UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE MERCK & CO., INC. SECURITIES, DERIVATIVE & "ERISA" LITIGATION	MDL No. 1658 (SRC)
THIS DOCUMENT RELATES TO: THE CONSOLIDATED SECURITIES ACTION	Civil Action No. 05-1151 (SRC) Civil Action No. 05-2367 (SRC)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF: (1) LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION; AND (2) CO-LEAD COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO
5 Becker Farm Road
Roseland, NJ 07068
(973) 994-1700

Al DeCotiis
DECOTIIS, FITZPATRICK & COLE, LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard
Teaneck, NJ 07666
(201) 928-1100

Paul B. Brickfield
BRICKFIELD & DONAHUE
70 Grand Avenue
River Edge, NJ 07661
(201) 258-3984

Liaison Counsel for Lead Plaintiffs and the Settlement Class

Max W. Berger
Salvatore J. Graziano
David Wales
Adam H. Wierzbowski
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

Matthew Gluck
Matthew A. Kupillas
MILBERG LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300

David A. P. Brower
Richard Weiss
BROWER PIVEN A PROFESSIONAL CORPORATION
475 Park Avenue South, 33rd Floor
New York, NY 10016
(212) 501-9000

Jules Brody
Mark Levine
Patrick Slyne
STULL, STULL & BRODY
6 East 45th Street, 5th Floor
New York, NY 10017
(212) 687-7230

Lead Counsel for Lead Plaintiffs and the Settlement Class

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Lead Plaintiffs and Co-Lead Counsel respectfully submit this reply memorandum of law in further support of: (1) Lead Plaintiffs' Motion for Final Approval of Settlement and Approval of Plan of Allocation (ECF No. 986); and (2) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (ECF No. 987).[1]

PRELIMINARY STATEMENT

The proposed Settlement, which provides for an $830 million Settlement Class Fund and a $232 million Fee/Expense Fund[2] for a total amount of $1.062 billion, is the largest securities class action settlement with a pharmaceutical company defendant and the second largest securities class action settlement in the Third Circuit, and represents an excellent outcome for the Settlement Class in light of the litigation risks discussed in the opening briefs. The related request for attorneys' fees and reimbursement of litigation expenses is fair and reasonable for all the reasons set forth in Co-Lead Counsel's initial papers, including the enormous amount of time and effort invested in the litigation, the substantial possibility of non-recovery that counsel faced, and the fact that essentially no multiplier is being sought on Plaintiffs' counsel's lodestar. Now, following dissemination of notice of the Settlement and the opportunity to object, the reaction of the Settlement Class also reflects broad support for the Settlement and fee request.

Epiq Class Action & Claims Solutions, Inc. ("Epiq"), the Claims Administrator, has

[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 (ECF No. 949-2) (the "Stipulation") or 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 (ECF No. 988) (the "Joint Declaration" or "Joint Decl."). "ECF No. __" references in this memorandum refer to docket entries in Civil Action No. 05-2367.

[2] As discussed in the opening papers, to the extent that the Court awards attorneys' fees and Litigation Expenses in an amount less than $232 million, any amount remaining in the Fee/Expense Fund will be credited to the Settlement Class Fund and will not revert back to Defendants or their insurers.

disseminated the Settlement Notice to more than 1.9 million potential Settlement Class Members and nominees informing them of the terms of the Settlement and the Plan of Allocation, and Co-Lead Counsel's intention to apply to the Court for attorneys' fees in an amount not to exceed 20% of the combined Settlement Class Fund and Fee/Expense Fund and reimbursement of up to $19 million in expenses, including any PSLRA awards. The deadline to file objections to the Settlement, the Plan of Allocation and/or motion for fees and expenses was May 14, 2016.

In response to the Settlement Notice, Co-Lead Counsel have received just 14 objections, a tiny number compared to the size of the Settlement Class.[3] All but one of the objectors have failed to provide proof of their membership in the Settlement Class or even a statement of how many shares of eligible Merck Securities they purchased or acquired during the Settlement Class Period. That itself is grounds to reject those objections. The only objector who provided proof of membership in the Settlement Class is a professional objector who apparently purchased 252 shares of Merck common stock during the Settlement Class Period, which is equivalent to just 0.00001% of the approximately 2.28 billion shares of Merck common stock that may have been affected by the conduct at issue in the Action, based on Lead Plaintiffs' damages expert's analysis.

In contrast, none of the objections is from an institutional investor. This is significant because the substantial majority of Merck's common stock was owned by institutions. Many of these institutions have a substantial financial interest in the Action, and they have in-house legal departments that are capable of submitting an objection where it is warranted. The fact that they did not, coupled with the extremely small number of individual objections and the fact that only

[3] Twelve of the 14 objections were previously filed on the Court's docket, but, for the Court's convenience, all 14 are attached as Exhibits 1 to 14 of the Supplemental Declaration of Salvatore J. Graziano (the "Supplemental Declaration" or "Suppl. Decl."), filed herewith. References to "Ex. __" herein refer to exhibits to the Supplemental Declaration.

two new, valid requests for exclusion have been received, is powerful evidence that the Settlement Class supports the Settlement, Plan of Allocation and fee and expense request.[4]

Finally, it is important to recognize that only two of the objections concern the adequacy or amount of the Settlement itself and only four object to the attorneys' fees requested. The others object on grounds not directly related to the adequacy of the proposed Settlement or the reasonableness of the fee request. All of the objections are without merit and should be rejected for the reasons discussed below.

