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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE PARTIES' JOINT MOTION FOR FINAL APPROVAL OF THE PROPOSED CLASS SETTLEMENT

This action arises from Plaintiffs' allegations that Medicis Pharmaceutical Corporation ("Medicis" or "Defendant") engaged in systemic, nationwide discriminatory treatment of female field sales employees in the Aesthetics and Dermatology divisions in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII") and applicable state civil rights laws. Plaintiffs claim that prior to December 11, 2012,[1] the senior management of the field sales Aesthetics and Dermatology divisions—led by Jonah Shacknai, then Chief Executive Officer of Medicis—oversaw policies and practices that allegedly discriminated against female field sales employees, impacting selection, compensation, promotion, leaves of absences and termination, and created a workplace culture that constituted systemic sexual harassment.

[1] Valeant Pharmaceuticals International, Inc. ("Valeant") purchased Medicis on December 11, 2012. Following Valeant's acquisition of Medicis, CEO Shacknai and many members of his executive sales management team ceased to be employed by the Company. Valeant's policies and practices are outside the scope of this action.

The proposed $7.15 million settlement[2] is fair, adequate, and reasonable. It is the product of extensive bargaining by both sides guided by six in-person mediation sessions and numerous calls with the mediator. It provides highly significant sums of recovery for Claimants. It creates long-lasting programmatic relief that will benefit female field sales employees currently employed by Defendant.

This Court found the Settlement within the range of fair, reasonable and adequate when it granted Preliminary Approval on August 5, 2015. (ECF 37). Following the Court's Preliminary Approval Order, the parties and the Claims Administrator complied with the Notice plan. Class Members have responded favorably to the Settlement. Notably, no Settlement Class Member has opted out of the Settlement, nor have any objections been lodged over any aspect of the Settlement Agreement. In light of the significant risks posed by continuing litigation and the possibility of no recovery at all on behalf of the Class, the Settlement is fair, reasonable, and adequate, and, accordingly, should be finally approved.

The history of this litigation and the terms of the Settlement are described in detail on pages two through eleven of Class Counsel's Memorandum in Support of the Motion for Preliminary Approval. (ECF 6). This extensive history is summarized below.

I. FACTUAL AND PROCEDURAL BACKGROUND

In February 2009, named Plaintiff Laurie Introp filed the first of Plaintiffs' charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") against Medicis, alleging sex/pregnancy discrimination in compensation, promotion, and other terms and conditions of employment in violation of Title VII and

[2] The parties' Modified Settlement Agreement (hereinafter "Settlement" or "S.A.") is attached as Exhibit 2 hereto.

applicable state and/or local civil rights laws. Named Plaintiffs Brown, Baginski, Cummings-Gallina, Oliveto and Pihaly also each filed charges of discrimination with the EEOC. In their EEOC charges and in the demand letter sent to Defendant by Class Counsel, Plaintiffs asserted that Defendant had a pattern and practice of discriminating against its female field sales employees on the basis of their sex, and that the standard operating procedure affected virtually all aspects of the employment relationship.

Beginning in the fall of 2011, counsel for Defendant and Plaintiffs engaged the services of Hunter Hughes, Esq., a highly experienced mediator, to conduct six in-person and numerous other telephonic mediation sessions. (Mehri Decl. ¶ 18, 23.)[3] In order to facilitate settlement discussions, the parties executed tolling agreements covering the time period from September 1, 2011, to the date of this Action. Defendant produced electronic human resource data and other information concerning the Aesthetics and Dermatology sales workforce and work practices relevant to the claims asserted by Plaintiffs. Class Counsel conducted interviews of individuals from numerous states during the course of the investigation. Class Counsel also retained an expert to conduct statistical analyses of the human resource data. The expert reviewed the data, ensured it was complete, requested supplemental data, and analyzed the data. The expert conducted studies similar to those that would have been conducted in preparation for a trial on this matter. *Id.* ¶¶ 19, 22, 25-27.

