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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

INSTITUTIONAL INVESTOR GROUP,	:	
GENESEE COUNTY EMPLOYEES'	:	
RETIREMENT SYSTEM, Individually	:	Civ. Action No.
and on Behalf of All Others	:	08-cv-2177-DMC
Similarly Situated,	:	
MAYER HORWITZ, PHILIPPE HOFMANS,	:	TRANSCRIPT OF
and PLYMOUTH COUNTY CONTRIBUTORY	:	SETTLEMENT
RETIREMENT SYSTEM,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
MERCK & CO., INC.,	:	
	:	
Defendant.	:	

-----x

Newark, New Jersey
October 11, 2013

BEFORE:

THE HON. DENNIS M. CAVANAUGH, U.S.D.J.

Reported by:
CHARLES P. McGUIRE, C.C.R.
Official Court Reporter

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

s/CHARLES P. McGUIRE, C.C.R.

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1 THE COURT CLERK: All rise.

2 THE COURT: Be seated.

3 Government shutdown: You can all go home.

4 (Laughter)

5 THE COURT: Not exactly what the Plaintiffs want
6 to hear.

7 (Laughter)

8 THE COURT: Good morning.

9 Did everybody get stuck out in the fire drill?

10 MR. CECCHI: We did.

11 THE COURT: They tipped me off as I was coming in
12 this morning. I was over getting my flu shot and didn't
13 come back.

14 All right. We are here today for the fairness
15 hearing in the In Re Schering-Plough Corporation Enhanced
16 Securities Litigation and In Re Merck & Company Vytorin
17 Zetia Securities Litigation.

18 Why don't we get our appearances for the record.

19 MR. CECCHI: May it please the Court.

20 James Cecchi. Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. McDONALD: Good morning, Your Honor.

23 Chris McDonald, Labaton Sucharow.

24 MR. D. BERGER: Good morning, Your Honor.

25 Daniel Berger, Grant & Eisenhofer, Plaintiffs in

1 the Merck case.

2 MR. GRAZIANO: Salvatore Graziano, Bernstein
3 Litowitz. Good morning, Your Honor.

4 THE COURT: Are you hiding?

5 (Laughter)

6 MR. M. BERGER: No.

7 Good morning, Your Honor. Max Berger, Bernstein
8 Litowitz, for the Plaintiff.

9 THE COURT: Anybody else over here?

10 MR. WEISS: Good morning, Your Honor.

11 Stephen Weiss from Seeger Weiss.

12 MR. KRAMER: Your Honor, Dan Kramer from
13 Paul Weiss for the defense.

14 THE COURT: Let the record reflect McGuire is not
15 -- neither is Krovatin -- in a dark jacket.

16 (Laughter)

17 MR. McGUIRE: Bill McGuire, Tompkins McGuire, for
18 Schering and Merck.

19 MR. JUCEAM: Dan Juceam from Paul Weiss for Merck
20 and Schering.

21 MR. LAGUARDIA: Good morning, Your Honor.

22 Daniel Laguardia, Sherman & Sterling, for the
23 underwriter Defendants.

24 MR. GRIFFIN: Howard Griffin, Sherman & Sterling.
25 Nice to see you, Your Honor.

1 MR. GREENBAUM: Good morning, Your Honor.

2 Jeffrey J. Greenbaum, Sills Cummis & Gross, for
3 the underwriter Defendants.

4 MR. KROVATIN: Good morning, Your Honor.

5 Gerald Krovatin for the outside Schering
6 directors.

7 THE COURT: All right.

8 This matter comes before the Court on the
9 following: That is, a motion for the final approval of a
10 class action settlement and plan of allocation by lead
11 Plaintiffs appointed in the action In Re Merck & Company
12 Vytorin Zetia Litigation; also, a motion for final approval
13 of a class action settlement and plan of allocation by lead
14 Plaintiffs appointed in the action In Re Schering-Plough
15 Corp. Enhanced Securities Litigation, and report and
16 recommendation of the special masters relating to the award
17 of attorneys' fees and expenses.

