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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE MERCK & CO., INC. SECURITIES, DERIVATIVE & "ERISA" LITIGATION	MDL No. 1658 (SRC) Civil Action No. 05-1151 (SRC) (CLW) Civil Action No. 05-2367 (SRC) (CLW)
THIS DOCUMENT RELATES TO: THE CONSOLIDATED SECURITIES ACTION	**NOTICE OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION**

TO: All Persons on ECF service list

PLEASE TAKE NOTICE that on June 28, 2016 at 10:00 a.m., Lead Plaintiffs, the Public Employees' Retirement System of Mississippi, Steven LeVan, Jerome Haber and Richard Reynolds, through their undersigned counsel, shall move before the Hon. Stanley R. Chesler, U.S.D.J., at the United States Post Office and Courthouse Building, Newark, New Jersey 07101, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for (i) entry of a judgment finally certifying the Settlement Class and approving the Settlement as fair, reasonable and adequate; and (ii) entry of an Order approving the proposed Plan of Allocation as fair and reasonable.

The undersigned intend to rely upon the annexed Memorandum of Law and the Joint Declaration of Co-Lead Counsel in Support of: (A) Lead Plaintiffs' Motion for Final Approval of Settlement and Approval of Plan of Allocation; and (B) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, with annexed exhibits. Proposed Orders granting the requested relief will be submitted with Lead Plaintiffs' reply papers after the deadlines for objecting to the Settlement and requesting exclusion from the Settlement Class have passed.

Dated: April 29, 2016

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MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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PRELIMINARY STATEMENT

Lead Plaintiffs the Public Employees' Retirement System of Mississippi, Steven LeVan, Jerome Haber and Richard Reynolds ("Lead Plaintiffs"), on behalf of themselves and the Settlement Class, hereby seek: final certification of the Settlement Class certified by the Court pursuant to Fed. R. Civ. P. 23(a) and (b)(3) in its Preliminary Approval Order entered on February 11, 2016; final approval of the proposed settlement Lead Plaintiffs have reached with defendants Merck, Edward M. Scolnick, and Alise S. Reicin (collectively, "Defendants") (the "Settlement"), and approval of the proposed Plan of Allocation of the Net Settlement Fund.[1]

Subject to Court approval, the Settlement provides for a combined recovery of $1.062 billion (including funds for attorneys' fees and litigation expenses, and the fees of the Special Master appointed by the Court regarding the award of attorneys' fees and expenses[2]) for the benefit of the Settlement Class. This recovery is in return for the dismissal with prejudice of the claims asserted in this Action on behalf of Settlement Class Members against Defendants and granting of the Releases specified and described in the Stipulation.

The Settlement is an outstanding result for the Settlement Class. If approved, the Settlement will be (i) the largest securities class action settlement ever with a pharmaceutical company defendant; (ii) the second largest securities class action settlement ever in the Third

---

[1] All capitalized terms used herein that are not otherwise defined have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated February 8, 2016 (the "Stipulation") or in the Joint Declaration of Co-Lead Counsel in Support of: (A) Lead Plaintiffs' Motion for Final Approval of Settlement and Approval of Plan of Allocation; and (B) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith. Citations to "¶ __" in this memorandum refer to paragraphs in the Joint Declaration.

[2] To the extent the Court awards attorneys' fees and Litigation Expenses in an amount less than the $232 million Fee/Expense Fund, any amount remaining in the Fee/Expense Fund, after the payment of the Special Master fees and any Taxes owed by the Fee/Expense Fund, will be credited to the Settlement Class Fund and will not revert back to any of the Defendants or their insurers.

Circuit; and (iii) among the top 15 largest securities class actions ever reached under the PSLRA. As explained below, in addition to providing an extraordinary recovery for the Settlement Class, the Settlement avoids the substantial risks and expense of taking this Action to trial, including the risk of recovering less than the Settlement Amount, or no recovery at all, after substantial delay.

As detailed in the Joint Declaration, this was an extremely hard-fought case that was litigated over more than 12 years and brought to the eve of trial before an agreement to settle was reached. Thus, at the time of the Settlement, Lead Plaintiffs and Co-Lead Counsel had a very well-developed understanding of the strengths and weaknesses of the Action. Prior to settlement, Co-Lead Counsel had, among other things: (i) conducted a thorough factual and legal investigation of the class's claims; (ii) drafted several detailed consolidated class action complaints; (iii) successfully appealed the District Court's initial dismissal of the Action on statute-of-limitations grounds to the U.S. Court of Appeals for the Third Circuit; (iv) withstood Defendants' appeal of that decision to the U.S. Supreme Court and achieved a unanimous 9-0 victory at the Supreme Court; (v) successfully opposed, in substantial part, Defendants' subsequent motions to dismiss the complaint on other grounds; (vi) successfully moved for class certification; (vii) engaged in extensive discovery efforts, including participating in 59 depositions, the review of more than 35.8 million pages of documents, and the preparation of detailed responses to Defendants' contention interrogatories; (viii) retained and consulted with numerous experts about various aspects of the case and worked with them to prepare expert reports; (ix) successfully opposed Defendants' motions for summary judgment; (x) completed virtually all pre-trial preparations, including the exchange of *Daubert* motions, as well as completing a comprehensive joint Pretrial Order; (xi) engaged in a multi-day mock trial session, which provided Co-Lead Counsel with extensive insight into the risks they faced at trial; and (xii) engaged in prolonged settlement negotiations, including

settlement conferences and mediation efforts before the Court and Judge Layn Phillips. ¶ 13.

Lead Plaintiffs respectfully submit that the very substantial and immediate benefit the Settlement provides to the Settlement Class is particularly noteworthy in light of the complexity and substantial risks of the Action. As discussed in more detail below and in the Joint Declaration, while Co-Lead Counsel believe that the Lead Plaintiffs have a strong case for liability, the claims against the Defendants presented a number of substantial challenges that might have resulted in no recovery for the class following trial. ¶¶ 209-240. Indeed, as noted above, this Action was already dismissed once in its entirety. The risk of no recovery here was very real.

