UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE MERCK & CO., INC. VYTORIN/ ZETIA SECURITIES LITIGATION	Civil Action No. 08-cv-2177 (DMC) (JD)

LEAD PLAINTIFFS' MEMORANDUM IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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PRELIMINARY STATEMENT

The Court appointed Co-Lead Plaintiffs in this action[1] ("Plaintiffs") respectfully request that the Court give final approval to the proposed Settlement and Plan of Allocation. The $215,000,000 cash Settlement is the third largest securities class action settlement where a pharmaceutical company was the defendant; the seventh largest overall within the Third Circuit; and among the top 50 largest securities class actions settlements ever. Plaintiffs – four large, sophisticated institutional investors – fully support and endorse the Settlement.

As explained below, there were many obstacles to Plaintiffs prevailing on required elements of their claims, particularly scienter, materially false statements and loss causation. In short, there were significant risks that Plaintiffs would not recover anything at all. Additionally, the many complex medical, scientific and statistical theories and facts at issue created risks of jury confusion. Seeking to avoid a lengthy and complicated trial (and possible appeals), the parties engaged in numerous mediation sessions, which ultimately resulted in the proposed Settlement.

Under these circumstances, the proposed $215 million Settlement is an excellent result for the Class. It is fair, reasonable and adequate and, therefore, should be approved. The proposed Plan of Allocation also should be given final approval, as it has a reasonable and rational basis and fairly allocates the recovery among Class Members.

[1] The Lead Plaintiffs are Stichting Pensioenfonds ABP, International Fund Management, S.A. (Luxemburg), the Jacksonville Police and Fire Retirement System, and the General Retirement System of the City of Detroit.

FACTUAL BACKGROUND

I. PROSECUTION OF THE CASE

A detailed description of Plaintiffs' prosecution of this case (including key pleadings, discovery efforts, use of experts, dispositive motions and preparations for trial) is set forth in the accompanying Joint Declaration Of Daniel L. Berger And Salvatore J. Graziano In Support Of (I) Lead Plaintiffs' Motion For Final Approval Of Class Action Settlement And Plan Of Allocation, And (II) Lead Counsel's Motion For An Award Of Attorneys' Fees And Reimbursement Of Litigation Expenses (the "Joint Declaration" or "Joint Decl."). Plaintiffs respectfully refer the Court to the discussion in the Joint Declaration (¶¶20-97).

II. HISTORY OF SETTLEMENT NEGOTIATIONS AND MEDIATIONS

The parties engaged in numerous settlement negotiations and mediation sessions during the course of the litigation. The parties first engaged in private mediation before the Honorable Layn R. Phillips (Ret.), who conducted two in person mediation sessions in 2011 and spoke with counsel for the parties on numerous other occasions. Joint Decl. ¶111. Prior to the initial session with Judge Phillips (in April 2011), the Plaintiffs and Defendants exchanged detailed mediation statements, each attaching nearly 100 exhibits. *Id*. The April 2011 mediation session was attended by representatives of Plaintiffs; representatives of Merck and Schering and their counsel; and representatives of certain Defendants' insurance carriers. *Id*. A second mediation session took place in July 2011, and was attended by the same representatives. *Id*. Supplemental mediation statements, outlining new discovery, were exchanged. Neither mediation was successful. *Id*.

In February 2012, the Court appointed the Honorable Nicholas H. Politan (Ret.) as an additional mediator to facilitate settlement discussions. Because Judge Politan unfortunately passed away shortly thereafter, the Court then appointed Stephen M. Greenberg and Jonathan L.

Lerner of Pilgrim Mediation Group as mediators to replace Judge Politan. Beginning in mid-2012, the parties began discussions with Messrs. Greenberg and Lerner and engaged in several separate mediation sessions. Joint Decl. ¶113. The Court convened an in-person mediation session at the courthouse in Newark, New Jersey on September 7, 2012 that was attended by the mediators, the parties counsel and representatives of each of the Lead Plaintiffs. *Id*. None of these mediation efforts were successful. *Id*.

In January 2013, less than two months before trial was to begin, Messrs. Greenberg and Lerner re-started the mediation process by engaging in separate in-person and telephone sessions with the parties. Joint Decl. ¶114. On February 1, 2013, Messrs. Greenberg and Lerner transmitted a final "mediators' recommendation" of a cash settlement of $215 million for the parties' consideration, with a deadline by which the parties were to communicate to the mediators whether the recommendation was accepted or rejected. *Id*. On Monday, February 11, 2013, the mediators confirmed that all parties had accepted the mediators' recommendation. *Id*. On February 25, 2013, the parties executed a Memorandum of Understanding. Joint Decl. ¶115. The formal Settlement Agreements were drafted over the following months, following numerous negotiating sessions, both by phone and in person, regarding the precise settlement terms. *Id*.

III. THE TERMS OF THE SETTLEMENT

The terms of the Settlement are set forth in the Stipulation and Agreement of Settlement dated as of June 3, 2013 (the "Stipulation"). Plaintiffs agreed to release the claims asserted against Defendants in the Consolidated Amended Complaint in exchange for a cash settlement of $215 million for the benefit of the certified Class. The Class is defined as "all persons or entities that purchased or acquired Merck common stock, or call options, and/or sold Merck put options, during the period between December 6, 2006 through and including March 28, 2008, and who

did not sell their stock and/or options on or before January 14, 2008, and who were damaged thereby."[2]

IV. THE PLAN OF ALLOCATION

The proposed Plan of Allocation is contained in the Settlement Notice that was mailed to potential Class Members and published on the website established for this Action www.merckvytorinsecuritieslitigation.com. According to the Plan of Allocation and as set forth more fully below, a Claimant's Recognized Claim is calculated based on the estimated artificial inflation in the prices paid for Merck common stock and call options and the artificial deflation in the price received for Merck put options sold on each day during the Class Period, as determined by Dr. Gregg Jarrell, Plaintiffs' damages expert, and Forensic Economics, Plaintiffs' economic consultants. This Plan of Allocation is similar in structure to numerous other such plans of allocation which have been approved and utilized in securities class action cases.

