

The requested data is contained in Exhibit A¹ and Plaintiffs' analysis is set out below. Plaintiffs believe that the information in the Claim Forms shows that the sexually hostile conduct was both severe and pervasive. It stemmed from the former CEO and other former senior management. That former CEO and his senior management left the employment of Medicis several years ago prior to Valeant's acquisition of Medicis, however, and Plaintiffs do not contend that the hostile work environment claims extended beyond December, 2012 when Valeant acquired Medicis. Plaintiffs believe, therefore, that the Court should expand the scope of the class claims to include the hostile environment claims through December 2012.

If the Court concludes, as the Plaintiffs believe, that the information provided is sufficiently clear and strong to support the expansion of the scope of the class claims to include hostile environment claims, a hearing on the expansion issue may not be necessary. Plaintiffs respectfully request that the Court permit the Class to pursue hostile work environment claims on the strength of the filings and further ask the Court to set a deadline for the parties to file a motion for final approval of the class action settlement and for Class Counsel to file its motion for an award of attorney's fees and costs.

¹ Throughout this Memorandum, Plaintiffs have included direct quotations from the Claim Forms. While some quotations have been edited for clarity or length, or to redact the full names of Hostile Work Environment Claimants, Plaintiffs have endeavored to retain the original quotation as much as possible. Each quotation in this Memorandum is included in Exhibit A, which provides relevant excerpts from the Forms and identifies Class Members by their initials. If the Court wishes to see the underlying Claim Forms themselves, Plaintiffs are happy to provide them for *in camera* review. Under the terms of the Settlement Agreement, Defendant is not permitted to have access to the content of the Claims Forms in order to protect the confidentiality of the Claimants so as to avoid the possibility of retaliation.

I. SUMMARY OF PROCEDURE AND FACTS

A. Procedural History

On August 5, 2015, the Court granted the parties' Joint Motion for Preliminary Approval of the Modified Class Action Settlement. ECF No. 37. As part of its Order, the Court granted preliminary certification to the following class ("Settlement Class"):

All women regularly employed directly by Medicis or by Medicis indirectly through Quintiles, Innovex or QFR Solutions in the Aesthetics Division or Dermatology Division in the following field sales positions at any time from April 15, 2008 up to and including December 10, 2012: Professional Sales Specialist, Senior Sales Specialist, Executive Sales Specialist, Territory Manager, Professional Territory Manager, Senior Territory Manager, Executive Territory Manager, Regional Manager, Senior Regional Manager and Executive Regional Manager. Any women who have previously released sex discrimination claims against Medicis for the entirety of the Class Period during which they were employed directly by Medicis or by Medicis indirectly through Quintiles, Innovex or QFR Solutions, and/or any women who obtained a final judicial determination concerning sex discrimination claims which would otherwise be covered by this Settlement Agreement, are excluded from the definition of the Settlement Class.

Id. at ¶ 2. The Court provisionally found that the requirements of Federal Rule of Civil Procedure 23(a) had been satisfied, *id.* at ¶ 3, and that the requirements of Rules 23(b)(2) and 23(b)(3) were met for class-wide claims for discrimination in compensation and promotions. *Id.* ¶ 4.

Certification of the Settlement Class was provisional pending final approval of the Settlement.

Id. ¶ 2. In its Order, the Court provided the following regarding the certification of the Settlement Class as to sexual harassment claims:

The Court has expressed concern, however, about certifying the class for sexual harassment claims based on the existing record. As a result, Plaintiffs are not seeking class certification for those claims at this juncture, but may seek to expand the scope of the class to sexual harassment claims after the completion of the claim form process and prior to the hearing on final approval.

Id. ¶ 5. The Court ordered that the parties analyze and prepare the data contained in the Claim Forms completed by the Settlement Class for submission to the Court by January 22, 2016, and stated that the Court would then set a hearing to determine whether to expand the class claims to include hostile environment claims. *Id.* ¶ 10.

Pursuant to the Court's Order, the data contained in the Claim Forms is analyzed below. The Settlement Class has responded very positively toward the Settlement and Claims process. 99 Claim Forms were submitted to the Claims Administrator by the deadline of November 15, 2015. This number comprises approximately 44% of the Settlement Class of 225 current and former employees of Medicis, which in Class Counsel's experience represents a high percentage response from the Settlement Class. *See, e.g., Velez v. Novartis Pharms. Corp.*, 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945, *18-19 (S.D.N.Y. Nov. 30, 2010) (in gender discrimination case, 444 of 6,206 class members submitted claim forms to seek additional compensation from a \$40 million compensatory fund); *Carlson v. C.H. Robinson Worldwide, Inc.*, Civ. No. 02-3780 (JNE/JJG), 2006 U.S. Dist. LEXIS 67108, at *21 (D. Minn. Sept. 18, 2006) ("Of more than 1,800 people who received notice [in gender discrimination class action], more than 200 submitted claim forms"). No Settlement Class Member has opted out of the Settlement, nor have any objections been lodged. Of the 99 total Claim Forms submitted, 60 (or 61%) contained evidence of a hostile work environment during the relevant time period of employment at Medicis ("Hostile Work Environment Claimants").

B. Summary of Facts

When women applied to work as sales representatives in the Aesthetics and Dermatology Divisions of Medicis from 2008 to 2012, they faced an unusual and inappropriate interview process led personally by then CEO Jonah Shacknai and other former senior executives. They

asked these women about their marital status, their caregiving responsibilities, and their future plans for relationships and children, and told them that Medicis is a “boys club” in which women needed to prove themselves. The former senior executives evaluated women for their physical appearance. The women who passed scrutiny were then initiated into a single, shared work culture in which female employees were subject to unwelcome and sexually-charged comments on a regular basis. When one woman won the Representative of the Year Award, Shacknai relayed to her that he “wanted to fuck her”; he commented to others that they needed cosmetic injections to improve their appearance. Female employees who were pregnant or planned to get pregnant were told that having children would harm their careers, that they should resign after starting a family, or even – in one employee’s case – that she should abort her pregnancy so that her manager wouldn’t have to cover her territory while she was out on maternity leave.