For example, to prove their case, Lead Plaintiffs needed to establish, among other things, that Defendants were in possession of material information evidencing an undisclosed cardiovascular ("CV") risk of Vioxx, and that, to hide that risk, Defendants falsely attributed a difference in the number of heart attacks observed in the VIGOR study patients to a purported CV benefit of the comparator drug in the trial, naproxen, rather than the increase in risk caused by Vioxx. ¶ 211. These complex scientific arguments, and the statistical concepts that underlie them, required expert testimony, were vigorously disputed by Defendants, and might not have been easily understood by a jury. ¶ 228. As a result, Lead Plaintiffs faced the very real risk that a jury would conclude that statements alleged to be materially false and misleading were not misstated or that the Defendants did not act with scienter (which requires an intent to defraud or recklessness). Proving scienter here would have been particularly difficult because Defendants would profess that they believed Vioxx was safe and argue that they were engaged in an open and public scientific debate in which scientists could reasonably differ based on the evidence then available. Defendants could have prevailed with that argument at trial. As further evidence of their lack of scienter, Defendants might point to the fact that Merck executives (including

Defendants Scolnick and Reicin) and their family members purportedly took Vioxx themselves while they were allegedly concealing its CV risk. ¶ 213. Defendants would also likely point to how Merck voluntarily designed and conducted another trial (APPROVe) which compared Vioxx to a placebo, which they would argue undercut any inference that Defendants understood that Vioxx raised CV risk. The difficulty of establishing Defendants' liability was further compounded by Defendants' argument that the FDA scrutinized much of the underlying Vioxx CV safety data, yet repeatedly approved the drug for sale. ¶ 216. Similarly, Defendants would argue was that the FDA, and not Merck, was responsible for Vioxx's labeling, and that jurors should not second-guess the FDA's determination. *Id*.

There were also risks as to the issue of damages and loss causation because, although the stock price of Merck fell upon the announcement of the withdrawal of Vioxx from the market, the same announcement also referenced the results of the APPROVe trial. Merck would argue that it was the results of the "new," recently unblinded APPROVe trial and not Defendants' previously undisclosed fraud that resulted in the September 30, 2004 stock price drop. ¶ 223.

As discussed below, Lead Plaintiffs also faced a number of other risks on pre-trial motions and at trial and, even if Lead Plaintiffs prevailed at trial, Defendants would surely appeal such a verdict and that would lead to substantial further delays at best, and at worst, no recovery at all.

The Settlement eliminates these risks and provides a substantial and immediate cash recovery for the Settlement Class. In light of these risks, and the extensive additional time and expense that continued litigation would require, Lead Plaintiffs and Co-Lead Counsel believe the Settlement is an excellent result for the Settlement Class and should be approved. ¶¶ 8, 241, 243. Moreover, the Settlement was reached after prolonged arm's-length settlement negotiations and with the assistance of the Court and an experienced Court-appointed mediator who made a

mediator's proposal recommending both the amount and structure of the proposed Settlement. ¶¶ 202-05. This further supports the fairness and reasonableness of the proposed Settlement.

Lead Plaintiffs also move for approval of the proposed Plan of Allocation of the Net Settlement Fund. The Plan of Allocation was developed in conjunction with Lead Plaintiffs' damages expert, is designed to fairly and equitably distribute the proceeds of the Settlement to Settlement Class Members, and should be approved. ¶¶ 250-258.

Lead Plaintiffs also request that the Court grant final certification of the Settlement Class. The Settlement Class includes all persons and entities who purchased or otherwise acquired Merck Common Stock or Merck Call Options, or sold Merck Put Options, from May 21, 1999 through October 29, 2004, inclusive (the "Settlement Class Period") – a period which is slightly longer than the previously certified class period, which ended on September 29, 2004.[3]

ARGUMENT

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement should be approved only if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *In re Nat'l Football League Players Concussion Injury Litig.*, 2016 WL 1552205, at *16 (3d Cir. Apr. 18, 2016) ("*NFL Players*"); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998); *McDonough v. Horizon Healthcare Servs., Inc.*, 2014 WL 3396097, at *4 (D.N.J. July 9, 2014), *aff'd*, 2015 WL 5573821 (3d Cir. Sept. 23, 2015). In ruling on final approval of a class settlement, the Court should examine both the negotiating process leading to the settlement and the settlement's substantive terms.

[3] Certain persons and entities are excluded from the Settlement Class by definition or by request, as set forth in the Stipulation. *See* Stipulation ¶ 1(bbb).

A. The Settlement Was Reached After Extensive, Arm's-Length Negotiations Conducted Under The Auspices Of The Court And An Experienced Mediator

The parties here negotiated the Settlement at arm's-length and under the auspices of the Court and former U.S. District Judge Layn Phillips, a highly respected mediator, which strongly supports a finding that the Settlement is fair and reasonable.

The settlement negotiations in this case were long and arduous. They included numerous in-person settlement conferences with the Court and mediation sessions and follow-up over the span of several years with highly knowledgeable and experienced attorneys representing each side. ¶¶ 202-205. This Court held settlement conferences with the parties on October 27, 2011, March 23, 2012, May 14, 2012, and September 30, 2013. Despite the Court's and the parties' best efforts, the settlement discussions at these times were not successful. ¶ 203. On September 19, 2014, the parties agreed to retain Judge Phillips as a private mediator after the Court suggested private mediation. A mediation session held with Judge Phillips on October 13, 2014 was unsuccessful and a previously scheduled second day of mediation for November 5, 2014 was cancelled. ¶ 204. There were then no settlement talks between the parties for a substantial period of time. *Id*.

Following the Court's ruling on summary judgment, Judge Phillips held the next mediation session on September 11, 2015. ¶ 205. After that mediation and a series of further discussions among the parties, the Court and the mediator, the parties finally reached an agreement in principle to settle the Action on December 17, 2015, over one year after the prior mediation efforts, after extensive trial preparation and the submission of the final Pretrial Order, and on the eve of trial. *Id*. The agreement to settle – both the amount and the structure – was the result of all parties accepting a mediator's proposal by Judge Phillips.

These circumstances strongly support a finding that the Settlement is fair and the parties entered into it without collusion. *See Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4,

2012) ("The 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.'"); *In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (finding a settlement fair where the parties engaged in "arm's length negotiations," including mediation before "retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases"); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (settlement entitled to a presumption of fairness where it was the product of "arms-length negotiation" facilitated by Judge Phillips, "a respected mediator"); *In re Cigna Corp. Sec. Litig.*, 2007 WL 2071898, at *3 (E.D. Pa. July 13, 2007) (finding a presumption of fairness where "negotiations for the settlement occurred at arm's length, as the parties were assisted by a retired federal district judge who was privately retained and served as a mediator").

