IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Bonnie Brown, Leslie Baginski, Lisa Cummings-Gallina, Laurie Introp, Lisa Levine, Bridget Oliveto, & Lindsay Pihaly on behalf of themselves and all others similarly situated, Plaintiffs, v. Medicis Pharmaceutical Corporation, Defendant.	NO. 1:13-cv-01345 CLASS ACTION

SUPPLEMENTAL DECLARATION OF CYRUS MEHRI IN SUPPORT OF THE JOINT MOTION FOR PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT

Pursuant to Title 28 U.S.C. Section 1746, I, Cyrus Mehri, hereby declare and state as follows:

1. I am over the age of eighteen years. I have personal knowledge of the facts set forth herein, and am competent to testify thereto.

2. I am submitting this supplemental declaration on behalf of myself and my co-counsel to respond to inquiries made by the Court at the June 6, 2014 status conference and to respond to the Court's June 9, 2014 minute order.

3. I am a founding partner at Mehri & Skalet, PLLC ("M&S") which is based in Washington, DC. Over the last 20 years, I have served as co-lead counsel and court-appointed class counsel in many large and complex gender and race discrimination cases that resulted in settlements. The hallmark of these settlements is innovative programmatic relief. Three of these settlements were approved by jurists in this District, and my firm is currently monitoring the

implementation of programmatic relief: *Carter v. Wells Fargo Advisors, LLC*, No. 1:09-CV-01752 (D.D.C. June 9, 2011) (J. Kollar-Kotelly) (Wachovia Securities was the original defendant until the Company was purchased by Wells Fargo); *Augst-Johnson v. Morgan Stanley & Co.*, No. 1:06-CV-01142 (D.D.C. Oct. 26, 2007) (J. Roberts) and *Amochaev v. Citigroup Global Markets d/b/a Smith Barney*, No. C-05-1298 (N.D. Cal. Aug. 13, 2008), Nos. 1:11-CV1785/1:06-CV-01142 (D.D.C. Feb. 13, 2013) (J. Roberts) (the case was transferred to this District after the merger of Morgan Stanley and Smith Barney and the parties entered into a consolidated and extended settlement agreement covering the merged entity).

4. With this declaration, I provide details requested by the Court regarding attorneys' fees and expenses, as well as information that is typically provided upon a motion for final approval of a class action settlement but that we believe will be helpful at this stage in light of the Court's questions. I will also provide an explanation of why we believe the request for fees and reimbursement of expenses is consistent with the law of this Circuit and District and the principles set forth by this Court's decisions in *In Re Fannie Mae Securities Litigation*, No. 04-1639, 2013 U.S. Dist. Lexis 172231 (D.D.C. Dec. 6, 2013) (hereinafter "*Fannie Mae*") and *Hubbard v. Donahoe*, 958 F. Supp. 2d 116 (D.D.C. 2013) (hereinafter "*USPS*").

5. An examination of attorneys' fees in a class action civil rights settlement begins with a determination as to whether the settlement contains a common fund and common fund principles apply or whether the fees are recovered under a fee

shifting provision of a statute and fee shifting principles apply. Fee shifting cases tend to involve heightened scrutiny of billing records since the court often has to link the payment to prevailing claims. In contrast, in common fund cases, equitable principles apply because class members as well as the named plaintiffs generally receive a monetary benefit. It would be unfair for the responsibility of attorneys' fees to fall only on the clients who entered into retainer agreements. The class should not be unjustly enriched by the work of counsel and a reasonable fee and expenses should be awarded from the award of the entire class. The leading common fund case in this Circuit is *Swedish Hosp. Corp. v Shalala*, 1 F. 3d 1261 (D.D.C. 1993). This Court applied *Swedish Hospital* and its progeny when analyzing the fee petitions in *Fannie Mae* and *USPS*.

