James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI
OLSTEIN, BRODY & AGNELLO, PC
5 Becker Farm Road
Roseland, New Jersey 07068-1739
(973) 994-1700
Liaison Counsel for the Class

Max W. Berger
Salvatore J. Graziano
Adam H. Wierzbowski
Laura H. Gundersheim
BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400
Co-Lead Counsel for Lead Plaintiffs and the Class

Jay W. Eisenhofer
Daniel L. Berger
John C. Kairis
Jeff A. Almeida
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, New York 10017
(646) 722-8500
Co-Lead Counsel for Lead Plaintiffs and the Class

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE MERCK & CO., INC. VYTORIN/ZETIA SECURITIES LITIGATION	Civil Action No. 08-2177 (DMC) (JAD) **NOTICE OF MOTION**

To: All Persons on ECF Service List

PLEASE TAKE NOTICE that on December 16, 2013 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.
Liaison Counsel for the Class

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

Dated: November 20, 2013

Jay W. Eisenhofer
Daniel L. Berger
John C. Kairis
Jeff A. Almeida
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, New York 10017
(646) 722-8500
Co-Lead Counsel for Lead Plaintiffs and the Class

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1285 Avenue of the Americas
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(212) 554-1400
Co-Lead Counsel for Lead Plaintiffs and the Class

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE MERCK & CO., INC. VYTORIN/ZETIA SECURITIES LITIGATION	Civil Action No. 08-2177 (DMC) (JAD) Return date: December 16, 2013

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

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI
OLSTEIN, BRODY & AGNELLO, PC
5 Becker Farm Road
Roseland, New Jersey 07068-1739
(973) 994-1700
Liaison Counsel for the Class

Jay W. Eisenhofer
Daniel L. Berger
John C. Kairis
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, New York 10017
(646) 722-8500
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Laura H. Gundersheim
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400
Co-Lead Counsel for Lead Plaintiffs and the Class

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PRELIMINARY STATEMENT

Lead Plaintiffs, Stichting Pensioenfonds ABP ("ABP"), International Fund Management, S.A. (Luxemburg), the Jacksonville Police and Fire Retirement System, and the General Retirement System of the City of Detroit, respectfully submit this Memorandum of Law in support of their motion for the entry of an order requiring the Orloff Family Trust DTD 12/31/01 and Dr. Marshall J. Orloff IRA R/O, represented by attorney Forrest S. Turkish, a serial objector (collectively, the "Turkish Objectors") and Franklin DeJulius ("DeJulius" and, together with the Turkish Objectors, the "Objectors") to post a bond pursuant to Federal Rule of Appellate Procedure 7 in order to pursue their appeals of this Court's October 1, 2013 Opinion and Orders granting final approval to the Settlement and awarding attorneys' fees and reimbursement of expenses.

The Objectors intend to hold up distribution of the $215 million settlement in order to extort a payment from Co-Lead Counsel. The Objectors' meritless appeals risk delaying the recovery for thousands of Class Members, and will impose thousands of dollars in additional, unnecessary expenses on the Class.

As more fully set forth below, bonds are warranted in this case for several reasons. First, the Turkish Objectors 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. 333-3 at pp. 70-96), in order for their objection to be considered, the Turkish Objectors were required to submit documents sufficient to prove their membership in the Class. The Turkish Objectors did not provide any such proof (*see* ECF No. 338) and, therefore, failed to establish that they are members of the Class with standing to object or appeal. The Turkish Objectors' appeal will be dismissed on this ground alone. *See Feder v. Elec. Data*

Sys. Corp., 248 F. App'x 579, 581 (5th Cir. 2007) ("*EDS*") (dismissing appeal of securities class action settlement for lack of objector standing); *Heller v. Quovadx*, 245 F. App'x 839, 842 (10th Cir. 2007) (an objector lacked standing to object to securities class action settlement where objector failed to present evidence of class membership); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) (noting that "[t]he plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals"); *see also AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1309 (11th Cir. 2004) (finding that "Objectors may not appeal the settlement because they are not class members and have not moved to intervene"); 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.").

Second, as set forth more fully in Lead Plaintiffs' Memorandum of Law in Response to Objections to Motion for an Award of Attorneys' Fees (ECF No. 339) and in Plaintiffs' Response to DeJulius' Opposition to Special Masters' Report (ECF No. 346), the Objectors' objections are, as both the Court-appointed Special Masters and the Court have already found – devoid of any merit. ECF Nos. 342, 349, 350.

