

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE SCHERING-PLOUGH CORP.
ENHANCE SECURITIES LITIGATION

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

IN RE MERCK & CO., INC.
VYTORIN/ZETIA
SECURITIES LITIGATION

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

ORDER APPOINTING SPECIAL MASTERS
PURSUANT TO FED. R. CIV. P. 23(h)(4) and 54(d)(2)(D)

Cavanaugh, District Judge:

On March 19, 2013, the Court, *sua sponte*, notified the parties to the Schering-Plough and Merck Securities Class Actions (the "Class Actions") pursuant to Fed. R. Civ. P. 53(b)(1) (the "Notice") that it was considering the appointment of Stephen M. Greenberg, Esq. and Jonathan J. Lerner, Esq., both of whom, are managing members of Pilgrim Mediation Group, LLC and served as court-appointed mediators in these actions, as Special Masters pursuant to Fed. R. Civ. P. 23(h)(4) and 54(d)(2)(D) to initially determine all issues relating to the attorneys' fees and costs to be awarded to counsel arising from the anticipated applications by the various law firms representing the Lead Plaintiffs and the Class (*see* Docket Entries 314 and 394). The Court directed the parties to comment on such an appointment by March 25, 2013. (*See id.* at 5.)

Lead Counsel for the Classes in the Class Actions have consented to the appointment¹ (*see* Docket Entries 316, 396) and the Corporate Defendants (which would not be expected to have any interest in the amount of attorneys' fees and costs to be awarded (*see id.* at 2)) advised the Court they have no objection to the appointment (*see* Docket Entries 315, 395). Having considered this matter carefully, the Court appoints Special Masters as follows:

1. **Appointment of the Special Masters.** For the reasons described in the Notice (*see Id.* at 4), the Court appoints as Special Masters in this case Stephen M. Greenberg, Esq. and Jonathan J. Lerner, Esq. pursuant to Fed. R. Civ. P. 23(h)(4) and 54(d)(2)(D).

2. **Duties of the Special Masters.** The Special Masters shall have the following duties in this matter:

A. To review any applications for attorneys' fees and expenses and all memoranda, responses, objections (including objections, if any, filed by members of, or lawyers for, the Class Plaintiffs pursuant to Fed. R. Civ. P. 23(h)(4)) and reply briefs and other documents that may be filed in support of or in opposition to any requested attorneys' fees and expenses.

B. If deemed necessary by the Special Masters, to hold an evidentiary hearing for the purpose of determining any disputed facts which may be material to the attorneys' fees and costs to be awarded.

C. 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

¹ In their letter consenting to the appointment, the Schering Class has requested certain provisions be included in this Order that would (i) authorize the Special Masters to establish procedures and time limits for filing motions; and (ii) limit *ex parte* communications by the Special Masters with any party without notice and consent (*see* Rule 53(b)(2)) and require submissions be filed with the Court's Electronic Case Filing ("ECF") system. The Court has addressed these requests in the provisions of the Order below. (*See* Paragraphs 2D, 3 and 7 below.)

should be awarded to the various law firms representing the Class Plaintiffs. The Special Masters shall attach a copy of any document or transcript used as evidence, referenced, or relied upon by the Special Masters in the report and recommendation.

D. Pursuant to Rule 53(e), the Special Masters shall file any orders, directives, findings, reports and/or recommendations with the Court via the Court's ECF system. Such filing shall fulfill the Special Masters' duties to serve their orders on the parties. Any submission by any party to the Special Masters also shall be filed with the Court's ECF system.

3. **Authority.** In discharging their duties, the Special Masters shall have all the authority provided by Rule 53(c), including, without limitation, the authority to set such time limits and procedures as may be necessary for the filing of motions and other materials relevant to the issues before them.

4. **Due Diligence.** Pursuant to Rule 53(b)(2), the Court hereby directs the Special Masters proceed with all reasonable diligence in performing their duties in these Class Actions.

5. **Fairness Considerations.** Pursuant to Rule 53(a)(3), the Court has considered the fairness of imposing the likely expenses of the Special Masters on the parties. The court believes that the appointment and use of the Special Masters will materially advance the litigation, thereby achieving considerable cost-saving to all parties. The Court will endeavor to protect against unreasonable expenses and delay through regular communications with the Special Masters.

6. **Preservation of Materials and Preparation of Record.** Pursuant to Rule 53(b)(2)(c), the Special Masters shall preserve for the record any document received from

counsel or the parties to this case that are not docketed in this or another court, but need not preserve for the record any document (whether created by a Special Master or anyone else) that is docketed in this or any other court.

