IN RE SCHERING-PLOUGH CORP. ENHANCE SECURITIES LITIGATION; IN RE MERCK & CO., INC. VYTORIN/ZETIA SECURITIES LITIGATION

Civil Action No. 08-397 (DMC) (JAD),Civil Action No. 08-2177 (DMC) (JAD)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2013 U.S. Dist. LEXIS 147981

August 27, 2013, Decided
August 28, 2013, Filed

SUBSEQUENT HISTORY: Adopted by, Motion granted by In re Schering-Plough Corp. Enhance Sec. Litig., 2013 U.S. Dist. LEXIS 141475 (D.N.J., Oct. 1, 2013)

COUNSEL: [*1] For CONFERENCE PENSION NEW YORK TEAMSTERS, RETIREMENT SYSTEM CITY OF PONTIAC GENERAL EMPLOYEES (2:08-cv-00397), Movants: JEFFREY W. HERRMANN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLC, SADDLEBROOK, NJ.

For CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, Policemen's Annuity and Benefit Fund of Chicago (2:08-cv-00397), Movants: DANIEL S. SOMMERS, LEAD ATTORNEY, COHEN, MILSTEIN, SELLERS & TOLL, PLLC, WASHINGTON, DC; MICHAEL BENJAMIN EISENKRAFT, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PC, NEW YORK, NY.

For Genesee County Employees' Retirement System (2:08-cv-00397), Movant: JOSEPH J. DEPALMA, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG, LLC, NEWARK, NJ.

For ARKANSAS TEACHER RETIREMENT SYSTEM, PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI, LOUISIANA MUNICIPAL POLICE EMPLOYEE'S RETIREMENT SYSTEM, Massachusetts Pension Reserves Investment Management Board (2:08-cv-00397), Lead Plaintiffs: DAVID HARLAN WEBBER, LEAD ATTORNEY, BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP, NEW YORK, NY; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; JOHN P. COFFEY, LEAD ATTORNEY, BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP, WESTFIELD, NJ; STEPHEN WILLIAM TOUNTAS, [*2] LEAD ATTORNEY, LABATON SUCHAROW LLP, NEW YORK, NY.

For F. RICHARD MANSON, Individually And On Behalf of All Others Similarly Situated (2:08-cv-00397), Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; LINDSEY H. TAYLOR, CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO, ROSELAND, NJ.

For NANCY KAMEL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED (2:08-cv-00397), Consol Plaintiff: PETER S. PEARLMAN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

For Plymouth County Contributory Retirement System (2:08-cv-00397), Intervenor Plaintiff: JUDITH S. SCOLNICK, SCOTT & SCOTT LLP, NEW YORK, NY.

For SCHERING-PLOUGH CORPORATION (2:08-cv-00397), Defendant: BRIAN M. ENGLISH, LEAD ATTORNEY, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ; DOUGLAS SCOTT EAKELEY, LEAD ATTORNEY, LOWENSTEIN SANDLER PC, ROSELAND, NJ; GAVIN J. ROONEY, LOWENSTEIN SANDLER, PC, ROSELAND, NJ; JASON E. HALPER, LOWENSTEIN SANDLER LLP, ROSELAND, NJ; RONNI E. FUCHS, PEPPER HAMILTION LLP, PRINCETON, NJ; THEODORE V. WELLS, JR., PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP, NEW YORK, NY.

For FRED HASSAN, ROBERT [*3] J. BERTOLINI, STEVEN H. KOEHLER, CARRIE S. COX (2:08-cv-00397), Defendants: BRIAN M. ENGLISH, LEAD ATTORNEY, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ; DOUGLAS SCOTT EAKELEY, LEAD ATTORNEY, LOWENSTEIN SANDLER PC, ROSELAND, NJ; GAVIN J. ROONEY, LOWENSTEIN SANDLER, PC, ROSELAND, NJ; JASON E. HALPER, LOWENSTEIN SANDLER LLP, ROSELAND, NJ.

For GOLDMAN SACHS & CO., BANC OF AMERICA SECURITIES LLC, Bear Sterns & Co. Inc., CITIGROUP GLOBAL MARKETS INC., MORGAN STANLEY & CO. INCORPORATED, BMP PARIBAS SECURITIES CORP., J.P. MORGAN SECURITIES INC., DAIWA SECURITIES AMERICA INC., SANTANDER INVESTMENT SECURITIES INC., Utendahl Capital Group, L.P., THE WILLIAMS CAPITAL GROUP, L.P., BANCA IMI SPA, BBVA SECURITIES INC., ABN AMRO ROTHCHILD LLC, BNY CAPITAL MARKETS, INC., ING FINANCIAL MARKETS LLC, Mitzuho Securities USA Inc. (2:08-cv-00397), Defendants: JEFFREY J. **GREENBAUM**, LEAD ATTORNEY, SILLS CUMMIS & GROSS P.C., NEWARK, NJ; DOUGLAS SCOTT EAKELEY, LOWENSTEIN SANDLER PC, ROSELAND, NJ.

For J.P. MORGAN SECURITIES INC. (2:08-cv-00397), Defendant: JEFFREY J. **GREENBAUM**, LEAD ATTORNEY, SILLS CUMMIS & GROSS P.C., NEWARK, NJ.

For MERCK/SCHERING-PLOUGH PHARMACEUTICALS (2:08-cv-00397), Defendant: [*4] BRIAN M. ENGLISH, LEAD ATTORNEY, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ; DOUGLAS SCOTT EAKELEY, LEAD ATTORNEY, LOWENSTEIN SANDLER PC, ROSELAND, NJ; RONNI E. FUCHS, PEPPER HAMILTION LLP, PRINCETON, NJ; THEODORE V. WELLS, JR., PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP, NEW YORK, NY.

For Credit Suisse Securities (USA) LLC (2:08-cv-00397), Defendant: JEFFREY J. **GREENBAUM**, LEAD ATTORNEY, SILLS CUMMIS & GROSS P.C., NEWARK, NJ.

For Plymouth County Contributory Retirement System (2:08-cv-00397), Defendant: JUDITH S. SCOLNICK, LEAD ATTORNEY, SCOTT & SCOTT LLP, NEW YORK, NY.

For Schering Securities Act Defendants (2:08-cv-00397), Defendant: GERALD KROVATIN, KROVATIN KLINGEMAN LLC, NEWARK, NJ.

For STEELWORKERS PENSION TRUST (2:08-cv-02177), Movant: LISA J. RODRIGUEZ, LEAD ATTORNEY, Schnader Harrison Segal & Lewis LLP, Cherry Hill, NJ.

For INSTITUTIONAL INVESTOR GROUP (2:08-cv-02177), Lead Plaintiff: JAMES R. BANKO, LEAD ATTORNEY, SWARTHMORE, PA; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; JAY W EISENHOFER, LEAD ATTORNEY, GRANT & EISENHOFER PA, WILMINGTON, DE.

For GENESEE COUNTY EMPLOYEES' RETIREMENT SYSTEM, Individually and on [*5] Behalf of All Others Similarly Situated (2:08-cv-02177), Plaintiff: CHRISTOPHER A. SEEGER, LEAD ATTORNEY, SEEGER WEISS LLP, NEW YORK, NY; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; TINA MOUKOULIS, LEAD ATTORNEY, LAW OFFICE OF BERNARD M. GROSS, PC, PHILADELPHIA, PA; LINDSEY H. TAYLOR, CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO, ROSELAND, NJ.

For MAYER HORWITZ, PHILIPPE HOFMANS (2:08-cv-02177), Consol Plaintiffs: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; LINDSEY H. TAYLOR, LEAD ATTORNEY, CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO, ROSELAND, NJ.

For Plymouth County Contributory Retirement System (2:08-cv-02177), Intervenor Plaintiff: JUDITH S. SCOLNICK, LEAD ATTORNEY, SCOTT & SCOTT LLP, NEW YORK, NY.

For MERCK & CO., INC. (2:08-cv-02177), Defendant: DOUGLAS SCOTT EAKELEY, GAVIN J. ROONEY, LEAD ATTORNEYS, LOWENSTEIN SANDLER PC, ROSELAND, NJ; JAMES L. BROCHIN, LEAD ATTORNEY, THEODORE V. WELLS, JR., PAUL, WEISS, RIFKIND, WHARTON, & GARRISON LLP, NEW YORK, NY; JASON E. HALPER, LEAD ATTORNEY, LOWENSTEIN SANDLER LLP, ROSELAND, NJ; WILLIAM B. MCGUIRE, LEAD ATTORNEY, BRIAN M. ENGLISH [*6] , TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ; RONNI E. FUCHS, PEPPER HAMILTON LLP, PRINCETON, NJ.

For RICHARD T. CLARK (2:08-cv-02177), Defendant: ALAN STUART MODLINGER, LEAD ATTORNEY, LOWENSTEIN SANDLER, LLP, ROSELAND, NJ; BRIAN M. ENGLISH, WILLIAM B. MCGUIRE, LEAD ATTORNEYS, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ; DOUGLAS SCOTT EAKELEY, GAVIN J. ROONEY, LEAD ATTORNEYS, LOWENSTEIN SANDLER PC, ROSELAND, NJ; JAMES L. BROCHIN, LEAD ATTORNEY, PAUL, WEISS, RIFKIND, WHARTON, & GARRISON LLP, NEW YORK, NY; JASON E. HALPER, LEAD ATTORNEY, LOWENSTEIN SANDLER LLP, ROSELAND, NJ.

For JUDY C. LEWENT, Deepak Khanna, Wendy L. Yarno (2:08-cv-02177), Defendants: ALAN STUART MODLINGER, LEAD ATTORNEY, LOWENSTEIN SANDLER, LLP, ROSELAND, NJ; BRIAN M. ENGLISH, WILLIAM B. MCGUIRE, LEAD ATTORNEYS, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ; DOUGLAS SCOTT EAKELEY, GAVIN J. ROONEY, LEAD ATTORNEYS, LOWENSTEIN SANDLER PC, ROSELAND, NJ; JASON E. HALPER, LEAD ATTORNEY, LOWENSTEIN SANDLER LLP, ROSELAND, NJ.

For Schering Securities Act Defendants (2:08-cv-02177), Defendant: GERALD KROVATIN, KROVATIN KLINGEMAN LLC, NEWARK, NJ.

JUDGES: STEPHEN M. GREENBERG, SPECIAL MASTER. JONATHAN J. LERNER, [*7] SPECIAL MASTER.

OPINION BY: STEPHEN M. GREENBERG; JONATHAN J. LERNER

OPINION

REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTERS RELATING TO THE AWARD OF ATTORNEYS' FEES AND EXPENSES

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STEPHEN M. GREENBERG AND JONATHAN J. LERNER, [*8] **SPECIAL MASTERS**

I. INTRODUCTION

In this Report and Recommendation, we address two separate motions for an award of attorneys' fees and expenses arising out of the settlement of two different but parallel securities class actions brought on behalf of shareholders of Schering-Plough Corporation (the "Schering Action") and Merck & Co., Inc. (the "Merck Action"), respectively. [1]

1 The Motion by Schering Co-Lead Counsel for Attorneys' Fees and Reimbursement of Litigation Expenses (the "Schering Application") is supported by the Joint Declaration of Salvatore J. Graziano, Esq., a member of Co-Lead Counsel Bernstein Litowitz Berger & Grossmann LLP ("BLB&G") and Christopher J. McDonald, Esq., a member of Co-Lead Counsel Labaton Sucharow, LLP ("Labaton ") (the "Schering Declaration"). The Motion by Merck Co-Lead Counsel for Attorneys' Fees and Reimbursement of Litigation Expenses (THE "Merck Application") is supported by the Joint Declaration of Daniel L. Berger, Esq., a Director of Co-Lead Counsel Grant & Eisenhofer PA ("G&E") and Salvatore J. Graziano, Esq., a member of Co-Lead Counsel BLB&G (the "Merck Declaration").

Although the claims differ in certain respects, [*9] both the Schering Action and the Merck Action contain securities claims under the Securities Exchange Act of 1934 (the "1934 Act") based on allegedly false and misleading statements made in connection with the commercial prospects of Vytorin, a drug being developed and marketed by a Joint Venture formed by Merck and Schering. [2] The allegations in both cases focused on the claimed failure to disclose material information and allegedly false statements pertaining to the results of a clinical trial known as ENHANCE that tested whether Vytorin, a cholesterol lowering drug consisting of a combination of a Merck drug (Zocor) and a Schering drug (Zetia), was more effective than Zocor alone in reducing the intima-media thickness of the carotid arteries ("cIMT").

2 Unlike the Schering Action, allegations in the Merck Action does not contain any claims under the Securities Act of 1933. (Merck Decl.. at ¶ 15.)

In both the Schering Action and the Merck Action, the core allegations are that more than a year before the ENHANCE results were made public, the corporate and individual defendants conducted improper statistical analyses of ENHANCE trial results and thereby determined that there was no statistically [*10] significant difference in cIMT change between subjects receiving Zocor alone and subjects receiving Vytorin. Lead Plaintiffs in the Schering and Merck Actions allege that the defendants failed to disclose their knowledge of these negative trial results while making materially false and misleading positive statements concerning the ENHANCE trial and the commercial prospects of Vytorin and Zetia which allegedly inflated the prices of both Schering and Merck shares. (Merck Decl. ¶ 17; Schering Decl. ¶ 17)

Following the statutory procedure dictated by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the Court appointed a Lead Plaintiff in the Schering and Merck Actions. In each case, the Court appointed a "group" Lead Plaintiff consisting of four large institutions to supervise the prosecution of the cases and in each action approved the Co-Lead Counsel selected by Lead Plaintiff. [3] As is customary in class actions, the Co-Lead Counsel in the Schering and Merck Actions undertook the prosecution of each of these cases purely on a contingency basis. (Schering Decl. ¶ 160-162; Merck Decl. ¶ 144, 145.)

3 *In re Cendant Securities Litigation, 264 F.3d 201, 223 n.3 (3d Cir. 2001),* [*11] then Chief Judge Becker observed that where, as here, the Lead Plaintiff appointed under the PSLRA consists of a "group", the members of the group still constitute a *single* plaintiff: "Only one 'entity' is entitled to speak for the class: *the Lead Plaintiff.* In cases where a group serves as Lead Plaintiff, it is for the group's members to decide how the group will make decisions, but it is the group -- not its constituent members -- that speaks

for the class. *A fortiori*, we use the term 'Lead Plaintiff throughout this opinion." In this Report and Recommendation we follow the Court's instruction referring to the Schering and Merck Lead Plaintiff Groups, and to their constituents as "members" of these groups.

Unlike many large securities class actions, where restated financial statements already have been issued by solvent corporations, [4] or indictments of senior corporate officers already have been announced or are likely to be forthcoming, [5] and critical elements of liability may be viewed from the inception of the case as a foregone conclusion, none of those aids were present here. (Schering Decl. ¶ 155; Merck Decl. ¶ 139.)

4 *See, e.g., In re Cendant, supra; In re Worldcom, Inc, Sec. Litig., 388 F. Supp. 2d 319, 329 (S.D.N.Y. 2005);* [*12] *Aronson v. McKesson, HBOC, Inc., 2005 U.S. Dist. LEXIS 7098, 2005 WL 93433 (N.D. CA 2005).*

5 *Id.*

In both these cases, Co-Lead Counsel, whose compensation was entirely contingent on achieving success, were on their own. [6] Their success, if any, depended solely on their own discovery efforts to prove liability, their investment of time and expenses would be substantial and the potential that the Class -- and Co-Lead Counsel -- would not prevail and could come away empty-handed was significant.

6 Apart from the absence of any restatement or potential indictment, no companion SEC proceeding was commenced and no deep-pocket shareholder had initiated separate litigation on which the class action could "piggy back." *See In re DaimlerChrysler AG Securities Litigation, Civ. Action No. 00-993/00-984/01-004 (JJF), 2004 U.S. Dist. LEXIS 31774, Report of Special Master Seitz, January 28, 2004 at 5-6* ("The revelations in the Financial Times caused Tracinda Corporation to file a fraud and securities action in this case. . . . The filing of Tracinda's complaint triggered an avalanche of class action complaints filed in this district.") *Tracinda v. DaimlerChrysler AG, 502 F.3d 212 (3d Cir. 2007).* At most, a group of state attorney generals investigated allegations [*13] that Schering and Merck delayed releasing the results of the ENHANCE trial which settled on July 15, 2009 -- almost four years before the settlements in this case -- without any admission of misconduct or liability by Schering or Merck and involved a payment of only $5.4 million to cover the cost of the investigation. (*See* Schering Decl. ¶ 120; Merck Decl. ¶ 109.)

In both the Schering and Merck Actions, the Co-Lead Counsel, who are among the most sophisticated and qualified law firms in the securities class action Bar, were well aware that these were challenging cases and by no means "lay-ups". (Schering Decl. ¶ 162; Merck Decl. ¶ 146.) At the time the Co-Lead Counsel undertook the significant responsibility to zealously prosecute the Schering and Merck Actions, respectively, they knew they were committing substantial resources to cases that promised to be difficult, complex, lengthy, and in all likelihood, extremely expensive with uncertain outcomes. *(Id.)* After all, the main corporate defendants, Schering and Merck, were large pharmaceutical companies who adamantly denied the allegations. They were no strangers to litigation and had more than ample resources to vigorously defend their [*14] innocence. Not surprisingly, Schering and Merck retained eminent and experienced defense counsel and for five years fought both cases tooth and nail. (Schering Decl. ¶ 142; Merck Decl. ¶ 158.)

Reflecting the profoundly divergent views of the merits of the two cases held by both sides, initial efforts to resolve each of the cases through mediation failed dismally. (Schering Decl. ¶ 122; Merck Decl. ¶ 111.) Only after defendants were unsuccessful in obtaining interlocutory review by the Court of Appeals of this Court's orders granting class certification, and after extensive contentious negotiations presided over by the Special Masters (who had served as Mediators pursuant to an Order dated April 9, 2012), were the parties to the Schering and Merck Actions finally able to reach agreements to settle each case -- efforts that did not bear fruit in either case until the eve of trial. [7] (Schering Decl. ¶ 125; Merck Decl. ¶ 114.)

7 The settlements finally came only after the Mediators made *final* proposals and imposed a deadline to accept or reject them. (Schering Decl. ¶ 125; Merck Decl. ¶ 114.)

The Schering settlement provides for a cash Settlement Fund of $473 million. (Schering Decl. ¶ 6.) [*15] It would be among the twenty-five largest securities class action settlements since passage of the PSLRA. Even more significantly, it would rank among the ten largest post-PSLRA securities class action settlements not involving a financial restatement. (Schering Decl. ¶ 8.)

On July 2, 2013, the Schering Co-Lead Counsel moved for approval of the settlement and for an award of attorneys' fees amounting to 16.92% of the Settlement Fund (including interest thereon), for reimbursement of litigation expenses in the amount of $3,620,049.63, and for reimbursement of expenses incurred by members of the Lead Plaintiff Group. (Schering Decl. ¶ 6.)

The Merck settlement provides for a cash Settlement Fund of $215 million. (Merck Decl. ¶ 8.) It would be among the fifty largest securities class action settlements ever obtained, would rank among the thirty largest securities class action settlements not involving a financial restatement, and is the third largest settlement ever obtained from a pharmaceutical company. (Merck Decl. ¶ 8; *see* Ex. A.) The amount of the Merck Settlement Fund, although not as large as the Schering Settlement Fund, is extremely impressive given the particular challenges presented [*16] by the Merck Action in proving causation, materiality, *scienter* and damages emanating from, among other difficulties, the failure of Merck shares to decline in the wake of the initial public disclosure that Vytorin had failed the ENHANCE trial. Unlike Schering's stock, which plummeted approximately 8% losing approximately $3.5 billion in value, Merck's stock price did not decline by any significant amount. (Merck Decl. ¶ 104.)

On July 2, 2013, the Merck Co-Lead Counsel moved for approval of the settlement and for an award of attorneys' fees, for reimbursement of expenses amounting to $4,367,376.95 and for reimbursement of expenses incurred by the members of the Lead Plaintiff Group. (Merck Decl. ¶ 6.) In the Merck Declaration, Co-Lead Counsel abjure applying for a specific amount of attorneys' fees: "[I]in light of the fact that the amount of attorneys' fees to be awarded will be initially recommended to the Court by the Court-appointed Special Masters, Co-Lead Counsel has not applied for a specific fee amount." (Merck Decl. ¶ 130.) Nevertheless, throughout the Merck Declaration and accompanying Memorandum of Law, the Merck Co-Lead Counsel argue that an award of 28% of the settlement [*17] would be "reasonable", and they offer support from three members of the Lead Plaintiff Group, "who support an award of fees amounting to 28% of the settlement fund." (*Id.; see also* Merck Lead Plaintiffs' Memorandum of Law in Support at 2: "it is abundantly clear an award of 28% is reasonable".)

By Order dated April 19, 2013, the Court appointed the Special Masters. [8] (S.ECF 418; M.ECF 327.) [9] Among other tasks, the Order directed the Special Masters "to prepare and file with the Court a Report and Recommendation determining any and all issues relating to the amount of attorneys' fees and expenses that should be awarded to the various law firms representing the Class Plaintiffs." [10] (*Id. at 2-3.*) In discharging this responsibility, we are cognizant that the Third Circuit has admonished district courts "to engage in robust assessments of the fee award reasonableness factors when evaluating a fee request." *In Re Rite Aid Corporation Securities Litigation, 396 F.3d 294, 301 (3d Cir. 2005) (Scirica, C.J.); see In Re Prudential Ins. Co., 148 F.3d 283, 340 (3d Cir. 1998)* (remanding for clarification of basis for fee award.) As the Third Circuit subsequently stated in an *en banc* decision in [*18] *Sullivan v. D.B. Investments, Inc.*: "[O]ur case law makes clear that a robust and 'thorough judicial review of fee applications is required in all class action settlements." *667 F.3d 273, 329 (3d Cir. 2011)(citation and quotation omitted).*

8 References to docket entries in the Schering Action are designated "S.ECF" followed by the entry number and references to docket entries in the Merck Action are designated as M.ECF followed by entry number.

9 On March 18, 2013, the Court filed a Notice of Intent to Appoint Special Masters pursuant to Federal Rules of Civil Procedure 23(h)(4) and 54(d)(2)(D) and sought consent, objections or any other views no later than March 23, 2013. (S.ECF 394; M.ECF 314.) On March 22, 2013, counsel for the Defendants advised the Court that the Defendants had no objection to the appointment of the Special Masters (S.ECF 395; M.ECF 315) and by letter dated March 25, 2013, Lead Counsel consented to the appointment. (S.ECF 396; M.ECF 316.)

10 On August 21, 2013, the Court issued an Amended Order directing that we also address the request in the Schering and Merck Applications for reimbursement of expenses by members of the Lead Plaintiff Groups. *(See S.ECF 434; M.ECF*

[*19] *341.)*

While we address in detail below the legal standards applicable to assessing legal fee applications, we apply these standards mindful that the overarching objective of our review is to "evaluate what class counsel actually did and how it benefitted the class." *In re AT&T Corp., 455 F.3d 160, 165-66 (3d Cir. 2006).* Accordingly, in this Report and Recommendation, we describe (i) the background of the Schering and Merck Actions; (ii) the prosecution of the Actions by Co-Lead Counsel from the inception of the actions through the settlement agreements; (iii) the applicable legal standards to be applied; and then (iv) we evaluate separately the Fee Applications submitted in the Schering and Merck Actions under the criteria mandated by Third Circuit law and provide our recommendations.

