UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE SCHERING-PLOUGH CORPORATION / ENHANCE SECURITIES LITIGATION	Civil Action No. 08-397 (DMC) (JAD)

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

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Salvatore J. Graziano
Adam H. Wierzbowski
Laura H. Gundersheim
1285 Avenue of the Americas
New York, NY 10019
Tel: (212) 554-1400
Fax: (212) 554-1444

LABATON SUCHAROW LLP
Jonathan M. Plasse
Christopher J. McDonald
Stephen W. Tountas
140 Broadway
New York, NY 10005
Tel: (212) 907-0700
Fax: (212) 818-0477

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

ARGUMENT 6

I. THE SETTLEMENT WARRANTS FINAL APPROVAL 6

A. The Law Favors and Encourages Settlement of Class Action Litigation 6

B. The Standards for Final Approval of Class Action Settlements 7

C. Application of the *Girsh* Factors Supports Approval of the Settlement 9

1. Complexity, Expense, and Likely Duration of the Litigation Support Approval of the Settlement 9

2. The Advanced Stage of Proceedings and the Amount of Discovery Completed Support Approval of the Settlement 14

3. The Risks of Establishing Liability and Attendant at Trial 16

4. The Risks of Establishing Damages 20

5. The Risks of Maintaining the Class Action Through Trial 21

6. Defendants' Ability to Withstand Greater Judgment, and Reasonableness of the Settlement in Light of the Best Possible Recovery and All Attendant Risks of Litigation 22

II. THE PROPOSED PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED 24

III. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

CASES

Anixter v. Home-Stake Prod. Co.,
77 F.3d 1215 (10th Cir. 1996) 13

In re Apple Computer Sec. Litig.,
No.C-84-20148(A), 1991 WL 238298 (N.D. Cal. Sept. 6, 1991) 13

In re Auto. Refinishing Paint Antitrust Litig.,
617 F. Supp. 2d 336 (E.D. Pa. 2007).....16

In re Cendant Corp. Litig.,
264 F.3d 201 (3d Cir. 2001) 7, 9

In re Cendant Corp. Sec. Litig.,
109 F. Supp. 2d 235 (D.N.J. 2000), *aff'd in relevant part*, 264 F.3d 201
(3d Cir. 2001).....25

Clark v. Lomas & Nettleton Fin. Corp.,
79 F.R.D. 641 (N.D. Tex. 1978), *vacated on other grounds*, 625 F.2d 49
(5th Cir. 1980).....20

In re Datatec Sys. Inc. Sec. Litig.,
No. 04-CV-525 (GEB), 2007 WL 4225828 (D.N.J. Nov. 28, 2007) 9

In re Domestic Air Transp. Antitrust Litig.,
148 F.R.D. 297 (N.D. Ga. 1993) 22

Ehrheart v. Verizon Wireless,
609 F.3d 590 (3d Cir. 2010) 6, 7

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974).....27

In re Enron Corp. Sec., Derivative & "ERISA" Litig.,
No. MDL-1446, 2008 WL 4178151 (S.D. Tex. Sept. 8, 2008).....26

In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995) 7, 23

Girsh v. Jepson,
521 F.2d 153 (3d Cir. 1975) 8

Hall v. AT&T Mobility LLC,
No. 07-5325 (JLL), 2010 WL 4053547 (D.N.J. Oct. 13, 2010).....9

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983).....26

In re Ikon Office Solutions, Inc.,
194 F.R.D. 166 (E.D. Pa. 2000).....24, 26

In re Pet Food Prods. Liab. Litig.,
629 F.3d 333 (3d Cir. 2010) 8

Plymouth Cnty. Contributory Ret. Sys. v. Hassan,
No. 08-1022 (DMC), 2012 WL 664827 (D.N.J. Feb. 28, 2012).....8

In re Prudential Ins. Co. of Am. Sales Practices Litig.,
148 F.3d 283 (3d Cir. 1998) 13, 16, 22, 27

Robbins v. Koger Props., Inc.,
116 F.3d 1441 (11th Cir. 1997) 13

In re Schering-Plough/Merck Merger Litig.,
No. 09-1099 (DMC), 2010 WL 1257722 (D.N.J. Mar. 26, 2010) 14, 16

Serio v. Wachovia Securities, LLC,
No. 06-4681 (MF), 2009 WL 900167 (D.N.J. Apr. 2, 2009) 9

Smith v. Daimler Chrysler Services N. Am., LLC,
No. 00-CV-6003 (DMC), 2005 WL 2739213 (D.N.J. Oct. 24, 2005) 16

Smith v. Dominion Bridge Corp.,
No. 96-7580, 2007 WL 1101272 (E.D. Pa. Apr. 11, 2007) 16

Sullivan v. DB Investments,
667 F.3d 273 (3d Cir. 2011) 6, 8, 14

In re Suprema Specialties, Inc. Sec. Litig.,
No. 02-168 (WHW), 2008 WL 906254 (D.N.J. Mar. 31, 2008).....9, 24