Shacknai and other former senior executives also pressured women to drink alcohol and socialize with co-workers, bosses, and clients late into the night and on weekends. In this pressurized culture of partying, senior executives bragged about their sexual exploits with subordinates and favored female employees who succumbed to quid pro quo advances. As Director of Sales Robert Nevin laughingly stated in one interview with a prospective female hire, “yeah I sleep with all my reps.” Female sales representatives who held out against this culture of sexual favoritism were disfavored and ineligible for certain job benefits. One employee explained that an executive “made sexual advances toward me which culminated with him attempting to French kiss me on one of the evenings that he came out socially with the trainees afterwards. . . I felt that I had to be cordial and engaging with [him] since he was an executive in a position of power over me and had the ability to affect my job and my livelihood.” Male Medicis employees followed the tone set by the top leadership, and subjected women to

unwanted touching and harassment on a regular basis during their daily work. One employee recalls that her sales manager “propositioned me for sex . . . He groped me and persisted when I said no.” When another woman complained to Human Resources about the harassment she had experienced, she was given no recourse and told “that was just the way the men at this company behaved.”

Plaintiffs believe that this hostile work environment, generated by the direct actions of a handful of former Medicis senior executives and broadened by their acquiescence toward the harassing acts of other employees, is appropriate for class treatment. The cumulative effect of the harassing, degrading, offensive and discriminatory acts was to create a single, unified, abusive work environment in which unwelcome behavior toward women was standard operating procedure.

II. FACTS

A. The Hostile Work Environment Was Created By A Small Group of Medicis Former Senior Executives, Including the Former CEO

Female field sales employees endured a systemic sexually hostile and demeaning work environment that altered the terms and conditions of their employment. This environment was created by a small group of former senior executives at Medicis, including former CEO Jonah Shacknai and other former members of senior management — Vincent Ippolito, Richard Havens, Claude Maraoui, Robert Nevin and Louis Frisina — who had overall responsibility for the Company’s policies and practices (the “Control Group”). In fact, of the 60 Hostile Work Environment Claimants, 34 (or 57%) reported of Jonah Shacknai’s direct involvement in some nature of harassing conduct. The Control Group, under Shacknai’s leadership, generated this hostile environment both by engaging in harassing conduct themselves and by sending the signal to other employees that a culture of sexual

harassment, discrimination, sexual favoritism, pressure for women to submit to quid pro quo sexual advances, and sexually-charged and offensive commentary about women was not only tolerated but encouraged.

B. Female Employees Experienced a Sexualized and Discriminatory Interview Process Prior to Being Hired By Medicis

Females who applied for a sales position in Medicis Aesthetics or Dermatology Divisions were initiated into the company's culture of sexual commentary and offensive comments about women before they were even hired. Members of the Control Group, led by Jonah Shacknai, personally conducted interviews of new female applicants. One applicant recalled that Shacknai insisted on conducting her interview in person despite scheduling difficulties: "Jonah Shacknai, CEO, had a scheduling conflict and strangely, I was asked if I wanted to fly back home to NY and come back to Arizona next week, or stay an extra few days in Arizona because Jonah needs to 'see me.' Based on my experience in the industry, this was highly unusual, as lower level managers typically do the interviewing and hiring." (emphasis added) (Form of Class Member LI). Shacknai asked another applicant to position herself in a certain way during his individual interview with her: "in my interview [Shacknai] requested I sit in a reclining leather-type chair. His questions focused on difficult customers and that 'my relationship' would influence them to purchase more product. I was wearing a dress." (Form of Class Member TR).

Of the 60 Hostile Work Environment Claimants, 48 (or 80%) reported experiencing some form of inappropriate and illegal questioning during her initial interview. The questions largely focused on topics such as marital status, caregiving responsibilities, plans to have children or get married in the future, and the applicants' economic status. Examples of illegal questioning include the following:

- Are you married? Family plans? If you are looking for a job with quality of life, then this isn't the job for you. This job requires all hours of work. (Form of Class Member EA)(Interview by Jim Rigby and Jonah Shacknai).
- Ask [sic] me during interview if I had kids or was going to have kids as a condition of hiring. (Form of Class Member HA)(Jonah Shacknai and others).
- I was asked if I was married and had children. I explained that I was married and had two daughters. I was questioned about my ability to work and have children. My husband is an optometrist and I was questioned about why I wanted to work based on my husband's occupation. (Form of Class Member DEB)(Jonah Shacknai and Claude Maraoui).
- I was getting married 5/2000. I was asked about my pregnancy plans and if I would continue to work. I was questioned about if my marriage (upcoming nuptials) would last &/or if it was worth it . . . I was told that women at Medicis had limited careers if they had babies. (Form of Class Member LC)(Jonah Shacknai, Richard Havens, Robert Nevin).
- I was interviewing to come from Innovex to Medicis. In my interview with Jonah he asked if my husband had a vasectomy? Said yes and he asked me to tell him about that. . . (Form of Class Member PV) (Jonah Shacknai).
- [A]sked if I was married, had children or was planning on getting married in the near future. I was also asked if I was willing to entertain my doctors during evening or weekend hours. In addition, Vince Ippolito mentioned that the company was seeking people who put "career before family," and did not wish to hire those that would put "family over career." (Form of Class Representative Leslie Baginski)(Jonah Shacknai, Ralph Bohrer, Vince Ippolito).
- I was specifically told that Medicis is the "boys club" and that I should do everything I can to prove myself. (Form of Class Member SB)(Robert Nevin and Michael McMyne).

Many Hostile Work Environment Claimants also noted that the Control Group was uninterested in their substantive qualifications for the job:

- I asked him if he wanted to know anything about my credentials / experience and he said "No, when I walk out of this room, I either give a thumbs up or a thumbs down." (Form of Class Member DP)(Vince Ippolito).
- [Richard] Havens had no interest in her "brag book"/resume but rather asked what magazines she read to learn about fashions and trends . . . Jonah told her she needed Restylane injections for her appearance . . . The men used intimidation during her interview by informing her that if one of the executives did not like

her, they would call a cab and send her home. (Form of Class Member Bonnie Brown²).

