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 OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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PRELIMINARY STATEMENT

Lead Counsel Grant & Eisenhofer P.A. and Bernstein Litowitz Berger & Grossmann LLP ("Lead Counsel"), respectfully submit this Memorandum of Law in support of their motion for an award of attorneys' fees and reimbursement of expenses. As detailed here and in Plaintiffs' papers submitted in support of final approval of the Settlement, the Settlement in this action represents an astounding victory for the Plaintiffs and the Class, particularly when judged in the context of the significant litigation risks attendant in this action. The $215 million that Lead Counsel obtained provides the Class with certain immediate recovery in a case that faced several significant obstacles that could have prevented any recovery at all. In achieving this result, Lead Counsel worked tens of thousands of hours for nearly five years on this complex litigation, all on a contingency basis, with no guarantee of success or ever being paid.

The Court has appointed two Special Masters to report and recommend as to the appropriate amount of attorneys' fees and reimbursable expenses which should be awarded Plaintiffs' Counsel.[1] The Special Masters will review Plaintiffs' Counsel's submissions and the record in this case, as well as additional documentation on Plaintiffs' Counsel's lodestar and expenses. Plaintiffs' Counsel believe that the fee recommended and ultimately awarded, along with reimbursement of their expenses of $4,367,376.95 and Co-Lead Plaintiffs' $109,865.31 in expenses, should properly reflect the many significant risks taken by Plaintiffs' Counsel, as well as the excellent results achieved in a hard fought litigation spanning several years. The Settlement Notice informed the Class that a fee of up to 28% might be awarded; when examined under this Circuit's preferred method of contingency fee determination (*i.e.*, percentage of the

[1] "Plaintiffs' Counsel" refers to Lead Counsel (Grant & Eisenhofer P.A. and Bernstein Litowitz Berger & Grossmann LLP) as well as Labaton Sucharow LLP; Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C.; Klausner & Kaufman, P.A.; and Seeger Weiss LLP.

fund with a lodestar cross-check), it is abundantly clear that an award of fees at 28% is reasonable, and well within the range of fees awarded in similar contingency cases (although none with litigation risks of the magnitude present here). Indeed, three of the four Court-appointed Co-Lead Plaintiffs – International Fund Management, S.A. (Luxemburg), the Jacksonville Police and Fire Retirement System, and the General Retirement System of the City of Detroit – each a sophisticated institutional investor with experience leading securities class litigation, support awarding Plaintiffs' Counsel the full 28% fee, along with reimbursement of costs and expenses, while the fourth Co-Lead Plaintiff (Stichting Pensioenfonds ABP) recognizes the excellent result achieved on account of the hard work of Plaintiffs' Counsel, but takes no position on the specific fee award other than to defer to the independent judgment of the Special Masters.[2]

BACKGROUND FACTS

I. PROCEDURAL HISTORY AND WORK PERFORMED

A. COMMENCEMENT OF THE LITIGATION THROUGH MOTION TO DISMISS

The initial complaint in this action was filed on May 5, 2008. On June 3, 2008, Co-Lead Plaintiffs moved for appointment as lead plaintiffs pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"). (ECF No. 9). The Court granted the motion on July 2, 2008, appointing them Co-Lead Plaintiffs and approving their selection of Grant & Eisenhofer P.A. and Bernstein Litowitz Berger & Grossmann LLP as Lead Counsel. (ECF No. 18).

After their appointment, on October 6, 2008, Co-Lead Plaintiffs filed an extremely detailed and carefully researched 217-page, 533-paragraph Consolidated Class Action Complaint ("Consolidated Complaint"). (ECF No. 24.) In preparing the Consolidated Complaint, Lead

[2] *See* Joint Decl. Exh. B-E.

Counsel used internal investigators and engaged a private investigative firm to interview knowledgeable former employees of Merck; reviewed hundreds of academic and lay articles relating to Vytorin, Zetia, and the ENHANCE clinical trial; reviewed annual, quarterly, and periodic financial statements and other filings with the Securities and Exchange Commission ("SEC"), press releases, and other communications issued by Defendants; and conducted extensive research into the legal basis of the claims. *See* Joint Decl. ¶¶20-25.

In brief, Co-Lead Plaintiffs allege that Defendants Merck & Co., Inc. ("Merck"), Merck/Schering-Plough Pharmaceuticals ("M/S-P"), Richard Clark ("Clark"), and Deepak Khanna ("Khanna") violated the federal securities laws by making material false or misleading statements or omissions regarding two of Merck's blockbuster cholesterol drugs, Vytorin and Zetia, and a clinical trial of Vytorin called ENHANCE. The Consolidated Complaint asserts claims under Rule 10b-5 of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") against all Defendants, under Section 20(a) against Defendants Clark and Khanna, and under Section 20A against Defendant Clark. Co-Lead Plaintiffs alleged that Defendants uncovered the results of the ENHANCE trial, learned that Vytorin failed to outperform the comparator drug, Zocor, and concealed that information, as well as certain additional financial information, from the investing public.

On December 12, 2008, Defendants filed their motion to dismiss the Consolidated Complaint, attacking the materiality of the alleged false and misleading statements, challenging Plaintiffs' theory of loss causation, and contending Plaintiffs failed to adequately allege scienter. (ECF No. 40). Following full briefing, on September 2, 2009, this Court denied in its entirety Defendants' motion to dismiss, finding that Co-Lead Plaintiffs adequately alleged that the ENHANCE clinical trial results were material to Merck investors, Merck's disclosure of that

trial's failure caused losses to investors, Defendants acted with scienter or intent to defraud investors, and that both Merck's joint venture partner, Schering-Plough Corp. ("Schering"), and the joint venture itself, M/S-P, made false or misleading statements in connection with the purchase or sale of Merck securities. This Court also upheld Co-Lead Plaintiffs' claims under Sections 20(a) and 20A of the Exchange Act because Co-Lead Plaintiffs adequately alleged claims under Section 10(b) of the Exchange Act. (ECF No. 64).

B. MASSIVE DOCUMENT PRODUCTION AND DOMESTIC AND FOREIGN DISCOVERY

Lead Counsel subsequently negotiated a comprehensive set of stipulations covering all aspects of what was expected to be, and was in fact, a massive process of discovery. Lead Counsel and counsel for Defendants worked to formulate a schedule governing fact and expert discovery, a confidentiality order, and an agreement on the substance and manner in which expert discovery would be conducted. *See* Joint Decl. ¶¶54-78.

Lead Counsel then embarked on a massive discovery effort which ultimately proved instrumental in obtaining the Settlement. Lead Counsel's discovery efforts included numerous requests for the production of documents served on Defendants. Over the course of the litigation, Defendants produced over 12 million pages of documents (including advertisements, video and audio recordings). Joint Decl. ¶58. Co-Lead Plaintiffs also served discovery requests on, and received documents from, various non-parties, including clinical imaging firms, informatics and technology firms, industry intelligence firms, and crisis management firms engaged by Defendants in connection with the ENHANCE trial or the marketing of Vytorin and Zetia. Joint Decl. ¶¶56-58.

Defendants likewise conducted discovery, serving Co-Lead Plaintiffs with requests for the production of documents (and Co-Lead Plaintiffs produced responsive documents), and subpoenaing various investment advisers and external account managers retained by Co-Lead

Plaintiffs during the Class Period, including State Street Corp.; Numeric Investors LLC; Blackrock Inc.; Thompson Siegel & Walmsley, Inc.; Advanced Investment Partners, LLC; Piedmont Investment Advisers LLC; Montag & Caldwell LLC; Intech Investment Management LLC; Edgar Lomax Co.; Atlanta Capital Management Co., LLC; OrbiMed Advisors LLC; Globalt, Inc.; Palisades Investment Partners LLC; and T. Rowe Price Associates, Inc. Over the course of the litigation, various non-parties produced documents to both Defendants and Co-Lead Plaintiffs. Joint Decl. ¶¶42-43.