Moreover, the fact that the Settlement was reached after arm's-length negotiations between experienced counsel after substantial discovery gives rise to a presumption that the terms of the Settlement achieved are fair and reasonable. The Third Circuit has directed courts to apply an "initial presumption of fairness" to the settlement if the district court finds:

> (1) the 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); *Henderson v. Volvo Cars of N. Am., LLC.*, 2013 WL 1192479, at *7 (D.N.J. Mar. 22, 2013) (same). The first three of these are easily met here (and it is too soon yet to assess the fourth element).

The record demonstrates that the parties, represented by experienced counsel, negotiated this Settlement at arm's length, including through multiple mediation sessions over several years. The Settlement occurred only on the eve of trial, after years of extensive document and deposition discovery, the submission of expert reports and expert discovery, resolution of summary judgment

motions, extensive trial preparation, briefing of *Daubert* motions, and the filing of a Pretrial Order. Accordingly, the Settlement here is entitled to a presumption of fairness. *See Rowe v. E.I. DuPont De Nemours & Co.*, 2011 WL 3837106, at *11 (D.N.J. Aug. 26, 2011) (proposed settlement entitled to presumption of fairness where it was negotiated at arm's length by experienced counsel after discovery had been completed and pre-trial motions had been filed); *In re Schering-Plough Corp. Sec. Litig.*, 2009 WL 5218066, at *3 (D.N.J. Dec. 31, 2009) ("Mediation sessions began years before the ultimate settlement, foundered, recovered, gained traction, and were successful—a pattern that demonstrates arms-length negotiating.") As the court held in *Schering-Plough*:

> 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 securit[ies] 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.

Id. Additionally, as made clear below, the factors considered by the Third Circuit with respect to the substantive terms of the Settlement also strongly support its approval.

B. Application Of The *Girsh* Factors Supports Approval Of The Settlement As Substantively Fair, Reasonable And Adequate

The Settlement is also substantively fair, reasonable, and adequate. The standards governing approval of class action settlements are well established in this Circuit. The Third Circuit has adopted a nine-factor test that should be considered in making this determination. The elements of this test – known as the "*Girsh* factors" – are:

> (1) the 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 a class action through the trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

NFL Players, 2016 WL 1552205, at *17 (citing *Girsh v. Jepson*, 521 F. 2d 153, 157 (3d Cir.

1975)); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164-65 (3d Cir. 2006) (same). As courts in this District have often noted:

> 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.

In re Schering-Plough Corp. ENHANCE ERISA Litig., 2012 WL 1964451, at *2 (D.N.J. May 31, 2012) ("*Schering-Plough ERISA*"); *Plymouth County Contributory Ret. Sys. v. Hassan*, 2012 WL 664827, at *2 (D.N.J. Feb. 28, 2012) (same).

1. The Complexity, Expense And Likely Duration Of The Litigation Support Approval Of The Settlement

The first *Girsh* factor considers "the probable costs, in both time and money, of continued litigation." *In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at *4 (D.N.J. July 29, 2013); s*ee Schering-Plough ERISA*, 2012 WL 1964451, at *4. "Where the Court finds, after balancing the Proposed Settlement against the anticipated expense, complexity, and time of possibly achieving a more favorable result through litigation, that the litigation would likely be expensive, complex, and time-consuming, this factor is found to weigh in favor of settlement." *Sullivan v. DB Invs., Inc.*, 2008 WL 8747721, at *16 (D.N.J. May 22, 2008).

Securities fraud class actions are recognized as "notably complex, lengthy, and expensive cases to litigate," *Par Pharm.*, 2013 WL 3930091, at *4, and this case was especially so. As discussed in the Joint Declaration, this litigation was extraordinarily complex. And, while the case has proceeded through the completion of all discovery and to the stage of pre-trial motions, in the absence of the Settlement, further pre-trial motions, a lengthy and complex trial, post-trial motions, and appeals would impose significant additional costs and delays on any recovery, even assuming

Plaintiffs were successful at trial.

When the parties reached an agreement in principle in December 2015 to settle the Action, multiple complex disputes had yet to be resolved. The parties' pre-trial filings pending before the Court included: (i) competing proposals on how to bifurcate the trial (with briefing on the issue scheduled); (ii) *Daubert* motions relating to 11 experts (with 495 pages of briefing); and (iii) a Pretrial Order which included three exhibit lists containing over 5,600 exhibits, a contemplated combined total of 52 *in limine* motions, deposition designations and objections to 34 deposition transcripts, hundreds of pages of contested and stipulated facts, and lists of 29 legal issues. ¶¶ 150-171.

If the case did proceed to trial, which was scheduled to begin on March 1, 2016, the trial would have been lengthy and expensive as a result of the many complex statistical, medical, scientific and legal issues presented, which would have required the use of numerous experts. For example, the trial would have required a detailed examination of the principles of conducting clinical trials and the protocols for Vioxx studies; the results of the VIGOR study; and statistical analyses concerning the conclusions that Merck should have reasonably drawn from the results of its studies. To prevail, Lead Plaintiffs would have had to persuade the jury that Defendants lacked a reasonable scientific basis for their claims that the VIGOR results could be explained by the hypothesis that Vioxx was cardio-neutral and that naproxen was cardio-protective. *See Warfarin,* 391 F.2d 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 litigated issues would be complex precipitating a "battle of the experts" that "would come at a burdensome expense"); *In re Vicuron Pharm., Inc. Sec. Litig.*, 512 F. Supp. 2d 279, 285 (E.D. Pa. 2007) (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").

