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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

To: All Persons on ECF Service List

PLEASE TAKE NOTICE that on January 6, 2014 at 10 a.m., or as soon thereafter as counsel may be heard, Lead Plaintiffs shall move before the Hon.

Dennis M. Cavanaugh, U.S.D.J. at the United States Post Office and Courthouse Building, Newark, New Jersey 07101 for entry of an Order pursuant to Fed. R. App. P. 7 imposing a bond for costs on appeal.

The undersigned intends to rely upon the accompanying Memorandum of Law. A proposed form of Order is attached.

The undersigned hereby requests oral argument.

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

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

Dated: November 26, 2013

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In re Schering-Plough Corporation/ENHANCE Securities Litigation	Case No. 2:08-cv-00397 (DMC) (JAD)

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF AN APPEAL BOND

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Lead Plaintiffs, the Arkansas Teacher Retirement System, the Public Employees' Retirement System of Mississippi, the Louisiana Municipal Police Employees' Retirement System, and the Massachusetts Pension Reserves Investment Management Board, respectfully submit this Memorandum of Law in support of their motion for the entry of an order requiring the Orloff Family Trust DTD 12/13/01 and Dr. Marshall J. Orloff IRA R/O, represented by attorney Forrest S. Turkish (collectively, the "Turkish Objectors"), to post a bond pursuant to Federal Rule of Appellate Procedure 7 in order to pursue their appeal of this Court's October 1, 2013 Opinion and Orders granting final approval to the Settlement and awarding attorneys' fees and reimbursement of expenses.

I. PRELIMINARY STATEMENT

The Turkish Objectors are serial objectors and intend to hold up distribution of the $473 million settlement – the largest securities class action settlement ever against a pharmaceutical company and among the top ten post-PSLRA class action securities settlements in cases not involving a restatement of financials – likely in order to extract a payment from Co-Lead Counsel in exchange for discontinuing the appeal. The Turkish Objectors' meritless appeal will impose thousands of dollars in additional, unnecessary expenses on the Class and risks delaying the distribution of settlement funds to thousands of Class Members who have already waited more than five years to recover their losses.

As more fully set forth below, because the imposition of costs on the Orloffs is highly likely and it is not likely that they will be able to pay these costs, a bond in this case is warranted. First, the Orloffs have no standing to pursue the appeal. As set forth in the Notice of (I) Proposed Settlement and Plan of Allocation; (II) Settlement Fairness Hearing; and (III) Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Settlement Notice") (ECF No. 424-5 at p. 25), for their objection to be considered, the Orloffs were required to submit documents sufficient to prove their membership in the Class. The Orloffs failed to provide any such proof (*see* ECF No. 431) and, therefore, failed to establish that they are members of the Class with standing to object or appeal. The appeal should be dismissed on this ground alone. Second, even if the Turkish Objectors had standing to appeal (which they do not), the Turkish Objectors' objection is, as both the Court-appointed Special Masters and the Court have already found – devoid of any merit. ECF Nos. 435 at 54-56; 437; 439.

Finally, the Court can consider the fact that the Turkish Objectors are professional objectors lodging generic and legally incorrect objections in its calculus of the merit of the appeal.

Accordingly, for the reasons more fully set forth below, Lead Plaintiffs respectfully request that this Court impose an appeal bond in the amount of $50,000.

II. BACKGROUND

On June 6, 2013, the Court preliminarily approved the $473 million Settlement and ordered that notice be sent to members of the Class. ECF No. 421.

Following the extensive Court-approved notice program, which included the mailing of more than 406,000 copies of the Settlement Notice to potential Class Members and nominees, there was only one objection (filed by the Turkish Objectors) to the request for attorneys' fees. Notably, no public pension fund or other institutional investor objected to either the Settlement or Co-Lead Counsel's request for fees and reimbursement of expenses.

In their objection, the Turkish Objectors summarily stated, without providing any supporting documentation, that "[the Orloffs] are each class member[s] who purchased the stock as defined in the Settlement Agreement." ECF No. 431 at 1. Despite the express requirements of the Court's Preliminary Approval Order and the Settlement Notice, the Turkish Objectors failed to provide any documents evidencing the Orloffs' membership in the Class, such as documents showing the number of Schering-Plough shares they purportedly purchased and the date(s) and price(s) of such purchase(s). Moreover, although the Turkish Objectors said they would provide "trade information in a supplemental filing prior to the final approval hearing," (*id.*), no such supplemental filing was

ever made.[1]

By Order dated April 19, 2013, the Court appointed the Special Masters to, among other things, "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." ECF No. 418 at ¶ 2.C.