6. Common fund principles apply in this settlement with Medicis as they did in *Fannie Mae* and *USPS.* As this Court noted in *Fannie Mae*:

> In a common fund case, such as this one, our Circuit has joined other circuits in concluding that 'a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award.' See *Swedish Hosp. Corp*., 1 F. 3d at 1271. …[C]ourts in this District have often considered the following seven factors (1) the size of the fund created and the number of persons benefited, (2) the presence or absence of substantial objections by class members to the settlement terms or fees requested by counsel, (3) the skill and efficiency of the attorneys involved, (4) the complexity and duration of litigation, (5) the risk of nonpayment, (6) the time devoted to the case by plaintiffs' counsel, and (7) awards in similar cases.

Fannie Mae, 2013 U.S. Dist. Lexis 172231 at *52.

7. At the June 6 hearing, the Court made clear its intent to review fees and expenses carefully at this preliminary approval stage even though many courts

postpone that close examination for final approval. We appreciate the opportunity the Court has provided in that regard.

8. It has been my practice in the dozens of class cases in which I have made fee requests to err on the conservative side. As such I have not had a fee request reduced or criticized by a court. While my co-counsel and I understand that the request of 35% in attorneys' fees in the instant action may at first blush stand out as high, we believe that under the seven factors identified in *Fannie Mae*, the request is well within the bounds of reasonableness.

Fannie Mae Factor No. 1 (Per Class Member Result Achieved)

9. We achieved an extraordinary result for this class. There are only 225 class members in this settlement and a common fund of $7.15 million. This fund will increase somewhat since under the agreement Medicis will make an additional payment for the employer's share of payroll taxes and is expected to make an additional payment of no more than $100,000 for the cost of claims administration. While in many cases the employer's share of payroll taxes and the cost of settlement administration come out of the common fund, here the company bears the burden of those expenses on top of the $7.15 million common fund. Even though those two provisions provide substantial economic benefits for the Class we are not including those benefits in support of our request. Instead, for purposes of our request we will use the $7.15 million figure.

10. The Class Member recovery here is remarkable when compared with similar cases. For reference, we have attached a chart of comparable sex discrimination settlements that have been reached after the landmark decision in *Wal-Mart*

Stores Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). (Exhibit 1). In those cases, the recovery per class member averaged from $538 to $14,800.[1] The estimated average potential class member recovery in this case after fees and expenses will be over $20,000 assuming that 100% of the class members file a claim form. The most comparable case to the case at bar is *Ellis v. Costco Wholesale Corp.*, No. 3:04-cv-03341-EMC, ECF No. 791 (N.D. Cal. May 27, 2014). In *Ellis*, a national class of women claimed that a small group of executives at a private employer discriminated against them. The *Ellis* case has about 700 class members who will receive on average $11,000 per class member if all class members file claims. Our result is about twice that on a per class member basis.

11. While every class member will have an opportunity to submit a claim form, based on past experience, we estimate that approximately 25% to 40% of the class will submit claim forms. Though the actual awards will vary based on each individual's tenure with Medicis and information submitted on the claim forms,[2] rough estimations can illustrate the benefits that this settlement fund will provide. If we assume a 40% claims rate (i.e. 90 claimants), then the estimated average award to each claimant from the settlement fund will be nearly $50,000, which is a rare and exceptional result. This is especially so because, if litigated, the result could easily have been nothing for the class after many years of litigation, as is the case in *Da Silva Moore v. Publicis Group SA*, No. 1:11-cv-01279 ALC/AJP,

[1] These estimates are average awards per class member are based on the common fund minus requested attorneys' fees and costs assuming every class member submitted a claim form.

[2] The allocation of monetary awards to class members from the Settlement Fund will be based on a scoring system developed by the Claims Administrator and Class Counsel using the factors set forth in the Settlement Agreement. Class members who do not wish to participate in the settlement will have the opportunity to opt out.

ECF No. 536 (S.D.N.Y. May 15, 2014), absent a reversal on appeal.

