UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE MERCK & CO., INC. SECURITIES, DERIVATIVE & "ERISA" LITIGATION	MDL No. 1658 (SRC) Civil Action No. 05-1151 (SRC) Civil Action No. 05-02367 (SRC)
THIS DOCUMENT RELATES TO: THE CONSOLIDATED SECURITIES ACTION	

REPORT AND RECOMMENDATION OF THE SPECIAL MASTER RELATING TO THE AWARD OF ATTORNEYS' FEES AND EXPENSES

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I.

INTRODUCTION

In this Report and Recommendation, I address a motion for an award of attorneys' fees and expenses arising out of the settlement of a securities class action brought on behalf of certain shareholders of Merck & Co., Inc. (the "Action"). The Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Motion") is supported by the Joint Declaration of Salvatore J. Graziano Esq., a partner of Co-Lead Counsel Bernstein Litowitz Berger & Grossman LLP, David A. P. Brower Esq., a managing director of Co-Lead Counsel Brower Piven, Matthew A. Kupillas Esq., a partner of Co-Lead Counsel Milberg LLP, and Mark Levine Esq., an attorney at Co-Lead Counsel Stull, Stull & Brody ("Joint Decl."). To the extent practicable, I have sought to verify the statements in the Joint Declaration by reference to filed documents and publicly available information. No material discrepancies were discovered.

The Action involves securities claims brought against Merck and individual defendants under Sections 10(b), 20(a) and 20A of the Securities Exchange Act of 1934 based on allegedly materially false and misleading statements made regarding the possibility that Vioxx, a drug sold by Merck beginning in May of 1999 and removed from the market on September 30, 2004, increased cardiovascular risks.

The Action's core allegations are that the corporate and individual defendants made a "series of material false and misleading public statements concerning Vioxx's purported CV safety and reasons for the results of the VIGOR study"; that "Defendants' material misstatements and omissions artificially inflated the prices of Merck common stock (and distorted the prices of Merck options) during the Class Period"; and that "Defendant [Dr. Edward] Scolnick sold $32.4 million worth of Merck common stock on October 25, 2000 based on material undisclosed adverse information about the safety of Vioxx." (Joint Decl. ¶ 33; *see* Corrected Sixth Amended Consolidated Complaint filed June 20, 2013)

Early efforts to resolve the Action were unsuccessful. Finally, on December 17, 2015 — after more than twelve years of hard-fought litigation and only three months prior to trial — the parties entered into an agreement in principle to settle. (Joint Decl. ¶ 205)

The settlement provides for a Settlement Fund of $1.062 billion and, if approved, will "represent the second largest securities class action recovery within the Third Circuit and the largest securities class action settlement ever with a pharmaceutical company defendant." (Joint Decl. ¶ 209)

On February 8, 2016, Co-Lead Counsel moved for approval of the settlement and the award of attorneys' fees equal to 20% of the Settlement Fund and for reimbursement of litigation expenses in the amount of $9,473,356.

By Order entered February 11, 2016, the Court appointed me as Special Master. Among other tasks, the Order directed the Special Master "[t]o prepare and file with the Court a report and recommendation regarding the fairness and reasonableness of Plaintiffs' Counsel's Application and any other requests for a payment of attorneys' fees and/or expenses by any other person in connection with the Securities Class Actions." (February 11 Order ¶ 2.C) 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, 302 (3d Cir. 2005) (Scirica, C. J.) ("*Rite Aid*")), and that "a robust and thorough judicial review of fee applications is required in all class action settlements." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 (3d Cir. 2011) ("*Sullivan*").

I am mindful that the objective of my review is to "evaluate what class counsel actually did and how it benefitted the class." *In Re AT&T Corp.*, 455 F.3d 160, 165-166 (3d Cir. 2006) ("*AT&T*"), quoting *In re Prudential Ins. Co. of Am.*, 148 F.3d 283, 342 (3d Cir.1998) ("*Prudential*"). In furtherance of the foregoing, in this Report and Recommendation, I (i) describe the background of the Action; (ii) describe the prosecution of the Action; (iii) discuss the applicable legal standards; and (iv) analyze the fee and expense applications. I shall then provide my recommendations.

II.

BACKGROUND

Vioxx is one of a class of pain relievers categorized as non-steroidal anti-inflammatory drugs ("NSAIDs"). Merck developed Vioxx to relieve pain with fewer adverse gastrointestinal ("GI") complications than other NSAIDs in the market. (Joint Decl. ¶ 18) On May 20, 1999, the FDA approved Vioxx for "relief of the signs and symptoms of osteoarthritis, management of acute pain [in adults] and treatment of primary dysmenorrhea." (*Id.* ¶ 23) Prior to the FDA's approval of Vioxx, Merck conducted a study, Protocol 023, to determine the effects of Vioxx on the kidneys. Protocol 023 concluded that patients receiving Vioxx expressed decreased levels of a substance which inhibits blood clotting, an effect that could lead to adverse cardiovascular ("CV") events, *e.g.*, heart attacks. (*Id.* ¶¶ 20-22)

Also prior to the approval by the FDA, Merck initiated another study, known as VIGOR, designed to measure Vioxx's GI benefits. Merck concluded that VIGOR confirmed Vioxx's GI benefit. However, the VIGOR study also demonstrated a statistically significant incidence of CV events. (Joint Decl. ¶ 25) Merck and another defendant publicly advanced another hypothesis (the "Naproxen Hypothesis") as a benign explanation for the VIGOR CV results and continued to make statements throughout the Class Period "touting" the safety of Vioxx. (*Id.* ¶ 27)

Ultimately, Merck initiated another study, APPROVe, which was overseen by an independent External Safety Monitoring Board (the "ESMB"). As a result of a meeting held on September 17, 2004, the ESMB recommended that the APPROVe trial be halted because of concerns regarding the incidence of increased CV events. (Joint Decl. ¶ 31) Following that meeting, Merck withdrew Vioxx from the world-wide market on September 30, 2004. (*Id.* ¶ 32)

III.