Additionally, even if Lead Plaintiffs had prevailed at trial, Defendants would surely have appealed the verdict. Trial, post-trial motions, pre-judgment claims administration, and post-judgment appellate proceedings would have added significantly to the expense of this action and delayed, potentially for years, any recovery to class members (with no assurance that plaintiffs would ultimately prevail or recover any more that the Settlement now provides). *See In re Vivendi Universal, S.A. Sec. Litig.*, No. 02. Civ. 5571 (S.D.N.Y.) (case filed in 2002, trial in October 2009, jury verdict in January 2010, and claims proceedings until 2016; Rule 54(b) appeal still pending); *Glickenhaus & Co. v. Household Int'l, Inc.*, No. 02 C 5893 (N.D. Ill.) (case filed in 2002, trial and verdict in 2009, claims proceedings through 2013, appeal resolved in 2015, which resulted in remand and a new trial on loss causation); *see generally Warfarin*, 391 F.2d 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"); *Par Pharm.*, 2013 WL 3930091, at *4 ("This matter has been pending for seven years, and even if Lead Plaintiff were to succeed at trial, 'necessary delay through a trial, post-trial motions, and the appellate process would likely deny the Class any recovery for years, an unfavorable result for all parties.'"). Given the age of the case, any additional delay could also further limit many class members' ability to recover, given the difficulty of locating records of Merck trades from long ago.

Settlement at this juncture results in an excellent recovery for the Settlement Class without the costs, risks and delays of trial and post-trial proceedings. The complexity, expense and likely duration of continued litigation all weigh heavily in favor of approving the proposed Settlement.

2. The Reaction Of The Settlement 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 April 28, 2016, more than 1.9

million copies of the Settlement Notice had been disseminated to potential Settlement Class Members and their nominees. *See* Declaration of Stephanie A. Thurin ("Thurin Decl."), attached as Exhibit 2 to Joint Decl, ¶ 10. In addition, the Summary Settlement Notice was published in *The Wall Street Journal* on March 29, 2016 and transmitted over three internet newswires from March 29, 2016 to April 5, 2016. *Id*. ¶ 11. The Settlement Notice, Claim Form and other documents related to the Settlement were also made available on the previously established case website, www.MerckVioxxSecuritiesLitigation.com. *Id*. ¶ 15. The Settlement Notice sets out the essential terms of the Settlement and informs potential Settlement Class Members of, among other things, their right to opt out of the Settlement Class (if eligible to do so) or opt back in to the Settlement Class, their right to object to the Settlement, Plan of Allocation or Fee and Expense Application, and the procedure for submitting Claim Forms.

The May 14, 2016 deadline set by the Court for Settlement Class Members to opt out of, or object to, the Settlement has not yet passed. To date, 8 objections have been received. ¶ 249. Lead Plaintiffs and Co-Lead Counsel believe that each of the objections is without merit. However, as provided in the Preliminary Approval Order, rather than responding to the objections in a piecemeal fashion, Co-Lead Counsel will file reply papers on May 24, 2016, after the objection deadline has passed, that will address all objections received and discuss the requests for exclusion.

3. The Advanced Stage Of The Proceedings And Extensive Discovery Completed Support Approval Of The Settlement

The third *Girsh* factor examines the "degree of case development that Class Counsel have accomplished prior to Settlement" to "determine whether counsel had an adequate appreciation of the merits of the case before negotiating" the settlement. *Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 321 (3d Cir. 2011); *In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at *10 (D.N.J. Mar. 26, 2010).

Here, given that the Settlement was reached just a few months before trial, there can be no dispute about whether Lead Plaintiffs and Co-Lead Counsel had an adequate appreciation of the merits of the claims and defenses before settling. Co-Lead Counsel, over a span of more than a dozen years, investigated and pled Lead Plaintiffs' claims, completed significant discovery and pushed this case forward in a manner favorable to the Class, positioning it as best as possible for trial and thus obtaining an outstanding settlement. Lead Plaintiffs, through Co-Lead Counsel, conducted a thorough investigation and extensive discovery, which included reviewing more than thirty-five million pages of documents produced by Defendants and third parties in the Action; taking 31 fact depositions of current and former Merck employees and third parties; submitting expert and rebuttal reports from seven experts; and conducting or defending 14 expert depositions. They also substantially defeated Defendants' motions to dismiss and for summary judgment; successfully obtained class certification; completed nearly all pre-trial preparations, including *Daubert* motions, the filing of the Joint Pre-Trial Order, and the drafting of motions *in limine*; and conducted one mock trial. ¶¶ 13, 37-201. Moreover, Lead Plaintiffs and Co-Lead Counsel engaged in a series of mediated discussions regarding a possible settlement of the Action over the course of several years through an ongoing series of formal and informal discussions and mediation sessions before arriving at the Settlement. ¶¶ 202-206.

Co-Lead Counsel's investigation and discovery with respect to both liability and damages issues, legal analyses, and trial preparations all enabled Lead Plaintiffs and Co-Lead Counsel to thoroughly understand and evaluate the strengths and weaknesses of the claims and the risks of continued litigation, and accordingly to enter into the Settlement on a fully informed basis. Accordingly, this factor also weighs strongly in favor of the proposed Settlement. *See Rowe*, 2011 WL 3837106, at *13 (finding that negotiating the proposed settlement "on the eve of trial" weighs

"strongly in favor of accepting the parties' proposal"); *Henderson*, 2013 WL 1192479, at *9 (approving settlement 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 appreciation of the potential liability and the likelihood of success.'").

4. The Significant Obstacles And Risks To Recovery Strongly Support Approval Of The Settlement

As discussed more fully in the Joint Declaration, in this case, the fourth and fifth *Girsh* factors – the risks of establishing liability and the risks of establishing damages – convincingly demonstrate the value of the Settlement when measured against the expected recovery from further litigation. 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*, 2012 WL 43272, at *19. *See also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 814 (3d Cir. 1995) (examining the "potential rewards (or downside)" of litigation if class counsel decided to continue litigating the claims).

Risks of Establishing Liability. Although Co-Lead Counsel believe that Lead Plaintiffs have a strong case for liability – and negotiated the Settlement on this basis – the claims against Defendants present unique challenges given, among other things, the highly technical nature of the alleged fraud here at issue. *See, e.g., Smith v. Daimler Chrysler Servs. N. Am., LLC*, 2005 WL 2739213, at *3 (D.N.J. Oct. 24, 2005) (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"). For example, to prove their case, Lead Plaintiffs needed to establish that Merck was in possession of material, undisclosed facts showing that the Naproxen Hypothesis lacked a reasonable basis, and that Vioxx was pro-thrombotic. The

complex statistical and scientific facts supporting Lead Plaintiffs' claims might not have been easily understood by a jury and were vigorously disputed by Defendants, who offered alternative explanations that they asserted were supported by exhibits, testimony and experts. ¶ 228.