ARGUMENT

I. THE OVERWHELMINGLY POSITIVE RESPONSE OF THE SETTLEMENT CLASS STRONGLY SUPPORTS APPROVAL OF THE SETTLEMENT, PLAN OF ALLOCATION AND THE MOTION FOR ATTORNEYS' FEES AND EXPENSES

One of the factors to be considered in approving a settlement under *Girsh v. Jepson* is "the reaction of the class to the settlement." 521 F.2d 153, 157 (3d Cir. 1975). Under that factor, the Court should consider whether "the number of objectors, in proportion to the total class, indicates that the reaction of the class to the settlement is favorable." *In re Merck & Co., Inc. Vytorin ERISA Litig.*, 2010 WL 547613, at *7 (D.N.J. Feb. 9, 2010).

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[4] The only members of the Settlement Class who were eligible to request exclusion at this time were those who were not members of the Certified Class – *i.e.*, those whose only purchases of Merck Common Stock and Merck Call Options (and sales of Merck Put Options) during the Settlement Class Period occurred from September 30, 2004 through October 29, 2004. Of the total 26 requests for exclusion received, seven were submitted by persons who indicate that they are Certified Class Members and therefore are not currently eligible to request exclusion and four were submitted by persons who state they did not have any eligible purchases or sales of Merck Securities during the entire Settlement Class Period (and therefore are not Settlement Class Members at all and need not request exclusion). Another 13 requests for exclusion were submitted by persons who did not provide sufficient information to determine whether or not they are Settlement Class Members or whether they are currently eligible to request exclusion. Just two of the requests appear to be validly submitted by Settlement Class Members who were not members of the Certified Class.

The size of the Settlement Class is quite large. Pursuant to the Preliminary Approval Order, from March 15 through March 18, 2016, Epiq began mailing copies of the Settlement Notice and Claim Form (the "Settlement Notice Packet") to potential Settlement Class Members and their nominees. *See* Declaration of Stephanie A. Thurin (ECF No. 988-2) (the "Thurin Decl."), at ¶ 8. Through May 23, 2016, more than 1.9 million copies of the Settlement Notice Packet have been mailed. *See* Supplemental Declaration of Stephanie A. Thurin (the "Suppl. Thurin Decl."), attached as Exhibit 15 to the Supplemental Declaration, at ¶ 2.[5]

On March 15, 2016, the Settlement Notice, Claim Form, Stipulation, and Preliminary Approval Order, among other documents, were posted on the website developed for the Action, www.merckvioxxsecuritieslitigation.com. *See* Thurin Decl. ¶ 15. The Summary Settlement Notice was published in *The Wall Street Journal* and released over *PR Newswire* on March 29, 2016 and was transmitted over *Business Wire* on March 31, 2016 and over *Globe Newswire* on April 5, 2016. *Id.* ¶ 11. On April 29, 2016, two weeks prior to the objection deadline, Lead Plaintiffs and Co-Lead Counsel filed detailed papers with the Court in support of the Settlement, Plan of Allocation, and fee and expense request. These papers were made available on the public docket (ECF Nos. 986-988), and on the case website. *See* Suppl. Thurin Decl. ¶ 3.

Following this extensive notice process, only 14 objections have been received – all of which are without merit and should be rejected for the reasons discussed below. Lead Plaintiffs and Co-Lead Counsel respectfully submit that the small number of objections received

[5] The Settlement Notice Packet was not the first notification to the class of the existence of this Action. From September through November 2013, over 1.58 million copies of the Certified Class Notice were mailed to potential members of the Certified Class. *See* Affidavit of Jose C. Fraga dated December 3, 2013 (ECF No. 578) at ¶ 8. Among other things, the Certified Class Notice advised class members, in bold text, to retain their documentation of transactions in Merck common stock and options. *See id.* Ex. A, at ¶¶ 19, 20.

(representing approximately 0.007% of the Settlement Class, based on the number of recipients of the Settlement Notice) provides further evidence that the Settlement is fair, reasonable, and adequate and should be approved by the Court. "The vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption . . . in favor of the Settlement." *In re Cendant Corp. Litig.,* 264 F.3d 201, 235 (3d Cir. 2001); *see also In re Nat'l Football League Players Concussion Injury Litig.* ("*NFL Players*"), --- F.3d ---, 2016 WL 1552205, at *19 (3d Cir. Apr. 18, 2016, as amended May 2, 2016) (objections by only 1% of class members "weigh[ed] in favor of settlement approval"); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1313-14 (3d Cir. 1993) (finding 30 objections out of a class of 1.1 million shareholders "an infinitesimal number" weighing in favor of approval); *Shlensky v. Dorsey*, 574 F.2d 131, 148 (3d Cir. 1978) ("overwhelming majority of Gulf shareholders" not objecting to settlement supported approval). Indeed, the Third Circuit has found that much higher levels of objection by class members support approval of the settlement. *See Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990) (objections by 29 members of a class comprised of 281 "strongly favors settlement"); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 803 (3d Cir. 1974) (settlement approved where 20% of class objected).

The small number of objections received similarly supports approval of the Plan of Allocation and the request for attorneys' fees and expenses. *See, e.g., In re Lucent Techs., Inc., Sec. Litig.*, 307 F. Supp. 2d 633, 649 (D.N.J. 2004) ("The favorable reaction of the Class supports approval of the proposed Plan of Allocation."); *Desantis v. Snap-On Tools Co.*, 2006 WL 3068584, at *10 (D.N.J. Oct. 27, 2006) ("The fact that there were so few objectors to the amount of attorneys' fees indicates that there is a positive reaction amongst the class to the requested fees.").

In addition, the absence of objections by institutional investors, which owned the majority

of publicly traded Merck common stock during the Settlement Class Period, further underscores the reasonableness of the Settlement. *See In re AT&T Corp. Sec. Litig.*, 2005 WL 6716404, at *4 (D.N.J. Apr. 25, 2005) (the reaction of the class "weigh[ed] heavily in favor of approval" where "no objections were filed by any institutional investors who had great financial incentive to object"); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 261 (D.N.H. 2007) (finding that "[t]he reaction of the class to the settlement has been almost entirely positive," where "[n]one of the institutional investors have objected to the size of the settlement").[6]

The lack of objections by such investors also supports approval of the fee request. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (fact that "a significant number of investors in class were 'sophisticated' institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive" and did not do so, supported approval of the fee request); *In re Bisys Sec. Litig.,* 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007) (noting that only one individual raised any objection, "even though the class included numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the [requested] fee was excessive").