II. BACKGROUND

A. Vytorin and the ENHANCE Trial

In 2000, Merck and Schering formed a Joint Venture to develop and market a cholesterol-lowering drug called Vytorin. (S.ECF 52 ¶ 24; M.ECF 208 ¶ 31.) Vytorin combines two cholesterol-lowering drugs: (i) Zocor (a brand name for simvastatin, the popular generic statin drug) and (ii) Zetia (the brand name for ezetimibe). (S.ECF 52 ¶¶ 44, 80¶; M.ECF 208 ¶¶ 47, [*20] 52.) Cholesterol has long been linked to plaque buildup that narrows the arteries, known as "atherosclerosis." (S.ECF 52 ¶¶ 4, 80; M.ECF 208 ¶ 45.) In 2004, the U.S. Food and Drug Administration approved the use of Vytorin based on clinical evidence that Vytorin is highly effective in reducing low-density lipoprotein ("LDL" or "bad") cholesterol. (S.ECF 52 ¶ 80; M.ECF 208 ¶ 52.)

The ENHANCE trial was designed to test whether Vytorin was more effective than statins alone in reducing plaque buildup, as measured by the intima-media thickness ("IMT") of the carotid arteries. S.ECF 52 ¶ 90; M.ECF 208 ¶¶ 64, 68.) Half of the study participants were treated with Vytorin, and the other half were treated with Zocor. (S.ECF 52 ¶ 91; M.ECF 208 ¶ 71.) The "primary endpoint," or main research question being analyzed, was the amount of change in patients' carotid IMT after two years of treatment. (S.ECF 52 ¶¶ 7, 90-92; M.ECF 208 ¶ 69.) The Defendants expected the ENHANCE trial to demonstrate that Vytorin's combination of Zetia and Zocor would stop or reduce the growth of fatty arterial plaque more than Zocor alone. (Schering Class Action Decision at 2-3, S.ECF 314.)

B. The January 14, 2008 Disclosure [*21] **of the ENHANCE Results**

On January 14, 2008, at 8:05 a.m., defendants issued a news release entitled "Merck/Schering Plough Pharmaceuticals Provides Results of the ENHANCE Trial," which announced that there was no statistically significant difference between the carotid IMT of the Vytorin and Zocor patients. (S.ECF 52 ¶ 172; M.ECF 208 ¶¶ 218-220; News Release dated Jan. 14, 2008.) The news release unequivocally stated that the ENHANCE trial had found "no statistically significant difference between treatment groups on the primary endpoint." (S.ECF No. 52 ¶ 172; M.ECF No. 208 ¶ 220.) In fact, it disclosed that there was also no statistically significant difference between treatment groups for each of the components of the primary endpoint, or any of the key secondary imaging endpoints.

The January 14, 2008 news release produced substantial media coverage. The major wire service ran stories that same day, with headlines such as: "Merck, Schering's Vytorin No Better Than Generic" (*Bloomberg News*); "Merck, Schering: Enhance Study Misses Significance" (*Reuters News*); "Merck, Schering-Plough's Cholesterol Drug Combination Fails to Benefit Patients in Study" (*Associated Press Newswires*); and [*22] "Study Shows Zetia Increases Level of Plaque in Blood" (NBC Nightly News). (*See, e.g.*, Expert Report of Gregg A. Jarrell (M.ECF 180 ¶ 84.)

C. The Impact of the January 14 Disclosure

The following day, national television networks and major newspapers throughout the country ran stories with headlines such as: "Cholesterol Drug Shocker Tests Show No Benefit from Zetia & Vytorin" (ABC News) (Good Morning America); "Cholesterol-Lowering Drug Vytorin Comes Up Short vs. Statin in Study" (USA Today); "Generic Found as Good as Vytorin" (Los Angeles Times); "Study Deals Setback to Vytorin Cholesterol Drug" (Wall Street Journal); and "Study Reveals Doubt on Drug for Cholesterol" (New York Times). (M.ECF 180 ¶ 86.) In one of the articles that day concerning the news release, Dr. Steven Nissen, chief of cardiology at the Cleveland Clinic, stated: "This drug doesn't work. Period. It just doesn't work." (M.ECF 208 ¶ 227; S.ECF 52 ¶ 176.)

The Lead Plaintiffs themselves allege that the January 14, 2008 release "shocked the market" because it "showed that Vytorin failed to reduce the buildup of arterial plaque any more than less expensive generic simvastatin alone." (S.ECF ¶ 172; M.ECF ¶ 218.) Only four [*23] days after the news release, on January 18, 2008, Schering shareholders filed a securities class action complaint alleging that the disclosure of the ENHANCE results had been delayed and that the purported "fraud" was disclosed on January 14, 2008. Specifically, the complaint alleged:

> On January 14, 2008, investors were shocked and alarmed after it was revealed, for the first time . . . that defendants had purposefully delayed the publication of a study that they possessed throughout the Class Period that demonstrated that VYTORIN was neither safe nor effective.

(S.ECF 1 ¶ 60.)

After the news was announced, Schering's stock price fell approximately 8%, resulting in a loss of approximately $3.5 billion of its market capitalization. (Schering Class Action Decision S.ECF 314.) In contrast, the shares of Merck's stock did not decline by any statistically significant amount on January 14, 2008. (Merck Decl. ¶ 104.) Given the importance of proving loss causation emanating from the Third Circuit's decision in *Semerenko v. Cendant Corp., 223 F. 3d 165 (3d Cir. 2000)*, [11] and the United States Supreme Court's subsequent decision in *Dura Pharmaceuticals, Inc. v. Michael Broudo, et al., 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)*, [*24] the vastly different stock market reaction of Merck's shares remained an overarching and potentially fatal problem for the Merck Lead Plaintiffs -- placing the potential success of the Merck Action on a far more risky footing than the Schering Action.

> 11 In Semerenko, the Third Circuit stated "where the value of the security does not actually decline as a result of our alleged misrepresentation, it cannot be said that there is in fact an economic loss attributable to that misrepresentation. In the absence of a correction in the market price, the cost of the alleged misrepresentation is still incorporated into the value of the security and may be recovered at any time simply by reselling the security at the inflated price." Id., 223 F. 3d at 185. *See, Alaska Elec. Pension Fund v. Pharmacia Corp., 554 F.3d 342 (3d Cir. 2009).*

D. The Impact of Subsequent Disclosures

In the wake of the January 14 disclosures, the Merck Defendants publicly appealed to investors, analysts and the medical community to await release of the full ENHANCE results and this may have tempered the stock market reaction to the January 14 news. (Schering Class Action Decision at 3; S.ECF 314.)

The release of full information [*25] about the ENHANCE trial occurred on Sunday, March 30, 2008 when the results were vetted at a meeting of the American College of Cardiology and discussed in an online article in the *New England Journal of Medicine.* (S.ECF 52 ¶¶ 194, 198; M.ECF 208 ¶¶ 249-255.) In keeping with the previous January 14 release, the full ENHANCE results showed that Vytorin provided no benefit over general simvastatin alone in reducing plaque buildup in the arteries. (Schering Class Action Decision at 3; S.ECF 314.) It also showed that the Vytorin portion of the study actually experienced an increase in arterial plaque. Thereupon, a panel of experts released a statement calling for cardiologists to limit the use of Zetia and Vytorin. *(Id.)*

Following the release of this news, on Monday, March 31, 2008, Schering's shares again plummeted, losing approximately $8.2 billion of its market capitalization. (*Id. at 3.*) This time, Merck's shares also declined by more than $14 billion in value. (M.ECF 208 ¶ 261.) Lead Plaintiffs in the Schering and Merck Actions vehemently contended these sharp declines demonstrated that the statements by Merck officials following the January 14 revelation of top line results urging [*26] investors to withhold judgment until disclosure of the full results of the ENHANCE trial were both misleading and highly effective. (Schering Class Action Dec. at 3; S.ECF ¶ 314.) Prevailing on this claim was by no means an easy task. After all, given the basic disclosures that already had made on January 14, 2008, revealing Vytorin had failed the ENHANCE trial and the widespread publicity it had received, "it is hard to see what benefits accrue from a short respite from an inevitable day of reckoning. There is no claim here the false statements were made in an effort to sell off shares by management, or to delay a criminal prosecution." *Shields v. Citytrust Bancorp, 25*

F.3d 1124, 1130 (2d Cir. 1994).

For the Schering Class, success on this difficult claim could have extended the class period beyond January 14, 2008 and significantly increased the amount of recoverable damages beyond the already large damage claims based on the $3.5 billion investor losses from the original January 14, 2008 disclosures. But, for the Merck Class (and Co-Lead Counsel) winning this argument was imperative. Failure to prevail and extend the case beyond January 14, 2008 would be fatal to the entire Merck [*27] Action.

III. THE PROSECUTION OF THE SCHERING AND MERCK ACTIONS

The Securities Litigation is Commenced The Schering Action

The ink was barely dry on the January 14 news release when the first Schering Action was filed. On January 18, 2008, the first of several securities class action complaints was filed by Schering shareholders alleging that disclosure of the ENHANCE results had been purposely delayed by Schering. (S.ECF No. 1).

2. Lead Plaintiff and Co-Lead Counsel Are Appointed in the Schering Action

On April 18, 2008, the Court entered an Order appointing the Lead Plaintiff in the Schering Action pursuant to the PSLRA. The Court appointed as Lead Plaintiff a "group" consisting of the following four institutions: Arkansas Teacher Retirement System ("ATRS"), the Mississippi Public Employees' Retirement System ("MPERS"), Louisiana Municipal Police Employees' Retirement System ("LMPERS"), and Massachusetts Pension Reserves Investment Management Board ("Mass PRIMB") (collectively "Schering Lead Plaintiff Group"). (S.ECF 30) (Schering Decl. ¶ 24)

The Court also approved the Group's selection of BLB&G and Labaton as Co-Lead Counsel for the Class and approved the law firm of Carella, Byrne, Cecchi, [*28] Olstein Brody and Agnello ("CBCOBA") as Liaison Counsel for the Class. (Schering Decl. ¶ 139, n. 11.)

3. The Merck Action

On May 5, 2008, a securities class action complaint was filed in the United States District Court for the District of New Jersey on behalf of Merck shareholders against Merck and its then Chief Executive Officer Richard T. Clark ("Clark"). (Merck Decl. ¶ 23.)

4. The Merck Lead Plaintiffs and Co-Lead Counsel Are Appointed

By Order dated July 2, 2008, the Court appointed as Lead Plaintiff in the Merck Action a group consisting of the following four institutions: Stichting Pensioenfonds ADP ("ADP"), International Fund Management, S.A. (Luxemburg) ("IFM"), the Jacksonville Police and Fire Retirement System ("Jacksonville"), and the General Retirement System of the City of Detroit ("Detroit") (collectively, the "Merck Lead Plaintiff Group"). (Merck Decl. ¶ 24.)

The Court also approved retention by Lead Plaintiff of the law firms of G&E and BLB&G as Co-Lead Counsel (Merck Decl. ¶ 3) and the law firms of CBCOBA and Seeger Weiss, LLP ("Seeger") as Liaison Counsel to the Class (Merck Decl. ¶ 135, n. 7).

5. Consolidated Amended Complaints Are Filed in Both Actions

Once the PSLRA [*29] appointment process was completed, Co-Lead Counsel in both the Schering and Merck Actions began preparing detailed and comprehensive Amended and Consolidated Complaints.

On September 15, 2008, the Schering Lead Plaintiffs filed a 230-page Consolidated Amended Complaint against 37 defendants, including, Schering-Plough Corporation ("Schering"), Merck/Schering-Plough Pharmaceuticals ("M/S-P"), Fred Hassan ("Hassan"), Carrie S. Cox ("Cox"), Robert J. Bertolini ("Bertolini'), Steven H. Koehler ("Koehler"), Susan Ellen Wolf ("Wolf), certain members of the Schering Board of Directors (the "Director Defendants") (collectively, the "Schering-Related Defendants"), and the underwriters of two offerings of Schering common and preferred stock (the "Underwriter Defendants") (referred to collectively along with the Schering-Related Defendants as the "Schering Defendants"). (*See* Schering Decl. ¶ 26.)

In the Amended Complaint, members of the Schering Lead Plaintiff Group alleged claims under section 10(b), 20(a) and 20A of the 1934 Act and Sections 11, 15 and 12(a)(2) of the 1933 Act. In essence, they alleged that Schering knew or recklessly disregarded, but did not disclose, the results of the ENHANCE [*30] study, which showed that Vytorin was in fact no more effective at reducing cIMT than simvastatin alone. Lead Plaintiff alleged that Schering knew the results of the ENHANCE test well before the results were "un-blinded," but withheld that information in order to forestall any negative impact the results would have on sales of Vytorin and Schering's common stock price. According to Lead Plaintiff, Schering used the pretext of data issues to delay the release of the results, and simultaneously made public statements actually touting the ENHANCE study and the purportedly greater medical benefits of Vytorin over simvastatin alone. (Schering Class Action Decision at 2-3; S.ECF 314.)

On October 6, 2008, the Merck Lead Plaintiff Group filed a 216-page Consolidated and Amended Complaint against Merck, Clark and other officers. (Merck Decl. ¶ 25; M.ECF 24.)

On February 9, 2012, members of the Merck Lead Plaintiff Group filed a Second Amended Consolidated Complaint for violations of the Federal Securities Laws (the "Complaint") which again asserted claims under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5. (Merck Decl. ¶ 33.) The Complaint added additional allegations concerning the [*31] alleged false statements and dropped all claims against two of Merck's officers who had been named as defendants in the Consolidated Complaint. Defendants denied all violations of the securities laws and asserted affirmative defenses to Lead Plaintiffs' allegations. (Merck Decl. Ex. A to Ex. F at p. 4.)

6. Defendants' Motion to Dismiss the Consolidated Class Action Complaint

By December 12, 2008, the Defendants in both cases had moved to dismiss the Schering and Merck Consolidated Class Action Complaints on a variety of legal grounds. In Orders dated September 2, 2009, the Court denied all dismissal motions. (S.ECF No. 123; M.ECF 64 and 65.)

7. Defendants Fight Class Certification

On February 7, 2011, members of the Lead Plaintiff Group in both the Schering and Merck Actions filed motions for class certification and, on September 16 and September 22, 2011, respectively, filed amended motions for class certification. (Schering Decl. ¶¶ 46, 47; Merck Decl. ¶¶ 46, 47.)

Securities class actions like the Schering and Merck Actions, routinely are certified as class actions, especially since the advent of the PSLRA in which the Court has been actively involved in the selection of lead plaintiffs [*32] and approval of lead counsel. Even though several significant institutions were selected as the Lead Plaintiffs in the Schering and Merck Actions, defendants, leaving no stone unturned, conducted extensive discovery into the propriety of certification and actively contested virtually every possible aspect of class certification. (*See* Schering Decl. ¶ 35; Merck Decl. ¶ 35.) Defendants not only resisted certification, but also utilized the certification process as a vehicle to attempt to sharply limit the Schering class period to end on January 14, 2008 -- and to try to eliminate the Merck class entirely. (Merck Decl. ¶ 48.) The pitched battle waged over certification was ferocious.

Indeed, on April 12, 2010, even before Lead Plaintiff Group's motions for class certification were filed, the Schering and Merck Defendants commenced extensive discovery by serving members of the Lead Plaintiff Groups with document requests that were extremely broad, including forty-eight (48) separate requests for documents and nine interrogatories. In response to Defendants' discovery requests, Lead plaintiffs produced more than 15,000 pages of documents, including account statements, investment guidelines [*33] and investment manager reports. Defendants then deposed five Rule 30(b)(6) representatives of the various members of the Schering Lead Plaintiff Group and six Rule 30(b)(6) representatives of the various members of the Merck Lead Plaintiff Group. (Schering Decl. ¶¶ 35, 36; Merck Decl. ¶¶ 35-37.)

Defendants also sought discovery from the external investment advisers that purchased Schering and Merck securities on behalf of members of the Lead Plaintiff Groups during the class period. It is common for public pension funds to diversify their investment strategy by apportioning capital among a number of investment managers, who usually specialize in different asset classes -- *e.g.*, equity, fixed income, emerging markets, etc. (Schering Decl. ¶ 42; Merck Decl. ¶ 42.)

Between December 2010 and March 2011, Defendants served subpoenas *duces tecum* on fifteen external advisors to the members of the Schering Lead Plaintiff Group and twenty-one external advisors to the members of the Merck Lead Plaintiff Group. (Schering Decl. ¶ 43; Merck Decl. ¶ 43.) These subpoenas required review by Co-Lead Counsel of approximately 100,000 pages of documents. (*Id.*) At depositions held throughout the country, Defendants [*34] deposed five representatives of the advisors to the members Schering Lead Plaintiff Group and fourteen advisors to the members of the Merck Lead Plaintiff Group. The unusually intense battle over certification even involved submissions of expert reports and expert depositions by all parties. (Schering Decl. ¶ 44; Merck Decl. ¶ 44.)

Following class certification discovery, and after receiving voluminous briefing, on September 25, 2012, the Court issued Opinions and entered Orders granting Lead Plaintiffs' motions in both the Schering and Merck Actions certifying Classes (*See* S.ECF 314; M.ECF 250.)

8. Both Actions Involved Massive Fact Discovery

After the motions to dismiss were denied, formal fact discovery began in both the Schering and Merck Actions. 12 (Schering Decl. ¶ 58; Merck Decl. ¶ 55.)

> 12 Even before the automatic PSLRA stay expired upon the denial of the dismissal motions and resort to formal discovery became available, Co-Lead Plaintiffs had conducted an extensive factual investigation. (*See* Schering Decl. ¶¶ 21-33 ; Merck Decl. ¶¶ 20-22.) The members of the Schering Lead Plaintiff Group also unsuccessfully sought to partially vacate the automatic stay granted by the PSLRA to [*35] obtain documents produced in related investigations. (Schering Decl. ¶ 57.)

At bottom, both the Schering and Merck Actions required proof of what Defendants knew about the ENHANCE trial -- and when they knew it. Of course, this evidence was almost entirely in the exclusive possession of Defendants. Accordingly, a massive discovery effort was required and the highly complex scientific and statistical nature of the evidence added to the difficulty. Throughout the course of both actions, Co-Lead Counsel embarked on an extensive and hotly-contested discovery effort to attempt to develop evidentiary support for the claims asserted in the Complaints. These efforts were critical to the result achieved for the Classes in both the Schering and Merck Actions.

Lead Plaintiffs in both cases served lengthy document requests, as well as interrogatories, on the various Defendants. Further, Lead Plaintiffs in the two cases gathered additional evidence through subpoenas *duces tecum* served on numerous non-parties, including clinical imaging firms, informatics and technology firms, industry intelligence firms and crisis management firms engaged by Defendants in connection with the ENHANCE trial or the marketing [*36] of Vytorin. (Schering Decl. ¶ 59; Merck Decl. ¶ 56.)

In response to these discovery efforts by Co-Lead Counsel, Defendants and nonparties produced more than 12 million pages of documents. (Schering Decl. ¶ 51; Merck Decl. ¶ 58.) In order to efficiently review and analyze this massive response, Co-Lead Counsel dedicated extensive resources and utilized advanced technology to organize, review and analyze the vast amount of information produced by Parties and non-parties. Given the significant efficiencies both in terms of time and money that could be achieved by joining their efforts in the two parallel actions, Co-Lead Counsel in the Schering and Merck Actions coordinated their discovery efforts. (Schering Decl. ¶ 62; Merck Decl. ¶ 59.)

Co-Lead Counsel in the two actions developed a joint discovery program for the review of documents and the taking of depositions, and areas of responsibility both as to document review and depositions were allocated among attorneys in both actions. This approach, among other things, allowed for a larger overall team of attorneys to review the documents and for the teams to effectively share information with each other and with more senior lawyers in each [*37] case. This increased the efficiency of the document review in both cases by reducing redundancy and duplicated efforts and facilitated the review of documents and the efficient preparation for depositions. (Schering Decl. ¶ 53; Merck Decl. ¶ 60.)

Additionally, the Co-Lead Counsel in the respective actions also sought to realize significant cost savings by placing all the documents in a shared electronic document depository hosted by a leading litigation technology support company that was hired jointly by Co-Lead Counsel in the Schering and Merck Actions. This avoided significant copying costs necessary to create numerous hard copy sets of the 12 million pages produced at a cost of more than $1 million (at $0.10/page) per set, an order of magnitude more than the $325,602.86 cost Co-Lead

Counsel incurred in connection with the document depository. (Schering Decl. ¶ 64; *see* Merck Decl. ¶ 63.)

The electronic document depository also enabled all Lead Plaintiffs' Counsel working on both cases to search the documents through "Boolean" type word searches (*i.e.*, the type of searches used in the Westlaw and Lexis-Nexis databases), as well as by multiple categories, such as by author and/or recipients, [*38] type of document (*e.g.*, emails, memoranda, SEC filings), date, bates number, etc. The electronic database was accessible through the Internet, allowing attorneys in both the Schering and Merck Actions, under the direction and supervision of their respective co-lead counsel, to review documents and coordinate discovery remotely. For example, when attorneys in one location identified "hot" documents, that designation was saved so attorneys in other locations would be aware of which documents carried that designation and could immediately review them. Co-Lead Counsel achieved substantial savings by working primarily electronically (saving significant copying costs), and by sharing the costs of electronic data storage. (Schering Decl. ¶ 65; Merck Decl. ¶ 62.)

To review the enormous document production, teams of attorneys from Plaintiffs' Counsel in both the Schering and Merck Actions were assembled and thorough document review guidelines and protocols were prepared to aid them. With guidance from more senior attorneys, they worked full-time on this project to complete the document review and analysis as quickly and efficiently as possible. The review was structured to limit overall cost, [*39] with the bulk of the initial review being conducted by more junior attorneys. (Schering Decl. ¶ 67; Merck Decl. ¶ 69.)

All aspects of the review by attorneys were supervised by Co-Lead Counsel to attempt to eliminate inefficiencies and to try to insure a high-quality work-product. This supervision included multiple in-person training sessions, the drafting of a detailed "document review manual," presentations regarding the key legal and factual issues in the case and in-person instruction from senior attorneys and experts. The training sessions were supplemented by weekly conferences with senior attorneys at each Co-Lead Counsel firm as well as conferences with Co-Lead Counsel in the companion case to discuss important documents and case strategy. (Schering Decl. ¶ 68; Merck Decl. ¶ 65.)

So-called "hot" documents that were identified were all subject to further analysis and assessment by senior attorneys (with the assistance of Lead Plaintiffs' experts) on an on-going basis. In addition, samplings of documents coded as "relevant" and "non-relevant" were reviewed by those same senior attorneys to provide quality control, i.e., to make certain that the more junior attorneys' assessments [*40] were accurate. (Schering Decl. ¶ 69; Merck Decl. ¶ 66.)

9. Depositions

In addition to reviewing more than 12 million pages of documents and taking and defending depositions related to class discovery as described above, Lead Plaintiffs in the Schering and Merck Actions conducted more than 45 depositions of fact witnesses and 30(b)(6) witnesses, some of which were two-day depositions. (Schering Decl. ¶ 71; Merck Decl. ¶ 67.)

In preparing for these depositions (and for possible trial), Co-Lead Counsel in both cases needed to analyze complex medical, scientific and statistical issues that were integral to the claims, including to prove loss causation and damages. As a result, Co-Lead Counsel and their experts needed to devote considerable time and effort to learning and analyzing: (i) the principles of conducting clinical trials and the protocol for the ENHANCE study; (ii) the interim and final clinical trial 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 [*41] and scientific literature concerning the various elements 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; and (vi) information relating to the marketing practices of Schering, Merck and M/S-P relating to their cholesterol franchise. [13] (Schering Decl. ¶ 73; Merck Decl. ¶ 69.)

13 Co-lead Counsel in the Schering Action also needed to analyze internal correspondence and memoranda produced by the Underwriter Defendants to determine whether adequate due diligence was conducted in advance of the Offerings. (Schering Decl. ¶ 73.)