Lead Plaintiffs faced the very real risk that a jury would conclude that the Defendants did not act with the requisite scienter. Although Lead Plaintiffs uncovered significant evidence during discovery that supported a finding of Defendants' scienter, Defendants presented many facts and counter-arguments in opposition. ¶ 212. At the summary judgment stage, this Court recognized that it was faced with a "dense and extensive" record, and that Merck made "plausible arguments, with citations to the record, responding to Plaintiffs' points." 2015 WL 2250472, at *1, *23 (D.N.J. May 13, 2015). For example, Lead Plaintiffs faced a serious risk that the jury might be swayed by the testimony of Merck's outside consultants, Drs. FitzGerald, Oates, and Patrono, regarding the Defendants' state of mind, which could paint the Defendants in a favorable light and support Defendants' contention that they did not act with scienter. ¶ 213. While Co-Lead Counsel had drafted a motion *in limine* to preclude such testimony, there was no guarantee it would be granted. In addition, several Merck executives (including Defendants Scolnick and Reicin) asserted that they and their family members personally took Vioxx during the Class Period. This might have persuaded jurors that Defendants could not have believed Vioxx was unsafe. *Id*.

Proving scienter would also require significant expert testimony. For instance, the testimony of Lead Plaintiffs' biostatistics expert, Dean Madigan, was crucial to establishing Defendants' scienter with respect to the alleged materially false and misleading statements, including Defendants' statements that Merck's data showed "no difference" in CV risk between Vioxx and non-naproxen comparators, while Defendants' expert opined to the contrary. The jury would be asked to determine which interpretation is more fully supported by the evidence among

extraordinarily complex scientific and technical theories. As a result, Lead Plaintiffs would need to explain, to a lay jury, numerous statistical and scientific concepts such as statistical significance, confidence intervals, Bayesian analysis, intention-to-treat analysis, and subgroup analyses, as well as cardiology, epidemiology and pharmacology, necessary to understand the case. Success was not a foregone conclusion. ¶ 214. *See Vicuron*, 512 F. Supp. 2d at 285 (recognizing that "the technical nature of the subject matter would undoubtedly have reduced the case to a battle of experts," and "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.").

The difficulty of establishing scienter was further compounded by the fact that Defendants would be able to buttress their own assertions of no wrongdoing in connection with the VIGOR trial or the marketing of Vioxx by citing to the fact that the FDA scrutinized the data and repeatedly approved the drug's labeling. ¶¶ 215-216. Defendants would also continue to contend at trial that the FDA's independent review and approval of Vioxx as safe and effective demonstrated that Defendants lacked scienter, and validated their statements. Given that the clinical testing required by FDA rules and regulations to approve a drug for sale typically takes several years to complete and is designed to evaluate the risks and benefits of innovative medicines, the FDA approval of Vioxx represented a substantial hurdle to Lead Plaintiffs' success at trial.

Furthermore, at the time the Settlement was reached, the parties had filed and opposed competing *Daubert* motions, in which Defendants were seeking to exclude critical testimony that Lead Plaintiffs intended to offer through their experts. Had Defendants prevailed in excluding any of this testimony, the presentation of many aspects of Lead Plaintiffs' case would have been extremely difficult. ¶¶ 231-236. In addition, at the time the parties reached the Settlement, Defendants had contemplated filing other *in limine* motions, in which they would seek to exclude

Plaintiffs' presentation of key evidence, such as evidence of Merck's "rush to market" Vioxx, evidence of Dr. Scolnick's stock sales, evidence of the FDA's true capabilities, and testimony from important witnesses. If Defendants succeeded on these motions, it would have also presented enormous obstacles to Lead Plaintiffs' presentation of their claims. ¶¶ 237-238.

When the parties reached the Settlement, Lead Plaintiffs were contemplating filing a motion to bifurcate the trial into common and plaintiff-specific stages. If Lead Plaintiffs did not prevail on that motion, Defendants would be able to emphasize at trial issues specific to individual plaintiffs, including numerous opt-out plaintiffs, and thereby attempt to distract jurors from Defendants' alleged misconduct, making success at trial more difficult. ¶ 239.

Even if the class succeeded at trial, Defendants almost certainly would appeal after a lengthy post-trial claims process. ¶ 240. Defendants are represented by experienced counsel who would continue to mount a zealous and thorough defense to the class's claims for relief not only before and during a full trial on the merits, but afterwards, through post-trial motions and appeals.

Thus, when compared with the immediate and very substantial benefits provided by the Settlement, this factor strongly favors approval of the Settlement.

The Risks of Establishing Damages. Should Lead Plaintiffs have succeeded in establishing liability, considerable risk remained with respect to establishing loss causation and damages. For example, Defendants had asserted and would likely have continued to assert a truth-on-the-market defense, contending that relevant information about Vioxx's CV risks was available to the market during the Settlement Class Period and that, therefore, price declines at the end of the Settlement Class Period were not caused by Defendants' alleged misstatements or non-disclosures. ¶ 222. Instead, Defendants would have argued that the withdrawal of Vioxx from the market, and the resulting substantial decline in the price of Merck stock on September 30, 2004,

was due to the availability of entirely new information – the newly unblinded APPROVe results – rather than the correction of any prior alleged misrepresentations. ¶ 223. Defendants would also have attacked the damages model put forth by Lead Plaintiffs' damages expert arguing, for example, that only the portion of the stock prices declines related to lost sales of Vioxx could be attributed to alleged fraud (and not the portions related to Vioxx's anticipated follow-on drug, Arcoxia, or increased liability related to personal injury suits after Vioxx's withdrawal). ¶ 224. Had any of Defendants' arguments been accepted in whole or in part, that could have eliminated or, at a minimum, significantly limited any potential recovery. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001) ("[E]stablishing 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."). This uncertainty surrounding proving damages, as well as the need to rely on experts, further supports a finding that the Settlement is fair, reasonable, and adequate.

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.

