UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STEVEN BRODY, CHAIM HIRSCHFELD, and SUZANNE GRUNSTEIN, on behalf of themselves and all others similarly situated, Plaintiffs, v. MERCK & CO., INC., f/k/a SCHERING-PLOUGH CORPORATION, MSD CONSUMER CARE, INC., f/k/a SCHERING-PLOUGH HEALTHCARE PRODUCTS, INC., MERCK SHARP & DOHME CORP., AS SUCCESSOR IN INTEREST TO SCHERING CORPORATION, SCHERING-PLOUGH HEALTHCARE PRODUCTS SALES CORPORATION, AND SCHERING-PLOUGH HEALTHCARE PRODUCTS ADVERTISING CORPORATION, Defendants.	CIVIL ACTION NO. 3:12-cv-04774-PGS-DEA *DOCUMENT ELECTRONICALLY FILED*

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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Defendants Merck & Co., Inc., MSD Consumer Care, Inc., and Merck Sharp & Dohme Corp. ("Defendants" or "Merck") submit this Memorandum of Law in Support of the Joint Motion for final approval of class action settlement, final certification of the settlement class, and issuance of related orders. For the reasons stated herein, the Court should find that the settlement satisfies the final approval criteria that a settlement be "fair, reasonable, and adequate," under Fed. R. Civ. P. 23(e), and therefore grant final approval of the settlement and dismiss this action.

I. INTRODUCTION

Plaintiffs have entered into a settlement with Merck resolving this litigation. The Parties executed the Settlement Agreement[1] on September 21, 2012. Preliminary approval of the Settlement and notice plan was granted by this Court on September 27, 2012. Notice publication has been completed in accordance with the Notice Plan. The deadline for objections and exclusions will pass on January 31, 2013. The deadline to submit claims is March 4, 2013.

Merck submits that for the reasons set forth below, the Settlement is fair, reasonable and adequate pursuant to Fed. R. Civ. P. 23(e). And as determined by the Court in granting preliminary approval, the Settlement is made in good faith after more than nine years of hard-fought, highly contested litigation in a

[1] The definitions in the Settlement Agreement are hereby incorporated as though fully set forth in this memorandum, and capitalized terms shall have the meanings attributed to them in the Settlement Agreement.

substantially similar California state action, and extensive arms-length negotiations. The compromise settlement provides Settlement Class Members with (i) injunctive relief relating to label and advertising changes for the Eligible Coppertone Sunscreen products; (ii) cash relief to eligible Settlement Class Members based on a simple settlement matrix; (iii) a streamlined claim process that includes a consumer-friendly and an easy-to-complete Claim Form; and (iv) guaranteed *cy pres* payments of not less than $1 million to three legal services organizations that, among other services, represent low income persons in consumer protection cases.

Merck has agreed to pay a minimum of $3 million and a maximum of $10 million as part of a Settlement Fund to resolve timely and valid claims, which amounts shall include making guaranteed *cy pres* payments, payments to Named Plaintiffs for incentive awards, claim administration costs, and other relief. In addition, Merck has agreed to separately pay, in addition to the Settlement Fund, notice and related notice administration costs, as well as Attorneys' Fees and Expenses not to exceed $2 million, as awarded by the Court.

In sum, Merck respectfully requests that this Court finally approve the nationwide class action settlement as fair, reasonable and adequate, pursuant to Fed. R. Civ. P. 23(e), because it satisfies the factors in Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975).

II. FACTUAL AND PROCEDURAL HISTORY OF THE SUNSCREEN LITIGATION

Between October 31, 2003 and November 25, 2003, four separate actions were filed against Merck in the Superior Courts for the State of California.[2] On February 10, 2004, plaintiff Robert Gaston filed a fifth action against Merck captioned Gaston v. Schering-Plough Corporation, et al., Case No. BC310407 (the "Gaston Action") in the Superior Court for the State of California, County of Los Angeles. Like the plaintiffs in the other four cases, Mr. Gaston asserted claims on behalf of a putative class of consumers relating to alleged misrepresentations concerning the nature, extent, amount and/or effectiveness of UVA and/or UVB protection provided by Eligible Coppertone Sunscreen Products.