THE PROSECUTION OF THE ACTION

A. The Initial Complaint and Appointment of Initial Lead Plaintiffs and Lead Counsel

Prior to the withdrawal of Vioxx from the world-wide market, the first securities class action complaint against Merck related to Vioxx was filed on November 6, 2003 by Frank Pringle in the Eastern District of Louisiana. The complaint was amended by Mr. Pringle on November 20, 2003 to include the unidentified names of Merck's insurance companies under the Louisiana statute permitting direct actions against insurers. (Joint Decl. ¶¶ 35-36)

On February 26, 2004, Judge Engelhardt of the Eastern District of Louisiana approved a stipulation appointing Richard Reynolds, Steven LeVan, Jerome Haber, and Marc Nathanson as Co-Lead Plaintiffs and approved Milberg Weiss Bershad Hynes & Lerach LLP and Stull, Stull & Brody as Co-Lead Counsel. On August 9, 2004, Lead Plaintiffs added Scolnick as a defendant in their Second Amended Complaint. On November 8, 2004, plaintiffs filed their Third Amended Complaint, which expanded the Class Period to one ending on October 29, 2004. (Joint Decl. ¶¶ 37-42)

B. The Transfer of the Action to the District of New Jersey

Following Merck's withdrawal of Vioxx on September 30, 2004, a number of additional Vioxx-related cases against Merck were filed in various jurisdictions including the District of New Jersey, the Eastern District of Louisiana, and the Eastern District of Pennsylvania. Several plaintiffs in these actions filed motions in the respective courts to replace or supplement the appointed Lead Plaintiffs and Co-Lead Counsel. (Joint Decl. ¶ 43)

On November 10, 2004, defendants moved the Judicial Panel on Multidistrict Litigation for an order transferring and coordinating the lawsuits. (Joint Decl. ¶ 43) By order of the Judicial Panel on Multidistrict Litigation dated February 23, 2005, all actions pending in the

Eastern District of Louisiana were transferred to the District of New Jersey and assigned to Judge Stanley R. Chesler for coordinated or consolidated proceedings. (Joint Decl. ¶ 48)

On April 8, 2005, the District Court entered an Order confirming the appointment of Richard Reynolds, Steven LeVan, Jerome Haber, and Marc Nathanson as Lead Plaintiffs. The Order also confirmed Milberg Weiss Bershad Hynes & Lerach LLP and Stull, Stull & Brody as Co-Lead Counsel. Finally, the Order denied as moot motions by other investors to intervene and have themselves appointed as lead plaintiffs. (Joint Decl. ¶¶ 49-50)

On January 25, 2007, the District Court ordered the implementation of a stipulation which 1) granted the substitution of The Public Employees' Retirement System of Mississippi ("PERSM") as Co-Lead Plaintiff in place of Marc Nathanson and 2) granted the addition of Bernstein Litowitz Berger & Grossman LLP and Brower Piven as Co-Lead Counsel in the action. (Joint Decl. ¶¶ 61-65)

C. Partial Lift of the PSLRA Discovery Stay

An automatic stay of discovery in the Action was imposed by the PSLRA. On May 9, 2005, plaintiffs filed a motion to partially lift the discovery stay for purposes of obtaining copies of documents that defendants previously produced to litigants in other Vioxx-related civil actions against Merck and documents produced to government entities. On July 8, 2005, the District Court granted plaintiffs' motion to partially lift the discovery stay. (Joint Decl. ¶¶ 51-55)

D. Litigation with the Merck Insurers

Plaintiffs filed their Fourth Amended Complaint on June 9, 2005. The Fourth Amended Complaint named twenty of Merck's insurers as defendants under the provisions of the Louisiana Direct Action Statute. However, on March 9, 2006 and April 4, 2006, the parties stipulated to the dismissal of the claims against the Merck insurers. (Joint Decl. ¶¶ 56-58)

E. Defendants' Original Motion to Dismiss the Complaint

On August 12, 2005, defendants moved to dismiss the Fourth Amended Complaint by arguing, among other things, that all of plaintiffs' claims were time-barred. Defendants argued

that investors were placed on inquiry notice of the facts on which plaintiffs' claims were based by no later than September 2001. Based on that assertion, defendants argued that plaintiffs' claims were barred by the applicable statute of limitations as they did not file suit until November 2003, more than two years later. (Joint Decl. ¶ 59) On April 12, 2007, the District Court granted defendants' motion to dismiss on statute of limitations grounds and dismissed the Action in its entirety as time-barred. *In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig*., 483 F. Supp. 2d 407 (D.N.J. 2007).

F. Plaintiffs' Appeal to the Third Circuit

On May 9, 2007, plaintiffs appealed the dismissal to the U.S. Court of Appeals for the Third Circuit. On September 9, 2008, the Third Circuit reversed the District Court's dismissal of the Action, holding that the District Court had erred in determining that plaintiffs were time-barred by inquiry notice. *In re Merck & Co., Inc., Derivative & "ERISA" Litig*., 543 F.3d 150 (3d Cir. 2008).