V. THE NOTICES

By Order entered September 25, 2012, the Court certified the Action to proceed as a Class Action, and on December 27, 2012, the Court entered an Order approving the Notice of Pendency of the Action ("Class Notice") to be sent to the Class. Beginning with the initial mailing on January 17, 2013, the Class Notice was mailed to over 725,000 potential Class Members. The Class Notice notified potential Class Members of, among other things: (i) the

[2] Excluded from the Class by definition are (a) Defendants; (b) members of the Immediate Families of the Individual Defendants; (c) the subsidiaries and affiliates of Defendants, as these terms are defined in the federal securities laws, including the 401(k) plans of Merck and Schering-Plough Corporation (Schering); (d) any person or entity who was a partner, executive officer, director, or controlling person of Merck, M/S-P or Schering (including any of their subsidiaries or affiliates), or any other Defendants; (e) any entity in which any Defendant has a controlling interest; (f) Defendants' directors' and officers' liability insurance carriers, and any affiliates or subsidiaries thereof; and (g) the legal representatives, heirs, successors and assigns of any such excluded party. Also excluded from the Class are any Persons listed in Appendix 1 to the Stipulation who do not opt back into the Class.

Action pending against the Defendants; (ii) the Court's certification of the Action to proceed as a class action on behalf of the Court-certified Class; and (iii) the right of Class Members to request to be excluded from the Class; the effect of remaining in the Class or requesting exclusion; and the requirements for requesting exclusion. Pursuant to the Court's December 27 Order, requests for exclusion from the Class (or opt-outs) were required to be postmarked by March 1, 2013. As set forth on Appendix 1 to the Stipulation, 188 opt-outs were received.

Once the settlement was reached, and the Stipulation signed by all Parties, on motion of Plaintiffs, on June 6, 2013, the Court entered an Order preliminarily approving the proposed Settlement, authorizing the Settlement Notice to be sent to the Class, providing a deadline by which objections to the settlement and fee and expense application, or requests to opt back into the class must be submitted, and setting the matter for a Final Approval Hearing on October 1, 2013. (ECF No. 330). Accordingly, on June 21, 2013, the Settlement Notice was mailed to over 689,000 persons. *See* Declaration Of Stephanie A. Thurin Regarding (A) Mailing Of The Settlement Notice And Proof Of Claim And (B) Report Of Opt-In Requests Receive To Date (the "Epiq Decl."). In addition, the Summary Settlement Notice will be published in the national edition of *The Wall Street Journal* and transmitted over the *PRNewswire* on July 2, 2013, and a copy of the Settlement Notice will also be posted on the settlement website, *www.merckvytorinsecuritieslitigation.com* by that date. *Id.* ¶¶9, 13. Additionally, Lead Counsel will also post the Complaint, Stipulation, the Settlement Notice, Preliminary Approval Order, and the Proof of Claim Form on their own respective websites.

The deadline set by the Court for Class Members to object to the Settlement or Plan of Allocation is August 5, 2013. To date, Lead Counsel are not aware of any objections. Lead

Counsel will address any objections that are received in their reply papers to be filed with the Court on or before August 13, 2013.

ARGUMENT

I. THE COURT SHOULD GRANT FINAL APPROVAL TO THE PROPOSED SETTLEMENT AND PLAN OF ALLOCATION

A. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

The Court may only approve a settlement of a class action if it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Third Circuit has adopted a nine-factor test to make this determination, that was first propounded in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) and has been applied by this Court on numerous occasions. The elements of this test – known as the "*Girsh* factors" – are:

> (1) [T]he complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In re Schering-Plough Corp. ENHANCE ERISA Litig., No. 08-cv-1432, 2012 WL 1964451, at *2 (D.N.J. May 31, 2012) (Cavanaugh, J.) ("*Schering-Plough ERISA*"). *See also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164-65 (3d Cir. 2006). As this Court has noted, applying *Girsh* is not a mechanical exercise:

> These factors are a guide and the absence of one or more does not automatically render the settlement unfair . . . . Rather, the court must look at all the circumstances of the case and determine whether the settlement is within the range of reasonableness under *Girsh*. . . . In sum, the Court's assessment of whether the settlement is fair, adequate and reasonable is guided by the *Girsh* factors, but the Court is in no way limited to considering only those enumerated factors and is free to consider other relevant circumstances and facts involved in [the] settlement.

Plymouth Cnty. Contributory Ret. Sys. v. Hassan, No. 08-cv-1022, 2012 WL 664827, at *2 (D.N.J. Feb. 28, 2012) (emphasis added) (Cavanaugh, J.); *Schering-Plough ERISA*, 2012 WL 1964451, at *2 (same).

Additionally, the Third Circuit has directed the district courts to apply an "initial presumption of fairness" to a settlement if they find:

> (1) the settlement negotiations occurred at arms' length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.

In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 535 (3d Cir. 2004) (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 232 n.18 (3d Cir. 2001) (*Cendant I*)); *Henderson v. Volvo Cars of N. Am., LLC.*, No. 09-cv-4146, 2013 WL 1192479, at *7 (D.N.J. Mar. 22, 2013) (same).

Since the first three of these elements are met here (and it is too soon yet to assess the fourth element), the proposed Settlement is presumptively fair. First, the record is clear that the settlement was negotiated at "arms' length" and in an adversarial context, with assistance of independent mediators, by counsel with vast experience in securities class actions. Second, the settlement occurred on the very eve of trial, after 3 years of extensive pretrial discovery, expert depositions, resolution of dispositive motions and preparation of a Pretrial Order. In similar circumstances, this District found a settlement entitled to a presumption of fairness, *In re Schering-Plough Corp. Sec. Litig.*, No. 01-cv-0829, 2009 WL 5218066, at *3 (D.N.J. Dec. 31, 2009):

> The settlement amount, $165 million, which is among the five largest securities class action recoveries in the District of New Jersey, was reached under the auspices of a highly-regarded mediator, who had the benefit of a fully litigated case that had persisted up through fully briefed summary judgment motions. Mediation sessions began years before the ultimate settlement, foundered, recovered, gained traction, and were successful—a pattern that demonstrates arms-length negotiating. In choosing mediation rather than a jury trial, the parties showed their respect for the difficulty of predicting a trial outcome given the matters in contention: claims of security fraud and actionable misstatement that

> were strongly disputed, and nuanced legal issues about scienter, loss causation, and the amount of damages. Given all of this, the settlement enjoys the presumption of reasonableness.

