

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

AMY VELEZ, PENNI ZELINKOFF, )  
MINEL HIDER TOBERTGA, )  
MICHELLE WILLIAMS, JENNIFER )  
WAXMAN-RECHT, KAREN LIGGINS, )  
LORI HORTON, HOLLY WATERS, )  
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VONLINTEL, CATHERINE WHITE, )  
KELLY CORBETT, JAMIE HOLLAND, )  
JOAN DURKIN, SIMONA LOPES, )  
MARYANNE JACOBY, and MARTA )  
DEYNE, )

04 Civ. 09194 (CM)

Individually and on Behalf of Others )  
Similarly Situated, )

PLAINTIFFS, )

v. )

NOVARTIS PHARMACEUTICALS )  
CORPORATION, )

DEFENDANT. )

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION  
FOR: (1) FINAL CERTIFICATION OF SETTLEMENT CLASS; AND (2) FINAL  
APPROVAL OF SETTLEMENT, SERVICE PAYMENTS TO CLASS  
REPRESENTATIVES AND CLASS MEMBERS, AND ATTORNEYS' FEES AND  
EXPENSES**

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**TABLE OF AUTHORITIES**

<b><u>FEDERAL CASES</u></b>	<b><u>PAGE(S)</u></b>
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<i>Behrens v. Wometco Enters.</i> , 118 F.R.D. 534 (S.D. Fla. 1988), aff'd, 899 F.2d 21 (11th Cir. 1990).....	25
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<i>Binetti v. Washington Mutual Bank</i> , No. 06 Civ. 1732, slip op. (S.D.N.Y. Apr. 15, 2008) (McMahon, J.) .....	38
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<i>Chatelain v. Prudential-Bache Secs.</i> , 805 F. Supp. 209 (S.D.N.Y. 1992).....	29
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*Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473 (2d Cir. 1995) .....15

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*deMunecas v. Bold Food LLC*, No. 09 Civ. 440, 2010 U.S. Dist. LEXIS 87644  
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*Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006).....17

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*Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240  
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*Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911,  
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*Hertzberg v. Asia Pulp & Paper Co.*, 197 Fed. Appx. 38 (2d Cir. 2006).....19

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*In re AOL Time Warner ERISA Litig.*, No. 02 Civ. 8853, 2006 U.S. Dist. LEXIS 70474  
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*In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164  
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*In re Crazy Eddie Secs. Litig.*, 824 F. Supp. 320 (E.D.N.Y. 1993).....25

*In re EVCI Career Colleges Holding Corp. Secs. Litig.*, No. 05 Civ. 10240  
2007 U.S. Dist. LEXIS 57918 (S.D.N.Y. July 27, 2007) (McMahon, J.).....*passim*

*In re Gilat Satellite Networks*, No. CV-02-1510 (CPS)(SMG),  
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*In re Global Crossing Secs. and ERISA Litig.*, 225 F.R.D. 436 (S.D.N.Y. 2004).....29

*In re Host Am. Corp. Secs. Litig.*, No. 3:05-cv-1250,  
2008 U.S. Dist. LEXIS 17405 (D. Conn. Mar. 7, 2008).....23

*In re Initial Public Offering Secs. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009).....25

*In re: Interpublic Secs. Litig.*, No. Civ. 6527 Class Action, 03 Civ. 1194  
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*In re Lloyd’s American Trust Fund Litig.*, No. 96 Civ. 1262,  
2002 U.S. Dist. LEXIS 22663 (S.D.N.Y. Nov. 26, 2002).....36, 39

*In re Luxottica Group S.p.A. Secs. Litig.*, 233 F.R.D. 306 (E.D.N.Y. 2006).....22

*In re NTL Inc. Secs. Litig.*, No. 02 Civ. 3013 (LAK), 2007 WL 1294377  
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*In re Marsh & McLennan Companies, Inc. Secs. Litig.*, No. 04 Civ. 8144, 2009  
U.S. Dist. LEXIS 120953 (S.D.N.Y. Dec. 23, 2009) (McMahon, J.).....*passim*

*In re Marsh ERISA Litig.*, 265 F.R.D. 128 (S.D.N.Y. 2010) (McMahon, J.).....*passim*

*In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297 (E.D.N.Y. 2010).....22, 24

*In re Michael Milken & Assocs. Secs. Litig.*, 150 F.R.D. 46 (S.D.N.Y. 1993).....23

*In re Oxford Health Plans, Inc. Secs. Litig.*, MDL Dkt. No. 1222,  
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*In re Paine Webber Ltd. Partnerships Litig.*, 147 F.3d 132 (2d Cir. 1998).....19

*In re Paine Webber Ltd. Partnerships Litig.*, 171 F.R.D. 104 (S.D.N.Y. 1997).....22, 28

*In re Priceline.com, Inc. Secs. Litig.*, No. 3:00-CV-1884, 2007 U.S. Dist. LEXIS 52538  
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*In re Prudential Inc. Secs. Ltd. Partnerships Litig.*, MDL No. 1005, M-21-67,  
1995 U.S. Dist. LEXIS 22103 (S.D.N.Y. Nov. 20, 1995).....25

*In re Sony Corp. Litig.*, No. 09-MD-2102, 2010 U.S. Dist. LEXIS 87643  
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*In re Telik Secs. Litig.*, 576 F. Supp. 2d 570 (S.D.N.Y. 2008) (McMahon, J.).....*passim*

*In re Veeco Instruments Secs. Litig.*, No. 05 MDL 1695, 2007 U.S. Dist. LEXIS 85269  
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*In re Warner Communications Secs. Litig.*, 618 F. Supp. 735 (S.D.N.Y. 1985).....36

*Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 687 (N.D. Ga. 2001).....41, 42

*Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000).....19

*Lenahan v. Sears, Roebuck & Co.*, Civ. No. 02-45, 2006 U.S. Dist. LEXIS 60307  
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*Liberte Capital Group v. Capwill*, No. 5:99 CV 818, 2007 U.S. Dist. LEXIS 64869  
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*Kaplan v. Rand*, 192 F.3d 60 (2d Cir. 1999).....39

*Khait v. Whirlpool Corp.*, No. 06-6381, 2010 U.S. Dist. LEXIS 4067  
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*Malchman v. Davis*, 706 F.2d 426 (2d Cir. 1982).....28

*Maley v. Del Global Techs.*, 186 F. Supp. 2d 358 (S.D.N.Y. 2002) (McMahon, J.).....*passim*

*Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007).....35

*Maywalt v. Parker & Parsley Petroleum*, 963 F. Supp. 310 (S.D.N.Y. 1997).....35

*Mba v. World Airways, Inc.*, 369 Fed. Appx. 194 (2d Cir. 2010).....20

*McMahon v. Olivier Cheng Catering and Events, LLC*, No. 08 Civ. 8713,  
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*McReynolds v. Richards-Cantave*, 588 F.3d 790 (2d Cir. 2009).....19, 27

*Mohney v. Shelley’s Prime Steak*, No. 06 Civ. 4270, 2009 U.S. Dist. LEXIS 27899  
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*Parker v. Jekyll & Hyde Entm’t Holdings, L.L.C.*, No. 08 Civ. 7670,  
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*Parker v. Time Warner Entertainment Co.*, 631 F. Supp. 2d 242 (E.D.N.Y. 2009).....23



*Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*,  
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*Reyes v. Buddha-Bar NYC*, No. 08 Civ. 2494, 2009 U.S. Dist. LEXIS 45277  
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*RMED Int’l, Inc., v. Sloan’s Supermarkets, Inc.*, No. 94 Civ. 5587,  
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*Roberts v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997) .....39, 40, 41

*Robidoux v. Celani*, 987 F.2d 931 (2d Cir. 1993).....16

*Rosenberg v. IKON*, No. 05-cv-09131, slip op. (S.D.N.Y. Jan. 22, 2008).....38

*Savoie v. Merchants Bank*, 166 F.3d 456 (2d Cir. 1999).....35

*Strougo ex rel Brazilian Equity Fund, Inc.v. Bassini*, 258 F. Supp. 2d 254  
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*Taft v. Ackermans*, No. 02 Civ. 7951, 2007 U.S. Dist. LEXIS 9144  
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*Thomas v. Citifinancial Auto Ltd.*, No. 07 Civ. 00721, slip op. (D.Md. Aug. 20, 2009).....38

*Toure v. Cent. Parking Sys. of N.Y.*, No. 05 Civ. 5237,  
2007 U.S. Dist. LEXIS 74056 (S.D.N.Y. Sept. 28, 2007).....17

*Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995).....41, 42

*Velez v. MaJik Cleaning Serv., Inc.*, No. 03 Civ. 8698, 2007 U.S. Dist. LEXIS 46223  
(S.D.N.Y. June 22, 2007).....41

*Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005).....*passim*

*Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982).....28

*Wooten v. Smith & Nephew*, No. 2:06-cv-2571, slip op. (W.D. Tenn. Nov. 25, 2009).....32

*Wright v. Stern*, 553 F. Supp. 2d 337 (S.D.N.Y. 2008).....27, 42

**OTHER AUTHORITIES**

*In Focus: Billing; A Firm-by-Firm Sampling of Billing Rates Nationwide*,  
Nat'l L.J., December 6, 2004.....38

Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments  
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Employment Rights and Employment Policy Journal 395 (2006).....42

Theodore Eisenberg and Geoffrey P. Miller, *Attorneys Fees and Expenses in  
Class Action Settlements: 1993-2008*, NYU Center for Law, Economics  
and Organization, Working Paper No. 09-50 (November 2009),  
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**I. INTRODUCTION**

The class action gender discrimination matter before this Court has been pending since 2004. At the close of more than seven years of litigation, this Court presided over a seven-week trial. After a verdict was returned for each Testifying Plaintiff and the Class of over **5,600** female sales force employees, the Parties entered into arm's length settlement discussions and ultimately reached a Settlement Agreement ("SA") affording significant nonmonetary and monetary relief. The Settlement Class expands beyond the initial certified Class Period of five years to include a total of **6,206** female sales employees who worked at Novartis at any point in an eight-year period, running from the start of the Class Period (July 15, 2002) to the preliminary approval date (July 14, 2010).