- During my interview Richard Havens asked me if I read “fashion magazines.” Richard Havens also told me ”You've got the look.” I do not believe these comments were made to my male counterparts. (Form of Class Member MSB).
- He then followed that question with a question that was irrelevant to my ability to perform the job when he asked, “what does your husband do for a living?” (Form of Class Member TG)(Jonah Shacknai).

Instead of job qualifications, the Control Group was interested in the physical appearance and manner of dress of the candidates, and whether they fit what the Control Group deemed to be the “Medicis profile” for female sales representatives. Other Medicis managers learned to emulate the Control Group’s preferences in their own selection processes:

- When I became a manager I asked Doug Turley what was important for me to know to help get my interview candidates through the home office meetings with Vince, Rick, and Jonah. One of the things he informed me regarding Jonah (CEO) was that “Jonah likes them young.” (Form of Class Representative Laurie Introp).
- When Doug did meet my candidates, he would comment on the appearance of the females. He would state, “first off, she is very pretty,” he'd state negatives such as “bad teeth” or discuss their clothing choices instead of their qualifications. Louis Frisina rejected one very qualified candidate, [AR], because she did not dress “female” enough. These were attributes important to Jonah and the Control Group. (Form of Class Representative Laurie Introp).
- Hires of Medicis have an image to uphold; Randy said, “I only hire attractive women.” (Form of Class Member CRR).
- When I asked Pete Raphael how the maternity backfill interviews were going Pete Raphael said a candidate had been identified. Peter Papas immediately asked, “Is she hot?” to which Pete Raphael responded, “Yes she is attractive.” . . . Their primary concern with female employees is that they are attractive. (Form of Class Member TG).

² Because Ms. Brown passed away during the pendency of this litigation, she is not treated as a class representative. Nonetheless, her Estate, a Plaintiff in the action, filed a Claim Form on her behalf.

These questions were transparently designed to identify women that fit a certain physical profile, and “weed out” women who were married, had child-rearing responsibilities, or planned to get married or have children. The answers also divulged information about the applicants’ sexual availability and economic vulnerability. The questions asked by the Control Group in initial interviews established from the outset of female employees’ tenure at Medicis that offensive stereotypes about women, pregnancy, and caregiving were not only condoned but wholly embraced and promoted at Medicis.

C. The Control Group Fostered The Shared Culture of Harassment at National Sales Meetings and Other Corporate Gatherings

National Sales Meetings, trainings, and other corporate gatherings where senior executives and employees came together put the actions of Jonah Shacknai and the Control Group toward female sales representatives on full display for all Medicis employees. At these corporate gatherings, the Control Group regularly and closely interacted with managers and frontline sales employees, and fostered a single, unitary culture of sexual harassment. Control Group members themselves made offensive and sexist comments in front of subordinates, sending a clear signal that such degrading and offensive treatment of women was not only tolerated but encouraged. In turn, lower-level managers and employees emulated the Control Group’s harassing behavior.

- While we were attending the 2011 National Sales Meeting, I was sitting with two other female employees, [AG] and [KW] during the happy hour meet and greet. [KW] became really uncomfortable and had tears in her eyes after a manager had come up and was whispering in her ear. After he left, I asked if she was ok and she said no and couldn't believe what she was just told. He told her that Jonah Shacknai was proud of her rep of the year award and that he wanted to “fuck” her ... This situation made all 3 of us very uneasy and disgusted. (Form of Class Member MT).
- One night during the training trip in May 2011, I was invited to Robert Nevin’s house for dinner along with other employees. Mr. Nevin hugged and kissed the

female employees in front of the entire group. During the training, Jonah Shacknai came and spoke to my class. He made a comment to a female manager that had recently been hired about how she needed to get injections to look younger. (Form of Class Representative Bridget Oliveto).

- I was humiliated at a companywide National sales meeting where I had to play “charades”. If your name was called and you were not in the room it was held against you. At the time, I was on stage with 3 other women. During the game, two female employees picked a card with the term “doggy-style” on it, and, due to company pressure, had to act out the sex act indicated in front of hundreds of co-workers. This card had been made by someone in the corporate office . . . It was commonplace for the sexist views that many Medicis executives and managers held toward women to be on display for everyone to see. (Form of Class Representative Leslie Baginski).
- At an Aesthetic Sales Meeting that I attended there was a mandatory evening event, charades . . . In one skit, Jonah Shacknai (CEO) who was in attendance, appeared in the room dressed in a shiny outfit appearing to look like a pimp. On his arms were scantily clad “ladies” and they were termed “Jonah’s girls” (presumably his scantily dressed field sales reps). By playing himself in this role it was obvious to all how Jonah viewed his reps and what was valued in their appearance and demeanor. (Form of Class Representative Laurie Introp).
- For instance, it was “mandatory” for Sales Specialists to provide a head shot photograph for the Regional Managers meeting each year, which were later used to embarrass female employees. The headshots were projected on a screen in front of all the managers during the managers meeting while each manager discussed their territory. Typically the viewing was accompanied by inappropriate comments when a female sales specialist’s head shot was displayed. This practice is unnecessary and objectifying. (Form of Class Representative Leslie Baginski).

At corporate meetings, female employees were subjected to intense pressure to drink alcohol and socialize with co-workers and clients late into the night. In this pressurized party culture, the actions of the Control Group and lower male managers made women feel they were expected to be sexually available to their superiors. Descriptions of this party culture by Hostile Work Environment Claimants include:

- During various sales meetings, I witnessed male managers getting female territory managers drunk, groping them & making inappropriate comments boasting about having sex with them the night before, etc. There was just so much inappropriate activity going on - it was shocking to me. (Form of Class Member NA).