In 2004, the five California sunscreen actions filed against Merck were coordinated in the Los Angeles County Superior Court in a Judicial Council Coordination Proceeding styled SUNSCREEN CASES, JCCP No. 4352 (the "Coordinated Proceeding") and assigned to the Honorable Judge Carl West.[3] On October 13, 2004, Abraham, Fruchter & Twersky, LLP was appointed as lead counsel for the plaintiffs in the Coordinated Proceeding.

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[2] In addition to the five actions filed against Merck, actions were filed in 2003, 2004, and 2005 against four other sunscreen manufacturers making similar claims.

[3] On February 3, 2006, the similar actions filed against the other sunscreen manufacturers were added to the Coordinated Proceeding.

Over the last nine years, the parties have substantially litigated a number of significant issues in the Coordinated Proceeding. These issues have included, but are not limited to the following:

- **Preemption/Primary Jurisdiction:** The parties extensively briefed whether plaintiffs' claims were preempted or were subject to the FDA's primary jurisdiction. The trial court denied, without prejudice, Merck's motion on February 9, 2005, finding no actual conflict. However, the court recognized the FDA's regulatory oversight.

- **Availability of Restitution/Damages:** The parties briefed two specific issues under California law regarding plaintiffs' claims for restitution. On June 2, 2006, the trial court rejected plaintiffs' arguments that restitution under the Unfair Competition Law ("UCL") could equal the purchase price of the sunscreen. Instead, the court required plaintiffs to introduce evidence of the "dollar value of the consumer impact" and noted its "serious reservations" about an individual plaintiff's ability to meet this burden through expert testimony.

- **Motion for Preliminary Injunction:** There was also detailed briefing on plaintiffs' request to preliminarily enjoin the sale of Merck's sunscreen products. In denying the motion on January 2, 2007, the trial court analyzed the deposition testimony of plaintiffs who stated that they had not sustained any injury or harm and concluded that plaintiffs had not shown any imminent risk of irreparable harm or a likelihood of success on the merits.

- **Motions for Summary Judgment:** In 2007, Merck filed motions for summary judgment as to all six named plaintiffs. In February 2008, the trial court granted the motions as to five of the six plaintiffs. The court found that Merck's labeling and advertising had no bearing on their decision to purchase the Coppertone sunscreen products and, thus, their claims were not legally sustainable. The court denied the motion as to Mr. Gaston with respect to his UCL, Consumers Legal Remedies Act ("CLRA") and common law fraud claims.

On May 30, 2008, Mr. Gaston, as the sole remaining putative class representative, filed a motion in the Coordinated Proceeding seeking to certify a California state-wide class of purchasers of Coppertone Sport SPF 30 sunscreen. The trial court denied Mr. Gaston's motion based upon the predominance of individual questions of fact regarding reliance, causation, deception and injury. Mr. Gaston appealed the decision to the California Court of Appeals, arguing that in light of the California Supreme Court's holding in In re Tobacco II, 46 Cal. 4th 298 (2009), the trial court's ruling should be reversed as it was grounded on an erroneous legal assumption – mainly that a representative plaintiff was required to prove that all class members had relied upon, were deceived by and suffered damages as a result of the alleged misrepresentations.

The California Court of Appeals agreed with Mr. Gaston and found that, *inter alia*, Mr. Gaston had shown that there were common questions of law and fact with respect to his UCL, CLRA and common law fraud causes of action. As such, the Court of Appeals reversed and ordered the case to be remanded with directions for the trial court to enter an order certifying the class. Merck's Petition for Writ of Certiorari to the California Supreme Court was denied, without reasons specified, on November 2, 2011.