12. In addition to examining the post-*Dukes* gender discrimination settlements we also examined pre-*Dukes* gender discrimination settlements in the pharmaceutical industry. The most similar case is *Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 1:07-cv-02207-JGK-GWG, ECF No. 82 (S.D.N.Y. Aug. 6, 2010), which settled for over $15 million for over 5,200 class members with an average recovery of $2,000 per class member after fees and expenses. Thus, the award per class member here is about 10 times the estimated average award per person in *Sanofi-Aventis*. Another pre-*Dukes* sex discrimination case in the pharmaceutical industry, *Velez et al v. Novartis Corp*., No. 1:04-cv-09194-CM (S.D.N.Y. Nov. 30, 2010), settled for $100 million for over 6,000 class members, which is about $16,113 per class member, but that case resolved after a trial victory. Our result compares favorably since it is a larger recovery on a per class member basis without the delay and risk of trial.

13. In sum, the monetary result achieved in this case is substantially above the norm in this field in contrast to *USPS* where the class member recovery was on average one half of the most comparable case. *USPS*, 958 F. Supp. 2d at 125-26.

14. In addition to these monetary benefits, the class will receive substantial non-monetary benefits. The programmatic relief achieved for the class is highlighted in the notice to the class (Dkt. 5-1 at 76) and in the memorandum in support of the motion for preliminary approval (Dkt. 6 at 13-14).

Fannie Mae Factors No. 5 (Risk of Non-Payment) and No. 7 (Awards in Similar Cases)

15. Over my career I have worked on class cases in a wide range of subject areas – antitrust, securities, consumer, environment, and equal opportunity. With the possible exception of environmental toxic tort cases, equal employment opportunity (EEO) cases are by far the most difficult class cases due to the complexity of the legal issues, their risks and the type of proof required. While these cases are extremely difficult, they also are important for our country because equal opportunity is crucial to our democracy. Discrimination in the workplace has a substantial human cost.

16. Jurists in this District have recognized the difficulty and importance of EEO class cases by creating a benchmark for fees in these cases that is significantly higher than the benchmark in other areas of law, such as antitrust and securities. While the average class action fee in this District averages around 30% and generally ranges between 15% and 40%, fee awards in employment discrimination class actions tend to fall in the range of 30-37.5%. *See McReynolds v. Sodexho Marriott Servs., Inc*., No. 1:01-CV-00510 (ESH) (D.D.C. July 26, 2006) (30.1% for fees and expenses); *Bynum v. District of Columbia*, 412 F.Supp.2d 73, 81 (D.D.C. 2006) (33.3% of class fund plus costs), *Kosen v. American Express Financial Advisers, Inc.,* No. 1:02CV00082 (HHK), slip op. at 12 (D.D.C. June 16, 2002) (35% for fees and expenses) (also citing *Thornton v. National Railroad Passenger Corp*., No. 1:98-cv-00890-EGS (D.D.C.), where court approved 37.5% for past and future fees and expenses; and *McLaurin v. National Railroad*

Passenger Corp, No. 1:98-cv-02019-EGS (D.D.C.), where court approved 37.5% for past and future fees and expenses).

17. In *Kosen*, Judge Kennedy noted that unlike antitrust cases where it is not uncommon to have dozens of firms file overlapping cases, overlapping EEO class cases are rare because of their risks. He explained:

> Employment discrimination class action cases are risky for many reasons. There is generally no government investigation to draw upon, as there frequently is in other types of class action cases. Companies are able to keep figures concerning the impact of their employment practices private, forcing plaintiffs firms to perform expensive investigations prior to filing suit, unlike, for example, in securities class actions. Many courts give great credence to employers' business rationales for their policies and practices.

Kosen v. American Express Financial Advisers, Inc., Civ. No. 1:02-CV-00082 (HHK), slip op. at 16 (D.D.C. June 16, 2002) (attached as Exhibit 2).