The parties also served numerous interrogatories. Co-Lead Plaintiffs served Defendants with several sets of interrogatories. *See* Joint Decl. ¶55. Defendants likewise served Co-Lead Plaintiffs with several sets of interrogatories, including numerous contention interrogatories. Joint Decl. ¶¶35, 70. On behalf of the Co-Lead Plaintiffs, Lead Counsel prepared responses to Defendants' interrogatories, including, in response to Defendants' contention interrogatories, detailed explanations of the factual bases for Co-Lead Plaintiffs' allegations. Co-Lead Plaintiffs' responses to Defendants' contention interrogatories spanned over 130 pages and contained citations to deposition transcripts, documents produced by both Defendants and Co-Lead Plaintiffs, expert reports, and other materials, and also set forth, in detail, each false statement on which Co-Lead Plaintiffs intended to seek relief from Defendants together with a comprehensive explanation as to the reasons for the falsity of those statements. Joint Decl. ¶70. Lead Counsel also prepared two sets of requests for admission which were served on Defendants, addressing specific issues raised by documents produced by Defendants and seeking Defendants' admission that hundreds of those documents were records of regularly conducted business activity. Joint Decl. ¶70.

Lead Counsel's discovery efforts also included numerous domestic and foreign depositions. Co-Lead Plaintiffs took over 50 domestic fact witness depositions, some of which spanned two days. Joint Decl. ¶67. In these depositions, Lead Counsel's examinations covered many technical scientific matters, including protocols for clinical drug trials and procedures for amending protocols, complex statistical theories and methods, cardiovascular health matters, proper clinical conduct in active comparator trials, the nature of surrogate endpoints and surrogate imaging trials, and data quality control and cleaning in imaging trials, among others. Lead Counsel's examinations also covered financial and business matters, including corporate financial projections of revenues and methodologies for creating projections, prescription sales volume monitoring, and marketing research and strategies. In addition to deposing the executives named as Defendants, Co-Lead Plaintiffs deposed Defendants' marketing and investor relation employees, biostatisticians, clinicians, and financial officers.

Further, each of the Co-Lead Plaintiffs was deposed by Defendants, for which they prepared (with Lead Counsel) diligently. Joint Decl. ¶¶37-41. Finally, Defendants deposed several of the external advisers and fund managers retained by Co-Lead Plaintiffs. Joint Decl. ¶44.

In order to take foreign depositions of three critical witnesses – Drs. John Kastelein, Eric de Groot, and Michiel Bots – Lead Counsel were required to prepare and file a motion for issuance of Letters of Request pursuant to Fed. R. Civ. P. 28(b), seeking this Court's approval of their request for international judicial assistance under the Hague Evidence Convention. Joint Decl. ¶68. On December 31, 2010, the Court granted Co-Lead Plaintiffs' motion, and Lead Counsel traveled to the Kingdom of the Netherlands to take the three depositions.

In sum, Co-Lead Plaintiffs, through the efforts of Lead Counsel, were able to develop strong evidentiary support for the claims asserted in the Consolidated Amended Complaint. The results achieved for the Class would not have been possible absent these discovery efforts.

C. MOTION FOR LEAVE TO AMEND

After the Court sustained Co-Lead Plaintiffs' Consolidated Complaint by denying Defendants' motion to dismiss, Co-Lead Plaintiffs moved to amend the Consolidated Complaint on June 3, 2011. Joint Decl. ¶¶29-30. The Court granted Plaintiffs' motion on February 7, 2012. Joint Decl. ¶33.

D. EXPERTS

In addition to several non-testifying consultants, Co-Lead Plaintiffs retained several expert witnesses who would provide critical expertise and testimony in support of Co-Lead Plaintiffs' claims: Dr. Curt D. Furberg (expertise: clinical trial standards, design, data analyses, and publication of clinical trial results); Dr. David B. Madigan (expertise: biostatistics, clinical trial standards for blinding, data quality, and reliability); Dr. Allen J. Taylor (expertise: cardiology, clinical trial standards, imaging trials, cIMT methodology, surrogate clinical markers); and Dr. Gregg A. Jarrell (expertise: damages, market efficiency, loss causation, valuation analyses). Joint Decl. ¶¶72, 78. Lead Counsel repeatedly met and worked extensively with each of these experts to learn about the key scientific and statistical methods and principles and help prepare the experts' reports.

On September 15, 2011, Co-Lead Plaintiffs served each of their expert reports on Defendants. Joint Decl. ¶72. On the same day, Defendants likewise served Co-Lead Plaintiffs with Defendants' expert reports: Dr. Arnold Barnett (expertise: statistics, clinical trial data quality and reliability); Dr. Marc Cohen (expertise: cardiology, surrogate clinical markers, publication of clinical trial results); Dr. Eva Lonn (expertise: cardiology, surrogate clinical

markers, imaging trials, cIMT methodology, publication of clinical trial results); Dr. Robert Starbuck (expertise: biostatistics, clinical trial data quality and reliability, clinical trial data cleaning); and Dr. Denise Neumann Martin (expertise: damages, market efficiency, loss causation, valuation analyses). Joint Decl. ¶73. Each expert for Co-Lead Plaintiffs and for Defendants subsequently prepared a rebuttal report (which was served on the other side on October 28, 2011). Joint Decl. ¶74.

Lead Counsel reviewed each of the reports served by the Defendants and worked with their own experts and consultants to prepare to depose each of the Defendants' expert witnesses. Lead Counsel took those depositions. Joint Decl. ¶¶75-76. A total of 9 expert witness depositions were taken by Co-Lead Plaintiffs and Defendants. Joint Decl. ¶¶76-77.

The services of Co-Lead Plaintiffs' scientific, medical, and statistical experts were essential to the development of their claims. Co-Lead Plaintiffs allege that ENHANCE biostatisticians conducted improper statistical analyses, in violation of accepted clinical trial standards, thereby learning the results of the ENHANCE study before it was proper to do so. The opinions of Drs. Madigan, Furburg and Taylor were necessary to support Co-Lead Plaintiffs claims that (i) conducting such analyses on "blinded" clinical trial data was improper, and (ii) the analyses revealed that Vytorin had failed to outperform Zocor. Joint Decl. ¶78.

II. POTENTIALLY DISPOSITIVE MOTIONS FOR CLASS CERTIFICATION AND SUMMARY JUDGMENT

A. MOTION FOR CLASS CERTIFICATION

Co-Lead Plaintiffs moved to certify the class and to be appointed class representatives on February 7, 2011, and filed an amended motion on September 16, 2011. Joint Decl. ¶¶46-47. Defendants vigorously opposed Co-Lead Plaintiffs' motion. In their brief filed on December 6, 2011, Defendants challenged the proposed class definition, the adequacy and typicality of Co-

Lead Plaintiffs, and loss causation. Joint Decl. ¶48. Defendants argued that the proposed class should extend, at most, to investors that purchased Merck securities from December 6, 2006 to January 11, 2008 (the last trading day before January 14, 2008), because investors that purchased Merck securities after the January 14, 2008 announcement of the ENHANCE results were in a substantially different position than those that purchased Merck securities earlier. *Id.* Defendants' arguments, if accepted by the Court, would have completely undermined Co-Lead Plaintiffs' claims because the price of Merck securities did not decline in a statistically significant amount upon Merck's January 14, 2008 disclosure of the top-line ENHANCE results. Joint Decl. ¶¶48. Thus, a class defined to terminate on January 11, 2008 would have eliminated any monetary recovery for the class.