Experts from both sides exchanged reports and participated in several mediation sessions. The opponents' analyses were contested by the parties. The parties also devoted a day of mediation entirely to the discussion of the experts' findings with the respective

[3] Class Counsel Cyrus Mehri's Declaration in support of Final Approval and an Award of Attorneys' Fees and Expense Reimbursement (hereinafter "Mehri Decl.") is attached as Exhibit 1 hereto.

experts and counsel. Class Counsel reviewed numerous employment personnel policies related to the facts underlying the claims and the legal issues raised in the EEOC Charges. As the negotiations and information exchange continued, Class Counsel also continued its interviews with potential Class Members. *Id*. ¶¶ 22-23, 25-27. After about a year and a half of intense negotiations, on March 19, 2013, counsel executed a Memorandum of Understanding setting forth the material terms of the proposed Settlement Agreement. Thereafter, the parties continued to work to resolve the details of the proposed settlement, exchanging numerous drafts of the Settlement Agreement and related papers. *Id*. ¶ 30. On September 4, 2013, the parties fully executed the proposed Settlement Agreement. *Id*.

The Parties moved for Preliminary Approval of the Settlement in September 2013. After several hearings and the Court's denial of the motion without prejudice (ECF 26), the Court informed counsel that the Court was inclined to provisionally certify the proposed class in connection with the settlement of pay and promotion claims asserted by Plaintiffs, but expressed concern that it could not certify the hostile environment claims with the record before the Court. The parties modified the Settlement Agreement to exclude class-wide hostile environment claims. (Mehri Decl. ¶ 31-32). On August 5, 2015, the Court granted Preliminary Approval to the modified Settlement, and reserved judgment on whether to expand the scope of the Class claims to include hostile environment claims pending the submissions of claim forms. (ECF 37). Specifically, the Court indicated that the Notice and claim form process may provide a more complete record by which to determine if there was sufficient evidence supporting class certification for hostile environment claims. (Mehri Decl. ¶ 31).

Per the Court's August 2015 Order, the Claims Administrator mailed the Notice and claim forms to the Class. The response from the class was robust and overwhelmingly positive – no Class Member lodged an objection to the Settlement, nor did any Class Members choose to opt out of its provisions. Of the 225 Members of the class, 99 (or 44%) submitted claim forms by the deadline, a relatively a high percentage response. *Id.* ¶ 35-36.

Plaintiffs' Counsel reviewed the claim forms submitted by Class Members and prepared a thorough, 29-page written analysis of hostile work environment allegations contained therein. Plaintiffs' Analysis included a chart which systematically categorized each of the allegations, if any, regarding hostile environment made by each of the 99 claimants. *Id.* ¶ 37. Of the 99 claim forms, 60 (or 61%) contained evidence of a hostile work environment during the relevant time period of employment at Medicis. *Id.*; (ECF 41).

Following a hearing, on March 21, 2016, the Court ordered that the scope of the claims of the Class be expanded to include hostile environment claims. (ECF 45). Based on Class Counsels' in-depth factual analysis, the Court found that the record supports class certification of hostile environment claims. (Mehri Decl. ¶ 38).

All parties and their counsel recognize that, in the absence of an approved settlement, they would face a long litigation course, including motions to dismiss, motions related to class certification, formal discovery, motions for summary judgment, and trial and potential appellate proceedings that would consume time and resources and present each of them with ongoing litigation risks and uncertainties. The parties desired to avoid these risks and uncertainties, as well as the consumption of time and resources,

and ultimately determined that an amicable settlement pursuant to the terms and conditions of the attached Settlement Agreement would be more beneficial to them than continued litigation. (Mehri Decl. ¶¶ 44-45, 62-63.) Class Counsel asserts that the terms of the Settlement Agreement are in the best interests of the class and are fair, reasonable, and adequate. *Id*. ¶ 42.