18 And I have received some voluminous work done by
19 Mr. Cecchi's firm or whomever on that side of the aisle.

20 Mr. Cecchi, do you or does anyone want to get
21 something on the record before we go further?

22 MR. CECCHI: Judge, just very, very briefly on
23 behalf of the Plaintiffs.

24 As Your Honor knows, there's no substantive
25 objections to the underlying settlement, and the Plaintiffs'

1 position would be -- it's unusual that you would have a case
2 where there's no objectors to a substantive settlement, not
3 even the usual cabal of serial objectors, and we think
4 that's because this is an outstanding result, and we're very
5 pleased with the result on behalf of the class.

6 There are two objections to the fee, and we've
7 divided our comments. Mr. Graziano will address the
8 Schering settlement and the objection thereto, and
9 Mr. Berger will address the Merck very briefly.

10 I just did want to note, Judge, that for many of
11 us -- it's now October 1, and we know that Your Honor will
12 be leaving the bench. We want to thank Your Honor for your
13 stewardship of this case, but not before you hear --

14 THE COURT: Who told you that?

15 (Laughter)

16 MR. CECCHI: But you have served the District
17 admirably, and we all thank Your Honor for that, because
18 this will probably be the last large matter we have before
19 Your Honor.

20 And with that, I would leave to Mr. Graziano to
21 make any remarks on behalf of the Schering case.

22 THE COURT: Thank you.

23 MR. GRAZIANO: Good morning, Your Honor.

24 As Your Honor already noted, there are extensive
25 submissions, so I'll be brief. If the Court has questions,

1 please ask.

2 I am speaking on behalf of the lead Plaintiffs in
3 the Schering case. One of their representatives is here in
4 court today, George Neville, from the Mississippi Retirement
5 System.

6 And we're pleased to present this proposed
7 settlement to Your Honor. It is an exceptional recovery of
8 \$473 million in the Schering case, and it's one of the
9 largest securities class action recoveries in this Court,
10 one of the largest against a large pharmaceutical company.

11 I looked at the Girsh factors in preparing my
12 remarks. They all uniformly support the settlement here.

13 The complexity, expense, and likelihood of
14 continued litigation here was enormous. We had over 30
15 Defendants just in the Schering case. The jury instructions
16 were books long because of the requirements already.

17 The evidence was quite complicated, both from the
18 scientific side, using novel ultrasound technology to look
19 at small differences in the human body, further complicated
20 by extensive statistics that were referred to by both sides,
21 raising the ultimate question in this very circumstantial
22 case as to whether or not there was misconduct. So this
23 would have been a trial of the experts - very expensive,
24 very, very complicated.

25 The reaction of the class to the settlement is

1 overwhelmingly positive. As Mr. Cecchi mentioned, there
2 have been only two minor objections, but, more importantly,
3 according to our research, 80 to 90 percent of the Schering
4 class was constituted of institutional investors. There
5 have been no objections to either settlement on behalf of
6 any institutional investors. The objections that we have
7 are on behalf of the small investors represented by
8 professional objectors.

9 The stage of the proceedings and the amount of
10 discovery completed. Here, as Your Honor knows, we are on
11 the eve of trial. We conducted over 90 depositions in this
12 case, the most important of which we had to go overseas to
13 do in front of a foreign judge who had never seen American
14 lawyers conduct those kinds of depositions before.

15 THE COURT: I bet you he was thrilled.

16 (Laughter)

17 MR. GRAZIANO: He was quite accommodating, which
18 actually meant a big difference. But it could have went --
19 you know, he could have insisted doing all the questions in
20 a foreign language. It was a high-risk procedure for sure
21 for us.

22 The risks of establishing liability and damages.
23 As I mentioned already, this was a very circumstantial
24 case - no admission of wrongdoing, no finding by any Federal
25 Government agency that anything wrong happened here. This

1 drug or these drugs are all still on the market. They sell
2 in the billions of dollars each year. Merck, Schering
3 denied any wrongdoing whatsoever. It was a very challenging
4 case for us, Your Honor.

5 Here, of course, the Defendants did have the
6 financial resources to pay the settlement, but they also had
7 the resources to continue to take this case through trial,
8 through appeal. It could have gone on for a much longer
9 time.