Settlement negotiations commenced in earnest following this decision. For approximately one year, counsel for the Parties conducted numerous face-to-face

and telephonic negotiations regarding the terms of the settlement, the Settlement Agreement and exhibits thereto. The Settlement Agreement was fully executed on September 21, 2012 and preliminarily approved in an order dated September 28, 2012 (Docket # 19).[4]

III. TERMS OF THE SETTLEMENT AGREEMENT

A. Settlement Class

The Settlement Class consists of all natural persons who purchased Eligible Coppertone Sunscreen Products in the United States of America, its territories and possessions up to the date notice is first disseminated pursuant to the Notice Plan.[5] "Eligible Coppertone Sunscreen Products" means any and all sunscreen products sold in the United States of America, its territories and possessions under the brand

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[4] On August 1, 2012, Mr. Gaston, who is also represented by Settlement Class Counsel in this Action, and Merck filed and received court approval of a settlement in the Coordinated Proceeding that provides injunctive relief to a California class of purchasers of Eligible Coppertone Sunscreen Products purchased in that state. The non-injunctive relief claims raised against Merck in the Coordinated Proceeding have been stayed pending the final approval by this Court of the Settlement Agreement in this Action.

[5] Excluded from the Settlement Class are: (a) all persons who timely and validly request exclusion from the Settlement Class; (b) natural persons who purchased Eligible Coppertone Sunscreen Products for purposes of resale; (c) Merck's officers, directors, and employees; (d) Merck's attorneys; (e) Settlement Class Counsel; (f) this Court and the members of his or her staff and immediate family; (g) the Honorable John Shepard Wiley, Jr. and the members of his or her staff and immediate family; (h) the Honorable Carl West and the members of his or her staff and immediate family, and (i) any Judge to which the case is subsequently assigned and the members of his or her staff and immediate family, if applicable.

name “Coppertone,” which were labeled and/or advertised to provide protection against the sun’s UVA and/or UVB rays.

B. Settlement Relief

As set forth in more detail below, Merck has agreed to provide substantial relief to the Settlement Class, which consists of: (1) injunctive relief relating to label and advertising changes for the Eligible Coppertone Sunscreen Products; (2) payments to Settlement Class Members who submit valid and timely Claims; and (3) guaranteed *cy pres* awards.

1. Injunctive Relief

Merck has agreed that all Coppertone sunscreen products manufactured on or after June 22, 2012 for sale in the United States, its territories and possessions, will not use the terms “sunblock,” “waterproof," “sweatproof,” “all day” and/or “all day protection” in the labeling, advertising, marketing or promotion of these products. Merck has also agreed that any Coppertone sunscreen product manufactured on or after June 22, 2012 for sale in the United States and its territories and possessions, will contain labels that comply with the requirements set forth in the Final Rule styled “Labeling and Effectiveness Testing; Sunscreen Products for Over-the-Counter Human Use” and codified in 76 FR 35620 (“Final Rule”), except with respect to the one (1) ounce Coppertone sunscreen products, as to which Merck is making good faith efforts to comply with the Final Rule given

the limited space on these products. Merck will also comply with any subsequent enforcement rulings under the Final Rule as they become effective. The injunctive relief is significant because the Final Rule became effective on December 17, 2012, approximately six months ***after*** Merck agreed to implement these changes.

2. Monetary Payments To Settlement Class Members

Merck will pay into a Settlement Fund a minimum of $3 million and a maximum of $10 million to be used to pay (a) timely, valid, and approved Claims, (b) claim administration costs, (c) payments to Named Plaintiffs for incentive awards and (d) the guaranteed *cy pres* awards.[6] If the total amount of payments from the Settlement Fund is less than $3 million, then any residual will be paid to the *cy pres* recipients and will not revert back to Merck.[7]

Each Settlement Class Member who purchased an Eligible Coppertone Sunscreen Product from July 31, 2006 up to the date that notice is first disseminated is entitled to submit a Claim in hard copy or electronically to the

[6] Merck has already made an initial deposit of $1.5 million into the Escrow Account. Of this amount, up to $1 million has or will be used for notice and related notice administration costs and expenses, and not less than $500,000 will be used as an advance (and credited as a payment towards the Settlement Fund) to pay Claims and claims administration and associated costs. Any remainder will be used as a credit for Claims and claims administration and associated costs and credited as a payment towards the Settlement Fund.