II. SUMMARY OF THE SETTLEMENT AGREEMENT PROVISIONS

A. General Provisions and Monetary Relief

The Settlement Agreement provides for both important injunctive relief as well as a "Settlement Fund" of $7.15 million. Except as noted, the Fund will cover:

a. All amounts to be paid to Class Members, including Named Plaintiffs;

b. All of Class Counsel's fees and costs, including those in connection with securing court approval of the Settlement, the claims process, and the monitoring of the Settlement Agreement;

c. Costs in connection with the Fund that exceed $100,000, including, but not limited to, those related to notice, claims processing, legal advice relating to the establishment of the qualified settlement fund and tax treatment and tax reporting of awards to claimants, preparation of tax returns (and the taxes associated with such tax returns as defined below), and the Claims Administrator's fees and expenses;[4] and

d. All applicable federal, state and local income taxes and the employee's portion of applicable payroll taxes. The Fund does not include Defendant's share of taxes or contributions (*i.e.*, FUTA, SUTA, FICA, and Medicare), which Defendant will pay separately to the Claims Administrator.

S.A. § VIII.

Garden City Group, LLC in Seattle, Washington is serving as the Claims Administrator and Trustee of the Settlement Fund with respect to the handling,

[4] Defendant will make separate payments of up to $100,000 to pay for claims administration, in addition to the Settlement Fund. *See infra*.

management, and distribution of the fund. Loree Kovach,[5] who is a Director of Operations at Garden City Group, is the primary Garden City Group employee overseeing the administration of the case. The Settlement directs the Claims Administrator to apply a formula to determine each Claimant's monetary award from the Settlement. The parties have agreed that the formula, described in further detail below, will be based on the following: (1) a back pay component based on length of service or tenure during the recovery period (February 9, 2007 through December 10, 2012); (2) a compensatory damages component based on information provided on the claim form regarding individual evidence of alleged sex discrimination and/or compensatory damages; (3) an interest component; (4) information provided by Class Counsel and on the claim form regarding the Claimant's contribution to the prosecution of this matter, if any, and (5) the scope of the release to be executed by the individual. (S.A. §VIII.E.) Sixty-five percent of the total amount to be distributed to Claimants shall be allocated to the back pay component, twenty-five percent of that total amount shall be allocated to the compensatory damages component, and ten percent of that total amount shall be allocated to the interest component. *Id*. The Claims Administrator will determine the allocation among back pay, compensatory damages and/or interest for each Claimant based on the information applicable to that Claimant. It is anticipated that not every Claimant will be allocated awards based on the same 65-25-10 percentages, and indeed, it is anticipated that some Claimants may not be allocated one or more of the three components. Any funds not distributed from the compensatory and interest components shall be reallocated to the back pay component.

[5] The Declaration of Loree Kovach (hereinafter "Kovach Decl.") is attached as Exhibit 3 hereto.

Following the Claims Administrator's determination as to the monetary award, if any, that should be paid to each Claimant from the Settlement Fund, the Claims Administrator shall send a Notice of Award to each eligible Claimant, along with a Named Plaintiff Release or a Class Member Release, whichever is applicable. Within a reasonable time period after receipt of an executed Named Plaintiff Release from a Named Plaintiff or an executed Class Member Release from a Class Member, the Claims Administrator shall send the Named Plaintiff or Class Member her award payment. (S.A. §§VIII.E4). Any Named Plaintiff who does not execute and timely deliver an executed Named Plaintiff Release to the Claims Administrator within two (2) months of the date of the Notice of Award was mailed to her shall be ineligible for, and forever barred from receiving, monetary relief under this Settlement Agreement and be deemed to have fully and finally discharged Defendant from any and all claims of sex discrimination. Any undistributed funds that remain after six (6) months from the mailing of the Notice of Award due to failure to execute and timely deliver a release shall be distributed to 501(c)(3) organizations advancing career opportunities for women, including career opportunities in the pharmaceutical industry, as selected by Class Counsel. *Id.* §§VIII.E4-7.

The proposed Administrative Order filed herewith will facilitate the administration of the Settlement Fund by the Claims Administrator. Among other things, the Order allocates the settlement fund into portions for claims, attorneys' fees, and administrative expenses, and appoints Garden City Group, LLC, as Trustee and outlines its duties.