10 Ultimately, Your Honor, I must note that a
11 settlement here was the result of the attention, dedication,
12 and sophistication of the Pilgrim Mediation Group, the group
13 you appointed, Your Honor.

14 THE COURT: Let me just say something about that,
15 by the way.

16 I thought that what they did -- I note that
17 Mr. Lerner is here; I think Mr. Greenberg is overseas, away,
18 or he would have been here, I'm sure. But I've just got to
19 state for the record that I thought that as mediators and
20 special masters that they did an extraordinary job, one of
21 the most professional and thorough that I've ever
22 encountered, and the Court is very grateful for the amount
23 of time that it saved on the judicial side, and I know how
24 much effort and work went in with them and all the attorneys
25 involved, and I just want it clear as to the fact that I

1 thought they did just an excellent job in this case.

2 MR. GRAZIANO: Yes, Your Honor. All of us on the
3 Plaintiffs' side agree with that. The ability and
4 experience on their part to dig into the facts really made
5 the settlement happen. If not for their perseverance, I
6 don't know if we'd be here today presenting this settlement.

7 We are proud to present the settlement today. So
8 I just want to briefly turn to the plan of allocation, which
9 essentially provides a pro rata distribution of the
10 \$473 million. There is no discrimination among class
11 members. It's purely based on when they bought, when they
12 sold, or when they held.

13 And there is only one minor objection to the plan
14 of allocation, which is an objection based on the fact that
15 you have to have a recovery worth more than \$10 to receive a
16 check, but as we set forth in our papers, that's supported
17 by numerous cases because it just becomes cost-prohibitive
18 to pay smaller claims.

19 So with that, I'll pause, Your Honor, unless
20 Your Honor has any further questions.

21 THE COURT: Well, my plan, just so you know, and
22 I'll listen to Mr. Berger or whomever is going to speak, my
23 plan is to hear whatever you or the defense have to say, any
24 objector to say what they want to say, and then I'll deal
25 with whatever I have to deal with.

1 But I'm also going to reserve for a short written
2 opinion, so I'm not going to have a lot of questions here,
3 and I think you've answered everything that I could think of
4 anyway.

5 MR. GRAZIANO: Thank you, Your Honor.

6 MR. D. BERGER: Good morning, Your Honor.

7 Daniel Berger on behalf of the lead Plaintiffs in
8 the Merck chase. I'll be quite brief.

9 Our settlement, as the Court knows, is for
10 \$215 million. We've set forth the reasons that we think
11 this is an excellent settlement and the Court should approve
12 it in our papers, and I won't belabor them.

13 I would just first of all echo what Mr. Graziano
14 said about our gratitude toward the special masters for
15 facilitating the settlement, and, in addition, for all the
16 work that they did on the fee and expense application.

17 Our case -- we have a smaller result than the
18 Schering case, but we believe it's still excellent. Our
19 case was riskier in a lot of ways than the Schering case.
20 We pointed that out to the Court in the papers. As your
21 Honor knows, we faced a very big challenge with respect to
22 proving loss causation because of the fact that the Merck
23 stock did not drop on January 14th, 2008, when the top line
24 results of enhanced work announced. The Defendants went at
25 us on this point at least three times before Your Honor, and

1 they were prepared to keep going at us at trial and on
2 appeal.

3 THE COURT: There was an appeal also; right?

4 MR. D. BERGER: And there was an appeal. They did
5 file a motion with the 3rd Circuit to take this case on
6 class certification. That request for appeal was denied,
7 but they would have gone back.

8 THE COURT: I think there was another issue, too,
9 on damages, wasn't it?

10 MR. D. BERGER: That was the only time in my
11 recollection of the case it went up to the 3rd Circuit,
12 potentially went to the 3rd Circuit.

13 But this Court had to address that issue on the
14 motion to dismiss, it had to address it on the class
15 certification motion, and it had to address it in summary
16 judgment. So this Court actually addressed that question
17 three times. We were successful each time, but there was no
18 guarantee we were going to be successful at trial with
19 respect to loss causation. We were going to have to
20 establish it in front of the jury, and that certainly would
21 have led to an appeal in front of the Circuit.