After extensive briefing, on August 27, 2013, the Special Masters issued a detailed 97-page Report and Recommendation addressing the topics set forth in the Court's April 19, 2013 Order (the "Special Masters' Report"). ECF No. 435. In the Special Masters' Report, the Special Masters analyzed Co-Lead Counsel's fee request under each of the Third Circuit's Gunter/Prudential factors (*see In re AT&T Corp.*, 455 F.3d 160, 166 (3d Cir. 2006)), and recommended that the Court approve attorneys' fees in the amount of 16.92% of the Settlement Fund. ECF No. 435 at 35-54, 60-61. Specifically, the Special Masters found and recommended the

[1] In the objection, Dr. Orloff also claimed that the Orloffs' "class membership has been confirmed by the administrator" and included a copy of the Settlement Notice mailed to the Orloffs. However, the Claims Administrator provided no such confirmation. First, receipt of the Settlement Notice is not a confirmation of class membership. Indeed, the Settlement Notice expressly states that "**RECEIPT OF THIS NOTICE DOES NOT MEAN THAT YOU ARE A CLASS MEMBER**." Settlement Notice at p. 6 (ECF No. 423-5 at p. 14) (emphasis in original). The Claims Administrator has no record of any other communication with Dr. Orloff or any other entity affiliated with him. *See* Supplemental Declaration of Stephanie A. Thurin (ECF No. 432-1) at ¶¶ 17-21.

following:

> 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'[sic] motion for an award of attorneys' fees in the amount of 16.92% of the Settlement Fund (including interest earned on the fund amount).

Id. at 60-61.

The Special Masters' Report also addressed the Turkish Objectors' objection, finding that it "lack[ed] merit and should be rejected." *Id*. at 56. The Special Masters explained that the main contention of the Turkish Objectors – that the fee award should be based on the lodestar method – is "incompatible with well-settled controlling Third Circuit case law, none of which is even mentioned in the [Turkish Objectors'] Objection." *Id*. at 55. The Special Masters also explained that the assertions by the Turkish Objectors that "[t]he court must engage in a detailed analysis of counsel's billing," and that a 1.3 multiplier is neither modest nor reasonable were "contrary to controlling precedent." *Id*.

On October 1, 2013, the Court held a hearing to consider the fairness of the

$473 million Settlement and Co-Lead Counsel's application for an award of attorneys' fees and reimbursement of expenses. ECF No. 441; *see also* Transcript of Settlement Hearing ("Transcript"). The Turkish Objectors did not appear at that hearing. Transcript at 4-6. At the hearing, the Court approved the Settlement and held that the attorney fee award sought by Co-Lead Counsel was appropriate, noting that the defense counsel opposing Co-Lead Counsel were formidable, the case was brought on a contingency basis, and that each of the Lead Plaintiffs supported the fee requests. Transcript at 20. The Court also held that the analysis conducted by the Special Masters regarding the attorney fee request was extensive, detailed, and well supported by the law. *Id*. at 18-20.

Later that same day, the Court issued an Opinion and Order approving Lead Plaintiffs' motion for an award of attorney's fees in the amount of 16.92% of the Settlement Fund (ECF Nos. 436, 439), as well as an Order adopting in its entirety the Special Masters' Report (ECF No. 437). In its Opinion and Order, the Court reviewed the Special Masters' Report, and held that the "Special Masters ha[d] done a thorough and accurate job assessing the Motions for Attorneys' Fees by conducting a detailed analysis of the Gunter and Prudential factors in The Report" and, as a result, adopted the Special Masters' Report "in its entirety" and "approve[d] of the recommendations set forth therein." ECF No. 436 at 6-7.