- Prior to the annual National Sales Meeting that occurred in Scottsdale, Arizona, Ms. Browder [from HR] called me. She asked me what I would be wearing, and told me to get ready because I would see inflated lips, push-up bras, short skirts and six-inch heels worn by some of the other sales reps. During the meeting, I was pressured to attend nighttime events that involved alcohol and went late into the night. I did not feel comfortable with the pressure to attend these events. (Form of Class Representative Bridget Oliveto).
- The corporate culture at Medicis encouraged and endorsed after-work drinking parties which lead to extramarital affairs. At national sales meetings, it was common to see married reps, managers and even directors hooking up with each other after the usual after-work drink parties. (Form of Class Member MG).
- Management pressured employees to go out drinking and partying with managers after work and at the National Sales Meetings. Women felt pressured to stay up with Rick Havens and drink with him at a bar. Jeff Allen, an Executive specialist, took 2 nurses to a bar that had hardcore pornography all over the walls. (Form of Class Member Bonnie Brown).
- After I was hired I traveled to Scottsdale, Arizona to attend training at Medicis headquarters. Claude Maraoui hosted a dinner at his home for the sales reps who were attending training. At the dinner Claude flirted with the female trainees and encouraged them to drink. This made me feel uncomfortable. I felt obliged to drink and did not want to vocally object to the behavior I witnessed while I was both a guest at the National Sales Director's (Claude's) house and a new employee in training. (Form of Class Member TG).

Like the initial interview process, National Sales Meetings and other corporate gatherings were avenues through which the Control Group created, implemented, and controlled a hostile work environment where it was acceptable for others to harass or sexualize women.

D. Female Employees Were Pressured to Succumb To Quid Pro Quo Advances and A Culture Promoting Sexual Favoritism

Female employees were encouraged to submit to sexual advances as a condition of job benefits or to avoid adverse job actions. The example set by Control Group members, many of whom had sexual relationships with female sales representatives or bragged about having such relationships, spurred on these quid-pro-quo exchanges and sexual favoritism:

- Claude Maraoui - He gave favorable sales goals to a specific female rep that he was having an affair with [RM]. As a result, she exceeded sales goals, earned top

dollar within the sales division, and won Circle for several years. They were both married at the time. Other reps within her region stated she had the lowest goals within her region. (Form of Class Member TS).

- Claude [Maraoui] was married and having an affair with [RM] . . . Rick [Havens] was married and having an affair with a female District Sales Manager [AMR]) ... Jonah [Shacknai]. In the past he had affairs with reps (and actually married one) so others probably felt they could do the same. (Form of Class Member MK).
- I heard reps were asked to go to Claude [Maraoui]'s room to have sex. I also heard about the two reps in Florida who had a job sharing territory. [DU and FK]. I heard they had a threesome with Robert Nevin and that is why they were the only reps in the company that were permitted to have a job-share. Additionally they always had good goals and high performing territories. (Form of Class Member DP).

Female employees who did not make themselves sexually available to managers were disfavored by former senior management. Instead, female sales representatives widely believed that supervisors favored women who accepted sexual overtures by offering them job benefits and opportunities that were not made available to other female employees.

- My experience at Medicis was that females who were in intimate relationships with Senior Management were promoted to higher level positions quicker, and at a higher salary than I. (Form of Class Representative Laurie Introp).
- It was understood that in order to get favorable treatment or opportunities, females had to party and sleep with certain individuals in management. (Form of Class Member HA).
- I felt like the training staff expected trainees to reciprocate in this flirting as a normal part of the Medicis culture. I was put off by this behavior both because I did not think it should be an acceptable part of my workplace environment and I was married . . . I did not want to voice my objections or leave because I knew the trainers would supply feedback to my manager based on my performance at training . . . Sales trainer Troy Magness noticed my cold reaction to the unwanted flirtation activities and said “[I]t doesn’t matter that you are married.” This made me feel very uncomfortable and sexually harassed. (Form of Class Member TG).
- At Medicis, having sexual relations with managers had a positive influence on job security. The extremely hostile work environment and the overwhelming pressure and coercion from Medicis Executive Management for sexual favors led some women to feel they had no other choice but to conform to Management's

expectations. Based on information and belief, members of Executive Management, including the CEO, have had coercive sexual relationships with female sales employees and /or promotions. Such behavior sends a signal to all female employees that they too are sex objects and constitutes sexual harassment. (Form of Class Representative Leslie Baginski).

- Female Reps that were in intimate relationships with male Manager [sic] were giving [sic] assistance to win awards. I was belittled and verbally battered during sales meetings ... Women were dating and having sexual relations with Management. I did NOT partake in this awful actiity [sic] and thisd [sic] was held against me for raises-promotions etc... (Form of Class Member ER).
- I witnessed sexual harassment on multiple occasions during my 3+ year employment with Medicis and Quintiles as a Medicis rep. I saw the VP of Sales pull a rep onto his lap and openly hit on her at a sales meeting dinner. When I wore flats and pulled my hair back into a bun I was criticized by the VP of Sales for "looking like a librarian." Women were expected to flirt with management but I refused and I believe it hurt my compensation. (Form of Class Member AF).

The environment of sexual favoritism created a culture in which managers felt comfortable demanding sexual availability from female sales representatives. As a result, female employees routinely experienced unwanted sexual advances in their daily work, including unwanted touching and sexual commentary:

- Randy Cushen, my former manager, secretly video taped me during ride alongs [sic] with a hidden camera. He repeated [sic] asked me to kneel down or bend over to take inappropriate shots + angles of me working + also questioned me inappropriately. (Form of Class Member DC).
- While Josh DeBlasio was on my sales team he sexually harassed me on a Circle trip to Cabo, Mexico. He came up to me on the dance floor and thrust his erect penis into my buttocks. I was disgusted and moved away from him ... I was also sexually harassed at a meeting in 2012 by Josh DeBlasio. He was relentless in his advances towards me at an after work function at the bar. He told me that if I ever left my husband or was considering leaving him that he wanted to be with me. I tried to walk away but he attempted to follow me to my room. I was compelled to request a female sales representative, [CB] to walk me back to my room. (Form of Class Member MG).
- Michael McCyne became my direct manager in April 2010. I felt that he was hitting on me the first time I met him. He was talking about being unhappy with his significant other and that they did not have sex much. He said it was important to men and that guys need it at least 3 times a week or they will stray. He said he

was just giving me advice since I was a newly divorced. I quit within the same month. (Form of Class Member LB).