In re Vicuron Pharm., Inc. Sec. Litig.
512 F. Supp. 2d 279 (E.D. Pa. 2007) 19

Walsh v. Great Atl. & Pac. Tea Co.,
726 F.2d 956 (3d Cir. 1983) 24

In re Warfarin Sodium Antitrust Litig.,
391 F.3d 516 (3d Cir. 2004) 6, 23

STATUTES

Fed. R. Civ. P. 23(e)(2) 1

Fed. R. Civ. P. 23(f) 15, 21

15 U.S.C. § 78u-4(a) ..... *passim*

OTHER AUTHORITIES

Administrative Office of the U.S. Courts, 2012 Annual Report to the Director 13

PRELIMINARY STATEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Court-appointed lead plaintiffs, Arkansas Teacher Retirement System, Public Employees' Retirement System of Mississippi, Louisiana Municipal Police Employees' Retirement System, and Massachusetts Pension Reserves Investment Management Board (collectively "Class Representatives" or "Lead Plaintiffs"),[1] on behalf of themselves and the certified Class,[2] respectfully submit this memorandum of law in support of their motion for final approval of the proposed Settlement of this class

[1] Capitalized terms not otherwise defined herein have the meanings set forth and defined in the Stipulation and Agreement of Settlement, dated as of June 3, 2013, and filed with the Court on June 4, 2013 (the "Stipulation") (ECF No. 419-1).

[2] The Class certified pursuant to the Court's Order entered October 12, 2012 (ECF No. 325) consists of: all persons and entities that purchased or acquired Schering common stock, 6% mandatory convertible preferred stock maturing August 13, 2010 ("Preferred Stock"), or call options, and/or sold Schering put options, during the period between January 3, 2007 through and including March 28, 2008 (the "Class Period"), and who did not sell their stock and/or options on or before December 11, 2007, and who were damaged thereby. Excluded from the Class by definition are (a) Defendants; (b) members of the Immediate Families of the Individual Defendants; (c) the subsidiaries and affiliates of Defendants; (d) any person or entity who was a partner, executive officer, director, or controlling person of Schering, M/S-P or Merck (including any of their subsidiaries or affiliates), or any other Defendants; (e) any entity in which any Defendant has a controlling interest; (f) Defendants' directors' and officers' liability insurance carriers, and any affiliates or subsidiaries thereof; and (g) the legal representatives, heirs, successors and assigns of any such excluded party. Also excluded from the Class are any Persons listed in Appendix 1 to the Stipulation who do not opt back into the Class.

action and approval of the proposed plan for allocating the proceeds of the Settlement to eligible Class Members (the "Plan of Allocation").

The Settlement provides for the gross payment of $473,000,000 in cash (the "Settlement Amount"), which has been deposited into a segregated account for the benefit of the Class, in exchange for the release of all Released Claims. This recovery represents an exceptional benefit for the Class – among the twenty-five largest securities class action settlements since the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), among the top ten post-PSLRA class action securities settlements in cases not involving a restatement of financials, the largest securities class action settlement ever against a pharmaceutical company, and the third largest settlement within the Third Circuit (*see* Securities Class Action Services, "Top 100 Settlements Semi-Annual Report for 2H 2012," Exh. 1[3] to the Joint Declaration of Salvatore J. Graziano and Christopher J. McDonald, dated July 2, 2013, ("Joint Declaration" or "Joint Decl.") submitted herewith) – especially in light of the risks posed by the upcoming trial.

The Settlement was reached just three weeks before trial was scheduled to begin, and after the Parties had completed nearly all pre-trial preparations. The

[3] Citations to "Exh. ___" herein refer to exhibits to the Joint Declaration. For clarity, exhibits that themselves have attached exhibits will be referenced as "Exh. ___ - ____." The first numerical reference refers to the designation of the entire exhibit attached to the Joint Declaration and the second reference refers to the exhibit designation within the exhibit itself.

Parties agreed in principle to settle the Action only after arduous and protracted litigation and prolonged, arm's-length settlement negotiations – including multiple in-person mediation sessions and additional negotiations – the most recent rounds of which were conducted by the Court-appointed mediators Stephen M. Greenberg and Jonathan L. Lerner of the Pilgrim Mediation Group, LLC.

As detailed in the Joint Declaration, at the time the agreement in principle to settle the Action was entered into, Lead Plaintiffs, through Co-Lead Counsel, had exhaustively litigated the Action and had a very realistic and thorough understanding of the strengths and weaknesses of the claims given their final pre-trial preparations.[4] Co-Lead Counsel, among other things: (i) conducted a thorough investigation into the Class's claims; (ii) drafted a detailed consolidated class action complaint; (iii) successfully opposed Defendants' motions to dismiss the Complaint as well as their motions for reconsideration; (iv) successfully moved for class certification and opposed Defendants' efforts to seek appellate interlocutory review of the Court's order granting class certification; (v) engaged