Finally, the Objectors are professional objectors seeking only to extract a fee by lodging generic and legally incorrect objections.

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 against the Turkish Objectors and DeJulius.

BACKGROUND

On June 6, 2013, the Court preliminarily approved the $215 million Settlement and ordered that notice be sent to members of the Class.

Following the extensive Court-approved notice program, which included the mailing of more than 725,000 copies of the Settlement Notice to potential Class Members and nominees, there were only two objections (filed by the Turkish Objectors and DeJulius) 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 the first objection, the Turkish Objectors summarily stated, without providing any supporting documentation, that "they are each class member[s] who purchased the stock as defined in the Settlement Agreement." ECF No. 338 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 their membership in the Class, such as documents showing the number of Merck shares they purportedly purchased and the date(s) and price(s) of such purchase(s). Moreover, although the Turkish Objectors said they would "provide their trade information in a supplemental filing prior to the final approval hearing," (*id.*), no such supplemental filing was ever made.[1]

In the second objection, DeJulius argued that class counsel were "seeking double recovery for the same work" performed in the *Schering* case, and that "[c]lass counsel [have] not provided any justification for awarding a 11% higher fee in Merck than the one requested in Schering Plough." ECF No. 337 at 1, 2. These arguments are meritless, as Co-Lead Counsel's

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[1] In the objection, Dr. Orloff also claimed that his "class membership has been confirmed by the administrator" and included a copy of the Settlement Notice mailed to the Turkish Objectors. 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 5 (ECF No. 333-3 at p. 74) (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. 339-1) at ¶¶ 12-14.

declaration detailed the time spent on each case and affirmed that there was no double counting of hours. Moreover, DeJulius wholly ignored the myriad risks (detailed in Co-Lead Counsel's fee brief, ECF No. 334-1) confronting Lead Plaintiffs and Co-Lead Counsel that they would recover nothing at all, despite years of contentious litigation. DeJulius also argued that the fee requests in the Merck and Schering cases should be combined and that the "market rate" for the fee requests is 17% of the common fund. ECF No. 337 at 2. As set forth below, those arguments were also meritless.

By Order dated April 19, 2013, the Court appointed 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. 327 at 2-3.

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. 342. 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. Sec. Litig.*, 455 F.3d 160, 166 (3d Cir. 2006)), and recommended that the Court approve attorneys' fees in the amount of 28% of the Settlement Fund. Special Masters' Report at 96. Specifically, the Special Masters found and recommended the following:

> In applying the various factors mandated by Third Circuit case law to determine under the POR [percentage of recovery] method a reasonable fee to be awarded to Co-Lead Counsel, we have attempted "to evaluate what class counsel actually did and how it benefitted the class." Based on our analysis, we believe Co-Lead Counsel achieved an outstanding settlement for the Class which was due exclusively to Co-Lead Counsels' [sic] 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 extremely significant risk their enormous amounts of time and money invested in this case might not be recovered. The suggested 28% fee award is supported by the three of the four institutional members of the Merck Lead Plaintiffs Group (while the fourth member ABP has reserved its view pending our Report and Recommendation[2]) and the lodestar "cross-check" strongly confirms that a 28% fee award sought is extremely reasonable, reflecting the herculean effort demanded by this complex five-year litigation. Finally, we note the extremely low number of objections which the Third Circuit has characterized as a "rare phenomenon" reinforces our view. In light of the foregoing and for the reasons discussed at length in the Report and Recommendation, we recommend the Court **GRANT** Merck Co-Lead Counsels' [sic] motion for an award of attorneys' fees in the amount of 28% of the Settlement Fund (plus interest).

Id at 95-96 (internal citation omitted).

The Special Masters' Report also addressed the Turkish and DeJulius Objections. With regard to the Turkish Objectors, the Special Masters found that their objection "lack[ed] merit and should be rejected." *Id.* at 56, 90. 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, 90. 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.* at 55.