See also Rowe v. E.I. DuPont De Nemours & Co., Nos. 06-cv-1810, 06-cv-3080, 2011 WL 3837106, at *11 (D.N.J. Aug. 26, 2011) (finding settlement presumptively fair); *Carroll v. Stettler*, No. 10-cv-2262, 2011 WL 5008361, at *4 (E.D. Pa. Oct. 19, 2011) (same); *In re Vicuron Pharm., Inc. Sec. Litig*., 512 F. Supp. 2d 279, 284 (E.D. Pa. 2007) (same).

As we discuss below, the settlement also satisfies the *Girsh* factors and should be approved.

1. The Significant Obstacles And Risks To A Recovery

In this case, the fourth and fifth of the *Girsh* factors – the risks of establishing liability and the risks of establishing damages – most convincingly demonstrate the value of the Settlement. As this Court has noted, these two factors "are commonly analyzed together" and they "survey the 'possible risks of litigation by balancing the likelihood of success . . . against the immediate benefits offered by settlement.'" *Alves v. Main*, No. 01-cv-789, 2012 WL 6043272, at *19 (D.N.J. Dec. 4, 2012) (Cavanaugh, J.) (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998)). *See also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 814 (3d Cir. 1995) ("*GM Truck*") (court will "examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them").

Although Plaintiffs were confident in the merits of their case, they concede that the outcome of the litigation is uncertain, particularly since Plaintiffs would have to overcome numerous legal and factual hurdles which could have prevented them from recovering anything. There were significant risks that Plaintiffs would not be able to prove that: (i) Defendants made any materially false statements; (ii) Defendants' false statements caused Plaintiffs' losses; and

(iii) Defendants made the challenged statements with the requisite scienter. Additionally, because the cholesterol drugs at the center of this litigation are still being sold and because certain influential public institutions made favorable statements regarding those drugs, the risk of jury confusion was high. Moreover, unlike the securities case against Merck's joint venture partner, Schering, the case against Merck did not include negligence-based claims brought under the Securities Act of 1933.

i. The Difficulty In Proving False Statements

To prove their case, Plaintiffs had to show that Defendants made materially false and misleading statements. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). Almost all of the purportedly false statements for which Plaintiffs sought relief did not specifically mention the ENHANCE trial; rather, Plaintiffs alleged that Merck's quarterly and annual financial guidance, which presumed certain amounts of sales and profits from the sale of Vytorin and Zetia, was knowingly overstated because Defendants knew or recklessly disregarded that they could not achieve those sales if the negative results of ENHANCE were disclosed. The logical and factual proof of this chain of events was problematic. More important, Defendants would have argued that their statements about expected future sales and income from, and prospects for the two drugs, were "forward-looking statements" and, as such, required Plaintiffs to prove that Defendants had "actual knowledge" that they were false when they were made – that is, that Merck and the two individual defendants did not actually believe the projections. *See, e.g., Institutional Investors Grp. v. Avaya, Inc.*, 564 F.3d 242, 274 (3d Cir. 2009); 15 U.S.C. § 78u-5(i)(1)(B). This would have been an enormous burden. Additionally, because certain of the financial guidance Defendants provided was met, and thus "came true," Plaintiffs ran the risk that the jury would fail to appreciate why those statements nevertheless operated to mislead the market at the time they were made.

Unlike Schering, Merck did not speak publicly about the ENHANCE trial before November 2007; when it did discuss ENHANCE in November and December 2007 (*i.e.*, near the end of the Class Period), all it said was that the trial remained "blinded." Defendants would have argued to the jury that the ENHANCE results were not as important to Merck; accordingly (unlike the case with Schering), securities analysts did not ask Merck officials to provide an update on the status of the trial during the company's investor conference calls as often as they did of Schering officials. Moreover, Merck did not volunteer information about ENHANCE as readily as Schering did. As a result, the vast majority of allegedly false statements were financial guidance statements, concerning the expected income contributions to Merck from continued sales of Vytorin and Zetia, and thus only related indirectly to ENHANCE.

Every financial guidance statement issued by Merck, moreover, was accompanied by disclaimers that arguably bring the statements within the safe harbor provision of the Exchange Act. To satisfy the legal standard for proving the falsity of the financial projections and guidance, Plaintiffs would not only have to convince the jury that Merck was aware of the alleged functional unblinding occurring at Schering (*see* Section I.A.1.iii, *infra*), but that this awareness translated into a subjective disbelief in the truth of the financial guidance Merck offered its investors. Yet, Merck achieved its 2007 guidance as the adverse ENHANCE results were delayed and did not affect 2007 sales. Plaintiffs' burden in proving falsity was therefore extremely difficult to meet, and the Plaintiffs' mock trial exercise served to bring this trial risk into clear focus.

ii. The Difficulty In Establishing Loss Causation

In addition to proving the falsity of Defendants' statements, Plaintiffs would have had to prove that their losses on their Merck investments were proximately caused by Defendants' fraud (*e.g.*, the concealing of material information – the ENHANCE results). *Dura*, 544 U.S. at 341-

42. The significant difficulty in proving this element of their claims is that, quite simply, Merck's stock did not drop on January 14, 2008 when the "top line" ENHANCE results were publicly disclosed. On that day, Merck and Schering announced that Vytorin did not outperform Zocor, and as a result, Schering's stock price plunged significantly, but Merck's stock did not move statistically significantly. Accordingly, Plaintiffs faced a stark prospect of not establishing loss causation, and thus recovering nothing.

Plaintiffs argued that the January 14, 2008 announcement of the ENHANCE results was not a complete disclosure of the alleged fraud and that, following that announcement, Merck officers made additional false and misleading statements in furtherance of the fraud. Plaintiffs' theory is that critical new information about the ENHANCE results was first disclosed on March 30, 2008, at the American College of Cardiology ("ACC") conference. However, throughout the litigation, Defendants argued that since the January 14, 2008 announcement disclosed that the trial had failed, that announcement fully cured the alleged fraud. Plaintiffs thus faced a substantial risk that a jury, or the Third Circuit on appeal, would agree. *See F.C.V. Inc. v. Sterling Nat'l Bank*, No. 04-cv-5035, 2006 WL 1319822, at *6 (D.N.J. May 12, 2006) (Cavanaugh, J.) (noting that "the outcome of the litigation is not certain" as "Plaintiffs face the challenge of establishing proximate cause").