- An employee named Chris Hutton regularly sexually harassed Ms. B[] ... When Mr. Hutton saw Ms. B[] and other female employees at the dinner, he commented, “Well, don’t you ladies look hot.” . . . As Ms. B[] was returning to her room, she noticed Mr. Hutton walking behind her. Ms. B[] turned her back and said, “Have a good night, I will see you tomorrow.” He continued walking toward her and tried to kiss her. She avoided his attempt and quickly entered her room alone. During this same meeting in Cabo, Ms. B[] was at the small hotel gift shop, and Mr. Hutton approached her from behind and said “You know, we can get some Viagra here.” (Form of Class Member Bonnie Brown).

E. Female Medicis Employees Endured Unwelcome Sexually-Charged Commentary and Offensive Stereotypical Comments About Women, Pregnancy and Caregiving

As part of their daily work environment, female sales representatives at Medicis were subjected to unwelcome sexually-charged “jokes” and commentary. Some examples of these comments reported by Hostile Work Environment claimants include the following:

- I was told [by Jonah Shacknai] that “what I needed was a little sport f***ing” by a member of the board and [illegible]. (Form of Class Member LS).
- I began to discuss the challenges I was having because I no longer had coverage under Blue Cross Blue Shield or Medicaid / Medicare and that was the primary payers in my territory at the time. In response to my concerns about the coverage and the disadvantage I had because of it, [Howie McRibbon] replied, “You’ll need to start sucking a lot of BCBS dick to get covered in Iowa.” . . . When I told Erin Browder [in HR] what he told me, she said that was just the way men at this company behaved. (Form of Class Member MT).
- I heard many men and women commenting about women's physiques. “That girl has had work done.” “She has nice tits.” (Form of Class Member DP).
- . . . Jeff Allen (Medicis employee) said to me “If I beat you in rankings you have to show me your tits.” (Form of Class Member MSB).

Female employees were also subjected to offensive stereotypical comments about women, pregnancy, and caregiving. These comments reinforced the idea first introduced during the initial interviews of female employees — that women with caregiving responsibilities were

inferior employees and did not deserve to be treated equally with male employees, regardless of whether the men had similar responsibilities.

- On the same day my direct manager told me I would always be subject to extra scrutiny under the performance improvement plan he plainly expressed to me that the best way to please him was to abort my well planned pregnancy so that I did not trouble him with the hassle of servicing my territory while I was on maternity leave ... (Form of Class Member TG).
- In September 2011 I found out I was pregnant. I was terrified to tell anyone at Medicis as Medicis was known to be a “boys Club.” I was told on multiple occasions “Medicis First, Family Third.” At 18 weeks I had to tell Randy as I was clearly pregnant. He told me that it was “ridiculous for me to get pregnant at my age (I was 38) and that I will probably have a miscarriage on the side of the road.” He also said “that having a baby at my age was as stupid as those women in Africa that keep having babies when they are not healthy enough” ... My manager kept telling me I was too old to have children (38 yrs) and that I would have a miscarriage in my company car which made me a liability to Medicis. (Form of Class Member CRR).
- Medicis had a company culture that pressured female employees to drink alcohol and stay out late partying with managers and colleagues. At one National Sales Meeting, one of my pregnant co-workers became exhausted after a full day of company events from 7 am to 11 pm. She needed to excuse herself due to severe cramping that she was experiencing. After she returned to her hotel room, my manager Robert Welch became angry and claimed she had no excuse not to be present. I explained that she had simply over-exerted herself, and he responded, “I didn’t put her in that condition.” This offensive comment was typical of the environment at Medicis which created a hostile work environment. (Form of Class Representative Lindsay Pihaly).
- While I was pregnant I was training in Arizona for 2 weeks. The trainer/manager asked me if “this was my last one” in a very sarcastic way. He laughed and said to another person sitting next to us, “can you believe she’s pregnant and she’s a part of the ’initial hire training class.’” (Form of Class Member JMP).
- We were told on a conference call that no other girls on the team can get pregnant because our boss couldn’t afford any vacant territories. (Form of Class Member KW).

These sexist, offensive, and stereotypical comments were pervasive throughout the Medicis culture and workplace.

F. Female Employees Suffered From and Sought Treatment for Adverse Psychological and Physical Effects from the Hostile Work Environment

Many female Medicis employees suffered negative psychological and physical effects as a direct result of the severe unwelcome conduct to which they were subject on a regular basis as part of their employment. Of the 60 Hostile Work Environment Claimants, 31 (or 52%) actively sought care from a healthcare provider to deal with the effects of the hostile environment experienced at work. The symptoms and diagnoses of these women are strikingly similar, with the majority suffering from depression, anxiety, and other stress-related illnesses. Most were prescribed some form of medication, with antidepressants such as Lexapro and Zoloft and anti-anxiety medications such as Xanax appearing commonly throughout the Claim Forms. Still other female employees reported similar stress-related symptoms but preferred to deal with them without formal medical care. A few examples describing the symptoms and causes of the conditions suffered by Medicis female employees include:

- I had not suffered with anxiety before my employment + today I do not suffer with it either. It was 100% connected to the hostile, discriminatory culture of Medicis.
- [My obstetrician] put me on an anti-depressant called Zoloft during the second trimester of my pregnancy for anxiety. When I would see him I would explain the anxiety was about my employer, Regional Manager, VP of Sales and the stress they were putting me under regarding my job . . .
- I was speaking to a coworker and she had mentioned that almost everyone in the Aesthetic Sales Force was either taking Xanax, Ambien or was on some other prescription drug for anxiety or depression or sleep deprivation.
- Depression / post-partum [sic] depression became more substantial being pushed to come back to work as soon as possible. It was frowned upon by my manager to take any longer off.