Accordingly, the overwhelmingly positive reaction of the Settlement Class strongly supports approval of the Settlement, Plan of Allocation and fee request.

II. THE OBJECTIONS TO THE SETTLEMENT SHOULD BE REJECTED

A. The Objections to the Settlement Itself Are Without Merit

Only two of the 14 objectors – and just two of the over 1.9 million possible Settlement

[6] *See also In re Citigroup Inc. Bond Litig.,* 296 F.R.D. 147, 156 (S.D.N.Y. 2013) (the reaction of the class supported the settlement where "not one of the objections or requests for exclusion was submitted by an institutional investor"); *In re AOL Time Warner, Inc.*, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006) (the lack of objections from institutional investors supported approval of settlement); *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 702-03 (E.D. Mo. 2002) (same).

Class Members – have objected to the substantive terms or adequacy of the Settlement itself.[7]

First, Arie J. Korving objects generally to "the terms of the settlement." Ex. 9 at 1. However, Mr. Korving provides no other basis for his objection and no discussion whatsoever of the specifics of this case, and seems principally concerned with class actions generally and with the attorneys' fees requested. Ex. 9 at 1-2. Mr. Korving's objection should be rejected because it provides no reasoned basis for disapproval of the Settlement, other than a generalized objection to class action litigation. *See, e.g., McLennan v. LG Elecs. USA, Inc.*, 2012 WL 686020, at *8 (D.N.J. Mar. 2, 2012) ("It is well-established that such generalized objections should be overruled."); *In re Royal Dutch/Shell Transp. Sec. Litig.*, 2008 WL 9447623, at *30 (D.N.J. Dec. 9, 2008) (rejecting an objection that was "vague at best" and "appear[ed] to be objecting to class actions generally, which is not an appropriate basis for objection").

Second, John J. Isbell objects to the adequacy of the settlement. *See* Ex. 8. Mr. Isbell objects because he believes that the proposed settlement represents only 2% or less of the losses in the case, based on his own personal calculations of those losses, which he believes amount to $77 billion. *Id*. Mr. Isbell's calculations are incorrect. In fact, as discussed in Lead Plaintiffs' initial papers, the maximum aggregate damages that could be established at trial, based on the analysis of Lead Plaintiffs' expert, would likely range from approximately $9.5 billion to $13.4 billion, based on the Court's or jury's potential findings as to the various components that could

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[7] Indeed, the majority of objections do not criticize the Settlement itself or advocate its non-approval but instead seek to participate in the Settlement. For example, the objectors discussed in Part II.B who object to the claims process do not object to the adequacy of the $1.062 billion total settlement amount but are frustrated at the requirement to document claims to participate in the Settlement. Similarly, the objectors discussed in Part II.E below object to the fact that they are not included in the Settlement Class, either because they purchased stock through an excluded employee benefit plan or because they acquired employee stock options that were not included in the Settlement Class.

be included in damages, and thus the total Settlement amount of $1.062 billion represents approximately 8% to 11.2% of the estimated maximum damages that could be established at trial. *See* Joint Decl. (ECF No. 988) at ¶¶ 241-242; Settlement Brief (ECF No. 986-1) at 22-23. These estimated maximum recovery amounts assume a complete victory at trial on all liability issues for the Certified Class of Merck investors from March 27, 2000 through September 29, 2004 despite substantial litigation risks presented by pre-trial motions, trial and possible appeals, and assume a highly unrealistic 100% participation rate by class members in a post-trial claims process.[8]

Mr. Isbell's estimate of $77 billion in damages is grossly inflated because, among other defects, it assumes that every share purchased during the Settlement Class Period was retained to the end of such period (and thus held over both corrective disclosures and eligible for recovery). In fact, only a fraction of the shares purchased during that period were held over even one corrective disclosure and, thus, could have been damaged by the alleged fraud. Thus, for example, the chart provided by Mr. Isbell estimates that 8.1 billion shares were damaged (5.7 million for every business day in the Settlement Class Period), whereas Lead Plaintiffs' expert has estimated the number of affected shares to be approximately 2.28 billion. *See* Settlement Notice at 2.

As discussed in Lead Plaintiffs' opening papers, the settlement of the Action now, for approximately 8% to 11.2% of maximum damages, is fair and reasonable to the Settlement Class in light of the significant risks of the litigation, including (a) hurdles of proving to a jury (through

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[8] 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.

the use of complex scientific evidence) that Defendants falsely attributed a difference in the number of heart attacks observed in the VIGOR study to the purported CV benefits of naproxen; (b) other difficulties in establishing falsity and scienter in light of the fact that the FDA repeatedly approved Vioxx for sale; (c) arguments that the release of the new APPROVe trial results, and not the revelation of Defendants' previous nondisclosures, was the cause of the September 30, 2004 price drop; and (d) many additional arguments that could be raised at trial or on appeal. This level of recovery is extremely high for a case of this magnitude. *See* Settlement Brief (ECF No. 986-1) at 23 (citing report showing an average recovery of 1% in cases with estimated damages of $5 billion or greater). Indeed, this recovery compares favorably to most settled securities class actions, even where aggregate damages are far smaller and settlement recoveries are typically a higher percentage of those damages. *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 Merrill Lynch & Co. Research Reports Sec. Litig.*, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (finding a settlement representing approximately 6.25% of estimated damages to be "at the higher end of the range of reasonableness of recovery in class action securities litigations"); *see generally* Settlement Brief at 23.