22 I'd just like to briefly, Your Honor, on plan of
23 allocation, similar to what Mr. Graziano said, we are
24 proposing to distribute \$215 million on a pro rata basis
25 based on the work that our expert did in determining the

1 amount of inflation during the class period for class
2 members.

3 This is also a case where we have no objections to
4 the settlement. This settlement is supported not only by
5 the class, but by the four lead Plaintiffs in this case, all
6 of whom are large institutional investors, quite
7 sophisticated, who had a lot of personal skin in the game
8 with respect to how much we recovered. So their support for
9 the settlement we think speaks very well.

10 With respect to the -- I'll just touch briefly on
11 the attorneys' fees, if I might, Your Honor.

12 We support the report and recommendation of the
13 special masters. I just want to make one comment because of
14 the objection that was lodged by Mr. DeJulius, who is a
15 professional objector, who actually owned two shares of
16 Merck stock that he bought after the disclosure of the top
17 line results. He purchased them in February of 2008, after
18 it was known that the enhanced trial had failed. His
19 objection has to do with the retainer agreement that was
20 entered into in the beginning of the case between our firm
21 and one of the lead Plaintiffs, not all of the lead
22 Plaintiffs, and at the conclusion of the case, that lead
23 Plaintiff, ABP, made a determination that that retainer
24 shouldn't bind what the Court did with respect to attorneys'
25 fees, and what ABP did was decide, after Your Honor

1 appointed special masters, ABP decided to wait and see what
2 the special masters would do, review it and make a
3 determination, which they did, and, in fact, they filed a
4 declaration with the Court on September 20 endorsing the
5 report of the special masters.

6 And that is exactly in keeping with the
7 3rd Circuit's jurisprudence that's expressed in a case,
8 In Re Bristol-Myers, decided in 2007, and that was a very
9 similar case where the lead Plaintiff in that case had a fee
10 retainer with lead counsel which called for a smaller fee.
11 At the end of the case, the lead Plaintiff agreed that lead
12 counsel could apply for a larger fee. There was an
13 objection, it went up to the 3rd Circuit, and the
14 3rd Circuit said that that was permissible.

15 And that's what takes these circumstances out of
16 the circumstances that the objector cites in the Cendant
17 case. This is not a case where the lead Plaintiffs are
18 objecting to the fee request, that the lead Plaintiffs, in
19 fact, are supporting the fee request wholeheartedly.

20 And, with that, Your Honor, unless the Court has
21 any additional questions, we submit that the settlement,
22 plan of allocation, fee and expense request ought to be
23 approved.

24 THE COURT: Thank you. I have no questions.

25 MR. D. BERGER: Thank you.

1 THE COURT: Anybody else want to --

2 MR. McDONALD: Yes, Your Honor.

3 Chris McDonald from Labaton Sucharow.

4 Mr. Graziano when he was at the podium was
5 primarily directing his comments to the approval of the
6 settlement itself, and he mentioned the Girsh factors.
7 There is also the Gunter factors relating to the approval of
8 the fee and the expenses, where -- Your Honor has already
9 said some kind words with respect to the work done by
10 Mr. Greenberg and Mr. Lerner with respect to the special
11 masters' report. We're happy to rely -- endorse the report
12 and rely on our papers.

13 If Your Honor has any questions, either with
14 respect to the fee or to the expenses, we're prepared to
15 respond.

16 THE COURT: I do not.

17 MR. McDONALD: Thank you.

18 THE COURT: How about the defense? Anything you
19 wish to say?

20 MR. KRAMER: Yes, Your Honor, very briefly.

21 We, too, appreciate Your Honor's management of
22 this very complex case. It hasn't always been easy, but
23 it's always been a pleasure to appear before Your Honor, so
24 we appreciate that.

25 THE COURT: Well, it's also good for the Court

1 when we have attorneys who have been around the block a few
2 times and know what they're doing. So it was a lot of work,
3 but the attorneys knew what they were doing.

4 MR. KRAMER: Thank you.

5 And we also want to note on the record our
6 appreciation to Mr. Greenberg and Mr. Lerner for all of
7 their help in bringing the parties together and helping us
8 to achieve this settlement.