5. Risks Related To Class Certification Support Approval Of The Settlement

The sixth *Girsh* factor "evaluates the risks of maintaining the class throughout the trial." *F.C.V. Inc. v. Sterling Nat'l Bank*, 2006 WL 1319822, at *6 (D.N.J. May 12, 2006). Here, following extensive class certification discovery and vigorous opposition from Defendants, the Court granted Lead Plaintiffs' motion for class certification on January 30, 2013, and certified a class consisting of all persons and entities who, from May 21, 1999 to September 29, 2004, inclusive, purchased or otherwise acquired Merck Common Stock or Merck Call Options, or sold Merck Put Options (the "Certified Class").

There was always the risk that the Action, or particular claims in the Action, might not

have been maintained as a class through trial. *See Sullivan,* 667 F.3d at 322 (a "district court retains the authority to decertify or modify a class at any time during the litigation"); *Prudential*, 148 F.3d at 321 (same); *McDonough*, 2014 WL 3396097, at *8 (same). However, given the imminence of trial and the strong arguments supporting the appropriateness of class certification in this case, Lead Plaintiffs believe that the risk of decertification was minimal here.

More salient was the fact that the Court's May 13, 2015 Order partially granting Defendants' motions for summary judgment dismissed all claims with respect to allegedly false statements made between May 21, 1999 and March 26, 2000 (*i.e.*, the alleged misstatements made prior to the public announcement of the VIGOR results on March 27, 2000), thereby effectively shortening the class period by ten months. Similarly, the Court's decision on Defendants' motion to dismiss rejecting claims based on a November 1, 2004 *Wall Street Journal* article had previously caused the class period to be shortened by a month (to end on September 29, 2004 rather than October 29, 2004), and thereby markedly reduced the investors' recoverable damages. While Lead Plaintiffs could potentially have challenged these decisions on appeal after trial, overturning them would not have been easy and, even if Lead Plaintiffs were successful in reviving claims based on purchases during those time periods on appeal, they still would have had to prevail at a second trial. Thus, there were extremely significant risks that investors who purchased during the May 21, 1999 to March 26, 2000 period or September 30, 2004 to October 29, 2004 period would never be able to recover for those purchases and that no class members would be able to recover based on the Merck stock price decline on November 1, 2004. The proposed Settlement (which has a Settlement Class Period that runs from May 21, 1999 through October 29, 2004) eliminates those risks and provides the potential for recovery for purchasers during the May 21, 1999 to March 26, 2000 and September 30, 2004 to October 29, 2004 time periods and for other purchasers during

the Settlement Class Period who held their Merck securities through October 29, 2004.[4] Accordingly, the risks related to class certification favor approval of the Settlement.

6. The Ability Of Defendants To Withstand A Greater Judgment

The seventh *Girsh* factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the settlement." *See Sullivan,* 667 F.3d at 323; *see also Cendant*, 264 F.3d at 240. Here, the $1.062 billion aggregate Settlement Amounts substantially exceeded Merck's available insurance. *See Merck Resolves Previously Disclosed Securities Class Action Lawsuit Related to Vioxx*, Business Wire (Jan. 15, 2016) ("After available funds under certain insurance policies, Merck's cash payment for the settlement and fees will be approximately $680 million."). Nonetheless, Merck is a large company with billions of dollars in revenue, and Lead Plaintiffs believe that Merck has substantial assets and could likely withstand a substantially greater judgment.

The courts have frequently held that a defendant's ability to pay a larger judgment does not, by itself, militate against approval of a settlement, especially where, as here, the other factors support approval. *See Sullivan,* 667 F.3d at 323 (where a "defendant entity is likely to be able to withstand a more substantial judgment . . . this fact alone does not undermine the reasonableness of the instant settlement"); *Saini v. BMW of N. Am., LLC*, 2015 WL 2448846, at *11 (D.N.J. May 21, 2015) ("even if Defendant could afford a greater amount, this fact provides no basis for rejecting an otherwise reasonable settlement"); *Henderson,* 2013 WL 1192479, at *11 ("to withhold approval of a settlement of this size because [Defendant] could withstand a greater

[4] However, as discussed below in Section II, given these risks, the proposed Plan of Allocation discounts the claims relating to purchases during the initial pre-VIGOR time period, and for shares held through October 29, 2004, by 90% to account for the significant additional difficulties that members of the Settlement Class would have had in achieving a recovery on these claims.

judgment would make little sense where the [settlement] is within the range of reasonableness and provides substantial benefits to the Class"); *In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 484 (D.N.J. 2012) ("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"). A "defendant is not required to 'empty its coffers' before a settlement can be found adequate." *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014).

Moreover, Merck's significant assets also meant that Defendants could have afforded to continue spending millions of dollars defending this Action through trial – and if Lead Plaintiffs were successful – through appeals.

7. The Size Of The Settlement Fund In Light Of The Range Of Possible Recoveries And The Attendant Risks Of Litigation Strongly Supports Approval Of The Settlement

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. Courts approving settlements should determine a "range of reasonableness" in light of the range of possible recoveries and all the attendant risks of litigation. *See General Motors*, 55 F.3d at 806. 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 (internal quotations and citations omitted). "The 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).

"Rather, the percentage recovery must represent a material percentage recovery to [the] plaintiff in light of all the risks considered under *Girsh*." *AT&T Corp.*, 455 F.2d at 170.

Lead Plaintiffs submit that the Settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. Had the class of Merck investors from March 27, 2000 through September 29, 2004 overcome all of the substantial litigation risks noted above, the maximum recoverable damages would be approximately $13.4 billion. ¶ 241.[5] This maximum estimated amount, based on the analysis of Plaintiffs' damages expert, Dr. David Tabak, assumes 100% participation by the class and includes damages based on declines in Merck's stock price with three distinct causes: (i) the loss of anticipated Vioxx sales; (ii) the negative impact of Vioxx's withdrawal on the approvability of Merck's follow-on Cox-2 inhibitor, Arcoxia; and (iii) the increased personal injury litigation liability tied to Vioxx's withdrawal. However, there was a real risk that the Court, in its *Daubert* rulings, or the jury at trial, might determine that only the Vioxx sales component of the decline in Merck's stock price was attributable to Lead Plaintiffs' claims. If damages based on the negative impact on Arcoxia were eliminated (either at the *Daubert* stage or at trial), maximum damages would drop to approximately $11.9 billion. If damages based on both the impact on Arcoxia and personal injury liability were excluded, the maximum damages would be approximately $9.5 billion.