B. The Objections to the Claims Process Should Be Rejected

Anthony I. Antonio, Richard Baylor, Albert T. DeMarco, Jr., Elizabeth G. Frazee, S. Ward Greene, David Sarokin and Thomas Scarce object to the claims process established by the Settlement. *See* Exs. 1, 2, 4, 6, 7, 13 and 14. They object generally to the difficulty in obtaining the required documentation to submit a claim, particularly in light of the age of the case, and they suggest that claims should be filed for them because they incorrectly believe that the Claims Administrator and/or Defendants have their investment information.

Many of these objections are based on misapprehensions. The Claims Administrator does not possess information about individual class members' transactions and holdings in Merck Securities that would allow it to prepare or submit a claim on behalf of a class member. Nor do Plaintiffs' Counsel or Merck have that information. As in most other securities actions, the only information that the Claims Administrator received from brokers and nominees was the names and addresses of beneficial owners who held Merck Securities during the Settlement Class Period. (In fact, some brokers provide no information and forward the notice directly to their clients.) Due to privacy concerns, brokers do not provide their clients' detailed trading information or other personal financial information to the Claims Administrator and, indeed, they probably could not do so unless their clients had specifically consented to the release of that information. Because the Claims Administrator does not have any information about potential class members' transactions and that information is necessary to process claims (otherwise there would be no way to validate or value the claims), it is reasonable to require class members, with the assistance of their brokers or financial advisors, to produce that information. Class members are not required to provide any more information than is reasonably necessary to verify their membership in the Settlement Class and to calculate their recovery. The information that claimants are required to provide is customary and routine in securities class action settlements.

Co-Lead Counsel are aware of the difficulties that the age of the class period may pose for some Settlement Class Members in obtaining documentation, and they took steps to try to alleviate that problem to the extent that they could. For example, Co-Lead Counsel advised potential class members at the earliest opportunity, in the Certified Class Notice mailed in 2013, to save their records of trading in Merck Securities. Thus, for example, that notice stated that, "***[i]f you choose to remain a member of the Class, you do not need to do anything at this time other than to retain***

your documentation reflecting your transactions in Merck common stock and options on Merck common stock as discussed below." Certified Class Notice (ECF No. 578, Ex. A) at ¶ 19 (emphasis in original). The Certified Class Notice also stated:

> While this Notice is not intended to suggest any likelihood that Lead Plaintiffs or members of the Class will recover any such damages, should there be a recovery, members of the Class will be required to support their requests to participate in the distribution of any such recovery by demonstrating their membership in the Class and documenting their purchases and sales of Merck common stock and options on Merck common stock, and their resulting damages. ***For this reason, please be sure to keep all records of your transactions in these securities.***

Id. ¶ 20 (emphasis in original).

Co-Lead Counsel also requested that the deadline for the submission of Claim Forms to participate in the Settlement be set for 180 days after the date of initial mailing of the notices (September 12, 2016), rather than the more typical 90 or 120 days, in order to provide potential claimants with additional time to request and obtain transaction records from brokers that might be stored in archives or otherwise not readily available. Co-Lead Counsel and the Claims Administrator have also been responding, and will continue to respond, to inquiries from potential Settlement Class Members, including those of the objectors, to explain that the Claims Administrator does not have their trading records and to assist them in tracking down that information from their brokers where at all possible.[9]

Co-Lead Counsel recognize that, notwithstanding these efforts, some potential claimants still may not be able to submit claims if neither they nor their broker retained records of their trading in Merck Securities during the Settlement Class Period. However, because the Claims Administrator also lacks this information and there is no practical way to verify or value a potential

[9] Similarly, Co-Lead Counsel contacted and assisted Louis Karples, who filed a non-objection letter with the Court that raised similar problems about obtaining transaction documents. ECF No. 985.

claim without information on how many Merck shares or options were purchased and when, it is reasonable to require claimants to produce this information to participate in the Settlement.

Moreover, the same result would have followed if Lead Plaintiffs were fully successful at trial in this case. Indeed, the trial and post-trial motions in this Action would easily have consumed another year or more, after which, assuming success at trial, a claims process similar to the one conducted in connection with this Settlement would have been required. And, unlike here, Defendants would have had the right to challenge any and all claims submitted, including for lacking sufficient documentation. Thus, the age of the case, which is in reality at the core of the objections to the claims process, actually militates in favor of approval of the Settlement as the alternative would have posed even greater challenges to class members ultimately recovering.

In addition, courts have repeatedly upheld the appropriateness of claim processes in securities class actions that require individual claimants to submit their securities transaction information. *See, e.g.*, *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *25 (S.D.N.Y. Dec. 23, 2009) (holding that requiring class members to submit transaction information "comport[ed] with the long-approved procedures for the efficient management of class-action settlement distributions" and noting that "[w]ithout that necessary information, the Claims Administrator could not calculate claimants' distributions"); *In re WorldCom, Inc. Sec. Litig.*, 2004 WL 2591402, at *12 (S.D.N.Y. Nov. 12, 2004) (rejecting objection to the requirement that individual claimants submit transaction information).

Similarly, in the recently approved settlement in *NFL Players*, the District Court recognized that "Class members must usually file claims forms providing details about their claims and other information needed to administer the settlement," *NFL Players*, 307 F.R.D. 351, 416 (E.D. Pa. 2015) (quoting MANUAL FOR COMPLEX LITIGATION § 21.66 (4th ed.)), rejected the

objection that "the claims process [was] unduly burdensome," and found that "the claims process needs to be rigorous enough to deter submission of fraudulent claims." *Id.* at 414. On appeal, the Third Circuit affirmed the approval of the settlement and found that the required claims process was reasonable. *NFL Players*, 2016 WL 1552205, at *21.