Co-Lead Plaintiffs filed their reply brief on January 31, 2012, and the Court certified the class as defined by Co-Lead Plaintiffs by Order dated September 25, 2012. Joint Decl. ¶¶49-50. Defendants sought permission to appeal the Court's certification order to the Court of Appeals for the Third Circuit on October 9, 2012 pursuant to Fed. R. Civ. P. 23(f). Joint Decl. ¶51. Defendants argued that the District Court erred in declining to resolve a factual dispute regarding the length of the Class Period. *Id.* Once again, if Defendants had succeeded in securing appellate review and modifying the class definition, Co-Lead Plaintiffs' claims would have evaporated because the price of Merck stock did not decline on January 14, 2008. After extensive briefing, on January 7, 2013, the Third Circuit issued an Order denying Defendants' Rule 23(f) petition. Joint Decl. ¶52.

In connection with the Court's certification of the Class, on December 27, 2012, Co-Lead Plaintiffs filed a letter seeking approval of the Notice and Summary Notice of Pendency of Class Action. Joint Decl. ¶53. On December 28, 2012, the Court approved the Class Notice prepared

by Lead Counsel. *Id.* Beginning with the initial mailing on January 17, 2013, the Class Notice was mailed to nearly 730,000 potential Class Members. *Id*.

B. MOTION FOR SUMMARY JUDGMENT

Defendants filed a second potentially dispositive motion, moving for summary judgment on March 1, 2012. Joint Decl. ¶79. Defendants argued that, because Merck announced the results of the ENHANCE trial on January 14, 2008 and the price of Merck securities did not thereupon decline in a statistically significant amount, Co-Lead Plaintiffs could not prove loss causation as to any alleged corrective disclosure. Joint Decl. ¶80. Defendants argued that the January 14, 2008 announcement fully corrected any alleged fraud insofar as it disclosed the "very facts" Co-Lead Plaintiffs claimed were concealed and misrepresented in Merck's public statements. *Id.* In support of its motion, Defendants submitted a Rule 56.1 Statement of Material Facts (11 pages and 33 paragraphs) and 42 exhibits. Joint Decl. ¶79. Defendants' argument, if accepted by the Court, would have been fatal to Co-Lead Plaintiffs' claims.

Co-Lead Plaintiffs submitted their opposition brief and Rule 56.1 Counter-Statement of Additional Material Facts (85 pages and 241 paragraphs), together with 238 exhibits, on April 6, 2012. Joint Decl. ¶81. Co-Lead Plaintiffs argued that Defendants misstated the legal standard for loss causation and argued that a reasonable jury would find that the alleged corrective disclosures (on January 17, 2008; January 29, 2008; and March 30, 2008) in fact revealed the misrepresentations which gave rise to Plaintiffs' claims. After Defendants filed their reply brief, the Court denied Defendants' motion for summary judgment in an Order dated September 25, 2012. Joint Decl. ¶¶83-84.

III. MEDIATION AND SETTLEMENT DISCUSSIONS

In early 2011, the parties jointly agreed to mediate before the Honorable Layn R. Phillips (Ret.). Judge Phillips conducted two mediation sessions in 2011 and spoke with counsel for the

parties on numerous other occasions. Joint Decl. ¶111. Co-Lead Plaintiffs' first formal mediation session with Judge Phillips occurred in April 2011. *Id.* Prior to the initial session with Judge Phillips, the Co-Lead Plaintiffs and Defendants exchanged detailed mediation statements, each attaching about 100 exhibits. *Id.* The mediation session was attended by representatives of Co-Lead Plaintiffs, representatives of Merck and Schering and their counsel, and representatives for certain Defendants' insurance carriers. *Id.* That mediation was unsuccessful. 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, but that mediation was unsuccessful. *Id*.

In February 2012, the Court appointed the Honorable Nicholas H. Politan (Ret.) as an additional mediator to facilitate settlement discussions, but Judge Politan passed away shortly after his appointment. In May 2012, the Court appointed Stephen M. Greenberg and Jonathan L. Lerner of Pilgrim Mediation Group to replace Judge Politan.

In mid-2012, the parties began meeting informally with Pilgrim Mediation Group *ex parte*. Messrs. Greenberg and Lerner conducted separate sessions with Co-Lead Plaintiffs and Defendants in person or by telephone on multiple occasions in May, June, July, August, and September 2012, and the Court convened an in-person mediation session at the courthouse in Newark, New Jersey on September 7, 2012. Joint Decl. ¶¶113. Co-Lead Plaintiffs and their counsel attended the in-person session on September 7, 2012 and were actively involved in the *ex parte* mediation discussions. *Id*. These mediation sessions also were unsuccessful. *Id*.

In January 2013, with trial set to start in less than two months, Messrs. Greenberg and Lerner re-started the process of separate in-person and telephone sessions with the parties. On February 1, 2013, Messrs. Greenberg and Lerner transmitted a "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. Joint Decl. ¶¶114. 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.

IV. TRIAL PREPARATION

As the parties' various mediation efforts throughout the course of the litigation were (until the very end) unsuccessful, Lead Counsel continued their vigorous prosecution of the case, including extensive trial preparation efforts. Trial was initially set to commence on November 13, 2012, but at Defendants' request and over Co-Lead Plaintiffs' opposition, trial was postponed to March 4, 2013. Lead Counsel's trial preparation efforts extended up to the eve of trial.

As detailed below, as part of its trial preparation, Lead Counsel reviewed the complete factual and legal record in the action in order to identify documents to be used as trial exhibits and witnesses to be called in their case in chief, and to plan their trial strategy; conducted an extensive multi-day mock jury trial testing their presentation of the evidence; and filed motions *in limine* and submitted comprehensive Pre-Trial Order materials.

A. MOCK JURY TRIAL

In the fall of 2012, Co-Lead Plaintiffs worked with jury consultants to prepare and conduct a multi-day mock jury trial. Joint Decl. ¶¶10, 94. This process allowed Co-Lead Plaintiffs to put their case in front of multiple juries drawn from the same pool of citizens that the Court would call as jurors. In connection with the mock jury trial, Lead Counsel reviewed every deposition video created in the case and selected portions to show at the mock trial, selected

samples of the documentary evidence, and prepared opening and closing statements. Various evidentiary themes and multiple demonstrative trial exhibits also were tested. The mock jury trial highlighted the many risks permeating Co-Lead Plaintiffs' case, including juror difficulty in comprehending complicated scientific evidence; witness credibility issues; the difficulty in establishing required elements of Co-Lead Plaintiffs' claims (such as false statements, scienter and loss causation); and the plausibility of Defendants' defenses and counter-arguments.

B. DEFENDANTS' DAUBERT MOTIONS TO PRECLUDE CERTAIN EXPERT TESTIMONY

By motion on January 14, 2013, Defendants sought to preclude all of Co-Lead Plaintiffs' expert witnesses from testifying at trial. Joint Decl. ¶89. Defendants' success on any one of these motions would have severely impeded or entirely prevented Co-Lead Plaintiffs from proving their case. Defendants argued that Drs. Madigan, Furberg, and Taylor should be precluded from testifying, *inter alia*, that the ENHANCE trial was functionally unblinded in the fall of 2006; that Defendants took an unusually long time to publish the ENHANCE results; and that Defendants' method of publication on January 14, 2008 prevented the public from fully learning the trial results. Joint Decl. ¶106. Defendants further argued that Dr. Jarrell should be precluded from testifying, *inter alia*, that certain events subsequent to the January 14, 2008 announcement were foreseeable consequences of Defendants' alleged fraud and that confounding positive news unrelated to the ENHANCE trial released by Merck on January 14, 2008 limited the ENHANCE results' impact on Merck's stock price. Co-Lead Plaintiffs filed their opposition briefs on February 4, 2013. Joint Decl. ¶90. The parties reached a settlement in principle prior to the filing of reply papers.