Plaintiffs sought to obtain equitable relief that would substantially improve Novartis Pharmaceutical Corporation's ("Novartis" or "NPC") employment practices in order to ensure that all members of its sales force are treated fairly. As described in the Joint Declaration of Class Counsel, the Settlement fulfills the primary purpose of the litigation by setting forth substantial programmatic relief. This relief includes, but is not limited to, requirements that NPC (1) strengthen its complaint process to ensure employees can safely raise concerns and that their concerns will be addressed in a timely and thorough fashion; (2) retain, with the input of Class Counsel, an external specialist to design an annual adverse impact analysis of its performance ratings to determine if there are any significant gender disparities, to share the results of such analyses with Class Counsel, and to institute remedies where appropriate; (3) retain, with the input of Class Counsel, an external Compensation and Benefits specialist to design a base salary pay-in-range analysis and annual adverse impact analysis of rate of pay to determine if there are any significant gender disparities, to share the results of those analyses with Class Counsel, and

to make adjustments to that compensation system in the next pay cycle where necessary; (4) retain, with the input of Class Counsel, an external specialist to design an adverse impact analysis pertaining to promotions to first-line managers to determine if there are any significant gender disparities, to share the results of such analyses with Class Counsel, and to institute remedies where appropriate; (5) adopt and circulate a sexual harassment policy that covers coworker and customer harassment and include in its bi-annual employee survey questions about work-life balance, sharing with Class Counsel a summary of any remedial action taken by NPC in response to the bi-annual survey results; and (6) be monitored in its compliance with the programmatic relief terms by a Court-appointed Compliance Master. (SA ¶¶7.1-7.45). The Settlement Agreement dictates that Class Counsel—for three years—must actively track the implementation of the programmatic relief provisions in the Settlement and aid the Compliance Master in assuring compliance with its terms. (SA ¶¶7.2, 7.39-7.41).

In addition, Plaintiffs and the Class have also achieved a fair and equitable resolution of the monetary dispute regarding pay, promotion and pregnancy. Specifically, Class Members will receive the entire back pay award calculated by Plaintiffs' expert labor economist, and they will have the opportunity to receive additional awards based on their claims for compensatory damages, up to the full \$300,000.00 provided for by law.

On July 14, 2010, this Court preliminarily approved the entire Settlement Agreement as fair, reasonable and adequate. The Court also approved as to form and content the proposed Notice and Claim Form materials; directed the mailing of these materials; certified the Settlement Class; and scheduled a Final Fairness Hearing to be held on November 19, 2010 on the question of whether the proposed Settlement should be finally approved as fair, reasonable and adequate as to the Settlement Class Members.

Plaintiffs now submit these papers in support of their Motion for: (1) final certification of the Settlement Class; and (2) final approval of the Settlement, including the award of (a) service payments for the 26 Named Plaintiffs and Testifying Witnesses and 20 Deponents, all of whom significantly contributed to the success of this action; and (b) attorneys' fees and expenses as detailed herein.

Given the substantial relief in the Settlement Agreement, Plaintiffs respectfully request that this Court approve as final the Settlement Agreement this Court has already preliminarily approved. Pursuant to the Settlement Agreement, Plaintiffs also seek this Court's Order to dismiss the civil action with prejudice and require that all discovery materials marked as containing Confidential or Highly Confidential Information pursuant to the Protective Order entered in the case be returned to the producing party or destroyed.

## **II. SUMMARY AND FACTUAL BACKGROUND**

### **A. FILING OF THE COMPLAINT AND EXTENSIVE CLASS, MERITS, AND DAMAGES DISCOVERY**

This class litigation ("Class Matter") began in 2003, when the lead Named Plaintiff, Amy Velez, filed her original charge of discrimination against Novartis with the District of Columbia EEOC, alleging discriminatory conduct relating to pay, promotion and pregnancy. In late 2004, several individual complaints, including Ms. Velez's, were consolidated into a single Class Complaint and filed in the Southern District of New York on behalf of five of the Named Plaintiffs. Joint Declaration of David W. Sanford and Katherine M. Kimpel at ¶7 (hereinafter "Joint Dec."). An Amended Complaint, adding seven more Named Plaintiffs, was filed on February 23, 2005. The Complaint was amended two additional times, with the final, Fourth Amended Complaint ("Class Complaint") filed on March 13, 2006. Joint Dec. ¶8. Prior to the filing of the Class Complaint in 2006, the Parties had fully briefed the Defendant's first motion

for summary judgment, although it was ultimately withdrawn. Joint Dec. ¶9.

The Parties proceeded to a lengthy class certification discovery process, including depositions of 11 Novartis corporate designees. In addition, Class Counsel prepared the declarations of 87 female Novartis employees from 31 states. During the certification discovery phase, the Plaintiffs produced more than 28,000 pages of documents, and Novartis deposed two experts and 17 class representatives nationwide. Joint Dec. ¶10.

Class Counsel filed their Motion for Class Certification on January 16, 2007, and the extensive briefing by both Parties was complete on April 16, 2007. The Court granted Plaintiffs' Class Motion, certified the Class, and appointed the current Class Counsel (who theretofore represented all the Plaintiffs jointly) on July 31, 2007. Joint Dec. ¶11. Defendant Novartis then filed a Petition for Permission to Appeal Class Certification Order with the United States Court of Appeals for the Second Circuit. The Plaintiffs filed a brief opposing the Petition, and the Petition was denied. Joint Dec. ¶12.

After the Class was certified, the Parties engaged in extensive merits, expert and damages discovery, which included scores of fact and expert depositions throughout the United States. Joint Dec. ¶13. Novartis filed two more motions for summary judgment, which the Plaintiffs vigorously opposed and which were ultimately unsuccessful. The Parties also engaged in extensive pretrial motions practice. Joint Dec. ¶14.

In all, over the past seven years, Plaintiffs: produced 109 declarations in support of class certification; took and defended approximately 107 depositions from coast to coast; reviewed and produced approximately 40,000 pages of documents to Novartis; reviewed and catalogued approximately 3.7 million pages of documents produced by Novartis; engaged two testifying expert witnesses, four consulting experts and four trial consultants; produced eight expert

reports; drafted and filed voluminous briefing, including, but not limited to, class certification briefs, interlocutory appeals, summary judgment briefing, and pre-trial filings, including ten motions *in limine* (as well as oppositions to 11 motions *in limine* filed by Novartis); identified over 1,300 trial exhibits, most of which were admitted during a full-day conference with the Court; prepared and presented 17 witnesses and called eight hostile witnesses at trial; and filed with the Court over 750 proposed findings of fact and conclusions of law. Joint Dec. ¶15. In furtherance of these efforts, to date, Class Counsel has spent \$1,891,098.31 in out-of-pocket expenses and dedicated 36,996.77 hours to this Class Matter, drawn from the efforts of no fewer than 68 attorneys and staff members.

## **B. TRIAL**

After the seven years of litigation and the seven weeks of trial, a nine-member jury returned a verdict for Plaintiffs on each of the three class claims, awarded \$250 million in punitive damages to the Class as a whole, and awarded a total of \$3.36 million in compensatory damages to 12 Testifying Witnesses.

The jury found that Novartis discriminated against female sales representatives, district managers and area sales managers (“Class Members”) in decisions regarding pay and promotion to first-level manager positions from July 15, 2002 through November 30, 2007. In addition, the jury found Novartis discriminated against pregnant Class Members with respect to the terms and conditions of their employment. Both the fact and scale of the verdict and resulting awards garnered significant national and international attention.

Under this schedule, following the jury verdict, this Court was to order the appropriate back pay award in light of the verdict; to decide the disparate impact claims, which the Parties previously argued to the Court; to order what affirmative, programmatic relief was required; and

to appoint Special Masters to hold individual hearings for Class Members who wanted to assert claims for compensatory damages. However, these actions all were held in abeyance after the Parties informed the Court that they would embark on serious settlement negotiations. Nonetheless, this Class Matter significantly engaged the resources of the Court and its staff in the past year alone. Having taken over the case mid-stream, the Court had to resolve numerous disputes between the Parties during the final eight months of discovery, rule on the summary judgment briefing, manage the pre-trial activity, and then preside daily over the lengthy trial.

Finally and most significantly, the trial required the bravery and commitment of Class Members and Class Representatives from across the United States, who spent days traveling to and from New York to testify on behalf of themselves and thousands of Class Members. For many of those Testifying Witnesses (and non-testifying witnesses who were Class Representatives), the ordeal was long and difficult, dating back—in some instances—to 2003. For them, the case involved the production of thousands of pages of documents; pre-class certification, merits and damages paper discovery; preparation for and attendance at day-long depositions (in many cases, hundreds of miles from their homes); and extensive, ongoing communications with Counsel. Each of these individuals exposed herself to great risk and emotional upheaval, overcoming fears of possible scorn of friends and colleagues and, in some cases, the displeasure of her own family members. Each courageously came forward and told her story in paper, in depositions, and, for some, at trial. Joint Dec. ¶40. The jury result was right and validated their years of effort and risk.

### **C. SETTLEMENT NEGOTIATIONS**

Soon after the jury verdict, the Parties entered into arm's length, hard-fought, labor-intensive negotiations. In addition to Class Counsel and Defendant's Counsel, Cravath Swaine



& Moore, LLP (including Cravath's Managing Partner, Evan Chesler), both Novartis's In-House Counsel and Corporate Executives took part. Those negotiations culminated on July 14, 2010, when the Parties entered into a 66-page Settlement Agreement, the product of those seven years of litigation and two months of focused, post-verdict talks and drafting.

**D. SETTLEMENT AGREEMENT**

That Settlement Agreement provides for robust, class-wide nonmonetary and monetary relief valued at up to \$175 million, including, *inter alia*, the following:

1. Novartis will implement proactive equal employment opportunity measures detailed in the Settlement Agreement.
2. Novartis will increase the size of the Human Resources Business Partners staff and the Employee Relations Group.
3. Novartis will revise its policies and processes for investigating discrimination claims.
4. Novartis will revise the timing and function of the "clarification meeting."
5. Novartis will train its staff on the changes as detailed in the Settlement Agreement.
6. Novartis will implement specified changes to its performance evaluation system and provide mandatory training for all managers regarding that system.
7. Novartis will retain an external specialist to design and carry out an annual adverse impact analysis of ratings.
8. Novartis will create an appeals process for employees who disagree with their performance ratings.
9. Novartis will work with an external Compensation and Benefits specialist to design a base salary pay-in-range analysis and subsequent adverse impact analysis of annual rates of pay.