10. Extensive Reliance on Experts

Given the complex scientific nature of the Schering and Merck Actions, it is hardly surprising that both sides needed to make extensive use of expert testimony. This required the preparation of lengthy expert reports, expert depositions and, of course, *in limine* motions. (Schering Decl. ¶¶ 75-83; Merck Decl. ¶¶ 71-78.) In the Schering Action, the parties exchanged a total of 22 opening and rebuttal reports from 11 experts. (Schering Decl. ¶ 75.) In [*42] the Merck Action, the parties exchanged a total of 18 opening and rebuttal expert reports from a total of 9 experts. (Merck Decl. ¶ 71.)

On September 15, 2011, the Schering and Merck Lead Plaintiff Groups served expert reports on Defendants from the following 5 experts:

Expert	Subject Area
Chad Coffman, CPA (Schering expert only)	Damages, Market Efficiency, Causation, Valuation Analyses
Gregg A. Jarrell, Ph.D. (Merck expert only)	Damages, Market Efficiency, Loss Causation, Valuation Analyses
Curt D. Furberg, M.D., Ph.D. (both actions)	Clinical Trial Standards, Clinical Trial Design, Clinical Trial Data Analyses, Publication of Clinical Trial Results
David B. Madigan, Ph.D. (both actions)	Biostatistics, Clinical Trial Standards Relating to Blinded Data, Clinical Trial Data Quality and Reliability
Allan J. Taylor, M.D., F.A.C.C., F.A.H.A. (both actions)	Cardiology, Clinical Trial Standards, Imaging Trials, cIMT Methodology, Surrogate Clinical Markers

(Schering Decl. ¶ 76; Merck Decl. ¶ 72.) Also, on September 15, 2011, Defendants served expert reports on Lead Plaintiffs in both the Schering and Merck Actions from the following individuals:

Expert	Subject Area
Arnold Barnett, Ph.D.	Statistics, Clinical Trial Data Quality and Reliability
Marc Cohen, M.D., F.A.C.C.	Cardiology, Surrogate Clinical Markers, Publication of Clinical Trial Results
Eva Lonn M.D., M.Sc., F.R.C.P.C., F.A.C.C.	Cardiology, Surrogate Clinical Markers, Imaging Trials, cIMT Methodology, Publication of Clinical Trial Results
Denise Neumann Martin, Ph.D.	Damages, Market Efficiency, Loss Causation, Valuation, Analyses
Robert Starbuck, Ph.D.	Biostatistics, Clinical Trial Data Quality and Reliability, Clinical Trial Data Cleaning

(Schering [*43] Decl. ¶ 78; Merck Decl. ¶ 73.) An additional expert report from Gary Lawrence, Esq. was served by Defendants in the Schering Action on the subjects of investment banking, public equity offerings and underwriter due diligence. (Schering Decl. ¶ 78.) Each of these experts was deposed. (Schering Decl. ¶¶ 81-82; Merck Decl. ¶¶ 76-77.)

11. Summary Judgment Motions

On March 1, 2012, the Defendants moved for partial summary judgment and summary judgment in the

Schering and Merck Actions, respectively. (Schering Decl. ¶ 84; Merck Decl. ¶ 79.) They contended that Lead Plaintiffs could not prove loss causation as to any corrective disclosure after January 14, 2008. (Schering Decl. ¶ 85; Merck Decl. ¶ 80.) After extensive briefing, on September 25, 2012, the Court denied the motions. (Schering Decl. ¶ 89; Merck Decl. ¶ 84.) In most cases, this would have cleared away the last major obstacle to trial.

Undaunted, on October 9, 2012, Defendants filed separate petitions in both the Schering and Merck Actions pursuant to Rule 23(f) in the Court of Appeals seeking interlocutory review of the Court's orders granting certification in both the Schering and Merck Actions. (Schering Decl. ¶ 53; Merck Decl. [*44] ¶ 51.) In these petitions, Defendants specifically challenged the district court's determination that it would be premature to determine to end the class period on January 14, 2013. (Schering Decl. ¶ 53; Merck Decl. ¶ 51.) If Defendants had succeeded, this would have significantly reduced the potential damages in the Schering Action (Schering Decl. ¶ 114) and would have entirely eliminated the Merck Action (Merck Decl. ¶ 104). As Co-Lead Counsel in the Merck Action note, if the class period were ended on January 14, 2008, it would "result[ ] in no recoverable damages for the Class." (Merck Decl. ¶ 104.) On January 7, 2013, the Third Circuit denied the Defendants Rule 23(f) the petitions. (Schering Decl. ¶ 54; Merck Decl. ¶ 52.)

12. Settlement Negotiations

By any definition, the settlement negotiations in both the Schering and Merck Actions were protracted and extremely contentious. Before the Court appointed Pilgrim Mediation Group LLC ("Pilgrim") to attempt to mediate a resolution, efforts led by party-appointed mediator Layne Phillips, Esq. had been unsuccessful and an enormous gulf existed between the parties in both cases. (Schering Decl. ¶ 121-22 ("those efforts still left the Parties [*45] with unbridgeable differences."). At the inception of Pilgrim's involvement, the discussions with counsel for all parties were dominated by recriminations over who was responsible for the previous miscommunications and lack of progress. As a result, it was difficult to make significant headway as Lead Plaintiffs continued to make stratospheric demands while Defendants refused to move beyond bargain basement proposals. While a modicum of progress did ensue, our efforts to translate it into a resolution fared no better than previous attempts. An "all-hands" mediation session, convened at the courthouse on September 7, 2012, failed to achieve a resolution and quickly demonstrated neither the time nor the dynamics were yet ripe for a settlement. In response, we determined to suspend our efforts and await further litigation developments to see whether they might create a more receptive environment. (*See generally*, Schering Decl. ¶¶ 120-124; Merck Decl. ¶¶ 110-113.)

13. Preparation for Trial

Once it became evident that neither action could be resolved in the short term, the Parties turned their full attention to final preparations for what promised to be a lengthy, complex jury trial scheduled [*46] to commence on March 4, 2013. Among other tasks, Co-lead Counsel in both the Schering and Merck Actions:

> o In January, 2013, as part of the pretrial order process, submitted lengthy statements of stipulated facts, exhibit lists, deposition designations, *voir dire* questions, jury instructions and verdict forms.
>
> o In January and February 2013, filed motions to bifurcate and were served with Defendants' competing motions to bifurcate different aspects of the case.
>
> o On January 14, 2013, filed a Dauber motion in the Schering Action challenging the testimony of an expert defense witness.
>
> o On February 1, 2013 filed 23 *in limine* motions accompanied by an omnibus 96-page brief and were served with seven *in limine* motions by the corporate defendants, and 2 additional *in limine* motions by the Underwriter Defendants in the Schering Action.
>
> o On February 1, 2013 filed responses to Defendants' Dauber motions challenging the opinions and qualifications of their expert witnesses.
>
> o In February 2013, filed a trial brief

> outlining their case in brief and the important legal and factual issues to be discussed.

(Schering Decl. ¶¶ 91, 98-100; Merck Decl. ¶¶ 86, 87, 89, 91-96.)

14. Settlement Agreements Are Reached [*47] **on the Eve of Trial**

In January 2013, once the summary judgment motions had been denied, class action status had been granted, the Third Circuit had rejected any interlocutory review and trial appeared to be both certain and imminent in both the Schering and Merck Actions, we restarted settlement discussions.

Given the radically divergent positions espoused by all of the Parties on the merits and damages and their correspondingly antagonistic settlement postures, either or both of the cases could well have gone to trial. Indeed, both sides appeared ready, willing and able to go that route, especially as the push toward final trial preparation gained momentum. Initially, Lead Plaintiffs and Co-Lead Counsel in both the Schering and Merck Actions continued demanding enormous amounts to settle a difficult circumstantial case they insisted had merit, while defendants and their counsel maintained the cases lacked merit and implacably resisted paying significant amounts until the very end.

Though negotiations still remained complex and difficult, on February 11, 2013, agreements in principle in both cases were reached only after final "take it or leave it" Mediators' proposals containing the [*48] financial terms of the settlements ultimately embodied in both the Schering and Merck settlements were accepted. On February 27, 2013, the Court was notified by Counsel for the Defendants that the parties had entered into an agreement in principle to settle the Schering and the Merck Actions. (*See generally*, Schering Decl. ¶¶ 125-126; Merck Decl. ¶¶ 114-115.)

We think the sophistication and quality of counsel for both sides who persuaded their clients that there was considerable risk that the jury, Judge or the Third Circuit might not share their bullish views about the cases were instrumental in producing the Settlement Fund. Given our own perspective, having participated in the intense negotiations, we think the settlements were true compromises by both sides -- and the prudence of the Lead Plaintiffs and Co-Lead Counsel in both the Schering and Merck Actions recognizing the considerable risk faced at all levels was significant and constructive. To paraphrase lyrics from a Kenny Rodgers country music song, Co-Lead Counsel in both the Schering and Merck Actions "knew when to hold'em, when to fold'em [and] knew when to walk away" ("The Gambler", lyrics by Don Schlitz.) We believe Co-Lead [*49] Counsel in both the Schering and Merck Actions played their cards deftly and their efforts to persuade Lead Plaintiffs to resolve the case at an optimal time for the Class warrants mention, if not some added support for their fee applications.

15. The Preliminary Approval Orders

On June 7, 2013, the Court entered Orders preliminarily approving both the proposed Schering and Merck settlements and providing for notice (the "Preliminary Approval Orders"). (Schering Decl. ¶ 133; Merck Decl. ¶ 122.) In the Preliminary Approval Orders, the Court specifically approved the form and content of the notice of the proposed settlements provided to members of the Class (the "Settlement Notice").

The Schering Settlement Notice specifically provided notice that:

> Plaintiffs' Counsel, which collectively is Co-Lead Counsel, Liaison Counsel, and all other counsel who, at the direction and under the control of Co-Lead Counsel, performed services on behalf of or for the benefit of the Class, have prosecuted this Action on a wholly contingent basis since its inception in 2008. Co-Lead Counsel (defined below), on behalf of Plaintiffs' Counsel, will apply to the Court for a collective award of attorneys' fees [*50] to Plaintiffs' Counsel in an amount not to exceed 17% of the settlement fund (which includes accrued interest). In addition, Co-Lead Counsel will apply for reimbursement of Litigation Expenses paid or incurred in connection with the prosecution and resolution of the Action in an amount not to exceed $5,250,000, plus accrued interest (which will include an application for reimbursement of the reasonable costs and expenses incurred by Lead Plaintiffs directly related to their

> representation of the Class in an amount not to exceed $150,000). Any fees and expenses awarded by the Court will be paid from the settlement fund.

(Schering Decl., Ex. A to Ex. 6 at 2.)

The Merck Settlement Notice provided notice that:

> Plaintiffs' Counsel, which collectively is Co-Lead Counsel, Liaison Counsel, and all other legal counsel who, at the direction and under the supervision of Co-Lead Counsel, performed services on behalf of or for the benefit of the Class, have prosecuted this Action on a wholly contingent basis since its inception in 2008. Co-Lead Counsel (defined below), on behalf of Plaintiffs' Counsel, will apply to the Court for a collective award of attorneys' fees to Plaintiffs' Counsel in an amount [*51] not to exceed 28% of the settlement fund (which includes accrued interest). In addition, Co-Lead Counsel will apply for reimbursement of Litigation Expenses paid or incurred in connection with the prosecution and resolution of the Action in an amount not to exceed $5,000,000, plus accrued interest, and will also apply for reimbursement of the reasonable costs and expenses incurred by Lead Plaintiffs directly related to their representation of the Class in an amount not to exceed $175,000. Any fees and expenses awarded by the Court will be paid from the Settlement Fund.

(Merck Decl. Ex. A to Ex. F at 2.)

Pursuant to the Preliminary Approval Orders in both Actions, hearings have been scheduled for October 1, 2013 to determine, inter alia, whether the Proposed Settlements and the motions by Co-Lead Counsel for an award of attorneys' fees and reimbursement of litigation expenses should be approved by the Court. (S.ECF 421, Order at 4; M.ECF 330, Order at 4.) The Preliminary Approval Orders provide that written objections to the Proposed Settlements must be made in writing no later than August 5, 2013. [14]

> 14 The Preliminary Approval Orders provide that any objections must be filed no later [*52] than forty-five (45) calendar days after the "Notice Date" (S.ECF 421; Order at 11) which is defined to be ten (10) business days after entry of the Preliminary Approval Order (id. at 4-5) which occurred on June 7, 2013. Accordingly, the Notice Date is June 21, 2013 and 45 days thereafter would fall on Sunday, August 4, 2013, allowing any objections to be filed on or before August 5, 2013, the following business day. (See Schering Decl. ¶ 134; Merck Decl. ¶ 123.)

16. The Fee Applications

On July 2, 2013, Co-Lead Counsel in both the Schering [15] and Merck Actions filed their separate applications for attorneys' fees and expenses. Co-Lead Counsel in the Schering Action seek 16.92% of the Settlement Fund which would constitute a total amount of $80,031,600, plus interest; reimbursement for total litigation expenses incurred in prosecuting the action in the amount of $3,620,049.63; and reimbursement for expenses incurred by members of the Schering Lead Plaintiff Group totaling $109,865.31. (Schering Decl. ¶ 6.)

> 15 To be precise, the fee application is by Schering's Co-Lead Counsel on behalf of all the law firms involved on the plaintiffs' side of the Schering Action: "Co-Lead Counsel is making [*53] a collective application on behalf of Plaintiffs' Counsel for a fee award of 16.92% of the settlement fund (which includes accrued interest)." (Schering Decl. ¶ 139.) Plaintiffs' Counsel include Co-Lead Counsel and the law firm of CBCOB&A, Court-appointed liaison counsel to the Class; the law firm of Cohen, Milstein, Sellers & Toll, PLLC, and the law firm of Corlew Munford & Smith, PLLC, which served as additional counsel for Lead Plaintiff the Public Employees' Retirement System of Mississippi." (Schering Decl. ¶ 139.)

In the Merck Fee Application, Co-Lead Counsel have taken a slightly different approach. [16] As they state, "in light of the fact that the amount of attorneys' fees to be awarded will be initially recommended to the Court by the Court-appointed, independent Special Masters, Co-lead Counsel has not applied for a specific fee amount." (Merck Decl. ¶ 130.) Having demurred from explicitly requesting a specific amount, Co-Lead Counsel hasten to note, "three of the four Lead Plaintiffs expressly support an award of fees amounting to 28% of the Settlement Fund, and the fourth Lead Plaintiff takes no position on the amount of the fee, *and instead defers to the discretion of the* [*54] *Special Masters and the Court.*" [17] (*Id., emphasis supplied.*) In this same vein, the balance of the Merck Declaration states "an award of fees up to 28% would be fair and reasonable" (Merck Decl., subheading A ¶ 132) and that "under the lodestar approach, a fee award of 28% of the settlement fund yields a multiplier of 1.34 on the lodestar . . . which is within the range of multipliers awarded in actions where similar settlements have been achieved." (Merck Decl. ¶ 136.) (*See also* ¶ 150: "[F]or the reasons set forth therein [referring to the Co-Lead Counsel's Memorandum of Law], a fee award *of 28%* is well within the range of fee awards that have been approved in other similarly sized litigation" (emphasis supplied).) Suffice it to say, we interpret the Merck fee application as strongly suggesting, if not requesting, an award of 28%. Merck Co-Lead Counsel also have applied for reimbursement of expenses amounting to $4,367,376.50 and for reimbursement of expenses of the four members of the Merck Lead Plaintiff Group in the aggregate amount of $109,865.31.

16 Although not as explicit as the Schering Fee Application, we interpret the Merck Fee Application by Co-Lead Counsel also to be made [*55] collectively on behalf of all Plaintiffs' Counsel who are referred to and included in the lodestar calculation, and who have submitted declarations in support of Merck Co-Lead Counsel's Fee Application. (*See* Exhibit A to Exhibit F of Merck Decl.; Notice of Proposed Settlement at 2 ("Co-Lead Counsel on behalf of Plaintiffs' Counsel, will apply to the court for a collective award of attorneys' fees. . . . ").) Throughout the Lead Plaintiffs' Memorandum of Law, they use Co-Lead Counsel and Plaintiffs' Counsel interchangeably. (*See, e.g.*, "[T]he Court should grant Plaintiffs' Counsel a fee equal to a percentage of the $215 million settlement" (Mem. Of Law at p. 19.)) As stated in paragraph 135 of the Merck Declaration, Plaintiffs' Counsel in the lodestar calculation "include Co-Lead Counsel, the law firms of CBCOB&A and Seeger, Court-appointed liaison counsel to the class; Labaton and Klausner Kaufman PA, additional counsel to Jacksonville". (Merck Decl. ¶ 135.)

17 This characterization is a more definitive reading of the Declaration of ABP, the abstaining a member of the Merck Lead Plaintiff Group, than we give it. The Declaration actually states "ABP will not now take a position on the [*56] specific amount of attorneys' fees that should be awarded; rather ABP will await the report and recommendation of the Special Masters and *evaluate that recommendation when it is made, but expects it will defer to the Special Masters.*" (Exhibit B to Merck Declaration at ¶ 13, emphasis supplied.)

IV. DISCUSSION OF APPLICABLE LEGAL STANDARDS

A. The Legal Standard Applicable to Common Fund Cases.

In the Third Circuit, the percentage-of-recovery method ("POR") should be applied in common fund cases like the Schering and Merck Actions. *Sullivan v. DB Investments, Inc., 667 F.3d 273, 330 (3d Cir. 2011) (En Banc)("Sullivan").* As the Court of Appeals has held: "[T]he POR method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." (*Id. at 3; citations and quotations omitted.) In re AT&T Corp., 455 F.3d 160, 164 (3d Cir. 2006 ("AT&T"); In re Rite Aid Corp. Sec. Litig.,* 396 *F.3d 294, 300 (3d Cir. 2005) ("Rite Aid") quoting In re Prudential Ins. Co., 148 F.3d 283, 333 (3d Cir. 1998).*

Indeed, Court of Appeals has "several times reaffirmed that the application of a percentage-of-recovery [*57] method is appropriate in common-fund cases." *In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 734 (3d Cir. 2001) ("Cendant PRIDES") (citing Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) ("Gunter")).* To be sure, while the Third Circuit has repeatedly "recommended" that POR award be "cross-checked" against the lodestar method to ensure its reasonableness, [18] *In re Cendant Corp. Litigation, 264 F.3d 201, 286 (3d Cir. 2001)("Cendant I")*, "[t]he lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method." *AT&T, 455 F.3d at 164.*

18 Although consistently phrased as a

> "recommended" or "suggested" cross-check, the Third Circuit in *Rite Aid* agreed with the objector that in "cross-checking" the lodestar, "the district court improperly applied the billing rates of only the most senior partners of plaintiffs' co-lead counsel, resulting in an artificially low multiplier. . . . The district court should apply blended billing rates that approximate the fee structure of all attorneys who worked on the matter. That did not occur here. . . . Failure to apply a blended rate, we believe is inconsistent with the exercise [*58] of sound discretion *and requires vacatur and remanding* for further consideration." *396 F.3d at 306 (emphasis supplied)..* If an incorrect calculation of the lodestar by the court while cross-checking is an abuse of discretion, *a fortiori*, failure to perform a lodestar cross-check at all must be reversible error. In reality, the lodestar cross-check, therefore, must be considered to be a requirement. As then Chief Judge Becker previously had observed in *Cendant I*, "Arguably Cendant PRIDES, which, as noted above . . . was not decided as a Reform Act case, may have, by implication, elevated the lodestar cross-check from being a 'recommendation' to a requirement." *264 F.3d at 285, n.57.* In light of *Rite-Aid's* subsequent remand, there can no longer be any real doubt that the lodestar "cross-check" is more than a recommendation -- it is mandated.

In keeping with prior case law, the PSLRA, which governs the Schering and Merck Actions, incorporated the POR method by providing that "[t]otal attorneys' fees and expenses awarded by the court to counsel for plaintiffs shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." PSLRA, [*59] 15 U.S.C. §78u-4(a)(6). The Third Circuit has interpreted this language to reflect the intention of Congress to adopt the percentage-of-recovery method, rather than the lodestar method, in determining attorneys' fees in securities class actions. *See In re Cendant Corp. Sec. Litig., 404 F.3d 173, 188 n. 7 (3d Cir. 2005) ("Cendant II"); Rite Aid, 396 F.3d at 300.*

B. A Robust Assessment of the Fee Requests is Mandated

As the Court of Appeals has made abundantly clear: "[A] 'robust and thorough judicial review of fee applications is required in all class action settlements.'" *Sullivan*, 667 F.3d at 329 *quoting In re DietDrugs*, 582 F.3d 524, 537-38 (3d Cir. 2009). *Accord, Rite Aid, 396 F.3d at 302* ("[W]e remind the trial courts to engage in robust assessments of the fee award reasonableness factors when evaluating a fee request").

C. The Applicable Reasonableness Factors

In applying the POR method to a requested fee award, among the factors the district court should consider are the seven factors derived from *Gunter:*

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or [*60] fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

223 F.3d at 195, n.1; accord, AT&T, 445 F.3d at 165; Rite Aid, 396 F.3d at 301.

These factors were, however, not "intended to be exhaustive". *AT&T, 455 F.3d at 165.* As Chief Judge Scirica observed:

> In *Prudential*, we noted three other factors that may be relevant and important to consider: (i) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations (ii) the percentage fee that would have been negotiated had the case been subject to a private contingency fee agreement at the time counsel was retained; and (iii) any "innovative" terms of settlement.

AT&T, 455 F.3d at 165 (citations omitted). Thus, there are at least ten factors that must be evaluated in assessing the reasonableness of an award of legal fees. *Sullivan,* *667 F.3d at 330* (referring to "each of the ten factors that we identified in *Gunter* [*61] *v. Ridgewood Energy* and *Prudential").*

In applying these factors in *AT&T*, the Third Circuit has emphasized the touchstone of the reasonableness analysis:

> [W]henever a district court awards attorneys' fees in class action cases, "[w]hat is important is that the district court evaluate what class counsel actually did and how it benefitted the class."

In re AT&T, 455 F.3d at 166, quoting Prudential, 148 F.3d at 342.

D. The Weight, if Any, to be Accorded Views Expressed by the Lead Plaintiffs

Each member of the Schering Lead Plaintiff Group and three out of four members of the Merck Lead Plaintiff Group have expressed views on the fee applications. We must, therefore, determine what, if any, weight should be accorded to these views.

As established in *Cendant I*, "[u]nder the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly selected lead counsel." *264 F.3d at 282.* As the Court explained, "[t]his presumption will ensure that the lead plaintiff, not the court, functions as the class's primary agent vis-à-vis its lawyers," and also would help align [*62] the interests of the class and its lawyers: "Further, by rendering *ex parte* fee agreements more reliable, it will assist those agreements in aligning the interests of the class and its lawyers during the pendency of the litigation." (*Id.*)

Even when an *ex ante* fee agreement is entered into by a lead plaintiff and lead counsel, subsequent Third Circuit jurisprudence appears to have diluted the weight to be accorded the *Cendant* presumption. As the Court of Appeals emphasize in *AT&T*:

> We now emphasize that the presumption of reasonableness set forth in *Cendant* does not diminish a court's responsibility to closely scrutinize all fee arrangements to ensure fees do not exceed a reasonable amount. *We caution against affording the presumption too much weight at the expense of the court's duty to act as a fiduciary guarding the rights of absent class members.*

455 F.3d at 168 (emphasis supplied).

Where, as here, the fee application is not predicated on an *ex ante* fee agreement, the Court of Appeals has held, "We would then review the fee request using the traditional standards." *AT&T, 455 F.3d at 172* (holding "traditional standards" apply if *Cendant* presumption were abrogated.) The question remains, [*63] however, what, if any, weight should be accorded the *ex post* views provided by members of the Schering Lead Plaintiff Group and the majority of the members of the Merck Lead Plaintiff Group. [19]

19 Although APB has reserved its position on the amount of legal fees that should be awarded in the Merck Action, it provides some affirmative support for the fee application. At the very least, APB appears to have authorized the fee application to be submitted (*see* Merck Lead Plaintiff Mem. Of Law at p. 18 ("Co-Lead Plaintiffs requested Plaintiffs' Counsel not to seek a fee greater than 28% of the Settlement Fund, and Lead Counsel agreed")), attests to the reasonableness of the *Lodestar* of *G&E*, acknowledges the fee agreement with G&E was executed before "joining with co-lead plaintiffs and co-lead counsel," and indicates it "expects" to defer to the Special Masters' Recommendation. (*See* Merck Decl. Ex. B ¶ 13.) We interpret this as more than a mere "failure to object". (*Compare Cendant*, 264 F.3d at 281 ("acquiescence" (which is the most a failure to object shows) is not the same thing as "prior approval".)