III. ARGUMENT

A. THE TURKISH OBJECTORS SHOULD BE REQUIRED TO FILE AN APPEAL BOND TOTALING $50,000

Pursuant to Fed. R. App. 7, a district court may require an applicant to file a bond or provide other security in any form or amount necessary to ensure payment of costs of an appeal. *See In re Nutella Mktg. and Sales Practices*, No. 11-1086 (FLW), 2012 WL 6013276, at *1 (D.N.J. Nov. 20, 2012) ("[A] district court, familiar with the contours of the case appealed, has the discretion to impose a bond which reflects its determination of the likely outcome of the appeal.") (quoting *Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998)); *In re Ins. Brokerage Antitrust Litig.*, No. 04-5184 (GEB), 2007 WL 1963063, at *2 (D.N.J. July 2, 2007) (same).[2]

The function of an appeal bond is to secure the appellant's payment of appeal costs to a successful appellee. *See, e.g.*, *In re Nutella*, 2012 WL 6013276, at *2 ("In many cases, an appeal bond is necessary to provide some level of security to Lead Plaintiffs who have no assurances that Appellants have the ability to pay costs and fees associated with opposing their appeals.") (internal quotation marks omitted); *In re Currency Conversion Fee Antitrust Litig.*, No. M 21-95, 2010 WL 1253741, at *1 (S.D.N.Y. Mar. 5, 2010) ("The purpose of this rule is to protect the appellee from the risk of nonpayment by the appellant, if the appellee

[2] District courts retain jurisdiction to entertain motions for collateral matters such as the requirement of an appeal bond after the filing of a notice of appeal. *See Venen v. Sweet*, 758 F.2d 117, 120-21 n. 2 (3d Cir. 1985).

wins the appeal.").

"[T]he nature and amount of the bond is a matter left to the sound discretion of the district court," *Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987), but should be sufficient to cover and secure the costs of the appeal. *See In re Wal-Mart Wage & Hour Emp't Practices Litig.*, No. 2:06-CV-00225-PMP-PAL, 2010 WL 786513, at *2 (D. Nev. Mar. 8, 2010). In the Third Circuit, courts regularly impose substantial appeal bonds on objectors appealing from the approval of a class action, based on the estimated costs of the appeal. *See, e.g., In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 695 F. Supp. 2d 157, 167 (E.D. Pa. 2010) (ordering $25,000 cost bond for appeal of class action); *Ins. Brokerage*, 2007 WL 1963063, at *3 (ordering $25,000 cost bond for appeal of class action and rejecting a requirement of a more detailed or "delineated showing" of the costs to be incurred in defending the appeal); *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593, 2000 WL 1665134, at *6 (E.D. Pa. Nov. 6, 2000) (finding $25,000 as a reasonable estimate of the costs of an appeal and ordering a bond in that amount).

1. The Turkish Objectors' Appeal Lacks Any Merit

Courts consider the merits of the appeal in determining whether to impose a bond and regularly impose bonds on appealing objectors where, as here, their appeals lack merit. *See In re Nutella*, 2012 WL 6013276, at *2 (requiring the

objectors to post a $22,500 bond because they failed to provide any substantial basis for their appeal); *In re Wal-Mart*, 2010 WL 786513, at *2 ("The Court further finds that the four Objectors should be required to file an appeal bond sufficient to secure and ensure payment of costs on appeals which in the judgment of this Court are without merit and will almost certainly be rejected"); *In re MagSafe Apple Power Adapter Litig*., No. C 09-01911 JW, 2012 WL 2339721, at *2 (N.D. Cal. May 29, 2012) ("because Objectors are highly unlikely to prevail in their appeals, and because there is a significant risk of non-payment following appeal [where the objectors were outside the jurisdiction of the court of appeals], the Court finds that a bond is warranted"); *In re Pharm. Indus. Avg. Wholesale Price Litig*., 520 F. Supp. 2d 274, 279 (D. Mass. 2007) ("the class is likely to be damaged if the appeal is rejected and there are public policy reasons to prevent frivolous objectors from threatening to hold up class distributions"); *Barnes v. Fleetboston Fin. Corp.*, No. 01-10395-NG, 2006 WL 6916834, at *1 (D. Mass. Aug. 22, 2006) ("the burden of litigating frivolous appeals [should] shift[] to [the objectors] instead of the class"); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL 1361, 2003 WL 22417252, at *1 (D. Me. Oct. 7, 2003) (stating that "damages resulting from delay or disruption of settlement administration caused by a frivolous appeal may be included in a Rule 7 bond").