B. <u>Injunctive, Programmatic Relief</u>

The Settlement Agreement requires the Company to implement programmatic relief with respect to its Aesthetics and Dermatology field sales force, which will remain in place for at least three (3) years following the effective date of the Settlement Agreement. The injunctive relief impacts numerous policies and practices of the Defendants and is aimed at improving and enhancing the experiences of female field sales representatives. The Company has agreed to undertake the following actions with respect to its field sales force in its Aesthetics and Dermatology dvisions::

a. Deliver an annual communication of its non-discrimination/harassment policies and complaint procedure, including a written and oral statement by senior leadership affirming its support of those policies and procedures. The policies, procedures, and written statement will be available on the employee intranet;

b. Provide comprehensive training on its non-discrimination/harassment policies to all new hires, employees, managers and supervisors in its sales force in its Aesthetics and Dermatology divisions at least twice over the three-year term. At least one of the training sessions will occur at the annual sales meeting;

c. Develop an anonymous hotline for employees to make complaints about discrimination and harassment concerns. A high-level employee in Human Resources or Compliance—trained and experienced in conflict resolution, investigation of sexual harassment complaints, and Title VII—will investigate the complaints, make recommendations regarding the matter, provide a written resolution to the employee, and ensure that any actions required by the resolution are implemented. An employee who disagrees with the written resolution may appeal to the Company Group Chair of Medicis;

d. Provide a vehicle for employees to register interest in possible advancement to supervisory and management positions. The Company will review the employee registry before advertising any vacancy in such positions outside the Company;

e. Provide feedback/guidance as part of the annual performance review on steps/improvements an employee should consider to reach his or her stated career goals;

f. Provide field sales employees with information about their sales goals and the factors used to establish them, as well as provide a vehicle for employees to seek review of their sales goals by higher level sales management after first attempting to resolve any concerns with their immediate managers;

g. Direct managers and supervisors not to ask applicants for employment or candidates for promotions questions about (1) their relationship status, marital status, plans for marriage, or spouse; or (2) their plans for having children;

h. Provide lawful treatment of field sales force employees with caregiving responsibilities consistent with the EEOC Enforcement Guidance 915.002 (May 23, 2007).

i. Ensure that employees' eligibility for consistency bonus compensation is not adversely affected by having taken leaves of absence for three months or less for maternity or paternity reasons;

j. Analyze employee compensation by sex on an annual basis; and

k. Submit written progress reports to Class Counsel and mediator Hunter Hughes articulating the actions taken to fulfill its programmatic relief obligations.

(S.A. §VII.A). Given that the Court has approved the Class to pursue a settlement of hostile work environment claims, under the Agreement the Company will also:

l. Include a provision in appropriate policy/compliance manual for its field sales force in its Aesthetics and Dermatology Divisions indicating that when alcohol is permitted to be consumed at company-sponsored events, it should be consumed responsibly and no employee should be pressured to consume alcohol; and

m. Include a provision in an appropriate policy/compliance manual for its field sales force in its Aesthetics and Dermatology divisions discouraging romantic/sexual relationships between supervisors and subordinates. If the Company learns that a manager/supervisor has engaged in such a relationship, it will review the situation and determine whether transfer, demotion or termination of such manager/supervisor is appropriate.

Id. §VII.B. The terms of the programmatic relief are set forth in Section VII of the Settlement Agreement.

C. Attorneys' Fees & Expenses

Pursuant to the Agreement, Class Counsel petitions the Court for attorneys' fees of 35% of the proposed $7.15 million monetary settlement plus reimbursement of all reasonable costs including costs for experts. The costs expenses as of May 23, 2016, were approximately $156,000. Mehri Decl. ¶ 58. The Agreement also permits Class Counsel to seek an additional $150,000 to be paid on the one year anniversary of the Settlement, plus any interest accrued, to cover future fees and expenses associated with implementing the Settlement. Class Counsel's memorandum in support of its request for attorneys' fees and expenses is filed herewith.