18. The risk and complexity of handling employment class actions identified by Judge Kennedy increased dramatically after the landmark decision in *Dukes*. The *Dukes* decision caused some commentators such as Professor John Coffee at Columbia Law School, an expert on class actions, to write that he believed that enforcement of systemic equal opportunity laws would come to an end. John C. Coffee Jr., "*You Just Can't Get There From Here": A Primer on Wal-Mart v. Dukes*, Class Action Litigation Report (BNA) 12 CLASS 610 (July 8, 2011). Indeed, the bar prosecuting these cases dwindled further in the wake of the decision.

19. At that time, it was my belief that commentators such as Professor Coffee overreacted to *Dukes*. Although *Dukes* certainly had an impact, EEO class

actions can still be certified post-*Dukes*, especially when counsel engage in sound, sophisticated legal analysis and hard investigative work.

20. My co-counsel Sara Wyn Kane of the law firm of Valli Kane & Vagnini, LLP ("VKV") on behalf of an individual filed a charge of discrimination against Medicis in February 2009. While the EEOC was conducting its review, her firm continued its own investigation and spoke with a number of other women with similar claims against the company. As she and her office came into contact with these additional female employees of Medicis, Ms. Kane and her firm further analyzed the possibility of a class action.

21. Ms. Kane approached me about the possibility of co-counseling on a class action in 2010. After a careful investigation, we concluded that a class action might be viable, and continued to believe in its viability even after *Dukes* because the discriminatory decisions at Medicis stemmed from the CEO (who has since departed the Company) and his executive team, and because there were common policies which caused the discrimination. Further, *Dukes* involved thousands of stores and thousands of decision-makers, while this case involved one set of decision-makers. While national in scope, the decision-making process was akin to one store in *Dukes*. But I also knew that we would face an extraordinary uphill battle convincing Medicis that it was vulnerable to a class action after *Dukes*, and failing that, convincing a court to certify a class.

22. In September 2011 (approximately three years after VKV began its work), we sent Medicis a detailed 20-page letter that not only set forth the fruits of our

factual investigation, but wrestled with the complex legal issues following the *Dukes* decision.

23. The risk associated with a case typically is examined at the time the complaint is filed. While it was not a complaint, our September 2011 letter to Medicis setting forth our legal theories regarding the class case should serve as the trigger point for evaluating risk. In September 2011, the risk for complex EEO class cases peaked to an all-time high. There was a widely held perception that EEO class cases were "dead" as Professor Coffee feared. The defense bar went so far as to file dozens of motions to dismiss or to strike class allegations in the wake of *Dukes*.

24. If we were unable to obtain a settlement in this matter, we would have faced a series of risks in the post-*Dukes* environment. First, we almost certainly would have faced a motion to strike class allegations and an *Iqbal/Twombly* motion to dismiss. It is entirely possible the case could have resulted in non-payment at that juncture.

25. Second, the scope of discovery allowed by the Court could have increased the risk of non-payment. Notwithstanding the heightened burdens placed on plaintiffs at various stages of the litigation, defense counsel, who are highly skilled, probably would have sought to narrow the scope of discovery. It is not uncommon for good EEO cases to fall short because the scope of permitted discovery is too narrow to obtain the evidence needed to prove plaintiffs' case on a classwide basis. For example, whereas in the mediation process we received the company's relevant employment personnel data, in litigation the data could

have been limited temporally, geographically, or by grade in a manner that could have hindered our sophisticated compensation and promotion analyses.

26. Third, class certification created another risk. Medicis would have put on a formidable defense and the outcome on class certification would have been highly uncertain. Although we did not know it in September 2011, the defendant would eventually have been able to cite to the Supreme Court decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and its progeny to challenge class certification. Plaintiffs faced a substantial risk of non-payment at the class certification stage.

27. Two post-*Dukes* class certification decisions highlight the uncertainties that we would have faced on class certification. In each case, like this one, female plaintiffs sought to proceed on behalf of a national class claiming that a small group of decision-makers discriminated against women in their promotion or compensation decisions. One district court certified the proposed class in *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012), but another court declined to certify a similar proposed class in *Da Silva Moore v. Publicis Group SA*, No. 1:11-cv-01279 ALC/AJP, ECF No. 536 (S.D.N.Y. May 15, 2014).