[4] The Joint Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted in the Action; the extensive litigation efforts of Co-Lead Counsel; the negotiations leading to the Settlement; the value of the Settlement to the Class, as compared to the risks and uncertainties of continued litigation; the terms of the Plan of Allocation for the Settlement proceeds; and a description of the services Co-Lead Counsel provided for the benefit of the Class.

in an extensive and diligent discovery program, including participating in over ninety (90) depositions, several of which were conducted overseas before a local court, and the production and review of more than twelve million pages of documents; (vi) defeated Defendants' motions for summary judgment; (vii) submitted 10 expert opening and rebuttal reports; (viii) completed nearly all pre-trial preparations, including the exchange of *Daubert* motions, motions *in limine*, trial briefs, as well as the extensive Pretrial Order; (ix) conducted two extensive and detailed mock trials and created numerous trial demonstratives; and (x) engaged in a series of mediated discussions regarding a possible settlement of the Action over the course of the litigation. *See* Joint Decl. ¶¶ 10-11.

Lead Plaintiffs, which are each sophisticated institutional investors of the type favored by Congress when passing the PSLRA, have closely monitored and participated in this litigation from the outset including participating in the settlement negotiation process, and recommend that the Settlement be approved. *See* Exs. 2-5B. Further, Co-Lead Counsel, who have extensive experience in prosecuting securities class actions, unequivocally believe, based on their knowledge and understanding of the claims and defenses asserted in this Action, that the $473 million Settlement is an outstanding result for the Class, particularly when considered against the very substantial risk of a much smaller recovery – or,

even no recovery – after a trial of the Action, and the inevitable and lengthy appeals that would follow assuming success at trial. *See* Joint Decl. ¶ 12.

The Court's Preliminary Approval Order and the Pre-Hearing Notice Program

Lead Plaintiffs filed the Stipulation and moved for preliminary approval on June 4, 2013 (ECF Nos. 419-1 through 419-11). On June 7, 2013, this Court preliminarily approved the Settlement and entered the Preliminary Approval Order (ECF No. 421). *See* Joint Decl. ¶¶ 4, 133. Pursuant to the Preliminary Approval Order, beginning on June 21, 2013, Epiq Systems, Inc., ("Epiq") the Court-appointed Claims Administrator, caused the Notice of (I) Proposed Settlement and Plan of Allocation; (II) Settlement Fairness Hearing; and (III) Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Settlement Notice") and Proof of Claim and Release form to be mailed to all Class Members who could be identified by reasonable effort. *See* Declaration of Stephanie A. Thurin Regarding (A) Mailing of the Settlement Notice and Proof of Claim and (B) Report on Opt-in Requests Received to Date ("Thurin Decl."), Exh. 6, at ¶ 6 & Exh. A thereto. To date, 346,354 Settlement Notice packets have been mailed. *Id.* ¶ 8. On June 21, 2013, the Settlement Notice and Proof of Claim form were also posted on the case-dedicated website established by Epiq, *id.* ¶ 13, and the websites of Co-Lead Counsel, Joint Decl. ¶ 137. On or about July 2, 2013, the

Summary Notice of (I) Proposed Settlement and Plan of Allocation; (II) Settlement Fairness Hearing; and (III) Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Summary Settlement Notice") will be published in *The Wall Street Journal* and issued over *PR Newswire*, a national business-oriented wire service. Exh. 6 ¶ 9.

ARGUMENT

I. THE SETTLEMENT WARRANTS FINAL APPROVAL

A. The Law Favors and Encourages Settlement of Class Action Litigation

Within the Third Circuit, there is a strong judicial policy favoring settlement of class actions. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010) ("a strong policy exists, which is particularly muscular in class action suits, favoring settlement of disputes, finality of judgments and the termination of litigation"); *see also Sullivan v. DB Investments*, 667 F.3d 273, 311 (3d Cir. 2011) (there is a "strong presumption in favor of voluntary settlement agreements, which we have explicitly recognized with approval") (internal citation omitted); *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 535 (3d Cir. 2004) (there is an "overriding public interest in settling class action litigation"). The Third Circuit has noted that this strong presumption in favor of voluntary settlement agreements "is especially strong 'in class actions and other complex cases where substantial

judicial resources can be conserved by avoiding formal litigation.'" *Ehrheart*, 609 F.3d at 595 (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995)). This policy will be well-served by the proposed Settlement of this complex Action that, otherwise, would consume months of additional time of this Court and, likely, years of appellate practice.

B. The Standards for Final Approval of Class Action Settlements

Rule 23(e) of the Federal Rules of Civil Procedure provides that the claims of a certified class may be settled with the approval of the Court, upon a finding, after reasonable notice and a hearing, that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001).

Courts in the Third Circuit look to several factors to guide this inquiry, including:

> "(1) the complexity, expense and likely duration of the litigation. . .; (2) the reaction of the class[5] to the settlement. . .; (3) the stage of the proceedings and the amount of discovery completed. . .; (4) the risks of establishing liability. . .; (5) the risks of establishing damages. . .; (6) the risks of maintaining the class action through trial. . .; (7) the

[5] Pursuant to the terms of the Preliminary Approval Order, and as set forth in the Settlement Notice, the deadline for Class Members to submit objections to the Settlement, the Plan of Allocation and/or Co-Lead Counsel's request for an award of attorneys' fees and reimbursement of litigation expenses is Aug. 5, 2013. To date, no objections to the Settlement have been received. *See* Joint Decl. ¶¶ 134, 138. All objections, if any, received will be addressed in Lead Plaintiffs' reply papers, which are due to be filed with the Court on Aug. 13, 2013.

