male, to determine the ADs' PCB compensation. *See* App. III, Dungan Dec., Ex. 45.

MetLife does not provide MLFS managers written criteria or guidelines on how to distribute discretionary business development resources to FSRs and agency managers or for determining ADs' share of the PCB, nor does it monitor these unguided decisions. Bielby, pp. 19-20, 22 at App. II, Dungan Dec., Ex. 26; App. III, Dungan Dec., 42, 44, 46. Consequently, MLFS managers have unfettered discretion to allocate these resources relying on subjective and gender-biased criteria to the detriment of women. *See* Section II.D below. MetLife does not provide any oversight or systematic gender specific analyses of these compensation-affecting decisions. For example, MetLife does not monitor the gender distribution of sales leads and books of business to FSRs. Nor does MetLife review FSRs' or agency managers' compensation for gender based disparities. *See* App. III, Dungan Dec., Ex. 47.

D. *Opportunities for Agency Management Positions and Compensation in MLFS Flow Disproportionately to Male FSRs and Agency Managers by All Statistical Measures.*

MetLife maintains a gender-stratified workforce in MLFS. The staffing and compensation patterns in the MLFS sales organization form a pyramid. Location on the pyramid is dictated by gender. The greatest concentration of women has been at the bottom of the pyramid, in FSR positions. There are far fewer women at the middle of the pyramid in higher paying MD, AD, and FM positions. The smallest number of women is found in the influential MD position, whose incumbents - almost all male - exercise the most significant decision making authority at the agency level and who earn far more than lower level managers (AD's and FM's) and FSRs. Women are completely absent at the top of the pyramid in the RVP and ZVP positions. *See* Drogin, App. 2A, 2B at App. I, Dungan Dec., Ex. 7; Bielby, pp.11-12 at App. II, Dungan Dec., Ex. 26; App. III, Dungan Dec., Ex. 48.

The chart below graphically depicts this persistent pattern of gender stratification in the MLFS sales agencies over time. *See* App. V, Grimes Dec., ¶ 5; App. III, Dungan Dec., Ex. 48.

YEAR	*FSRs*		*FMs*		*ADs*		*MDs*		*RVPs*	*ZVPs*
	Total #	*% Female*	*Total #*	*% Female*	*Total #*	*% Female*	*Total #*	*% Female*	*Total #*	*Total #*
1996	7,287	21.5%	0	0	315	7.9%	415	4.9%	0	0
1997	6,691	22%	113	8.8%	226	9.3%	380	3.7%	0	0
1998	6,295	22.4%	287	8.4%	234	9.8%	372	3.2%	0	0
1999	6,422	22%	375	10.7%	243	17.3%	318	3.8%	0	0
2000	6,077	21.4%	377	9.3%	275	21.5%	250	3.6%	0	0
2001	5,767	20.2%	286	9.8%	356	21.9%	197	5.6%	0	0

Female FSRs move into MD, AD, and FM positions at significantly lower rates than similarly situated males as a result of MetLife's discretionary and subjective selection policies and practices. Female FSRs are less likely to move into agency management positions (MD, AD, FM) than similarly situated males. Plaintiffs' statistical expert Dr. Drogin found that, between August 1999 and September 2002, women received 40 fewer job moves into these positions than expected. *See* Drogin, pp. 6-7 at App. I, Dungan Dec., Ex. 7. The gender disparities in promotions to agency management positions are statistically significant. The “Z-value” is -4.9. *See id.* This reflects a gap between male and female selection rates of almost five standard deviations,[FN7] meaning they are virtually certain not to have occurred by chance, but rather from some casual relationship, *see* Drogin, p. 5 at App. I, Dungan Dec., Ex. 7, such as gender discrimination. Moreover, the disparities are common across MLFS zones and over the entire liability period. *See* Drogin, pp. 6-7 at App. I, Dungan Dec., Ex. 7. In fact, this pattern of gender disparity antedates the liability period. Between January 1996 and August 1999, the female selection “shortfall” was 45 agency management jobs for a cumulative shortfall of 85 agency management jobs from 1996 through 2002, having a Z-value of -7.27. *See id.*

FN7. A probability value of Z>2 means that the observed disparity is highly unlikely (.05 probability) to reflect chance variations. A value of Z>5 means that the likelihood that random factors or chance can explain the disparity is very remote (one in 1,700,000). (*See* Drogin, p. 5 at App. I, Dungan Dec., Ex. 7.) Adverse impact of greater than two or three standard deviations “undercut [[s] the hypothesis that decision were being made randomly with respect to [[gender].”