For example, in *Allapattah Servs, Inc. v. Exxon Corp.*, No. 91-0986 CIV.,

2006 WL 1132371 (S.D. Fla. Apr. 7, 2006), the court approved a settlement of $1,075,000,000 to more than 10,000 current and former Exxon direct-served dealers in 35 states. *Id*. at *2, *4, *17. A single objection to the settlement was filed by Westheimer Service Station ("Westheimer"). *Id*. at *8. The court found that Westheimer's objection was frivolous "both as to the objector itself and to the Class as a whole," *id*. at *11, and required it to post a $13.5 million bond if it filed an appeal to cover the damages that the class would suffer from such appeal:

> To the extent that Westheimer attempts to appeal this Order on behalf of the entire Class, however, Westheimer will be required to post a bond. I make this conclusion because any appeal of this Order as to the entire class stays both the entry of final judgment on all claims in the Claims Administration Process and payment to all Class members. *Accordingly, the highly detrimental impact of an appeal of the settlement agreement as to the entire class renders it appropriate for the Court to require Westheimer to post an appeal bond pursuant to Federal Rule of Appellate Procedure 7.*
>
> Fed. R. App. P. 7 provides that: "[I]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Pursuant to Rule 7, the Court will require Westheimer to post an appeal bond in an amount sufficient to cover the damages, costs and interest that the entire class will lose as a result of the appeal. The amount of the bond will be $13,500,000.00.

Id. at *18 (emphasis added, citation omitted). Here, like in the cases cited above, the Turkish Objectors' objection has no merit.

First, the Turkish Objectors have completely ignored the requirements established by the Court for the submission of objections and have no standing to

appeal the fee request. It is black-letter law that, as the party seeking to establish jurisdiction, the Turkish Objectors bear the burden of proving standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The elements of standing must be supported as any other matter on which the plaintiff bears the burden of proof. *Id*. A party must satisfy three conditions to have constitutional standing to sue (or appeal): it must allege a concrete injury in fact; the injury must be connected to the other party's conduct; and it must be likely that a favorable decision will provide redress. *Id*. at 560-61. "The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Az.*, 520 U.S. 43, 64 (1997).

Thus, in order to have standing to either object or appeal, the Orloffs were required to be class members and to prove that they are members of the Class. *See, e.g.*, 4 NEWBERG ON CLASS ACTIONS § 11:55 (4th ed. 2002) ("[A]s a general rule, only class members have standing to object to a proposed settlement."); *In re Royal Dutch/Shell Transport Sec. Litig.*, No. 04-374, 2008 WL 9447623, at * 29 (D. N.J. Dec. 9, 2008) (ruling that "because [objector] is not a member of the Class, he has no standing to object."); *Esslinger v. HSBC Bank Nevada, N.A.*, No. 10-3213, 2012 WL 5866074, at *7 (E.D. Pa. Nov. 20, 2012) (ruling that group of Attorneys General had no standing to object, because they were not class members); *Feder v. Elec. Data Sys. Corp*., 248 Fed. App'x 579, 581 (5th Cir.

2007) ("*EDS*") (an objector who "produced no evidence substantiating his membership in the class" had no standing to object); *In re Initial Pub. Offerings Sec. Litig.*, No. 21 MC 92 (SAS), 2011 WL 3792825, at *2 (S.D.N.Y. Aug. 25, 2011) (objector who submitted unsworn, unauthenticated tax form did not establish class membership).

The Turkish Objectors failed to provide any documentation, such as account statements or trading confirmations, "sufficient to prove [the Orloffs'] membership in the Class," as specifically required by the Court and as they said they would in their objection. Indeed, despite the explicit instruction in the Settlement Notice that any objection must include documents proving class membership, including documents identifying the date(s), price(s) and number of shares of all purchases, acquisitions and sales of Schering stock made during the Class Period, the Turkish Objectors' objection failed to provide any such documentation.[3] This is a

[3] The District Court's Order Preliminarily Approving Proposed Settlement and Providing for Notice (ECF No. 421) directed that "Any objections, filings, or other submissions by an objecting Class Member must . . . include documents sufficient to prove the objector's membership in the Class, such as the number of shares of Schering common stock, shares of Preferred Stock, Schering call options, and/or Schering put options purchased, acquired and sold during the Class Period, as well as the dates and prices of each such purchase, acquisition, and sale." *Id.* ¶ 15. The Order further stated that "Any Class Member who does not make his, her, or its objection in the manner provided herein shall be deemed to have waived his, her, or its right to object to any aspect of the proposed Settlement, the proposed Plan of Allocation, and/or Co-Lead Counsel's motion for attorneys' fees and reimbursement of Litigation Expenses. Such Class Member shall forever be barred and foreclosed from objecting to the fairness, reasonableness, or adequacy of the

reflection of the fact that the Turkish Objectors regularly "recycle" their objections without consideration of the facts, and it reflects a disregard for the requirements set by the Court.