Finally, it must be emphasized that, contrary to the contention of Ms. Frazee that the documentation requirement "rewards the Defendants by preventing the submission of legitimate claims" (Ex. 6 at 2), neither Defendants nor any attorneys benefit in any way if class members are unable to submit potentially valid claims. There will be no reversion of any of the settlement funds to Defendants or their insurers based on the amount of claims submitted. The Net Settlement Fund will simply be distributed on a *pro rata* basis to Settlement Class Members who submit eligible claims. There is likewise no benefit to Plaintiffs' Counsel, who seek a flat percentage of the total $1.062 billion settlement amount in attorneys' fees, or to any other attorneys if class members fail to submit claims. On the contrary, Co-Lead Counsel would like to assist as many Settlement Class Members as they possibly can in submitting valid claims.

C. The Objections to the Settlement Notice Are Without Merit

Various objections to the form or content of the Settlement Notice are also advanced by Messrs. Antonio, Greene, Sarokin, and Michael Rinis.[10] These objections are baseless.

Mr. Antonio complains that he could not find the address of the Court to which class members can address complaints in the Settlement Notice. Ex. 1 at 2. However, the Settlement Notice sets forth the address of the Court in several locations. The mailing address of the Court for submission of objections is set forth clearly on page 20 of the Settlement Notice under the

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[10] As discussed further below in Part IV, Mr. Rinis is a professional objector who has a long track record of making meritless objections to class action settlements.

heading "How do I tell the Court that I don't like the Settlement?" Page 20 also sets forth the location of settlement hearing under the heading "When and where will the Court decide whether to approve the Settlement?" Page 21 of the Settlement Notice again sets forth the address of the Court under the heading "How do I get more information?" The fact that Mr. Antonio and other objectors successfully submitted their objections to the Court also belies this contention.

Mr. Greene and Mr. Sarokin object to the length and complexity of the Settlement Notice. For example, Mr. Greene states that the notice is "mind-numbing" and that a "rank and file investor" could not be expected to read and understand it (Ex. 7 at 1), and Mr. Sarokin finds it "turgid, redundant and . . . user-unfriendly" (Ex. 13 at 1). While the Settlement Notice does include many details, including much information required by Rule 23 and the PSLRA (*see* Fed. R. Civ. P 23(c)(2)(B)(i)-(vii); 15 U.S.C. § 78u-4(a)(7)(A)-(F)), and the full language of the releases that will affect Settlement Class Members, it also includes a simple summary of rights at the beginning of the notice and employs a question-and-answer format so that Settlement Class Members can readily find the answers to their questions. Contact information for the Claims Administrator and Co-Lead Counsel (including phone numbers and emails) is provided in the Settlement Notice and on the website and the Claims Administrator and Co-Lead Counsel have been responding to many inquiries from class members and potential class members who have questions about the Action, their rights or how to submit claims.

Mr. Rinis contends that the Settlement Notice is misleading because it does not adequately explain the relationship between the Settlement Class Fund and the Fee/Expense Fund and was "designed to give the impression that there's no relationship" between the two funds. Ex. 12 at 2. This is simply not true. The Settlement Notice defines the Settlement Class Fund and Fee/Expense Fund and makes clear in simple terms the exact relationship between the two funds and the basis

for the attorneys' fee requested. For example, the first page of the Settlement Notice states that, "To the extent the Court awards attorneys' fees and Litigation Expenses in an amount less than $232 million, any amount remaining in the Fee/Expense Fund, after the payment of the Special Master's 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." The Settlement Notice further makes clear that Co-Lead Counsel would be requesting a percentage fee award, not to exceed 20%, of the combined "Settlement Funds," which is expressly defined as "the aggregate of the Settlement Class Fund and the Fee/Expense Fund." Settlement Notice at 2.

Mr. Rinis also claims that the Settlement Notice is faulty because it does not provide information on the average damages per share suffered by class members. Ex. 12 at 2. This objection is also without merit. The PSLRA expressly provides that, if the parties "do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged," the notice need only include a statement "concerning the issue or issues on which the parties disagree." 15 U.S.C. § 78u-4(a)(7)(B)(ii). Here, as stated in the Settlement Notice, the Parties "do not agree on the average amount of damages per share, call option or put option that would be recoverable if Lead Plaintiffs were to have prevailed on each claim alleged" and the Settlement Notice provides a statement concerning the issues on which the Parties disagree. *See* Settlement Notice at 2.

Courts have repeatedly held that an estimated per-share damages number does not need to be provided in these circumstances. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 247 n.26 (3d Cir. 2001) (holding that, where the parties do not agree on the average amount of damages per share, "a statement of the *damages* issues on which the parties disagree . . . was sufficient"); *In re Bank of Am. Corp. Sec., Derivative, & ERISA Litig.*, 772 F.3d 125, 134 (2d Cir. 2014) ("Having

identified in the notice of the settlement the particulars of their differences, the parties complied with the requirements of [the PSLRA], and they were under no obligation to identify the average amount of damages per share");[11] *In re Am. Int'l Grp., Inc. Sec. Litig.*, 452 Fed. App'x 75, 77 (2d Cir. 2012) (finding that the objector's argument "contradicts the [PSLRA's] plain language and finds no support in the precedent of this or any other circuit" and holding that where the parties do not agree about per share damages, the PSLRA requires "no more" than a statement of the issues about which the parties disagree, and "clearly requires an amount recoverable be provided *only* in the case that the parties agree on that amount.").[12]

D. Mr. Brown's *Cy Pres* Objection Is Without Merit

Mr. Brown objects to the proposed *cy pres* distribution procedure. Ex. 3 at 2. However, there may never be a *cy pres* distribution in this case. Any donation of residual funds to charity would occur only after one or more full distributions of the Net Settlement Fund to Authorized Claimants is completed and only when the funds remaining as a result of uncashed or returned checks is so small that a further distribution would not be "cost-effective" (such as when the costs to conduct a subsequent distribution would exceed the remaining funds). *See* Settlement Notice at 15 (¶ 27). If that occurs, Co-Lead Counsel will seek the Court's approval to contribute the remaining balance "to non-sectarian, not-for-profit organization(s), to be recommended by Co-Lead Counsel and approved by the Court." *Id*. It may be that funds will be fully distributed to Authorized Claimants without any residual balance, in which case no donation to charity will be

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[11] Mr. Rinis should be familiar with the Second Circuit's holding in the *Bank of America* case as he was one of the objector-appellants who pursued this meritless argument in that case.