[7] Separate and apart from the amounts Merck has agreed to pay into the Settlement Fund, Merck has also agreed to pay Attorneys' Fees and Expenses not to exceed $2 million, as awarded by the Court and incentive awards to the Named Plaintiffs not to exceed $2,500.

Notice and Settlement Administrator during the Claim Period. The payment for each Eligible Coppertone Sunscreen Product shall be up to $1.50, subject to the adjustments and other procedures discussed in the Settlement Agreement.

The Claim Form is short and simple, easily understood and asks only a few basic questions. Claim Forms may be completed on line and submitted electronically or by U.S. Mail. Claimants may seek reimbursement for purchases of up to six (6) Eligible Coppertone Sunscreen Products without proof of purchase. For Claimants seeking reimbursement for between seven (7) and nine (9) Eligible Coppertone Sunscreen Products, Merck shall have the right to request that the Notice and Settlement Administrator request and require proof of purchase for each unit from Claimants who seek reimbursement. Claimants who seek reimbursement for purchases of ten (10) or more Eligible Coppertone Sunscreen Products will be required to provide proof of purchase for each unit with the submission of the Claim.

3. Guaranteed *Cy Pres* Payments

Within thirty (30) days after the attainment of the Final Settlement Date, Merck has agreed to make guaranteed *cy pres* payments totaling $1,000,000.00 consisting of $333,333.33 each to the Legal Aid Foundation of Los Angeles ("LAFLA") and Legal Services of New York City ("LSNYC"), and $333,333.34 to Legal Services of New Jersey ("LSNJ") (hereinafter the "guaranteed *cy pres*

awards"). These three legal services organizations each have units dedicated to protecting consumers. See, e.g., LSNYC ("Our core practice areas are Family, Housing, Benefits, Consumer, and Education law.") http://www.legalservicesnyc.org/index.php?option=com_content&task=view&id=22&Itemid=51 (last accessed: January 17, 2013).

IV. ARGUMENT

A. The Law Favors Settlement

The Third Circuit has held that there is an overriding public interest in settling litigation, particularly in class actions, where "substantial judicial resources can be conserved by avoiding formal litigation." In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 536 (3d Cir. 2004) ("Warfarin") (quoting In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir.), cert. denied, 516 U.S. 824 (1995) ("GM Trucks")).

As a threshold inquiry this Settlement is entitled to an initial presumption of fairness because "(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." Varacallo v. Massachusetts Mutual Insurance Co., et al., 226 F.R.D. 207, 235 (D.N.J. 2006).

B. This Court Has Jurisdiction to Consider and Rule on the Settlement

1. The Court Has Subject Matter Jurisdiction Over All Claims Asserted By Plaintiffs Against Merck

This Court has federal subject matter jurisdiction pursuant to 28 U.S.C. § 1332. This action is between citizens of different states, a class action has been pled in which the total number of potential class members is in excess of 100, and the matter in controversy exceeds the sum or value of $5,000,000 exclusive of interest and costs.

In addition, the existence of original jurisdiction authorizes this Court to exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) over the remaining state law claims. 28 U.S.C. § 1367(a) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case or controversy under Article III of the United States Constitution."); Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. of Am. Sales Practices Litig.), 148 F.3d 283, 304 (3d Cir. 1998), cert. denied, 525 U.S. 1114 (1999) ("Prudential II").

2. The Court Has Personal Jurisdiction Over All Settlement Class Members

This Court has personal jurisdiction over the Plaintiffs, who are parties to this class action and have agreed to serve as representatives for the Settlement Class. The Court also has personal jurisdiction over absent Settlement Class Members.