The new information disclosed at the March 30, 2008 ACC conference did not significantly change the message of the January 14, 2008 press release: that ENHANCE had failed. However, that new information consisted of additional detail, such as subgroup statistics, that were not provided in the January 14, 2008 statement. Even if Plaintiffs succeeded in demonstrating that the full truth was disclosed only on March 30, 2008, Plaintiffs would still have to overcome Defendants' argument that all or most of the Merck stock drop that day

resulted from an overreaction to the March 30 disclosure, rather than any new information about ENHANCE. Defendants intended to argue in addition that the stock price decline on March 31, 2008 was mostly a result of critical comments made by third parties, such as Dr. Harlan Krumholz, at the ACC conference.

iii. The Difficulty In Proving Defendants' Scienter

Scienter is a required element of Plaintiffs' claims. *Dura*, 544 U.S. at 341. Here, Plaintiffs would have to show that over a year before Defendants disclosed the results of the ENHANCE trial, they reviewed the trial data and applied statistical analyses which revealed that the trial had failed. However, the difficulties in establishing these facts (and Defendants' scienter) were that: (1) all the trial data was maintained by Schering employees; (2) Schering, not Merck, statisticians engaged in the purported early review and statistical analysis of the trial data; (3) the "treatment arms" of the trial were blinded, meaning that the information as to which patients took which drugs was kept secret; and (4) the purported communication of the news of the trial's failure occurred during a single meeting (between the CEOs of Schering and Merck) for which there were no notes or other documentation (regarding the substance of the meeting) nor any corroborating testimony. In short, Plaintiffs had no admission of fraud and were forced to rely on circumstantial evidence.

As to the first two difficulties in proving scienter, discovery indeed confirmed that the ENHANCE trial was overseen primarily by Schering, including the operations of the trial (*e.g.*, writing, amending and purportedly enforcing the protocol, and data management) and, ultimately, calculating and interpreting the results. Discovery also confirmed that it was primarily Schering statisticians who reviewed and analyzed the blinded trial results (and purportedly communicated those adverse results to Schering executives).

As to the third difficulty in proving scienter, Plaintiffs would have to show that Schering statisticians "functionally unblinded" the ENHANCE trial data, meaning they learned which patients took which drugs (*e.g.*, Vytorin or Zocor). Plaintiffs' theory is that Schering statisticians "unblinded" the trial data using sophisticated statistical methods, and then conveyed those results to Schering officers, who communicated the results to Schering CEO Fred Hassan who later conveyed them to Merck CEO Richard Clark in a private meeting. However, the Schering statisticians and Defendants' statistical expert all testified that the statistical analyses of the trial data were routine and did not reveal anything about the trial's results. Indeed, the alleged improper violations of clinical trial practices related to the conduct of ENHANCE were vigorously disputed by Defendants, who offered a plausible alternative explanation supported by experts and numerous exhibits that Defendants were focused on improving data quality and not improperly learning the ENHANCE results.

Plaintiffs had no document stating that, based on an early review of the data, the trial had failed. No such conclusion was contained in any of Defendants' documents (until the results were revealed on January 14, 2008). Nor did any Merck employee testify that he or she ever saw or knew about the statistical documents. The statistical documents that Plaintiffs would use to demonstrate this part of their case do not include any narrative conclusions about the trial, but rather contain lists of numbers that require statistical interpretation. Thus, there would be a "battle of experts" about what the documents conveyed: Plaintiffs' statistical expert has opined that these documents reveal the trial's results while Defendants' statistical expert has opined the contrary. The jury would be asked to determine which interpretation is more fully supported by the evidence, which requires them to understand an extraordinarily complex technical questions and statistical modeling.

As to the fourth difficulty in establishing scienter, Plaintiffs' theory was that the early knowledge that the trial had failed was communicated from Schering statisticians to their supervisors at Schering and then to Schering's CEO Fred Hassan, who then informed Merck CEO Clark in a private meeting. However, there are no notes, outlines, or other materials disclosing anything about the conversation between Clark and Hassan, and Clark flatly denied that such a conversation took place. Moreover, neither Clark nor Hassan recalled that the private meeting even occurred. Thus, to find that Merck (*e.g.*, Clark) knew the trial results, the jury would again be required to make inferential connections based on disputed circumstantial evidence.

Finally, none of the Defendants ever admitted wrongdoing in connection with the ENHANCE trial or the marketing of Vytorin and Zetia, and although Congress launched an investigation into the conduct of the trial, that investigation produced no findings adverse to Defendants. Similarly, the FDA scrutinized the management of the ENHANCE trial but made no finding adverse to Defendants. These facts firmly distinguish this action from other major securities fraud cases in which corporate executives are sent to prison, in which corporations are required to issue financial restatements, or in which other criminal or administrative penalties are imposed on defendants. Lead Counsel had no government assistance or admissions of wrongdoing, which made prosecuting and trying a securities fraud case against Defendants that much riskier.

iv. Additional Jury Confusion Risks

Additional facts and circumstances in this case threatened to confuse the jury. In addition to the technical complexity of the statistical and financial issues outlined above, Vytorin and Zetia are still widely sold in the US and worldwide. Because this case is not about the safety or health risks of those drugs, but rather a failure to show their efficacy in one specific way using

disputed scientific methodology in a trial that may have been conducted poorly, the jury may fail to see what harm Defendants have done to investors. Further, health agencies that carry considerable weight to jurors, such as the U.S. Food and Drug Administration ("FDA"), the American Heart Association ("AHA"), and the ACC, issued statements advising patients that the ENHANCE trial did not put the safety of Vytorin or Zetia in question. A jury may misunderstand these statements about health in a way that is prejudicial to Plaintiffs, suggesting that Defendants or the drugs are endorsed or supported by the FDA, AHA, or ACC. *See In re Merck & Co., Inc. Vytorin ERISA Litig.*, No. 08-cv-285, 2010 WL 547613, at *11 (D.N.J. Feb. 9, 2010) (Cavanaugh, J.) ("*Merck ERISA*") ("the former FDA approval of these drugs created a hurdle in the present litigation").