G. The Supreme Court Decision

On January 15, 2009, defendants filed a petition for writ of certiorari with the United States Supreme Court, seeking review of the Third Circuit's decision. On May 26, 2009, the Supreme Court granted defendants' petition. On April 27, 2010, the Supreme Court unanimously affirmed the decision of the Third Circuit holding that the Action was not time-barred by inquiry notice. *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010).

H. Defendants Again Move to Dismiss the Complaint

On March 10, 2010, plaintiffs filed a Consolidated Fifth Amended Complaint designed to reflect new factual developments. Defendants moved to dismiss the Action on various grounds.

On August 8, 2011, the District Court granted the motions in part, but largely denied defendants' motions to dismiss. While dismissing portions of the allegations, the District Court

upheld most of the Section 10(b) claims and upheld the Section 20A insider trading claim as to Defendant Scolnick. (Joint Decl. ¶¶ 86-94)

I. Class Certification and Relevant Discovery

Plaintiffs filed a motion for certification of a plaintiff class on April 10, 2012. Plaintiffs sought certification of a class comprised of all persons and entities who, from May 21, 1999 to September 29, 2004 inclusive, purchased or otherwise acquired Merck common stock or call options, or sold Merck put options, and were damaged thereby. (Joint Decl. ¶ 95)

The parties engaged in extensive class discovery, which included defendants' requests for production of documents, interrogatories, numerous depositions, and disputes regarding expert opinions. (Joint Decl. ¶¶ 96-102) Plaintiffs' motion for class certification was vigorously opposed by defendants.

On January 30, 2013, the District Court certified a plaintiff class consisting of all persons and entities who, from May 21, 1999 to September 29, 2004 inclusive, purchased or otherwise acquired Merck common stock or Merck call options, or sold Merck put options, and appointed the Lead Plaintiffs as Class Representatives and Co-Lead Counsel as Class Counsel. (Joint Decl. ¶ 103) On August 6, 2013, the District Court directed that notice be sent to potential members of the certified class and, beginning on September 4, 2013, more than 1.5 million copies of the class notice were sent to potential class members. (Joint Decl. ¶¶ 104-105)

J. Sixth Amended Complaint

On March 15, 2013, plaintiffs moved for leave to file a Sixth Amended Complaint seeking to add further alleged misstatements. Defendants opposed the motion. On May 29, 2013, the District Court granted plaintiffs' request to file an amended complaint in part and denied it in part. (Joint Decl. ¶¶ 106-110)

K. Defendants' Motion for Judgment on the Pleadings

On May 3, 2012, defendants filed a motion for judgment on the pleadings. This motion was opposed by plaintiffs. On August 29, 2012, the Court granted in part and denied in part the

motion. Plaintiffs were successful in upholding the core allegations of the Action. (Joint Decl. ¶¶ 111-113)

L. Fact Discovery

Plaintiffs engaged in extensive discovery efforts, which involved lengthy document requests and multiple discovery disputes. In addition to pursuing discovery from defendants, plaintiffs also served more than 60 subpoenas on third parties requesting production of documents. Plaintiffs' counsel reviewed more than 35.8 million pages of documents produced by defendants and third parties. Additionally, plaintiffs took 31 fact depositions of current and former Merck employees and third parties throughout the United States (and one in Italy) in 2012 and 2013. (Joint Decl. ¶¶ 114-135)

Given the complex nature of the Action, both sides required the use of numerous highly qualified experts. Plaintiffs' counsel retained and consulted with several experts about various aspects of the Action. The work required the preparation of lengthy expert reports and rebuttal reports and the involvement in expert depositions. In July 2013, plaintiffs served six expert reports on defendants consisting of more than 750 pages. In August 2013, defendants served seven expert reports on plaintiffs. In September 2013, plaintiffs served seven expert rebuttal reports on defendants. (Joint Decl. ¶¶ 136-139)

Expert discovery followed submission of the expert reports. In October and November 2013, plaintiffs and defendants deposed all fourteen experts who had submitted reports. (Joint Decl. ¶ 140)

M. Defendants' Contention Interrogatories

On June 13, 2013, Defendants Merck and Reicin served on plaintiffs their First Set of Contention Interrogatories. Defendant Scolnick served a separate set on plaintiffs. On December 13, 2013, plaintiffs served their Responses and Objections to the Defendants' Contention Interrogatories. The Responses cited to more than 1,350 documents and spanned 543 single-spaced pages. (Joint Decl. ¶¶ 141-142)

N. Defendants' Motions for Summary Judgment

On January 17, 2014, defendants moved for summary judgment. They argued there was no evidence any defendant intentionally or recklessly deceived investors. Defendants further argued that plaintiffs could not prove damages because the facts demonstrated that Vioxx was commercially viable. Defendant Scolnick also moved for summary judgment, contending that plaintiffs could not establish their Sections 10(b), 20A and 20(a) claims against him. After extensive briefing, on May 13, 2015, the District Court granted defendants' summary judgment motions with respect to statements made by Merck between May 21, 1999 and March 26, 2000 and with respect to a December 2001 statement by Defendant Scolnick. The District Court denied defendants' summary judgment motions as to all other matters. (Joint Decl. ¶¶ 143-148)

O. Co-Lead Counsel Conduct Mock Trial

Co-Lead Counsel conducted a mock trial exercise on July 29-30, 2014 in order to test plaintiffs' presentation of the factual evidence. Co-Lead Counsel were also planning for a second round of mock jury exercises, but the settlement made that moot. (Joint Decl. ¶ 149)