28. Even if the trial court certified the class, we would have faced a Rule 23(f) petition for appeal that the Circuit could have granted, adding another one to two years of delay and a great deal of uncertainty.

29. If plaintiffs prevailed at the class certification stage at the District Court and appellate level, we would have faced another couple of years of merits discovery and motion practice including motions for summary judgment. Some portions of

the case or the entire case could have been lost on classwide summary judgment and/or individual summary judgment motions against the named plaintiffs.

30. The risk of non-payment at trial is also extraordinarily high in class actions. Individual employment discrimination plaintiffs win only one in four trials. In a class case, defendants have two bites at the apple since EEO cases typically follow the trial plan set forth in *Teamsters* and reaffirmed in *Dukes*. First, plaintiffs establish a pattern or practice of discrimination or a disparate impact that applies to the entire class. Even if successful, the employer has the right to challenge each class member in a series of mini-trials, albeit with the burden of proof reversed. We likely would have faced substantial risk of non-payment at both the common liability phase and the mini-trial phase.

31. All told, absent a settlement, this would have been an epic journey that would have probably taken 5 to 7 years and enormous judicial resources to resolve. The risk of non-payment was massively high.

32. There would also have been a human element risk. While our clients are extremely dedicated, to endure this type of litigation is a great deal to ask of them. Many, possibly even most, of the 40 or more witnesses whom we interviewed with confidentiality would have been afraid to come forward in Court due to fear of retaliation by Medicis or fear of being blacklisted by the industry.

33. Considering the risk of non-payment and the conventional wisdom of practitioners and scholars at the time, it would have been difficult to find skilled counsel to take a case like this in September 2011, or at any other time before a

settlement was agreed to, at less than a 40% of the recovery. Some courts, most notably the Seventh Circuit in *Continental Illinois Securities Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) (J. Posner), have explained that the percentage of the fund should mimic the economic market. Using that approach, taking on a complex and risky class EEO case at a time when the market for this legal work was collapsing with many lawyers in the field either dropping out altogether or retreating from this work could justify a fee of at least 40%. However, we chose to err on the side of caution and stay well within the range previously established by this District before the market shift. Our requested 35% falls squarely within the 30% to 37.5% range established in this District for EEO cases and errs on the side of being conservative in the post-*Dukes* era.

34. The requested award is reasonable for a second reason. While the common fund created by the settlement is large on a per capita basis, in absolute terms it is relatively small. In *Fannie Mae* this Court noted the history of a sliding scale downward for megafund settlements. *Fannie Mae*, at *53-55. Though they were not quite megafund settlements, in my previous EEO class action settlements in this District, I used a similar concept and sought fees below the midpoint of the range established in this District. Considering that the absolute amount of this settlement is smaller still, a fee award in the typical range for pre-*Dukes* EEO class actions in this District is not only reasonable but likely on the conservative side when one reviews the inherent risks involved.

***Fannie Mae* Factor No. 3 (Skill and Efficiency of Class Counsel) and *Fannie Mae Factor* No. 4 (Complexity and Duration of Litigation)**

35. This case was intensely litigated through the mediation process overseen by noted mediator Hunter Hughes. All the lawyers involved – plaintiffs' counsel, defense counsel and the mediator – handled themselves with great professionalism, even when we reached several impasses along the way. By ultimately reaching a settlement, we saved our clients from years of litigation and minimized the burden on the Court's resources.

36. In contrast to the concerns this Court raised in the *USPS* case, class counsel here worked in a tightly controlled and highly efficient manner. As mentioned above, initial investigations were performed and EEOC charges prepared and filed by VKV. After VKV and M&S decided to co-counsel we made sure to maximize efficiency. Our assignments fell into these broad categories: (1) client relations; (2) factual investigation and witness interviews; (3) legal framework and addressing evolving legal standards; (4) framing the issues for the defendants; (5) analysis of company policies and practices; (6) expert non-statistical and statistical analysis; (7) settlement negotiations; and (8) drafting settlement papers and settlement approval papers.