C. THE PARTIES' MOTIONS TO BIFURCATE

In January and February 2013, Co-Lead Plaintiffs and Defendants filed competing motions to bifurcate trial. Defendants moved on January 14, 2013 to permit in the first phase of trial evidence relating to both Defendants' liability and Co-Lead Plaintiffs' damages, reserving evidence of Class damages to the second phase. Joint Decl. ¶96. By contrast, Co-Lead Plaintiffs moved on February 1, 2013 to confine evidence relating to Co-Lead Plaintiffs' and the Class' damages to the second phase of trial. *Id*. Defendants' motion to bifurcate presented additional risks to the success of Co-Lead Plaintiffs' claims, because evidence of Co-Lead Plaintiffs' investments and related matters would threaten to distract the jury from the Defendants' alleged fraud. The bifurcation motions were pending when the parties reached a settlement in principle.

D. NUMEROUS MOTIONS *IN LIMINE*

On February 1, 2013, Co-Lead Plaintiffs filed 23 motions *in limine* supported by 96 pages of legal argument and 43 exhibits. Joint Decl. ¶91. Co-Lead Plaintiffs sought to exclude, *inter alia*: (1) evidence and argument regarding Defendants' contention that Merck and Schering are good corporate citizens, including references to the companies' mission to extend and enhance human life; (2) evidence and argument regarding Merck's employment of thousands of New Jersey residents; (3) evidence and argument regarding post-Class Period results of governmental investigations into Defendants' conduct after the release of the ENHANCE results; (4) evidence and argument regarding the size of other pending clinical trials relating to Vytorin; (5) hearsay evidence concerning the quality of the ENHANCE clinical data; and (6) certain lay opinion testimony regarding what is and is not common in clinical trials. *Id.*

The same day, Defendants also served motions *in limine* seeking to exclude, *inter alia*: (1) settlements or allegations of misconduct relating to Vioxx or other drugs; (2) evidence and argument regarding the Congressional investigation into the ENHANCE study; (3) evidence and

argument regarding certain internet message board postings; (4) purported opinion testimony of two physicians who spoke publicly about the ENHANCE results during the Class Period; (5) evidence or argument regarding the merger between Merck and Schering, any Defendant's personal wealth, or the decision of a certain physician to "cut ties" with Merck; and (6) evidence or argument concerning a purported link between Vytorin and cancer. Joint Decl. ¶92. The parties reached a settlement in principle prior to any ruling on the motions *in limine*.

E. STATEMENTS OF CONTESTED AND UNCONTESTED FACTS

On January 8, 2013, Co-Lead Plaintiffs submitted a comprehensive statement of Stipulated Facts containing 980 paragraphs, covering 139 pages, plus three appendices of the prices of Merck common stock throughout the Class Period. Joint Decl. ¶86. In addition, Co-Lead Plaintiffs submitted on the same date a comprehensive statement of Contested Facts containing 86 paragraphs, covering 19 pages, plus seven appendices regarding per-day/per-share inflation of Merck common stock and put and call options. *Id*. Defendants submitted a statement of Stipulated Facts containing 272 paragraphs and covering 48 pages. *Id.* Subsequently, on January 22, 2013, Co-Lead Plaintiffs responded to Defendants' proposed Stipulated Facts and submitted a list of Supplemental Stipulated Facts and also submitted a statement of Contingent Stipulated Facts for use in the event the Court granted Defendants', rather than Co-Lead Plaintiffs', motion to bifurcate trial. Joint Decl. ¶86.

F. EXHIBIT LIST AND DEPOSITION DESIGNATIONS

Co-Lead Plaintiffs' trial exhibit list, which was served initially on January 8, 2013 and supplemented on January 25, 2013, contained more than one thousand carefully selected entries. Joint Decl. ¶86. Co-Lead Plaintiffs also served a Contingent List of Exhibits containing approximately 150 additional exhibits pertaining to Co-Lead Plaintiffs' investments and damages for use in the event the Court granted Defendants', rather than Co-Lead Plaintiffs', motion to

bifurcate. *Id*. On January 8, 2013, Defendants served their trial exhibit list, containing over one thousand entries, and served their supplemental list containing 15 additional entries on January 28, 2013. *Id*. Lead Counsel reviewed each entry on Defendants' lists and provided objections to the admissibility of their proposed exhibits, where appropriate.

Co-Lead Plaintiffs designated the deposition testimony of six fact witnesses for use at trial and served these designations on Defendants on January 8, 2013. *Id*. Defendants designated the testimony of some of the same witnesses and several additional witnesses, and Lead Counsel provided objections based on evidentiary principles and counter-designations for all of Defendants' designations, totaling over 30 witnesses, on January 22, 2013. *Id*.

G. VOIR DIRE, JURY INSTRUCTIONS, AND VERDICT FORM

The parties exchanged proposed *Voir Dire* Questions, Jury Instructions, and Verdict Forms on January 8, 2013. Joint Decl. ¶86. Lead Counsel prepared a 46-question juror questionnaire and proposed 8 questions for Judge-conducted *voir dire*. *Id*. Lead Counsel also proposed 27 jury instructions relating to class actions, evidentiary standards and concepts, witness credibility, expert witnesses, and the legal claims asserted. *Id.* Finally, Lead Counsel prepared a Verdict Form presenting the allegedly false or misleading statements made by Defendants during the Class Period and matrices for juror use with respect to Co-Lead Plaintiffs' satisfaction or non-satisfaction of the elements of the claims asserted. *Id.* Co-Lead Plaintiffs served their objections to Defendants' *Voir Dire* Questions, Jury Instructions, and Verdict Form on January 22, 2013. *Id*.

H. PREPARATION OF OPENING AND CLOSING STATEMENTS AND DIRECT AND CROSS-EXAMINATION OF WITNESSES

Lead Counsel expended considerable time preparing their opening and closing statements and their examinations of fact and expert witnesses for trial. Alerted to weaknesses and risks in

their trial strategy through the mock trial conducted in late 2012, Co-Lead Plaintiffs reassessed their strategy and the evidentiary foundations of their opening and closing statements. In January and February 2013, Co-Lead Plaintiffs prepared complete direct and cross-examinations, including the selection and arrangement of trial exhibits for use during the examinations, of fact and expert witnesses.

V. SETTLEMENT

The parties executed a Memorandum of Understanding, settling the action in principle, on February 25, 2013, following a series of mediation sessions conducted by Messrs. Greenberg and Lerner. Joint Decl. ¶¶114-15. Pursuant to the Preliminary Approval Order, and as set forth in the Settlement Notice, all Class members who want to participate in the distribution of the Settlement Fund must submit a valid Proof of Claim and all required information postmarked no later than November 18, 2013. As provided in the Settlement Notice, after deduction of Court-awarded attorneys' fees and expenses, Notice and Administration Costs, and any and all applicable taxes, the balance of the Settlement Fund will be distributed according to a Plan of Allocation to be approved by the Court. The parties submitted a proposed Plan of Allocation, which was prepared in consultation with Co-Lead Plaintiffs' damages expert, on June 4, 2013. If approved, Epiq Systems, Inc., as the claims administrator, will determine each authorized claimant's *pro rata* share of the Settlement Fund pursuant to the terms of the Plan of Allocation.