Hazelwood School Dist. v. United States, 433 U.S. 299, 311 n.17 (1977). *See also Smith v. Xerox,* 196 F.3d 358, 366 (2d Cir. 1999) ("If an obtained result varies from the expected result by two standard deviations... Courts generally consider this level of significance sufficient to warrant an inference of discrimination.") *See generally,* Ramona L. Paetzold and Steven L. Willborn, *The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases* §4.13 (West Group 1999).

Female FSRs, ADs, and MDs also receive significantly less compensation than similarly situated men. Female FSRs earned between 7.7% and 13.1% less than their male counterparts in each year during the liability period. These disparities are statistically significant. *See* Drogin, pp. 8-10 at App. I, Dungan Dec., Ex. 7. Similarly, female MDs and ADs together earned between 33% and 46.2% less than similarly situated males during the same period. Average earnings for female MDs and ADs were less than for males in those positions in 1999, 2000 and 2001, respectively. These disparities also are statistically significant. *See* Drogin, pp. 10-12 at App. I, Dungan Dec., Ex. 7.

The chart below shows average earning shortfalls for female FSRs, ADs and MDs (compared to men) in 1999, 2000 and 2001. *See* Drogin, pp. 10-11 at App. I, Dungan Dec., Ex. 7.

Average Earnings Shortfalls Of Female FSRs and MDs/ADs				
YAR	*FSRs*		*MANAGERS*	
	Earnings Shortfall	*Z-value*	*Earnings Slortfall*	*Z-value*
1999	$3,425	-4.57	$37,707	-5.48
2000	$5,134	-5.36	$50,392	-7.08
2001	$7,002	-6.91	$59,185	-9.05

E. *MetLife Had Ample Notice Of Systemic Barriers For Women In MLFS But Failed To Take Effective Measures To Address And Eliminate Such Barriers.*

In February 1999, the internally produced report, "The Women of MetLife," revealed a paucity of women in MLFS management positions and found "there does not appear to be a level playing field [in selections for MLFS management positions]. Men are several times more likely to be selected than women in each of the [sales] management positions." *See* Women of MetLife, p. 7 at App. I, Dungan Dec., Ex. 2. The Report's finding of an unlevel playing field for women within MLFS has been echoed repeatedly in formal complaints brought by numerous female MLFS employees. *See* App. IV, Rafanan Dec., Ex. 43.

MetLife's response to notice of systemic gender bias within MLFS has been to ignore that information and "kill the messenger." MetLife distributed the Women of MetLife Report only to a very few senior executives in MetLife. Almost immediately after the Report was issued, MetLife reduced the author's job duties and, ultimately, eliminated her position as MetLife's National Director for Women's Recruiting. *See* App. III, Dungan Dec., Ex. 49. Plaintiff Janet Ramsey was similarly victimized when she complained to MetLife's HR Department that she had been discriminatorily removed from her MD position because of her gender and further that "MetLife has not had a stellar record when it comes to promoting, supporting and developing females at the level of Managing Directors ... [and] are pushing out some of the few women managers they did have at that level." *See* App. III, Dungan Dec., Ex. 50. MetLife failed to investigate Ms. Ramsey's complaint of systemic gender discrimination and demoted her to an FSR position. *See* App. IV, Rafanan Dec., Ex. 6. Additionally, 17 class members and female witnesses alleged they were subjected to retaliation by MLFS managers after complaining about discriminatory treatment. *See* App. IV, Rafanan Dec., Ex. 1.

Findings from focus groups MetLife conducted as recently as February 2002 reiterate long-standing complaints of systemic career barriers women face within MLFS. The focus group participants, who included female current and former FSRs and agency managers, reported that: (1) women are bypassed for MLFS agency management positions in favor of less qualified men; (2) male agency managers favor male FSRs in distributing sales leads; (3) male managers and FSRs treat female MLFS FSRs and agency managers disrespectfully; and (4) female agency managers earn less than male managers. *See* App. III, Dungan Dec., Ex. 51.