9 And beyond that, I have nothing to add to our
10 papers.

11 Thank you, Your Honor.

12 THE COURT: Any other Defendant have anything?

13 (No response)

14 THE COURT: Are any of the objectors here, and do
15 they wish to be heard? Or the objector, I guess.

16 (No response)

17 THE COURT: All right. Anything further, counsel?

18 MR. CECCHI: No, Your Honor.

19 Oh, wait, Judge, there is just one thing.

20 Your Honor indicated you were going to be filing a
21 short opinion.

22 We had also prepared, in the event that our
23 arguments were favorably received, forms of order on the
24 plan of allocation, final judgment, and the attorneys' fees
25 in both cases.

1 THE COURT: Yes. This will all be done today, by
2 the way. I wasn't going to reserve for a long period of
3 time.

4 MR. CECCHI: Right, and with the Government
5 shutting down, Judge, we would appreciate --

6 (Laughter)

7 THE COURT: Right. I don't get paid after
8 tomorrow.

9 (Laughter)

10 MR. CECCHI: Which we thought it was an irony you
11 were having a fire drill when the Government was shutting
12 down, but -- can I hand them to your clerk, Judge?

13 THE COURT: Yes, please.

14 MR. CECCHI: Thank you.

15 (Document(s) were handed up.)

16 THE COURT: Well, as counsel know, the Court does
17 have a job here to act as the, in effect, fiduciary for the
18 class, and I have to find that the settlement is fair,
19 accurate, and reasonable, as the law is.

20 Under normal circumstances, my clerks and I would
21 put together the opinion setting forth the Girsh and Gunter
22 factors in the two cases.

23 However, in this case, as counsel just mentioned,
24 I have the benefit of that outstanding report and
25 recommendation done by Messrs. Greenberg and Lerner, and it

1 is my intention to adopt the report and recommendation in
2 its entirety.

3 I don't know whether or not the Court could have
4 improved on this. They submitted almost 100 -- 97 pages on
5 the first, and then they had a supplemental dealing with one
6 of the issues that was mentioned, the fact that there seemed
7 to be more expenses on the lesser of the cases, but that
8 really was very clearly explained as to why that was in
9 their report and recommendation, and even though on the
10 Merck side, the settlement was less, that doesn't mean that
11 the problems that were to be encountered by the Plaintiffs
12 in that case were less; and, in fact, they weren't.

13 And I think that the percentages -- I realize that
14 the fees here sound very large, and they are, but the
15 Plaintiffs took this case on not knowing if they were going
16 to be successful. They had, certainly, some very, very
17 respected and highly regarded attorneys against them who
18 were not giving up easily; I mean, they fought this, and as
19 well they should have.

20 So I really think, after looking at all of this,
21 and especially in the detail that the special masters went
22 through in their report and recommendation on the fees, and
23 as to the allocation and the factors, and they went in in
24 great detail, and I think they support this well with the
25 law that they cited, and, of course, they were intimately

1 involved in the negotiations and the like, they know what
2 was going on here, and, I think probably most important,
3 there are sophisticated Plaintiffs here, all of whom are in
4 line with this. They're not ones to be giving their money
5 away, so I have to assume that they recognize the job here
6 that was done by Plaintiffs' counsel.

7 And I don't want to leave out defense counsel.
8 This was a tough, tough case. I'm sure there are some
9 people on that side who might think the settlement could
10 have been a little bit different, but, you know, that's why
11 it's called a settlement.

12 And I think this is fair, adequate and reasonable,
13 and I will sign the orders, and I will submit our opinion,
14 and I'll make the report and recommendation adopted and a
15 part of my opinion.

16 Is there anything else, counsel?

17 MR. CECCHI: No, Your Honor.

18 THE COURT: Well, gentlemen, thank you.

19 MR. CECCHI: Thank you, Judge.

20 MR. D. BERGER: Thank you, Your Honor.

21 THE COURT: I really appreciate your help, and
22 maybe we'll see you again someday.

23 MR. M. BERGER: Thank you, Your Honor.

24 (Matter concluded)

25