VI. COURT'S ORDER APPOINTING SPECIAL MASTERS TO RECOMMEND AN AWARD OF FEES AND EXPENSES

On April 22, 2013, the Court issued an Order appointing the two mediators, Messrs. Greenberg and Lerner, as Special Masters "[t]o review any applications for attorneys' fees and expenses" and "prepare and file with the Court a report and recommendation determining any and all issues relating to the amount of attorneys' fees and expenses that should be awarded."

(ECF No. 327). Plaintiffs' Counsel has submitted herewith their lodestar and expense information to assist the Special Masters (and ultimately the Court) in their determinations. Joint Decl. ¶¶135-36.

The Co-Lead Plaintiffs requested that Plaintiffs' Counsel not seek a fee greater than 28% of the Settlement Fund, and Lead Counsel agreed. Three of the four Co-Lead Plaintiffs – Jacksonville, City of Detroit, and International Fund Management, S.A. (Luxembourg) – endorse an award of a 28% fee to Lead Counsel, in addition to the recovery of their costs and expenses. The remaining Lead Plaintiff, Stichting Pensioenfonds ABP ("ABP"), was the only Lead Plaintiff with a pre-existing fee agreement. The fee agreement was executed as part of its retainer with G&E prior to ABP agreeing to team up with other plaintiffs in a Co-Lead Plaintiff structure to jointly prosecute this case, and capped fees to G&E at 15% of any recovery for settlements less than $500 million. ABP has decided, in light of the Co-Lead Plaintiff structure and the circumstances of this case, to take no position on the fee but to defer to the Special Masters and the Court in determining a reasonable fee and expense award.

In light of the duration of the litigation and the overall time, costs and expenses incurred by the various Plaintiffs' Counsel, and the fact that the litigation was not settled until the eve of trial, Plaintiffs' Counsel believe that any recommendation and award of attorneys' fees of up to 28% of the Settlement Fund would be appropriate. Such an award would result in only a 1.34 multiplier on the total lodestar of all Plaintiffs' Counsel, which is reasonable under the circumstances, particularly given the significant risks to any recovery confronting Plaintiffs' Counsel, and is well within the range of multipliers awarded by this Court and other courts in the Third Circuit under similar circumstances.

LEGAL ARGUMENT

I. THE REQUEST FOR LEAD COUNSEL FEES AND REIMBURSEMENT OF EXPENSES SHOULD BE APPROVED

For the reasons set forth below, the Court should grant Plaintiffs' Counsel a fee award equal to a percentage of the $215 million Settlement, plus reimbursable expenses. Plaintiffs' Counsel have conferred a substantial benefit upon the Class in a challenging contingency case and should be appropriately compensated.

A. THE COMMON FUND DOCTRINE APPLIES TO THE SETTLEMENT

The propriety of awarding attorneys' fees from a common fund is well established. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."). The Third Circuit has noted that at the "heart of this [doctrine] is a concern for fairness and unjust enrichment; the law will not reward those who reap the substantial benefits of litigation without participating in its costs." *Polonski v. Trump Taj Mahal Assocs.*, 137 F.3d 139, 145 (3d Cir. 1998). The Third Circuit and this Court have found it appropriate in securities fraud cases to award attorneys' fees out of a common fund. *See, e.g., In re AT&T Corp., Sec. Litig.*, 455 F.3d 160, 175 (3d Cir. 2006) (affirming award of attorneys' fees from common fund in securities fraud case); *Louisiana Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, No. 03-cv-4372, 2009 WL 4730185, at *9 (D.N.J. Dec. 4, 2009) (Cavanaugh, J.) (awarding attorneys' fees from common fund in securities fraud case).

Here, Plaintiffs' Counsel successfully negotiated a settlement payment by Defendants of $215 million, which represents a "common fund." Plaintiffs' Counsel are therefore entitled to a share of that fund because, through their efforts, the Class Members obtained access to the Court, and will receive a distribution from the common fund. Paying Plaintiffs' Counsel's reasonable

fees from the common fund properly compensates counsel for bringing and pursuing the claims in this case, and furthers the purpose of the securities laws.

B. PLAINTIFFS' COUNSELS' FEES SHOULD BE BASED ON A PERCENTAGE OF THE COMMON FUND

The awarding of attorneys' fees and the method used to determine that award are "within the discretion of the court." *In re Merck & Co., Inc. Vytorin ERISA Litig.,* No. 08-cv-285, 2010 WL 547613, at *6 (D.N.J. Feb. 9, 2010) (Cavanaugh, J.) ("*Merck ERISA*"). However, the Third Circuit has consistently ruled that in common fund cases such as this one, the percentage-of-recovery method is the preferred approach in calculating an award of fees because it allows the Court to reward success and penalize failure. *AT&T*, 455 F.3d at 164*; In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 (3d Cir. 2001); *Henderson v. Volvo Cars of N. Am., LLC,* No. 09-cv-4146, 2013 WL 1192479, at *14 (D.N.J. Mar. 22, 2013) ("The percentage-of-recovery method is preferred in common fund cases"); *Unite Nat'l Ret. Fund v. Watts*, No. 04-cv-3603, 2005 WL 2877899, at *5 (D.N.J. Oct. 28, 2005) (Cavanaugh, J.) ("Typically, in determining approval of attorneys' fees in large settlements, a court will award fees based on a percentage of recovery of the common fund awarded to the plaintiffs.").

The Third Circuit has identified several factors, known as the *Gunter* factors, that the Court should consider when evaluating a motion for an award of attorneys' fees in a common fund settlement. Those factors are:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by Lead Counsel; and (7) the awards in similar cases.

AT&T, 455 F.3d at 165; *Cendant*, 243 F.3d at 733; *Plymouth Cnty. Contributory Ret. Sys. v. Hassan*, No. 08-cv-1022, 2012 WL 664827, at *2 (D.N.J. Feb. 28, 2012) (Cavanaugh, D.J.)

(citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000)). As this Court has explained, additional factors to consider include:

> (8) the value of benefits attributable to the efforts of class counsel to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained, and (10) any innovative terms of settlement.

Merck ERISA, 2010 WL 547613, at *6. *See also In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009). The Court should not apply the factors "in a formulaic way" because particular facts may require that "[c]ertain factors . . . be afforded more weight than others." *Merck ERISA*, 2010 WL 547613, at *6. *See also AT&T,* 455 F.3d at 166 (the factors are not to "be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest") (internal quotations omitted).

Additionally, the Third Circuit recommends that the Court "use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award." *AT&T*, 455 F.3d at 164. *See also Merck ERISA*, 2010 WL 547613, at *12 (applying lodestar cross-check). However, "[t]he lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method." *AT&T,* 455 F.3d at 164.

C. A SUBSTANTIAL FEE AWARD IS WARRANTED UNDER THE CIRCUMSTANCES

Each of the *Gunter* factors supports an award of attorneys' fees at the highest percentage (28% of the Settlement Fund) that the Special Masters may, in their discretion, recommend to the Court. In particular, the size of the Settlement and the significant risks that Plaintiffs might not have recovered anything support a sizeable fee award to Plaintiffs' Counsel.