Unlike *ex ante* fee agreements which help "align[] the interests of the class and its lawyers [*64] during the pendency of the litigation," the *ex post* views provided here by Lead Plaintiffs do not assist this alignment. *A fortiori*, the *ex post* views expressed by Lead Plaintiffs do not rise to the level of an *ex ante* agreement and are not sufficient to trigger even the mild *Cendant* presumption. *Compare, Lucent Technologies, Inc. Securities Litigation, 327 F. Supp. 2d 426, 434 (D.N.J. 2004) (Pisano, J.)* (applying *Cendant* reasonableness presumption where

Lead Plaintiffs negotiated a revised fee agreement with common shareholders' lead counsel when the case concluded to reflect the evolution of the case and to harmonize the terms of the two original retainer agreements.) We are reinforced in our conclusion by both the Schering and Merck Fee Applications which do not suggest any presumption of reasonableness applies.

On the other hand, the Lead Plaintiff and Co-Lead Counsel in both the Schering and Merck Actions were properly selected pursuant to the PSLRA and "there is good reason to think under the PSLRA that a lead plaintiff that has been properly selected" would possess "the incentive and ability to monitor lead counsel's performance". *Cendant*, 264 F.3d at 282. Each member of the [*65] Lead Plaintiff Groups (except for ABP in the Merck Action which has deferred) has submitted an affidavit attesting to their involvement in this case and their active roles in monitoring Lead Counsel. Our own previous observation of the active roles played by Lead Plaintiffs during the Mediation confirm that they actively participated in supervising Lead Counsel.

As the Third Circuit has stated, "[i]n reviewing an attorneys' fees award in a class action settlement, a district court should consider the *Gunter* factors, the *Prudential* factors, and any other factors that are useful and relevant to the particular facts of the case." *AT&T*, 455 F.3d at 166 (emphasis supplied). Given their active roles, we believe the views of the members of the Lead Plaintiffs Groups in both the Schering and Merck Actions are "useful and relevant," that according weight to them is consistent with their role under the PSLRA as "the class' primary agent[s] *vis-a-vis* its lawyers" *(Cendant I, 264 F.3d at 282)* and their views should be considered as an additional factor bearing on the reasonableness of the amount of the award. *(See Lucent Technologies, 327 F Supp. 2d at 440.)*

V. ANALYSIS OF THE SCHERING AND MERCK [*66] **APPLICATIONS**

A. The Schering Fee Application

We now apply the reasonableness factors to the Schering Fee Applications.

1. The First Factor: The Size of the Fund Created and the Number of Persons

The first *Gunter* factor requires assessment of the size of the fund created and the number of persons benefitted. The size of the common fund is a primary benchmark of the success obtained and is, therefore, one of the critical factors in evaluating an attorneys' fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) ("the most critical factor is the degree of success obtained").

Under any criteria, the size of the fund created by the Schering settlement is an outstanding result. The Schering settlement created a $473 million Settlement Fund which would be among the twenty-five largest securities class action settlements since passage of the PSLRA. Even more significantly, it would rank among the ten largest post-PSLRA securities class action settlements ever achieved without the assistance of a financial restatement. In absolute dollars alone, the size of the Schering Settlement Fund is extremely impressive. A comparison of the Settlement Fund created here to the results in other cases involving [*67] comparably sized investor losses, confirms the great success achieved by Schering's Co-Lead Counsel. Although the Schering Fee Application did not provide an expert report or offer comparative analyses to other settlements -- perhaps content to let the absolute amount speak for itself -- the NERA Consulting Group's respected "Recent Trends in Securities Class Action Litigation: 2012 Full Year Review," which contains an analysis of the median securities class action settlement value as a percentage of investor losses from January 1996 through December 2012, confirms that the size of the Settlement Fund is a significant achievement for the Class. According to NERA's analysis, the median settlement value as a percentage of investor losses in cases where investor losses were between $1 billion and $4.999 billion was only 1.1%. Where investor losses were between $5 billion and $9.999 billion, the median settlement was only 1.0%, and where investor losses exceeded $10 billion, the median settlement was a mere .7%. *(NERA, Recent Trends in Securities Class Action Litigation: 2012 Full Year Review at p. 32.)*

Measured against January 14, 2008 investor losses of $3.5 billion, the $473 million Settlement [*68] Fund constitutes more than 13% of the investor losses. The achievement is all the more impressive given the absence of any critical admissions from criminal pleas or financial restatements or assistance by companion SEC or DOJ proceedings, or even a motivated deep-pocket individual shareholder leading the charge. [20]

20 Indeed, the only other outside effort appears to have come from a group of state attorneys general who resolved their investigations years before the settlement of the Schering Action for $5.4 million to cover their costs. (*See* Schering Mem. Of Law at p. 27; Schering Decl. ¶ 120.)

Even if we were to include in the equation the far more speculative additional Schering investor losses on March 31, 2008, after the full results of the ENHANCE trial were disclosed -- recovery of which are much more problematic given the January 14 disclosures -- which could add another $8.2 billion of investor losses, the Settlement Fund still would constitutes a full 4% of the $11.7 billion of investor losses compared to the median settlement for losses of that size of only .7% -- a very small fraction of the Schering settlement here.

As of August 12, 2013, a total of 406,733 Settlement Notice [*69] Packets had been mailed to potential class members and nominees. (Suppl. Decl. of Stephanie A. Thurin ¶¶ 4,5.) Accordingly, there can be little doubt that a great number of Schering investors will benefit from the settlement.

In the final analysis, we think the $473 million Settlement Fund is an outstanding accomplishment that strongly supports the requested 16.92% attorneys' fees requested.

2. The Second Factor: The Presence or Absence of Substantial Objections by Members of the Class

As of July 1, 2013, more than 346,000 Settlement Notice Packets had been mailed to potential Class Members pursuant to the Court's Preliminary Approval Order advising them that Co-Lead Counsel would seek an award of attorneys' fees not to exceed 17% of the Settlement Fund. Despite the large number of Class Members, only a single objection to the fee application had been received by the August 5, 2013 deadline.

Under these circumstances, there can be no doubt that this overwhelmingly positive reaction to the Schering Fee Application strongly supports approval of the requested fee. In *Rite Aid*, the Court of Appeals for the Third Circuit held in language equally applicable here: "The class' reaction to the [*70] fee request supports approval of the requested fees. Notice of the fee request and the terms of the settlement were mailed to 300,000 class members, *and only two objected. We agree with the district court such a low level of objection is a 'rare phenomenon.'" Rite Aid, 396 F.3d at 305 (emphasis supplied). See AT&T, 455 F.3d at 166, 170* (where "more than one million class members were notified of the proposed settlement. . . and only four opposed the attorneys' fee award. No objections were filed by institutional investors with the greatest financial stake in the settlement. The district court characterized this low level of objection as rare. . . . ") Plainly, the single objection here, which we conclude below lacks merit, is an equally "rare phenomenon" and strongly supports the Schering fee application.

3. The Third Factor: The Skill and Efficiency of the Attorneys Involved

In this case, we have no doubt that the outstanding result achieved for the class is the direct product of outstanding skill and perseverance by Co-Lead Counsel. The skill and efficiency of counsel is "measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, [*71] the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Hall v. AT&T Mobility LLC, No. 07-5325 (JLL), 2010 U.S. Dist. LEXIS 109355, 2010 WL 4053547, at *19 (D.N.J. Oct. 13, 2010) (citation omitted).* Indeed, courts in this district have found that "the single clearest factor reflecting the quality of class counsels' services to the class are the results obtained." *In re AremiSoft Corp. Sec. Litig., 210 F.R.D. 109, 132 (D.N.J. 2002).* Here, the $473 million Settlement Fund was obtained through Co-Lead Counsel's hard work, persistence and skill, overcoming numerous difficult and novel legal and factual challenges, which were litigated to the hilt by highly-experience and first-rate defense counsel to the eve of trial.

Indeed, the case was fraught with unusual class certification issues and the absence of high-level direct admissions requiring Co-Lead Counsel to grapple with complex issues of circumstantial proof, loss causation and damages, many of which lacked clear precedent. In particular, they faced substantial difficulties in establishing falsity and *scienter*, given Defendants' claimed data [*72] quality reasons for delaying the ENHANCE results and loss causation and damages under Section 10(b), given that the top-line results of the ENHANCE study were publicly disclosed two months before the end of the Class Period. *Scienter* would have been especially hard to prove in a highly complex, scientifically based case where Co-Lead Counsel were forced to rely only on circumstantial evidence presented through adverse witnesses and highly technical expert testimony. (Schering Decl. ¶¶ 106-14, 159-60.)

Although cases of this magnitude, especially founded on complex scientific circumstantial evidence, by nature do not lend themselves to efficiency, no doubt mindful that a recovery was by no means certain and that a very real risk existed that the enormous amount of time and expenses Co-Lead Counsel committed to the Schering Action might never be recoverable, Lead Counsel had every incentive to be as efficient as possible. From their pre-filing investigation, through fact and expert discovery, and into final pretrial preparations, Co-Lead Counsel developed and followed a plan to coordinate the marshaling of evidence and prosecution of the Action. (Schering Decl. ¶ 21.) To achieve synergies, [*73] among other things, Co-Lead Counsel conducted the review of Defendants' twelve million page document production in close coordination with Co-Lead Counsel in the parallel Merck Action. The cooperative effort among Plaintiffs' Counsel in the two cases allowed for a larger overall team of attorneys to review the documents and for the teams to more effectively share information with each other and with more senior lawyers in each case, allowing for a more efficient document review, reducing redundancy and duplicated efforts. (Schering Decl. ¶¶ 62-69.)

With respect to "the experience and expertise" of counsel, Plaintiffs' Counsel are the cream of the crop of the securities class action Bar. Co-Lead Counsel are among the most experienced and skilled firms in the securities class action litigation field, and each firm has a long and successful track record in securities cases throughout the country. (Schering Decl. ¶ 157.) *In re Schering-Plough Corp. Enhance ERISA Litig., No. 08-1432, 2012 U.S. Dist. LEXIS 75213, 2012 WL 1964451, at *6 (D.N.J. May 31, 2012) (Cavanaugh, J.)* (noting that the skill and efficiency of attorneys with substantial experience in class action litigation, as demonstrated by their supporting documents, [*74] favored an award of attorneys' fees); *In re Genta Sec. Litig., No. 04-2123, 2008 U.S. Dist. LEXIS 41658, 2008 WL 2229843, at *10 (D.N.J. May 28, 2008)* ("the attorneys' expertise in securities litigation favors approving the requested award for attorneys' fees").

In a securities class action of this potential magnitude, and given the caliber of the opposition, a top-tier team like this was needed. "'The quality of opposing counsel is also important in evaluating the quality of counsel's work.'" *Hall*, 2010 U.S. Dist. LEXIS 109355, 2010 WL 4053547, at *19 (citation omitted); *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525 (GEB), 2007 U.S. Dist. LEXIS 87428, 2007 WL 4225828, at *7 (D.N.J. Nov. 28, 2007). *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 358 (S.D.N.Y. 2005) (stating defense counsel, including Paul, Weiss, the lead defense firm here, were "formidable opposing counsel" and among "some of the best defense firms in the country").

Defense counsel zealously represented the interests of their respective clients and were fully prepared to try and appeal this case to the very end. Faced with this experienced, formidable, and well-financed opposition who aggressively litigated the Schering Action, Co-Lead Counsel stood toe-to-toe and achieved an outstanding [*75] result for the Class. The fact that Co-Lead Counsel achieved this Settlement for the Class "in the face of formidable legal opposition further evidences the quality of their work." *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 496 (E.D. Pa. 2003).

The quality of the representation provided by Co-Lead Counsel and the team they assembled, which we believe is directly responsible for the outstanding result that was achieved, strongly supports the reasonableness of the fee request.

4. The Fourth Factor: The Complexity and Duration of the Litigation

As the Third Circuit has observed, a case is complex when it involves "complex, and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel." (*PRIDES, 243 F.3d at 722.*) Under this definition, or any other test, the Schering Action epitomizes the kind of complex case embodying all the factors described by the Third Circuit. It was vigorously litigated to the hilt for five years and required extensive discovery into extremely difficult circumstantial evidence involving complex scientific and statistical data.

The Schering Action included claims under both the [*76] 1934 Act and the Securities Act against more than two dozen defendants. (Schering Decl. ¶¶ 15-19.) At every turn, the case presented difficult and challenging legal and factual issues that required creativity and sophisticated analysis. It was hotly contested at every stage -- from motions to dismiss and class certification through the partial summary judgment motion -- and included exhaustive discovery and trial preparation. Even the settlement negotiations, which initially succeeded only inflaming both sides, spanned two years and were incredibly contentious and complicated. *(Id. at ¶¶ 11, 121-25.)*

The basic theory of the case -- that Schering cheated on the ENHANCE trial by secretly "unblinding" it -- presented extremely difficult challenges given the highly technical nature of the alleged fraud. Given the absence of admissions of liability or a "smoking gun" to prove their case, Lead Plaintiff needed to show that Schering biostatisticians conducted improper statistical analyses on unblinded data from the ENHANCE study, and from their knowledge of statistical methods, were able to deduce that Vytorin had failed the ENHANCE study. These complicated claims of cheating in the conduct of [*77] clinical trials were especially difficult to present to a jury and were vigorously disputed by Defendants, who offered a plausible alternative explanation, supported by experts and numerous exhibits, that Defendants were attempting to improve data quality and not improperly learning the ENHANCE results. In this context, a very real risk existed that a jury would conclude Defendants did not "cheat" at all by prematurely unblinding the ENHANCE test or that they did not act with the requisite *scienter* required by the 1934 Act claims. Indeed, it bears emphasis that the statistical analyses at the heart of the Schering Action were conducted by employees of Schering who were several steps down the corporate ladder from the senior officers of the Company requiring Co-Lead Counsel to rely entirely on circumstantial evidence to attempt to show that the senior officers were aware that the ENHANCE study had failed. (Schering Decl. ¶¶ 109-11); *AT&T, 455 F. 3d at 170* ("the difficulty of proving actual knowledge under § 10(b) of the Securities Exchange Act . . . weighed in favor of approval of the fee request.").

The Securities Act claims were also challenging. Sections 11 and 12 require a plaintiff [*78] to "come forward with facts to suggest that reasonable jurors might be able to find that the information allegedly omitted or misrepresented *was known* . . . prior to the time the prospectus was prepared and disseminated. . . . : *Krim v. BancTexas Group* 989 F.2d 1435, 1446 (5th Cir. 1993). *Compare, Castlerock Management, Ltd. v. Ultralife Batteries, Inc., 114 F. Supp. 2d 316, 323 (D.N.J. 2000) (Hochberg, J.)* ("Section 11 or Section 12 require 'that allegedly omitted facts both existed *and were known or knowable at the time* of the offering'") *with Truk Int'l Fund LP v. Wehlmann, 737 F. Supp. 2d 611, 621 aff'd 389 Fed. Appx. 354 (5th Cir. 2010).* Accordingly, the Schering Lead Plaintiffs to prevail on the Securities Act claims still needed to prove the underlying misconduct with the ENHANCE trial was known by senior officers of Schering at the time of the Offering Materials.

Lead Counsel also needed to rely heavily on expert witnesses for critical scientific expert testimony. Defendants sought to block the experts by the filing of Daubert motions challenging all five of Lead Plaintiff's designated testifying experts. Had Defendants prevailed in excluding any of this testimony, the [*79] presentation of many aspects of the case would have been more difficult and the exclusion of all this testimony could have crippled the case. (See Schering Decl. ¶¶ 116-17.)

We conclude the Schering Action was extremely complex and lengthy and that this factor strongly supports the requested attorneys' fees.

5. The Fifth Factor: The Risk of Non-Payment

Some cases addressing the risk of non-payment have focused on the credit risk presented to defendants when trying to "collect" a judgment once it is obtained. (*See, e.g., In re Lucent Technology, 327 F. Supp. At 439; see also, In re AT&T Corp., 455 F.3d at 171* ("chances of AT&T going bankrupt are quite small. . . . ") In *Rite-Aid*, the Third Circuit made clear the risk of non-payment also includes the "risk of establishing liability". *396 F.3d at 304* (holding " the District Court made several significant findings in assessing the 'risks of establishing liability' under the *Girsh* analysis that affect the risk of non-recovery" and "there were significant risks of non-payment or non-recovery, which weighs in favor of approving the fee request.") *See Rowe v. DuPont DeNemours & Co., 2011 U.S. Dist. LEXIS 96450, 2011 WL 383710 (D.N.J. 2011).*

Here, Plaintiffs' Counsel undertook [*80] this Action on a purely contingent fee basis, assuming an enormous risk that the litigation would yield potentially little, or no, recovery and leave them uncompensated for their significant investment of time and very substantial expenses. This Court and others have consistently recognized that this risk is an important factor favoring an award of attorneys' fees. *See, e.g., Schering-Plough ENHANCE ERISA Litig., 2012 U.S. Dist. LEXIS 75213, 2012 WL 1964451, at *6 (Cavanaugh, J.)* ("Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval").

From the outset of this Action, Co-Lead Counsel understood that they were embarking on a complex, expensive, and lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and money the case would require. In undertaking that responsibility, Co-Lead Counsel obligated themselves to ensure adequate resources were dedicated to the prosecution of the Schering Action, and that millions of dollars in funding were available to compensate staff and to cover the expenses a case like the Schering Action required. Even if the case were to be successful -- which, as we have [*81] explained, was by no means a foregone conclusion -- an expected lag time of several years exists for cases of this type to conclude. Accordingly, both the risk and financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis. As it turned out, Plaintiffs' Counsel still have not yet received any compensation whatsoever during the nearly five years the Schering Action has been pending for the massive commitment of attorney time devoted to the case -- 126,177.49 hours (*see* Schering Decl. ¶ 152) or reimbursement for the $3,620,049.63 incurred in external expenses in prosecuting this Action for the benefit of the Class. (Schering Decl. ¶ 162.)

The significant risk of no financial recovery in a complex case like this one is heightened when plaintiffs' counsel aggressively press to maximize the result for the Class, as Co-Lead Counsel did here, rather than "satisficing" -- accepting a more modest recovery that may pass muster and may be less risky to counsel and far easier to achieve. By pushing the case to the brink of trial and convincing Defendants that Co-Lead Counsel were ready, willing and able to try the case (and thereby threatening to "go [*82] all in") raising the stakes for Defendants by exposing them to a potentially ruinous jury verdict", Plaintiffs' Counsel were able to achieve a better result for the Class. By doing so, however, Plaintiffs' Counsel raised the stakes for themselves as well -- by increasing the potential that Defendants would accept the challenge and win the case, leaving Plaintiffs' Counsel to walk away empty-handed. Even if Lead Plaintiffs had prevailed at trial on both liability and damages, which was by no means assured, the judgment would not have been secure until after the rulings on the inevitable post-judgment motions and appeals became final -- a process that could have taken years. Co-Lead Counsel were acutely aware that their success in a contingent litigation, like the Schering Action, is never assured, and there are many examples of class actions in which plaintiffs' counsel expended tens of thousands of hours and received nothing for their efforts. [21] (Schering Decl. ¶ ¶ 161-163.)

21 Indeed, even judgments that are bonded and initially affirmed on appeal by an appellate panel are not an absolute assurance of an ultimate recovery. *See, e.g., Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) [*83] (after 11 years of litigation, and following a jury verdict for plaintiffs and an affirmance by a First Circuit panel, plaintiffs' claims were dismissed by an en banc decision and plaintiffs recovered nothing). Similarly, even the most promising cases can be eviscerated by a sudden change in the law after years of litigation. *See, e.g., In re Alstom S.A. Sec. Litig., 741 F. Supp. 2d. 469 (S.D.N.Y. 2010)*(after completion of extensive foreign discovery, 95% of plaintiffs' damages were eliminated by the Supreme Court's reversal of 40 years of unbroken circuit court precedents in *Morrison v. Nat'l Bank of Austl., 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)).*

We conclude that a significant risk of non-payment existed in the Schering Action from the beginning of the case and until the Settlement. (*See* [*84] Schering Decl. ¶¶ 108-119, 161, 163.) Given the very substantial investment of time and expenditure of money by Plaintiffs' Counsel that was required by their fiduciary duty to effectively prosecute the Schering Action on behalf of the Class, the risk was very significant in this case. (Schering Decl. ¶ 162.) We conclude the risk of non-payment in this case weighs strongly in favor of the requested attorneys' fees.

6. The Sixth Factor: The Amount of Time Devoted to the Case

It follows from our prior discussion of other factors, especially *Gunter* Factor 4 (complexity and duration) and

Gunter Factor 5 (risk of non-payment) that an enormous amount of time was devoted to this case. Plaintiffs' Counsel devoted more than 126,00 total hours to the Schering Action which had a value of almost $60 million -- with no guaranty whatsoever it would be recovered. In keeping with their fiduciary duties, Plaintiffs' Counsel had to devote this enormous amount of time to this case because the large amount at stake, the hotly-contested nature of the case, the complexity and the five-year duration mandated it. This was the antithesis of cases like *Cendant PRIDES*, where liability under Section 11 of the 1933 [*85] Act was "virtually certain" due to a financial restatement that was issued almost immediately after the securities offering was marketed to investors by a corporation that could withstand an enormous judgment, and a large settlement -- which was inevitable -- was quickly procured in a Securities Act case without any significant motion practice or discovery. This factor too weighs heavily in favor of the requested fee award.

7. The Seventh Factor: The Requested Attorneys' Fees are Reasonable In Comparison to Awards in Similar Cases

The seventh Gunter factor is the size of awards in similar cases. In this case, the requested fee is 16.92% of the Settlement Fund which consists of $473 million.

In *Rite-Aid*, the Third Circuit considered an award of 25% of the $126.6 million settlement noting the district court's analysis of this factor with apparent approval:

> In comparing this fee request to awards in similar cases, the District Court found persuasive three studies referenced by Professor Coffee: one study of securities class action settlements over $10 million that found an average percentage fee recovery of 31%; a second study by the Federal Judicial Center of all class actions resolved or [*86] settled over a four-year period that found a median percentage recovery range of 27-30%; and a third study of class action settlements between $100 million and $200 million that found recoveries in the 25-30% range were "fairly standard." *Id.* at 610. We see no abuse of discretion in the District Court's reliance on these studies.

Rite Aid,, 396 F.3d at 303..