The prevalence of the adverse psychological and physical effects suffered by Hostile Work Environment Claimants shows that the work environment at Medicis was not only

offensive and inappropriate, but these women shared a common injury — the severe and lasting effect on the working conditions and personal lives of the women who suffered under it.

III. ARGUMENT

The Court should expand the claims of the preliminarily certified Class to include hostile work environment claims under the standards developed pursuant to Rule 23 of the Federal Rules of Civil Procedure. The analysis should be similar to that used by the Court in deciding to preliminarily certify the proposed Class to pursue compensation and promotion claims. As before, the Court should use a threshold inquiry standard intended merely to reveal conspicuous defects. *Manual for Complex Litigation (Fourth)* § 21.632 (2004). The proposed claims in this case do not suffer from any conspicuous defects that would prevent the Class from asserting hostile work environment claims, for the purpose of settlement only, under Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation and at least one of the subsections of Rule 23(b), in this case Rule 23(b)(3). *See 4 Newberg on Class Actions* § 11.27 (“When the court has not yet entered a formal order determining that the action may be maintained as a class action, the parties may stipulate that it be maintained as a class action for the purpose of settlement only.”)

Courts have found that classes may pursue hostile work environment claims when “a sexually hostile environment results from unwelcome conduct based on sex which, based on all of the circumstances, is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 22718 at *16 (S.D. Ill. 2001). “The members of a class alleging a hostile work environment are not required to prove that each of them experienced abuse, which, considered in isolation, was objectively sufficiently severe or pervasive to alter the conditions of their

employment and create an abusive atmosphere. Rather, the plaintiffs must demonstrate that the ‘landscape of the total work environment’ was hostile towards the class.” *Brown v. Nucor Corp.*, 2012 U.S. Dist. LEXIS 190946, *66-67 (D.S.C. Sept. 11, 2012). In this case, plaintiffs believe that the information provided in the Claims Forms is sufficiently strong that there is no need for a hearing to conclude that the class hostile environment claims are appropriate.

A. The Proposed Hostile Work Environment Claims Satisfy Rule 23(a)

Federal Rule of Civil Procedure 23(a) allows a class to assert a claim when “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. 23(a). No conspicuous defects under these requirements prevent the class from asserting hostile work environment claims.

1. A Class Asserting a Claim on Behalf of 60 Members Satisfies Numerosity

Courts generally agree that classes with forty or more members satisfy the numerosity requirement. *See Bynum v. District of Columbia*, 214 F.R.D. 27, 32 (D.D.C. 2003); *Frazier v. Consol. Rail Corp.*, 851 F.2d 1447, 1456 n.10 (D.C. Cir. 1988). Based on Class Counsel’s review of the Claim Forms received by the Claims Administrator, 60 Class members documented experiencing a sexually hostile work environment during the relevant time period. Courts have certified hostile work environment classes with very similar numbers of employees. *See Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 22718 at *16 (S.D. Ill. 2001) (78 members); *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 664 (D. Minn. 1991) (65 members).

The certification of these claims is even more appropriate for certification than the raw numbers indicate, for three reasons. First, the 60 Hostile Work Environment Claimants are

geographically dispersed, being located in twenty five (25) states from the west coast to the east coast. Exhibit B. *See Lewis v. National Football League*, 146 F.R.D. 5, 8-9 (D.D.C. 1992) (holding that numerosity satisfied for class of approximately 250 members in part because “the geographical dispersion of the potential class members” makes joinder “clearly impracticable”); *Meijer, Inc. v. Warner Chilcott Holdings Co. III*, 246 F.R.D. 293, 306-07 (D.D.C. 2007) (holding that numerosity satisfied for class of about 30 members who are “geographically dispersed, such that joinder would be impracticable”). Second, the Class already has been preliminarily approved to assert other claims, and it is judicially efficient to allow Class members to assert additional claims as well, for the same reason that moderately sized subclasses are approved. *See Haggart v. United States*, 104 Fed. Cl. 484, 489 (2012) (“numerosity must be considered in the unique context of subclasses. ‘[J]udicial economy arising from the avoidance of a multiplicity of actions favors certification,’”) (quoting); *Otsuka v. Polo Ralph Lauren Corp.*, 251 F.R.D. 439 (N.D. Cal. 2008) (holding that subclasses satisfy numerosity requirement even though smallest has 49 members partly because “the fact that the subclass members are also members of the larger class, also suggest that the subclasses, though small, meet the numerosity requirement of Rule 23(a)). Finally, the *Jenson* and *Wilfong* classes were certified prior to the claims process, before any class members actually came forward, and were likely to shrink during the litigation process. Here, 60 Class members have actually come forward to assert hostile work environment claims. For all these reasons, the Hostile Work Environment Claimants meet the numerosity requirement.

2. Common Questions of Law and Fact Exist Regarding Medicis’ Policies and Practices Affecting its Hostile Work Environment

Commonality requires that the claims in a case raise issues that involve questions of law or fact common to the class, but does not require that every issue of law or fact be identical with

respect to each class member. *Taylor v. D.C. Water & Sewer Auth.*, 241 F.R.D. 33, 37 (D.D.C. 2007). Not all questions need to be common to the class – “even a single common question will do.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011). In general, the commonality requirement is satisfied where there is at least one issue which, if resolved, affects all or a significant number of class members. *DL v. District of Columbia*, 713 F.3d 120, 128 (D.C. Cir. 2013).

To prove a hostile work environment, a plaintiff must prove that:

- (1) the conduct was severe or pervasive enough to create an intimidating, hostile or offensive work environment;
- (2) the conduct was motivated by discriminatory animus based on sex;
- (3) the conduct was unwelcome; and
- (4) there is some basis for imputing liability to the employer.

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993)). The first element requires proof that the environment was both hostile to a reasonable woman and that it was perceived as hostile by the individual plaintiff or claimant. *Id.* at 21-22.