P. *Daubert* Motions and Motions *In Limine*

Plaintiffs filed motions to limit the testimony of two defense experts. On August 28, 2015, defendants filed seven motions to limit testimony of certain of plaintiffs' experts and witnesses who were arguably experts. Oppositions to all of these motions were filed. As of the time of settlement, the District Court had not yet ruled on these outstanding motions. (Joint Decl. ¶¶ 150-168) Plaintiffs had also already drafted nineteen motions *in limine* that were never filed due to the timing of the settlement. (Joint Decl. ¶ 169) Plaintiffs had also prepared to file a motion to bifurcate the trial into common and plaintiff-specific stages, but, again, the settlement occurred prior to filing. (Joint Decl. ¶ 171)

Q. Exchange of Pretrial Materials and the Joint Pretrial Order

On August 27, 2015, the District Court issued an Order setting trial to begin on March 1, 2016, with the final pretrial conference to occur on January 8, 2016. (Joint Decl. ¶ 173)

Throughout the summer and fall of 2015, the parties participated in numerous teleconferences and exchanges relating to the Final Joint Pretrial Order. (Joint Decl. ¶¶ 174-180) On November 20, 2015, plaintiffs filed a proposed Final Pretrial Order consisting of 2,170 pages. The parties engaged in lengthy conferences in December 2015 regarding the proposed Final Pretrial Order. (Joint Decl. ¶¶ 178-180)

R. Settlement Discussions

The parties engaged in prolonged settlement negotiations over several years during the Action, including settlement conferences and mediation efforts before Judge Chesler, Magistrate Judge Waldor, and the undersigned, former U.S. District Judge Layn Phillips. The District Court held settlement conferences with the parties on October 27, 2011, March 23, 2012, May 14, 2012, and September 30, 2013. I held a meeting with plaintiffs on October 8, 2014 and also held a joint mediation session on October 13, 2014 with all parties. These efforts were unsuccessful. (Joint Decl. ¶¶ 203-204)

After the District Court's summary judgment ruling, the parties engaged in a further mediation session before me on September 11, 2015. This session again did not result in a settlement. However, following the mediation, there were a series of discussions among the parties, the District Court, and myself that led to an agreement in principle to settle the action on December 17, 2015. After agreement was reached, Co-Lead Counsel drafted the settlement stipulation and continued to work with defendants to finalize its terms. (Joint Decl. ¶¶ 205-206)

S. The Settlement

The total settlement amount of $1.062 billion consists of $830 million for the Settlement Class Fund and $232 million for the Fee/Expense Fund. To the extent the District Court should award attorneys' fees and expenses in an amount less than the $232 million, any remaining amount in the Fee/Expense Fund will be credited to the Settlement Class Fund and will not revert back to defendants or their insurers.

On February 8, 2016, plaintiffs filed a motion for preliminary approval of the settlement with the District Court and requested approval of the notice to the settlement class. On February 11, 2016, the Court entered the Preliminary Approval Order. This preliminarily approved the settlement, certified the settlement class for settlement purposes, and set a schedule governing the deadlines for settlement proceedings. (Joint Decl. ¶¶ 207-208)

IV.

DISCUSSION OF APPLICABLE LEGAL STANDARDS

A. The Legal Standard Applicable to Common Fund Cases.

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 Diet Drugs*, 582 F.3d 524, 537-538 (3d Cir. 2009). Attorneys' fee requests are generally assessed under either the percentage-of-recovery method ("POR") or the lodestar method. *Sullivan*, 667 F.3d at 330. The POR method is "generally favored" in the Third Circuit in cases involving a settlement which creates a common fund like the matter at hand. *Rite Aid*, 396 F.3d at 300. The POR method gives courts the opportunity to "award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." *Id*.

The PSLRA also supports the POR method in requiring that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." PSLRA, 15 U.S.C. §78u-4(a)(6). This has made the POR method the standard for determining whether attorneys' fees are reasonable in securities class actions. *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 n.7 (3d Cir. 2005) ("*Cendant*"). The lodestar method can be used "to cross-check the reasonableness of a [POR] fee award." *AT&T*, 455 F.3d at 164.

B. The Applicable Reasonableness Factors

In common fund cases like this one, the district court should consider the following factors:

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

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) ("*Gunter*").

These factors were not meant to be exhaustive. *AT&T*, 455 F.3d at 165. The following factors may also be relevant:

> (1) 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; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any "innovative" terms of settlement.

AT&T, 455 F.3d at 165 *citing Prudential*, 148 F.3d at 338-340.

As each case is different, these factors "need not be applied in a formulaic way . . . and in certain cases, one factor may outweigh the rest." *Gunter*, 223 F.3d at 195 n.1. As the Third Circuit has emphasized, "[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.'" *AT&T*, 455 F.3d at 165-166, *quoting Prudential*, 148 F.3d at 342.

In reviewing an attorneys' fees award, the Third Circuit has further instructed that the district court should consider "the *Gunter* factors, the *Prudential* factors, and any other factors that are useful and relevant with respect to the particular facts of the case." *AT&T*, 455 F.3d at 166.

V.