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

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) (citation omitted). *Accord In re Pet Food Prods. Liab. Litig*., 629 F.3d 333, 350 (3d Cir. 2010). "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 this settlement." *Plymouth Cnty. Contributory Ret. Sys. v. Hassan*, No. 08-1022 (DMC), 2012 WL 664827, at *2 (D.N.J. Feb. 28, 2012) (Cavanaugh, J.).

Notably, a presumption of fairness applies when reviewing a proposed settlement where, as here, the settlement is reached by experienced counsel after arm's-length negotiations. *See Sullivan*, 667 F.3d at 320 ("an initial presumption of fairness may apply when reviewing a proposed settlement where (1) the settlement negotiations occurred at arm's 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.") (internal quotes and citation omitted). Indeed, as courts within this District have held, "the participation of an independent mediator in settlement negotiations virtually insures [sic] that the negotiations were conducted at arm's length and without collusion between the

parties." *Hall v. AT&T Mobility LLC*, No. 07-5325 (JLL), 2010 WL 4053547, at *7 (D.N.J. Oct. 13, 2010).

C. Application of the *Girsh* Factors Supports Approval of the Settlement

1. Complexity, Expense, and Likely Duration of the Litigation Support Approval of the Settlement

The first *Girsh* factor – the complexity, expense and likely duration of the litigation – assesses the "probable costs, in both time and money, of continued litigation." *Cendant,* 264 F.3d at 233. In evaluating the settlement of securities class actions, courts have repeatedly recognized that such litigation is complex and uncertain. *See, e.g., In re Suprema Specialties, Inc. Sec. Litig*., No. 02-168 (WHW), 2008 WL 906254, at *5 (D.N.J. Mar. 31, 2008) (finding complexity of the securities class action supports final approval); *In re Datatec Sys. Inc. Sec. Litig*., No. 04-CV-525 (GEB), 2007 WL 4225828, at *3 (D.N.J. Nov. 28, 2007) (approving a securities fraud class action settlement in part due to the complexity of the issues involved in a securities class action); *see also Serio v. Wachovia Sec., LLC*, No. 06-4681 (MF), 2009 WL 900167, at *6 (D.N.J. Apr. 2, 2009) (approving settlement where underlying evidence was "highly technical in nature" and the issues presented were "sufficiently complex that a layperson on a jury could have difficulty comprehending them. As a result, continued prosecution of this case both before and at trial would likely require the extensive involvement of experts [and]

[t]he trial in this matter would likely last for weeks and result in substantial additional expenditures of time and expense.").

This Action was no exception. This securities fraud class action was brought under the Securities Exchange Act of 1934 ("Exchange Act") and the Securities Act of 1933 ("Securities Act"). The Exchange Act claims were brought against Schering, several of its former senior executives, and a joint venture formed by Schering and Merck ("M/S-P") alleging that they violated the Exchange Act by, *inter alia*, failing to disclose during the Class Period material information concerning the commercial prospects of Vytorin (a cholesterol-lowering drug that is a combination of a drug developed by Merck (Zocor) and a drug developed by Schering (Zetia)), the commercial prospects of Zetia, and the results of a clinical trial known as ENHANCE that tested whether Vytorin was more effective than Zocor alone in reducing the intima-media thickness of the carotid arteries. The Securities Act claims were brought against Schering, several of its former senior executives and directors, and several investment banks alleging that they are statutorily responsible for false or misleading statements contained in the registration statement and prospectus filed with the SEC in relation to Schering's public offering of common stock shares that occurred on or about August 15, 2007 (the "Common Stock Offering"), and Schering's public offering of 6.00% mandatory convertible preferred stock that occurred on or about August 15, 2007

(the "Preferred Stock Offering," and together with the Common Stock Offering, the "Offerings"). *See* Joint Decl. ¶ 15.

As set forth in detail in the Joint Declaration, the case involved an exhaustive examination of, among other things: (i) the principles of conducting clinical trials and the protocol for the ENHANCE study; (ii) the interim and final results of the ENHANCE study; (iii) information relating to collection, transmittal, storage and analysis of data gathered during the course of the ENHANCE study, including the use of the "SAS" platform in connection with statistical analyses; (iv) internal Schering and Merck documents and scientific literature concerning the pharmacodynamics of Vytorin, Zetia, Zocor, other cholesterol drugs in the "statin" class, and other cholesterol-lowering medications; (v) internal Schering and Merck documents and scientific literature relating to complex statistical concepts and methods; (vi) information relating to the marketing practices of Schering, Merck and M/S-P relating to their cholesterol franchise; and (vii) internal correspondence and memoranda produced by the Underwriter Defendants to determine whether adequate due diligence was conducted in advance of the Offerings. *See* Joint Decl. ¶ 73.