In addition to the risks associated with demonstrating the elements of Plaintiffs' claims and with jury confusion, note that similar facts in *In re Vicuron Pharmaceuticals, Inc. Sec. Litig.*, 512 F. Supp. 2d 279 (E.D. Pa. 2007) supported approval of a proposed settlement. In *Vicuron*, the court held that it was "possible that a jury would not have found that the statements made by the defendants were false, misleading, or material. In addition, several of the statements that the class alleges to be misleading in certain contexts may have been found to be technically accurate standing alone and, therefore, not misleading." *Id*. at 285. In *Vicuron*, as here, there was no insider trading that could have helped prove the defendants' scienter. *Id.* ("It is also possible that the class would not have been able to prove at trial that the defendants acted with recklessness. This risk was heightened by the fact that, as the class did not uncover any evidence of insider trading, it would be more difficult to prove scienter").

In short, despite the efforts of Lead Counsel, certain weaknesses in the case and gaps in the evidence as well as the heightened burdens under the PSLRA presented a significant

possibility that Plaintiffs would not be able to prove liability or damages at trial. *See Schering-Plough ERISA*, 2012 WL 1964451, at *5 ("[T]hat Plaintiff faced significant risks in establishing liability and damages if the matter proceeded to trial . . . weighs in favor of approval"); *Plymouth Cnty.*, 2012 WL 664827, at *3 ("Plaintiff faces significant risks in establishing liability and damages, and this factor therefore weighs in favor of approval"); *Alves*, 2012 WL 6043272, at *19 (approving settlement where "[l]iability would be a strongly contested issue"); *In re Schering-Plough/Merck Merger Litig.*, No. 09-cv-1099, 2010 WL 1257722, at *11 (D.N.J. Mar. 26, 2010) (Cavanaugh, J.) (settlement approval warranted where there was "substantial risk that Plaintiffs would not prevail" on their claim); *Simon v. KPMG LLP*, No. 05-cv-3189, 2006 WL 1541048, at *10-11 (D.N.J. June 2, 2006) (Cavanaugh, J.) ("Plaintiffs would have to overcome numerous legal hurdles" that were "clearly outweighed by the benefits of an immediate settlement").

Plaintiffs faced additional risks from their reliance on expert opinion to prove much of their case. At trial, Plaintiffs would present expert testimony to prove that Defendants learned the ENHANCE results early, that Defendants breached established scientific, clinical protocol by looking at the ENHANCE data before it was unblinded, and to prove that investors' losses were caused by Defendants' fraud. This would precipitate a "battle of experts" with Defendants with no guarantee that the jury would understand or believe Plaintiffs' experts' opinions. *See Cendant I*, 264 F.3d at 239 ("establishing damages at trial would lead to a 'battle of experts,' with each side presenting its figures to the jury and with no guarantee whom the jury would believe"); *Smith v. Daimler Chrysler Servs. N. Am., LLC*, No. 00-cv-6003, 2005 WL 2739213, at *3 (D.N.J. Oct. 24, 2005) (Cavanaugh, J.) (finding risks supported settlement approval where "Plaintiffs would have to rely heavily upon statistical evidence by way of expert opinions with

the uncertainty of how the Court or a jury would interpret such opinions"); *Vicuron*, 512 F. Supp. 2d at 285 ("Each side would have offered extensive testimony from expert witnesses on the efficacy of drugs, . . . clinical studies, . . . causation, and damages. Compelled to choose between experts, it is far from certain that a jury would have found for the class, much less awarded it damages on the order of the settlement agreement.").

Even if Plaintiffs prevailed at trial, the risks confronting them would continue through post-trial motions and likely appeal. *See Merck ERISA*, 2010 WL 547613, at *8 ("Even if Plaintiffs successfully established causation at trial, post-trial motions and appeals present added risk"). As this Court has aptly noted, "although plaintiffs may prevail at trial, even a victory at trial is not a guarantee of ultimate success" because "the defendants would appeal such judgment" and "[a]n appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself." (internal quotations and citations omitted). *Id.* at *11. *Robbins v. Koger Props. Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing on appeal $81 million jury verdict in securities action and dismissing case with prejudice). *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict in securities fraud action following two decades of litigation); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A), 1991 WL 238298 (N.D. Cal. Sept. 6, 1991) ($100 million jury verdict vacated on post-trial motions).

In short, due to the many significant risks confronting Plaintiffs, both of these *Girsh* factors strongly weigh in favor of final approval of the proposed Settlement.

2. Complexity, Expense and Likely Duration of the Litigation

The other *Girsh* factors likewise support approval of the proposed Settlement. The first *Girsh* factor is whether the Settlement avoids a lengthy, complex and expensive continuation of the litigation. "This factor is concerned with assessing the 'probable costs, in both time and

money, of continued litigation.'" *Schering-Plough ERISA*, 2012 WL 1964451, at *4 (quoting *Cendant I*, 264 F.3d at 234).

As explained above, this litigation presented many complex statistical, scientific and legal issues requiring the use of many experts, making a trial both lengthy and expensive. For example, to prevail, Plaintiffs would have had to persuade the jury that Schering biostatisticians mined the blinded ENHANCE clinical data to uncover the trial results using sophisticated statistical techniques, and that Merck officers learned these results in a private CEO meeting that is mostly undocumented and which neither the Merck CEO nor the Schering CEO recalls. *See Warfarin*, 391 F.3d at 536 (approving settlement where case presented "complex factual and legal questions" requiring "a complicated, lengthy trial"); *Rowe*, 2011 WL 3837106, at *12 (approving settlement where "the issues to be litigated would be complex" precipitating a "battle of the experts" that "would come at a burdensome expense"); *Vicuron*, 512 F. Supp. 2d at 285 (approving settlement where "complicated medical facts" and "the technical nature of the subject matter would undoubtedly have reduced the case to a battle of experts"); *Serio v. Wachovia Sec., LLC*, No. 06-cv-4681, 2009 WL 900167, at *6 (D.N.J. Apr. 2, 2009) (approving settlement in case with "highly technical" and "complex" evidence and issues requiring "extensive involvement of experts" such "that a layperson on a jury could have difficulty comprehending them"); *F.C.V. Inc.*, 2006 WL 1319822, at *4 (approving settlement, noting that litigation "would involve intricate legal questions of . . . fraud, . . . causation and damages").