The Turkish Objectors have no true interest in this litigation, and their appeal must be dismissed for lack of jurisdiction. *See, e.g., Arizonians for Official English*, 520 U.S. at 73 (vacating Ninth Circuit judgment where case had become moot for lack of standing). Courts have uniformly dismissed appeals of overruled objections, where the objector failed to establish class membership. For example, in *EDS*, 248 Fed. App'x 579, the Fifth Circuit held that an objector lacked standing to challenge a securities class action settlement because, like the Turkish Objectors here, the objector "produced no evidence substantiating his membership in the class." 248 Fed. App'x at 581. The Fifth Circuit explained, "the burden of proving class membership cannot be satisfied by the appellant's unsupported assertions of class membership. [The objector] did not submit a proof of claim form. Nor did he provide the documentary evidence required by the claim form to support his contention that he bought or sold EDS stocks during the class period.

Settlement, the Plan of Allocation, or the requested attorneys' fees and Litigation Expenses, and otherwise from being heard concerning the Settlement, the Plan of Allocation, or the attorneys' fees and expense request in this or any other proceeding." *Id.* ¶ 16. As of the date of this filing, the Orloffs have also failed to submit Proof of Claim forms. The postmark deadline for submission of Proof of Claim forms was November 18, 2013.

His objection did not include the required information as to the number or type of EDS securities that [the objector] alleges to have dealt in during the period." *Id.* The Fifth Circuit concluded by holding that:

> Allowing someone to object to settlement in a class action based on this sort of weak, unsubstantiated evidence would inject a great deal of unjustified uncertainty into the settlement process. . . . *[T]he right to object to settlement in a securities class action must rest on something more than the sort of bare assertions of stock-ownership made by [the objector]. Because [the objector] lacked standing to object to the settlement, he cannot now appeal the district court's ruling on his objection.*

Id. (emphasis added); *see also AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1311 (11th Cir. 2004) (investors who were not class members were not entitled to appeal the denial of their objections to the settlement because they were not parties to the lawsuit and, as nonclass members, they were not seeking to "protect their own property, their own allotment from an award or settlement or any other cognizable legal right or interest"); *Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1354-55 (11th Cir. 2003) (nonclass members had no standing to contest attorneys' fee award in class action on appeal because they were not parties to the lawsuit and had suffered no injury).

Second, the objection, which is factually incorrect and legally unsupported, is frivolous on its face. First, the objection contends that the Settlement is not fair to Class Members but provides absolutely no reason why the Turkish Objectors think the Settlement is unfair, just boilerplate language about the Court's

responsibility to independently review the Settlement. ECF No. 431 at 1-3.

The objection also reflects a misapprehension of the basic components of the law in the Third Circuit regarding attorney fee awards. For example, the Turkish Objectors baldly state that the attorney fee request "is neither modest or reasonable," that "the billed charges are unreasonably high" and that "there is no justification for using a 1.3 multiplier." ECF No. 431 at 3, 4. As the Special Masters found in their report, these arguments are meritless. Specifically, the Special Masters found that the Turkish Objectors' "main contention" – that the fee award should be based on the lodestar method – was "incompatible with well-settled controlling Third Circuit case law, none of which is even mentioned in the . . . Objection." ECF No. 435 at 55. The Special Masters similarly found the Turkish Objectors' assertion that "[t]he court must engage in a detailed analysis of counsel's billing" was unsupported by Third Circuit case law, and stated that their "*ipse dixit* assertion" that a 1.3 multiplier was unreasonable was "contrary to controlling precedent." *Id.*[4]

Finally, the lack of merit of the appeal is underscored by the fact that it is being orchestrated by professional objectors. *See Nutella*, 2012 WL 6013276 at *2

[4] The objection also falsely stated that "[t]he fee motion was not posted on the settlement website," ECF No. 431 at 4, when, in fact, the fee motion and all supporting documentation was posted on that website at the time the motion was made and more than a month before the objection was filed. ECF 432-1 at ¶ 7.