District courts within the Third Circuit regularly have approved fee awards larger than the POR sought in the Schering Fee Application in other securities class actions and other complex common fund cases involving settlements of similar size to the Schering Settlement Fund. *See, e.g., Lucent Technologies, 327 F. Supp. 2d at 442-43* (awarding 17% of $517 million settlement and stating that the fee was "considerably less than the percentages awarded in nearly every comparable case"); *In re Rite Aid Corp. Secs. Litig., 362 F. Supp. 2d 587 (E.D. Pa. 2005) and 146 F. Supp. 2d 706, 736 (E.D. Pa. 2001)* (awarding 25% of combined $320 million settlement); *In re DaimlerChrysler AG Sec. Litig., No. 00-0993 (KAJ), 2004 U.S. Dist. LEXIS 31758 (D. Del. Feb. 5, 2004)* (awarding 22.5% of $300 million settlement). [22]

> 22 Although less persuasive because the jurisprudential basis [*87] upon which fee awards are granted often varies by circuit, Co-Lead Counsel also have cited fee decisions in securities class actions and other complex common fund cases with comparable settlements in *other* federal circuits also have approved fee awards significantly higher than the awards sought in the Schering fee application. *See, e.g., In re Cardinal Health Inc. Sec. Litigs.*, 528 F. Supp. 2d 752, 767 (S.D. Ohio 2007) (awarding 18% of $600 million settlement); *In re Bankamerica Corp. Secs. Litig.* 228 F. Supp. 2d 1061, 1066 (E.D. Mo. 2002) (awarding 18% of $490 million settlement); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 LLM, 2006 U.S. Dist. LEXIS 84621, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006), *aff'd*, 272 Fed. Appx. 9 (2d Cir. 2008) (awarding 21.4% of $455 million settlement); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 2011 WL 5873389, at *22 (S.D. Fla. 2011) (awarding 30% of $410 million settlement); *Ohio Pub. Employees Ret. Sys. v. Freddie Mac.*, No. 03-CV-4261, 2006 U.S. Dist. LEXIS 98380, at *4 (S.D.N.Y. Oct. 26, 2006) (awarding 20% of $410 million settlement).

In *Sullivan* where the Third Circuit affirmed an award of 25% of a $295 million settlement [*88] in a non-securities class action, Judge Rendell, writing for the

Court *en banc*, stated:

> [I]n Cendant PRIDES, we discussed fee awards in class actions in which the settlement fund exceeded $100 million and which relied upon the POR method, finding that "the attorneys' fee awards ranged from 2.8% to 36% of the total settlement fund." 243 F.3d at 737. Similarly, in Rite Aid, we found no abuse of discretion in a district court's reliance on three studies that demonstrated an average percentage fee recovery in large class action settlements of 31%, 27-30%, and 25-30%. 396 F.3d at 303. Here, the District Court determined that the 25% fee requested by counsel fell within this range.

Sullivan, 667 F.3d 273, 332.

Comparing the POR awarded in other cases of similar size is necessary to the analysis of the seventh *Gunter* factor, but not sufficient. To be meaningful, the analysis must also take account of several variables that bear on the "similarity" of the cases. As *Sullivan* holds:

> We are cognizant that a comparison of this award to fees ordered in other cases is a complex analytical task, in light of variations in the efforts exerted by attorneys and the presence of complex legal and factual issues. [*89] That said, we have emphasized "that a district court may not rely on a formulaic application of the appropriate range in awarding fees but must consider the relevant circumstances of the particular case."

Sullivan, 667 F.3d 273, 332.

These additional variables that can influence the amount of a fee award may include the stage at which the case settles, the amount of discovery conducted, including the number of documents and depositions, the complexity of the issues and the amount of hours the case required. An extreme illustration would be a comparison of the fee awards in two of the largest settlements ever reached, *Tyco* and *Cendant*, both of which involved settlement amounts of approximately $3.2 billion but produced vastly different fee awards of $464 million (*Tyco*) and $55 million (*Cendant*). The amount of discovery conducted in *Tyco* was vast, including 83 million pages of documents reviewed and 220 depositions conducted. In sharp contrast, *Cendant* involved one million pages of documents reviewed and no depositions. [23] (*See In re Enron Securities, Derivative & ERISA Litigation Conclusions of Law, Findings of Fact and Order re: Award of Attorneys' Fees, Fed. Sec. L. Rep. [2008 TRANSFER* [*90] *BINDER] ¶ 94,836 at 95,447-48 (S.D. TX 2008).* As our analysis of the other *Gunter* factors previously discussed makes abundantly clear, the Schering Action was settled on the courthouse steps only after a lengthy five-year pitched battle over a potentially meritorious but highly uncertain case -- unaided by restatements, criminal convictions or parallel government actions -- that required massive discovery and complex circumstantial proof.

> 23 Of course, these variables are also likely to be reflected in the lodestars as they were in *Tyco* ($172 million) and *Cendant* ($8 million). *(Id.)*

In light of other awards in similar cases, we believe the 16.92% sought by Co-Lead Counsel is extremely reasonable -- if not modest -- and strongly supports the Schering Fee Application. *See Rite Aid*, 396 F.3d at 303-04 (distinguishing *Cendant PRIDES*).

8. The Eighth Factor: Did the Benefits Accrue from the Efforts of Class-Counsel or Others?

The record in this case compels the conclusion that all the benefits accruing to the class derive exclusively from the efforts of Plaintiffs' Counsel. As we have already observed, there was no one else on the scene that could have produced the result here -- no government agency [*91] or corporate litigant to lead the charge and the Settlement Fund is the product solely of the efforts of Plaintiffs' Counsel.

9. The Ninth Factor: The Amount That Could Be Negotiated in a Private Contingency Fee Agreement

In several cases, courts within the Third Circuit have observed that "attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class commercial litigation." *In re Remeron Direct Purchaser Antitrust Litigation, 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808 (D.N.J. 2005)* (Hochberg, J.); *Lucent, 327 F. Supp. 2d at 442* ("[t]he 17% fee is also considerably less than what is typically earned in contingent fee arrangements and negotiated and non-class action litigation. If this were a non-class action case, the customary contingent fee would likely range between 30% and 40% over the recovery"); *In re Ikon Office Solutions, Inc., 194 F.R.D. 166, 194 (E.D. PA 2000)* ("In private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery.") Measured against the private market as observed by these district courts, the fee award requested by the Schering Co-Lead Plaintiffs [*92] compares favorably.

It is well-established that "courts may give some of these [*Gunter/Prudential*] factors less weight in evaluating a fee award." *AT&T, 455 F.3d at 166.* Given the significant differences in the risk and reward considerations between representing a client in private non-class action contingent litigation and serving as lead counsel in a PSLRA securities class action, we would accord this factor much less weight. [24]

24 In individual contingency cases, the lawyer need communicate only with her clients, often a single individual, and they are able together to definitively decide to accept a settlement. Under the PLSRA securities class action regime, lead counsel must keep the entire class informed of any settlement, which is subject to judicial review and to objections by absent class members. In private contingent litigation, the fee agreement is enforceable subject to ethical limitations *(see M.R.P.C. 1.5)*, while fee agreements in PLSRA securities class actions receive a mild "presumption" but are always subject to judicial review and "the court's duty to act as a fiduciary guarding the rights of absent class members". *AT&T, 455 F.3d at 169.*

10. The Tenth Factor: Any Innovative [*93] **Terms in Settlement**

The settlement in the Schering Action is plain vanilla -- cash in exchange for releases and is a neutral factor.

11. An Additional Factor: The Views of Lead Plaintiff Group Members

We take additional comfort that the fee award requested by Schering Co-Lead Counsel is reasonable from the strong support expressed by each of the four members of the Schering Lead Plaintiff Group. As attested in the Schering Declaration and the underlying Declarations submitted on behalf of each member of the Schering Lead Plaintiff Group, "Lead Plaintiffs -- each of which was substantially involved in the prosecution and negotiation of the settlement -- considered the size of the recovery obtained particularly in light of the considerable risks of litigation and collectively agreed to allow co-lead counsel to apply for 16.92% of the settlement fund." (Schering Decl. ¶ 140; see Exhibits 2, 3, 4, 5A and 5B.) All the members are "sophisticated institutional investors . . . [who] have evaluated the Fee and Expense Application and believe it to be fair, reasonable and warranting consideration *and approval by the Court.*" (Schering Decl. ¶ 140; emphasis supplied.) Each of the Declarations by members [*94] of the Schering Lead Plaintiff Group confirm that they unanimously support Co-Lead Counsel's fee application: "Arkansas Teachers fully supports Co-Lead Counsel's Motion for an Award of Attorneys' Fees.. ." (Schering Decl. Ex. 2 at ¶ 8); *accord*, Ex. 3 ¶ 8 (LAMPER "fully supports"); Ex. 4 ¶ 8 (MissPERS "fully supports"); Ex. 5A ¶ 8 (OAG [25] "we support").

25 In the case of *Mass PRIMB*, the declaration supporting the requested fee award was made by an Assistant Attorney General on behalf of the Office of the Massachusetts Attorney General of the Commonwealth of Massachusetts ("OAG"). (Schering Decl. Ex. 5A.)

As members of the Schering Lead Plaintiff Group were involved throughout the case, have significant financial stakes in maximizing recovery, and owe fiduciary duties both to the class and to their various funds, we think their judgment on the performance of Plaintiffs' Counsel and the compensation to be provided to the lawyers they supervised in achieving a very impressive result warrants consideration. (*See*, discussion above, Section IV, 1. D: Weight, If Any, To be Accorded Views Expressed by the Lead Plaintiffs; *see also Lucent, 327 F. Supp. 2d at 440* ("Significantly, the Lead Plaintiffs, [*95] both of whom are institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel's fees. . . . ").) The unanimous views of Lead Plaintiffs supporting the requested 16.92% of the Settlement Fund sought weighs heavily in favor of the fee request. *See Gunter, 223 F.3d at 199* ("[A] client's views regarding her attorneys' performance and their request for fees should be considered when determining a fee award.")

12. The Lodestar Cross-Check

In the Third Circuit, the lodestar of plaintiffs' counsel is used as a "cross-check" to test whether the fee that would be awarded under the POR approach is reasonable. *See Sullivan, 667 F.3d at 330; AT&T, 455 F.3d at 164.* In "cross-checking" the POR award against the lodestar, the Third Circuit has emphasized that the calculation is "not a full-blown lodestar inquiry" and need not entail "mathematical precision" or "bean counting". *AT&T, 455 F.3d at 169, n.6, quoting Rite-Aid, 396 F.3d at 306.* Accordingly, "the district court may rely on summaries submitted by counsel and need not review billing records." *Rite-Aid, 396 F.3d at 306-307.* [26]

26 Under the full "lodestar method," the number of hours [*96] each timekeeper spent on the case is multiplied by a reasonable hourly rate, and that "lodestar" figure is then adjusted by applying a multiplier to reflect such factors as the risk and contingent nature of the litigation, the result obtained and the quality of the attorney's work. The lodestar multiplier is intended to "account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *Rite Aid, 396 F.3d at 305-06.*

Where, as here, a lodestar is utilized as a cross-check, the potential award under the POR approach is compared to the value of the billable time devoted to the case or "lodestar" To produce this ratio, the putative POR award is divided by the lodestar (which consists of the value of billable time devoted to the case calculated by multiplying the total hours submitted by counsel by the blended current billing rates of all attorneys and paraprofessionals who worked on the case). (*See AT&T, 455 F.3d at 169.*) When the multiplier yielded is very large, the lodestar cross-check serves the salutary purpose of alerting the trial judge to reconsider whether its POR calculation is reasonable. Conversely, where the ratio of the POR to [*97] the lodestar is relatively low, the cross-check can confirm the reasonableness of the potential award under the POR method.

Here, the summaries submitted by Plaintiffs' Counsel show an aggregate of 126,177.49 hours was spent on the prosecution and resolution of the Schering Action. (Schering Decl. ¶ 152.) Based on these summaries, the Schering Plaintiffs' Counsel lodestar is $59,450,367.00 [27] (derived by multiplying each firm's hours by the current hourly rates for attorneys, paralegals and other professional support staff). [28]

27 In keeping with the Third Circuit's determination that the "cross-check" does not involve "bean counting" or "mathematical precision," we have not fly-specked the summaries submitted by Plaintiffs' Counsel. Although Co-Lead Counsel did not attempt to substantiate the reasonableness of the billing rates charged, we have perused these rates and compared them against the 2012 *National Law Journal* ("NLJ") Annual Billing Survey, which samples law firm billing rates. The NLJ reports New York based law firm DLA Piper charges up to $1,200 per hour for partners and New York based law firm Kelley Drye & Warren charges up to $950 hourly per partner. Patton Boggs, based [*98] in Washington, D.C., charges $990 per hour and Locke Lord in Dallas charges $1,285 hourly for their highest charging partner. It has been widely reported from public bankruptcy records that as long ago as 2008-2009, partners at top New York law firms, including Paul Weiss Rifkind Wharton & Garrison and Sherman & Sterling, both of whom represent the Defendants in the Schering Action, were charging well over $1,000 per hour. (*See* A. Kotz, "Bankruptcy Rates Top $1,000 Mark in 2008-09," *American Lawyer*, December 16, 2009.) Based on our limited unscientific review, we find no basis to conclude the rates contained in the summaries are inordinately high. Senior Partners at Co-Lead Counsel, including Max Berger (BLB&G), Jonathan Plasse (Labaton) and Lawrence Sucharow (Labaton) all charged hourly rates of $975. Messrs. Graziano (BLB&G) and McDonald (Labaton), the partners who managed the day-to-day litigation, charged $875 and $775 per hour, respectively. Mr. Cecchi's (CBCOB&A) billing rate of $750 per hour is lower than the top rate the NLJ reports is charged by the New Jersey-based Gibbons firm of $815.

28 In utilizing the blended billing rates to calculate the lodestar, the courts allow the [*99] use of current billing rates at the time the calculation is made rather than the billing rates actually in effect at the time the hours were recorded. Although counterintuitive, this is

intended to compensate for delay in receiving fees. *Missouri v. Jenkins, 491 U.S. 274, 283-8, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989); In re Enron Securities, Derivative & ERISA Litigation Conclusions of Law, Findings of Fact and Order re: Award of Attorneys' Fees, Fed. Sec. L. Rep. [2008 TRANSFER BINDER] ¶ 94,836 at 95,449(S.D. TX 2008); In re Rent-Way Securities Litigation, 305 F. Supp. 2d 491, 517, n. 10 (N.D. PA 2003); In re Ikon Office Solutions, Inc. Securities Litigation, 194 F.R.D. 166, 194 (E.D. PA 2000).*

The requested fee of 16.92% of the Settlement Fund, which would amount to $80,031,600, [29] would yield an extremely modest multiplier of approximately 1.3, reflecting the extensive time and effort demanded by this case. Thus, the "premium" or bonus over the billable time actually devoted to the case produced by the POR method to compensate Plaintiffs' Counsel for all the risks undertaken in this long, complex and uncertain case is only 30% of the value of the time charges actually devoted to the case. Not surprisingly, this [*100] very low 1.3 multiplier is well within the parameters allowed by courts throughout the Third Circuit and provides compelling evidence that the requested attorneys' fee is reasonable. Indeed, lodestar multipliers well above 1.3 and up to four are often used in common fund cases. *Prudential*, 148 F.3d at 341; *see also AT&T*, 455 F.3d at 172 (approving a 1.28 multiplier and noting the Third Circuit's prior "approv[al] of a lodestar multiplier of 2.99 in . . . a case [that] 'was neither legally nor factually complex.'") (citation omitted); *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08-1432, 2012 U.S. Dist. LEXIS 75213, 2012 WL 1964451, at * 6 (D.N.J. May 31, 2012) (Cavanaugh, J.) (awarding 1.6 multiplier); *Lucent*, 327 F. Supp. 2d at 443 (awarding 2.13 multiplier in $517 settlement); *DaimlerChrysler*, No. 00-0993 (awarding 4.2 multiplier); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 135 (D.N.J. 2002) (awarding 4.3 multiplier); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 195 (E.D. Pa. 2000) (awarding 2.7 multiplier and noting that it was "well within the range of those awarded in similar cases").

29 The requested fee award would apply the 16.92% to the Settlement Fund *plus* interest earned [*101] on the fund. (Schering Decl. ¶ 16.) Our calculation does not reflect any interest.

We conclude the *Lodestar* cross-check confirms that the requested 16.92% POR is reasonable and strongly supports Co-Lead Counsel's request.

13. The Orloff Objection

The only objection to the Schering fee application is filed jointly by the Orloff Family Trust d/t/d 12/13/01 and Dr. Marshall J. Orloff IRA (the "Orloff Objection") (S.ECF 338). [30] The basis for the Orloff Objection is hard to understand and harder still to reconcile with well-established Third Circuit law. [31] The substance of the Orloff Objection [32] appears to consist entirely of an attack on the lodestar of Plaintiffs' Counsel:

> "Plaintiffs' Counsel lodestar -- which is derived by multiplying their hours by each firm's current hourly rates for attorneys, paralegals and other professional support staff is $59,450,367.00. Accordingly, the requested 16.92% fee, which amounts to $80,031,600, represents a modes multiplier of approximately 1.3." The request is neither modes or reasonable. The court must engage in a detailed analysis of counsel's billing to determine the reasonable [sic] of the lodestar calculation. Under such an analysis the billed [*102] charges are unreasonably high. Further, there is no justification for using a 1.3 multiplier. In a settlement this large, percentages should not persuade; the court must award a reasonable fee based on the actual time and effort by counsel.

(Orloff Objection at 3-4.)

30 The Orloff Objection also purports to lodge an objection to the Schering settlement itself, which the Objection asserts "is not fair to class members." As this issue is beyond the scope of our authority, we do not address this aspect of the Orloff Objection. We are, however, constrained to observe that the Orloff Objection is bereft of any indication, much less argument, as to why this settlement, which we conclude pursuant to the first *Gunter* factor is extremely impressive, is "not fair" or should be rejected.

31 It appears that the Orloffs and their attorney, Mr. Turkish, are professional objectors having

submitted at least 10 objections in other recent securities class action settlements, including five this year alone. (*See* Schering Reply Memorandum of Law at 11 n.7; Reply Ex. 3.) As Lead Counsel points out, the Objection bears the erroneous caption of the "Southern District of New Jersey" suggesting it was carelessly [*103] marked-up from one of the objections the Orloffs have recently filed in the Southern District of New York. *(See Reply Ex. 3.)*

32 We are aware that Co-Lead Counsel contend the Orloff Objection fails to comply with the requirements for the submission of objections in the Court's Preliminary Order of Approval and, therefore, any objection by Orloff is waived. (*See* Schering Reply Memorandum at 11-12, n.8.) Because we believe that the Orloff Objection is so substantively flawed, we need not pause to consider this or other technical objections which are preserved, and remain available, should Orloff persist in trying to advocate his Objection further.

As we understand the gravamen of this Objection, it is that "the court must award a reasonable fee based on the actual time and effort by counsel." (Orloff Objection at 4.) In other words, the main contention in the Orloff Objection is that the fee award should be based on the lodestar method -- a position incompatible with well-settled controlling Third Circuit case law, none of which is even mentioned in the Orloff Objection. As Chief Judge Scirica stated in *Rite Aid, 396 F.3d at 306:* "[W]e reiterate that the percentage of common fund approach [*104] is the proper method of awarding attorneys' fees".

Of similar ilk is the assertion in the Orloff Objection that "The court must engage in a detailed analysis of counsel's billing. . . ." (Orloff Objection at 3.) As *Rite Aid* holds: "The lodestar cross-check calculation need not entail mathematical certainty nor bean counting. . . . and may rely on summaries submitted by the attorneys and need not review actual billing records." *396 F.3d at 306-307.* Indeed, "ultimately, the fact-intensive Prudential/Gunter analysis must trump all other considerations." *Sullivan, 667 F.3d at 331, n.64.* The Orloff Objection would substitute a full-blown lodestar method complete with a "detailed analysis of counsel's billing" for the fact intensive *Prudential/Gunter* analysis designed to provide a reasonable award under the POR method. In all events, even if the lodestar were more than a "cross-check", the *ipse dixit* assertion that a multiple of 1.3 "is neither modest or [sic] reasonable" (Orloff Objection at 3) is contrary to controlling precedent. *See, e.g., AT&T, 455 F.3d at 172.* "[W]e think a multiplier of 1.28 is well within a reasonable range. . . ." For these reasons and more, we conclude the Orloff [*105] Objection lacks merit and should be rejected [33]

33 Even though the filing of the Orloff Objection itself demonstrates the Motion for a Fee Award was accessible to Class members, the Orloff Objection complains, without any supporting evidence whatsoever, that "the fee motion was not posted on the settlement website". (Objection at 4.) As a factual matter, this *ipse dixit* assertion appears to be baseless as both the Motion for a Fee Award and Supporting Declarations were posted on the website on July 3, 2013. (*See* Supplemental Declaration of Stephan A. Thurin ¶ 7.) Nowhere does the Orloff Objection dispute that members of the class were made fully aware of the amount of fees being sought through the Notice Packets transmitted to them. Accordingly, we do not believe there is any basis to defer the objection deadline or final hearing as sought by the Orloff Objection. Our conclusion is fortified by the conspicuously low number of objections given the extremely large number of Notice Packets delivered to class members -- the Orloff Objection is the only objection received to the Schering fee application.

B. Co-Lead Counsel's Request for Reimbursement for Litigation Expenses

Co-Lead Counsel's [*106] fee application also seeks reimbursement for litigation expenses reasonably incurred in and necessary to the prosecution of the Schering Action in the amount of $3,620,049.63. (Schering Decl. ¶¶ 170-78; Exs. 7A -- 7E.) In support, each of the law firms comprising Plaintiffs' Counsel has submitted a declaration attesting to the accuracy of their expenses along with a summary categorizing the type of expenses incurred and the amounts incurred in each category. (Schering Decl. Exs. 7A-7E.)

It is well established that the kind of expenses for which reimbursement is sought here may be properly recovered by counsel. *See Schering-Plough, 2012 U.S. Dist. LEXIS 75213, 2012 WL 1964451, at * 8. In re Safety Components, Inc. Sec. Litig., 166 F. Supp. 2d 72,* *108 (D.N.J. 2001)* ("[c]ounsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action" (*citing Abrams v. Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir. 1995)); Hall, 2010 U.S. Dist. LEXIS 109355, 2010 WL 4053547, at *23* ("Courts have generally approved expenses arising from photocopying, use of the telephone and fax, postage, witness fees, and hiring of consultants."). [34]

34 Many of the expenses [*107] were paid out of two litigation funds created by Co-Lead Counsel and maintained by BLB&G or G&E, Co-Lead Counsel in *Merck.* (*See* Schering Decl. ¶ 171; Exs. 9 and 10.) Co-Lead Counsel collectively contributed $2,389,500.00 to the Schering Litigation Fund and the Schering Litigation Fund contributed $515,000.00 to the Joint Litigation Fund. (Schering Decl. ¶ 171 .)

As to the amount of expenses, Co-Lead Counsel represents, "from the very beginning of the case, Co-Lead Counsel were well aware that they might not recover any of their out-of-pocket expenses until the Action was successfully resolved. Thus, Co-Lead Counsel were instructed to, and did, take significant steps to minimize expenses as much as practicable without jeopardizing the efficient prosecution of the case" (Schering Decl. ¶ 169.) Out of the total expenses, almost 80% were for outside experts and consultants $2,225,217 (61%) and document production copying costs ($624,873) (17%). (*See* Schering Decl. ¶¶ 172 to 173.)

We believe that the amount of expenses correlate best with the level of effort required, *i.e.*, the hours billed, to achieve the result, rather than the amount of the settlement. [35] Not surprisingly, Professors Eisenberg [*108] and Miller found the strongest associations between costs and hours. *See T. Eisenberg and G. Miller, "Attorneys' Fees and Expenses in Class Action Settlements: 1993 -- 2008" at p. 26.* We observe here the ratio of expenses to the lodestar (value of time devoted) confirms that expenses are about 6% of the value of time which does not seem out of the ordinary or suggest expenses were too high.

35 Comparing the expenses incurred to the size of the settlement, as some commentators have done, including NERA, seems to us less informative because enormous settlements can be achieved very quickly and ought to result in lower expenses, while a hard-fought lengthy litigation that produces a much lower settlement would be expected to generate far higher expenses.