Additionally, as explained above, even if Plaintiffs had prevailed at trial, Defendants would surely have appealed the verdict; indeed, they already petitioned to appeal this Court's decision granting class certification. Trial, post-trial motions and any appeal would have significantly added to the expense of this action and delayed, potentially for years, any recovery

to Class Members (with no assurance that Plaintiffs would ultimately prevail). *See Warfarin*, 391 F.3d at 536 ("it was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of any recovery to the class"); *Schering-Plough ERISA*, 2012 WL 1964451, at *4 ("If the case does indeed go to trial, there will necessarily be significant additional delay. Therefore, this factor favors settlement approval."); *Rowe*, 2011 WL 3837106, at *12 ("Moreover, the length of the trial, and the high likelihood of an appeal, would further delay any relief the class might eventually receive"); *Merck ERISA*, 2010 WL 547613, at *7, *11 (noting that "continued costs and time" from, *inter alia*, "trial and post-trial matters would be great" and that "[a]n appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself"): *Vicuron*, 512 F. Supp. 2d at 285 ("it is not certain that the class would have ultimately recovered even if it had prevailed at trial. Had the class prevailed at trial, the defendants would likely have filed any number of post-trial motions and, if necessary, appealed the decision to the Court of Appeals for the Third Circuit. In such a situation, the defendants, setting aside the considerable expense and delay inherent to post-trial motions and appeal, might prevail as a matter of law or win a retrial. The potential pitfalls further support approval of the settlement").

Settlement at this juncture results in a substantial and tangible present recovery without the attendant risks and delays of trial and post-trial proceedings. Thus, the complexity, expense and likely duration of continued litigation all weigh heavily in favor of approving the proposed Settlement.

3. Reaction of the Class

The second *Girsh* "factor evaluates whether members of the class generally support or object to the settlement." *Alves*, 2012 WL 6043272, at *10. As of July 2, 2013, Lead Counsel is

unaware of any objections. However, as the deadline for objections has not yet passed, Plaintiffs will address any objections and discuss this factor in their reply papers due August 13, 2013.

4. Stage of the Proceedings and Amount of Discovery

The third *Girsh* factor requires the Court to "consider the 'degree of case development that Class Counsel have accomplished prior to Settlement,' including the type and amount of discovery already undertaken." *Merck ERISA*, 2010 WL 547613, at *7 (quoting *GM Truck*, 55 F.3d at 813). "In short, under this factor the Court considers whether the of amount of discovery completed in the case has permitted 'counsel [to have] an adequate appreciation of the merits of the case before negotiating.'" *Merck ERISA*, 2010 WL 547613, at *7 (alteration in original) (quoting *In re Prudential Ins. Co. Am. Sales*, 148 F.3d at 319).

Here, the Settlement was reached after nearly 5 years of litigation, the completion of fact and expert discovery (involving the review of millions of documents and over 50 depositions), briefing and decisions on motions to dismiss, summary judgment and class certification, mock trials and extensive pre-trial preparation. *See* Joint Decl. ¶¶15-97.[3] *See Henderson*, 2013 WL 1192479, at *9 (approving settlement reached after three years of litigation and substantial completion of discovery, noting that "'[g]enerally, post-discovery settlements are viewed as more likely to reflect the true value of a claim as discovery allows both sides to gain an

[3] Pre-trial papers prepared by Plaintiffs include: Motion to Bifurcate Trial; Motions *In Limine*; Stipulated Facts; Contested Facts; Witness List; Expert Witness List; Juror Questionnaire & Voir Dire; Jury Instructions; Lay Opinion List; Legal Issues List; Neutral Statement of the Case; List of Trial Exhibits; Verdict Form; Deposition Designations; Supplemental Stipulated Facts; Contingent Stipulated Facts; Supplemental List of Trial Exhibits; Contingent List of Trial Exhibits; Objections and Counter-Designations to Defendants' Deposition Designations; Objections to Defendants' List of Additional Voir Dire Questions; Responses and Objections to Defendants' Verdict Form; Objections to Defendants' List of Trial Exhibits; Responses and Objections to Defendants' Stipulation of Facts; Response to Defendants' Neutral Statement of the Case; Response to Defendants' List of Legal Issues; Objections to Defendants' Proposed Expert Summaries; Objections to Defendants' Counter-Designations; Objections to Defendants' Additional List of Trial Exhibits; Final Pretrial Order; Trial Brief.

appreciation of the potential liability and the likelihood of success.'") (citation omitted); *Alves*, 2012 WL 6043272, at *18 (approving settlement and noting that "this is not a case resolved on a scant record without discovery. Nor does class counsel lack an understanding of the facts and issues. Quite the opposite."). In short, everything was completed for trial, which was just weeks away when the parties finally agreed to the Settlement. *Rowe*, 2011 WL 3837106, at *13 ("Given that the parties only negotiated the proposed settlement on the eve of trial, the Court finds that this factor weighs strongly in favor of accepting the parties' proposal.").

Quite clearly, Plaintiffs and their counsel "have an adequate appreciation of the facts in this matter, and this factor weighs in favor of approval." *Schering-Plough ERISA*, 2012 WL 1964451, at *4. *See also Colon v. Passaic Cnty.*, No. 08-cv-4439, 2012 WL 1457764, at *4 (D.N.J. Apr. 24, 2012) (Cavanaugh, J.) ("Considering the amount of effort expended by class counsel in this matter, as well as class counsel's extensive experience litigating class actions . . . the Court is convinced that Plaintiffs have a sufficient understanding of the merits of this case."). Accordingly, the third *Girsch* factor also supports approval of the proposed Settlement.

5. Ability of Plaintiffs to Maintain Class Certification

The sixth *Girsh* factor "evaluates the risks of maintaining the class throughout the trial." *F.C.V. Inc.*, 2006 WL 1319822, at *6. The Court here certified the class and the Third Circuit denied Defendants' petition for permission to appeal that decision pursuant to Fed. R. Civ. P. 23(f). Joint Decl. ¶¶50-52. Accordingly, there was little risk that Plaintiffs would not be able to maintain the class throughout the trial (although, of course, the length of the Class Period would be subject to continued attack throughout trial and appeal), and this factor neither supports nor detracts from the fairness of the Settlement.