(unresponsiveness of briefs and "fact that the Objectors appear to be objectors who repeatedly raise objections in class actions around the country, further suggest that their appeal in this case is meritless.") Mr. Turkish and/or the Orloffs have submitted similar objections in at least ten other recent class action cases in this District and others.[5] Indeed, this is their fifth objection this year alone. In virtually every one of these cases, the court overruled the objections, and then the Turkish Objectors filed notices of appeal for appeals that either were never perfected or were voluntarily dismissed. The Turkish Objectors' appeal here, which lacks any legitimate basis, can thus only be viewed as an effort to extract a fee from Co-Lead Counsel in exchange for dismissing their appeal. As the Court in *Barnes v. Fleetboston Fin. Corp*., stated:

> Repeat objectors to class action settlements can make a living simply

[5] *See, e.g.*, *In re Citigroup Inc. Sec. Litig.*, No. 07-cv-09901 (SHS) (S.D.N.Y. Mar. 15, 2013), ECF No. 226; *In re Bank of Am. Corp. Sec., Derivative & ERISA Litig.*,No. 09-MDL-2058 (PKC) (S.D.N.Y. Mar. 5, 2013), ECF No. 842; *In re Am. Int'l Grp. Sec. Litig.*, Master File No. 04-Civ-8141 (DAB)(AJP) (S.D.N.Y. Mar. 6, 2013), ECF No. 671; *In re Tremont Sec. Law, State Law & Ins. Litig.*, Master File No. 08-cv-11117 (TPG) (S.D.N.Y. May 11, 2011), ECF No. 464; *In re L.G. Philips LCD Co., Ltd. Sec. Litig.*, Civil Action No. 1:07-cv-00909-RJS (S.D.N.Y. Mar. 3, 2011), ECF No. 76; *In re Micron Tech, Inc. Sec Litig.*, Master File No. 1:06-cv-00085-S-WFD (D. Id. Jan. 19, 2011), ECF No. 173, *aff'd*, 484 F. App'x 138 (9th Cir. 2012); *In re Mercury Interactive Corp. Sec. Litig.*, No. 5:05-CV-3395-JF(PVT) (N.D. Cal. Jan. 13, 2011), ECF No. 401; *Brody v. Merck & Co*., No. 12-cv-4774 (D.N.J. Jan. 31, 2013), ECF No. 27; *In re Ins. Brokerage Antitrust Litig*., No. 04-cv-5184 (D.N.J. Aug. 30, 2011), ECF No. 1894; *In re Resort Condos. Int'l, LLC*, No. 06-cv-1222 (D.N.J. Nov. 20, 2009), ECF No. 453. *See* Reply Decl. Ex. 3 (ECF No. 432-2) for copies of these objections.

> by filing frivolous appeals and thereby slowing down the execution of settlements. The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal). Because of these economic realities, professional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors.

2006 WL 6916834, at *1; *see also Initial Pub. Offering*, 728 F. Supp. 2d at 295 n. 37 ("Federal courts are increasingly weary of professional objectors . . . [with] objections [that] were obviously canned objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests."). Indeed, the "goal" of professional objectors like Turkish, is "to hijack as many dollars for themselves as they can wrest from a negotiated settlement." *In re UnitedHealth Group Inc. PSLRA Litig*., 643 F. Supp. 2d 1107, 1109 (D. Minn. 2009).

2. An Appeal Bond Is Required To Ensure That Lead Plaintiffs' Appeal Costs Are Paid

An appeal bond should be ordered to protect the Lead Plaintiffs from the costs of defending the Turkish Objectors' frivolous appeal. "In many cases, an appeal bond is 'necessary to provide some level of security to Lead Plaintiffs who have no assurances that Appellants have the ability to pay the costs and fees associated with opposing their appeals.'" *Nutella*, 2012 WL 6013276 at *1 (noting also that objectors were geographically diverse).