We have also compared the litigation expenses requested here to NERA's statistics on the median expenses awarded in settlements of similar size in its *Recent Trends In Securities Class Action Litigation: 2012 Full Year Review at p. 34.* For settlements between $100 million and $500 million, the median expenses were 1.4% of the settlement value for settlements between 1996 and December 2009 and 1.2% of the settlement value for settlements between [*109] January 2010 and December 2012. Even though the Schering Action was extremely complex, protracted and involved massive discovery, the expenses of $3,620,049 are only .7% of the Settlement Fund which is well below the median expenses of between $5.6 million and $6.6 million. The litigation expenses are also way below the mean and median expenses found by Professors Eisenberg and Miller who analyzed all types of class action costs and expenses from 1993 to 2008. They found mean (average) costs from 1993 to 2008 were 2.8% of the recovery and the median costs were 1.8% and from 2003 to 2008 mean costs were 2.7% of recovery and median costs were 1.7%. *See T. Eisenberg and G. Miller, "Attorneys' Fees and Expenses in Class Action Settlements: 1993 -- 2008" at 26.*

Each member of the Schering Lead Plaintiff Group supports the reimbursement request and attests that "the litigation expenses being requested for reimbursement to Co-Lead Counsel are reasonable and represent costs and expenses necessary for the prosecution and resolution of this complex securities fraud action. . . ." (Schering Decl. ¶ 7 of Exs. 2, 3, 4 and 5A.) No objection whatsoever has been filed to the portion of the fee application [*110] seeking reimbursement of litigation costs. *In re Par Pharmaceutical, 2013 U.S. Dist. LEXIS 106150, 2013 WL 3930091 (D.N.J. July 29, 2013)*; *Lucent Technologies, Inc. Securities Litigation, 327 F. Supp. 2d 426, 463 (D. N.J. 2004.* These factors give additional comfort that the expenses for which reimbursement is sought are reasonable.

C. Request for Reimbursement of Costs and Expenses Incurred by Members of Lead Plaintiff Group

The members of the Schering Lead Plaintiff Group also seek reimbursement of costs and expenses in the aggregate amount of $102,447.26 incurred by them in their representation of the Class. Each member of the Schering Lead Plaintiff Group has submitted a declaration by a representative detailing the time and effort devoted to their roles as Lead Plaintiff and the cost of their time, which could not be devoted to their other regular activities. (Schering Decl. ¶ 178; *see* Exs. 2, 3, 4 to 5B to Schering Decl.)

The Third Circuit favors encouraging class representatives, by appropriate means, to create common funds and to enforce laws -- even approving "incentive awards" to class representatives. [36] *Sullivan, 667 F. 3d at 333, n.65.* Although the PSLRA specifically prohibits incentive awards or "bonuses" [*111] to Lead Plaintiffs, it specifically authorizes an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 77z-1(a)(4). Indeed, Congress explicitly acknowledged the importance of awarding appropriate reimbursement to class representatives. *See H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995)* ("The Conference Committee recognizes that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grants the courts discretion to award fees accordingly.")

36 In *Sullivan*, a non-securities case where incentive awards are not prohibited by statute as they are under the PSLRA, Judge Rendell writing for the Court of Appeals *en banc* specifically approved "the district court's decision to grant incentive awards to class representatives." The Court noted "Incentive awards are not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class. . . . The purpose of these payments is to compensate named plaintiffs [*112] for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws." (*Sullivan*, 667 F.3d at 333, n.65.)

Here, members of the Schering Lead Plaintiff Group, ATRS, MPERS, LAMPERS and MassPRIM, seek reimbursement of their costs and expenses in the amounts of $8,020.00, $39,080.00, $19,575.00, and $35,772.26, respectively. The amount of time and effort devoted to this action by the members of Lead Plaintiff Group is detailed in the accompanying declarations of their respective representatives. (*See Schering Decl. Exs. 2, 3, 4, 5B.)*

Reasonable payments to compensate class representatives for the time and effort devoted by them have been approved. *See In re Am. Int'l Grp. Inc. Sec. Litig., 2012 U.S. Dist. LEXIS 13784, 2012 WL 345509, at *6 (S.D.N.Y. Feb. 2, 2012)* ("Courts . . . routinely award . . . costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." (citation and internal quotations [*113] omitted)); *In re Satyam Computer Servs. Ltd. Sec. Litig., No. 09-MD-2027-BSJ, slip op. at 3-4 (S.D.N.Y. Sept. 13, 2011*) (awarding a combined $193,111 to four institutional lead plaintiffs); *In re Marsh & McLennan Co. Inc. Sec. Litig., No. 04-cv-08144, 2009 U.S. Dist. LEXIS 120953, 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009)* (awarding a combined $214,657 to two institutional lead plaintiffs).

Here, members of the Schering Lead Plaintiff Group have collectively devoted more than 700 hours to the Action, which included time spent, *inter alia*: (i) reviewing pleadings and case materials; (ii) corresponding with Co-Lead Counsel about the status and strategy of the case; (iii) responding to document requests and producing more than 15,000 pages of documents; (iv) preparing for depositions and being deposed; and (v) preparing for, attending and participating in, multiple in-person mediation sessions and other settlement negotiations. *(Schering Decl. Exs. 2, 3, 4, 5B.)*

D. The Schering Recommendations

In applying the various factors mandated by Third Circuit case law to determine whether under the POR method the fee award requested by Co-Lead Plaintiffs of 16.92% of the Settlement Fund is reasonable, we have attempted "to [*114] evaluate what class counsel actually did and how it benefitted the class." *AT&T, 455 F.3d at 165-66.* Based on our analysis of the *Gunter/Prudential* factors, we believe Co-Lead Counsel achieved an outstanding settlement for the Class which was due exclusively to Co-Lead Counsel's perseverance and skill in prosecuting a very difficult and lengthy case without any assistance from restatements, criminal convictions or companion SEC proceedings. Plaintiffs' Counsel undertook this case purely on a contingency basis and accepted the significant risk that the enormous amounts of time and money they invested in this case might not be recovered. The requested fee award is unanimously supported by the four institutional members of the Lead Plaintiff Group and the lodestar "cross-check" confirms that the award sought is reasonable. In light of the foregoing and for the reasons discussed at length in the Report and Recommendation, we recommend the Court **GRANT** Co-Lead Counsels' motion for an award of attorneys' fees in the amount of 16.92% of the Settlement Fund (including interest earned on the fund amount).

We also recommend that the Court **GRANT** the motion of Co-Lead Counsel to be reimbursed for [*115] expenses in the amount of $3,620,049.63.

We also recommend that the Court **GRANT** the motion of Lead Plaintiffs to be reimbursed for costs and expenses in the total amount of $102,447.26

E. The Merck Fee Application

We now apply the reasonableness factors to the separate fee application by Merck's Co-Lead Counsel which seeks attorneys' fees up to 28% of the Settlement Fund (including interest thereon, reimbursement of litigation expenses in the amount of $4,367,376.895 and reimbursement of members of the Merck Lead Plaintiff Group for costs and expenses in the amount of $109,865.30

We recognize that the Merck and Schering Actions were different cases brought on behalf of completely different Classes by a completely different Lead Plaintiff Group and involved different challenges and risks. At the same time, however, overlap does exist between these cases. After all, the Merck and Schering Actions arose out of a nucleus of common fact, were litigated in parallel, discovery was coordinated by Co-Lead Counsel in both cases, there was overlap in the law firms comprising Co-Lead Counsel and Liaison Counsel in both cases, and some expenses were shared through a Joint Litigation Fund. (Schering [*116] Decl. ¶ 171.) As a result, the analysis of certain of the *Gunter/Prudential* reasonableness factors in the Merck Action, such as the duration and complexity of the litigation and the skill and efficiency of the attorneys involved, is similar to the Schering Action discussed at length above. [37] In evaluating the fee application by Co-Lead Counsel in the Merck Action, some comparisons between the Schering and Merck Actions are inevitable and we will take notice of significant similarities and differences where we believe it is appropriate and to do so will advance the analysis.

37 We hasten to add that while the Merck Lead Plaintiff Group and Co-Lead Counsel faced the challenges and the complexity that were present in the Schering Action, as discussed below, there were a host of additional challenges and risks in the Merck Action that were not present in the Schering Action.

1. The First Factor: Size of the Fund Created and the Number of Persons Benefitted

The Merck settlement created a $215 million cash Settlement Fund. It would be among the fifty largest securities class action settlements of all time, the seventh largest ever attained within the Third Circuit and the third largest securities [*117] class action settlement ever by a pharmaceutical company. (*See* Merck Decl. ¶ 8.) The creation of this very sizeable Settlement Fund is all the more impressive given the presence of very significant obstacles relating only to the Merck Action that Co-Lead Counsel needed to confront and overcome to achieve it, and the absence of factors traditionally contributing to increased settlement size, such as a financial restatement, criminal pleas by officers, a companion SEC enforcement action, an accounting firm defendant or Section 11 claim.

As we have already observed, the lack of any significant decrease in the price of Merck shares in the wake of the initial public disclosure on January 14, 2008 that Vytorin had failed the ENHANCE trial -- while Schering stock plummeted losing approximately $3.5 billion in value -- was a potentially fatal vulnerability in the Merck Action. Not surprisingly, Defendants repeatedly attempted to exploit this possible "show stopper" throughout the Merck Action, including in their summary judgment motion, opposition to class certification, and in their attempt to obtain interlocutory review by the Third Circuit of the Court's Order certifying the class.

Ironically, [*118] as Co-Lead Counsel successfully surmounted each of these potentially dispositive attacks and thereby moved the Merck Action along the path toward success, they also significantly increased their own financial risk. Viewed purely from the perspective of Merck Co-Lead Counsel's financial risk, losing their investment of time and expenses expended at the motion to dismiss stage is bad enough -- but losing at the summary judgment stage after four years of litigation and massive discovery is vastly more costly -- and losing at trial or on appeal is even worse. Undaunted, Merck Co-Lead Counsel persevered to the verge of trial refusing to acquiesce to any settlement that they believed failed adequately to compensate the Class -- just as they would be expected to do.

Measured against investor losses on January 14, 2008, when the Vytorin lack of success in the ENHANCE trial was first publicly disclosed -- which were zero -- the settlement achieved in the Merck Action is literally incomparable. Indeed, on January 14, 2008, any Merck shareholders for whom Vytorin's success in the ENHANCE trial was material to their investment decision could have sold without incurring any financial loss.

Even measured [*119] against the much more problematic investor losses sustained more than two months later, on March 31, 2008, when Merck shares lost $14 billion in value, the $215 million settlement represents more than 1.5% of these investor "losses". According to NERA's analysis, the median settlement value of cases in which investor losses exceed $10 billion is only .7%. *NERA, Recent Trends in Securities Class Action Litigation: 2012 Full Year Review at p. 32.* For a case where investor losses were $14 billion, the median settlement would be about $98 million. Accordingly, the $215 million Settlement Fund is more than twice the median settlement for investor losses of this size.

There is also no doubt that an enormous number of Merck investors will benefit from the settlement. As of July 1, 2013, 729,295 Settlement Notice Packets were sent to potential class members. (Merck Decl. ¶ ¶ 126, 151; Ex. F , Decl. of Stephanie A. Thurin ¶ 8.) Thereafter, 26,873 additional Settlement Notice Packets were mailed to class members for a cumulative total of 758,388 as of August 12, 2013. (Suppl. Decl. of Stephanie A. Thurin ¶ ¶ 3, 4.)

Thus, we conclude that the size of the Settlement Fund achieved by Merck's Co-Lead [*120] Counsel is an outstanding result, especially in light of the extremely significant difficulties and risks presented by the case. We believe this factor weighs heavily in favor of the suggested fee award.

2. The Second Factor: Number Of Objections By Class Members

For the second *Gunter* factor, "the Court evaluates the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel." *In re Merck & Co. Vytorin ERISA Litig.*, 2010 U.S. Dist. LEXIS 12344, 2010 WL 547613, at *10. As of July 1, 2013, class members had been sent 725,295 settlement notice packets (Merck Decl. ¶¶ 126, 151) apprising them Co-Lead Plaintiffs on behalf of Plaintiffs' Counsel would apply to the Court for an award of attorneys' fees not to exceed 28%. (Merck Decl. Ex. A, p. 2 to Ex. F.) Accordingly, the Class Members were fully informed of the amount Co-Lead Counsel would seek as attorneys' fees. *See Lucent, 327 F. Supp. 2d at 435, n. 10.*

The deadline for filing objections expired on August 5, 2013. (Merck Decl. ¶ 123.) We understand that only two objections to the amount of fees sought by Merck Co-Lead Counsel were received (Lead Plaintiffs' Memorandum of Law in Response to Objections at 1) -- an exceptionally [*121] low number of objections. Even though the Merck shareholder base consists of a substantial number of institutional holders -- not a single institution objected to Co-Lead Counsel's fee request. (Merck Lead Plaintiff Memorandum in Response to Objections at 2-3, n.2.) In the words of the Court of Appeals decision in *Rite Aid*, which is squarely in point:

> The class's reaction to the fee request supports approval of the requested fees. Notice of the fee request and the terms of the settlement were mailed to 300,000 class members, and only two objected. *We agree with the District Court such a low level of objection is a "rare phenomenon." Id. at 610.* Moreover, as the court noted, a significant number of investors in the class were "sophisticated" institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive. *Id. at 608 and n. 5.* The District Court did not abuse its discretion in finding the absence of substantial objections by class members to the fee requests weighed in favor of approving the

fee request.

396 F.3d 305 (emphasis supplied). The filing of only two objections here, both in our view lacking in merit (as discussed [*122] below), neither by an institution, constitutes an equally "rare phenomenon" and overwhelmingly supports the Merck Fee Application.

3. The Third Factor: The Skill and Efficiency of Co-Lead Counsel

Like Co-Lead Counsel in the Schering Action, Co-Lead Counsel in the Merck Action are at the top of the Plaintiffs' Securities Class Action Bar. Indeed, both G&E and BLB&G, which is Co-Lead Counsel in both cases, have platinum reputations and records of high achievement in securities class actions.

The quality of their work in this case was especially impressive. Co-Lead Counsel fought this very complex, difficult and extremely risky case for almost five years. In the process, they successfully overcame Defendants' opposition to class certification, resisted Defendants' motions to dismiss, for summary judgment, and for interlocutory appeal to the Third Circuit from this Court's order granting class certification. In achieving these results and preparing the case for trial, Lead Counsel were required to master a host of complex issues, including protocols for clinical trials, the science behind the drugs at issue, and the complex statistical principles needed to prove that Defendants improperly [*123] unblinded the ENHANCE data and learned the trial results long before publicly disclosing them. *See Rowe*, 2011 U.S. Dist. LEXIS 96450, 2011 WL 383710, at *20 (finding that "complex issues raised in [the] litigation required counsel with numerous areas of expertise. . . . [including] specialized understanding of on-going scientific, regulatory, political/legislative and legal developments").

Defendants' counsel in this case were top attorneys from highly respected law firms who mounted a ferocious defense. The high quality and vigor of defense counsel bears on the evaluation of the quality of services rendered by Class Counsel. *See, e.g., In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) ("The quality of opposing counsel is also important in evaluating the quality of Lead Counsels' work.").

In the final analysis, Co-Lead Counsel fielded a team that convinced Merck's very accomplished defense team and sophisticated clients that they were ready, willing and able to try this very complex and very risky case to verdict and that a sufficient chance existed that a very large verdict in favor the Class would be returned that Defendants were willing to pay $215 million to settle the Merck Action and [*124] forego pursuit of their very formidable legal and factual defenses.

In the context of this lengthy and contentious case, the equivalent of a legal brawl, the Merck Co-Lead Counsel were as efficient as possible. They used highly advanced technology to manage the twelve million documents and coordinated with Co-Lead Counsel in the Schering Action to maximize the litigation effort and attempt to avoid duplication. (*See* Merck Decl. ¶ ¶ 60, 64.) In the end, they succeeded in obtaining a very large recovery for Class Members in the face of very substantial risks of recovering nothing. *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 121 (D.N.J. 2012) ("The substantial settlement sum negotiated by Class Counsel . . . further evidences their competence"). We conclude the skill and efficiency of Co-Lead Counsel strongly support the suggested fee award.

4. The Fourth Factor: Complexity and Duration

The fourth *Gunter* factor requires examination of the complexity and duration of the litigation. As this Court previously has observed, by nature "securities class actions are inherently complex." *Louisiana Mun. Police*, 2009 U.S. Dist. LEXIS 112989, 2009 WL 4730185, at *8 (D.N.J. 2009) (Cavanaugh, J.). Here, this complexity [*125] was compounded by the medical and scientific issues necessary to understand clinical trial protocols and the science behind the drugs at issue, and the statistical analyses that Co-Lead Counsel were required to learn to effectively prosecute their claims. Beyond the complicated subject matter, numerous legal obstacles confronting the Merck Co-Lead Counsel pervaded the case and required exceptional effort and skill to maneuver around them -- especially the extremely significant legal challenges posed by the failure of Merck's shares to decline appreciably in response to the January 14, 2008 disclosures, which Defendants pressed at every opportunity.

This complex and hotly-contested securities fraud litigation lasted for nearly five years and epitomizes the kind of drawn out and complicated case contemplated by the fourth *Gunter* factor. This *Gunter* factor also strongly supports Co-Lead Counsel's fee application. *See Schering-Plough ERISA, 2012 U.S. Dist. LEXIS 75213, 2012 WL 1964451, at *7* ("This is a significantly complex litigation that has been ongoing for four years. This factor weighs in favor of an award of attorneys' fees".); *Merck ERISA, 2010 U.S. Dist. LEXIS 12344, 2010 WL 547613, at *10* ("inherently complex suit" that was "ongoing for [*126] more than two years" warranted fee award).

5. The Fifth Factor: The Risk of Non-Payment

In applying the *Gunter/Prudential* factors, the Third Circuit has made clear that "each case is different, and in certain cases, one factor may outweigh the rest." *Gunter, 223 F.3d at 195, n.1. Accord, AT&T, 455 F.3d at 166; Rite Aid, 396 F.3d at 301.* We believe the fifth *Gunter* factor, the risk of non-payment, is particularly significant in the Merck Action. *See Esslinger v. HSBC Bank Nevada, N.A., No. 10-cv-3213, 2012 U.S. Dist. LEXIS 165773, 2012 WL 5866074, at *13 (E.D. Pa. Nov. 20, 2012)* ("This [risk of non-payment] factor allows courts to award higher attorneys' fees for riskier litigations"); *In re Pet Food Prods. Liab. Litig., No. 07-cv-2867, 2008 U.S. Dist. LEXIS 94603, 2008 WL 4937632, at *22 (D.N.J. Nov. 18, 2008), aff'd in part, vacated in part on other grounds, 629 F.3d 333 (3d Cir. 2010)* ("Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees").

Plaintiffs' Counsel undertook this action on an entirely contingent fee basis, knowing they very likely would be committing to a very complex, lengthy and expensive battle that carried an extreme risk that the litigation [*127] would yield no, or very little, recovery and leave them uncompensated for their huge investment of time, as well as for their significant out-of-pocket expenses. (Merck Decl. ¶ 145-147.) As things transpired, there existed an very large chance that Plaintiffs would recover nothing, despite having devoted enormous amounts of time and money to five years of contentious litigation and taken the case to the eve of trial.

(a) The Risk In Establishing Loss Causation and Damages

From the inception of the Merck Action through the settlement, the Merck Lead Plaintiff Group and the Plaintiffs' Counsel were faced with a potentially fatal obstacle. As a matter of law, Plaintiffs would have to prove their losses on their Merck investments were proximately caused by Defendants' fraud (*e.g.*, the concealing of material information -- the ENHANCE results). *Dura, 544 U.S. at 341-42.* Standing between the Merck Lead Plaintiff Group and this indispensable element of their claims was the acknowledged fact that Merck's stock did not drop by a statistically significant amount on January 14, 2008 when the "top line" ENHANCE results were publicly disclosed. On that day, Merck and Schering announced that Vytorin [*128] did not outperform Zocor and Schering's stock price plunged significantly, losing $3.5 billion in value while Merck's stock barely moved. Accordingly, Plaintiffs faced a stark prospect of not being able to establish loss causation, and thus recovering nothing. *Semerenko v. Cendant Corp., 223 F. 3d 165 (3d Cir. 2000). In Semerenko*, the Third Circuit stated "where the value of the security does not actually decline as a result of our alleged misrepresentation, it cannot be said that there is in fact an economic loss attributable to that misrepresentation. In the absence of a correction in the market price, the cost of the alleged misrepresentation is still incorporated into the value of the security and may be recovered at any time simply by reselling the security at the inflated price." *Id., 233 F. 3d at 185.*

To be sure, the Merck Co-Lead Counsel fought hard to overcome this potentially fatal problem arguing that the January 14, 2008 announcement of the ENHANCE results was not a complete disclosure of the alleged fraud and that, following that announcement, Merck officers made additional false and misleading statements in furtherance of the fraud. Plaintiffs' theory was that critical [*129] new information about the ENHANCE results was disclosed on March 30, 2008, at the American College of Cardiology ("ACC") conference. Throughout the Merck Action, Defendants vehemently argued that since the January 14, 2008 announcement disclosed that the ENHANCE trial had failed, that announcement fully cured any alleged fraud. Indeed, at the time of the settlement, briefing on Defendants' latest attempt to exploit this issue -- their motion to exclude any expert testimony by Dr. Greg Jarrell as to any injury subsequent to January 14, 2008 -- was almost complete and could have demolished the case. In short, Merck Lead Plaintiff and Co-Lead Counsel faced a huge risk that a jury, the judge or the Third Circuit on appeal, would agree with Defendants and that they would recover nothing.

(b) The Risk In Proving Defendants' Scienter

Other challenges abounded. Like the Schering Lead Plaintiff, the Merck Lead Plaintiff would have had to show that more than a year before Defendants disclosed the results of the ENHANCE trial, the Merck Defendants reviewed the trial data and applied statistical analyses which revealed that the trial had failed. As we observed in the Schering Fee Application, this [*130] was no easy task for Schering Co-lead Counsel because no Defendant ever admitted wrongdoing nor was subject to criminal or other governmental sanctions and the Schering scientists were well down the corporate ladder from the senior officers. But, the proof was far more difficult in the Merck Action because the ENHANCE trial was run by Schering, not Merck. As a result, the difficulties in establishing these facts (and Defendants' *scienter*) were greater for Merck's Co-lead Counsel because (i) all the trial data was maintained by Schering employees; (ii) Schering, not Merck, statisticians engaged in the purported early review and statistical analysis of the trial data; and (iii) the purported communication of the news of the trials' failure from Schering to Merck occurred during a meeting where the CEO of Schering (if it could ever be shown he had received the information) communicated it to the CEO of Merck for which there was no documentation concerning the substance of the meeting nor any corroborating testimony. In short, Lead Plaintiffs in the Merck Action had no "smoking gun" and a much harder road to hoe than the Schering Plaintiff Group.

The Third Circuit Task Force on Selection [*131] of Class Counsel explained the very important link between the significant risk faced by Class Counsel and compensating Class Counsel for accepting this risk with a "premium" for success:

> It is plaintiffs' counsel who work to obtain whatever recovery any member of the class who has not opted out of the litigation will receive. The fact that there will be no payment if there is no settlement or trial victory means that there is greater risk for plaintiffs' counsel in these class action cases than in cases in which an hourly rate or flat fee is guaranteed. The *quid pro quo* for the risk, and for the delay in receiving any compensation in the best of circumstances, is some kind of risk premium if the case is successful.

74 Temple L. Rev. 689, 691-692 (2001) (footnote omitted).

We believe the extremely substantial risk of non-recovery in the Merck Action weighs heavily in favor of the fee application. See T. Eisenberg and G. Miller, "Attorneys' Fees and Expenses in Class Action Settlements: 1993 -- 2008 at 18; (2009) Cornell Faculty Working Paper 64 at p. 11. *("[S]tandards applied to attorney fees uniformly indicate that greater risk warrants an increased fee. . . courts systematically reward* [*132] *risk. . . and [t]he difference within a case category between high risk cases and other cases was statistically significant only for the large Securities category. ")(Emphasis supplied.*)

6. The Sixth Factor: Amount of Time Devoted By Plaintiffs' Counsel

Given the complexity and five-year duration of the Merck Action, and the scorched-earth defense mounted by top-notch defense counsel, it is by no means surprising Merck Plaintiffs' Counsel devoted enormous time and effort to the Merck Action -- the case demanded it. Since its inception, Plaintiffs' Counsel expended 105.341.76 hours -- valued at approximately $45 million (as calculated for purpose of the lodestar) (*see* Merck Decl. ¶ 136; Ex. M). The enormous time and effort devoted by Plaintiffs' Counsel, necessitated by the magnitude and complexity of the case, which was at high risk throughout the Merck Action, also strongly supports the suggested fee award.