10. Novartis will implement changes to its promotional policies.
11. Novartis will implement changes to its Management Development Program (“MDP”) training.
12. Novartis will implement changes to its tracking and monitoring of promotional opportunities.
13. Novartis will retain an external specialist to design and carry out an adverse impact analysis with respect to the pool of employees qualified for and interested in promotions to first-line manager.
14. Novartis will work with two outside consultants to improve the overall culture of the company.
15. The Court will appoint a Compliance Master to monitor the company’s implementation of the terms of Section VII of the Settlement Agreement.
16. Novartis will report annually to Class Counsel detailing its compliance with Section VII of the Settlement Agreement. Novartis and Class Counsel will thereafter submit a report to the Compliance Master.
17. Novartis will pay \$152.5 million into a Settlement Fund to satisfy (a) backpay, (b) compensatory damage claims, (c) attorneys’ fees and costs associated with this litigation, and (d) administrative fees, costs and expenses incurred in connection with administering the Settlement Fund. The \$152.5 million is earmarked as follows: \$60 million is committed to back pay for the class, which represents full value according to analysis by Plaintiffs’ expert; approximately \$40 million is allocated to a compensatory damages fund, which can be accessed by Class Members who submit claim forms; approximately \$10 million is committed to Testifying Witnesses, Class

Representatives, and Deponents, and includes \$164,500.00 committed to *cy pres* awards outlined below; \$38,125,000.00 is committed to attorneys' fees; approximately \$2.375 million is committed to payment of administrative settlement costs; and up to \$2 million is committed to reimbursement of litigation expenses. Any portion of the compensatory damages fund that is not awarded as a result of the claims process will revert back to Novartis.

18. Novartis will distribute a total of \$164,500.00 in seven equal portions to the following organizations as a *cy pres* award, in accord with the Settlement Agreement at paragraph 8.8.
  - a. The **American Association of University Women**, a 501(c)(3) with a long history of working for the interests of girls and women across the United States and with programs that include the funding of \$3.2 million in graduate grants and the publishing of reports such as Behind the Pay Gap, an analysis of gender-related pay disparities.
  - b. The **Employee Rights Advocacy Institute for Law and Policy**, a 501(c)(3) that uses a multidisciplinary approach in combination with innovative legal strategies, policy development, grassroots advocacy, and public education to help ensure that American workplaces are free of discrimination, harassment and retaliation.
  - c. The **Impact Fund**, a 501(c)(3) dedicated to seeking civil rights and environmental and economic justice that provides (i) counseling, advice and assistance on procedural and substantive issues that arise in complex litigation, and (ii) high-quality training programs on various aspects of class action and impact litigation to these ends.

- d. The **Institute for Women’s Policy Research**, a 501(c)(3) that employs economists and other social scientists to conduct research on issues related to women in the workplace, including studies on paid parental leave, work flexibility, and breastfeeding in the workplace.
  - e. The **National Partnership for Women and Families Employment Project**, a 501(c)(3) that focuses on the Family Medical Leave Act and work and family-related issues, often partnering with corporations and other employer groups to find creative solutions to work-life balance issues.
  - f. The **National Women’s Law Employment Project**, a 501(c)(3) that educates the public and the legislature regarding the needs of women in the workplace, including a “Stop Discounting Women” campaign to address pay disparities.
  - g. **Workplace Fairness**, a 501(c)(3) that provides information, education, and assistance to individual workers and their advocates nationwide and promotes public policies that advance employee rights through efforts to make information about workers’ rights more readily accessible and by sharing the employee perspective in publications, policy debates, and public discussion.
19. This Court has appointed Rust Consulting (“Rust”) as the Claims Administrator, in accord with paragraph 10.2 of the Settlement Agreement.
20. This Court will appoint at least one Claims Adjudicator, in accord with paragraph 10.3 of the Settlement Agreement.

**E. NOTICE TO THE CLASS, EXCLUSIONS, OBJECTIONS AND CLAIM FORMS**

As noted above, the Court appointed Rust Consulting to administer the settlement. The following facts are distilled from the Declaration of Stacy L. Roe, Senior Project Administrator

for Rust (hereinafter “Rust Dec.”).

On September 8, 2010, Rust sent Notice of the Proposed Class Action Settlement to 6,212 Settlement Class Members. Rust Dec. ¶9.

The deadline for requests for exclusion was 35 calendar days after the mailing date, or Wednesday, October 13, 2010. Only six Class Members, which represents approximately one-tenth of one percent (0.001) of the Class, have timely excluded themselves from the Settlement. Rust Dec. ¶13.

The deadline for objections to the Settlement was 45 calendar days after the mailing date, or Saturday, October 23, 2010 (SA ¶10.25). **None of the 6,206 Class Members objected.** Rust Dec. ¶16. The absence of objections underscores both the extraordinary nature of the relief obtained for the Class and the fairness of the Settlement as a whole.

As a result, **all 6,206 Settlement Class Members will receive an automatic payment of their backpay award** from the \$60 million fund per the terms of the Settlement. Moreover, as of November 12, 2010, Rust received 444 Claim Forms and 151 Riders to Claim Form, seeking additional compensation from the \$40 million compensatory fund. Rust has seen a steady return of approximately 40 forms per week. Rust Dec. ¶13. Based on this history – along with the confidential communications in which Class Counsel continues to engage with interested claimants – Plaintiffs’ Counsel anticipates significantly more compensatory claim forms to be filed prior to the final deadline of December 11, 2010.

The Claim Forms and Riders to Claim Form allow Class Members to seek compensatory damages under the Settlement Agreement. Class Members who submit a Claim Form may receive compensatory damages based on the number of months they worked at Novartis during the Settlement Class Period. These awards are distributed from the Maximum Class Award for

Compensatory Damages, which totals approximately \$40 million. The Claim Form asks for a reasonably detailed description of (1) the circumstances giving rise to the contention that gender discrimination caused physical and/or emotional pain and suffering, and (2) the nature of the claimant's physical and/or emotional pain and suffering.

Class Members who believe that the pain and suffering they experienced as a result of Novartis' discriminatory treatment was particularly severe may choose to complete an additional form, the Rider to Claim Form, which may entitle them to an increase in compensatory damages up to a total of \$300,000.00. The Rider requires Class Members to identify a medical professional who provided treatment during the Settlement Class Period for pain and suffering resulting from gender discrimination. Medical professionals must describe in writing, under penalty of perjury, the treatment provided during the relevant time period and attest that the treatment was for physical and/or emotional pain and suffering resulting from gender discrimination. The Claims Adjudicator will review the Claim Forms and Riders to evaluate eligibility and make final determinations regarding entitlement to compensatory awards. The Settlement Agreement sets aside \$5 million from which the Claims Adjudicator may award compensatory damages based on submitted Riders. Any portion of the compensatory damages fund that is not awarded as a result of the claims process will revert back to Novartis.

#### **F. POST-SETTLEMENT**

Class Counsel's work continues. At present, Class Counsel plays a significant role in the Claim Form process. Since Rust sent Notice to Class Members two months ago, approximately 400 individuals have contacted Class Counsel's Washington, D.C. office. Call intakes range from two to 20 minutes, with the average lasting about 10 minutes. Joint Dec. ¶30. These calls continue and will likely continue for some time. Class Counsel's staff assists with the substance

of the Claim Forms; clarifies terms of the Settlement; explains what each Class Member must do in order to participate in the Settlement; and, in general, assists with the overall Settlement process. *Id.* In addition, Class Counsel has spent significant time working with Rust to handle anomalous claimants and other issues that arise in this process. Joint Dec. ¶31.

Class Counsel will remain (1) directly involved throughout the three-year course of the Settlement Agreement; (2) communicate with Class Members as needed; (3) address any issues regarding concerns of retaliation; (4) communicate with Novartis Counsel; and (5) in general, oversee the Settlement to ensure strict compliance with the terms of the Settlement Agreement. Joint Dec. ¶¶29, 33, 34. In addition, as set forth above and the Settlement Agreement, many of the terms of the Programmatic Relief call for the involvement of Class Counsel. Class Counsel likely will need to enlist additional consultants to help carry out the attendant responsibilities. Joint Dec. ¶34.

Class Counsel also will be available to provide the Court-appointed Claims Adjudicator with any necessary additional information and assistance during the one-time, 20-day remedial period for correcting incomplete submissions. Joint Dec. ¶32.

#### **G. PROPOSED SERVICE AWARDS AND ATTORNEYS' FEES AND EXPENSES**

Plaintiffs propose that service awards be granted to those individuals who significantly contributed to the litigation during the past seven years. Twenty deponents seek an award of \$25,000.00 each. Twenty-five Named Plaintiffs and Testifying Witnesses seek an award of \$125,000.00 each. And one Named Plaintiff, Amy Velez, who filed the initial EEOC class-wide Charge of Discrimination in 2003 and who has championed this matter ever since, seeks a service award of \$150,000.00. Plaintiffs seek, therefore, a total of \$3,775,000.00 in service award payments, which represents only approximately 2.4 percent of the entire monetary award

of \$152.5 million (or approximately 2.1 percent of the entire value of the settlement of \$175 million).

Plaintiffs also seek attorneys' fees in the amount of \$38,125,000.00, which represents 25 percent of the entire monetary award and less than 22 percent of the Settlement value. Plaintiffs' Counsel staffed 25 attorneys and 43 law clerks and legal assistants (a total of 68 individuals) on this matter since 2003. Plaintiffs had six full-time attorneys (five of whom work in SWH's Washington, D.C. office) and three full-time legal assistants (all of whom work in SWH's Washington, D.C. office) on the trial team, complemented by an additional team of three attorneys and one legal assistant. In addition, Plaintiffs engaged four trial consultants from DOAR Consulting, who assisted Class Counsel full-time throughout the trial with jury selection and trial presentation.

In all, Plaintiffs' Counsel spent 36,996.77 hours prosecuting this matter, which amounts to \$16,320,113.25 in lodestar fees. Granting Plaintiffs' fee request would amount to granting Plaintiffs' Counsel a multiplier of approximately 2.4, which is well within the range of acceptability in the Second Circuit. Likewise, Plaintiffs' request for \$2 million in expenses (1.1 percent of total recovery) is well below the average ratio of expense to litigation time and hours, which would predict expenses of approximately 2.8 percent of the total recovery.

### **III. ARGUMENT**

#### **A. THE COURT SHOULD CERTIFY AS FINAL FOR SETTLEMENT PURPOSES A CLASS OF NOVARTIS FEMALE SALES FORCE EMPLOYEES**

In its preliminary approval order dated July 14, 2010, this Court preliminarily certified a settlement class. Plaintiffs now request **final** certification of the following Class for settlement purposes:



*All women who are currently holding, or have held, a sales-related position with Novartis Pharmaceuticals Corporation, including those who have held positions as Sales Representatives, Sales Consultants, Senior Sales Consultants, Executive Sales Consultants, Sales Associates, Sales Specialists, Senior Sales Specialists and District Managers I, from the start of the class period, July 15, 2002, through the Preliminary Approval date (July 14, 2010) and excluding individuals who opt out of the settlement on a timely basis.*

The Court should certify the above Settlement Class because the Plaintiffs meet all of the requirements for settlement class certification under Federal Rule of Civil Procedure 23.