III. CLASS COUNSEL HAS COMPLIED WITH THE COURT-ORDERED NOTICE PROVISIONS AND THE RESPONSE OF THE CLASS HAS BEEN UNIFORMLY FAVORABLE

On August 20, 2015, the Claims Administrator mailed the court-approved Notice and claim forms to 225 individuals whose names were on a class list provided by Defendant's counsel. (Kovach Decl. ¶¶ 3,5.) The Claims Administrator had previously run the addresses contained in the list provided by Defendant's counsel through the National Change of Address database and obtained updated addresses for 66 records. *Id*. ¶ 4. Of the 225 Notices that were mailed on August 20, 2015, 19 were returned as undeliverable with forwarding address information; for those 19, the Claims Administrator re-mailed Notices at their new addresses on October 12, 2015. *Id*. ¶ 6. One Notice was returned as undeliverable without forwarding address information; for that individual, the Claims Administrator conducted an advanced address search, obtained an updated address, and subsequently re-mailed Notice to the Class Member. *Id*. On October 15, 2015, the Claims Administrator mailed a Reminder Notice Postcard to the 204

individuals who had not returned a claim form as of that date to their addresses on file. *Id*. ¶ 7. The Administrator also performed an advanced address search for the 204 Class Members and received 62 new addresses. The Claims Administrator mailed a second Notice Reminder Postcard to the new addresses obtained. *Id*. On November 2, 2016, the Claims Administrator mailed a Second Notice Reminder Postcard to the 195 Class Members that had not returned a Claim Form as of that date. *Id*. ¶ 8. On April 5, 2016, the Claims Administrator mailed the Second Notice of Class Action to all 225 Class Members, which notified Class Members of the date of the final fairness hearing. *Id*. ¶ 9.

Class Members have responded very positively to the Settlement. Of the Class of 225 female field sales representatives, 99 submitted claim forms by the deadline. *Id*. ¶ 12. No Class Member has objected to or sought to opt out of the Settlement. *Id*. ¶ 11.

VI. THE COURT SHOULD APPROVE THE SETTLEMENT

A. Standard for Approval of a Class Settlement

Fed. R. Civ. P. 23(e) governs approval of a class action settlement. Rule 23(e) provides, in relevant part, that:

> The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

Fed. R. Civ. P. 23(e). During a fairness hearing, the Court determines whether the proposed settlement is "fair, reasonable, and adequate and is not a product of collusion

between the parties" as required by Fed. R. Civ. P. 23(e). *In Re Fannie Mae Securities Litigation*, 4 F. Supp. 3d 94, 100 (D.D.C. 2013)(internal quotation omitted). In making this determination, the Court must consider the unique facts and circumstances of the case and exercise its discretion to determine whether the proposed settlement should be approved. *Blackman v. District of Columbia*, 454 F.Supp.2d 1, 8 (D.D.C. 2006)(*citing Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), *aff'd* 206 F.3d 1212 (D.C. Cir. 2000)). Three over-arching judicial principles provide guidance. First, the courts favor compromise of complex litigation to obviate the uncertainties of the outcome and to avoid wasteful litigation and expense. *See, e.g.*, *United States v. MTU Am. Inc.*, 105 F. Supp. 3d 60, 62-63 (D.D.C. 2015)("[s]ettlement is highly favored, as not only the parties, but the general public as well, benefit from the saving of time and money that results . . .")(internal quotation omitted); *Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993) (noting the "interest in encouraging settlements, particularly in class actions, which are often complex, drawn out proceedings demanding a large share of finite judicial resources.")

Second, the purpose of requiring court approval of the settlement of a class action is to protect the interests of the nonparty Class Members. *See Blackman*, 454 F. Supp. 2d at 7-8 ("In deciding whether to approve a proposed settlement, the Court must protect the interests of those unnamed class members whose rights may be affected by the settlement of the action.")

Third, in evaluating a settlement under these principles, a court should leave considerable discretion to the litigants and their counsel. *See Alvarez v. Keystone Plus Constr. Corp.*, 303 F.R.D. 152, 160 (D.D.C. 2014); *United States v. District of Columbia*,