[12] Moreover, the Settlement Brief and Joint Declaration, which were publicly filed by ECF, appear on the publicly available docket and were made available on the case website, specifically discussed the potential maximum damages that might have been recovered at trial. These documents provided Settlement Class Members with a basis for comparison with the amount of the proposed Settlement. *See* Settlement Brief at 22-23; Joint Decl. ¶¶ 241-243.

made. In any event, there is no reason to believe that the Court will not apply the appropriate standards in the selection of a *cy pres* recipient if that becomes necessary.[13]

E. The Objections Submitted by Persons Who Purchased Merck Stock Through an Excluded Employee Benefit Plan or Who Acquired Employee Stock Options Should Be Rejected

Three other objections were submitted by individuals who are not included in the Settlement Class and who are, therefore, not eligible to participate in the Settlement (but would like to be). All of these objections should be rejected.

Robert J. Lynch and Joanne E. Tomassini, a married couple who were employees of Merck during the Settlement Class Period, object to the Settlement and to their exclusion from the Settlement Class. Ex. 10. While their objection is not entirely clear, the basis for their objection appears to be that they purchased Merck stock though a Merck employee plan that was excluded from the Settlement Class and they "see no logical reason for this exclusion." *Id*. Certain Merck employee benefit plans are expressly excluded from the Settlement Class.[14] The exclusion of these plans from the Settlement Class is appropriate because an ERISA action was previously brought on behalf of the participants and beneficiaries of these plans based on the same underlying factual claims relating to Vioxx and that case has been separately settled.[15]

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[13] Mr. Brown raised this precise objection – in identical language – in at least two other recent class action settlements and both times the objection was summarily rejected. *See* Exs. 16, 17.

[14] The Settlement Class expressly excludes "the Merck & Co., Inc. Employee Savings & Security Plan (now known as the Merck U.S. Savings Plan), the Merck and Co., Inc. Employee Stock Purchase & Savings Plan (now known as the MSD Employee Stock Purchase & Savings Plan), the Merck Puerto Rico Employee Savings & Security Plan (now known as the MSD Puerto Rico Employee Savings & Security Plan), and the Merck-Medco Managed Care, LLC 401(k) Savings Plan (and any successor or successors thereto)." Stipulation ¶ 1(bbb).

[15] Moreover, although not specifically identified, such plans were also excluded from the Certified Class, which excluded all "affiliates" of Merck. *See In re Motorola Sec. Litig*., 644 F.3d 511 (7th Cir. 2011) (finding that an ERISA plan was an "affiliate" of the corporation and thus excluded from a securities class action class by definition).

John Doorley and Edward P. Pollack, Jr. object to the fact that persons who acquired Merck employee stock options are not included in the Settlement Class and are not entitled to a recovery. *See* Exs. 5 and 11. However, the Settlement Class, by definition, includes only persons or entities who purchased or acquired Merck common stock or call options on Merck common stock (or sold put options) during the Settlement Class Period, not persons who were awarded employee stock options during that period. Consistent with common usage, the "call options" included in the definition of the Certified Class and the Settlement Class referred to exchange-traded call options, not employee stock options. *See, e.g.,* Congressional Budget Office, Accounting for Employee Stock Options (April 2004), available at http://cbo.gov/sites/default/files/cbofiles/ftpdocs/53xx/doc5334/04-02-stockoptions.pdf ("How Employee Stock Options Differ from Call Options . . . employee stock options differ from call options in several respects"). Employee stock options are fundamentally different than traditional call options because they are not publicly traded and therefore could not be valued as artificially inflated at any specific time. Because employee stock options are not publicly traded, there was certainly no efficient market in these securities as required for inclusion of a security in the class. *See, e.g.*, ECF No. 395 at 13-23, 26-30 (Defendants' brief opposing certification of the class because the market for Merck common stock and publicly traded options was purportedly not efficient); ECF No. 434 at 19-22 (Lead Plaintiffs' reply brief providing evidence of efficiency in market for exchange-traded options). For these reasons, employee stock options were never included in the Certified Class or Settlement Class.

Case law has also repeatedly recognized that when an employee does not give up anything of value for a security other than the continuation of employment, there is no "investment decision" to acquire the security and thus no "purchase" of a security as required for eligibility under the securities laws. *See In re Cendant Corp. Sec. Litig.*, 81 F. Supp. 2d 550, 556-57 (D.N.J. 2000)

("To 'purchase or sell' stock options, employee-purchasers must 'give up a specific consideration in return for a separable financial interest with the characteristics of a security.' Conversely, '[w]hen an employee does not give anything of value for stock other than the continuation of employment nor independently bargains for such stock,' there is no 'purchase or sale' of securities."); *In re Cendant Corp. Sec. Litig.*, 76 F. Supp. 2d 539, 545 (D.N.J. 1999) (a plaintiff who acquired stock options awarded pursuant to an employee stock option plan did not have standing to assert Section 10(b) claims because the award of the stock options in connection with her employment and without any specific "bargained-for exchange that required her to make an affirmative investment decision" was not an eligible "purchase or sale" under the Exchange Act). For this reason, claims under the Exchange Act could likely not have been asserted for employee stock options routinely awarded by Merck to its employees and therefore it was appropriate that they were not included in the scope of securities included in the class.