37. After we sent the detailed letter to the defendant in September 2011, the parties spent nearly two years in mediation, with six in-person sessions and numerous calls with the mediator. The parties conducted something akin to full blown discovery with production of data and policies by the defendant and detailed disclosures about individual claims via verbal presentations by our clients and the equivalent of interrogatory answers. We consulted an expert to help analyze

policy documents and hired a labor economist to analyze the human resource data. Defendant engaged a statistician to perform counter-analyses of the data. Each statistical expert prepared two reports. The parties held dueling expert sessions over the data which were conducted like informal depositions. An agreement was reached in July of 2013 and a complaint and a motion for preliminary approval were filed in September of 2013.

38. In the division of labor, Ms. Kane and her firm have taken the lead in communicating with and updating the clients from the outset to the present day. When it came to explaining the settlement terms and the settlement process, my partner Ellen Eardley and I became involved due to our expertise in class cases.

39. The firms divided the factual investigation and witness interviews and interviewed about 40 class members, a substantial segment of the class. These interviews provided invaluable insights and strengthened our position in the settlement negotiations. The sensitive topics being discussed – one key aspect of the case is a sexualized work environment that started at the CEO level and permeated throughout the sales force – made them challenging. The lawyers in both firms have considerable experience conducting witness interviews and conducted these emotionally charged interviews in this case with exceptional skill and efficiency. Ms. Eardley has particular expertise in this area as she previously worked at the National Women's Law Center and currently teaches Sex-Based Discrimination at American University Washington College of Law.

40. I took the lead with input from Ms. Eardley and M&S Of Counsel Michael Lieder on analyzing the evolving legal standards after *Dukes* and framing the legal

issues with the defendant. Both Mr. Lieder and I have written articles and spoken at various CLEs about the Supreme Court's decision in *Dukes* and related cases.

41. Perhaps more than any other firm, my firm has been on the leading edge of policy reforms affecting employees in many of the nation's top companies over a twenty year period. This wealth of knowledge from a cross section of Fortune 500 companies gave us invaluable experience to analyze the Medicis policies and procedures for purposes of pinpointing weaknesses and crafting programmatic relief. With input from Mr. Lieder, Ms. Kane and me, Ms. Eardley took the lead in crafting programmatic relief proposals. My firm also reached out to a non-statistical expert for advice on our proposals.

42. One of the most complex aspects of EEO class actions is working with a statistical expert to produce a statistical analysis and expert report and to challenge the opposing expert's analysis and report. Mr. Lieder, who has practiced in this field for 20 years, is highly regarded for his skill and in-depth knowledge of the interface between statistics, labor economics and equal opportunity by the plaintiff and defense bars as well as by the experts who specialize in this area. He has written numerous articles on the subject. Due to Mr. Lieder's exceptional skill in this subject, he took the lead on this aspect of the case with input from me.

43. With input from my co-counsel, I took the lead on the settlement negotiations. We established our settlement positions and delivered them to Medicis at all hands mediation sessions and at lawyer only sessions. I also often had one-on-

one conversations with the mediator to further the process. My skill as a settlement negotiator has been honed over 20 years prosecuting these types of cases. I always strive to, and believe I do, bring integrity, creativity and open-mindedness to the process, which I have found is well received by defense counsel. Similarly, Ms. Kane has spent over a decade negotiating settlements in EEO cases on an individual, mass, group and class level against defendants ranging in size from small companies to some of the largest in the world.

44. Ms. Eardley took the lead in drafting the settlement documents and related papers. As the principal drafter of numerous other class settlements, including some of those that have been approved by jurists in this District, she is extremely skilled in this regard. Additionally, due to our involvement in similar settlements, we were able to model the structure of the settlement based on agreements that have been successful in other cases and approved by courts in this District.