ANALYSIS OF FEE AND EXPENSE REQUEST

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

The initial factor to be considered under *Gunter* is an assessment of the size of the fund created and the number of persons who benefit. The size of the fund is indicative of the success

obtained through a settlement, and, accordingly, a significant consideration in evaluating the reasonableness of an award for attorneys' fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("[T]he most critical factor is the degree of success obtained.") and *In re Schering-Plough Corp. Sec. Litig.*, 2009 WL 5218066, at *6 (D.N.J. Dec. 31, 2009).

The settlement resulted in a $1.062 billion Settlement Fund. The size of the settlement would rank eleventh among class action settlements according to the NERA Consulting Group's "Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review" ("NERA 2015") and first among class action settlements involving a pharmaceutical company. The Settlement Fund also compares well to the median class action settlement value as a percentage of investor losses, i.e. "the recovery compared to a rough measure of the size of the case", as described in NERA 2015. The maximum recoverable damages were $13.4 billion, assuming complete victory at trial on all remaining damage theories. (Joint Decl. ¶ 241) Accordingly, the $1.062 billion settlement represents approximately 8% of the maximum recoverable damages. The "Median of Settlement Value as a Percentage of Investor Losses" as reported in NERA 2015 (Figure 29 at p. 33) in matters involving losses of $10 billion or more was 0.6% — substantially smaller than the 8% achieved in this Action.

As of April 28, 2016, 1,907,361 Settlement Notice Packets were mailed to potential Settlement Class Members. (Decl. of Stephanie A. Thurin at ¶ 10 of Exh. 2 to the Joint Decl.) Accordingly, it appears likely that a significant number of Merck investors will benefit from the settlement.

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

Through April 28, 2016, 1,907,361 Settlement Notices have been mailed to potential class members. (Joint Decl., Exh. 2 ¶ 10). The Settlement Notices advised the potential class members that up to $232 million of the $1.062 billion Settlement Fund would be allocated to the payment of legal fees and expenses. Only fourteen objections were received by the May 14, 2016 deadline. (Reply Memorandum in Further Support of (1) Lead Plaintiffs' Motion for Final

Approval of Settlement and Approval of Plan of Allocation; and (2) Co-Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses dated May 24, 2016, p. 2) Of the fourteen objections received, only four objected to the request for attorneys' fees.

These objections were either extremely general (the amount is "too high") or advocate methods inconsistent with Third Circuit law, *e.g.*, the lodestar method based upon a review of "detailed billing records" or disregarding the *Gunter* factors. The four objections submitted do not appear to be "substantial," within the meaning of *Gunter*.

The absence of a meaningful number of objections suggests that the class members support approval of the fee application, or, at least, have no serious problem with the request. The Third Circuit in *Rite Aid* noted "[t]he class' reaction to the fee request supports approval of the requested fees." 396 F.3d at 305. In *Rite Aid*, notice of the fee request and the terms of the settlement were mailed to 300,000 class members, and only two objected. The Third Circuit agreed with the district court that "such a low level of objection is a 'rare phenomenon.'" *Id*.

Four objections to the fee request in response to the mailing of 1,907,361 Settlement Notices is also a "rare phenomenon," suggesting that the class members do not believe that the request for 20% of the total award is unreasonable.

C. <u>The Third Factor: the Skill and Efficiency of the Attorneys Involved</u>

The standard for measuring the skill and efficiency of counsel is "the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, 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 WL 4053547, at *19 (D.N.J. Oct 13, 2010) ("*Hall*").

The result achieved for the Class Members was the result of the skill and perseverance of counsel in multiple respects. The skill of plaintiff's counsel was particularly evidenced by the successful results they achieved in a series of potentially dispositive procedural motions in the District Court, the Third Circuit and the United States Supreme Court.

First, the District Court granted defendants' motions to dismiss the Action in its entirety on the basis that it was time-barred as a result of receipt of inquiry notice by the investors on or prior to November 6, 2001 – effectively ending the Action if the decision were upheld. Plaintiffs successfully appealed the decision to the Third Circuit and then defended their victory in the United States Supreme Court, where they obtained a unanimous decision in their favor. *See In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, 543 F.3d 150 (3d Cir. 2008); *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010).

Second, following the decision of the Supreme Court, defendants moved to dismiss on different grounds than the previous motion. Plaintiffs successfully resisted the motion, achieving substantial victory.

Third, plaintiffs successfully resisted defendants' motion for judgment on the pleadings in substantial part.

Fourth, plaintiffs successfully obtained class certification over vigorous opposition from defendants.

Fifth, plaintiffs successfully moved for leave to file a Sixth Amended Complaint.

Sixth, plaintiffs successfully resisted defendants' summary judgment motions, which would have ended the Action.

Each of the foregoing negative consequences was avoided as a result of the skill provided by Co-Lead Counsel, which was representative of the highest degree of advocacy of the plaintiffs' securities class action bar in the United States. Avoidance of those negative consequences unquestionably increased the ultimate settlement value of the Action.

The question of efficiency in litigation with a duration of more than twelve years and the procedural and subject matter complexity of this case is a relative one. In light of the vigorous opposition mounted by defendants and the sheer volume of discovery, efficiency tends to take a back seat to survival. However, I did not note any obvious indications of inefficiency on the part of plaintiffs' counsel, and the substantial risk of non-payment (discussed below) tends to encourage efficiency by counsel acting on a pure contingency basis.