As the initial and fundamental principle, it is important to remember that when considering certification in the context of a proposed settlement, “courts must take a liberal rather than a restrictive approach.” Cohen v. J.P. Morgan Chase & Co., 262 F.R.D. 153, 157-58 (E.D.N.Y. 2009). In other words, many of the restrictions or considerations that come into play in the standard certification analysis do not receive the same treatment at the settlement stage.

For example, although considerations of manageability weigh heavily in class certification determinations *before* trial, manageability carries no weight at all in the settlement context, where the purpose is to have no trial. See Amchem Products, Inc., v. Windsor, 521 U.S. 591, 619-29 (1997). By the same token, it has no bearing in a case such as this one that has already gone to trial, and where settlement avoids the prospect of further trials and appeals.

Based on the remaining factors, the Novartis Class easily satisfies the low threshold for certification of a settlement class.

- The Novartis Settlement Class meets Rule 23(a)(1)’s **numerosity** requirement. There are more than 6,000 Class Members and, consequently, joinder is impractical. See, e.g., Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) (“Numerosity is presumed at a level of 40 members.”); In re Sony Corp. Litig., No. 09-

MD-2102, 2010 U.S. Dist. LEXIS 87643, at \*5 (S.D.N.Y. Aug. 24, 2010) (“The proper inquiry is whether such joinder is impracticable, not whether it is impossible.”) (citing Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993)); In re Marsh & McLennan Companies, Inc. Secs. Litig., No. 04 Civ. 8144, 2009 U.S. Dist. LEXIS 120953, at \*28 (S.D.N.Y. Dec. 23, 2009) (McMahon, J.).

- The Novartis Settlement Class also meets Rule 23(a)(2)’s **commonality** requirement. All Class Members bring the common claim that Novartis discriminated against female sales employees with respect to wages, promotion and pregnancy. See, e.g., Bellifemine v. Sanofi-Aventis, No. 07 Civ. 2207, 2010 U.S. Dist. LEXIS 79679, at \*3-4 (S.D.N.Y. Aug. 5, 2010) (“The commonality requirement is met because the Named Plaintiffs’ claims involve allegations of common pay and promotion claim arising from the same alleged policies and practices of the company.”).
- The Novartis Settlement Class satisfies Rule 23(a)(3)’s **typicality** mandate. All of the Class Members’ allegations, including those of the Named Plaintiffs, arise from the same factual and legal circumstances. Specifically, the Class and the Named Plaintiffs are all female Novartis sales employees alleging that Novartis discriminated against them on the basis of their gender. See, e.g., In re Telik Secs. Litig., 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008) (McMahon, J.) (“Typicality is satisfied if ‘each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.’”) (internal citations omitted); Lenahan v. Sears, Roebuck & Co., Civ. No. 02-45, 2006 U.S. Dist. LEXIS 60307, at \*25-26 (D.N.J. July 10, 2006) (“Here, the same allegedly unlawful conduct affected both the named Plaintiffs and the . . . class members . . . Accordingly, this Court finds that a typicality

requirement . . . is also satisfied.”).

- The Novartis Settlement Class Representatives are **adequate representatives** under Rule 23(a)(4) because their interests are congruent with those of Class Members. See Toure v. Cent. Parking Sys. of N.Y., No. 05 Civ. 5237, 2007 U.S. Dist. LEXIS 740456, at \*18-19 (S.D.N.Y. Sept. 28, 2007) (noting that the “adequacy requirement exists to ensure that the named representatives will ‘have an interest in vigorously pursuing the claims of the class, and have no interests antagonistic to the interests of other class members’”) (citing Denney v. Deutsche Bank AG, 443 F.3d 253, 268 (2d Cir. 2006)). Indeed, not a single member of the class objected in any way to the terms negotiated and approved by the Settlement Class Representatives.
- **Adequacy** is further established where Class Counsel has “an established record of competent and successful prosecution of large . . . class actions . . . .” Reyes v. Buddha-Bar NYC, No. 08 Civ. 2494, 2009 U.S. Dist. LEXIS 45277, at \*11-12 (S.D.N.Y. May 28, 2009). Here, Class Counsel, Sanford Wittels & Heisler LLP, has just the sort of established record contemplated by the Rules. See, e.g., Bellifemine, at \*4 (approving a nation-wide gender discrimination settlement and affirming specifically that attorney David Sanford and the law firm of Sanford Wittels & Heisler have such record).

Finally, the Settlement Class also meets Rule 23(b)(3)’s requirement that common factual allegations and a common legal theory **predominate** over any factual or legal variations among Class Members and that class adjudication of this case is plainly **superior** to individual adjudication. See Mohny v. Shelley’s Prime Steak, No. 06 Civ. 4270, 2009 U.S. Dist. LEXIS 27899, at \*11 (S.D.N.Y. Mar. 31, 2009).

- All members of the Class are unified by common factual allegations. See

Bellifemine, at \*4-5; Hnot v. Willis Group Holdings Ltd., 228 F.R.D. 476, 483 (S.D.N.Y. 2005). Here, those allegations are: that Novartis favored male sales force employees over females in compensation and promotion and that Novartis favored non-pregnant sales force employees over pregnant sales force employees in the terms and conditions of their employment.

- Class resolution will conserve judicial resources because it is more efficient for Class Members to resolve this suit on a Class-wide basis than to bring their claims piecemeal. Mohney, at \*12.
- This case has already been adjudicated for nearly seven years, through the trial stage on behalf of the Class. To divide this Class of over 6,000 women would risk scores of repetitious individual lawsuits and would fracture what would certainly become the appellate stage of that litigation. See deMunecas v. Bold Food, LLC, No. 09 Civ. 440, 2010 U.S. Dist. LEXIS 87644, at \*9 (S.D.N.Y. Aug. 23, 2010) (noting that class certification would “not only achieve economies of scale for putative class members but will also conserve the resources of the judicial system and . . . prevent inconsistent adjudications of similar issues and claims”).

For all these reasons, final certification of the Settlement Class should be ordered.

**B. BECAUSE THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, IT SHOULD BE APPROVED IN ALL RESPECTS.**

**1. The Law Favors Class Action Settlements.**

Courts generally favor the resolution of civil actions, particularly class actions, through settlement. In In re EVCI Career Colleges Holding Corp. Secs. Litig., this Court reaffirmed the well-established “general judicial policy favoring settlement.” No. 05 Civ. 10240, 2007 U.S.

Dist. LEXIS 57918, at \*10 (S.D.N.Y. July 27, 2007) (McMahon, J.) (internal citation omitted). See also McReynolds v. Richards-Cantave, 588 F.3d 790, 804 (2d Cir. 2009) (noting “strong judicial policy in favor of settlements particularly in the class action context”) (citing Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005)); In re Paine Webber Ltd. Partnerships Litig., 147 F.3d 132, 138 (2d Cir. 1998); In re Telik Sec. Litig., 576 F. Supp. 2d at 575; Clark v. Ecolab, Inc., Nos. 07 Civ. 8623, 06 Civ. 5672, 04 Civ. 4488, 2010 U.S. Dist. LEXIS 47036, at \*17-18 (S.D.N.Y. May 11, 2010) (“public policy favors settlement, especially in the case of class actions”); Dupler v. Costco Wholesale Corp., 705 F. Supp. 2d 231 (E.D.N.Y. 2010); Khait v. Whirlpool Corp., No. 06-6381, 2010 U.S. Dist. LEXIS 4067, at \*12 (E.D.N.Y. Jan. 20, 2010); Mohney, at \*12-13.

**2. The Settlement Agreement Meets the Second Circuit’s Standard for Approval under Rule 23(e).**

In order to approve a class action settlement, a district court “must determine whether the settlement, taken as a whole, is fair, reasonable, and adequate.” In re EVCI Career Colls., at \*10; see also McReynolds, 588 F.3d at 800; Joel A. v. Giuliani, 218 F. 3d 132, 138 (2d Cir. 2000); Grant v. Bethlehem Steel Corp., 823 F.2d 20, 22 (2d Cir. 1987); In re Veeco Instruments Secs. Litig., No. 05 MDL 1695, 2007 U.S. Dist. LEXIS 85629, at \*17 (S.D.N.Y. Nov. 7, 2007) (McMahon, J.). Federal courts within this Circuit make the fairness determination based upon “two types of evidence:” (1) substantive and (2) procedural. Wal-Mart Stores, 396 F.3d at 116 (“A court determines a settlement’s fairness by looking at both the settlement **terms** [substantive] and the **negotiating** process leading to settlement [procedural]”) (emphasis added); see also In re Telik, 576 F. Supp. at 575; Hertzberg v. Asia Pulp & Paper Co., 197 Fed. Appx. 38, 40 (2d Cir. 2006). Substantive evidence includes a comparison of the substantive terms of the settlement with the likely rewards of litigation. Protective Comm. For Indep. Stockholders of

TMT Trailer Ferry, Inc. v. Anderson, 370 U.S. 414, 434-25 (1968); see also Mba v. World Airways, Inc., 369 Fed. Appx. 194, 197 (2d Cir. 2010); Clark, at \*17; deMunecas, at \*10. Procedural evidence includes whether the settlement is the product of arm's length negotiations between experienced counsel and is untainted by collusion. D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001); see also In re Sony Corp., at \*10-11; deMunecas, at \*10; Taft v. Ackermans, No. 02 Civ. 7951, 2007 U.S. Dist. LEXIS 9144, at \*14-15 (S.D.N.Y. Jan. 31, 2007).

Given the prevailing policy in favor of settlement, there is a strong, bedrock presumption that a negotiated settlement is "fair and reasonable." Absent a substantial number of objectors or "evidence of fraud or overreaching, courts have consistently refused to act as Monday morning quarterbacks in evaluating the judgment of counsel." Strougo ex rel Brazilian Equity Fund, Inc. v. Bassini, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003) (citations omitted); see also Wal-Mart Stores, 396 F.3d at 116 ("A presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery"); In re Telik, Inc., Secs. Litig., 576 F. Supp. 2d at 576; McMahon v. Olivier Cheng Catering and Events, LLC, No. 08 Civ. 8713, 2010 U.S. Dist. LEXIS 18913, at \*11 (S.D.N.Y. Mar. 2, 2010); In re Marsh & McLennan, at \*25-26.

### **3. The Substantive Terms of the Settlement Meet the Grinnell Test for Fairness, Reasonableness, and Adequacy.**

More than three decades ago, the Second Circuit erected the analytical framework for evaluating the substantive fairness of a class action settlement in City of Detroit v. Grinnell Corp. 495 F.2d 448 (2d Cir. 1974), abrogated on other grds. by Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000). Under Grinnell, a district court, in determining whether to approve a proposed settlement, should consider the following nine factors:

- (1) the complexity, expense, and likely duration of the litigation;

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

Id. at 462-63. Each of these factors will be discussed more fully below.