As courts have found, the commonality requirement may be satisfied as to several of the four requirements in hostile work environment cases where, as here, the challenged practices were committed under the supervision or approval of a small group of upper-level managers. *See Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 22718 at *9, 17-18 (S.D. Ill. Dec. 27, 2001) (“Rent-A-Center’s top executives have enunciated and directed the enforcement of a policy of sex discrimination . . . A hostile work environment claim, like Plaintiffs’ claim, involves crucial questions of fact common to the claims of all class members.”); *Neal v. Moore*, 1994 U.S. Dist. LEXIS 21339 at *28 (D.D.C. 1994) (“The challenged practices may have been committed under the supervision and with the approval of the Director of the Department . . . An

obvious common factual question is whether defendants knew of and tolerated a systemic policy of harassment . . . And whether this policy violates Title VII or 42 U.S.C. § 1983 is a common question of law.”).

Indeed, hostile work environment claims are uniquely suited to disposition on a class basis, because the pervasive and severe working conditions resulting from unwelcome conduct based on sex will affect not only the individual women at whom such harassment is directed, but most if not all female employees who experience this environment. As the Supreme Court has recognized, “[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The “unlawful employment practice” therefore . . . occurs over a series of days or perhaps years . . . Such claims are based on the cumulative effect of individual acts.” *AMTRAK v. Morgan*, 536 U.S. 101, 115 (2002) (internal citations omitted). The cumulative effect is suffered not just by the direct victims of the individual acts comprising it. “[O]ne can ‘presume’ from [a finding of a pattern or practice of sexual harassment] that the working environment, as a whole, is hostile, and that *most women* would also find such an environment subjectively hostile.” *EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059, 1079 (C.D. Ill. 1998)(emphasis in original).

Based on the Claim Forms submitted by Class members, Plaintiffs can identify several common questions of law and fact that meet the commonality requirement and show that Hostile Work Environment Claimants were subject to the same shared hostile work environment, as opposed to separate, unrelated incidents of harassment. Common questions in the present case include, but are not limited to, the following:

- Was the conduct severe or pervasive enough to create a work environment that a reasonable woman would find to be hostile? *See Jenson*, 139 F.R.D. at 665 (“the

common question of law is . . . whether a reasonable woman would find the work environment hostile”).

- Did Medicis’ executives, including former CEO Jonah Shacknai, and managers engage in this conduct because of the sex of the Hostile Work Environment Claimants? *See Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 22718 at *9 (treating evidence of company policy such as “statements made by the Company’s Chairman and CEO” and “statements made by officers, vice-presidents, regional directors, market managers and store managers across the company” toward women as common issue).
- May liability be imputed to Medicis on the bases that its top executives created the hostile work environment, knew and condoned of the behavior of managers and co-employees, and/or did not take action to prevent and promptly correct harassing behavior? *See Mitsubishi*, 990 F. Supp. at 1072 (treating “company’s notice and negligence” as common issue).

The resolution of these common issues would impact the Hostile Work Environment Claimants as a whole. The answers to these common questions are established by common, class-wide proof such as that which is set forth in the submitted Claim Forms.

3. The Class Representatives’ Claims Are Typical of the Hostile Work Environment Claimants

“The typicality requirement aims at ensuring that the class representatives have suffered the same injuries in the same general fashion as absent class members.” *Cohen v. Warner Chilcott Pub. Co.*, 522 F. Supp. 2d 105, 114 (D.D.C. 2007). The typicality requirement “may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and the other

members of the class.” *Markham v. White*, 171 F.R.D. 217, 223 (N.D. Ill. 1997). Thus, “it is not necessary that each of the named plaintiffs be subjected to all of the methods by which the defendants may have harassed . . . employees. All that is required is that the named plaintiffs suffered from the general policy of harassment . . . alleged to be operative” at the company. *Neal*, 1994 U.S. Dist. LEXIS 21339 at *30 (certifying sexual harassment class). Courts have liberally construed the typicality requirement. *See, e.g., In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 259 (D.D.C. 2002).

The claims of the class representatives in this case are typical of the claims of the Hostile Work Environment Claimants. Leslie Baginski, Laurie Introp, Lisa Levine, Lisa Cummings-Gallina, Bridget Oliveto, and Lindsay Pihaly all submitted Claim Forms describing the type of hostile work environment that they experienced while employed at Medicis. As can be gleaned from the excerpts reproduced in the fact section above and from the fuller presentation in Exhibit A, their claims involved fact patterns highly similar to those of other members of the Class, including being subjected to an inappropriate interview process by members of the control group, attending the sexually charged sales meetings, experiencing unwelcome sexually-charged commentary and offensive stereotypical comments about women, pregnancy, and caregiving, and experiences or knowledge of quid pro quo advances and sexual favoritism. The claims of the class representatives and other Hostile Work Environment Claimants thus rest on similar evidence and common legal theories of liability and recovery. The typicality requirement is satisfied, and no basis exists not to include hostile environment claims among those asserted by the Class for failure to meet the typicality requirement.

4. Class Representatives and Their Counsel Continue To Adequately Represent the Class

The adequacy requirement is intended to expose incompetent or ineffective class counselor to uncover any potential conflicts of interest between class representatives and the remaining class members. *See Anchem Prods. v. Windsor*, 521 U.S. 591, 625-27 (1997). Based on Plaintiffs’ Motion for Preliminary Approval of Class Settlement, ECF No. 6, the Court already has held that “[t]he Plaintiffs and their counsel are adequate representatives of the Settlement Class,” finding that Leslie Baginski, Lisa Cummings-Gallina, Laurie Introp, Lisa Levine, Bridget Oliveto, and Lindsay Pihaly are adequate Class Representatives. ECF No. 37 at ¶ 2(c). The Court appointed Cyrus Mehri and Ellen Eardley³ of Mehri & Skalet PLLC and Sara Wyn Kane of Valli Kane & Vagnini LLP as Lead Class Counsel. *Id.* ¶ 2(d). No changes in the status of the class representatives or Lead Class Counsel affects their ability to adequately represent the Class.