When the Parties reached an agreement in principle in February 2013 to settle the Action, a multitude of complex disputes had yet to be resolved. The Parties' pre-trial filings with the Court included:

- sixty-one pages of briefing with competing proposals on how to bifurcate the trial (with further briefing scheduled);

- a combined total of thirty-two *in limine* motions (more than 200 pages of briefing, with further briefing scheduled);

- *Daubert* motions (and responses) relating to six experts (260 pages of briefing, with further briefing scheduled);

- a Pretrial Order which included:

    - competing sets of jury instructions, verdict forms, and *voir dire* offering in critical respects fundamentally divergent views of the applicable law;

    - three exhibit lists containing over 2000 exhibits as to which a party had interposed one or more objections (this in addition to the over 500 exhibits the Parties agreed were admissible);

    - deposition designations and objections to thirty-eight deposition transcripts; and

    - a combined list of eighty-seven legal issues.

See Joint Decl. ¶¶ 90-101.

In addition to the risks that the Court may have made rulings on critical issues in Defendants' favor, discussed below and in the Joint Declaration, the expense of continuing to litigate would have been substantial. While the Parties have already spent more than five years litigating the case, their efforts would have required considerably more time and money if the case ultimately went to trial. *Id*. ¶¶ 116-19. On liability alone, a trial would have involved substantial attorney and expert time, voluminous documentary and deposition evidence, vigorously

contested motions, and the considerable use of judicial resources. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 318 (3d Cir. 1998) ("the trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both parties and the Court."). A verdict in favor of Plaintiffs on liability would have ushered in a second phase of trial in which damages would have to be assessed, a process requiring additional Court, attorney and expert time and expense.

Even assuming Lead Plaintiffs and the Class were awarded a judgment after trial larger than the Settlement Amount, post-trial motions and the appellate process would likely have delayed any recovery to the Class for years[6] or possibly denied recovery altogether in the event of a reversal.[7] The proposed Settlement, on the other hand, will provide the Class with an immediate recovery of $473 million

---

[6] According to the "2012 Annual Report of the Director," compiled and reported by the Administrative Office of the United States Courts, in 2012, the median time interval between the noticing of an appeal to the Third Circuit and a final order following oral argument in a private civil case was approximately 11 months, available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/B04ASep12.pdf (last visited June 18, 2013). Additional time would also likely be spent seeking review by the Supreme Court of the United States.

[7] For illustrative examples, *see, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversal of jury verdict of $81 million against accounting firm after a 19-day trial); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict following two decades of litigation); *cf. In re Apple Computer Sec. Litig.*, No. C-84-20148(A), 1991 WL 238298 (N.D. Cal. Sept. 6, 1991) ($100 million jury verdict vacated on post-trial motions).

in cash, less any attorneys' fees and expenses the Court may approve. Under these circumstances, this factor strongly favors of the Settlement.

2. The Advanced Stage of Proceedings and the Amount of Discovery Completed Support Approval of the Settlement

This factor examines the "degree of case development that Class Counsel have accomplished prior to Settlement" and allows the court to "determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Sullivan*, 667 F.3d at 321; *In re Schering-Plough/Merck Merger Litig*., No. 09-1099, 2010 WL 1257722, at *10 (D.N.J. Mar. 26, 2010).

Given that the Settlement was reached just three weeks before trial, there can be no dispute about whether the 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 period of more than five years, 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. As more fully set forth in the Joint Declaration, Lead Plaintiffs, through Co-Lead Counsel, conducted a coordinated investigation, which included interviewing more than 85 former Schering and Merck employees; reviewing more than twelve million pages of documents; conducting or defending more than 90 depositions, several of which were overseas; and submitting expert reports and

rebuttal reports from five experts. *See* Joint Decl. ¶¶ 21-23, 62-82. They also defeated Defendants' motions to dismiss and for summary judgment; successfully obtained class certification and fended off petitions for permission to appeal the Class Certification Order to the United States Court of Appeals for the Third Circuit under Fed. R. Civ. P. 23(f); completed nearly all pre-trial preparations, including pre-trial motions; and conducted two mock trials. *Id*. ¶¶ 29, 50-54, 91-104.

Moreover, as explained in the Joint Declaration, Lead Plaintiffs and Co-Lead Counsel engaged in a series of mediated discussions regarding a possible settlement of the Action over the course of more than two years before arriving at the Settlement that has been submitted to the Court. At different points in time, three well-respected and highly experienced mediators contributed their efforts in attempts to resolve Lead Plaintiffs' claims, collectively holding dozens of formal and informal discussions and formal mediation sessions. *Id*. ¶¶ 11, 121-125. The Settlement and its terms are a result of a tough, arm's-length, and fair bargaining process.

Co-Lead Counsel's investigation and discovery with respect to both liability and damages issues, legal analyses, and jury research 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 strongly weighs in favor of the proposed Settlement.