The Special Masters found that the DeJulius Objection similarly lacked merit. Noting that DeJulius only purchased 2 shares and purchased those 2 shares after the disclosure revealing that Vytorin failed the ENHANCE trial, the Special Masters found that DeJulius' primary objection – that the fees requested should be the same as requested in the companion Schering

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[2] After reviewing the Special Masters' Report, ABP also supported a 28% fee award. *See* ECF No. 347.

case because they had "similar risk" – was incorrect. *Id*. at 86-87. Specifically, the Special Masters stated:

> Mr. DeJulius, however, provides no analysis, much less any basis, for the premise that the two cases presented similar risk profiles. Apart from the overarching risk presented by the failure of Merck's shares to drop meaningfully on January 14, 2008 – the Merck Plaintiffs had much more difficult issues of proof because the ENHANCE trial was conducted by Schering scientists, not Merck's, which provided significant additional challenges. In addition, the allegations that Schering defendant Carrie Cox, a Schering executive, had engaged in substantial inside trading might have assisted the Schering Plaintiff Group to establish *scienter*, but there were no similar insider trading claims in the Merck Action.

Id. at 86.

The Special Masters also analyzed – and rejected based on Third Circuit law – DeJulius' claim that the fee requests in the Merck and Schering cases should be treated as one fee request, finding that DeJulius "provides no justification for his perfunctory contention and we can think of no sensible reason to conflate the fee applications." *Id*. at 87. Specifically, the Special Masters found that the Schering and Merck action "were separate class actions, [brought] on behalf of completely different classes of securities holders in different public companies," and that the two cases "involved different legal issues and risks" and "had completely different Lead Plaintiffs." *Id.*

DeJulius' claim that the "court may not award class counsel more than 17%" was similarly rejected by the Special Masters, who noted that "the Third Circuit has squarely rejected slavish adherence to statistical 'ranges' or 'averages'" (*id*. at 88), and that the *Prudential/Gunter* analysis required by the Third Circuit demonstrated that the 28% attorneys' fee requested in Merck was appropriate. *Id*. at 89.

Finally, the Special Masters found that DeJulius' claim that "Class Counsel has not stated in its fee affidavits that no portion of the lodestar claims in this case [Merck] was claimed in the Schering-Plough case" was "contradicted" by the evidence. *Id*. at 86 n.45.

On September 10, 2013, DeJulius filed an Opposition to the Special Masters' Report, (ECF No. 344), arguing that a retention letter between Lead Plaintiff ABP and Co-Lead Counsel Grant & Eisenhofer P.A. purportedly providing for a "cap" on fees of 15% of recovery, should govern the Court's review of the Lead Plaintiffs' request for fees, and that Lead Plaintiffs were required to disclose the content of that letter in the class notice. *Id*. at 3-4. As Lead Plaintiffs pointed out in their Response to DeJulius' Opposition to Special Masters' Report (ECF No. 346), these arguments fail, as *all* Lead Plaintiffs, *including* ABP, supported the fee request. *See* APG Declaration filed on September 24, 2013, ECF No. 347, ¶ 3. Moreover, the class notice explicitly stated that the fees awarded may constitute up to 28% of the recovery. *See, e.g.*, *In re Bristol-Myers Squibb Sec. Litig.*, No. 06-cv-2964, 2007 U.S. App. LEXIS 18093, at *6-7 (3d Cir. July 27, 2007) (class notice stating that up to 20% of recovery may be awarded in attorneys' fees was sufficient).

On October 1, 2013, the Court held a hearing to consider the fairness of the $215 million Settlement and Co-Lead Counsel's application for an award of attorneys' fees and reimbursement of expenses. ECF No. 354. Neither the Turkish Objectors nor DeJulius appeared at that hearing. *Id*. At the hearing, the Court held that the attorneys' 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 request. Oct. 1 Hearing Tr. at 20. The Court also held that the analysis

conducted by the Special Masters regarding the attorneys' 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 attorneys' fees in the amount of 28% of the Settlement Fund (ECF No. 349), as well as an Order adopting in its entirety the Special Masters' Report (ECF No. 350). In its Opinion and Orders, the Court reviewed the Special Masters' Report, and held that the "Special Masters ha[d] done a thorough and accurate job in 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. 349 at 6-7.

ARGUMENT

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

Pursuant to FED. R. APP. P. 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. & Sales Practices*, No. 11-cv-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-cv-5184 (GEB), 2007 WL 1963063, at *2 (D.N.J. July 2, 2007) (same).[3]

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 *1 ("In many cases, an appeal

[3] 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, 121 n.2 (3d Cir. 1985).

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.") (internal quotations omitted); *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, 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 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. 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-cv-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).