Given the substantial amount of the costs of this appeal (discussed below),

the fact that the Orloffs appear to be located in California, and the fact that the Turkish Objectors have been unable to even muster proof of membership in the Class, an appeal bond is warranted here.

a. This Court Should Require A $25,000 Bond For The Costs Of The Appeal

The costs on appeal subject to a bond include those costs itemized in Rule 39 of the Federal Rules of Appellate Procedures and 28 U.S.C. § 1920. *See* Fed. R. App. P. 39(e) (listing costs taxable by district court for benefit of prevailing party on appeal); 28 U.S.C. § 1920 (listing costs taxable by federal judges and clerks). Courts have held that such costs include the costs of printing and reproducing briefs, appendices, records, and court reporter transcripts. *See Hirschensohn v. Lawyers Title Ins. Co.*, No. 96-7312, 1997 WL 307777 at *1 (3d Cir. 1997); *Ins. Brokerage Antitrust Litig.*, 2007 WL 1963063, at *1; *In re Diet Drugs*, 2000 WL 1665134, at *6.

An appeal here will entail significant costs, including the costs of reproducing lengthy briefs and a substantial appellate record that could be tens of thousands of pages—covers for the briefs and appendices alone could cost $1,000. Accordingly, Lead Plaintiffs seek a $25,000 bond for these taxable costs. Courts have determined that similar amounts were an appropriate amount of costs in appeal bonds. *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, 2010 WL 1253741, at *2-*3 (appellants ordered to post appeal bond of $50,000); *Berry v.*

Deutsche Bank Trust Co. Am., 632 F. Supp. 2d 300, 308 (S.D.N.Y. 2009) (appellant ordered to post appeal bond of $50,000); *Baker v. Urban Outfitters, Inc.*, No. 01 CV 5440 LAP, 2006 WL 3635392, at *2 (S.D.N.Y. Dec. 12, 2006) (same); *In re Am. Investors Life Ins. Co.*, 695 F. Supp. 2d at 167 (appellants ordered to post appeal bond of $25,000); *Ins. Brokerage Antitrust Litig.*, 2007 WL 1963063, at *3 (appellants ordered to post appeal bond of $25,000); *In re Diet Drugs*, 2000 WL 1665134, at *6 (appellants ordered to post appeal bond of $25,000); *Initial Pub. Offering*, 728 F. Supp. 2d at 294 (appellant ordered to post appeal bond of $25,000).

b. The Court Should Require A $25,000 Bond To Cover The Administrative Costs Of Delay Associated With This Frivolous Appeal

Costs securable by a Rule 7 appeal bond may also include the costs attendant to the delay associated with an appeal – *i.e.*, the incremental costs imposed on the settlement administration by that delay. *See, e.g., In re Nutella*, 2012 WL 6013276, at *2-*3 (requiring bond including $20,000 in administrative costs that would result from delays resulting from the appeal); *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, No. 11-MD-2247 ADM/JJK, 2012 WL 3984542, at *4 (D. Minn. Sept. 11, 2012) ("Costs incurred as the result of a delay of a settlement caused by an appeal are recoverable under Rule 7."); *In re Checking Account Overdraft Litig.*, No. 1.09-MD-02036 JLK, 2012 WL 456691, at

*2 (S.D. Fla. Feb. 14, 2012) (ordering a bond in excess of $616,000 for delay and appeal costs because the appeal "prevent[ed] distribution of the Settlement proceeds"); *In re Pharm. Indus.*, 520 F. Supp. 2d at 279 (appealing objector required to post $61,000 bond for administrative costs that class would suffer as a result of delay in distribution from class action settlement); *Barnes*, 2006 WL 6916834, at *3 (requiring bond including $643,750 in delay costs); *In re Broadcom Corp. Sec. Litig.*, No. SACV 01-275 DT (MLGx), 2005 U.S. Dist. LEXIS 45656, at *9 (C.D. Cal. Dec. 5, 2005) ("the costs of delay are properly included in a Rule 7 bond"); *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 815 (6th Cir. 2004) (affirming imposition of bond that included $123,429 for "incremental administrative costs" due to projected delay); *In re Compact Disc.*, 2003 WL 22417252, at *1-*2 (concluding that costs of delay or disruption of settlement may be included in Rule 7 bond and granting $35,000 appeal bond); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 124, 128 (S.D.N.Y. 1999) (requiring bond including "damages resulting from the delay and/or disruption of settlement administration" caused by [the] appeal); *see also Ins. Brokerage Antitrust Litig.*, 2007 WL 1963063, at *3 (appeal bond properly included the "administrative costs associated with an appeal"). This is particularly true, where, like here, the appeal is meritless. *See, e.g.*, *In re Uponor*, 2012 WL 3984542, at *5 ("The [$20,000 in] costs of administration should be shouldered by the Objectors, particularly given