933 F. Supp. 42, 46-57 (D.D.C. 1996)("the function of the reviewing court is not to substitute its judgment for that of the parties to the decree, but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy"). There is a presumption that settlements reached as a result of arm's length negotiations are fair and reasonable. *In Re Fannie Mae Securities Litigation*, 4 F.Supp.3d at 102 (granting final approval to class action settlement that was "the product of extensive and vigorous arm's-length bargaining"); *Carter v. Wells Fargo Advisors, LLC*, No. 09-1752 (CKK) at 4-5 (D.D.C. 2011)(granting final approval to class action settlement that was "negotiated at arm's length with the assistance of an experienced, professional mediator"); *Radosti v. Envison EMI*, 717 F. Supp. 2d 37, 56 (D.D.C. 2010) (granting final approval to class action settlement that was the result of arm's length negotiations by experienced counsel); *Augst-Johnson v. Morgan Stanley & Co.*, No. 06-1142, (D.D.C. Oct. 26, 2007) (order certifying class and granting final approval of class action settlement on behalf of female financial advisors)(Docket No. 32-7.); *see also Newberg on Class Actions* § 11.41 at 11-88 (3d ed. 1992).

B. <u>The Settlement is Fair, Reasonable and Adequate</u>

1. <u>The Settlement Provides Exceptional Relief to the Class</u>

In the Court's assessment of whether a settlement satisfies the requirements of Rule 23(e), "[b]y far the most important factor is a comparison of the terms of the . . . settlement with the likely recovery that plaintiffs would realize if they were successful at trial." *Blackman*, 454 F. Supp. 2d at 8, 13.

This Settlement should be granted final approval because it is likely more favorable than the relief Plaintiffs and the Class would achieve through trial. Moreover,

the settlement will result in conservation of judicial resources as well as those of the parties.

As set forth above in detail, this Settlement implements comprehensive, valuable programmatic relief to the entire class which is likely greater than any injunctive relief that would be fashioned by the Court after a trial. (Mehri Decl. ¶ 44-46, 63). In particular, the Settlement requires Defendants to implement measures designed to retain, promote, and fairly compensate women. Defendants have agreed to provide a vehicle for field sales employees to identify their career goals and register their interest in possible advancement to supervisory and management positions. Further, as a part of the employees' annual performance review process, the Company will provide field sales force employees with appropriate feedback and guidance on steps the employee should consider to reach her stated goals.

The Company will also provide employees with information about their sales goals and the factors used to establish them, and provide a mechanism by which employees may request review of their sales goals by higher level sales management after first discussing and attempting to resolve any concerns with their immediate managers. The Company will structure its consistency bonus program to ensure that field sales force employees who take leaves of absence for three months or less for maternity or paternity reasons and who miss more than half a quarter because of such leave are not evaluated for performance against goals during that quarter for the purpose of determining eligibility for the consistency bonus. Such quarters shall also not be counted against an employee for the purpose of determining her consistency bonus in that quarter or subsequent years.

The Settlement also addresses the treatment of female candidates during the interview process and the lawful treatment of field sales force employees with caregiving responsibilities. Its additional obligations require provisions governing the use of alcohol at company-sponsored events and discouraging romantic/sexual relationships between supervisors and subordinates to be included in appropriate policy and compliance manuals. The programmatic relief in this settlement very likely surpasses in scope what plaintiffs and the class could achieve if they went to trial and won. (Mehri Decl. ¶ 63).

The monetary relief to the Class is also remarkable and likely equals or exceeds what could have been achieved at trial, as described in further detail below. The data produced enabled the parties to produce and dispute expert reports, and to determine approximate economic damages and loss during the mediation sessions. The portion of the settlement fund covering economic damages and loss will be distributed pursuant to criteria enumerated in the Notice and claim forms. The criteria will include the length of service and tenure during the recovery period; individual experiences of alleged gender discrimination; an interest component; the Claimant's contribution, if any, to the prosecution of this matter; and the scope of the release to be signed by the individual. S.A. § VIII(E). If this case went to trial and judgment, the Court would likely base monetary allocations to individual Class Members on the same or similar criteria adopted by the parties through settlement.

2. The Monetary Relief is Extraordinary, Exceeds Comparable Settlements and Will Be Fairly Allocated Among Named Plaintiffs and Class Members.

The Settlement Agreement provides highly substantial, even historic, monetary relief. The total fund created by the Settlement will be $7.15 million plus interest,

providing for outstanding results on a per-Class Member basis and overshadowing other similar settlements in the industry. (Mehri Decl. ¶ 47.) When compared with recent sex discrimination settlements, the settlement fund here is outstanding when considered on a per-class member basis. *Id*. ¶ 47-48.