3. The Risks of Establishing Liability and Attendant at Trial

In assessing the fairness of the Settlement, the Court must balance the benefits afforded the Class, including the immediacy and certainty of a substantial recovery, against the risks of establishing liability and damages through continuing litigation. *See Prudential,* 148 F.3d at 319; *Smith v. Dominion Bridge Corp.*, No. 96-7580, 2007 WL 1101272, at *5 (E.D. Pa. Apr. 11, 2007). In considering this factor, the Court has recognized that "[a] trial on the merits always entails considerable risks," *Schering-Plough,* 2010 WL 1257722, at *10, and "no matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *In re Auto. Refinishing Paint Antitrust Litig*., 617 F. Supp. 2d 336, 343 (E.D. Pa. 2007) (citation omitted).

Although Co-Lead Counsel believe that the Lead Plaintiffs have a strong case for liability – and negotiated the Settlement on this basis – the claims against the Exchange Act Defendants presented unique challenges given, among other things, the highly technical nature of the alleged fraud here at issue. *See, e.g., Smith v. Daimler Chrysler Services N. Am., LLC*, No. 00-cv-6003 (DMC), 2005 WL 2739213, at *3 (D.N.J. Oct. 24, 2005) (Cavanaugh, J.) (finding risks supported settlement approval where "Plaintiffs would have to rely heavily upon statistical

evidence by way of expert opinions with the uncertainty of how the Court or a jury would interpret such opinions"). For example, to prove their case, Lead Plaintiffs needed to establish that Schering biostatisticians conducted improper statistical analyses on blinded data from the ENHANCE study, and were then able to conclude, based on their knowledge of statistical methods, that the ENHANCE study had failed. These alleged violations of complex practices related to the conduct of clinical trials might not have been easily understood by a jury and were vigorously disputed by Defendants who offered a plausible alternative explanation supported by experts and numerous exhibits that Defendants were focused on improving data quality and not improperly learning the ENHANCE results. *See* Joint Decl. ¶¶ 109-10.

Additionally, even if any improper actions were proven, Lead Plaintiffs also faced the very real risk that a jury would conclude that the Exchange Act Defendants did not act with the requisite *scienter*. The statistical analyses at the heart of this case were conducted by employees of Schering, who were several steps removed from the senior officers of the company. Lead Plaintiffs were forced to rely on circumstantial evidence to show that the Exchange Act Defendants were aware that the ENHANCE study had failed. Without a "slam dunk" trial exhibit showing actual scienter, a jury may have concluded that Lead

Plaintiffs did not adequately prove this element of their case. *See* Joint Decl. ¶¶ 111-12.

The difficulty of establishing *scienter* was further compounded by the fact that Defendants would be able to buttress their assertion of no wrongdoing in connection with the ENHANCE trial or the marketing of Vytorin and Zetia, by citing to the fact that, although Congress launched an investigation into the conduct of the trial, that investigation produced no findings adverse to Defendants and, similarly, that the FDA scrutinized the management of the ENHANCE trial but also made no adverse findings. *Id*. ¶ 112.

Lead Plaintiffs also faced significant risks in establishing their Securities Act claims. Even if Lead Plaintiffs could prove the underlying misconduct with the ENHANCE trial, Defendants would have credibly argued that that there were no misstatements in the Offering Materials. Moreover, even if the statements identified in the Complaint were found to be misstated, the Securities Act Defendants intended to assert a due diligence defense. Specifically, the Underwriter Defendants would have presented evidence showing that they conducted an investigation into the prospects of Schering's cholesterol franchise, which included discussions specifically related to the ENHANCE study. *Id*. ¶ 113. These Defendants also would have continued to maintain that Lead Plaintiffs did not have standing to bring Section 11 claims on behalf of common stock and

Preferred Stock purchasers, nor standing to bring Section 12(a)(2) claims on behalf of common stock and Preferred Stock purchasers. *See* Joint Decl. ¶¶ 48, 53, 85.

The technical nature of the underpinning of the claims asserted necessitated very heavy reliance by Lead Plaintiffs on scientific expert testimony which would be critical to establishing liability. The acceptance of such testimony by the jury was far from certain. *In re Vicuron Pharm., Inc. Sec. Litig*. 512 F. Supp. 2d 279, 285 (E.D. Pa. 2007) (recognizing that "the technical nature of the subject matter would undoubtedly have reduced the case to a battle of experts. Each side would have offered extensive testimony from expert witnesses on the efficacy of drugs, relapse rates, clinical studies, EC, causation, and damages. Compelled to choose between experts, it is far from certain that a jury would have found for the class, much less awarded it damages on the order of the settlement agreement.")

Further, at the time the Settlement was reached, the Parties had exchanged *Daubert* motions in which Defendants were seeking to exclude all or most of the testimony that Lead Plaintiffs intended to offer through these experts. Had Defendants prevailed in excluding any of this testimony, the presentation of many aspects of Lead Plaintiffs' case would have been extremely difficult. *See* Joint Decl. ¶¶ 95, 117.