45. Ms. Kane, Ms. Eardley and I worked to ensure that assignments to staff at both firms were made based on the appropriate skill, experience and efficiency. Paralegals and junior attorneys took on many assignments that fit their skill level. We minimized the number of attorneys involved on given assignments as appropriate and in the mediation sessions we were frequently outnumbered by the other side, which had two major law firms, an active in-house counsel and management present.

46. Because we were able to successfully negotiate a settlement before a complaint was filed, this case did not last nearly as long as most class cases. Of course, we did not know that the negotiations would be successful when we sent the

initial class demand letter in 2011, and we were prepared to litigate for many years if necessary. While we were not before the Court and therefore not involved in formal litigation procedures, we were nonetheless engaged in a similar process. Our clients appeared before the Company and its counsel to present their claims and those of the class. Those that were unable to attend in-person presented their experiences via conference call. Medicis had the opportunity to ask questions and request support for those claims. There was an extensive exchange of information that was reviewed and followed up on. Both parties hired experts who prepared reports based on the exchanged information, as if for trial. There were many sessions with the mediator and directly with counsel to argue over the document production, the facts of the claims and the expert reports. For all intents and purposes, the parties engaged in discovery, partook in the equivalent of depositions, engaged in extensive document analysis and worked with experts. The parties then made arguments both written and oral that would equate to summary judgment motions, which all eventually culminated in the negotiations that led to an agreement. Thereafter, the parties engaged in extensive discussion and edits to come to terms on said agreement. Thus, as the time records reflect, we worked intensively during the period prior to and after reaching a settlement.

47. In *USPS*, the Court raised concerns that two dozen lawyers at three firms and a not-for-profit "could have performed their duties much more efficiently, with leaner staffing and better team management and coordination." *USPS*, 958 F. Supp. 2d at 125. The tight team management and coordination in this case

sharply contrasts with *USPS*. Since we are performing the work on contingency, market forces call for a level of efficiency that the Court indicated might have been absent in *USPS*.

48. We believe we not only handled this case efficiently, but also skillfully. The fact that a settlement agreement was reached at all, the fact that it was achieved while using minimal judicial resources and the settlement terms themselves speak to the skill of counsel.

***Fannie Mae* Factor # 6 (The Time Devoted by Plaintiffs' Counsel)**

49. Per the Court's June 9 order, the monthly time records of class counsel are attached as Exhibit 3. My firm and the VKV firm collectively have expended over 3,700 hours that have a lodestar value of over $1.8 million based on our standard and current hourly rates. As is our custom, both Ms. Eardley and I reviewed the time records from our firm for billing judgment purposes and Ms. Kane did the same for her firm. We did so not once but twice – first nearly a year ago when we prepared our preliminary approval papers and again this month as we prepared this supplemental declaration.

50. While the D.C. Circuit has endorsed a percentage-of-the-fund approach to determining the amount of attorneys' fees, other Circuits use a risk multiplier analysis, comparing lodestar to the amount of fees sought. Our risk multiplier would be 1.39. It is worth noting that our multiplier will be reduced even further after the notice period to the class and the motion for final approval are completed. Our risk multiplier is very reasonable given that risk multipliers of 2 to 3 are common in class cases, but is particularly reasonable with the risk of non-

payment and the excellent results in this case.

Fannie Mae Factor No. 2 (Potential Objections)

51. While it is difficult to analyze the reaction of the class until notice is sent, the named plaintiffs all support the settlement and the claims administration process. We believe that the class should have an opportunity to be heard in the notice process and this factor should be considered at the final approval stage.

Reimbursement of Expenses

52. M&S and VKV have incurred $116,403.70 and $3,759.31 in expenses related to prosecuting this case for a total of $120,163.01 in unreimbursed expenses. The largest expenses relate to paying expert fees, plaintiffs' side of the mediator expenses, and travel costs for counsel and the clients. Per the Court's June 9 order, an explanation of expenses is attached as Exhibit 4.