Also significant is the fact that defendants were well represented by experienced, nationally regarded counsel, who similarly performed at the highest levels of advocacy in their field. "'The quality of opposing counsel is also important in evaluating the quality of counsel's work.'" *Hall*, 2010 WL 4053547, at *19 (citation omitted); *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525 (GEB), 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, one of the defense firms in this case, were "formidable opposing counsel" and among "some of the best defense firms in the country"). Defense counsel in the Action were among the very best of the securities defense bar – Cravath, Swaine & Moore LLP, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Schulte Roth & Zabel LLP, and Hughes Hubbard & Reed LLP. The success of plaintiffs' counsel in achieving the settlement "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).

In sum, the overall quality of the services provided to the class by plaintiffs' counsel supports the reasonableness of the fee request.

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

The Third Circuit reasoned that 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." *In re Cendant Corporation PRIDES Litigation*, 243 F.3d 722, 741 (3d Cir. 2001). The Action easily satisfies the above description.

The Action continued for over twelve years and involved multiple defendants, extensive discovery, multiple procedural motions, and appeals to the Third Circuit and ultimately the United States Supreme Court. Settlement occurred only three months prior to the scheduled trial date. While plaintiffs believed they had a strong case, defendants had significant defenses related to scienter, falsity, loss causation and damages in addition to procedural defenses related to the statute of limitations and class certification. The defense yielded no ground with respect to

the facts and the law – from motions to dismiss, a petition for writ of certiorari to the Supreme Court, a contested class certification process, motions for judgment on the pleadings and summary judgment to, at the time of settlement, pending *Daubert* motions and motions *in limine*. The defense continuously signaled that it was prepared to try the Action with a litigation team led by two of the country's leading commercial trial lawyers, fully committed to the trial of the case.

The theory of the case, while not unique in the context of securities cases against pharmaceutical companies, was factually complex, requiring plaintiffs' counsel to understand and, if tried, explain complex scientific, economic and statistical facts to a lay jury. Counsel relied on seven experts for critical scientific, statistical and economic testimony and defendants filed motions *in limine* to exclude all or portions of the planned testimony of six of the experts. If successful, those motions would have hindered, if not crippled, plaintiffs' presentation of their case. (Joint Decl. ¶¶ 154 – 166)

I conclude that the Action was extremely complex and lengthy and supports the requested attorneys' fees.

E. <u>The Fifth Factor: The Risk of Non-Payment</u>

The Third Circuit held in *Rite Aid* that "significant risks of non-payment or non-recovery… weighs in favor of approving the fee request." 396 F.3d at 304. Included in the risk of non-payment analysis is an assessment of the "risks of establishing liability." *Id.* Moreover, "[c]ourts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval." *Schering-Plough ENHANCE ERISA Litig.*, 2012 WL 1964451, at *7 (Cavanaugh, J.) ("*Schering-Plough ERISA*").

I have reviewed certain of the filings and opinions in the Action. Based on that review, I conclude that plaintiffs faced substantial obstacles to obtaining a successful result at trial – and hence faced a significant risk of non-payment. The arguments asserted by defendants were

credible, and as discussed above, defendants' dispositive challenges to plaintiffs' case were numerous and fiercely litigated.

Plaintiffs' case was largely based upon the proposition that defendants knew that Vioxx was unsafe, yet the FDA (which had access to the same studies as defendants) had never withdrawn its finding that Vioxx was safe and effective; defendants voluntarily withdrew Vioxx from the market as soon as the APPROVe results were unblinded. The Supreme Court has held that, in order to prevail on a Section 10(b) claim, a plaintiff must prove that the defendant acted with scienter, defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Establishing the requisite scienter at trial would be difficult in light of the fact that defendants were not even alleged to have concealed the results of their studies from the public or the FDA and voluntarily withdrew Vioxx from the market immediately upon receiving definitive proof that Vioxx was unsafe.

Plaintiffs also faced significant difficulties in establishing loss causation. In *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005), the Supreme Court held that a Section 10(b) plaintiff must prove more than the fact that it suffered a loss by reason of investing in a defendant's stock in reliance on a misrepresentation – the plaintiff must also prove that the decline in value of the stock was actually the result of the misrepresentation. Defendants presented substantial arguments (supported by expert testimony) rebutting plaintiffs' theory of loss causation. Although plaintiffs' experts supported their theory of loss causation, it is uncertain whether the jury would accept the views of plaintiffs' experts or defendants' experts. This problem was exacerbated by the fact that plaintiffs' damages theories were aggressive, and asserted at least three different types of damages.

Furthermore, Plaintiffs' counsel prosecuted this case on a purely contingent fee basis, with the concomitant risks of little, or no, recovery and therefore no compensation for the time expended over a period of twelve years and no recovery of the significant expenses advanced by Co-Lead Counsel throughout the duration of the Action. The twelve year duration of this case is significantly beyond the median years from filing of a complaint to resolution which ranged from

a low of 2.1 years and a high of 3.1 years for cases filed from January 1996 to December 2013 (NERA 2015, Figure 23 at p. 25). The Action was complex, expensive and lengthy and there was no guarantee of compensation for the enormous amount of time expended by plaintiffs' counsel, the expense of compensating staff during the pendency of the Action and the $9,473,356 of expenses incurred in order to ensure that adequate resources were dedicated to the case.

The risk of non-payment and the significant expenses in prosecuting the Action could lead to plaintiffs' counsel failing to take those steps necessary to maximize the results for the class. The willingness of counsel to incur substantial expenses (in time and money) and to push the case to the brink of trial belies any suggestion that plaintiffs' counsel were lax in fulfilling their obligations. In spite of the enormous investment and risks associated with doing so, counsel continued to prosecute the Action to the threshold of trial and, ultimately, to settlement. The willingness to proceed likely resulted in a better result for the class while exposing counsel to continued risk.