Despite such notice, MetLife has failed to take adequate steps to eliminate systemic barriers that limit female FSRs' and agency managers' career advancement and compensation opportunities within MLFS, or to ensure that MLFS managers are held accountable for providing these women equal employment opportunities. *See* Bielby, pp. 22-30 at App. II, Dungan Dec., Ex. 26; App. III, Dungan Dec., Ex. 52. This indifference reflects MetLife's ratification of the practices that have resulted in the significant MLFS wide gender disparities summarized above.

III. ARGUMENT

A. *General Principles of Class Certification.*

This is the type of case for which the class action procedure was designed. Gender discrimination, no less than race discrimination, "is by definition class discrimination." *Gen. Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 157 (1982). One of the primary purposes of Federal Rule of Civil Procedure 23 was to facilitate litigation of civil rights claims - like those presented here - challenging systemic practices. Fed.R.Civ.P. 23(b)(2), Advisory Committee Notes, 39 F.R.D. 69, 102 (1966). The Second Circuit Court of Appeals' controlling decision in *Robinson v. MetroNorth Commuter R.R.,* 267 F.3d 147 (2d Cir. 2001), *cert. denied,* 122 S.Ct. 1349 (2002), construed Rule 23 correctly and ordered certification of a Rule 23(b)(2) class in an employment discrimination case that, like this one, sought both equitable and compensatory damages.

Plaintiffs must demonstrate they meet the four prerequisites of Rule 23(a) and one of the requirements of Rule 23(b) to proceed as a class action. *See Visa Check/Mastermoney Antitrust Litigation,* 280 F.3d 124, 132-33 (2d Cir. 2001), *cert. denied,* 122 S. Ct. 2382 (2002). Plaintiffs do not have to demonstrate that they will prevail on the merits at this stage of the litigation. *See Caridad v. MetroNorth Commuter R.R.,* 191 F.3d 283, 293 (2d Cir. 1999) ("Such a weighing of evidence is not appropriate at this stage of the litigation."), *cert. denied,* 120 S. Ct. 1959 (2000), *citing, Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974). Rather, the Court should consider the allegations in the complaint as true and examine the evidence only to determine whether the requirements of Rule 23 are met. *See Hirschfeld v. Stone,* 193 F.R.D. 175, 182 (S.D.N.Y. 2000), *citing, Shelter Realty Corp. v. Allied Maint. Corp.,* 574 F.2d 656, 661 n.15 (2d Cir. 1978). In making this determination, it is appropriate for the Court to consider evidence submitted outside of the pleadings, such as deposition testimony, declarations, and expert reports. *Hirschfeld,* 193 F.R.D. at 182, *citing Sirota v. Solitron Devices, Inc.,* 673 F.2d 566, 571 (2d Cir. 1982).

B. *Plaintiffs Meet Rule 23(a)'s Prerequisites of Numerosity, Commonality, Typicality, and Adequacy of Representation.*

Plaintiffs satisfy the four prerequisites of Rule 23(a) - numerosity, commonality, typicality, and adequacy of representation.

1. *The class is so numerous that joinder of all class members is impracticable. (Fed.R.Civ.P. 23(a)(1)).*

Plaintiffs easily meet Rule 23's numerosity requirement because joinder of all class members is impracticable. There are potentially thousands of women in the proposed class. In 2001 alone, 1,387 women were employed in FSR and agency management positions in MLFS, and more women were employed in these positions over the entire liability period. *See* Drogin, App. 2A at App. I, Dungan Dec., Ex. 7. These numbers are more than sufficient to establish numerosity, which "is presumed at a level of 40 [class] members" in this Circuit. *Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir. 1995), *citing, 1 Newberg On Class*

Actions 2d, (1985 ed.) § 3.05.

2. *MetLife's discriminatory policies and practices raise questions of law and fact common to the class. (Fed.R.Civ.P. 23(a)(2)).*

Rule 23(a)(2) requires the existence of questions of law or fact that are common to the class. The commonality test is to be liberally applied and is satisfied if there is at least one common issue of fact or law that affects all class members. *See Triefv. Dun & Bradstreet Corp.,* 144 F.R.D. 193, 198 (S.D.N.Y. 1992). Plaintiffs satisfy the commonality requirement because this case raises multiple common legal claims based on patterns of conduct by MetLife that are common to the class.