**(a) The Complexity, Expense and Likely Duration of this Litigation Favor Final Approval.**

The first factor—the complexity, expense, and likely duration of this case—favors final settlement approval here. Class actions are generally complex. See, e.g., In re Austrian and German Bank Holocaust Litig., 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), aff'd, 236 F.3d 78 (2d Cir. 2001). This particular case has involved both complex legal issues and an extensive litigation process – even when compared to average class action durations.

The conduct underlying this lawsuit dates back to 2001 and continued throughout the seven-year litigation process. Resolution required years of extensive investigations, in which Plaintiffs produced 109 declarations and over 40,000 pages of documents, took and defended 107 depositions, reviewed over 3.7 million pages of documents produced by Novartis, and engaged two testifying expert witnesses, four consulting experts and four trial consultants. The Parties have already engaged in vigorous litigation before this Court, concluding in a jury trial that resulted in a verdict in favor of the Plaintiffs on all counts.

Not only is the issue of equitable damages still pending before the Court, but without this Settlement, there would undoubtedly be a lengthy appeals process that would greatly delay any

payout to the Class Members. As this Court has recognized, “[d]elay not just at the trial stage, but through post-trial motions and the appellate process, would cause Class Members to wait years for any recovery, further reducing its value.” Maley v. Del Global Techs., 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (McMahon, J.) (citing Grinnell, 495 F.2d at 467). Although the Parties have incurred great expenses and burdens in this litigation already, they would likely incur much more going forward. This fact strongly militates in favor of the Settlement. In sum: “Settlement at this juncture results in a substantial and tangible present recovery, without the attendant risk and delay” of post-trial motions and appeals. In re EVCI Career Colls., at \*6 (internal citations omitted).

**(b) The Reaction of the Class to the Settlement Favors Final Approval.**

“It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy . . . **In fact, the lack of objections may well evidence the fairness of the settlement.**” Maley, 186 F. Supp. 2d at 362-363 (citing In re American Bank Note Holographics, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (McMahon, J.) (emphasis added). See also Wal-Mart Stores, at 118 (“[i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement”); In re Metlife Demutualization Litig., 689 F. Supp. 2d 297, 333 (E.D.N.Y. 2010) (same); In re Luxottica Group S.p.A. Secs. Litig., 233 F.R.D. 306, 311 (E.D.N.Y. 2006) (“lack of objection is strong evidence of the settlement’s fairness”); In re Painewebber Ltd. Partnerships Litig., 171 F.R.D. 104, 126 (S.D.N.Y. 1997).

Here, over 6,200 full-form notices were sent to the Class and not a single member objected to the Settlement. Only six individuals (a negligible .001) requested exclusion. See Rust Dec. ¶14. This overwhelming lack of objection argues strongly for judicial approval. See,



e.g., Maley, 186 F. Supp. 2d at 362-363; Collins v. Olin Corp., No. 3:03-cv-945, 2010 U.S. Dist. LEXIS 39862, at \*13 (D. Conn. Apr. 21, 2010); In re Host Am. Corp. Secs. Litig., No. 3:05-cv-1250. 2008 U.S. Dist. LEXIS 17405, at \*7 (D. Conn. Mar. 7, 2008).

(c) **The Stage of the Proceedings and the Amount of Discovery Completed Favor Final Approval.**

Under the third Grinnell factor, settlement is especially favored when the litigation is at an “advanced stage” and an “extensive amount of discovery [has been] completed.” In re Marsh & McLennan, at \*20. This is because such development of the class claims allows the Parties to be “clearly in a position to realistically evaluate the strengths and weaknesses of the claims, and . . . the fairness of the proposed Settlement.” Id. See also Parker v. Time Warner Entertainment Co., 631 F. Supp. 2d 242, 259 (E.D.N.Y. 2009) (“This factor relates to whether the Plaintiffs had sufficient information on the merits of the case and to enter into a settlement.”); Frank v. Eastman Kodak Co., 228 F.R.D. 174, 185 (W.D.N.Y. 2005) (settlement at a late stage affords the court an opportunity to “intelligently make . . . an appraisal of the Settlement”); In re Michael Milken & Assocs. Secs. Litig., 150 F.R.D. 46, 55-56 (S.D.N.Y. 1993) (“the stage of the proceedings and the amount of discovery completed is another factor which the Courts consider in approving a settlement”) (citing Grinnell at 463).

Significantly, both Parties tested their cases at trial and had the benefit of a jury verdict to evaluate their positions. The posture of the case greatly assisted Class Counsel in evaluating the strengths and weaknesses of both sides’ positions during the negotiations.

(d) **The Risks of Litigation—Establishing Liability, Damages and Maintaining the Class Action Through Trial—All Also Favor Final Approval.**

As federal courts in this Circuit have consistently recognized, litigation inherently involves risks, and the purpose of settlement is to avoid uncertainty. See, e.g., deMunecas, at

\*23 (“[T]he risk of establishing liability and damages further weighs in favor of final approval.”); Clark, at \*22; Banyai v. Mazur, No. 00 Civ. 9806, 2007 U.S. Dist. LEXIS 22342 (S.D.N.Y. Mar. 27, 2007). Although this case has been tried, real risks remain for the Plaintiffs. In the absence of settlement, the Plaintiffs would face a long road to recovery, including post-trial motions and the appeal, with no guarantee of success. See In re Marsh & McLennan, at \*18 (noting the additional expense and uncertainty of “inevitable appeals” and the benefit of Settlement, which “provides certain and substantial recompense to the Class members now”). This is in addition to the significant risks Plaintiffs have already shouldered over the past seven years. The Settlement resolves this significant and cumulative uncertainty in a manner favorable for all.

(e) **The Net Settlement Amount Is Reasonable in Light of the Best Possible Recovery and All Attendant Risks of Litigation.**

Under the Settlement, each of the Class Members will receive an award that is more than reasonable given the risks and time attendant to the post-trial motion and appeals process. “The determination of a reasonable settlement is not susceptible of a mathematical equation yielding a particular sum but turns on whether the settlement falls within a range of reasonableness. This ‘range of reasonableness’ recognizes the uncertainties . . . in any particular case . . . .” In re Metlife Demutualization Litig., 698 F. Supp. 2d at 340. As discussed above, many uncertainties remain. For example, as this Court recognized in reviewing the range of reasonableness in Maley, “[s]ettling avoids delay as well as uncertain outcome . . . on appeal” and “the appellate process . . ., with the risk of reversal, make the fairness of this substantial settlement readily apparent.” 186 F. Supp. 2d at 366.

Because settlement can provide certain and immediate recovery, courts often approve settlements even where the benefits obtained are less than those originally sought. As the

Second Circuit stated in Grinnell: “[t]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery.” 495 F.2d at 455, n.2. See also In re Marsh ERISA Litig., 265 F.R.D. 128, 141 (S.D.N.Y. 2010) (McMahon, J.). In fact, courts often approve class settlements even where the benefits represent “only a fraction of the potential recovery.” See, e.g., In re Initial Public Offering Secs. Litig., 671 F. Supp. 2d 467, 483-85 (S.D.N.Y. 2009) (approving settlement which provided only “miniscule” 2 percent of defendants’ maximum possible liability, observing that “the Second Circuit has held that even a fraction of the potential recovery does not render a proposed settlement inadequate”); Hall v. Children’s Place Retail Stores, Inc., 669 F. Supp. 2d 399, 402 n.30 (S.D.N.Y. 2009) (approving a settlement that amounted to 5-12 percent of provable damages); In re Prudential Inc. Secs. Ltd. Partnerships Litig., MDL No. 1005, M-21-67, 1995 U.S. Dist. LEXIS 22103 (S.D.N.Y. Nov. 20, 1995) (approving settlement of between 1.6 percent and 5 percent of claimed damages); In re Crazy Eddie Secs. Litig., 824 F. Supp. 320, 324 (E.D.N.Y. 1993) (approving settlement that awarded class members between six cents and ten cents for every \$1.00 lost); Behrens v. Wometco Enters., 118 F.R.D. 534, 542 (S.D. Fla. 1988), aff’d, 899 F.2d 21 (11th Cir. 1990) (“The mere fact that the proposed settlement of \$.20 cents a share is a small fraction of \$3.50 a share is not indicative of an inadequate compromise”).

Here, the value of the settlement is no small fraction of the relief originally sought, and in fact greatly exceeds the norm. First, Plaintiffs’ obtained significant, extensive, and long-lasting programmatic relief, detailed over 23 pages of the Settlement Agreement. This substantial programmatic relief—a primary focus of the litigation—will provide just the sort of significant benefit for Novartis’ employees for years to come that Plaintiffs sought all along. See Bellifemine, at \*12-13 (recognizing the value of substantial programmatic relief provisions).

The initial value of implementing these reforms is set at approximately \$22.5 million, although the agreement also contemplates that additional monies may be necessary pending the results of various statistical studies prescribed by the agreement.

In addition, the Settlement Class will receive up to \$152.5 million in monetary relief from the Settlement, and the monies will be distributed in a matter of months. The Settlement makes these awards for the Class a certainty. In contrast, punitive damages remain a hotly debated subject in the legal community; where -- as here -- the jury awarded particularly high punitive damages, the appellate process could entail great risk to monetary awards made in conjunction with the verdict.

Nonetheless, Plaintiffs negotiated a settlement that dictates that the Settlement Class will receive **100 percent** of the potential recovery for Back Pay (\$60 million) as calculated by Plaintiffs' expert. Dr. Louis R. Lanier, PhD, a labor economist with extensive experience in the analysis of labor markets and gender differentials in the workforce, analyzed the data in the present case and estimated that Back Pay damages accruing from underpayment of Class Members was \$42.8 million. See Lanier Damages Report ¶9; Joint Dec. ¶19. He also estimated that Back Pay damages from the under-promotion of Class Members were \$12.1 million. Id. Therefore, total damages for Back Pay, for both underpayment and under-promotion from the period of 2002 until 2009 were estimated at \$54.9 million. The instant \$60 million in payments and compensation to the Class Members for Back Pay represents **over 100 percent** of this estimate. Even assuming that damages continued to accrue through half of 2010, the \$60 million set aside for Back Pay would still reach at least **100 percent** of Dr. Lanier's estimate of the Defendant's highest possible exposure.

Furthermore, each Settlement Class Member has the opportunity to seek up to the statutory maximum in compensatory damages or chose a lower, pro-rata payout. Accordingly, the Settlement provides each Settlement Class Member the opportunity to seek damages at **100 percent** of the possible relief.

Given the length and difficulty of the process needed to reach this result, it is Class Counsel's informed judgment that "there is little reason to believe that further settlement negotiations would result in any additional settlement funds." Wright v. Stern, 553 F. Supp. 2d 337, 347 (S.D.N.Y. 2008). Moreover, "[t]here is simply no assurance that more years of litigation would result in any greater recovery." Id. at 339. For these reasons, the Settlement Agreement is reasonable in light of the maximum possible recovery.