7. The Seventh Factor: Awards in Similar Cases

The Co-Lead Plaintiffs' suggestion that we recommend an award of 28% of the Settlement Fund would place the fee award toward the higher end of the spectrum of fee awards in settlements of this size. Whether the suggested POR is justified [*133] depends on an evaluation of ta number of variables.

In *Sullivan*, the Third Circuit considered the propriety of awarding attorneys' fees of 25% of the $293 million Settlement Fund. There, an objector contended the fee award was unjustified by the Court of Appeals jurisprudence arguing "this being a default judgment case, which entailed minimal motions practice and discovery." *667 F.3d at 329.* There, where "the Special Master and District Court observed that counsel devoted nearly 39,000 hours to litigating this matter . . . " -- less than 40% of the time devoted by Plaintiffs' Counsel here -- the Court rejected the objection stating, in salient part, "[w]e find no abuse of discretion in the District Court's conclusion that the complexity and duration of the litigation supported the requested fee." *(Id. at 331.)*

In applying this seventh *Gunter* factor -- comparing the award to awards in similar cases -- the Court of Appeals in *Sullivan* stated:

> Finally, the objectors' assertion that the award improperly exceeds the awards in similar cases is equally unavailing. In *Cendant PRIDES*, we discussed fee awards in class actions in which the settlement fund exceeded $100 million and which relied upon [*134] the POR method, finding that "the attorneys' fee awards ranged from 2.8% to 36% of the total settlement fund." *243 F.3d at 737.* Similarly, in *Rite Aid*, we found no abuse of discretion in a district court's reliance on three studies that demonstrated an average percentage fee recovery in large class action settlements of 31%, 27-30%, and 25-30%. *396 F.3d at 303.* Here, the District Court determined that the 25% fee requested by counsel fell within this range. (App'x 320.)

(*Id. at 332-333.*)

Although *Sullivan* was an antitrust case, the Court of Appeals relied on *Rite Aid*, which sustained the district court's application of *Gunter's* seventh factor as favoring approval of a 25% POR award of a $126 million Settlement Fund. Relying on three studies of class action settlements, the Court in *Rite Aid* stated:

> In comparing this fee request to awards in similar cases, the District Court found persuasive three studies referenced by Professor Coffee: one study of securities class action settlements over $10 million that found an average percentage fee recovery of 31%; a second study by the Federal Judicial Center of all class actions resolved or settled over a four-year period that found a median percentage [*135] recovery range of 27-30%; and a third study of class action settlements between $100 million and $200 million that found recoveries in the 25-30% range were "fairly standard." *Id.* at 610. We see no abuse of discretion in the District Court's reliance on these studies.

Rite Aid, 396 F.3d 294, 303.

NERA's most recent study of attorneys fee awards in securities class actions shows that for settlements between $100 million and $500 million, the median attorneys' fee award for the period January 1996 to December 2009 was 22.8% and for the most recent two-year period from January 2010 to December 2012, the median attorneys' fees award was 18.2%. *NERA, Recent Trends in Securities Class Action Litigation: 2012, Full Year Review at January 29, 2013 at p. 34.* As NERA notes, "typically fees and expenses grow with settlement size but less than proportionately, *i.e.*, the percentage fees . . . shrink as the settlement size grows." *(Id. at 34.)* Given the extremely broad -- and possibly overly inclusive -- settlement range used by NERA, and the inverse correlation between the settlement size and the percentage awarded, it is reasonable to believe the median percentage would increase at the lower end of [*136] the $100 million to $500 million range, which is where the $215 million would be situated. At the $25 million to $100 million settlement range, the median is 28.8% for settlements between January 1996 and December 2005 and 25% for the period January 2010 to December 2012. This suggests that the median for settlements between $100 and $300 million would lie between the two ranges.

Significantly, the Court of Appeals in *Sullivan* emphasized that application of the "awards in similar cases," seventh *Gunter factor*, does not involve simplistic comparisons or "formulaic applications of the appropriate range":

> We are cognizant that a comparison of this award to fees ordered in other cases is a complex analytical task, in light of variations in the efforts exerted by attorneys and the presence of complex legal and factual issues. That said, we have emphasized "that a district court may not rely on a formulaic application of the

> appropriate range in awarding fees but must consider the relevant circumstances of the particular case." *Cendant PRIDES, 243 F.3d at 736.*

Sullivan 667 F.3d 273, 333).

Applying this criteria, Judge Rendell observed: [A]lthough this case may have lacked some of the contested [*137] motion practice and extensive discovery elicited in some of the other cases receiving similar percentage awards, the case presented other challenges. . . ." (*Id. at 333, citations omitted.*) Thus, the Court of Appeals sustained the 25% fee awarded, holding:

> [T]he District Court here properly considered the relevant *Gunter* and *Prudential* factors, and determined that the case presented all of the factors we had recognized as supporting a higher award: "complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel." (App'x 320 (*quoting Cendant PRIDES, 243 F.3d at 741).*)

The Merck Action involved all the factors the Court of Appeals recognized as supporting higher awards. Complex and novel legal issues permeated the case, there was extensive discovery and more than a hundred thousand hours were spent on a case that epitomized "acrimonious litigation". Unlike *Sullivan*, which may have "lacked some of the contested motion practice and extensive discovery," *667 F.3d 333*, the Merck Action featured extensive motion practice -- dismissal, summary judgment, class certification, interlocutory review and *in limine* motions, [*138] and involved massive discovery involving review, assimilation and analysis of 12 million pages of documents and the depositions of 45 witnesses.

Given the vast range of attorneys' fee awards in class actions, including securities class actions settling at levels exceeding $100 million, each of which depended on weighing numerous variables impacting the particular decision, it is difficult, if not impossible, to liken the Merck Action to an identical case. Certain observations, however, can be made.

The suggested attorneys' fee award of 28% of the Settlement Fund is within the broad range of awards identified in *Cendant PRIDES* and also well within the ranges of studies of fee awards subsequently referred to by the Court of Appeals in both *Sullivan* and *Rite Aid.* The suggested award, however, would be exceed the median attorneys' fee award observed by NERA in settlements of this size. However, this simply means that the award would be among the 50% of fee awards falling above the "median," which by definition is the point at which that half the fee awards will fall below the "median" and half will exceed the "median".

Giving weight to the factors the Third Circuit in *Sullivan* "recognized [*139] as supporting a higher award: 'complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel'" *(Sullivan 667 F.3d at 333)*, we find them all present in the Merck Action. In addition, however, we also believe that the extremely risky nature of the Merck Action combined with the magnitude of the endeavor undertaken by Plaintiffs' Counsel in the Merck Action which would, and did, require an enormous investment of time and money on a purely contingent basis, more than two and one half times the hours expended in *Sullivan* -- unaided by any other contributing factors like indictments or restatements that would be expected to enhance the likelihood of recovery -- strongly supports "a higher award" in the Merck Action. As in *Sullivan*, "the risk of nonpayment remained ever-present throughout the litigation and settlement proceedings." *667 F.3d at 332.* Indeed, it remains unclear to the end, whether the Merck Action ultimately could have survived the January 14, 2008 disclosures -- a Sword of Damocles that again was raised by Defendants' *in limine* motion seeking to preclude testimony by one of the key plaintiffs' [*140] experts as to any post January 14, 2008 damage that was on the verge of submission when the case was settled . [38] On balance, we believe the seventh *Gunter* factor also supports the suggested fee award.

38 Given this Court's previous rulings, including its holding on class certification that it would be premature to decide this issue, we recognize it would be reasonable for Merck Co-Lead Counsel and Defendants' Counsel to expect the motion to be denied . But that would merely have forestalled, not disposed of, this critical legal overhang. Certainly, an enormous risk existed that

the jury, the Court on post-trial motions or the Third Circuit could decide that causation, damages and/or materiality were foreclosed by the admitted failure of Merck's share price to react when the basic information about Vytorin's performance in the ENHANCE trial was disclosed on January 14, 2008.

8. The Eighth Factor: Were the Benefits Acquired from the Efforts of the Class-Counsel or Others

As is true in the Schering Action, the record in the Merck Action compels the conclusion that all the substantial benefits accruing the Merck Class derived exclusively from the herculean efforts of Plaintiffs' Counsel. [*141] As we have already observed, there was no one else on the scene that could have contributed to, much less produced, the result here -- no government agency or corporate litigant led the charge, no restatement or criminal conviction provided aid or leverage. In short, we conclude the Settlement Fund is the product solely of the efforts of Plaintiffs' Counsel and this weighs heavily in favor of the suggested fee award.

9. The Ninth Factor: The Amount That Could Be Negotiated in a Private Contingency Fee Agreement

As we noted in applying this factor in the Schering Action, a number of courts within the Third Circuit have observed attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class commercial litigation. Although the suggested Fee Award compares favorably to the private contingency fee levels, for the reasons discussed in the Schering Fee Application, we accord this factor little weight. [39] *(See note 24, supra.)*

39 As we discuss in detail in the next session, ABP, a member of the Merck Lead Plaintiff Group, negotiated an individual fee agreement with G&E, one of the Merck Co-Lead Counsel containing a fee arrangement limiting G&E's fee to 15% [*142] of the first $500 million recovered in a class action that contemplated a single Lead Plaintiff and only one Lead Counsel to share the fee award.. As the agreement contemplated a class action not an individual private action, and one not involving a group lead plaintiff or co-lead counsel sharing the fee -- we address it below in Section 11(b).

10. The Tenth Factor: Innovative Factors in the Settlement

Like the Schering Action, the terms of the settlement are plain vanilla involving cash in exchange for releases and is a neutral factor.

11. An Additional Factor: The Views of Lead Plaintiff Group Members

(a) The Merck Lead Plaintiff Group

At the inception of the case, the four institutions, ADP, IFM, Jacksonville and Detroit, determined to join together to form a group they denominated as the "Institutional Investor Group" to seek appointment under the PSLRA as a Group Lead Plaintiff. By forming the Institutional Investor Group, the members were able to aggregate their losses and enhance their likelihood of having the "largest financial interest in the relief sought by the class" in the Merck Action and thereby becoming the "presumptive" lead plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii). [*143] Not surprisingly, in the Memorandum of Law filed by the Institutional Investor Group in support of, among other relief, their appointment as Lead Plaintiff, they relied on the cumulative loss suffered by the four members: "[t]he Institutional Investor Group, *combined*, purchased over 6.9 million shares of Merck stock suffering losses of $38,390,726 in connection with its transactions." (Memorandum of Law in Support of Institutional Investor Group's Motion for Appointment as Lead Plaintiff at 2; emphasis supplied); *see also Id. at 15* ("[T]he Institutional Investor Group believes that it has a greater financial interest in this action than any other class member who has come forward by virtue of its approximate losses of over $38 million.") In its July 2, 2008 Order, this Court appointed each member of the Institutional Investors Group as Lead Plaintiff.

It was the entire Lead Plaintiff Group, not any one member acting alone, that retained Co-Lead Counsel. In the Motion to be Appointed as Lead Plaintiff, the Institutional Investor Group requested the Court to approve the counsel retained by the "Group". In support of the Institutional Investor Group's selection of counsel, the Group represented [*144] "*[t]he Institutional Investor Group retained counsel* to represent the class, subject to the Court's approval. This Court should not disturb Lead Plaintiffs' choice. . . ." *(Id. at 15; emphasis added.)* It further states: "[I]n that regard, *the Institutional*

Investor Group has selected and retained the law firm of Grant & Eisenhofer and Bernstein Litowitz Berger & Grossman LLP as Co-lead Counsel, and Carella Byrne and Seeger Weiss as Co-Liaison Counsel, for the Class." *(Id.; emphasis supplied.)*

Each of the four institutional members of the Merck Co-Lead Plaintiff Group has submitted a declaration supporting the settlement. As to the Co-Lead Counsel's Fee Application, three of the four members fully support an attorneys' fee award of 28% of the Settlement Fund. [40] (Merck Decl. ¶ 130.) As Lead Plaintiff member IFM stated in its accompanying declaration, "IFM fully supports a fee award of 28% of the Settlement Fund, which takes into account the hard fought nature and long history of the case, the excellent results achieved and the substantial risks that Class Counsel undertook pursuing these difficult claims." (IFM Decl. ¶ 13; Ex. C to Merck. Decl.) In its declaration, Lead Plaintiff member [*145] Jacksonville echoed this view: "[I]n a case of this magnitude and degree of complexity where counsel has demonstrated superior skill and ability, Jacksonville P&G believes a fee of 28% is a reasonable fee award. Jacksonville has authorized counsel to present this fee request to the Court. . . ." (Ex. D, ¶ 16.) In expressing this view, Lead Plaintiff Jacksonville specifically stated, among other reasons, the substantial recovery obtained for the class . . . would not have been possible without the tremendous efforts of Co-Lead Counsel." (*Id. at ¶ 7.*) Finally, Detroit, a member of the Merck Lead Plaintiff Group, also states "a fee of 28% is a reasonable attorneys' fee award." (Ex. E, ¶ 6.)

> 40 According to the Merck Co-Lead Counsel's Memorandum of Law, the 28% suggested fee award was the product of discussions with the members of the Merck Lead Plaintiff Group: "Co-lead Plaintiffs requested that Plaintiffs' Counsel not seek a fee greater than 28% of the Settlement Agreement and Lead counsel agreed." (Merck Lead Plaintiffs' Memorandum of Law at 18.) Merck does not mention or illuminate this discussion.

The remaining member of the Merck Lead Plaintiff Group is ABP. In a declaration submitted [*146] on behalf of ABP, it states:

> ABP's retainer with G&E, which was entered before joining with Co-Lead Plaintiffs and Co-Lead Counsel, contains a provision capping G&E's attorneys' fees at 15% of any recovery by settlement or judgment of up to $500 million. ABP has also been made aware of the time and expenses incurred by other Co-Lead Counsel. ABP understands that Court-appointed Special Masters (Mr. Greenberg and Mr. Lerner) have been charged to review the applications for attorneys' fees and expenses, and to file with the Court a report and recommendation that determines what they conclude is the amount of attorneys' fees and expenses that should be awarded to Class Counsel. In light of this procedure established by the Court, ABP will not now take a position on the specific amount of attorneys' fees that should be awarded; rather ABP will await the report and recommendation of the Special Masters and evaluate that recommendation when it is made, but expects it will defer to the Special Masters.

(Merck Decl. Ex. B ¶ 13.)

(b) The Effect, If Any, of the G&E Retainer Letter

We do not believe the 15% fee cap in the individual retainer letter between ABP and G&E can, or should, control the [*147] amount of fees to be awarded to Plaintiffs' Counsel in the Merck Action. On its face, the letter is only between G&E and ABP, and specifically provides that "ABP will seek to be Lead Plaintiff". It is only "if ABP is successful in obtaining Lead Plaintiff designation that 'G&E will request and ABP will support a fee of 15 percent up to $500 million. . . .'" Thus, neither the letter nor the fee agreement appears to contemplate the Group appointment that ultimately occurred or the appointment of Co-Lead Counsel. [41] *(Compare Cendant I, 264 F.3d at 224, n.4 ("The retainer agreement declared to members of the Group have agreed to proceed together to seek Co-Lead Plaintiff position"* and states *the funds, if selected, will seek the appointment of BRB and BLBH as co-lead counsel.")*

> 41 In this context, we construe the reference in the retainer letter to G&E's "attempting to get other counsel to agree to the proposed fee

schedule," as referring to local New Jersey liaison counsel and any other that might work on behalf of G&E as sole lead counsel.

As ABP acknowledges, the Retainer Agreement with G&E "was entered before joining with the Co-Lead Plaintiffs and Co-Lead Counsel". [42] None of the other [*148] members of the Institutional Investor Group -- which retained Co-Lead Counsel -- nor the other law firms comprising Plaintiffs' Counsel, including Co-Lead Counsel BLB&G, are signatories to the G&E engagement letter or bound by it. According to its submission to the Court, the members of the Institutional Investors Group *collectively* retained Co-Lead Counsel and Liaison counsel and requested the Court to defer to the Group's decision. Here, the three other members of the Institutional Investors Group support a fee award of 28% made by Co-Lead Counsel on behalf of all Plaintiffs' Counsel.

42 The retainer letter was executed on May 29, 2008, five days before the Institutional Investor Group made its submission reflecting ABP's joinder with the other members of the Lead Plaintiff Group and retention of Co-Lead Counsel.

Significantly, APG (which acted for ABP) also attests it was kept abreast of the time and money G&E devoted to the case on a monthly basis and expresses the view that the 59,593 hours of time expended by G&E's lawyers and paralegals, which created a lodestar value of $24,634,856 over the five years the case was prosecuted, "was reasonable, and necessary to prosecute the action [*149] and achieve the result." (Merck Decl. Ex. B, ¶ 11.) ABP also appears to recognize that the fee award should be decided based on an evaluation of the relevant factors stating, "APB will await the report and recommendation of the Special Masters and evaluate that recommendation when it is made, but expects it will defer to the Special Masters." (Merck Decl. Ex. B ¶ 13.) It bears emphasis that nowhere does ABP suggest that the fee cap in its letter agreement with G&E should limit the fee award in the Merck Action.

Given the extremely large lodestar, which all the members of the Merck Lead Plaintiff Group appear to agree was reasonable and necessary to achieve the superb result, application of the individual retainer letter to the Fee Application would, in our view, drastically short-change Plaintiffs' Counsel. Indeed, if a fee of 15% were awarded -- which would produce a fee of $32,250,000 for all Plaintiffs' Counsel to share -- the lodestar would be .71%. In other words, for all their effort and the risk they accepted, the Plaintiffs' counsel would receive a "negative" premium and be providing a 30% discount from their non-contingent billing rates. This result would contravene the very [*150] purpose of utilizing the POR method which "allows courts to award fees from the fund in a manner that rewards counsel for success. . . ." *Rite Aid, 396 F.3d at 300 (quotation and citation omitted).*

In the final analysis, we conclude the G&E engagement letter should have no application here, and that the full support provided by the three member majority of the Merck Lead Plaintiff Group, who actively supervised Co-Lead Counsel in prosecuting the Merck Action, for a Fee Award in the amount of 28% and ABP's recognition that there were "significant risks," that the "settlement represents an excellent recovery for the class" (Merck Decl. Ex. 2 ¶ 9) and that G&E's "lodestar of $24,634,856.50 over the course of almost five years the was prosecuted . . .was reasonable and necessary to proceed with the action and achieve the result" *(Id. at ¶ 11)* adds further support for the Fee Application.

(c) The Lodestar Cross-check

We now turn to the lodestar "cross-check" to stress test whether the suggested fee award of 28% of the Settlement Fund would be reasonable. In performing the cross-check, we apply the same rules enunciated by the Third Circuit discussed in the section of this Report and Recommendation [*151] addressing the fee application in the Schering Action and will not repeat them here. Suffice it to say, the abbreviated "cross-check" does not constitute a "full blown" lodestar calculation, and neither "bean counting" nor "mathematical precision" is required, and summaries may be relied on. *Rite Aid, 396 F.3d at 306-307.*

In the Merck Declaration, Co-Lead Counsel have submitted a summary of the lodestar for the hours expended by each of the law firms comprising Plaintiffs' Counsel. (Merck Decl. ¶ 136 and Exhibit M.) The following summary is contained in Exhibit M:

Summary of Plaintiffs' Counsel Hours, Lodestar and Expenses by the Firm

FIRM NAME	TOTAL HOURS	LODESTAR	EXPENSES
Grant & Eisenhofer, P.A.	59,593.7	$24,634,856.50	$3,515,697.07
Bernstein Litowitz Berger & Grossmann LLP	30,817.5	$13,813,696.25	$ 575,860.01
Labaton Sucharow LLP	11,341.9	$ 4,339,199.00	$ 221,249.83
Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C.	2,362.36	$ 1,638,020.00	$ 37,921.75
Klausner & Kaufman, P.A.	112.9	$ 73,385.00	$ 14,911.17
Seeger Weiss LLP	1,113.40	$ 442,746.00	$ 1,737.12
TOTAL	**105,341.76**	**$44,941,902.75**	**$4,367,376.95**

(Merck Decl. Ex. M.)

In the supporting declarations submitted by each of the law firms, they included in the lodestar [*152] summary itemized hours expended on the case by each individual within the firm, provided the billing rates "that would be charged for their services on non-contingency matters" in their markets for legal services, along with declarations of partners from each law firm summarizing tasks and attesting to the preparation of the summaries from daily time records. (*See* Merck Decl. Exs. G, H, I, J, K and L.)

The summaries submitted by Merck Plaintiffs' Counsel show an aggregate of 105,341.76 hours was spent on the prosecution and resolution of the Merck Action. (*See* Merck Decl. ¶ 136.) Based on these summaries, the Merck Plaintiffs' Counsel lodestar is $44,941.902.75 (derived by multiplying their hours by each law firm's current hourly rates for attorneys, paralegals and other professional support staff). [43]

43 As in the Schering Action, in keeping with the Third Circuit instructions for utilizing the abbreviated lodestar "cross-check", we have not fly-specked the summaries. We previously observed, however, that the hourly rates charged here by partners at Co-Lead Counsel BLB&G are in line with rates charged by other comparable law firms, including Paul, Weiss, Rifkind Wharton & Garrison, the [*153] Defendants lead counsel in the Merck Action. *(See note 27 supra.)* The same holds true for G&E. Indeed, the top rate charged by G&E is by Daniel L. Berger, a very experienced class action lawyer, whose hourly rate is $875 and appears to be extremely reasonable, if not a bargain.

The suggested 28% of the $215 million Settlement Fund would yield a fee of $60,204,000 (plus interest) under the POR method. This potential POR fee award divided by the $44,941,902 lodestar would produce a multiplier of only 1.34.

We believe this multiplier is extremely modest given the duration of the action, the complexity and difficulty and the very substantial investment of time and money required from Merck Co-Lead Counsel to shepherd the case to a successful conclusion against a powerful pharmaceutical company with top defense counsel and, perhaps most importantly, the very substantial risk that Plaintiffs' Counsel could come away completely empty-handed. As the Third Circuit stated in language directly applicable here: "We think the multiplier of 1.28 is well within a reasonable range, particularly given the district court's emphasis on the significant time and effort devoted to the case by class counsel." [*154] *AT&T, 455 F.3d at 173.* Indeed, "[M]ultipliers ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *In re Prudential, 148 F.3d 283, 341 (3d Cir. 1998)* In short, we believe that all the factors that could justify a multiplier toward the higher end of the 1 to 4 accepted rate are present in the Merck Action. *See Cendant PRIDES, 243 F.3d at 742* ("[I]n all the cases in which the high percentages were applied to arrive at attorneys' fees, the Courts explained the extensive amount of work that the attorneys had put into the case, and appropriately the lodestar multiplier in those cases may exceed 2.99.") Viewed purely from the perspective of a lodestar calculation, we believe the presence in the Merck Action of numerous factors the Third Circuit cases have identified as supporting a multiplier toward the higher end of the accepted range, including risk, complexity and duration, a multiplier here of at least 2, if not higher, would be appropriate. Applying this multiplier to the lodestar of $44,941,902 would produce a fee of $89,883,804 -- almost $30 million more than the suggested 28% POR would yield.