a. *Plaintiffs and the class have common claims that rely on the same evidence.*

Plaintiffs and the class have common complaints about MetLife's selection and compensation practices and their effect on women. MLFS has uniform job titles and functions. MLFS uses uniform personnel policies and practices to delegate agency manager selection and resource allocation decisions to predominantly male managers. These managers rely on highly discretionary and subjective criteria with little oversight or review. MetLife's delegation of unfettered discretion to ZVPs, RVPs, and MDs to select agency managers and allocate resources constitutes a policy or practice sufficient to satisfy the commonality requirement. *See Latino Officers Ass'n v. City of New York,* 209 F.R.D. 79, 88 (S.D.N.Y. 2002) ("The delegation of discretionary authority to supervisors constitutes a policy or practice sufficient to satisfy the commonality requirement.") Consistent application of subjective decision making throughout MLFS also raises common questions of fact and is a well recognized basis for finding commonality. *See Rossini v. Ogilvy & Mather, Inc.,* 798 F.2d 590, 598-99 (2d Cir. 1986).

The claims of plaintiffs and the class rest on a foundation of common evidence: MLFS wide statistical data; expert reports analyzing MLFS wide data and practices; and documents and deposition testimony, mostly from MetLife's own managers, describing uniform MLFS policies and practices for selecting agency managers and allocating resources that impact compensation. Plaintiffs' statistical evidence establishes that women are unrepresented in MLFS senior level manager positions, under-selected for agency management positions, and earn less than similarly situated male MLFS employees. *See* Section II.D above. Statistical evidence is particularly relevant where decision making is subjective, as it is in MLFS. *See Caridad,* 191 F.3d at 292. Plaintiffs also present extensive anecdotal evidence to show how MetLife's managers make selection and resource allocation decisions in MLFS. *See* Section II.C above. Plaintiffs' statistical and anecdotal evidence shows that MetLife's actions are not "isolated or discrete instances but, rather, form a pattern of behavior that commonly affects all of the proposed class members." *Marisol A by Forbes v. Guiliani,* 126 F.3d 372, 377 (2d Cir. 1997).

b. *Multiple common questions of fact are present in this case.*

Plaintiffs' claims and evidence raise the following questions of fact that are common to the entire class: (1) Whether, in making agency manager selections and resource allocations in MLFS, MetLife uses criteria that are vague, subjective and lend themselves to discriminatory and gender-stereotyped application by MLFS managers; (2) Whether women are systematically excluded from or disproportionately denied access to higher level and better paying MLFS agency management positions; (3) Whether female FSRs and agency managers are paid less than similarly situated males; (4) Whether female FSRs are treated less favorably than similarly situated males in the assignment of sales leads, books of business, and other resources; (5) Whether female agency managers are treated less favorably than similarly situated males in the allocation of agency discretionary funding and other resources; and (6) Whether MetLife perpetuates limitations on opportunities for women within MLFS by failing to post agency manager positions, develop articulated criteria for selection of agency managers and distribution of sales leads, books of business, and other resources, or implement accountability measures to prevent MLFS managers from making gender-biased selection and resource allocation decisions.

c. *Multiple common questions of law are present in this case.*

The overarching common questions of law raised in this case are whether MetLife discriminated against plaintiffs and the class in violation of Title VII and applicable New York State and New York City laws against employment discrimination. Additional questions of law include: (1) What is the significance and legal effect of plaintiffs' statistical evidence of gender-stratified staffing patterns and gender disparities in selections for agency management positions? *See Robinson,* 267 F.3d at 158-59, 160; (2) What is the significance and legal effect of plaintiffs' statistical evidence of gender disparities in FSR and agency manager compensation? *See id.;* (3) What is the significance and legal effect of the discretionary and subjective decision making MetLife affords MLFS managers in light of the statistical disparities in selection and compensation outcomes? *See Caridad,* 191 F.3d at 291-92; (4) What is the significance and legal effect of MetLife's failure to provide written selection and resource allocation procedures and criteria or to monitor MLFS managers' exercise of discretion in making selection and resource allocation decisions? *See id.;* and (5) Can MLFS' practices be justified by "business necessity" or can they be replaced by less discriminatory alternatives? *See Robinson,* 267 F.3d at 161. A host of subsidiary common questions of law also could be easily articulated.

d. *Common issues of law arise from plaintiffs' reliance on both disparate impact and disparate treatment theories of gender discrimination.*

Plaintiffs' disparate treatment and disparate impact theories of discrimination both raise numerous common class wide issues of law.