A. THE OBJECTORS' APPEALS LACK 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 *2-3 (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. 09-cv-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. Average 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-cv-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 to the class"); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, MDL No. 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 Services, Inc. v. Exxon Corp.*, No. 91-cv-0986, 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 Objectors' appeals have 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.* Thus, in order to establish their standing to either object or appeal, the Turkish Objectors were required to prove that they are members of the Class. *See EDS*, 248 F. App'x at 581 (an objector who "produced no evidence substantiating his membership in the class" had no standing to object); *In re Initial Pub. Offering Sec. Litig.*, No. 21-cv-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 [their] membership in the Class," as specifically required by the Court. 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 Merck stock made during the Class Period, the Turkish Objectors' objection failed to provide any such documentation.[4] Either this is a reflection of the fact that the Turkish Objectors regularly "recycle" their objections without consideration of the facts, or it reflects a disregard for the requirements set by the Court. Therefore, the Turkish Objectors have no apparent interest in this litigation, and their appeal must be dismissed for lack of jurisdiction. *See AAL High Yield Bond Fund*, 361 F.3d at 1310-11 (investors who were not class members were not entitled to appeal the denial of their objections to the class 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).

Courts have uniformly overruled objections to class settlements, and dismissed appeals of such, because the objector failed to establish his membership in the class. For example, in *EDS*,

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[4] The District Court's Order Preliminarily Approving Proposed Settlement and Providing for Notice (ECF No. 330) 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 Merck common stock, Merck call options, and/or Merck 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 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, no Proof of Claim form has been received from the Turkish Objectors. The postmark deadline for submission of Proof of Claim forms was November 18, 2013.

248 F. 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 F. App'x at 581. The Fifth Circuit explained that "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. 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 Heller*, 245 F. App'x at 842 (rejecting an objection for lack of standing where the objector failed to present "any evidence suggesting membership, and therefore he has no standing to object under Rule 23."); *Cent. States Se. & Sw. Areas Health & Welfare Fund*, 504 F.3d 229, 243-44 (2d Cir. 2007) ("Because CareFirst is not a class member, it does not have an affected interest in the class Plaintiffs' claims against Medco so as to be able to assert its objections . . . ."); *Gould*, 883 F.2d at 284 ("non-class members have no standing to object . . . to a proposed class settlement.").

Second, both the Turkish Objectors' and DeJulius' Objections are frivolous on their face. The Turkish Objectors' objection is four pages long and the arguments set forth in the objection are factually incorrect and legally unsupported. 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. 338. 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 nor reasonable, that "the billed charges are unreasonably high" and that there is no justification for the 1.3 multiplier. *Id.* at 5. 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. 342 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.*

The three-page DeJulius Objection is equally baseless. ECF No. 337. DeJulius' unfounded speculation that Class Counsel in the *Merck* case were "seeking double recovery for the same work" performed in the *Schering* case and his assertion that "class counsel has not stated in its fee affidavits that no portion of the lodestar claimed in this [*Merck*] case was claimed in the Schering Plough case" (*id*. at 1) fail. The declarations filed by each law firm in the *Merck* case detailed the time spent by each partner, associate, and paralegal in each firm on the *Merck* case, and made clear that no portion of the lodestar claimed in *Merck* case was also claimed in the *Schering Plough* case.

DeJulius' contention that there was no justification for a higher fee in the *Merck* case likewise fails. As the Special Masters concluded in their Report, "the risk of non-payment, is

particularly significant in the Merck Action." ECF No. 342 at 68. The Special Masters found that there was "a potentially fatal obstacle" in proving loss causation and damages in the *Merck* case because, on the day that the "top line" results of the ENHANCE trial were disclosed, Schering's stock price plunged significantly, while Merck's stock "barely moved." *Id.* at 69. The Special Masters also noted that proving scienter "was far more difficult in the Merck Action because the ENHANCE trial was run by Schering, not Merck." *Id.* at 70-71.

Further, the Special Masters found that a fee award of 28% of the Settlement Fund was "within the broad range of awards" in this Circuit and supported by "the extremely risky nature of the Merck Action combined with the magnitude of the endeavor undertaken by Plaintiffs' Counsel in the Merck Action." *Id.* at 75-76. Finally, the Special Masters rejected all of DeJulius' challenges to the amount of the requested fees, as well as DeJulius' argument to conflate the Schering and Merck Actions and treat them as one fee request. *Id.* at 87.