The extremely low multiplier in this [*155] case embodies many of the factors *Gunter and Prudential* require be applied to select the POR and provides powerful confirmation that an award at the 28% level suggested by Co-Lead Counsel and approved by three members of Lead Plaintiff Group is reasonable. [44]

44 Given the extremely low multiple yielded by the lodestar cross-check and the abbreviated nature of the crosscheck procedure, we have not found it necessary to seek clarification of certain questions raised by our review of the underlying Declarations. We note, for example, that G&E's lodestar appears to be understated by virtue of the omission of any time accrued by senior partner Jay Eisenhofer, Esq., who we know devoted substantial time to the settlement negotiations -- attending several lengthy meetings, including one held at the courthouse that lasted the better part of the day, and a number of telephone conferences. We also observe that the Labaton firm, which is Co-Lead Counsel in the Schering Action, and on May 5, 2008 commenced the initial Merck class action in the District of New Jersey on behalf of Genesee County Employees' Retirement System ("GCERS"), Civil Action No. 2:08 CV 2177, devoted more than $4 million to the [*156] overall lodestar in the Merck Action although it had no "official" role in the Merck Action. The Merck Declaration's description of the roles played by the numerous law firms comprising Plaintiffs' Counsel omits any indication of the role played by the Labaton firm in the Merck Action. (*See* Merck Decl. ¶ 135, n.7.) In his accompanying declaration for the Labaton firm (Exhibit I), Mr. McDonald described his firm's role "as counsel to named plaintiff GCERS and describes several tasks undertaken in collaboration with Lead Counsel, which included providing GCERS with "regular updates on the status of the action". (Exhibit I, Paragraph 2.) Mr. McDonald enumerates other activities performed by Labaton which appear to have provided value to the Merck Class especially given the overlap of certain legal and factual issues with the Schering Action. The members of the Merck Lead Plaintiff Group appear to support compensation for the Labaton firm's activities by virtue of including its charges within the lodestar, which is described by Co-Lead Counsel as "fair and reasonable". (Schering Decl. ¶ 150.) After the appointment of the lead plaintiff, "the primary responsibility for compensation shifts [*157] from the court to that lead plaintiff, subject, of course, to ultimate court approval." *In re Cendant Sec. Litig., 404 F.3d at 198 (3d Cir. 2005) ("Cendant II").* As Judge Becker observed, "any such compensation will normally come directly out of the class's recovery, and the PSLRA ensures that lead plaintiff has a large stake in that recovery. Any compensation paid to non-lead counsel may substantially reduce the recovery of the lead plaintiffs. Thus, lead plaintiff will have a direct financial interest in keeping down the fees of non-lead counsel." *404 F.3d at 198-99.* We interpret the Merck Declaration as vouching that the tasks were performed at the instance of Co-Lead Counsel and we believe they may be appropriately included in the lodestar. On the other hand, briefing GCERS -- which is not a Lead Plaintiff -- appears to duplicate Lead Counsel's role and to be excluded under *Cendant II, 404 F.3d at 201* ("non-lead counsel cannot be compensated out of the class' recovery for monitoring the work of lead counsel on behalf of individual clients"). In all events, we have concluded further "mathematical precision" is not required because it would not affect the lodestar cross-check. Even if [*158] we were to overcompensate by recalculating the lodestar cross-check without any of Labaton's time, the multiple still would be only 1.48 -- still a very low multiple -- well within an acceptable range providing strong support to the suggested few award.

(d) The Objections

-- The DeJulius Objection

One of the only two objections to the Fee Application received in the Merck Action was submitted by an individual named Franklin DeJulius ("DeJulius"), who purchased 2 shares in Merck on February 7, 2008 -- almost a month after the January 14, 2008 disclosures revealed that Vytorin had failed the ENHANCE trial -- and who appears to have liquidated his entire portfolio on June 10, 2008. (DeJulius Objection, Ex. A.) Represented by the law firm of Verdiramo & Verdiramo, DeJulius contends that "Class Counsel have requested a 28% fee award in this case while requesting 17% in a companion case *with similar risk*." (DeJulius Objection at 1; emphasis added.) Mr. DeJulius, however, provides no analysis, much less any basis, for his premise that the two cases presented similar risk profiles. In reality, as we already have concluded, the Merck Action had a vastly higher risk profile. Apart from the overarching [*159] risk presented by the failure of Merck's shares to drop meaningfully on January 14, 2008 -- the Merck Plaintiffs had much more difficult issues of proof because the ENHANCE trial was conducted by Schering scientists, not Merck's, which provided significant additional challenges. In addition, the allegations that Schering defendant Carrie Cox, a Schering executive, had engaged in substantial insider trading might have assisted the Schering Plaintiff Group to establish *scienter*, but there were no similar insider trading claims in the Merck Action. [45]

45 DeJulius also argues without any support that "Class Counsel has not stated in its fee affidavits that no portion of the lodestar claimed in this case [Merck] was claimed in the Schering Plough case." (Objection at 1.) This assertion is contradicted by both the Merck Declaration and the Schering Declaration. The Merck Declaration unequivocally states: "Plaintiff Counsel have expended 105,341.76 hours in the investigation, prosecution and resolution of *the Action* against Defendants." (Merck Decl. ¶ 136; emphasis added.) The "Action" is explicitly defined as the "above-captioned action", which is the Merck Action. (Merck Decl. ¶ 1.) Likewise, [*160] the Schering Declaration attests that "Plaintiffs' Counsel have expended 125,177.49 hours in the investigation, prosecution and resolution of the Action." (Schering Decl. ¶ 152.) The "Action" is explicitly defined as the "above captioned action", which is the Schering Action. (Schering Decl. ¶ 1.)

Based on the conclusory premise that the Schering and Merck Actions presented identical risk, which we consider counterfactual, Mr. DeJulius submits an article authored by Brian J. Fitzpatrick entitled "An Empirical Study of Class Action Settlements and Their Fee Awards," *7 J. Empirical Legal Stud. 811 (2010)*, and argues that the fee awards in the Schering and Merck Actions should be conflated: "[T]he Court should treat the two fee requests in this case as one fee request, with one lodestar cross-check." (DeJulius Objection at 1.)

As a threshold matter, the Third Circuit in *Rite Aid* declined an objector's invitation to conflate two different, but related cases stating in language applicable here:

> Kaufmann contends we should assess the aggregate $334 million settlement fund created by the Rite Aid I and Rite Aid II settlements. Class counsel respond we should consider only the $126.6 million from [*161] the Rite Aid II settlement. Even though the settlement in Rite Aid II resulted in the termination of the Rite Aid I appeal, *these are separate settlements, involving distinct legal issues and risks with which class counsel had to contend.* The Rite Aid I settlement resulted in a recovery of $193 million with a fee award of $48.25 million. That fee award is not under review. *Accordingly, we will not conflate the two distinct settlements and will consider only the reasonableness of the attorneys' fees based on the Rite Aid II settlement.*

Rite Aid, 396 F.3d 294, 302, n. 11. (Emphasis supplied.) Here, the Schering and Merck Actions were separate class actions on behalf of completely different classes of securities holders in different public companies. As in *Rite Aid*, the cases involved different legal issues and risks -- and they had completely different Lead Plaintiffs. Mr. DeJulius provides no justification for his perfunctory contention and we can think of no sensible reason to conflate the fee applications -- after the cases were resolved.

Based on the single Fitzpatrick article, which is not predicated on Third Circuit jurisprudence or limited to securities class actions, [46] Mr. DeJulius [*162] argues that the "mean" (or average) "fee for cases that settle for between $100 million and $250 million is just slightly higher at 17.9%" and, therefore, "this court may not award class counsel more than 17% in either of the two cases." (DeJulius Objection at 2.) In language equally applicable to the DeJulius Objection here, the Third Circuit has squarely rejected slavish adherence to statistical "ranges" or "averages": "[T]hese varying ranges of attorneys' fees confirm that *a district court may not rely on a formulaic application of the appropriate range in awarding fees but must consider the relevant circumstances of the particular case.*" [47] *Cendant PRIDES, 243 F.3d at 736. Accord, Sullivan, 667 F.3d at 333.*

46 The article on which Mr. DeJulius relies is based on only an extremely limited two-year study of various types of class actions during 2006 and 2007 from across the country. As the article itself notes, "[T]he courts that use the percentage of the settlement method usually rely on a multifactor test" (which the article by footnote observes involves using different numbers of factors in different circuits) "and like most multifactor tests, it can plausibly yield a variety of [*163] results." (Class Action Fee Awards at p. 833.) Even though the limited two-year sample was country-wide, not from the Third Circuit, the sample size (*i.e.*, number of settlements) was limited in specific categories so the standard deviation was extremely high. Thus, the mean (or average) settlement between $100 and $250 million was 17.9%, but had a large standard deviation of 5.5%.

47 Even if formulaic application of ranges were not contrary to Third Circuit law, which it is, the reliance on this single article disregards other more germane studies that address securities class actions, such as the often cited surveys by courts in the Third Circuit, *see, e.g., Cendant PRIDES, 243 F.3d at 737* and *Lucent, 327 F. Supp. 2d at 440-441*, and others published by respected economists, such as NERA and Cornerstone Research . Mr. DeJulius provides no evidentiary foundation for considering Professor Fitzpatrick's study in the form of expert testimony or other evidentiary basis.

Of course, the DeJulius Objection is grounded in precisely on the kind of "formulaic" adherence to averages the Third Circuit has uniformly rejected. *Sullivan, 667 F.3d at 333; Cendant PRIDES, 243 F.3d at 736.* In *AT&T*, the [*164] Court of Appeals rejected the same discredited argument DeJulius makes here. There, the objector, like DeJulius, contended "[C]ourts are increasingly finding that class counsel can be reasonably compensated by a fee award that is substantially less than 20% of the settlement fund. . . They cite a study, which they cited to the District Court, concluding the average award for fees and costs in class action cases whose settlements were valued over $100 million was 15.1 %, and the average award for fees and costs in all cases was 18.4%." *455 F.3d at 172.* In upholding the district court's exercise of discretion in setting the fee, the Court of Appeals noted the distinctions advanced by class counsel to justify the award, which emphasized the "extent of litigation to create the Settlement Fund during the four years of litigation was 48,000 hours lead counsel spent on the case" and the "significant disparity between the originally requested fee award and the lodestar cross-check." *455 F.3d at 172.* As the *AT&T* court stated, "we think the multiplier of 1.28 is well within a reasonable range, particularly given the district court's emphasis on the significant time and effort devoted to the [*165] case by class counsel." *455 F.3d at 173.* In short, the Court of Appeals found the fee not to be excessive because the district court "justified its approval by demonstrating *the case was not an average case." (Id. at 173.)* In sustaining the district court's exercise of discretion, the Court of Appeals pointed to "the size of settlement fund, the difficulty and length of the litigation, and the fact that all the benefits accruing to class members are properly credited to the efforts of class counsel." *(Id. at 174.)* These are the exact same factors we have concluded are present here. The *reducto ad absurdum* of the theory espoused by Mr. DeJulius is that all the recent Third Circuit cases sustaining fee awards above 17%, which he designates as the "market rate," are wrong and should be reconsidered. In light of Third Circuit decisions, such as *Sullivan*, an *en banc* 2011 decision by the Third Circuit, sustaining a fee award of "25% of the $293 million principle settlement fund," Mr. DeJulius' *ipse dixit* "one percentage fits all" theory is contrary to the controlling Third Circuit law. *See also, AT&T, 455 F.3d at 172* (rejecting reliance on "a study . . . concluding average award for fees [*166] and costs in class actions valued over $100 million was 15.1%.")

Contrary to the DeJulius' Objection, *Sullivan* squarely held that the "fact-intensive *Prudential/Gunter* analysis must trump all other considerations." *667 F.3d at 331*. Accordingly, we conclude that Mr. DeJulius' contention that the "average" based on a single article constitutes a "market rate" that must dictate the amount of fees awarded in the Merck Action in which an enormous benefit for the class was produced entirely by the superb and dogged performance of Plaintiffs' Counsel should be rejected.

-- The Orloff Objection

The only other objection to the Merck fee application is by the Orloff Family Trust d/t/d 12/13/01 and Dr. Marshall Orloff (the "Orloff Objection") -- the same serial objectors who also objected to the Schering Fee Application. The objection to the Merck Fee Application appears to be cut from the same standard form as the Orloff Objection in the Schering Action -- even containing the identical incorrect caption denominating the court as the "Southern District of New Jersey." It erroneously states that "class counsel fails to disclose their actual lodestar in their motion. . . ." (Orloff Objection at 5.) In [*167] fact, the Merck Declaration is pellucid in stating:

> As summarized in Exhibit M hereto, Plaintiffs' Counsel have expended 105,341.76 hours in the investigation, prosecution and resolution of the Action against Defendants, for a collective lodestar value of $44,941,902.75 through May 31, 2013. Under the lodestar approach, a fee award of 28% of the Settlement Fund yields a multiplier of 1.34 on the lodestar. This multiplier is within the range of multipliers awarded in actions where similar settlements have been achieved. *See* Fee Memorandum at Legal Arg. § I.C.2 (i). (Emphasis supplied.)

Merck Declaration at ¶ 38. (Footnote omitted.)

The balance of the perfunctory objection is *in haec verba* with the Orloff Objection to the Schering Fee Application. For the reasons already discussed at length in the Schering Fee Application, we believe the Orloff objection lacks merit and should be rejected.

F. Merck Co-Lead Counsel's Request for Reimbursement for Litigation Expenses

Merck Co-Lead Counsel's fee application also seeks reimbursement for litigation expenses reasonably incurred in and necessary to the prosecution of the Action in the amount of $4,367,376.95 (Merck Decl. ¶¶ 154.) In support, each [*168] of the law firms comprising Plaintiffs' Counsel have submitted declarations attesting to the accuracy of their expenses along with a summary categorizing the type of expenses incurred and the amounts incurred in each category. (Merck Decl. Exs. G, H, I, J, K and L.)

It is well-established that the kinds of expenses for which reimbursement is sought may be properly recovered by counsel. *In re Safety Components, Inc. Sec. Litig., 166 F. Supp. 2d 72, 108 (D.N.J. 2001)* ("[c]ounsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action"); *Hall, 2010 U.S. Dist. LEXIS 109355, 2010 WL 4053547, at *23* ("Courts have generally approved expenses arising from photocopying, use of the telephone and fax, postage, witness fees, and hiring of consultants.").

As Co-Lead Counsel represents, "from the very beginning of the case, Co-Lead Counsel were well aware that they might not recover any of their out-of-pocket expenses until the Action was successfully resolved. Thus, Co-Lead Counsel were instructed to, and did, take significant steps to minimize expenses as much as practicable without jeopardizing the efficient [*169] prosecution of the case" (Merck Decl. ¶ 153.) Out of the total expenses, almost 66% were for outside experts and consultants $2,293,300 (54%) and document production copying costs ($503,388) (11%). (*See* Merck Decl. ¶¶ 156 to 157; *See* Merck Decl. Ex. G Declaration of Daniel L Berger, Esq., Ex 2 "internal copying $503,988.) Other major expenses included responding to third-party subpoenas ($191,835.74) and a mock trial ($200,493).

Members of the Lead Plaintiff Group have expressed views "that the litigation expenses being requested for reimbursement to Co-Lead Counsel are reasonable and expenses necessary for the prosecution and resolution of this complex securities fraud action. . . ." (Merck Decl. Ex. D, ¶ 17.) (*See also*, Ex. C, G&E expenses "were reasonable and necessary".) No objection to the reimbursement of litigation expenses has been filed which further supports the application. *In re Par Pharmaceutical, 2013 U.S. Dist. LEXIS 106150, 2013 WL 3930091 (D.N.J. July 29, 2013); Lucent, 327 F. Supp. 2d at 463.)*

In the Merck Action, the ratio of expenses to the lodestar reflects expenses that are under 10% of the value of time. We have also compared the litigation expenses requested here against NERA's analysis of [*170] the median expenses awarded in settlements of similar size in *Recent Trends In Securities Class Action Litigation: 2012 Full Year Review.* For settlements between $100 million and $500 million, the median expenses were 1.4% for settlements between 1996 and December 2009 and 1.2% for settlements between January 2010 and December 2012. Although, the $4,367,000 is well above the median which would be $3.0 million and $2.6 million, respectively, the members of the Lead Plaintiff Group and Co-Lead Counsel had every incentive control the expenditures -- they might never be recovered -- and the complexity, difficulty and length of the Merck Action could explain why the expenses would be among the half of cases above the median. The expenses, however, appear to be well within the 2.7% - 2.8% "mean" or average of the recovery for class actions as found by Professors Eisenberg and Miller, which would be $5,805,000 - $6,020,000. We note that in *AT&T*, where the lodestar was only $21.25 million based on 48,000 hours devoted to the case *(455 F.3d at 169, 172)*, the district court "approved class counsels' request for reimbursement of expenses in the amount of $5,465,996.79 finding the expenses were [*171] reasonably and appropriately incurred during the prosecution of this case, and sufficiently documented in the declarations." *455 F.3d at 160.*

On the current record, however, we are unable to approve the reimbursement request. Given the correlation between the time billed to a case and the expenses incurred (*see* Eisenberg & Miller at 26), we are concerned by the incongruity between the significantly higher amount of expenses incurred in the Merck Action compared to the much lower expenses incurred in the Schering Action, which had a significantly higher lodestar. In the Schering Action, the litigation expenses were $3,620,049.60 based on total hours of 126,177.49 and a total lodestar value of $59,450,360. In contrast, the litigation expenses in the Merck Action were more than $700,000 higher at $4,367,376.95 based on total hours of 105,341.76 for a total lodestar value of $44,941,902.75. Apparently, we are not alone in expecting the litigation expenses would be lower in the Merck Action than in the Schering Action. In the Notices of the Motion for Reimbursement of Litigation Expenses sent to the Classes in the two Actions, the Schering Class was informed reimbursement for litigation [*172] expenses would not exceed $5,250,000 while the Merck Class was informed reimbursement of litigation expenses would not exceed $5,000,000 -- $250,000 less than in the Schering Action. (*Compare* Schering Decl. Ex. 6, Ex. A. at p. 2 *with* Merck Decl. Ex. F, Ex. A. at p. 2.)

The Merck Declaration does not attempt to explain the disparity of more than $700,000. In light of the close coordination of discovery between the Merck and Schering Actions, the overlap of lead counsel, and the shared litigation expense funds, we are unable to rule out at least the possibility that some expenses that were properly attributable to the Schering Action inadvertently were shifted to the Merck Action.

Accordingly, we are constrained to temporarily defer our recommendation on this aspect of the application and request Merck Co-Lead Counsel to submit by September 6, 2013 a supplemental declaration containing additional information addressing the reason for the disparity and providing additional support for the request. We also request the supplemental declaration contain confirmation from Co-Lead Counsel that they have carefully reviewed the expenses from all the other law firms included in the lodestar and that [*173] none of the Merck expenses for which reimbursement is sought were incurred in connection with activities that under *Cendant II* are not appropriately charged to the Class as opposed to individual clients. [48] As no objection has been made to the Merck application for reimbursement of litigation expenses and no viable appeal could be filed on this specific aspect of the Merck Fee Application, we believe that ample time exists to receive the additional information and be able to provide the Court with our recommendation in advance of the Hearing.

48 Unlike the lodestar cross-check calculation, where we concluded the possible inclusion of time charges that *Cendant II* holds are properly chargeable to an individual client rather than the Class, made no difference to the "cross-check" because the multiple was so low, expenses incurred by any of the various law firms for services performed for individual clients who are not members of the Merck Lead Plaintiff Group or expenses related to performing other tasks for which compensation is foreclosed by *Cendant II*, no matter how small would adversely impact the Merck Class dollar for dollar.

G. Members of Merck Lead Plaintiff Group Request for Reimbursement [*174] **of Costs and Expenses**

The members of the Merck Lead Plaintiffs' firms also seek reimbursement of costs and expenses in the aggregate amount of $109,865.31 incurred by them directly relating to their representation of the Class. (Merck Decl. ¶ 163.) Each of the Lead Plaintiffs have submitted a declaration by a representative detailing the time and effort devoted to their roles as members of the Merck Lead Plaintiff Group and cost of their time which could not be devoted to their other regular activities. (Merck Decl. ¶ 161; *see* Exs. B, C, D and E to Merck Decl.)

As noted in our discussion of the Schering fee application, the Third Circuit favors encouraging class representatives, by appropriate means, to create common funds and to enforce laws -- even approving "incentive awards" to class representatives. *Sullivan, 667 F. 3d at 333, n.65.* Although the PSLRA specifically prohibits incentive awards or "bonuses" to Lead Plaintiff, it specifically authorizes an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4). Indeed, Congress explicitly [*175] acknowledged the importance of awarding appropriate reimbursement to class representatives. *See H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995)* ("The Conference Committee recognizes that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grants the courts discretion to award fees accordingly.")

Here, Merck Lead Plaintiffs, ABP, IFM, Jacksonville and Detroit, seek reimbursement of their reasonable costs and expenses incurred directly in connection with their representation of the Class in the amounts of $34,557.41, $45,682, $13,455.90 and $16,170, respectively. (Merck Decl. ¶ 161.) The amount of time and effort devoted to this Action by the Lead Plaintiffs is detailed in the accompanying declarations of their respective representatives. (*See* Merck Decl. Exs. B, C, D. and E.) The time charges sought range from $22 per hour to $161 per hour, which appear reasonable.

Here, members of the Merck Lead Plaintiffs Group have collectively devoted more than 700 hours to the Merck Action, which included time spent, *inter alia*: (i) reviewing pleadings and case materials; (ii) corresponding with Co-Lead [*176] Counsel about the status and strategy of the case; (iii) responding to document requests and producing documents; (iv) preparing for depositions and appearing at depositions; and (v) preparing for, attending and participating in, multiple in-person mediation sessions and other settlement negotiations. (*Merck Decl. Exs. B, C, D and E.*) We conclude the amount of time devoted by each of the members of the Merck Lead Plaintiff Group and the out-of-pocket expenditures for which reimbursement is sought appear reasonable.

H. The Merck Recommendations

In applying the various factors mandated by Third Circuit case law to determine under the POR method a reasonable fee to be awarded to Co-Lead Counsel, we have attempted "to evaluate what class counsel actually did and how it benefitted the class." *AT&T, 455 F.3d at 165-66.* Based on our analysis, we believe Co-Lead Counsel achieved an outstanding settlement for the Class which was due exclusively to Co-Lead Counsels' perseverance and skill in prosecuting a very difficult and lengthy case without any assistance from restatements, criminal convictions or companion SEC proceedings. Plaintiffs' Counsel undertook this case purely on a contingency basis [*177] and accepted the extremely significant risk their enormous amounts of time and money invested in this case might not be recovered. The suggested 28% fee award is supported by the three of the four institutional members of the Merck Lead Plaintiffs Group (while the fourth member ABP has reserved its view pending our Report and Recommendation) and the lodestar "cross-check" strongly confirms that a 28% fee award sought is extremely reasonable, reflecting the herculean effort demanded by this complex five-year litigation. Finally, we note the extremely low number of objections which the Third Circuit has characterized as a "rare phenomenon" reinforces our view. In light of the foregoing and for the reasons discussed at length in the Report and Recommendations, we recommend the Court **GRANT** Merck Co-Lead Counsels' motion for an award of attorneys' fees in the amount of 28% of the Settlement Fund (plus interest).

For the reasons stated above, we **DEFER** our recommendation with respect to the motion of Co-Lead Counsel to be reimbursed for expenses in the amount of $4,367,376.95, pending receipt of supplemental information requested *no later than September 6, 2013.*

We also recommend that the Court [*178] **GRANT** the motion of Lead Plaintiffs to be reimbursed for costs and expenses in the total amount of $109,865.31.

Dated: August 27, 2013

STEPHEN M. GREENBERG

/s/: Stephen M. Greenberg

SPECIAL MASTER

JONATHAN J. LERNER

/s/: Jonathan J. Lerner

SPECIAL MASTER