I conclude that a significant risk of non-payment existed from the initiation of the Action until the settlement. The substantial investment of time and expenditure of money required of plaintiffs' counsel to meet their fiduciary obligations resulted in significant risk, and I find that the risk of non-payment weighs strongly in favor of the requested attorneys' fees.

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

Plaintiffs' counsel assert that they expended 448,502 hours of time with a value of $205,611,776 on the Action. Although the number of hours seems quite high, the duration of the Action and the aggressive nature of the defense tends to support that claim. This factor supports the requested fee award.

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

The seventh *Gunter* factor is a comparison of the requested fee to those permitted in similar cases. The requested fee is $212,400,000 or 20% of the $1,062,000,000 Settlement Fund.

Plaintiffs' Counsel identified a number of Third Circuit "mega-fund" recoveries of over $100 million where the attorneys' fees award equaled or exceeded the POR requested in this case including *In re DaimlerChrysler AG Sec. Litig.*, No. 00-0993 (KAJ), slip op. at 1 (D. Del. Feb. 5, 2004) (awarding 22.5% of $300 million settlement); *Sullivan*, 667 F.3d at 333 (affirming award of 25% of $295 million settlement); *In re Bristol-Myers Squibb Sec. Litig.*, 2007 WL 2153284, at *1 (3d Cir. July 27, 2007) (affirming award of 19.77% of $185 million settlement, which equaled the lodestar)*; In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340-SLR, Dkt. No. 543 (D. Del. 2009) (33 1/3% fee from $250 million settlement fund); *Automotive Refinishing Paint*, 2008 WL 63269, at *1 (32.6% attorneys' fee from settlements totaling $105.75 million); *In re Lucent Tech., Inc. Sec. Litig*., 327 F. Supp. 2d 426, 441-443 (D.N.J.2004) (awarding 17% of $517 million settlement, finding fee was "considerably less than the percentages awarded in nearly every comparable case" and collecting cases and stating "where cases involving comparable risks . . . have settled for more than $100 million, courts have typically awarded fees in the range of 25% to 30%"). *See* Memorandum of Law in Support of Co-Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses filed April 29, 2016 ("Fee Memorandum"), pp. 6-8.

Of course, these figures should not be applied "in a formulaic way." *Gunter*, 223 F.3d at 195 n.1. Variables such as the stage at which a case settles, the amount of discovery conducted, the complexity of the issues and the amount of hours necessary to conclude the case must be considered. Here, those "other factors" tilt in favor of the requested award. As discussed above in considering other *Gunter* factors, the parties entered into an agreement in principle to settle the Action only three months prior to trial following twelve years of litigation, appellate trips to the Third Circuit and the United States Supreme Court, extensive discovery including the review of

over 35 million pages of documents, a determined defense and active motion practice. The legal issues were complex and the subject matter dense.

As a result of the foregoing, I believe that this factor supports the application.

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

While Merck disclosed that it was the subject of a formal SEC investigation concerning Merck's public disclosures related to Vioxx, there is no record of the SEC bringing a lawsuit or administrative proceeding against Merck, no criminal actions were filed against any of the defendants, and there is no record of an investigation or proceeding against Dr. Scolnick. This is not a case where the plaintiffs were able to "piggyback" on the efforts of the government or other parties. It appears that the settlement was directly the result of the efforts of plaintiffs' counsel.

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

Courts within the Third Circuit have acknowledged 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 WL 3008808, at *16 (D.N.J. 2005) (Hochberg, J.); *see also In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("*Ikon*") ("In private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements provided for between thirty and forty percent of any recovery."). Measured against private contingent fee agreements, the fee award requested here compares favorably.

J. The Tenth Factor: Any Innovative Terms in Settlement

The settlement is simple – cash in exchange for releases. The "innovative terms" factor is not relevant here.

K. The Lodestar Cross-Check

In the Third Circuit, the lodestar is used as a "cross-check" to test whether the fee under the POR approach is reasonable. *AT&T*, 455 F.3d at 164. In "cross-checking" the POR award against the lodestar, the Third Circuit emphasizes 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. The district court is permitted to "rely on summaries submitted by counsel and need not review billing records." *Rite Aid*, 396 F.3d at 306-307.

In this case, plaintiffs' counsel assert that they devoted an aggregate of 448,502.72 hours to the prosecution of the Action. The value of the time totals $205,611,776.90 (derived by multiplying each firm's hours by the current hourly rates for attorneys, paralegals and other professional support staff still employed by the respective firms and by the hourly rate assigned to the individuals at the time of departure for those no longer employed). At my request, each firm was required to provide an affidavit certifying the accuracy of the professional time included in the respective submissions.

The requested fee of 20% of the Settlement Fund, which amounts to $212,400,000 (plus interest earned on the Settlement Fund which is not reflected in this calculation) would yield a modest multiplier of approximately 1.03. Stated another way, the premium or bonus over the billed time devoted to the prosecution of this complex case with a duration of over twelve years is only 3% of the value of the time charges incurred. The multiplier is comfortably within the parameters permitted by courts in the Third Circuit and supports the conclusion that the fee request is reasonable. *See AT&T*, 455 F.3d at 172 (approving a 1.28 multiplier); *Schering-Plough ERISA*, 2012 WL 1964451 at *8 (awarding a 1.6 multiplier); and *Ikon*, 194 F.R.D. at 195 (awarding a 2.7 multiplier).