In order to claim monetary benefits, the Class Members were required to complete a claim form. Each Class Member's monetary recovery will be determined based on: length of service or tenure at Medicis during the recovery period; individual evidence of alleged sex discrimination; an interest component; the Claimant's contribution to the prosecution of this matter, if any; and the scope of the release to be executed by the individual. (S.A. §VIII.E.)

The Claims Administrator assigned claim forms values based on a formula. (Kovach Decl. ¶¶ 14-32.) In developing the formula, the Claims Administrator attempted to draw parallels between the claim form responses and the types of evidence a plaintiff would need to produce to assert a successful claim at trial. *Id*. ¶ 14. As a general matter, more detailed and specific responses were awarded more points. *Id*. Claimants were awarded a specific number of points for each type of response to each question and its sub-parts on the claim form. *Id*. A Claimant who provided names, dates, and other identifying details particular to specific instances of discrimination received maximum points, while statements asserting discrimination had occurred but providing no details as to the specific received fewer points. *Id*. Claimants who alleged discriminatory treatment received the most points when they identified a male comparator in the appropriate context who was equally or less qualified and who received a benefit the Claimant was denied. *Id*. ¶ 15. As a general rule, a Claimant only received credit for descriptions of

events that occurred within the relevant time period and applicable to the specific Claimant, unless she provided evidence that the effect of discrimination experienced prior to the beginning of the relevant period continued into the relevant period. *Id.* ¶ 15.

A description of the formula used by the Claims Administrator, as well a detailed explanation of the allocation of points within each question and the theory behind that allocation, is contained in paragraphs 13-32 of the Kovach Declaration, attached as Exhibit 2 hereto.

3. The Uniformly Positive Reaction of the Class Supports Approval of the Settlement

Class Members have responded favorably to the Settlement. The Class consists of approximately 225 current and former employees of Medicis. 99 Class Members submitted claim forms 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 (7%) of 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" (11.1%).

No Settlement Class Member has opted out of the Settlement, nor have any objections been lodged. Mehri Decl. ¶ 68. This heavily weighs in favor of approval of the Settlement. *See, e.g. Stephens v. U.S. Airways Grp., Inc.*, 102 F.Supp.3d 222, 229

(D.D.C. April 30, 2015)("The existence of even a relatively few objections certainly counsels in favor of approval")(internal quotation omitted); *Bynum v. District of Columbia*, 412 F.Supp.2d 73, 77 (D.D.C. 2006)("low number of opt outs and objectors … supports the conclusion that the terms of the settlement were viewed favorably by the overwhelming majority of class members"). Based on Class Counsel's experience it is extremely rare to have no objections and no opt outs in a class action settlement. (Mehri Decl. ¶ 68).

Class Counsel, who are experienced in litigating employment discrimination and class action cases, respectfully submit that this proposed settlement is in the best interest of the Class. (Mehri Decl. ¶ 62-63.)

4. Further Litigation Posed Significant Risks

The "risk, expense, complexity, and likely duration of further litigation" also are factors to be considered in assessing a proposed settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also Radosti*, 717 F. Supp. 2d at 59 (considering the litigation status of the case and the ability of counsel to assess the risks of litigation). Due to the complexity of the factual and legal issues presented by this case, any liability phase trial of plaintiffs' claims would involve hundreds of Class Members and require substantial additional preparation including fact and expert witnesses. Remedial phase proceedings would add to this complexity. All of these complex proceedings would be expensive and would result in significant delay before any potential recovery.

Litigating the case to trial also presents substantial risks. Although Plaintiffs and Class Counsel believe Class Members' claims are strong, it is clear that Defendants would put on a vigorous defense. Not only would Plaintiffs face motions to dismiss, but

the critical junctures of discovery, class certification, and summary judgment could also nullify Plaintiffs' case. Litigating equal employment opportunity cases in particular carries a high risk of non-recovery due to the complexity of the legal issues, the type of proof required, and the changed legal landscape subsequent to the Supreme Court's decision in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). (Mehri Decl. ¶ 43). The likelihood of success at any eventual trial would also have been unpredictable. In contrast to the complexity, delay, risk and expense of continuing litigation, the proposed settlement will yield a prompt, certain, and substantial recovery for Class Members.