1. Plaintiffs' Counsel's Efforts Conferred A Substantial Benefit Upon Class Members

Plaintiffs' Counsel's success in bringing this litigation to a successful conclusion is a strong indicator of the experience and ability of the attorneys involved. In applying the first *Gunter* factor, the Court "consider[s] the fee request in comparison to the size of the fund created and the number of class members to be benefitted." *Rowe v. E.I. DuPont De Nemours & Co.*, Nos. 06-cv-1810, 06-cv-3080, 2011 WL 3837106, at *18 (D.N.J. Aug. 26, 2011). *See also In re Schering-Plough Corp. Sec. Litig.*, No. 01-cv-0829, 2009 WL 5218066, at *6 (D.N.J. Dec. 31, 2009) ("*Schering-Plough*") ("Most important, and easiest to point to, is the first factor, the size of the fund and the number of persons benefitted"); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002) ("the single clearest factor reflecting the quality of class counsels' services to the class are the results obtained.") (internal quotation and citation omitted).

The proposed Settlement creates a common fund of $215,000,000 in cash for the benefit of thousands of Class members. This recovery is the third largest securities class action settlement against a pharmaceutical company, the seventh largest within the Third Circuit, and among the top 50 largest securities class actions ever.[3] The recovery provides a large monetary recovery to the Class and, as made clear below, is particularly significant in light of the risks posed by trial. Thus, the first *Gunter* factor – the size of the fund created and the number of persons benefitted – strongly supports a sizeable fee award to Plaintiffs' Counsel. *See Schering-Plough*, 2009 WL 5218066, at *6 (approving fee award where "settlement is among the five largest securities litigation settlement awards in the District and the class size is substantial").

[3] *See* Joint Decl. Exhibit A, chart of top settlements.

2. A Fee at the Maximum Percentage the Special Masters May Recommend Would Be Fair Given the Risks Confronting Plaintiffs

The fifth *Gunter* factor – the risk of non-payment – is particularly significant here. *See In re Pet Food Prods. Liab. Litig.*, No. 07-cv-2867, 2008 WL 4937632, at *22 (D.N.J. Nov. 18, 2008), *aff'd in part, vacated in part on other grounds*, 629 F.3d 333 (3d Cir. 2010) ("Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees"). Plaintiffs' Counsel undertook this action on an entirely contingent fee basis, assuming a substantial risk that the litigation would yield no or very little recovery and leave them uncompensated for their time, as well as for their substantial out-of-pocket expenses. While all litigation entails some risks, here, there was a very real possibility that Plaintiffs would recover nothing, despite having completed several years of contentious litigation and taken the case to the eve of trial. As explained below, and as set forth in the Joint Declaration at paragraphs 98-108, these significant risks include the possibility of a finding at trial or a ruling on appeal that Plaintiffs had not established Defendants' scienter, loss causation, or any materially false statements, all required elements of Plaintiffs' claims, as well as the threat of juror confusion as a result of complicated medical, statistical and scientific evidence. Additionally, Defendants demonstrated that they would vigorously present their potentially dispositive arguments at trial and, even if Plaintiffs prevailed, on appeal.

These many, significant risks show that the $215 million settlement was an astounding success for Plaintiffs and Lead Counsel under the circumstances. The significant risk of non-payment confronting Lead Counsel demonstrates that a high fee award is appropriate here. *See Esslinger v. HSBC Bank Nevada, N.A.*, No. 10-cv-3213, 2012 WL 5866074, at *13 (E.D. Pa. Nov. 20, 2012) ("This [risk of non-payment] factor allows courts to award higher attorneys' fees for riskier litigations"); *Merck ERISA*, 2010 547613, at *9 ("the size of the fund and number of

persons benefitted by the fund weighs in favor of an award of attorneys' fees"). The particular risks confronting Plaintiffs and Lead Counsel are explained below.

a. The Difficulty In Proving Defendants' Scienter

Scienter is a required element of Plaintiffs' claims. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). 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; (4) the purported communication of the news of the trials' failure occurred during a meeting (between the CEOs of Schering and Merck) for which there is no documentation (regarding the substance of the meeting) nor any corroborating testimony; and (5) no Defendant ever admitted wrongdoing nor was subject to criminal or other governmental sanctions. In short, Plaintiffs had no "smoking gun."

As to the first two difficulties in proving scienter, discovery indeed confirmed that the ENHANCE trial was overseen by Schering, including the day-to-day 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 trial results (and purportedly communicated those 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.

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. Moreover, 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 is that the early knowledge that the trial had failed was communicated from Schering statisticians to their supervisor 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 the nature of any conversation between Clark and Hassan, and Clark 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 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.

b. The Difficulty In Establishing Loss Causation

In addition to proving scienter, Plaintiffs would have 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 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; as a result, Schering's stock price plunged significantly, but Merck's stock barely moved. Accordingly, Plaintiffs faced a stark prospect of not being able to establish loss causation, and thus recovering nothing.

In an attempt to cure this problem, 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 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.

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 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.

c. The Difficulty In Proving False Statements

To prove their case, Plaintiffs would also have to show that Defendants made materially false and misleading statements (and/or material omissions). *Dura*, 544 U.S. at 341. Almost all of the purportedly false statements on which Plaintiffs sought relief concern Merck's quarterly and annual financial guidance. Defendants would likely argue that the statutory safe harbor for forward-looking statements immunized them from liability for their guidance statements. Assuming that argument were accepted, to prove that Merck's statements about its future financial performance were false or misleading, Plaintiffs would have to show that the statements were made with actual knowledge of their falsity. *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). Additionally, because certain guidance Defendants provided was in fact 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 the statements were made.

Every financial guidance statement issued by Merck was accompanied by disclaimers that arguably brought 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 functional unblinding, but that this awareness translated into a subjective disbelief in the truth of the financial guidance Merck offered its investors. Plaintiffs' burden in proving falsity was therefore extremely difficult to meet.

d. Additional Jury Confusion Risks

Additional facts and circumstances in this case threatened to confuse the jury. First, 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 their efficacy, the jury might fail to see what harm Defendants had 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 might 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 Merck ERISA,* 2010 WL 547613, at *11 ("the former FDA approval of these drugs created a hurdle in the present litigation").

In sum, there were many significant obstacles to proving required elements of Plaintiffs' claims. The value of the Settlement and the quality of Lead Counsel's services to the Class are best measured by considering these many significant risks confronting the Plaintiffs.

The risks here were exponentially greater than those faced by class counsel in a similar case, the *Merck ERISA* consumer action. In that case, class counsel invested 8,199 hours and expended $146,186 in costs in litigating their case, *Merck ERISA*, 2010 WL 547613, at *11; Plaintiffs' Counsel here put in multiples of both of those figures. *See* Joint Decl., Exh. M. Even more significantly, Lead Counsel in this action took the case to the brink of trial, preparing dozens of pretrial motions and extensive Pretrial Order materials, whereas class counsel in *Merck ERISA* resolved their case well ahead of trial. In that case, this Court awarded 33-1/3% of the settlement fund in attorneys' fees, noting, in particular, class counsel's risk of non-payment. *Id*. (also noting that even "[i]f plaintiffs were successful at trial and obtained a judgment for substantially more than the amount of the proposed settlement, the defendants would appeal such judgment. An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself."). Similarly, in the related *Schering-Plough ERISA* consumer case, this Court approved a 33-1/3% fee where class counsel litigated the case for four years but devoted fewer hours (only 4,640 hours) to the case. *In re Schering-Plough Corp. ENHANCE ERISA Litig.*, No. 08-cv-1432, 2012 WL 1964451, at *7-8 (D.N.J. May 31, 2012) (Cavanaugh, D.J.) ("*Schering-Plough ERISA*"). *See also Plymouth Cnty.*, 2012 WL 664827, at *5 ("Counsel has maintained vigor and dedication throughout this litigation, and the risk of nonpayment therefore weighs in favor of an award of attorneys' fees."). Again, as in *Merck ERISA*, class counsel in *Schering-Plough ERISA* resolved their case well ahead of trial, but Lead Counsel here prepared to try this very complex case.