B. The Proposed Certification of the Hostile Work Environment Claims Satisfies Rule 23(b)(3)

The Class will continue to satisfy the provisions of Rule 23(b)(3) if hostile work environment claims are included. The Court previously has preliminarily certified a “hybrid” class under Rules 23(b)(2) and (b)(3) to pursue the class-wide claims for discrimination in compensation and promotions. ECF No. 37 ¶ 4. The declaratory and injunctive relief that is the hallmark of a 23(b)(2) class are unnecessary to protect the Hostile Work Environment Claimants because Mr. Shacknai and other members of the Control Group have not been employed by Medicis for three years. Certification of the hostile work environment claims under Rule 23(b)(3) is appropriate for the same reasons that the Court certified the Class claims partly under

³ Ellen Eardley is no longer employed at Mehri & Skalet, PLLC and has withdrawn from representation. ECF No. 35. However, this does not impair Mehri & Skalet’s ability to continue to adequately represent the class.

Rule 23(b)(3)— namely, that common factual and legal questions associated with the hostile work environment claims predominate over factual and legal issues affecting only individual members, and that a class action is superior to other means for adjudicating the issues. *Id.* ¶ 4(b).

1. Common Issues Predominate Over Purely Individualized Issues

Rule 23(b)(3) requires the court to find that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The predominance requirement

does not simply require a mathematical accounting of whether common or individualized questions are more *numerous*. Instead, it requires a qualitative assessment . . . it is not bean counting . . . If the most substantial issues in controversy will be resolved by reliance primarily upon common proof, class certification will generally achieve the economies of litigation that Rule 23(b)(3) envisions. If not, the parties are better served by individualized trials.

In re Air Cargo Shipping Servs. Antitrust Litig., Master File No. 06-MD-1175 (JG)(VVP), 2014 U.S. Dist. LEXIS 180914, at *193-194 (E.D.N.Y. Oct. 15, 2014) (quotation deleted).

The three common questions of law and fact affecting the Hostile Work Environment Claimants — Was the conduct severe or pervasive enough to create a work environment that a reasonable woman would find to be hostile? Did Medicis’ executives, including former CEO Jonah Shacknai, and managers engage in this conduct because of the sex of the Hostile Work Environment Claimants? May liability be imputed to Medicis on the bases that its top executives created the hostile work environment, knew and condoned of the behavior of managers and co-employees, and/or did not take action to prevent and promptly correct harassing behavior? — are the most substantial questions in controversy as to class members’ hostile environment claims. Their resolution will largely establish whether Medicis is liable to class members.

These questions will largely be resolved based on common proof. Through that proof they will attempt to show that: female employees were asked inappropriate and discriminatory questions, largely focusing on topics such as marital status and caregiving responsibilities, in their interviews with Control Group members; female employees were subjected to unwelcome sexually-charged commentary and offensive stereotypical comments about women and pregnancy on a continuing basis and especially at company-wide meetings; a culture of partying existed that pressured women to drink alcohol, socialize with co-workers, bosses, and clients late into the night and on weekends; this culture pressured women to succumb to unwanted touching, harassment, quid pro quo advances and sexual relationships with male supervisors in order to receive job benefits not offered to others; and a small group of former Medicis senior executives were responsible for fostering these pervasive and severe working conditions. Hostile Work Environment Claimants are also unified by a common legal theory — that these policies violated Title VII.

By contrast, whether a particular class member found the environment subjectively hostile and whether she welcomed the conduct are not likely to be issues in substantial dispute. Thus, the common issues predominate over any questions affecting only individual class members.

2. A Class Action Is Superior to Other Means of Adjudicating the Dispute

A class action is superior to other methods for the fair and efficient adjudication of the dispute over whether Medicis maintained a hostile work environment. Possible difficulties in managing a class action are not in issue after the parties have agreed to a settlement. *Amchem*, 521 U.S. at 620. And in this case, Class members already have “voted” that a class action is superior. No Class member has opted out to litigate her hostile environment claims individually,

or has objected to the proposed settlement on any basis. Sixty Class members have presented information concerning the hostile environment, from which it can be inferred that they are looking to this settlement to compensate them for the injuries suffered on account of the environment. Given the strong common factual themes evident in the Claim Forms, requiring each Class member to pursue her claim individually would result in wasted time and resources. Plaintiffs are unaware of any Class member engaging in ongoing individual litigation over the existence of a hostile work environment during the period prior to December 2012. Certification of the hostile work environment claims would “achieve economies of time, effort, and expense, and promote . . . uniformity of decisions as to persons similarly situated.” *Id.* at 615.

IV. CONCLUSION

The hostile work environment at Medicis was created by a small group of former senior executives, including former CEO Jonah Shacknai. The single, shared culture fostered by these individuals created a work environment in which sexual, offensive, and stereotypical commentary were pervasive, women were pressured to succumb to quid pro quo advances and accept a culture of sexual favoritism to advance their careers, and systemic harassment and unwanted touching of female employees was commonplace. During the period up to December 2012, these practices were not addressed, much less effectively so, by Medicis. Since then, the company has addressed the issues by terminating the employment of Shacknai and his Control Group, but that does not eliminate the right of affected Class members to be compensated.

Plaintiffs respectfully request that the Court, without resort to a hearing,

- a. permit the preliminarily certified Class to pursue the hostile work environment claims on a par with the previously approved advancement and compensation claims;

- b. set a deadline for the parties to file a motion for final approval of the class action (including the hostile work environment claims) and the Settlement as well as for Class Counsel to file its motion for an award of attorneys' fees and costs;
- c. set a date and time for a final fairness hearing; and
- d. authorize Plaintiffs to send a Second Notice to members of the Class in the form attached as Exhibit C to advise Class members of these developments.

Respectfully submitted this 22nd day of January 2016,

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CERTIFICATE OF SERVICE

I certify that on January 22, 2016, a true and correct copy of Plaintiffs' Analysis of the Claims Form Data Concerning Possible Expansion of the Scope of the Class Claims to Include Hostile Work Environment Claims and a Proposed Order was served via electronic mail on counsel and/or hand delivery for Defendant listed below:

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