DeJulius' Opposition to the Special Masters' Report fails as well. There, DeJulius argued that a retainer agreement with one of the Lead Plaintiffs (ABP) should control the amount of the fee award, and that Co-Lead Counsel were required to disclose that retainer letter in the Settlement Notice. However, all of the Lead Plaintiffs supported an attorneys' fee award of up to 28% of the Settlement Fund. *See* ECF No. 334-3. Indeed, after reviewing the Special Masters' Report, ABP executed a declaration "support[ing] the Special Masters' recommendation for an award of attorneys' fees to Class Counsel in the amount of 28% of the Settlement Fund (plus interest). ECF No. 347, ¶ 3. *See also In re Bristol-Myers Squibb Sec. Litig.*, 2007 U.S. App. LEXIS 18093 (finding that plaintiffs' initial retention agreement did not control where plaintiff subsequently supported higher fee request). Additionally, as the Settlement Notice informed Class Members that a fee of up to 28% might be awarded, disclosing the non-controlling initial

ABP retention letter would only confuse, not inform Class Members, and thus need not be discussed in the notice.

Finally, the appeal bond is warranted since the appeal is being orchestrated by professional objectors. Mr. Turkish and/or the Orloff Family Trust 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 they then filed a Notice of Appeal in order to leverage compensation for themselves. Similarly, counsel for DeJulius – John Pentz – is a serial objector who has filed objections in over fifty class actions. Numerous courts across the country have recognized that Pentz's objections are meritless and made simply to leverage a fee for himself.[6] The Objectors'

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[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.*, No. 04-cv-8141 (DAB)(AJP) (S.D.N.Y. Mar. 6, 2013), ECF No. 671; *In re Tremont Sec. Law, State Law & Ins. Litig.*, 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.*, No. 07-cv-00909-RJS (S.D.N.Y. Mar. 3, 2011), ECF No. 76; *In re Micron Tech., Inc. Sec Litig.*, No. 06-cv-00085-S-WFD (D. Idaho Jan. 19, 2011), ECF No. 173, *aff'd*, 484 F. App'x 138 (9th Cir. 2012); *In re Mercury Interactive Corp. Sec. Litig.*, No. 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-md-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 In re Schering-Plough*, No. 08-cv-397, Reply Decl. Ex. 3 (ECF No. 432-2) for copies of these objections.

[6] *See, e.g., Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 575 n.19 (D.N.J. 2010), *rev'd and remanded by*, 681 F.3d 170 (3d Cir. 2012) (summarizing cases criticizing Pentz's objections); *In re Wal-Mart*, 2010 WL 786513, at *1 (Pentz has a "documented history of filing notices of appeal from orders approving other class actions settlements, and thereafter dismissing said appeals when [he] and [his] clients were compensated by the settling class or counsel"); *Barnes*, 2006 WL 6916834, at *1-2 (Pentz is a "professional objector" who seeks to "make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements"); *In re Initial Pub. Offering Sec. Litig*., 721 F. Supp. 2d 2010, 2014-15 (S.D.N.Y. 2010) (concluding that Pentz is a "serial objector" and there was evidence that he acted in "bad faith" and engaged in "vexatious conduct"); *In re AOL Time Warner ERISA Litig*., No. 02-cv-8853 (SWK), 2007 WL 4225486, at *3 & 1 n.2 (S.D.N.Y. Nov. 28, 2007) (Pentz's objection

appeals, which lack any legitimate basis, can thus only be viewed as an effort to extort a fee from Co-Lead Counsel in exchange for dismissing their appeals. As the Court in *Barnes* stated:

> Repeat objectors to class action settlements can make a living simply 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 In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 295 n.37 (S.D.N.Y. 2010) ("Federal courts are increasingly wary 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.") (internal quotations omitted). 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 Grp. Inc. PSLRA Litig.*, 643 F. Supp. 2d 1107, 1109 (D. Minn. 2009).

B. THIS COURT SHOULD REQUIRE THE TURKISH OBJECTORS AND DEJULIUS TO PAY 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. Corp.*, No. 96-cv-7312, 1997 WL 307777 at *1 (3d Cir. 1997); *Ins. Brokerage*, 2007 WL 1963063, at *1; *In re Diet Drugs*, 2000 WL 1665134, at *6.

"contained several arguments that were irrelevant or simply incorrect," were "counterproductive," and were supported by "*no* evidence whatsoever").