e. The Other Gunter Factors Further Support An Award Of Attorneys' Fees At The Maximum Amount The Mediators May Recommend

(1) Number Of Objections By Class Members

For the second *Gunter* factor, "the Court evaluates the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel." *Merck ERISA*, 2010 WL 547613, at *10. While to date there have been no objections to the Settlement or fee request, the deadline for filing objections is August 5, 2013. Therefore, Lead Counsel will address this factor and any objections that are filed in Lead Counsel's reply papers (due August 13, 2013).

f. Plaintiffs' Counsel Were Skilled And Efficient

The quality of the work that has been presented to the Court speaks for itself. Lead Counsel successfully opposed Defendants' motions to dismiss and for summary judgment, successfully moved for class certification and opposed Defendants' appeal of the Court's order granting class certification, and obtained a large recovery for Class Members in the face of substantial risks of recovering nothing. *See In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 121 (D.N.J. 2012) ("The substantial settlement sum negotiated by Class Counsel . . . further evidences their competence"). Moreover, in addition to their legal skills, Lead Counsel were required to learn protocols for clinical trials, the science behind the drugs at issue, and complex statistical principles that were used to show that Defendants improperly unblinded the ENHANCE data and learned the trial results well before publicity disclosing those results. *See Rowe*, 2011 WL 3837106, at *20 (finding that "complex issues raised in [the] litigation required counsel with numerous areas of expertise. . . . [including] specialized understanding of on-going scientific, regulatory, political/legislative and legal developments").

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by Class Counsel. *See*, *e.g.*, *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) ("The quality of opposing counsel is also important in evaluating the quality of Lead Counsels' work."); *Moore v. Comcast Corp.*, No. 83-cv-773, 2011 WL 238821, at *5 (E.D. Pa. Jan. 24, 2011) (awarding fees of 33% of fund, noting that Lead Counsel "prosecuted the case against opponents represented by highly skilled counsel"); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (among factors to be considered in measuring class counsel's quality of representation is "the performance and quality of opposing counsel") (internal quotation and citation omitted).

Defendants' counsel in this case were attorneys from highly respected national law firms (Paul, Weiss, Rifkind, Wharton & Garrison LLP; Lowenstein Sandler PC; and Tompkins, McGuire, Wachenfeld & Barry LLP), whose various filings, including the briefs filed in support of Defendants' motions to dismiss and for summary judgment, and their briefs in opposition to Plaintiffs' motion for class certification and in support of their appeal of the class certification order, reflected a vigorous defense. Lead Counsel's ability to obtain a favorable settlement for the Class in the face of such opposition further confirms the superior quality of Lead Counsel's performance and supports an award of a high percentage of the common fund. *See Plymouth Cnty.*, 2012 WL 664827, at *4 (approving fee request where "[t]he skill and efficiency of the attorneys involved is high. Class Counsel are highly skilled attorneys with substantial experience in class action litigation"); *Schering-Plough ERISA*, 2012 WL 1964451, at *6 (same).

g. Complex Medical, Statistical And Scientific Methods And Principles Permeated The Case

For the fourth *Gunter* factor, the Court examines the complexity and duration of the litigation. As this Court has previously noted, "securities class actions are inherently complex."

Louisiana Mun. Police, 2009 WL 4730185, at *8. This complexity was compounded by the medical and scientific issues necessary to understand clinical trial protocols and the science behind the drugs at issue, and the statistical analyses that Lead Counsel were required to learn in order to effectively prosecute their claims (and explain them to the Court and, ultimately, to a jury). This complex litigation has been ongoing for nearly 5 years. These facts strongly support Plaintiffs' Counsel's fee application. *See Schering-Plough ERISA*, 2012 WL 1964451, at *7 ("this is a significantly complex litigation that has been ongoing for four years. This factor weighs in favor of an award of attorneys' fees"); *Merck ERISA*, 2010 WL 547613, at *10 ("inherently complex suit" that was "ongoing for more than two years" warranted fee award) (both awarding fees of 33-1/3% of settlement fund).

h. Amount of Time Devoted By Plaintiffs' Counsel

Since its inception, Plaintiffs' Counsel have expended 105.341.76 hours and incurred $4,367,376.95 in out-of-pocket expenses on this case. (*See* Joint Decl., Exh. M.) This includes, *inter alia*, the time spent in the initial investigation of the case; researching complex statistical and scientific principles and issues of law; preparing and filing two amended Complaints; briefing the opposition to Defendants' motion to dismiss; reviewing over 12 million pages of documents produced by Defendants; conducting over fifty (50) fact and expert depositions; briefing Plaintiffs' motion for class certification; opposing Defendants' appeal of the Court's class certification decision, Defendants' motion for summary judgment and their *Daubert* motions to preclude expert testimony; preparing several submissions to mediators and engaging in numerous mediation sessions; preparing for and participating in a mock trial; preparing for trial (including preparing deposition designations, detailed statements of contested and uncontested facts, exhibits, briefing on motions *in limine*, voir dire, jury questionnaires and instructions, verdict forms, pre-trial brief, and direct and cross-examination of witnesses and

opening and closing statements); documenting the terms of the Settlement and preparing the related Stipulation, notices, plan of allocation, and other settlement documents; researching and briefing issues relating to the preliminary approval of the Settlement; and further time to be spent in briefing and arguing final approval. Indeed, Plaintiffs' Counsel's submission today does not include time to be spent going forward—both in preparing and presenting arguments on final approval, or defending the Settlement from any objection or other appellate or other attacks that may result. *See Merck ERISA*, 2010 WL 547613, at *11 (approving fee request and noting that "the time dedicated and expenditures incurred do not include costs that will arise immediately in the future, such as the settlement hearing conducted before this Court"). Accordingly, this *Gunter* factor likewise strongly supports Plaintiffs' Counsel's fee request.

i. Awards in Similar Cases

Plaintiffs' Counsel have submitted the issue of the appropriate amount of the fee award to two independent mediators, who are familiar with the long history of this case. An award of 28% of the Settlement Fund would be similar to the percentages that are typically awarded by courts in the Third Circuit, including this Court, in common fund cases. *See*, *e.g.*, *Schering-Plough ERISA*, 2012 WL 1964451, at *7 (awarding 33⅓%, noting that "[c]ourts have generally awarded fees in the range of nineteen to forty-five percent"); *Rowe*, 2011 WL 3837106, at *21 (awarding 33⅓% as "within the accepted range of fees approved in common fund cases"); *Merck ERISA*, 2010 WL 547613, at *11 (awarding 33⅓% and noting that "awards in similar common fund cases appear analogous" and award was "consistent with other similar cases") (citing *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-cv-0085, 2005 WL 3008808, at *44 (D.N.J. Nov. 9, 2005) where a review of 289 settlements demonstrated "average attorneys' fees percentage [of] 31.71% with a median value that turns out to be one-third")); *Carroll v. Stettler*, No. 10-cv-2262, 2011 WL 5008361, at *8 (E.D. Pa. Oct. 19, 2011) (awarding fees of 33-1/3% of

fund, noting that "district courts in this circuit have typically awarded attorneys' fees of 30% to 35% of the recovery"); *Louisiana Mun. Police*, 2009 WL 4730185, at *8 (awarding 30%, noting that it is "similar to settlements in other cases in this circuit"). If anything, the challenges faced here were greater than those in most of the aforementioned cases, including the *Merck* and *Schering* consumer cases, given the complexity of the claims, the heightened burdens imposed by the PSLRA (that did not apply in those consumer cases), and the very significant risks that Plaintiffs would recover nothing.

j. Additional Factors

Also strongly supporting Plaintiffs' Counsel's fee application is the fact that none of the benefits accruing to Class members resulted from efforts of other groups, such as government agencies. The Congressional investigation that commenced in late 2006 resulted in no fines or penalties against any of the Defendants, nor any judgment or findings that could have been used in this action. *See Merck ERISA*, 2010 WL 547613, at *11 (approving fee request, noting absence of related investigation or prosecution by governmental agency).