6. Ability of Defendants to Withstand a Greater Judgment

In addressing the seventh *Girsh* factor, "the Court must evaluate whether Defendants could withstand a judgment much greater than the amount of the settlement." *Merck*, 2010 WL 547613, at *9. *See also Cendant I*, 264 F.3d at 240. While Merck is a large pharmaceutical company with billions of dollars in global sales and could potentially withstand a greater judgment, that fact alone does not militate against approval of the Settlement. *See Henderson*, 2013 WL 1192479, at *11 ("Plaintiffs acknowledge that 'there is currently no indication that Volvo here would be unable to withstand a more significant judgment,' but 'to withhold approval of a settlement of this size because it could withstand a greater judgment would make little sense where the [settlement agreement] is within the range of reasonableness and provides substantial benefits to the Class.'") (citing cases where settlement was approved despite defendants' ability to withstand a greater judgment); *In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 484 (D.N.J. 2012) ("But even assuming there are sufficient funds to pay a greater judgment, the Third Circuit has found that a defendant's ability to pay a larger settlement sum is not particularly damaging to the settlement agreement's fairness as long as the other factors favor settlement") (internal quotations and citations omitted). In light of the substantial risks to any recovery and the substantial benefits to the Class under the Settlement, this factor does not weigh against approval.

7. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The final two *Girsh* factors "'evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case.'" *Schering-Plough/Merck Merger*, 2010 WL 1257722, at *12 (quoting *Warfarin*, 391 F.3d at 538). As this Court has often explained, "according to *Girsh*, courts approving settlements should determine a range of reasonable

settlements in light of the best possible recovery (the eighth *Girsh* factor) and a range in light of all the attendant risks of litigation (the ninth factor)." *Schering-Plough/Merck Merger*, 2010 WL 1257722, at *12. Additionally, in conducting this evaluation, the Court should keep in mind "that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding to[o] large a settlement based on the court's view of the merits of the litigation." *Johnson & Johnson*, 900 F. Supp. 2d at 484-85 (alteration in original) (internal quotations and citations omitted). As this Court has stated, "[t]he best possible recovery, while arguably more than the settlement, is tempered by the risks of further litigation." *United Nat'l Ret. Fund v. Watts*, No. 04-cv-3603, 2005 WL 2877899, at *4 (D.N.J. Oct. 28, 2005) (Cavanaugh, J.).

Defendants claimed that there were no recoverable damages in this case (as Merck's stock price did not drop following the January 14, 2008 disclosure of the top-line ENHANCE results). On the other hand, Plaintiffs estimated that recoverable damages potentially ranged from $4 billion to $7 billion, depending on whether Plaintiffs were successful on all their claims, which of Merck's statements they would have been able to prove at trial were false and made with scienter, and the extent of participation of the Class in the judgment. While the proposed $215 million Settlement in this case is only a portion of the total estimated recoverable damages sustained by the Class, it is still very substantial. Indeed, as the Third Circuit has recognized: "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 105 (D.N.J. 2012) (internal quotation and citation omitted). *See also In re AT&T Corp.*, 455 F.3d at 170 (same). Rather, the percentage recovery "must represent a material percentage recovery to [the] plaintiff in light of

all the risks considered under *Girsh*." *Ins. Brokerage*, 282 F.R.D. at 105 (internal quotations omitted).

As explained above, Plaintiffs faced real risks of proof with respect to the required elements of falsity of statements, scienter, and loss causation, and even if they obtain a favorable jury verdict, also faced a substantial risk with respect to class certification on appeal. Under these circumstances, the proposed $215 million recovery is unquestionably a reasonable Settlement in light of the potential recovery. Settling at this juncture provides an immediate and substantial monetary benefit for Class Members, and obviously represents a "much better option than little or no recovery at all." *F.C.V. Inc.*, 2006 WL 1319822, at *7. *See also In re AT&T Corp.*, 455 F.3d at 170 (approving settlement "in light of the risks of establishing liability and damages"); *Henderson*, 2013 WL 1192479, at *12 (final two factors weighed in favor of approval "given the size of the Settlement Class, the potential benefits available to Class Members, and the risks in proving liability and damages"); *Schering-Plough/Merck Merger*, 2010 WL 1257722, at *12 ("The value of the benefit conferred is commensurate with the projected success of this case and potential relief available"); *Serio*, 2009 WL 900167, at *10 ("In light of such risks, there is a strong indication that the Settlement represents the best possible recovery for the Class."). In short, the last two *Girsh* factors weigh in favor of approval of the proposed Settlement.

8. Additional Considerations

Additional considerations present here further support approval of the Settlement. First and foremost, each of the four Plaintiffs wholeheartedly endorses and supports the Settlement. *See* Joint Decl. Exhibits B thru E. As set forth in more detail in their respective declarations, Plaintiffs played an active role in litigating the Action – from filing of the initial complaint straight through the mediations and ultimate agreement to settle. *See id.* Each of these

sophisticated institutional investors – who have experience in leading classes in securities fraud actions and who are well-aware their fiduciary duties to absent class members – approved the Settlement with full knowledge of the strengths and weaknesses of Plaintiffs' claims, of the full amount of damages alleged, and of the risks attendant to continuing to a trial on the merits. Against this backdrop, the approval of paradigmatic PSLRA Lead Plaintiffs supports approval of the settlement.

Further, as this Court recently noted: "In addition to the *Girsh* factors, courts in this Circuit traditionally 'attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class.'" *Alves*, 2012 WL 6043272, at *22 (quoting *Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995)). Here, Lead Counsel, experienced class action and trial attorneys, believe that the Settlement is in the best interests of the Class as a whole. Joint Decl. ¶¶8-14. Their "recommendation provides further support for approving the settlement." *Alves*, 2012 WL 6043272, at *22.

Additionally, as explained above, the Settlement was facilitated by the efforts of independent mediators. After being appointed as mediators by the Court in mid-2012, Messrs. Lerner and Greenberg developed a detailed understanding of the complex facts of this case based on fulsome submissions from and discussions with Plaintiffs and Defendants. Because the parties were unable to resolve this Action after numerous attempts at mediation, and with trial quickly approaching, Messrs. Lerner and Greenberg proposed a final, "take-it-or-leave-it" settlement recommendation. Based on their detailed knowledge of the case, they believed that this amount – $215 million – was a reasonable resolution for both parties. The mediators' recommendation was submitted to the parties on February 1, 2013. On February 11, 2013, Messrs. Lerner and Greenberg confirmed that all parties had accepted the recommendation.