In addition, at the time the Settlement was reached, the Parties had briefed *in limine* motions in which Defendants were seeking to exclude key evidence. If

Defendants succeeded on these motions, it would have presented enormous obstacles to Lead Plaintiffs' presentation of their claims. *See* Joint Decl. ¶¶ 100, 118.

Even if the Class succeeded at trial, Defendants almost certainly would appeal. Defendants are represented by experienced counsel who would continue to mount a zealous, thorough and no-holds barred 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. Perhaps that is why, as one court aptly noted, "no contested lawsuit is ever a 'sure thing.'" *Clark v. Lomas & Nettleton Fin. Corp.*, 79 F.R.D. 641, 651 (N.D. Tex. 1978), *vacated on other grounds*, 625 F.2d 49 (5th Cir. 1980).

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

4. The Risks of Establishing Damages

Should the Lead Plaintiffs have succeeded in establishing liability, considerable risk remained with respect to proving damages. Lead Plaintiffs faced a significant risk in establishing loss causation and resulting damages with respect to all claims asserted against Defendants. If a jury were to find that any of the alleged corrective disclosures identified in the Complaint were not true corrective disclosures, the potential recovery for the Class would be significantly diminished.

Specifically, Lead Plaintiffs faced the possibility that a jury could agree with the Schering Defendants and find that misstatements were fully cured as of January 14, 2008, when the top-line results of the ENHANCE study were publicly disclosed. If the Defendants were able to convince the jury that no new material information relating to the alleged fraud was publicly disclosed after January 14, 2008, the jury could very well have ended the Class Period on that date, eliminating multiple stock price drops in the case, including the single largest price drop, thereby, significantly reducing the damages that could be awarded against the Defendants. *See* Joint Decl. ¶ 114.

This uncertainty surrounding proving damages, as well as the need to rely on experts, lends clear support to the Lead Plaintiffs' argument that the $473 million recovery in this Settlement is fair, reasonable, and adequate. Under these circumstances, this factor very strongly weighs in favor of the Settlement.

5. The Risks of Maintaining the Class Action Through Trial

This Court's certification of the Class withstood the Schering-Related Defendants' and the Underwriter Defendants' petition to the Third Circuit, pursuant to Fed. R. Civ. P. 23(f), on the ground that the Court erred by declining to resolve a factual dispute regarding the length of the Class Period and the ground that the Court erred by ruling that ATRS had standing to pursue claims under the Securities Act. However, class certification can always be reviewed or modified

before trial, and a class may be decertified at any time. In its Sept. 25, 2012 Opinion, the Court found that certain issues, such as standing, were premature. (ECF No. 314.) It is unclear how they would fare at a later stage of the case. As one court observed in approving a class action settlement. "Indeed, the Court recognized that its class certification order was subject to alteration or amendment before the decision on the merits. 'To paraphrase Benjamin Franklin, plaintiffs now have their class action, the question is can they keep it.'" *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 317 (N.D. Ga. 1993) (citations omitted).

In short, there is always the risk that the action, or particular claims in the action, might not be maintained as a class through trial. *Prudential*, 148 F.3d at 321. Thus, the risks of failing to obtain class certification or failing to maintain class certification through trial, though certainly not substantial in this case, favor approval of the Settlement.

6. Defendants' Ability to Withstand Greater Judgment, and Reasonableness of the Settlement in Light of the Best Possible Recovery and All Attendant Risks of Litigation

The last three *Girsh* factors are essentially consideration of the reasonableness of the settlement in light of (i) the defendants' ability to withstand a greater judgment, (ii) the best possible recovery, and (iii) all the attendant risks of litigation. These factors, too, support approval of this Settlement and its significant financial benefit.

Although Merck[8] and the Underwriter Defendants could likely withstand a higher judgment than $473 million,[9] the Third Circuit has noted that this fact alone does not weigh against settlement approval. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) (finding no error where district court concluded that DuPont's ability to pay a higher amount was irrelevant to determining fairness of settlement). More importantly, the court must "measure[] the value of the settlement itself to determine whether the decision to settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case." *GM Truck*, 55 F.3d at 806. The Third Circuit further stated in *GM Truck*:

> [I]n cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement. . . . The evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.

Id. (citations omitted).

---

[8] Schering-Plough Corporation no longer exists independently. During the pendency of the Action, it merged with Merck.

[9] As the litigation continued, more and more of this judgment would have had to be paid directly by the Defendants, given wasting insurance policies that were being consumed by defense efforts.

Here, the cash settlement amount of $473 million makes this among the twenty-five largest securities class action settlements since the passage of the PSLRA in 1995, among the top ten post-PSLRA class action securities settlements in cases not involving a restatement of financials, the third largest settlement within the Third Circuit, and the largest securities fraud class action settlement ever obtained from a pharmaceutical company. *See* Exh. 1. Moreover, the Settlement is significantly larger than the only other monetary recovery arising from the alleged wrongdoing—the $5.4 million settlement by a coalition of thirty-six state attorneys general. *See* Joint Decl. ¶ 120. Accordingly, the final *Girsh* factors strongly support approval of the Settlement.