3. A Fee Award At The Top Amount That The Special Masters May Recommend Is Supported By The Lodestar Cross-Check

The Third Circuit has expressly stated that, in common fund cases, the court should use counsel's lodestar as a "cross-check" on any requested percentage fee award in order to gauge its reasonableness. *AT&T*, 455 F.3d at 164. This Court has done so on numerous occasions. As this Court recently explained, "[t]he lodestar analysis is performed by multiplying the number of hours reasonably worked [on the case] by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys." *Plymouth Cnty.*, 2012 WL 664827, at *5. Additionally, the Court should calculate the lodestar multiplier "which is equal to the proposed fee award divided by the lodestar."

Schering-Plough ERISA, 2012 WL 1964451, at *7. Here, the lodestar method confirms the reasonableness of a very substantial percentage fee award.

Plaintiffs' Counsel have spent a total of 105,341.76 hours on this case. (*See* Joint Decl., Exh. M; Berger Decl. ¶5; Graziano Decl. ¶5; McDonald Decl. ¶5; Cecchi Decl. ¶5; Klausner Decl. ¶5; Buchanan Decl. ¶4.) As reflected in Plaintiffs' Counsel's accompanying Declarations, the hours recorded were incurred on, among other tasks, those set forth above (*supra* at pages 2-17). Given the effort expended, the risks confronting Plaintiffs and the complexity of the legal and factual issues involved, the hours incurred are entirely reasonable.

Moreover, Plaintiffs' Counsel's rates vary appropriately between attorneys and between paralegals, depending on the position, experience level, and locale of the particular attorney. The rates for each individual attorney and paralegal are set forth in the Declarations and in the charts and exhibits to those Declarations. As appropriate in the Third Circuit, the lodestar rates are based on a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided and the experience of the lawyer. *Gunter*, 223 F.3d at 195.

Taking into account the several factors discussed above, including the benefits of the Settlement, the complexity and significant risks of the litigation, and the skill and experience of counsel, Lead Counsel's rates are reasonable in this case. As set forth in Plaintiffs' Counsel's accompanying Declarations, at a 28% award, the multiple of Plaintiffs' Counsel's lodestar would be only 1.34. *See* Joint Decl. ¶136. This multiple of counsel time is at the low end of the fee multipliers awarded in this Court and the Third Circuit.

In the Third Circuit, multipliers are applied to a lodestar in order to account for the risks of non-recovery, as an incentive for counsel to undertake socially beneficial litigation, or as an award for an extraordinary result. Although "[b]y nature they are discretionary and not

susceptible to objective calculation," *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 340 (3d Cir. 1998), the Third Circuit in *Prudential* and this Court in *In re Cendant Corp. Derivative Action Litigation*, 232 F. Supp. 2d 327 (D.N.J. 2002), have noted that "[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *In re Prudential*, 148 F.3d at 341 (internal quotation and citation omitted); *Cendant Derivative*, 232 F. Supp. 2d at 341-42 (same). In similar cases with less risk of nonpayment, this Court has awarded multipliers of 1.5 (*Schering-Plough Sec. Litig.*), 1.6 (*Schering-Plough ERISA*), and 2.786 (*Merck ERISA*). In *AremisSoft*, the Court noted that a multiplier of 4.3 was proper given the "high risk of non-payment." 210 F.R.D. at 135.[4]

Here, the outcome for the Class is substantial. As discussed in detail above, Plaintiffs' Counsel faced a significant risk of nonpayment, not only for their time, but of unreimbursed out-of-pocket costs. Thus, a multiplier of approximately 1.34 in this matter is well within the range approved by the Third Circuit, this Court, and other district courts throughout this Circuit.

Accordingly, use of the lodestar method as a cross-check further demonstrates the reasonableness of Plaintiffs' Counsel's request.

4. Plaintiffs' Counsel Should Be Reimbursed For Their Reasonably Incurred Litigation Expenses

The Court should also award Plaintiffs' Counsel and Co-Lead Plaintiffs reimbursement of all the costs and expenses they incurred, "as they have been 'adequately documented and

[4] Much higher multipliers are often awarded by courts in the Third Circuit. *E.g.*, *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995) (awarding fee that resulting in a multiplier of 9.3 times hourly rate); *Muchnick v. First Fed. Sav. & Loan Ass'n*, No. 86-cv-1104, 1986 WL 10791 (E.D. Pa. Sept. 30, 1986) (awarding fee equal to multiplier of 8.4); *Frederick v. Range Res.-Appalachia, LLC*, No. 08-cv-288, 2011 WL 1045665, at *13 (W.D. Pa. Mar. 17, 2011) (5.95 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589-90 (E.D. Pa. 2005) (6.96 multiplier); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. 03-cv-4578, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (15.6 multiplier).

reasonably and appropriately incurred in the prosecution of the case.'" *In re Schering-Plough/Merck Merger Litig.*, No. 09-cv-1099, 2010 WL 1257722, at *19 (D.N.J. Mar. 26, 2010) (internal quotation and citation omitted); *Merck ERISA*, 2010 WL 547613, at *14 (same); *Louisiana Mun. Police*, 2009 WL 4730185, at *9 (same). Plaintiffs' Counsel have provided a full itemization of costs and expenditures in their respective firm declarations. The Special Masters will review Plaintiffs' Counsel's submissions and recommend an amount of such costs and expenditures to be awarded.

The Notice to Class Members specifically provided that Plaintiffs' Counsel would apply for reimbursement of up to $5,000,000 in expenses, plus up to $175,000 in expenses incurred by Co-Lead Plaintiffs. The amounts requested are less than the amounts provided in that Notice: $4,367,376.95 in prosecution expenses plus $109,865.31 in expenses relating to representation of the Class incurred by Co-Lead Plaintiffs. Further, the PSLRA specifically authorizes Co-Lead Plaintiffs' recovery of the "reasonable costs and expenses (including lost wages) directly relating to the representation of the class." 15 U.S.C. § 78u-4(a)(4). These amounts should, therefore, be awarded in full. *See Rowe*, 2011 WL 3837106, at *22 (approving expenses as they were "adequately documented and reasonable in nature") (internal quotation and citation omitted); *Merck ERISA*, 2010 WL 547613, at *14 (approving request for reimbursement of costs where "Class Counsel has provided itemized expenditures"); *Serio v. Wachovia Sec. LLC*, No. 06-cv-4681, 2009 WL 900167, at *12 (D.N.J. Apr. 2, 2009) (awarding costs where "such expenses have been adequately documented and are reasonable based on the circumstances of this case").

CONCLUSION

For all the reasons set forth above and in the accompanying Joint Declaration and affidavits, Plaintiffs' Counsel respectfully requests that their motion for attorneys' fees and costs

in the amount recommended by the mediators be granted, and that Lead Counsel be permitted to allocate all fees awarded.

Dated: July 2, 2013

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