**4. The Arm's Length Negotiations between Experienced Counsel Ensures that the Settlement Is Procedurally Fair.**

After the district court has analyzed the substantive fairness of a proposed settlement, it turns to the procedural fairness, which examines "the negotiating process by which the settlement was reached." McReynolds, 588 F.3d at 804; see also Clark, at \*18-20. As the Second Circuit has instructed, when a district court examines a proposed settlement's procedural fairness, the court must "pay close attention to the negotiating process, to ensure that the settlement resulted from arm's length negotiations and that plaintiff's counsel possessed the necessary experience and ability" to effectively vindicate the interests of the class. McReynolds, 588 F.3d at 804. In other words, "a settlement is procedurally fair if: (1) the settlement is the product of 'arms-length negotiations'; (2) during negotiation, both sides were represented by 'experienced, capable counsel'; and (3) it was reached after conducting 'meaningful discovery.'" In re Sony Corp., at \*12 (quoting Wal-Mart Stores, Inc., at 116).

The proper focus of this inquiry is on “the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves.” Malchman v. Davis, 706 F.2d 426, 433 (2d Cir. 1982) (citing Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982)); see also D’Amato, 236 F.3d at 85 (citing Malchman for same proposition). To that end, “a strong presumption of fairness attaches to a class action settlement reached in arm’s-length negotiations among able counsel.” In re Telik, 576 F. Supp. 2d. at 576 (citing Wal-Mart, at 116). Accordingly, “so long as the integrity of the negotiating process is ensured by the Court, it is assumed that the forces of self-interest and vigorous advocacy will of their own accord produce the best possible result for all sides.” Maley, 186 F. Supp. 2d at 366 (quoting In re Painewebber Ltd. Partnerships Litig., 171 F.R.D. at 132); Banyai, at \*11.

(a) **Experienced Counsel Represented Both Parties in This Case.**

Both Parties were represented by experienced counsel with substantial experience in employment class action litigation. For example, Class Counsel has been recognized by numerous courts for their work in securing similar class action settlements. See, e.g., Hernandez v. C&S Wholesale Grocers, Inc., No. 06 CV 2675 (CLB)(MDF), slip op. (S.D.N.Y. July 31, 2008) (in approving a wage and hour settlement, Judge Karas described SWH as “exceptionally able and experienced” and praised “the work that counsel have put in, not just in terms of the quantity, but what it was that counsel did, with obviously the tremendous amount of work...” and acknowledged a highly favorable result in “obviously a very complex dispute, both in terms of the law and in terms of the facts”); Bellifemine, at \*16-17 (in approving a gender discrimination class action settlement, Judge Koetl noted that the “action was litigated zealously by counsel” and recognized the “substantial programmatic relief provisions throughout the

settlement,” and the role that Class Counsel would play “in ensuring compliance with the settlement and facilitating the claims form process”).

In such circumstances, Courts accord “great weight” to the recommendations of Counsel, who are in the best position to evaluate the strengths and weaknesses of their cases. Maley, 186 F. Supp. 2d at 366; In re Telik, 576 F. Supp. 2d at 576; Chatelain v. Prudential-Bache Secs., 805 F. Supp. 209, 212 (S.D.N.Y. 1992); In re EVCI Secs. Litig., at \*10; In re Global Crossing Secs. and ERISA Litig., 225 F.R.D. 436, 461 (S.D.N.Y. 2004).

**(b) The Settlement was Negotiated by Experienced Counsel Over Several Weeks.**

The protracted settlement discussions in this case were conducted over approximately two months. During negotiations, the Parties conducted multiple full-day, face-to-face mediations, which were followed by lengthy telephone conferences and exchanges of multiple drafts and related materials. Joint Dec. ¶18. These exchanges then shifted to focus on similar lengthy, arms-length negotiations regarding the preparation and drafting of the voluminous settlement documentation now on file with the Court. Joint Dec. ¶20. In sum, the arduous process leading to the Settlement was procedurally sound and fair. See, e.g., In re Telik, 576 F. Supp. 2d at 576 (appropriate negotiations included face-to-face meetings, an unsuccessful mediation, numerous telephone conferences, and substantial concessions by both sides); In re EVCI Secs. Litig., at \*10 (negotiations took place over several weeks by capable counsel); Chatelain, 805 F. Supp. at 212 (relies on counsels’ description of “arms-length” negotiations); In re AOL Time Warner ERISA Litig., No. 02 Civ. 8853, 2006 U.S. Dist. LEXIS 70474, at \*16-17 (S.D.N.Y. Sept. 27, 2006) (negotiations conducted by counsel well-informed of the merits of the claims at that stage of litigation).

**C. ADEQUATE NOTICE HAS BEEN PROVIDED TO THE CLASS.**

The Notice approved by the Court in this case plainly informed each Class Member of the terms of Settlement. Courts deem a notice sufficient when, as here, it “may be understood by the average class member.” Wal-Mart Stores, 396 F.3d at 114; see also In re Marsh ERISA Litig., 265 F.R.D. at 145. Under that test, the notice here satisfied due process and Rule 23.

**D. PLAINTIFFS’ APPLICATION FOR ATTORNEYS’ FEES AND EXPENSES SHOULD BE APPROVED.**

**1. An Award of Attorneys’ Fees and Expenses Is Standard.**

Federal courts have long recognized that a lawyer whose efforts create a common fund may recover a reasonable fee from the fund as a whole. See Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC, 504 F.3d 229, 249 (2d Cir. 2007) (citing Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (“under the ‘equitable fund’ doctrine, attorneys for the successful party may petition for a portion of the fund as compensation for their efforts”)); Banyai, at \*9 (“[T]he common or equitable fund doctrine . . . allows an attorney whose actions have conferred a benefit upon a given group or class of litigants [to] file a claim for reasonable compensation for his efforts”) (internal quotations omitted); In re American Bank Note, 127 F. Supp. 2d at 430. Moreover, it is well-established that “[a]n agreed upon award of attorneys’ fees and expenses is proper in a class action settlement, so long as the amount of the fee is reasonable under the circumstances.” Bellifemine, at \*14-15.

To decide an appropriate amount of attorneys’ fees in class actions, the courts have adopted the principles articulated by the Second Circuit in Grinnell:

We are not under the illusion that a “just and adequate fee” can necessarily be ascertained by merely multiplying attorney’s hours and typical hourly fees... [L]ess objective factors can be introduced into the calculus. Perhaps the foremost of these factors is the attorney’s “risk of litigation”



*i.e.* the fact that despite the most vigorous and competent of efforts success is never guaranteed.

495 F.2d 448, 471. Other generally accepted factors as stated in Grinnell include: (1) the standing of counsel at the bar – both counsel receiving award and opposing counsel; (2) time and labor spent; (3) magnitude and complexity of the litigation; (4) responsibility undertaken; (5) the amount recovered; and (6) what it would be reasonable for counsel to charge a victorious plaintiff. Id. at 470.

**2. The Terms Negotiated in the Settlement Agreement Comport with the Standard.**

The Settlement Agreement provides that, subject to Court approval, Class Counsel will receive \$38.125 million in attorneys' fees—which equals 21.8 percent of the \$175 million total gross value of the settlement, including the attorneys' fee provision. Plaintiffs now apply for those attorneys' fees and \$2,000,000.00 in expenses. Given the extraordinary results of the Settlement, the time-consuming and diligent efforts of Class Counsel to effectuate it, and Class Counsel's continuing supervision responsibilities, the Court should grant Plaintiffs' application for these fees and costs and expenses. As shown below, this application is fair, reasonable and should be approved under either method of evaluating class counsel fees.

Based on the "percentage of the fund" approach for evaluating class action fees, the amount of attorneys' fees in question is compared to the overall settlement value, including any portion earmarked for said fees. Here, the requested fees represent approximately **21.8** percent of the total relief available through the settlement. Even if calculated in the more conservative and less-accepted methodology of percent against monetary fund (rather than overall value), the requested fees represent approximately **25** percent of the monetary relief available through settlement. As such, the fee falls substantially below the mainstream of percentage of awards granted by courts in the Second Circuit in class suits of similar size and complexity.

Under the alternative “lodestar” measure, Plaintiffs have to date expended 36,996.77 hours in attorney time and expect to devote further, substantial hours overseeing the Settlement. Plaintiffs therefore seek approximately a **2.4** multiplier, an enhancement routinely approved as part of the spectrum for multipliers in Second Circuit class fee cases.

**3. The Fees Are Justified by the Relevant Factors.**

**(a) The “Risk of Litigation” Was Substantial.**

The most significant factor in determining the reasonableness of attorneys’ fees, the risk of litigation, weighs heavily in favor of an award of fees in this case. Success for the Plaintiff-Class was never guaranteed. The fact that the case proceeded to trial, a risky proposition in and of itself, also serves as strong evidence that the two, sophisticated Parties nonetheless widely disagreed about the strength of the Plaintiffs’ case. Accordingly, Class Counsel took a great risk in litigating this action – a risk ultimately paid off with a great reward for the Settlement Class Members.

**(b) Counsel for Both Parties Have a High Standing at the Bar.**

David Sanford and SWH are AV rated, which is the highest rating given to a lawyer and law firm through a peer-review rating process monitored by Lexis Nexis.

Class Counsel has previously been recognized by this jurisdiction for having “an established record of competent and successful prosecution of large . . . class actions.” Bellifemine, at \*4. In addition, Class Counsel has ushered several class actions to settlement, including two recent matters: Bellifemine v. Sanofi, No. 07 Civ. 2207, 2010 U.S. Dist. LEXIS 79679 (S.D.N.Y. Aug. 5, 2010); and Wooten v. Smith & Nephew, No. 2:06-cv-2571, slip op. (W.D. Tenn. Nov. 25, 2009).

Novartis was represented for six years through trial by the law firm of Vedder Price, a nationally recognized firm whose reputation for zealous representation of its clients is well known. Novartis is now represented by the law firm of Cravath, Swaine and Moore, also nationally recognized and arguably the preeminent defense firm in the United States.

(c) **Lead Counsel's Dedicated Significant Time and Labor.**

Class Counsel devoted 36,996.77 hours from 68 attorneys and staff members to the successful prosecution of this matter. That time, effort and dedication of resources brought this complex litigation to an unmitigated, successful resolution. The work involved investigating both the legal and factual allegations of gender bias at Novartis; drafting of pleadings and other motion practice; obtaining and interpreting statistical analysis of jobs data; conducting extensive deposition and document discovery; briefing and arguing pretrial motions; preparing and conducting a nearly seven-week trial; arguing the disparate impact claims; and, ultimately, negotiating and then drafting the Settlement Agreement. Furthermore, as noted above, significant additional post-settlement work remains to be done. Joint Dec. ¶¶29-34.