5. The Parties Conducted Extensive Investigations and Analysis and the Settlement was Reached through Arm's Length Negotiations

"A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *In Re Fannie Mae Securities Litigation*, 4 F.Supp.3d at 102 (quoting *In Re Vitamins Antitrust Litig*., 305 F. Supp. 2d 100, 104)(D.D.C. 2004)). As described above, the parties engaged in extensive arm's length negotiations under the supervision of an experienced employment discrimination class action mediator, Hunter Hughes, Esq. The data and document exchange during negotiations allowed Class Counsel to assess the strengths and weaknesses of the claims against Defendants and the benefits of the proposed settlement under the circumstances of this case. (Mehri Decl. ¶¶ 19-28.) Class Counsel also retained Dr. Vekker, Ph.D., an experienced labor economist who teaches at the University of Pennsylvania, to conduct several statistical analyses of the detailed personnel data produced by Medicis. Dr. Vekker conducted studies similar to those that would have been conducted in preparation for a trial on this

matter. (*Id*. ¶ 27). The parties devoted one full in-person mediation session solely to dueling presentations by experts and discussion of statistical analyses. As a result, Class Counsel were well informed regarding the potential monetary damages to the Class and Defendants' policies and practices and relied on that information in negotiating the terms of the Settlement Agreement. (*Id.* ¶ 28).

In sum, the proposed Settlement Agreement is the result of intensive factual and legal analysis and arms' length negotiations between experienced and well-informed counsel under the supervision of an experienced mediator.

V. THE PROPOSED CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

The Court's August 5, 2015 preliminary approval order conditionally certified a Settlement Class under Fed. R. Civ. P. 23(a), (b)(2) and (b)(3), defined as:

> 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.

ECF 37 ¶ 2. The Court provisionally found that the requirements of Federal Rule of Civil Procedure 23(a) had been satisfied because the Settlement Class of 225 employees is so

numerous that joinder of every member would be impractical; that there are common questions of law and fact regarding the Company's policies pertaining to compensation and promotion; that Plaintiffs and their Counsel are adequate representatives of the Settlement Class; and designating Cyrus Mehri and Sara Wyn Kane as Lead Class Counsel. *Id*. ¶ 3. The Court also found that the requirements of Rules 23(b)(2) and 23(b)(3) were met for class-wide claims for discrimination in compensation and promotions, because Medicis acted on grounds that apply generally to the Settlement Class; that common factual and legal issues associated with pay and promotion predominate over issues affecting only individual members; and the proposed class action is superior to other methods for fairly and efficiently adjudicating the controversy. *Id*. ¶ 4. In March 2016, on Motion by Plaintiffs, the Court ordered that the scope of the claims be expanded to include hostile environment claims. ECF No. 45.

For the reasons stated herein, in Plaintiffs' Memorandum and Points of Authority in Support of Preliminary Approval (ECF 6), in Plaintiffs' Analysis of the Claims Form Data Concerning Possible Expansion of the Scope of the Class Claims To Include Hostile Work Environment Claims (ECF 41), and in the Court's August 5, 2015 (ECF 37) and March 21, 2016 (ECF 45) Orders, the Court should grant final certification to the Settlement Class and should confirm the appointment of the Class representatives and Class Counsel.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the following: (1) an order confirming as final its certification of the Settlement Class, confirming as final its appointment of Named Plaintiffs and Class Counsel, approving

the proposed plan of allocation of monetary awards to Claimants, and granting final approval to the Settlement Agreement; and, (2) an order approving proposed Administrative Order, which will facilitate the administration of the Settlement Fund. In addition to the foregoing, Plaintiffs have filed a related Motion for An Award of Attorneys' Fees and Expense Reimbursement, and a Memorandum in support thereof.

DATED: May 27, 2016

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CERTIFICATE OF SERVICE

I certify that on May 27, 2016, a true and correct copy of Plaintiffs' Memorandum In Support of Final Approval of Class Action Settlement was served via electronic mail on counsel and/or hand delivery for Defendant listed below:

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