An appeal here will entail significant costs, including copying costs for briefs and compilation of the substantial appellate record. Accordingly, Lead Plaintiffs seek that the Turkish Objectors and DeJulius pay a $25,000 bond for these taxable costs.[7] Courts have determined that similar amounts were an appropriate amount of costs in appeal bonds. *See, e.g., In re Currency Conversion Fee*, 2010 WL 1253741, at *2-3 (appellants ordered to post appeal bond of $50,000); *Berry v. Deutsche Bank Trust Co. Ams*., 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*, 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 295 (appellant ordered to post appeal bond of $25,000).

C. THE COURT SHOULD REQUIRE THE TURKISH OBJECTORS AND DEJULIUS TO PAY 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 a result of delay of a settlement caused by an appeal are recoverable under Rule 7."); *In re Checking Account*

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[7] The Turkish Objectors and DeJulius should each be ordered to pay for half of this amount. In the event that either the Turkish Objectors or DeJulius dismisses their appeal, the remaining objector must pick up the dismissed objector's share and pay the entire $25,000 bond for the costs of appeal.

Overdraft Litig., No. 09-md-02036 JLK, 2012 WL 456691, at *2-3 (S.D. Fla. Feb. 14, 2012) (ordering a bond in excess of $616,000 for delay 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. 01-cv-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 administration 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*, 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 additional 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 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 and DeJulius appeals. These expenses include, among other things, additional costs necessary to extend website maintenance, to process and respond to written and verbal inquires about the status of claims processing during the appeal and to process change-of-address forms. Based on recent appeals of settlements, 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 the costs of a 24-month delay in increased settlement administration costs at approximately $89,000 (over $3,700 per month). However, at this time, Lead Plaintiffs

only seek a total bond of $25,000 for these costs of delay (reserving their rights to seek additional costs at a later date, if necessary).[8]

CONCLUSION

As a result of meritless appeals which the Turkish Objectors do not even have standing to pursue, the Objectors threaten to substantially delay the distribution of the Settlement proceeds to Class Members and cause the Class needless expense and substantial harm, and Lead Plaintiffs may well have difficulty recovering from the Turkish Objectors and DeJulius after the Class prevails on appeal. Accordingly, this Court should require the Turkish Objectors and DeJulius to pay a $50,000 appeal bond under Fed. R. App. P. 7 in the manner set forth herein.

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO, P.C.
Liaison Counsel for the Class

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

Dated: November 20, 2013

Max W. Berger
Salvatore J. Graziano
Adam H. Wierzbowski
Laura H. Gundersheim
BERNSTEIN LITOWITZ BERGER &
GROSSMANN LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400
Co-Lead Counsel for Lead Plaintiffs
and the Class

Jay W. Eisenhofer
Daniel L. Berger
John C. Kairis
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, New York 10017
(646) 722-8500
Co-Lead Counsel for Lead Plaintiffs
and the Class

[8] As with the bond for the costs of the appeal, the Turkish Objectors and DeJulius should each be ordered to pay for half of this amount. In the event that either the Turkish Objectors or DeJulius dismisses their appeal, the remaining objector must pick up the dismissed objector's share and pay the entire $25,000 bond for the costs of delay.

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI
OLSTEIN, BRODY & AGNELLO, PC
5 Becker Farm Road
Roseland, New Jersey 07068-1739
(973) 994-1700
Liaison Counsel for the Class

Jay W. Eisenhofer
Daniel L. Berger
John C. Kairis
Jeff A. Almeida
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, New York 10017
(646) 722-8500
Co-Lead Counsel for Lead Plaintiffs and the Class

Max W. Berger
Salvatore J. Graziano
Adam H. Wierzbowski
Laura H. Gundersheim
BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400
Co-Lead Counsel for Lead Plaintiffs and the Class

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

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

ORDER

THIS MATTER having been opened to the Court by Co-Lead Counsel for Lead Plaintiffs and the Class, in the presence of all parties of record and counsel for objectors Franklin DeJulius, Dr. Marshall J. Orloff IRA R/O and Orloff Family Trust DTD 12/13/01 ("Appealing Objectors"), and the Court having read the parties papers and good cause appearing,

IT IS THIS ___ day of December, 2013

ORDERED that the motion to require the Appealing Objectors to post bonds pursuant to Fed.R.App.P. 7 is granted; and it is further

ORDERED that Appealing Objectors 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.