the tenuous nature of their arguments."); *In re Pharm. Indus.*, 520 F. Supp. 2d at 278-79 (including the costs of delay in bond where appeal was "likely to be deemed frivolous" and noting that "there are public policy reasons to prevent frivolous objectors from threatening to hold up class distributions"); *In re Compact Disc.*, 2003 WL 22417252, at *1 ("damages resulting from delay or disruption of settlement administration caused by a frivolous appeal may be included").

While delay costs cannot be quantified with precision, the difficulty in quantifying the costs of delay does not prevent Courts from estimating such costs and requiring appellees to bond them. As one court explained in requiring a $500,000 appeal bond:

> While it is difficult to calculate with mathematical precision the duration of Objectors' appeal, or the administrative costs and the interest costs to the potentially more than 3 million class members, or other costs reasonably incurred under Rule 39 of the Federal Rules of Appellate Procedure, the Court finds the sum of $500,000 . . . to be reasonable.

In re Wal-Mart, 2010 WL 786513, at *2. *See also Broadcom*, 2005 U.S. Dist. LEXIS 45656, at *9 (including in appeal bond costs of delay and disruption of settlement administration estimated at $517,000 resulting from, *inter alia*, "costs of updating addresses and other information needed to remain in contact with Class members, locating lost Class members, . . . paying monthly fees for maintaining the website created to inform Class members, and providing phone support to answer inquiries from the Class members").

Here, the Class will incur substantial increased administrative expenses from the delay caused by the Turkish Objector's appeal. These expenses include, among other things, additional costs necessary to extend website maintenance, to process additional claims, to process and respond to written and verbal inquires about the status of claims during the appeal and to process change-of-address forms. Based on recent appeals of settlements, Lead Plaintiffs estimate that the appeal could take up to 24 months to resolve. *See Dewey v. Volkswagen Aktiengesellschaft*, 681 F. 3d 170 (3d Cir. 2012) (21 months to resolve from notice of appeal); *Larson v. AT&T Mobility LLC*, 687 F.3d 109 (3d Cir. 2012) (19 months to resolve from notice of appeal). The Court-appointed Claims Administrator estimates that a 24-month delay could increase settlement administration costs by approximately $3,500 per month, or more than $84,000 for two years, however Lead Plaintiffs are only seeking $25,000 to compensate for administrative delay at this time.[6]

IV. CONCLUSION

As a result of a meritless appeal that the Orloffs do not even have standing to pursue, the Turkish Objectors threaten to substantially delay the distribution of the Settlement proceeds to Class Members and cause the Class needless expense and substantial harm, which Lead Plaintiffs may well have difficulty recovering from

[6] Lead Plaintiffs reserve the right to seek additional costs at the appropriate time.

the Turkish Objectors after the Class prevails on appeal. Accordingly, this Court should require a $50,000 appeal bond under Fed. R. App. P. 7.

Dated: November 26, 2013

Respectfully submitted,

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

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE SCHERING-PLOUGH CORPORATION / ENHANCE SECURITIES LITIGATION	Civil Action No. 08-00397 (DMC) (JAD)

THIS MATTER having been opened to the Court by Counsel for Lead Plaintiffs and the Class, in the presence of all parties of record and objectors Dr. Marshall J. Orloff IRA R/O and the Orloff Family Trust DTD 12/13/01, represented by attorney Forrest S. Turkish, (the "Turkish Objectors") and the Court having read the parties' and the Turkish Objectors' papers and good cause appearing,

IT IS THIS ___ day of _____, 201_

ORDERED that the motion to require Dr. Marshall J. Orloff IRA R/O and the Orloff Family Trust DTD 12/13/01 to post a bond pursuant to Fed.R.App.P. 7 is granted; and it is further

ORDERED that Dr. Marshall J. Orloff IRA R/O and the Orloff Family Trust DTD 12/13/01 are jointly and severally responsible for the posting of a single bond in the amount of $50,000 pursuant to Fed. R. App. P. 7, under which they will be jointly and severally liable.

_____
DENNIS M. CAVANAUGH, U.S.D.J.