(d) **This Litigation was Extremely Complex, Requiring Significant Efforts.**

The prosecution of this action required a high level of experience and expertise in complex class action litigation, as well as the ability to provide such service under challenging circumstances. In addition, many of the issues or particular challenges of taking this matter to trial involved issues of first-impression or matters that otherwise had little development in the law. While the full extent and nature of the efforts of Class Counsel are described in detail in the Joint Declaration, proof that Class Counsel has litigated this action vigorously and will continue to take its obligations seriously in the post-settlement stage are seen throughout the construction of the Settlement Agreement itself.

(e) **The Litigation Has Bestowed Substantial Benefits on the Class.**

As discussed above, the benefits of the Settlement to Plaintiffs and the Class are substantial. The Settlement provides \$175 million in relief, of which approximately \$134.875 million is dedicated to the direct betterment of the Settlement Class. In addition, the Back Pay award -- \$60 million of that sum -- represents 100 percent of what the total valuation of back pay damages by Plaintiffs' own expert. Joint Dec. ¶19. Moreover, the Programmatic Relief awarded is of a scope and standard that both Parties expect it to position Novartis "to occupy a leadership position for gender equity in the industry." (See Joint Dec. Ex. B).

The relief Class Counsel has obtained required great effort over a number of years, along with a successful outcome at trial. Moreover, the benefits of the Settlement will be ongoing. Novartis has agreed to several significant gender-equalizing programmatic reforms that will benefit members of the Class far into the future. For these reasons, this Settlement is an impressive achievement.

**4. The Fees Requested Are Reasonable and Appropriate under Both Approaches.**

The Second Circuit has authorized district courts, in the exercise of their informed discretion, to calculate class action counsel fees either on a "percentage of the fund" basis or by fashioning a "lodestar" when awarding fees in a common fund case. See Central States, 504 F.3d at 249.

However, as this Court has recently recognized, "the district court has discretion to use either method, although the trend in this Circuit is toward the percentage method." In re Marsh ERISA Litig., 265 F.R.D. at 146. See also Wal-Mart Stores, 396 F.3d at 121 ("The trend ... toward the percentage method ... directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation")

(citations omitted); Dupler, 705 F. Supp. 2d 242 (same). Indeed, this Court endorsed this shift two years earlier in In re Telik, noting “the administrative problems associated with the lodestar method, and the advantages presented by the percentage of recovery approach,” which “led most district courts in this Circuit to adopt the percentage of recovery methodology.” 576 F. Supp. 2d at 586.

The percentage method calculates the fee award as some percentage of the settlement fund created for the class. Id. The lodestar method multiplies the number of hours each attorney has expended by the hourly rate attorneys of similar skill charge in the area; then it applies to that figure a multiplier which factors in the litigation risks and other considerations. Id. (citing Savoie v. Merchants Bank, 166 F.3d 456, 460 (2d Cir. 1999)). In combination, the documentation of hours submitted by counsel can be used as a “cross check” on the reasonableness of the requested percentage of the fund. Goldberger, 209 F.3d at 55.

Under either a “percentage-of-the-fund” analysis or a “lodestar” approach, the \$38.125 million fee sought herein is amply justified.

**(a) A 22 Percent of Gross Settlement Benefit Is Well Within the Range of Reasonableness.**

As noted above, the Second Circuit favors awarding fees according to the “percentage-of-the-fund” over the “lodestar” method in common fund cases. Moreover, this Circuit has ruled that “[a]n allocation of fees by percentage should therefore be awarded on the basis of total funds made available **whether claimed or not.**” Masters v. Wilhelmina Model Agency, Inc., 473 F. 3d 423, 437 (2d Cir. 2007) (emphasis added).

The federal courts have established that approximately 20-50 percent is a standard fee in complex class action cases like this one, where plaintiffs counsel have achieved a good recovery for the class. See, e.g., Maywalt v. Parker & Parsley Petroleum, 963 F. Supp. 310, 313

(S.D.N.Y. 1997) (citing In re Warner Communications Secs. Litig., 618 F. Supp. 735, 749 (S.D.N.Y. 1985), aff'd 798 F.2d 35 (2d Cir. 1986)); Brown v. Steinberg, Nos. 84 Civ. 464, 84 Civ. 4665, 84 Civ. 8001, 1990 U.S. Dist. LEXIS 12516, at \*6 (S.D.N.Y. Oct. 12, 1990) (citing Blum v. Stenson, 465 U.S. 886, 903 (1984), in which the Supreme Court, in dicta, approved this fee award method); In re Marsh ERISA Litig., 265 F.R.D. at 149 (noting trend of awarding 20-50 percent of recovery to attorneys and finding fee of over \$11M, or one-third of the recovery, “fair and reasonable in relation to the recovery and compares favorably to fee awards in other risky common fund cases in this Circuit and elsewhere.”).

Accordingly, district courts in the Second Circuit routinely award attorneys’ fees that are 30 percent or greater. See, e.g., In re Priceline.com, Inc. Secs. Litig., No. 3:00-CV-1884, 2007 U.S. Dist. LEXIS 52538 (D. Conn. July 20, 2007) (awarding **30 percent** of \$80 million fund); Frank, 228 F.R.D. at 189 (awarding attorneys’ fees of **38.26 percent** of \$125,000.00 settlement fund); In re Oxford Health Plans, Inc., Secs. Litig., MDL Dkt. No. 1222, 2003 U.S. Dist. LEXIS 26795, at \*13 (S.D.N.Y. June 12, 2003) (awarding **28 percent** of \$300 million fund); Maley, 186 F. Supp. 2d at 369 (approving attorneys’ fees of **33.3 percent** of a \$11.5 million settlement fund); Strougo, 258 F. Supp. 2d at 262 (**33.33 percent**); In re Lloyd’s American Trust Fund Litig., No. 96 Civ. 1262, 2002 U.S. Dist. LEXIS 22663, at \*76 (S.D.N.Y. Nov. 26, 2002) (“In this district alone, there are scores of . . . cases where fees . . . were awarded in the range of **33.3 percent** of the settlement fund.”); In re Veeco, at \*13-14 (same); deMunecas, at \*19 (“Class Counsel’s request for **33 percent** of the Fund is reasonable under the circumstances of this case and is consistent with the norms of class litigation in this circuit.”); Becher v. Long Island Light Co., 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999) (**33.33 percent**).

Moreover, the fee requested in this case comports with awards in similar cases across the country. A recent study surveying the award of attorneys' fees in class action settlements reviewed data on cases nationwide and found that the mean fee award for employment class action settlements is 27 percent of the recovery, and the median is 25 percent of the recovery. Theodore Eisenberg and Geoffrey P. Miller, *Attorneys Fees and Expenses in Class Action Settlements: 1993-2008*, NYU Center for Law, Economics and Organization, Working Paper No. 09-50 (November 2009), *available at* <http://ssrn.com/abstract=1497224>. The study notes, however, that those percentages do not account for an important indicator of the fee award—risk. Indeed, the fee awards for class action in cases that are “low/medium” risk average 26.2 percent of total recovery, and in cases that are “high” risk average 35.1 percent of total recovery. *Id.* at Table 8. (The study coded for risk based largely on whether the court deciding the case mentioned risk as a significant factor in the opinion or, in some cases, if the risk level was evident from the facts and procedural history of the case.) *Id.* at 5-6. For the reasons explained above, this was clearly a high-risk case whose outcome was unprecedented. Accordingly, the fee requested by Class Counsel falls well below the average award for this type of case.

The fee request at bar is consistent with class action fee awards in the Second Circuit, as well as fee averages in similar cases nationwide. In fact, the requested fees are substantially less than awards routinely granted by many courts in the Second Circuit. Therefore, the attorneys' fee request should be granted in whole.

**(b) The Lodestar Sought is Well within the Range of Reasonableness.**

As set forth in the Joint Declaration, Class Counsel and staff devoted 36,996.77 hours to prosecute this litigation. The current hourly rates for Co-Lead Trial Class Counsel are \$750.00 for David Sanford, Esq. and \$600.00 for Katherine Kimpel, Esq. Other Trial Counsel's rates are

\$750.00 for Steven Wittels, Esq., \$700.00 for Sharon Eubanks, Esq., \$500.00 for Katherine Leong, and \$400.00 for Felicia Medina, Esq. See Joint Dec. ¶50 (setting forth hourly rates of other attorneys and staff who worked on the Matter over the course of the litigation).

In Bellifemine, Judge Koeltl approved a fee application by Plaintiffs' counsel, the law firm of Sanford Wittels & Heisler, LLP, which was based on similar work on another class action employment discrimination case. See also Thomas v. Citifinancial Auto Ltd., No. 07 Civ. 00721, slip op. (D. Md. Aug. 20, 2009) (Motts, J.) (also approving similar work of Plaintiffs' counsel, Sanford Wittels & Heisler, LLP); Rosenberg v. IKON, No. 05-cv-09131, slip op. (S.D.N.Y. Jan. 22, 2008) (Crotty, J.); Binetti v. Washington Mutual Bank, No. 06 Civ. 1732, slip op. (S.D.N.Y. Apr. 15, 2008) (Karas, J.).

Class Counsel further notes that this Court approved attorneys' fees based on similar rates in In re Marsh ERISA Litig., 265 F.R.D. at 146 (rates ranging from \$125.00 for administrative personnel to \$775.00 for senior lawyers). Likewise, in In re Veeco Secs. Litig., this Court held, in approving a fee award based on a current hourly rate similar to the ones involved in this fee application, that:

The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation . . . In determining the propriety of the hourly rates . . . the standard is the rate charged in the community where the services were performed . . . Thus, substantial precedent—as well as a market check—demonstrates that the rates utilized by Plaintiffs' Counsel in calculating its lodestar are reasonable.

2007 U.S. Dist. LEXIS 16922, at \*9 n.7; see also In Focus: Billing; A Firm-by-Firm Sampling of Billing Rates Nationwide, Nat'l L.J., December 6, 2004, at 22 (2004 billing survey showing that, six years ago, senior partners in New York City charged \$750.00 per hour); In re NTL Inc. Secs. Litig., No. 02 Civ. 3013 (LAK), 2007 WL 1294377, at \*8 (S.D.N.Y. May 2, 2007) (citing



cases approving rates up to \$850.00 for partners;); In re Gilat Satellite Networks, No. CV-02-1510 (CPS)(SMG), 2007 WL 2743675, at \*17 (E.D.N.Y. Sept. 18, 2007) (approving rates of \$725.00 for partners).