Moreover, even if acquisitions of employee stock options *were* considered eligible for membership in the Settlement Class, Mr. Doorley was granted his options before the beginning of the Settlement Class Period (the options merely vested during the Settlement Class Period). Thus, at the time the options were granted to Mr. Doorley, the price of Merck stock was not inflated (Vioxx had not even yet been released to the market) and, thus, even if these were acquisitions of "call options" they are not eligible here.

Because Mr. Doorley acquired the employee stock options before the Settlement Class Period and never exercised most of his options, the crux of Mr. Doorley's argument that he was damaged was that he was induced not to exercise his options and sell the shares (but to hold them in hope of even higher returns) because he relied on projections and other misstatements of the Company. Ex. 5 at 2, 4. This is essentially the same as the claim of a holder of a security who

alleges that he was induced not to sell the security based on defendants' misrepresentations. The courts have long held such "holder" claims are not eligible for recovery under the federal securities laws. *See VT Inv'rs v. R & D Funding Corp.*, 733 F. Supp. 823, 832 (D.N.J. 1990) ("Shareholders who allege that they decided not to sell their shares because of an unduly rosy representation or a failure to disclose unfavorable material are . . . precluded from bringing a private action under Rule 10b–5.") (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737-38 (1975)). Even if some state law might provide relief for holder claims (Ex. 5 at 3), Lead Plaintiffs are certainly not required to provide compensation for such claims under the Settlement in an Action such as this one where they asserted only federal securities fraud claims.

III. THE OBJECTIONS TO THE MOTION FOR ATTORNEYS' FEES AND EXPENSES SHOULD BE REJECTED

Messrs. Brown, Korving, Rinis and Sarokin object to the amount of attorneys' fees requested. See Exs. 3, 9, 12 and 13. These objections are also without merit.

Mr. Korving contends that the attorneys' fees requested are "unconscionable" and a "travesty" (Ex. 9 at 1, 2), but his objection is wholly generalized and contains no arguments specific to this case, and therefore should be rejected. *See In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 264 n.3 (S.D.N.Y. 2012) (rejecting objection to attorneys' fees as "excessive" for being "conclusory and bereft of factual or legal support").

Mr. Sarokin similarly contends that the requested attorneys' fees are "excessive" and suggests "they be limited to no more than 2% (two percent) of the overall settlement package." Ex. 13 at 1. He also provides no argument in law or fact for this limitation, but argues only that 2% of a billion dollars "is still a heck of a lot of money." *Id*. Mr. Sarokin does not address the fact that a 2% fee award would be far below the range of fees awarded in comparable cases, let alone a case like this one that has been litigated for more than 12 years, proceeded to the Supreme

Court, was settled only weeks before the scheduled trial date, and which presented substantial risks of non-payment for counsel. Indeed, a 2% fee award here would result in an award of attorneys' fees representing only ***10%*** of Plaintiffs' counsel's reported lodestar in the Action, an unfair result, especially in light of the fact that courts typically award a *positive* multiplier on counsel's lodestar to account for the substantial contingency risks of the litigation and other relevant factors. *See Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007) (reversing district court's fee award and stating "[b]ecause the district court failed to provide for the risk of loss, the possibility exists that Counsel, whose only source of a fee was a contingent one, was undercompensated"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) ("a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors"); *In re Comverse Tech., Inc., Sec. Litig.*, 2010 WL 2653354, at *5 (E.D.N.Y. June 23, 2010) ("Where, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar."). Here, despite the ample risks of non-payment at the outset of the litigation that would justify an upward multiplier, the 20% fee sought by Co-Lead Counsel is equivalent to a multiplier of just 1.03 on Plaintiffs' counsel's lodestar. Fee Brief (ECF No. 987-1) at 10.

Mr. Brown also objects in general terms that the fee request is unfair because "the percentage of the settlement amount is far too high" (Ex. 3 at 2), and that it is unreasonable in the absence of "detailed billing records (including hourly rates of the professionals, hours accumulated and reasonable costs incurred), which can be evaluated by Class Members and the Court." *Id.* This objection is meritless. Co-Lead Counsel has publicly filed summary lodestar charts from all Plaintiffs' counsel which include the hourly rates of their professionals and the total hours spent

by each professional and tables showing summaries of expenses incurred by category. Moreover, Plaintiffs' counsel have also filed detailed time and expense records *in camera* before the Special Master. Plaintiffs' counsel should not be required to publicly file their detailed time records or provide them to objectors as they contain a substantial amount of information that is privileged and confidential. *See*, *e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 342 (3d Cir. 1998) (the district court did not abuse its discretion in declining to permit discovery of "detailed time summaries" in class action where the lodestar was used only as a cross-check); *In re Pall Corp. Class Action Attorneys' Fees Application*, 2013 WL 1702227, at *4 (E.D.N.Y. Apr. 8, 2013) ("Neither existing case law nor, frankly, the conduct of objectors' counsel in this case suggests that objectors' counsel should be provided with the detailed time records of counsel for the class plaintiffs").[16]

Finally, Mr. Rinis argues that the requested attorneys' fees are excessive because they do not take into account "economy of scale" and because he contends that the size of the recovery is based on the large number of damaged shares and had "nothing to do with the skill or ability of class counsel." Ex. 12 at 2. These arguments fail. There was never a guarantee that there would be any recovery in this Action, let alone a billion dollar total recovery, simply due to the large number of damaged shares. On the contrary, this settlement was obtained only in the face of very significant litigation risks and only as a result of the high quality work that class counsel brought to bear, including obtaining a reversal of the dismissal of the case at the Third Circuit, securing a 9-0 victory at the Supreme Court, substantially defeating Defendants' second round of motions to

[16] Indeed, many courts have held that where the fee is awarded on a percentage basis, the lodestar cross check does not require exhaustive scrutiny of class counsel's time and that the court may rely on summaries submitted by attorneys rather than detailed time records themselves. *See, e.g.*, *Tavares v. S-L Distribution Co.*, 2016 WL 1743268, at *14 n.9 (M.D. Pa. May 2, 2016) ("The district courts may rely on summaries" and "need not review actual billing records.").

dismiss and their motions for summary judgment, and aggressively pursuing fact and expert discovery and pre-trial preparations until just months before trial. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("If the Lead Plaintiff had been represented by less tenacious and competent counsel, it is by no means clear that it would have achieved the success it did here on behalf of the Class. . . . While some significant recovery in a case of this magnitude may seem a foregone conclusion now, the recovery achieved here was never certain. . . . it is likely that less able plaintiffs' counsel would have achieved far less").