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

In determining whether to approve a proposed Plan of Allocation, "[t]he Court's principal obligation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund." *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983). "In general, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); *see also Suprema Specialties,* 2008 WL 906254, at *7 (same). A "Plan of Allocation need not be,

and cannot be, perfect." *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 272 (D.N.J. 2000), *aff'd in relevant part*, 264 F.3d 201 (3d Cir. 2001).

Here, the Plan of Allocation, which was prepared with the assistance of Lead Plaintiffs' damages expert, provides for the *pro rata* distribution of the Net Settlement Fund based on formulas tied to liability and damages. Lead Plaintiffs' expert calculated the reasonable amount of artificial inflation present in the per share closing prices of Schering common stock, Preferred Stock and call options (and artificial deflation in the per share closing prices of sold Schering put options) throughout the Class Period that was purportedly caused by the alleged fraud. The damages expert's analysis entailed studying the price decline in the Schering common stock and Preferred Stock and call options (and price increase in the sold Schering put options) associated with the alleged corrective disclosures, adjusted to eliminate the effects attributable to general market or industry conditions. Joint Decl. ¶¶ 128-29.

Calculation of a Recognized Claim will depend upon several factors, including when the Authorized Claimant's common stock or Preferred Stock or call options were purchased (or put options were sold) during the Class Period, whether these securities were purchased (or sold) during the Class Period, and if so, when, and whether these securities were purchased (or sold) in or traceable to the secondary offering of common stock that occurred on or about August 15, 2007

and/or the initial offering of the Preferred Stock that occurred on or about August 15, 2007. *Id*. ¶ 130.

Class Members who can establish that they purchased Schering Common Stock in or traceable to the secondary offering and all Class Members who purchased Schering Preferred Stock have claims under Section 11 of the Exchange Act. The Recognized Loss for the purchase of such shares is multiplied by 1.25 under the Plan, thus enhancing the Recognized Claims of Class Members with Securities Act claims by 25 percent over those with only Exchange Act claims. The multiplier recognizes the fact that Section 11 claims do not require proof of *scienter* at trial, *see Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983). Plans of Allocation with similar multipliers for Section 11 claims are regularly approved by courts throughout the country. *See, e.g.*, *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, No. MDL-1446, 2008 WL 4178151, at *5 n.13 (S.D. Tex. Sept. 8, 2008) (approving use of 1.25 multiplier for class members with Section 11 versus Section 10(b) claims); *Ikon*, 194 F.R.D. at 184 (1.5 multiplier).

In sum, the proposed Plan of Allocation should be approved as it was designed to fairly and rationally allocate the Net Settlement Fund among Authorized Claimants based on the amount of alleged artificial inflation (or deflation) present in Schering securities purchased and the risks of recovery.

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

In accordance with the Court's Preliminary Approval Order, beginning on June 21, 2013, the Court-approved Claims Administrator, Epiq, caused the approved Settlement Notice and Proof of Claim form to be mailed by first-class mail, postage prepaid, to potential Class Members. *See* Thurin Decl. ¶¶ 6-8. The approved Summary Settlement Notice will be published in *The Wall Street Journal* and disseminated over the *PRNewswire* on July 2, 2013. *Id*. ¶ 9. The notice program, which combines an individual, mailed notice to all potential Class Members who could be reasonably identified, as well as to brokers and nominees, and a summary notice published in the nation's pre-eminent national business publication and on the internet, meets the requirements of Rule 23 of the Federal Rules of Civil Procedure, which calls for "the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (citation omitted); *Prudential*, 148 F.3d at 326-27.

As these cases require, the Class has been given notice of the proposed Settlement and Plan of Allocation, as well as the rights of Class Members, and the method and dates by which they may object to the Settlement and proposed Plan. Additionally, the Class has been advised of the date of the final fairness hearing at

which they will have an opportunity to be heard with respect to any objection raised.

CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that this Court grant final approval to the proposed Settlement and approve the Plan of Allocation of the Net Settlement Fund. A proposed Judgment Approving Class Action Settlement, negotiated as part of the Settlement, will be submitted with Lead Plaintiffs' reply papers after the deadline for objections and opting back into the Class has passed.

Dated: July 2, 2013

Respectfully submitted,

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO, P.C.

Liaison Counsel for the Class

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

`

Salvatore J. Graziano
Adam H. Wierzbowski
Laura H. Gundersheim
BERNSTEIN LITOWITZ BERGER &
GROSSMANN LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400

Counsel for Lead Plaintiffs Arkansas Teacher Retirement System, Public Employees' Retirement System of Mississippi, Louisiana Municipal Police Employees' Retirement System and Co-Lead Counsel for the Class

Jonathan M. Plasse
Christopher J. McDonald
Stephen W. Tountas
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
(212) 907-0700

Counsel for Lead Plaintiff Massachusetts Pension Reserves Investment Management Board and Co-Lead Counsel for the Class