Accordingly, the $1.062 billion total Settlement represents approximately 8% to 11.2% of

[5] The Settlement Class is broader than the Certified Class, as limited by the Court's opinions, and includes investors with dismissed claims, who (a) acquired Merck securities during the May 21, 1999 to March 26, 2000 period or (b) suffered losses as a result of the November 1, 2014 alleged corrective disclosure. Additional recoverable damages for those two categories of loss are approximately $4.3 billion. However, had the case gone to trial, based on the Court's prior rulings, the Certified Class would not have been able to recover any of those additional damages, which would only have been available if the Court's rulings were overturned on appeal and Plaintiffs then prevailed in a second trial.

estimated potential maximum damages, assuming Lead Plaintiffs prevailed on all questions of liability and all Class members filed proofs of claim. ¶ 242. That percentage recovery is very favorable when compared to the percentage of damages recovered in other securities class action settlements. *See, e.g., In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) ("the average settlement amounts in securities fraud class actions where investors sustained losses over the past decade . . . have ranged from 3% to 7% of the class members' estimated losses"); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving settlement representing "just over 9% of the maximum potential recovery" and finding that this is "higher than the median percentage of investor losses recovered in recent shareholder class action settlements"); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (finding a settlement representing recovery of approximately 6.25% of estimated damages to be "at the higher end of the range of reasonableness of recovery in class action securities litigations"). Indeed, a recent analysis by Cornerstone Research found that, for cases where estimated damages were in the range of $5 billion or greater (like this one), the median settlement as a percentage of estimated damages was 1.0% for 2006-2014, and just 0.8% in 2015. Securities Class Action Settlements – 2015 Review and Analysis (Cornerstone Research), at 9, *available at* www.cornerstone.com. Thus, the recovery here, assuming a victory on all issues at trial, and a 100% class member claims rate, is at least 8 times more than the 2006-14 median recovery and at least 10 times more than the 2015 median recovery in cases of this size. The high percentage recovery of Settlement Class Members' hypothetical best possible estimated damages compared to other similar cases, alone, may suffice to demonstrate that the Settlement is fair, reasonable, and adequate.

Moreover, assuming 100% or full class participation in estimating individual class member

recoveries in the Settlement is too conservative – particularly here, given the long pendency of the case – and thus claimants who do participate in the Settlement by filing valid proofs of claim can expect to recover a higher percentage of their damages. ¶ 242. As discussed above, if a jury or the Court had credited even some of Defendants' arguments with respect to liability, the class might have recovered significantly less or even nothing. Given those substantial risks, the Settlement is a favorable outcome for the Settlement Class. In short, the last two *Girsh* factors weigh in favor of approval of the proposed Settlement.

8. The Opinion Of Experienced Counsel Supports Approval Of The Settlement

The *Girsh* factors do not provide an exhaustive list of factors to be considered when reviewing a proposed settlement. *See AT&T Corp.*, 455 F.3d at 165; *Prudential*, 148 F.3d at 323.[6]

In determining whether a given settlement is reasonable, the opinion of experienced counsel is also entitled to considerable weight. *See Good v. Nationwide Credit, Inc.*, 2016 WL 929368, at *13 (E.D. Pa. Mar. 14, 2016) ("the opinion of experienced class counsel that settlement is in the class's best interest is entitled to 'significant weight'"); *O'Brien v. Brain Research Labs, LLC*, 2012 WL 3242365, at *12 (D.N.J. Aug. 9, 2012) ("the opinion of experienced counsel, based

[6] In *Prudential,* the Third Circuit said that, where appropriate and relevant, a district court should also consider the following non-exhaustive factors: "the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved – for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable." *Prudential*, 148 F.3d at 323. The first of these factors – the maturity of the underlying substantive issues, as measured by the extent of discovery on the merits, among other things – supports approval of the Settlement, and the others are neutral or not applicable here.

upon their familiarity with the facts and law and understanding of the strengths and weaknesses of their positions, is entitled to considerable weight and favors finding that the settlement is fair").

Here, Co-Lead Counsel, who are experienced class action and trial attorneys, believe that the Settlement represents an excellent result for the Settlement Class and is in the best interests of the Settlement Class as a whole, in light of all of the litigation risks discussed above. ¶¶ 241, 243. In addition, as discussed above, this Settlement was only achieved after lengthy arm's-length settlement negotiations and mediations before the Court and the Honorable Layn R. Phillips, a former U.S. District Court Judge, who has significant experience in mediating complicated securities class actions. ¶¶ 202-205. The fact that the Settlement was achieved after extensive arm's-length negotiations between experienced counsel on the eve of trial and that these negotiations were conducted with the assistance of an experienced and respected mediator, strongly supports the fairness and reasonableness of the agreed Settlement.

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

II. THE PLAN OF ALLOCATION IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED

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." *Par Pharm.*, 2013 WL 3930091, at *8; *see also Schering-Plough ERISA*, 2012 WL 1964451, at *2 (same); *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983) ("The Court's principal obligation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the Fund"). To meet this standard, a plan of allocation recommended by experienced and competent class counsel "need only have a reasonable and rational basis." *Par Pharm.*, 2013 WL 3930091, at *8; *see In re WorldCom, Inc.*

Sec. Litig., 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005). 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 here is contained in the Settlement Notice that was mailed to potential Settlement Class Members and published on the case website. ¶ 252. The objective of the Plan of Allocation is to equitably distribute the Net Settlement Fund among those Settlement 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 Fund. ¶¶ 251-252.

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 Merck Call Options or artificial deflation in the prices received for Merck Put Options on each day during the Settlement Class Period, as determined by Lead Plaintiffs' damages expert in his expert report. ¶¶ 253. Lead Plaintiffs' damages expert reviewed publicly available information regarding Merck and performed statistical analyses of the price movements of Merck Common Stock, Merck Put Options and Merck Call Options and the price performance of relevant market and peer indices during the Settlement Class Period and calculated the alleged artificial inflation or deflation by isolating the losses in the Merck Securities that resulted from the alleged violations of the federal securities laws, eliminating losses attributable to market factors, industry factors, or Company-specific factors unrelated to the alleged violations of law, and adjusting for the strength of the claims asserted in the Action. *Id.* The amount of artificial inflation in Merck Common Stock on each day of the Settlement Class Period is set forth in a table attached to the Settlement Notice,

and the artificial inflation and deflation in Merck Call Option and Put Options are set forth in tables available to Settlement Class Members on the settlement website. *Id*.