This Court in *Alves* found similar circumstances to be an "additional consideration" supporting approval, because "[t]he participation of an independent mediator in settlement negotiations 'virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.'" 2012 WL 6043272, at *12 (quoting *Bredbenner v. Liberty Travel, Inc.*, No. 09-cv-905, 2011 WL 1344745, at *10 (D.N.J. Apr. 8, 2011)). *See also Henderson*, 2013 WL 1192479, at *10 (approving settlement "reached after extensive arm's length negotiations and all-day mediation sessions"); *Plymouth Cnty.*, 2012 WL 664827, at *3 (approving settlement reached after parties "engaged in mediation"); *Colon*, 2012 WL 1457764, at *5 (approving settlement, noting the efforts of a magistrate judge in bringing the matter to "an appropriate resolution").

In sum, all of the *Girsh* factors, and additional considerations, support approval of the proposed Settlement.

B. THE PLAN OF ALLOCATION HAS A REASONABLE AND RATIONAL BASIS AND IS FAIR, REASONABLE AND ADEQUATE TO THE CLASS MEMBERS

As this Court has previously explained, "[t]he approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *Schering-Plough ERISA*, 2012 WL 1964451, at *2 (internal quotations and citation omitted). *See also Walsh v. Great Atl. & Pac. Tea Co. Inc.*, 726 F.2d 956, 964 (3d Cir. 1983) ("The [C]ourt's principal obligation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the [F]und"); *Ins. Brokerage*, 282 F.R.D. at 105 (stating the standard for approval of a plan of allocation). To meet this standard, "'[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.'" *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y.

2005) (quoting *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002)). Further, "[a] plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable." *In re Lucent Techs. Inc., Sec. Litig.*, 307 F. Supp. 2d 633, 649 (D.N.J. 2004).

The proposed Plan of Allocation is contained in the Settlement Notice that was mailed to potential Class Members and published on the case specific website. The objective of the Plan of Allocation is to equitably distribute the Net Settlement Fund to those Class Members who suffered economic losses as a proximate result of the alleged wrongdoing. The computations under the Plan of Allocation are a method to weigh the claims of Authorized Claimants against one another for the purposes of making *pro rata* allocations of the Net Settlement. Under the Plan of Allocation, a Claimant's Recognized Claim is calculated based on the estimated artificial inflation in the prices paid for Merck common stock and call options or artificial deflation in the prices received for Merck put options sold on each day on each day during the Class Period, as determined by Plaintiffs' damages expert, Dr. Gregg Jarrell and Forensic Economics, Plaintiffs' economic consultant.

The estimated artificial inflation equals the excess amount that Class Members allegedly paid over fair market value for Merck common stock and call options during the Class Period and the estimated artificial deflation equals the reduced amount that Class Members allegedly received below the fair market value of Merck put options sold during the Class Period. The amounts of artificial inflation or deflation for the Merck common stock and options during the Class Period are set forth in various charts included in the Settlement Notice.

For purposes of determining whether a Claimant had an overall market gain or loss on his, her or its transactions in Merck securities during the Class Period, gains and losses on the

Claimant's trades are netted. If a Claimant had a market gain from his, her or its overall transactions in Merck securities during the Class Period, the Recognized Claim will be zero. To the extent that a Claimant suffered an overall market loss on his, her or its overall transactions in Merck securities during the Class Period, but that loss was less than the Recognized Claim calculated under the Plan, the Recognized Claim shall be limited to the amount of actual market loss. This Plan of Allocation is similar in structure to numerous other such plans of allocation which have been utilized in securities class action cases. *See, e.g., Lucent*, 307 F. Supp. 2d at 649. Accordingly, the Plan of Allocation has a reasonable and rational basis and is fair and equitable to Class Members and should be approved.

II. THE NOTICES TO THE CLASS SATISFIED BOTH THE PRELIMINARY APPROVAL ORDER AND APPLICABLE LAW

In order to comport with the Due Process Clause of the Constitution, notice must be reasonably calculated to reach potential Class Members. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974); *In re Diet Drugs Prod. Liab. Litig.*, 431 F.3d 141, 145 (3d Cir. 2005) (class members must "have certain due process protections in order to be bound by a class settlement agreement"). Additionally, as this Court has certified the Class under Fed. R. Civ. P. 23(b)(3), the notice must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). In its Preliminary Approval Order, the Court approved the form and content of the Settlement Notice and the proposed plan for providing notice to potential Class Members. (ECF No. 330)

In accordance with the Court's Preliminary Approval Order, beginning on June 21, 2013, the Court-approved Claims Administrator, Epiq, caused the approved Settlement Notice and Proof of Claim form to be mailed by first-class mail, postage prepaid, to potential Class

Members. *See* Epiq Decl. ¶¶ 6-7. The approved Summary Settlement Notice will be published in *The Wall Street Journal* and disseminated over the *PRNewswire*. *Id*. ¶9. The notice program, which combines an individual, mailed notice to all potential Class Members who could be reasonably identified, as well as to brokers and nominees, and a summary notice published in the nation's pre-eminent national business publication and over the internet, meets the requirements of Rule 23 of the Federal Rules of Civil Procedure, which calls for the "best notice practicable" under the circumstances, including individual notice to all members who can be identified through reasonable effort. *See Eisen*, 417 U.S. at 173 (internal quotation omitted); *Prudential*, 148 F.3d at 326-27.

As these cases require, the Class has been given notice of the proposed Settlement and Plan of Allocation, as well as the rights of Class Members, and the method and dates by which they may object to the Settlement and proposed Plan. Additionally, the Class has been advised of the date of the final fairness hearing at which they will have an opportunity to be heard with respect to any objection raised.

CONCLUSION

For all the foregoing reasons and for the reasons set forth in the Joint Declaration, the Plaintiffs respectfully submit that the proposed Settlement is fair, reasonable and adequate and that the Plain of Allocation has a reasonable, rational basis and fairly allocates the recovery among Class Members, and request that this Court grant final approval to the Settlement and Plan of Allocation.

Dated: July 2, 2013

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