i. *Disparate treatment.*

To prevail under a theory of class wide disparate treatment, plaintiffs must establish that intentional discrimination against female FSRs and agency managers was MetLife's standard operating procedure. *See Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 349 (1977); *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 985-87 (1988). The focus of the proof in a disparate treatment class action is on the class as a whole and not on the treatment of individual plaintiffs or class members. *See Robinson,* 267 F.3d at 158 & n.5. Whether plaintiffs' proof establishes their disparate treatment claim raises common legal issues. *See Rossini,* 798 F.2d at 599 ("discriminatory intent clearly was a major issue of law and fact shared in common"). The most important evidence from which a pattern of intentional discrimination may be inferred is class wide statistical evidence. *See Teamsters,* 431 U.S. at 339; *Robinson,* 267 F.3d at 158 n.5, (statistical evidence is the core of plaintiffs' pattern or practice disparate treatment case). Plaintiffs present such class wide statistical evidence in Dr. Drogin's report. His analysis shows the existence of statistically significant gender disparities in compensation for FSRs and agency managers and in selections for agency management positions. *See* Drogin, pp. 5-12 at App. I, Dungan Dec., Ex. 7.

Plaintiffs also rely on anecdotal evidence from MetLife managers, class members, and other MLFS employees to show systemic discrimination against plaintiffs and the class. *See* Section II.C above. The importance of anecdotal evidence, which brings "the cold numbers convincingly to life," *Teamsters,* 431 U.S. at 339, is to assist the court in drawing inferences from class wide statistical evidence. *See Robinson,* 267 F.3d at 168 (anecdotal evidence at the liability stage "simply provides 'texture' to the statistics"). The inferences that can be drawn from plaintiffs' statistical and anecdotal evidence raise common legal issues.

ii. *Disparate impact.*

To prevail under a theory of disparate impact, plaintiffs must prove that employment practices that appear facially neutral have a discriminatory effect. *See Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971); *Watson,* 487 U.S. at 986-87. Evidence of discriminatory intent is not necessary. *See Griggs,* 401 U.S. at 431; *Watson,* 487 U.S. at 986. Disparate impact analysis may be applied to an employer's undisciplined system of subjective decision making. *See Watson,* 487 U.S. at 990; *Caridad,* 191 F.3d at 292. This analysis raises common questions of law as to the validity of such a system when it has class wide disparate impact.

Class wide statistical evidence is also crucial to proving a disparate impact claim. *See id.; Robinson,* 267 F.3d at 160 (statistical proof occupies "center stage" in a disparate impact claim). Plaintiffs' statistical evidence establishes that MetLife's employment practices have an adverse impact on female FSRs' and agency managers' compensation and selections of women for agency management positions. *See* Drogin, pp. 5-12 at App. I, Dungan Dec., Ex. 7. This evidence applies to MLFS as a whole and raises common questions of law as to whether MetLife can rebut the *prima facie* case established by plaintiffs' showing of adverse impact. Additional common legal and factual issues will arise if MetLife asserts a "business necessity" defense. *See Robinson,* 267 F.3d at 161.

3. *The claims of the representative plaintiffs are typical of the claims of the class members. (Fed.R.Civ.P. 23(a)(3)).*

Rule 23(a)(3) requires that the claims of the representative plaintiffs be typical of those of the class.[FN8] Typicality requires that disputed issues of law or fact "occupy essentially the same degree of centrality to the named plaintiff's claims as to that of the other members of the proposed class." *Caridad,* 191 F.3d at 293, *citing, Krueger v. New York Tel. Co.,* 163 F.R.D. at 442. Plaintiffs' and the class' claims are typical because they are based on the same class allegations, legal theories and conduct by MetLife. *See Latino Officers Ass'n,* 209 F.R.D. at 90. Plaintiffs allege that MLFS managers, who are almost all male, exercise discretionary authority using subjective criteria to deny them equal opportunities for agency management positions, resources, and compensation in favor of similarly situated males. The experiences of the plaintiffs, who worked in different MLFS agencies, are strikingly similar.

FN8. The commonality and typicality requirements "tend to merge" and "both serve as guideposts for determining whether ... the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence." *Caridad,* 191 F.3d at 291, *citing, Falcon,* 477 U.S. at 157 n.13. The factors cited by plaintiffs regarding commonality therefore also support a finding of typicality.