Based on these rates, Class Counsel requests a multiplier of 2.4, a number that falls well within the range of multipliers accepted within the Second Circuit. See Roberts v. Texaco, Inc., 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (rev'd on diff., grounds by Kaplan v. Rand, 192 F.3d 60 (2d Cir. 1999)) (awarding a 5.5 multiplier in race discrimination class action); Wal-Mart Stores, 396 F. 3d 96 (2d Cir. 2005) (multiplier of 3.5 in antitrust class action); Maley, 186 F. Supp. 2d at 369-71 (approving "modest multiplier" of 4.65 in securities fraud class action); In re Interpublic Secs. Litig., No. Civ. 6527 Class Action, 03 Civ. 1194 Derivative Action, 2004 U.S. Dist. LEXIS 21429, at \*36-37 (S.D.N.Y. Oct. 26, 2004) (multiplier of 3.96); In re Lloyd's Am. Trust Fund Litig., at \*27 (multiplier of "just" 2.09 is "at the lower end of the range of multipliers awarded by courts in the Second Circuit.").

Moreover, courts in this Circuit have recognized that where "class counsel will be required to spend significant additional time on this litigation in connection with implementing and monitoring the settlement, the multiplier will actually be significantly lower." Bellifemine, at \*19; see also Parker v. Jekyll & Hyde Entm't Holdings, L.L.C., No. 08 Civ. 7670, 2010 U.S. Dist. LEXIS 12762, at \*7-8 (S.D.N.Y. Feb. 9, 2010) (noting that, "as class counsel is likely to expend significant effort in the future implementing the complex procedure agreed upon for collecting and distributing the settlement funds, the multiplier will diminish over time").

**E. PLAINTIFFS' APPLICATION FOR REIMBURSEMENT OF \$2 MILLION IN LITIGATION EXPENSES SHOULD BE GRANTED**

Plaintiffs have expended \$1,891,098.31 to date in expenses, and anticipate spending significant additional dollars in the next three years, both on enforcing the terms of the settlement

agreement and in maintaining and fulfilling its duties to the Class Members through regular communication and general availability.

Chief amongst these expenses will be the retention and consultation fees for an expert to aid Plaintiffs' Counsel in the supervision and response to the various statistical analyses called for as a part of the programmatic relief. No fewer than four different statistical models will be reviewed by Plaintiffs (studies of the performance evaluation system, the management promotions rates, the pay-in-range distributions, and the base pay gender variance); and some analyses are conducted on an annual – rather than one time – basis. As a result, Class Counsel will likely expend far greater than the \$2 million negotiated as a part of the settlement agreement. Joint Dec. ¶¶29, 32-34.

As this Court has recognized, “it is well-established that counsel who create a common fund . . . are entitled to the reimbursement of [all reasonable] litigation costs and expenses . . . .” In re Marsh ERISA Litig., at \*56; see also In re Marsh & McLennan, at \*59. In class action settlements nationwide, litigation costs and expenses average about 2.8 percent of the total recovery. Eisenberg and Miller, *Attorneys Fees and Expenses in Class Action Settlements: 1993-2008*, at 26. Here, Class Counsel has incurred far less than the \$4.9 million in expenses than the average percentage predicted. The \$2 million in expenditures, over more than seven years of litigation and three additional years of settlement enforcement, are modest in comparison. Accordingly, the Court should grant Plaintiffs' request for recoupment of these expenses.

**F. THE NAMED PLAINTIFFS, TESTIFYING WITNESSES AND DEONENTS ARE ENTITLED TO SERVICE PAYMENTS IN THE SUMS REQUESTED**

**1. Courts Commonly Award Service Payments to Class Representatives and Class Members Who Provide Substantial Assistance.**

In Roberts v. Texaco, Inc., Judge Brieant articulated the prevailing rule in the Second

Circuit and throughout the federal judiciary on awarding incentive payments to class members in a class action:

In this Circuit, the Courts have, with some frequency, held that a successful Class action plaintiff, may, in addition to his or her allocable share of the ultimate recovery, apply for and, in the discretion of the Court, receive an additional award, termed an incentive award . . . .

979 F. Supp. at 200. See also Velez v. MaJik Cleaning Serv., Inc., No. 03 Civ. 8698, 2007 U.S. Dist. LEXIS 46223, at \*21-22 (S.D.N.Y. June 22, 2007) (approving incentive award equal to twice that provided to class members on ground that “[t]he risks to which [class representatives] allowed themselves to be exposed . . . and the effort they expended on behalf of all class members, justifies their receipt of an incentive award.”); RMED Int’l, Inc., v. Sloan’s Supermarkets, Inc., No. 94 Civ. 5587, 2003 U.S. Dist. LEXIS 8239, at \*2 (S.D.N.Y. May 15, 2003) (Leisure, J.); Fears v. Wilhelmina Model Agency, Inc., No. 02 Civ. 4911, 2005 U.S. Dist. LEXIS 7961, at \*9-10 (S.D.N.Y. May 5, 2005); Liberte Capital Group v. Capwill, No. 5:99 CV 818, 2007 U.S. Dist. LEXIS 64869, at \*10-15 (N.D. Ohio Aug. 29, 2007); Ingram v. The Coca-Cola Co., 200 F.R.D. 685, 687 (N.D. Ga. 2001); Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294, 298 (N.D. Cal. 1995).

## **2. Service Awards Are Especially Appropriate in Employment Discrimination Class Actions.**

As Judge Brieant noted in Roberts, class action plaintiffs in employment discrimination suits are particularly deserving of incentive awards:

[T]here is a fundamental distinction between litigation based on claims of racial, gender or other discrimination, and securities-based litigation . . . or antitrust suits—the primary reported instances in which incentive awards have been sought . . . . In discrimination-based litigation, the plaintiff is frequently a present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril.

Roberts, 979 F. Supp. at 201; see also Parker v. Jekyll & Hyde, at \*4-6 (incentive award

particularly appropriate given risks facing current and former employees suing employer); Frank., 228 F.R.D. at 187 (finding incentive awards “particularly appropriate in the employment context”); Nantiya Ruan, Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions, 10 Employment Rights and Employment Policy Journal 395, 410-411 (2006) (which emphasizes the special risks an employee-plaintiff confronts for racial or gender discrimination).

**3. Courts Have Often Awarded Service Payments in Amounts Similar to Those Applied for Here.**

Incentive awards have been awarded to individuals in a variety of contexts, including employment discrimination suits, antitrust cases and consumer fraud suits. See Roberts, 979 F. Supp. 185 (awarding \$50,000.00 and \$85,000.00 to two of the named plaintiffs in a racial discrimination employment class action); Wright, 553 F. Supp. 2d at 345 (approving \$50,000.00 awards to each of 11 named plaintiffs in employment discrimination action); Beck v. Boeing Co., No. C00-301P, 2004 U.S. Dist. LEXIS 27622, at \*4 (W.D. Wash. Apr. 9, 2004) (approving \$100,000.00 awards to each of 12 plaintiffs); Ingram, 200 F.R.D. 685 (four representative plaintiffs awarded \$300,000.00 each); Brotherton v. Cleveland, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (approving incentive awards ranging of \$50,000.00); Van Vranken, 901 F. Supp. at 299-300 (\$50,000.00 incentive award); Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D. Ohio 1991) (six class representatives granted incentive awards of \$50,000.00 each); Liberte, at \*15 (\$95,172.47 to class plaintiff).

Not just Named Plaintiffs, but other members of the class who have lent substantial assistance to the litigation should be rewarded. Accordingly, this Court has recognized that service awards are an important way of “reimbursing class representatives who ‘take on a variety of risks and tasks when they commence representative actions, such as complying with discovery

requests and often must appear as witnesses in the action.” In re Marsh ERISA Litig., 265 F.R.D. at 58 (quoting Strougo, 258 F. Supp. 2d at 264); see also Bellifemine, at \*20-21 (approving service payments to unnamed class members “for their assistance in the prosecution of this action... in light of the time and energy that they have devoted to [the] case, and the benefit conferred on the Class”).

#### **4. The Service Payments at Bar Are More Than Justified.**

Under the case law surveyed above, the Service Payments at bar are more than justified. The Named Plaintiffs, Testifying Witnesses, and Deponents all gave a significant amount of time and effort to the prosecution of this case, which made it possible to prevail at trial and, ultimately, reach settlement. Moreover, as the Joint Dec. describes, the Named Plaintiffs, Testifying Witnesses, and Deponents have all: (1) risked economic harm, or (2) contributed significantly to prosecuting this action. Joint Dec. at ¶¶35-40.

This is particularly true given the high-profile, landmark nature of this lawsuit and the fact that the case went to trial. The pharmaceutical sales field is small and tightly knit. Within that community, each of the Named Plaintiffs, Testifying Witnesses, and Deponents lent their names to the prosecution of this suit, at great personal sacrifice, and were instrumental in achieving this settlement. Certain testifying witnesses faced scrutiny not only at trial by Novartis, but also by the press, as their pictures and testimony made their way into the mainstream media. Id.

In all, this case presents a particularly striking warrant for incentive payments, because without this testimony the class may not have been certified, summary judgment may not have been defeated, and the jury may not have ruled the way that it did. The Court should grant Plaintiffs’ motion for awards of compensatory damages and service awards ranging from

\$175,000.00 to \$425,000.00 to the 26 Named Plaintiffs and Testifying Witnesses, and an award of \$25,000.00 in service payments to each of the 20 deponents who contributed significantly to the success of this lawsuit pre-trial.

Such service payments are necessary not only to recognize the significant role that each of the individuals played in the prosecution of this matter, but also generally to encourage individuals who believe they have been discriminated against to play an active role in the private enforcement of public rights. Again, the individuals in question here provided assistance which made the difference between success and failure of the litigation. There is no more fitting occasion for awarding a service fee than this suit.

#### **IV. CONCLUSION**

The road to this Settlement was long, arduous, risky and expensive. The Settlement is, by all measures, excellent. Strong evidence of the excellence of the Settlement is the fact that no one has objected out of more than 6,000 employees to whom Notice of the Settlement was sent.

The present Application for final approval should be granted in all respects. The Settlement provides extraordinary equitable and monetary relief directly to Novartis' female sales employees. The Settlement contains comprehensive programmatic relief designed to eliminate any residual gender disparities at Novartis, which the Company must implement within one year. The monetary component of the Settlement essentially amounts to 100 percent of the maximum estimated Class award for back pay and allows for available individual awards up to the statutory maximum in compensatory damages.

For the reasons provided in this memorandum and in all of Plaintiffs' preliminary and final approval submissions, the Court should certify the Settlement Class as final; approve the Settlement; award the requested monetary awards and service fees to the Named Plaintiffs,