The amount of hours expended appears to be quite high, even for a case of this length and complexity. Assuming an attorney billed an average of 2,200 hours per year, plaintiffs' counsel assert that they spent approximately 17 lawyer-years for every year in which the Action was pending, *i.e.*, 17 lawyers working full time throughout the duration of the Action. In other cases,

this assertion would give me pause. Not in this case. Even if I were to reduce the number of claimed hours by half, plaintiffs' counsel would still only be claiming a lodestar multiplier of 2. A multiplier of 2 is not uncommon in similar cases. (See Fee Memorandum, pp. 11-12). In light of the relevant *Gunter* factors, a multiplier of 2 would be fully justified in this case. Accordingly, I am not concerned about the number of hours allegedly expended.

I conclude that the lodestar cross-check confirms that the requested 20% POR is reasonable and supports counsel's request.

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

Counsel's fee application seeks reimbursement for litigation expenses reasonably incurred in and necessary to the prosecution of the Action in the amount of $9,473,356.02. (Joint Decl. ¶¶ 281-290; Exhs. 3A-3S and 4). At my request, each firm was required to provide an affidavit certifying the accuracy of the expenses included in the respective submissions.

Expenses of the type for which reimbursement is sought may be properly recovered by counsel. See *Schering-Plough ERISA*, 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 reasonable 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 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."). Many of the expenses were paid out of a litigation fund financed by Co-Lead Counsel. (Fee Memorandum, p. 29)

As to the amount of the expenses, counsel represents that "[f]rom the beginning of the case, Co-Lead Counsel were aware that they might not recover any of their expenses, and, at the very least, would not recover any of their out-of-pocket expenses until the Action was successfully resolved. Thus, Co-Lead Counsel were motivated to, and did, take significant steps

to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the case." (Joint Decl. ¶ 282)

$6,845,365 of the request are for reimbursements of Document Management/Litigation Support and Copying ($2,193,326), Experts ($4,580,711) and Specialized and Local Counsel ($713,228), including, in the third category, the cost of "the retention of specialized Supreme Court counsel, which was paid on an hourly and non-contingent basis and ultimately billed a total of over $530,000 of its time". (Joint Decl. ¶ 286 and Exh. 4)

The requested expenses compare favorably to those discussed in the NERA 2015 report, in particular, the chart depicting the "Median of Plaintiffs' Attorneys' Fees and Expenses, by Size of Settlement" (Figure 32 at p. 36). According to NERA 2015, the median expenses for settlements valued in excess of $1 billion and occurring in 2011-2015 is 1.1%. The $9,473,356 expense reimbursement requested by counsel represents only 0.8% of the Settlement Fund – in spite of the twelve year duration and extensive discovery undertaken in the Action.

M. Lead Plaintiff's and Mr. Jerome Haber's Reimbursement Requests

Lead Plaintiff PERSM seeks reimbursement of costs and expenses in the aggregate amount of $98,712.50 (Declaration of George W. Neville in Support of the Mississippi Public Employees' Retirement System's Application) ("Neville Decl.") and Lead Plaintiff and Class Representative, Jerome Haber ("Haber"), seeks reimbursement for time expended in assisting in the prosecution of the Action as a representative of the Class in the amount of $10,000 (Declaration of Jerome Haber in Support of His Application for Reimburse of Litigation Expenses) ("Haber Decl."), each under the PSLRA.

All of the Lead Plaintiffs have submitted declarations in support of the respective motions. The Third Circuit favors encouraging class representatives to create common funds and to enforce laws. *Sullivan* 667 F.3d at 333 n.65. Although specifically prohibiting incentive awards or "bonuses" to a lead plaintiff, the PSLRA 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). Lead Plaintiff PERSM provided a detailed declaration setting forth the amount of time and effort devoted to the Action. The time charges range from $75 to $275 per hour. Lead Plaintiff Haber also submitted a declaration describing the services provided and estimating a time expenditure of 100 hours over the duration of the Action.

Lead Plaintiffs have devoted time (i) reviewing major pleadings and attending hearings; (ii) discussing discovery results; (iii) assisting in the class certification discovery process, including sitting for depositions; and (iv) preparing for and participating in, in person mediation sessions and other settlement negotiations. (Neville Decl. at 4-12 and Haber Decl. at 6-10) I conclude that the amount of time devoted by each of the Lead Plaintiffs for which reimbursement is sought appears reasonable.

VI.

THE RECOMMENDATIONS

Based on the foregoing, I believe counsel achieved an outstanding settlement for the class. Plaintiffs received no assistance from criminal convictions or SEC proceedings. The Action took twelve years to resolve, was factually complex and presented difficult legal challenges and issues. Counsel prosecuted the Action on a fully contingent basis at significant risk that the time and money invested in the case might never be recovered.

In view of the foregoing and for the reasons discussed at length in this Report and Recommendation, I recommend the Court GRANT Co-Lead Counsels' motion for an award of attorneys' fees in the amount of 20% of the Settlement Fund (including interest earned).

I also recommend that the Court GRANT the motion of Co-Lead Counsel to be reimbursed for expenses in the amount of $9,473,356.02.

Finally, I recommend that the Court GRANT the motions of Lead Plaintiff PERSM for reimbursement for time expended in the amount of $98,712.50 and Lead Plaintiff Haber for reimbursement for time expended in the amount of $10,000.

Dated: June 3, 2016

LAYN R. PHILLIPS

/s/: Layn R. Phillips

SPECIAL MASTER