Plaintiff Stella Mitchell began her career with MetLife in 1987 as an FSR. She was promoted twice, in 1994 and 1998, to positions as the MD of start up agencies. In each of these positions, Ms. Mitchell was denied business development resources and financial support, such as agency development funds, books of business, transferred FSRs, and adequate clerical support, which similarly situated men received. Ms. Mitchell was demoted to AD in 1996 and again to FSR in 2000. Additionally, she was not selected in 2000 for either of two MD positions for which MetLife selected men with less qualifications and tenure with MetLife. *See* App. IV, Rafanan Dec., Ex. 2.

Plaintiff Hwa-Mei C. Gee began her employment with MetLife in 1986 as an FSR. In 1995, Ms. Gee was promoted to AD and, in 1999, she was promoted to MD of a start up agency. Ms. Gee was denied access to business development resources and financial support she needed to grow and develop the new agency, which MetLife provided to similarly situated men. In 2000, Ms. Gee was demoted to FSR. In 2002, MetLife selected a less qualified man over Ms. Gee for an AD position. *See* App. IV, Rafanan Dec., Ex. 3.

Plaintiff Durpatty Persaud began her career at MetLife in 1993 as an FSR and quickly became a top producer in her agency. Ms. Persaud was denied multiple promotions to FM in 1999 in favor of less qualified men. She also was denied business development resources that MetLife provided to similarly situated male FSRs. *See* App. IV, Rafanan Dec., Ex. 5.

Plaintiff Janet Ramsey was hired by MetLife as an FSR in 1983. She was promoted to MD in 1986 and was assigned to a larger, multi-office agency in 1995. MetLife refused to provide Ms. Ramsey business development resources and financial support that it provided to similarly situated men. MetLife refused to select Ms. Ramsey for an MD position for which she was well qualified and instead demoted Ms. Ramsey to AD in 2000. In 2001, after she complained about discriminatory treatment, MetLife demoted Ms. Ramsey to FSR. *See* App. IV, Rafanan Dec., Ex. 6.

The plaintiffs' experiences are typical and illustrative of those of the class. For example, 28 female witnesses and class members complain they were passed over for agency management positions in favor of less qualified men. Another 55 allege that as FSRs they were not provided comparable sales leads, books of business, and other business development resources as similarly situated men received, resulting in lower compensation. Another 11 allege that as agency managers they were denied business development resources and support that similarly situated men received, resulting in lower compensation. *See* App. IV, Rafanan Dec., Ex. 1. This evidence establishes a systematic pattern or practice of discrimination against women by MetLife, demonstrates that the plaintiffs' experiences are not unique and satisfies the typicality requirement.

4. *The representative plaintiffs and their counsel will fairly and adequately protect the interests of the class. (Fed.R.Civ.P. 23(a)(4)).*

Rule 23(a)(4) requires plaintiffs and their counsel to demonstrate they will adequately protect the class' interests. Plaintiffs must meet two tests to satisfy this requirement: (1) absence of conflict and (2) assurance of vigorous prosecution. *See* Robinson, 267 F.3d at 170-71.

There are no conflicts of interest here. Plaintiffs' interests are aligned with those of the class. Plaintiffs and the class have the same complaints that discriminatory practices in MLFS disadvantage female FSRs and agency managers by denying them equal opportunities for compensation and agency management positions. Plaintiffs and the class are seeking to end the discriminatory practices and compensation for their losses. Plaintiffs have actively participated in the prosecution of the case by producing documents, providing written discovery responses, giving depositions, and assisting counsel in the development of the case. *See* App. V, Declaration of David Borgen ("Borgen Dec."), 11; App. V, Declaration of Adam Klein ("Klein Dec."), ¶ 13.

There can be no legitimate contention that plaintiffs' counsel are not adequate to prosecute this case. Outten & Golden and Goldstein, Demchak, Baller, Borgen & Dardarian have been appointed class counsel in other employment discrimination cases and have substantial experience successfully prosecuting complex employment discrimination and wage and hour class actions. *See* App. V, Borgen Dec., 11 7; App. V, Klein Dec., ¶ 10. The Court should thus find that plaintiffs and their counsel will adequately represent the class.

C. *This Court Should Certify the Class as a Rule 23(b)(2) Action because Plaintiffs Satisfy the Requirements of that Rule.*

Plaintiffs also must satisfy one of the subparts of Rule 23(b) to proceed as a class action. This class should be certified under Rule 23(b)(2) because MetLife "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2).