Moreover, with respect to the "economy of scale" argument, the Third Circuit has stated that "there is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizable fund." *Sullivan v. DB Investments*, 667 F.3d 273, 331 n.6 (3d Cir. 2011); *see Rite Aid,* 396 F.3d at 303 (same). Instead, the Court should consider and balance a range of issues including the complexity of the case and the risks presented and the amount and quality of efforts dedicated to the case. *Sullivan*, 667 F.3d at 333. As discussed in Co-Lead Counsel's opening papers, this was not a case where the "recovery is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *Id.* at 331 n.64.

Co-Lead Counsel respectfully submit that the attorneys' fees requested are reasonable for all the reasons set forth in Co-Lead Counsel's initial papers, including the enormous amount of time and effort invested in the litigation; the high quality of Co-Lead Counsel's efforts and the results achieved; and the substantial risks of the litigation and possibility of non-recovery that counsel faced. This is a case that was initially dismissed by the Court and that had to be litigated all the way to the Third Circuit and Supreme Court to allow it to proceed, so the risks of non-payment were very real. Indeed, this case was litigated for longer than any of the other comparable securities actions with billion-dollar recoveries and was the only such case to have been litigated

to the Supreme Court. Accordingly, Co-Lead Counsel believe that the requested attorneys' fees and expenses are reasonable and the objections should be overruled.[17]

IV. MESSRS. BROWN AND RINIS ARE PROFESSIONAL OBJECTORS

The objections of Messrs. Brown and Rinis should also be rejected because both men are professional objectors with long track records of making meritless objections to class action settlements and attorneys' fees requests and seeking to leverage them for payment from the class or class counsel. Not counting this case, Mr. Brown has filed at least eleven objections to class action settlements or fee requests in federal class actions; and Mr. Rinis, or a related entity, has filed at least 24 such objections. *See* Suppl. Decl. ¶¶ 4, 6. Mr. Rinis has objected so often that several federal courts have held that he is a "serial objector." *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *3 (N.D. Cal. Dec. 27, 2011) ("Mr. Rinis appears to be a 'serial objector' who has filed objections in at least 21 class action settlements in federal courts."); *In re Delphi Corp. Sec., Derivative & ERISA Litig.*, 248 F.R.D. 483, 500 (E.D. Mich. 2008) ("Mr. Rinis … can be fairly characterized as a 'serial objector.'"). "Federal courts are increasingly weary of professional objectors" such as Messrs. Brown and Rinis. *In re Initial Pub. Offering Sec. Litig.,* 728 F. Supp. 2d 289, 295 n.37 (S.D.N.Y. 2010); *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 295 n. 26 (E.D. Pa. 2003) (same). Co-Lead Counsel respectfully submit that, under the circumstances, the Court should view their objections in this case with a healthy dose of skepticism, and reject them for the reasons discussed above. In addition, Mr. Brown's objection should also be rejected because he failed to provide any documentation establishing his

[17] There were no specific objections to Co-Lead Counsel's motion for reimbursement of Plaintiffs' counsel's litigation expenses and no objection whatsoever to the motions for reimbursement of the expenses of Lead Plaintiffs Miss. PERS and Jerome Haber pursuant to the PSLRA (ECF No. 991, 992). Accordingly, these motions should be granted for the reasons set forth in the original moving papers.

membership in the Settlement Class, and because his objection was late, having been mailed on May 14, 2016 rather than ***received*** by counsel and the Court on that date. Both of these requirements were established in the Preliminary Approval Order and set forth in the Settlement Notice. *See* Preliminary Approval Order ¶¶ 20, 21; Settlement Notice at 19.

CONCLUSION

For all of the forgoing reasons, Lead Plaintiffs and Co-Lead Counsel respectfully request that the Court overrule the objections and: (1) finally approve the Settlement and Plan of Allocation; and (2) grant Co-Lead Counsel's motion for an award of attorneys' fees and reimbursement of expenses.

Dated: May 24, 2016

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO

By: /s/ James E. Cecchi
JAMES E. CECCHI

Liaison Counsel for Lead Plaintiffs and the Settlement Class

Max W. Berger
Salvatore J. Graziano
David Wales
Adam H. Wierzbowski
BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

Robert A. Wallner
Matthew A. Kupillas
MILBERG LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300

David A.P. Brower
Richard H. Weiss
BROWER PIVEN
A PROFESSIONAL CORPORATION
475 Park Avenue South, 33rd Floor
New York, NY 10016
(212) 501-9000

Jules Brody
Mark Levine
Patrick Slyne
STULL, STULL & BRODY
6 East 45th Street, 5th Floor
New York, NY 10017
(212) 687-7230

Co-Lead Counsel for Lead Plaintiffs and the Settlement Class

DECOTIIS, FITZPATRICK
& COLE, LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard
Teaneck, NJ 07666
(201) 928-1100

BRICKFIELD
& DONAHUE
70 Grand Avenue
River Edge, NJ 07661
(201) 258-3984

Additional Liaison Counsel for Lead Plaintiffs and the Settlement Class

#986340