7. **Ex Parte Communications.** Pursuant to Rule 53(b)((2)(B), the Special Masters may communicate *ex parte* with the Court at any time. In order to facilitate the fair and effective performance of their duties, the Special Masters also may communicate *ex parte* with any attorney, as the Special Masters deem appropriate for the purpose of ensuring the efficient administration and management of the proceedings to which their duties relate. However, the Special Masters may not engage in *ex parte* communication with any party or attorney concerning any substantive issue relating to the total amount of attorneys' fees and expenses to be awarded to counsel in the Class Actions without first providing notice to, and receiving consent from, Co-Lead Counsel for the Class and the Class Representatives.

8. **Court's Actions on Special Masters' Reports or Recommendations.** Pursuant to Rule 53(f)(1), in acting on an order, report or recommendation of the Special Masters, the Court shall afford the parties an opportunity to present their positions and, in its discretion, may receive evidence, and may adopt or affirm, modify, wholly or in part, reject or reverse, resubmit to the Special Masters with instructions, or make any further orders it deems appropriate.

A. **Time Limit for Review.** Any party may file an objection to an order, finding, report or recommendation by the Special Masters within fourteen (14) calendar days of the date it was electronically filed on the ECF system. The failure to meet this deadline or to timely request an extension of the deadline shall result in permanent waiver of any objection to the Special Masters' orders, findings, reports or

recommendations. Any opposition shall be filed within ten (10) days after the objection is filed.

B. **Filing the Record for Review.** The party filing an objection or motion shall submit with such objection or motion any record necessary for the Court to review the Special Masters' order, report and/or recommendation, including any transcripts of proceedings before the Special Masters and any documents submitted by the parties in connection with the Special Masters' order, report and/or recommendation. Failure to provide the record shall constitute grounds for the Court to overrule the objection or deny the motion.

C. **Standards for the Court's Review.** In accordance with Rule 53(f)(3) and (4), the Court shall decide *de novo* all objections to conclusions of law or findings of fact made or recommended by the Special Masters.

D. **Procedural Rulings.** The Court shall set aside a ruling by the Special Masters on a procedural matter only for an abuse of discretion.

9. **Compensation.** The Special Masters shall charge for their time at billing rates not to exceed the hourly rates previously agreed upon by the parties for their services as Mediators. The charges of the Special Masters shall be considered an Administrative Expense of the Settlement.

A. **Billing Fees and Expenses.** From time to time, the Special Masters shall submit to the Court itemized statements of fees and expenses, which the Court will inspect for regularity and reasonableness. The Court expects these itemized statements might reflect confidential communications between the Special Masters and the Court. Accordingly, the Special Masters are ordered to submit, together

with their itemized statements, summary statements which shall not reflect any confidential information, accompanied by the statement "Approved for Disbursement".

B. Review of Statements and Payment. The Court shall review the itemized statements in camera for the purpose of determining the reasonableness of the Special Masters' fees and costs. The itemized statements shall not be made available to the public or counsel. If the Court determines the itemized statements are regular and reasonable, the Court will sign the corresponding summary statement and transmit it to Lead Class Counsel, who shall have five (5) calendar days to submit objections, if any, to the Court. The Court will review any objections and will make its final authorization and submission for payment thereafter. Once finally approved by the Court, payment shall be remitted to the Special Masters by Lead Class Counsel within twenty (20) calendar days. The Court will return the original itemized statements to the Special Masters, who shall preserve those originals until this matter has been fully and finally resolved for all purposes.

10. **Submission of Affidavits and Effective Date of Appointment.** The Court notified the Special Masters they would be appointed and they have filed affidavits attesting pursuant to Rule 53(b)(3) that no non-disclosed ground for disqualification exists under 28 U.S.C. § 455. The appointment of the Special Masters shall be effective immediately.

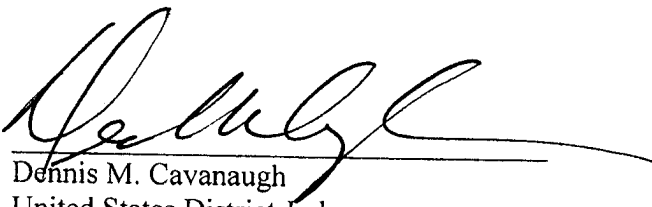
11. **Appearance Limitation.** Given that the Special Masters are practicing lawyers who appear in the federal courts, as a precaution to avoid even the appearance of any possible conflict of interest, I am directing that neither Special Master shall individually appear before me in any other case during the pendency of the appointment. (*See Advisory Committee*

Notes, 2003 Amendments to Subdivisions (a)(2) and (3).) This limitation shall not apply to the law firms with which the Special Masters have an affiliation or to any other lawyers at such law firms.

12. **Cooperation.** The Special Masters shall have the full cooperation of the parties and their counsel. As agents and officers of the Court, the Special Masters shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar functions. The parties will make readily available to the Special Masters any and all facilities, files, databases and documents necessary to fulfill the duties and functions described in this Order.

IT IS SO ORDERED.

Dated: April 19, 2013


Dennis M. Cavanaugh
United States District Judge