1. *Certification of this class under Rule 23(b)(2) is required by the Second Circuit's decision in Robinson v. MetroNorth Commuter Railroad.*

A Rule 23(b)(2) class action is intended for cases, such as this one, where broad, class wide injunctive or declaratory relief is necessary to redress a group wide injury. *See Robinson,* 267 F.3d at 163. This case meets the standards for Rule 23(b)(2) certification enunciated by the Second Circuit in *Robinson* because the value of the equitable relief sought is significant and predominates over the compensatory and punitive damages sought. *See id.* at 164. Rule 23(b)(2) certification was appropriate for a class of African American employees alleging denial of promotions and disparate discipline and seeking both equitable relief and non-incidental damages in *Robinson. See id.* at 167. The same Rule applies to the gender discrimination claims here.[FN9]

FN9. *See also Molski v. Gleich,* Nos. 00-57099, 01-55066, 01-55068, 2003 WL 255964 (9th Cir. 2003) (relying on *Robinson* and finding certification under Rule 23(b)(2) appropriate for a class of mobility impaired persons alleging denial of access to gasoline stations, and seeking injunctive relief and non-incidental damages).

The value and importance of the equitable relief sought by plaintiffs are predominant and outweigh the compensatory and punitive damages also demanded. Plaintiffs seek comprehensive changes to MetLife's agency management selection and business resource allocation practices and systemic oversight or monitoring of these practices. Given the number of the positions at issue here, and the potential earnings in those positions, the value of equitable relief that will increase women's career opportunities and compensation over time will greatly exceed any monetary award that may be obtained. The class wide remedies plaintiffs seek are more important than the individual relief that may also accrue to any particular class member. *See Latino Officers Ass'n,* 209 F.R.D. at 93 (finding that the value of the declaratory and injunctive relief sought to remedy discriminatory disciplinary practices was predominant).

Class treatment is appropriate here because the class is manageable and such treatment is efficient and will achieve judicial economy. *See Robinson,* 267 F.3d at 164. Class certification will eliminate the need for hundreds of separate duplicative lawsuits that could yield inconsistent results and/or not result in any meaningful changes to MetLife's discriminatory practices. Moreover, the Court possesses broad powers under Rules 23(c)(4) and 23(d)(2) to manage class actions in order to accomplish these goals. *See Robinson,* 267 F.3d at 166-167.

2. *In the alternative, the Court could bifurcate the action and grant class certification, pursuant to Rule 23(b)(2), limited to liability issues.*

Alternatively, the Court could bifurcate the action by initially certifying the liability stage of the pattern or practice claims for class treatment under Rule 23(b)(2) and reserving the remaining claims and issues for subsequent proceedings. *See Robinson,* 267 F.3d at 168 ("[L]itigating the pattern or practice liability phase for the class as a whole would both reduce the range of issues in dispute and promote judicial economy."); *see also Teamsters,* 431 U.S. at 430 (setting standards for bifurcating trial of employment discrimination class actions into two stages). Numerous district courts have followed this bifurcated approach in certification of employment discrimination class actions. *See e.g. Latino Officers Ass'n,* 209 F.R.D. at 92; *Butler v. Home Depot, Inc.,* 70 Fair Empl. Prac. Cas. 51 (BNA) (N.D. Cal. 1996); *Shores v. Publix Super Markets, Inc.,* 69 Empl. Prac. Dec. (CCH) P44, 478 (M.D. Fla. 1996); and *Stender v. Lucky Stores,* 803 F. Supp. 258 (N.D. Cal. 1992); *see also Lemon v. Int'l Union of Operating Eng.,* 216 F.3d 577, ____ (7th Cir. 2000) (holding that district court can bifurcate proceedings and certify a Rule 23(b)(2) class for equitable relief); *Jefferson v. Ingersoll Int'l, Inc.,* 195 F.3d 894, 898 (7th Cir. 1999) (same).

IV. CONCLUSION

For the reasons set out above, the Court should (1) grant plaintiffs' motion for class certification and allow this case to proceed as a Rule 23(b)(2) class action, (2) certify Stella Mitchell, Hwa-Mei C. Gee, Durpatty Persaud and Janet Ramsey as representatives of the class, and (3) appoint Outten & Golden and Goldstein, Demchak, Baller, Borgen & Dardarian as Class Counsel.

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