Expert Expenses

53. Our primary expert for this case is Dr. Alexander Vekker, a labor economist at the University of Pennsylvania. He is a very experienced labor economics expert in EEO class cases and I personally have worked with him for over a dozen years. His work was cited favorably in *Taylor v. D.C. Water and Sewer Authority*, 241 F.R.D. 33, 42-43 (D.D.C. 2007) (J. Kennedy). My firm had no involvement in that case. He charges $350 an hour.

54. As the labor economist in this case, his work had several phases. First, he had to be sure that the data produced by the Company was in complete, readable, and usable form. We had to go back to Medicis several times before the data was in the proper condition for analysis.

55. Next Dr. Vekker compiled descriptive information about the position of women in Medicis sales' hierarchy and numerous multiple regression analyses of total compensation and various elements of compensation, both as part of plaintiffs' affirmative proof and in response to the analyses of defendant's expert. These analyses commenced during the second half of 2012 and continued throughout the mediation process until the spring of 2013.

56. Dr. Vekker completed an initial expert report during the month of August 2012. In response to the Company's rebuttal report of September 2012, Dr. Vekker performed new analyses, answered written questions from the Company, and participated in a mediation session during October in which plaintiffs and Medicis were able to ask questions of the other side's expert. In response to the Company's questions about his analyses, Dr. Vekker produced new analyses in late 2012 and early 2013 that were provided to the Company.

57. In addition to the written reports, Dr. Vekker was available to counsel in preparation for the mediation sessions and by telephone for some of the mediation sessions. The fees and expenses related to statistical analysis and expert reports were $52,064.74.

58. There is no doubt that Dr. Vekker's outstanding work was a key part of our ability to obtain this outcome for the class.

Mediator Expenses

59. Hunter Hughes of Rogers & Hardin in Atlanta, Georgia, is probably the most experienced mediator in the field of EEO class actions. He also practices as a management labor and employment lawyer. I have worked with him personally as a mediator for over a dozen years and have found him to be the best mediator in our field. He is trusted by both sides. Most importantly, he is gifted as a problem solver in these highly complex cases. He understands and asks both sides good questions on statistical analyses, which is a unique skill. He also has a rare ability when it comes to resolving complex issues regarding shaping injunctive relief and allocations from the common fund. He has a deep understanding of legal issues pertaining to employment issues across the waterfront from individual claims to payroll tax issues. He is the best in the business and we might not have been able to resolve the case without him.

60. I do not know his normal fee schedule, but in this case he charged a flat fee of $7,500 per in-person mediation session in New York and Philadelphia, which included three hours of preparation time, the actual mediation time, travel time and travel expenses. For any additional time, including conference calls, he charged each side $350 per hour. Mr. Hughes does not charge a success fee, let alone one for $150,000, which was a concern for this Court in *USPS*.

61. Mr. Hughes held six in-person sessions and numerous telephonic mediation sessions. He also conducted numerous telephone calls with individual counsel, many of which he did not charge for. Plaintiffs paid $43,756.31 in mediation costs.

62. Upon reviewing our expenses, we discovered we paid one of Mr. Hughes's bills twice and he is issuing a refund. The attached description of expenses reflects this change.

Travel Expenses

63. Even though there was extensive travel, we picked locations for the mediation sessions that minimized travel expenses. For example, most of the sessions were in New York where the VKV firm and one set of defendant's counsel are located. When we held the "dueling expert" sessions we did so in Philadelphia where Dr. Vekker is located. While we had our clients attend particular mediation sessions where their presence was required, they did not come unnecessarily. We did not ask them to come to the preliminary approval hearing although we intend to ask that they be present for the final approval hearing.

Next Steps

64. The Court indicated that it might ask counsel to return in July for another hearing concerning preliminary approval after the Court has had an opportunity to review this supplemental declaration. I have canvassed counsel on both sides and we are available on July 8, 10, 11, 17 and 18. We are also generally available starting on August 11; however, the parties prefer to return to the Court in July if at all possible. For the Court's convenience, we also have included an updated proposed order with this filing.