The Plan of Allocation includes two adjustments, discussed above, to reflect the relative weakness of certain claims that were dismissed by the Court, but that are nevertheless being compensated under the Settlement. First, to account for the Court's dismissal of all claims arising from the alleged November 1, 2004 corrective disclosure, the change in artificial inflation attributable to that corrective disclosure has been reduced by 90%. ¶ 255. Second, to account for the Court's dismissal of claims related to alleged misstatements made by Defendants before March 27, 2000, the Recognized Loss or Gain Amounts for Common Stock purchased or acquired from May 21, 1999 through March 26, 2000 is 10% of the Recognized Loss or Gain Amount that would otherwise be calculated for those transactions. *Id*. Otherwise, the Plan of Allocation uses the same inflation amounts and methodology as Plaintiffs would have offered at trial.

Recognized Loss Amounts are calculated under the Plan of Allocation based primarily on the difference in the amount of alleged artificial inflation (or deflation in the case of Put Options) in the Merck Securities at the time of purchase or acquisition and the time of sale. In order to have a Recognized Loss Amount, a Settlement Class Member who purchased or acquired Merck Securities (or wrote Put Options) from May 21, 1999 through September 29, 2004, must have held those Merck Securities through at least the close of trading on September 29, 2004, and with respect to Common Stock or Call Options contracts purchased/acquired and Put Options contracts sold from September 30, 2004 through October 29, 2004, those securities must have been held through at least the close of trading on October 29, 2004. ¶ 254. For securities purchased and sold before the first corrective disclosure date, or purchased and then sold between the two disclosures there is no recovery because any loss suffered by that investor would not have been

caused by the alleged fraud. *Id*. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342-43 (2005).

Claimants can also have a Recognized Gain Amount on certain transactions if, for example, they purchased Merck Common Stock and then sold it during the Settlement Class Period at a time when the alleged artificial inflation was greater on the date of sale than the date of purchase. ¶ 256. A Claimant's Recognized Gain Amounts, if any, will be offset against his, her or its Recognized Loss Amounts to determine the Claimant's Net Recognized Loss Amount. *Id*. In addition, the Claims Administrator will determine whether a Claimant had an overall market gain on his, her or its transactions in Merck Securities during the Settlement Class Period and, if so, the Claimant will not be eligible to recover. *Id*. To the extent that a Claimant suffered an overall market loss but that loss was less than the Claimant's Net Recognized Loss Amount calculated under the Plan, the Claimant's Recognized Claim shall be limited to the amount of his, her or its actual market loss. *Id*. The Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claims. ¶ 257.

Co-Lead Counsel believe that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Settlement Class Members who suffered losses as result of the conduct alleged in the Action and should be approved by the Court.

III. CERTIFICATION OF THE SETTLEMENT CLASS REMAINS WARRANTED

The Court's Preliminary Approval Order certified the Settlement Class, for settlement purposes only, pursuant to Fed. R. Civ. P. 23(a) and (b)(3). ECF No. 951. Nothing has changed to alter the propriety of certification for settlement purposes and, for all the reasons stated in Lead Plaintiffs' Preliminary Approval Brief (ECF No. 949-1, at 7-11), which is incorporated herein by reference, and in the Court's Preliminary Approval Order, Lead Plaintiffs respectfully request that the Court affirm its determination to certify the Settlement Class pursuant to Rules 23(a) and (b)(3).

IV. NOTICE TO THE SETTLEMENT CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The notice provided to the Settlement Class satisfied the requirements of (i) Rule 23(c)(2)(B), which requires "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); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974); and (ii) Rule 23(e)(1), which requires that notice of a settlement be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them," *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1318 (3d Cir. 1993); *see also In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013) ("[N]otice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights").

Both the substance of the Settlement Notice and the method of its dissemination to potential members of the Settlement Class satisfied these standards. The Court-approved Settlement Notice includes all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (i) an explanation of the nature of the Action and the claims asserted; (ii) the definition of the Settlement Class; (iii) the amount of the Settlement; (iv) a description of the Plan of Allocation; (v) an explanation of the reasons why the parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of Settlement Class Members' right to opt-out of the Settlement Class (if eligible), to opt back in, or to object to the Settlement, the Plan of Allocation or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment.

As noted above, in accordance with the Preliminary Approval Order, from March 15, 2016 through April 28, 2016, the Claims Administrator, Epiq, has disseminated more than 1.9 million

copies of the Settlement Notice Packet to potential Settlement Class Members and nominees. Thurin Decl. ¶¶ 8-10. To disseminate the Settlement Notice Packet, Epiq mailed the notice to all the names and addresses to which the Certified Class Notice was mailed (after updating the addresses through a change of address database) as well as to additional persons who purchased or acquired Merck Common Stock and Call Options (or sold Merck Put Options) during the period from September 30, 2004 through October 29, 2004, who were identified by records provided by Merck's transfer agent and by brokers and nominees. *Id*. ¶¶ 4-10. Epiq also caused the Summary Settlement Notice to be published in *The Wall Street Journal* on March 29, 2016 and to be transmitted over three different internet newswire services from March 29 to April 5, 2016. *Id*. ¶ 11. Epiq also established a toll-free informational telephone line and caused information regarding the Settlement to be posted on the website for the Action, www.MerckVioxxSecuritiesLitigation.com, which provides access to the Settlement Notice, Claim Form and other documents. *Id*. ¶ 15.

The combination of individual first-class mail to all Settlement Class Members who could be identified with reasonable effort, supplemented by publication notice and use of internet websites, is the best notice practicable under the circumstances. *See, e.g.*, *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *12-*13 (S.D.N.Y. Dec. 23, 2009); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 448-49 (S.D.N.Y. 2004).

CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully submit that: (i) the Court should grant final certification to the Settlement Class; (ii) the proposed Settlement is fair, reasonable and adequate and the Court should grant final approval to the Settlement; and (iii) the Plan of Allocation is fair and reasonable, and the Court should approve the Plan of Allocation.

Dated: April 29, 2016

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