The Prudential II court, restating the holding in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811,12 (1985) noted that, for a Rule 23(b)(3) class:

> [T]he district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class. The combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class satisfy the due process requirements of the Fifth Amendment.

148 F.3d at 306 (citations omitted).

Here, the notice provided to Settlement Class Members and the opportunity to object and appear at the Fairness Hearing, fully satisfies due process requirements for personal jurisdiction for a Rule 23(b)(3) class.

C. Due Process

Constitutional due process requires that the notice and means of disseminating notice "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 315 (1950). In Eisen v. Carlisle & Jacquelin, 417

U.S. 156, 173 (1974), the U.S. Supreme Court determined in the context of a class action that notice must be directed to class members using "the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." The extensive notice disseminated to the Settlement Class and the contents of that notice, as reviewed and approved by the Court, easily satisfy the requirements of Rules 23(c)(2)(B) and 23(e)(1) and due process and was "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the class action and afford them an opportunity to present their objections.'" In re Metropolitan Life Ins. Co. Sales Practices Litigation, MDL 1091, 1999 WL 33957871, at *15 (W.D. Pa. Dec. 28, 1999) (quoting Mullane, 339 U.S. at 314).

1. There Was Widespread Dissemination of the Notice

As set forth in the attached Declaration of Lael D. Dowd ("Dowd. Decl."), by using overlapping notice techniques, Settlement Class Members were afforded several different opportunities to learn of the Settlement and exercise their rights. These overlapping techniques included: (i) publication of a short-form notice ("Publication Notice") in nationally circulated consumer magazines and U.S. Territorial Newspapers; (ii) banner advertising in English and Spanish on highly trafficked internet websites; (iii) the creation of an informational website (www.sunscreensettlement.com) on which the notices and other important Court

documents are posted; (iv) the establishment of a toll-free information line; and (v) issuing a neutral press release in both English and Spanish over PR Newswire within the United States and its territories, as well as a social networking post. See Dowd Decl. ¶ ¶ 16-28.

a. The Summary Notice Was Broadly Published in Magazines, Newspapers and Banner Ads Were Published on the Internet

The Court-approved Summary Settlement Notice was published in *People Magazine*, *Better Homes & Gardens* and *Newsweek*. See Dowd Decl. at ¶ 20. The Notice was also published in various U.S. Territorial newspapers to ensure that notice was disseminated to Settlement Class Members who are residents of the U.S. Territories. Id at ¶ 21. The combined circulation of these magazines and newspapers is over 12.5 million. Id. ¶ ¶ 20-21.

Notice was also published by posting banner advertisements on Yahoo! RON, Yahoo! Mail, 24/7 (Real Media Group), AOL, MSN RON, MSN Hotmail and Batanga Hispanic Network for 8 weeks, yielding over 350,000,000 impressions. Id. at ¶ 22.

b. A Stand-Alone Website Was Established

A stand-alone official Internet website was established to allow Settlement Class Members to obtain details about the Settlement, their rights, dates and deadlines, and related information, as well as the claim form. See Dowd Decl. at ¶

26. The Settlement Website makes available, in .pdf format: (i) the Settlement Agreement; (ii) the Long Form Notice; (iii) the Claim Form, (iv) the Preliminary Approval Order; (v) Frequently Asked Questions, (vi) the toll-free telephone number (which provides Settlement-related information in English and, if requested, in Spanish); and (vii) other relevant orders of the Court. Nationwide access to the Settlement Website was provided by registering the website with Google so that appropriate queries yield a link to the Settlement Website. In addition, the Publication Notice and Long Form Notice reference the Settlement Website. To date, the website has received close to 250,000 visits. See Dowd Decl. at ¶ 26.

c. A Toll-Free Telephone Line Was Established and a Neutral Press Release Was Issued

The Notice and Settlement Administrator established and maintains a toll-free telephone number where callers can obtain information about the Settlement. See Dowd Decl. at ¶ 25. The automated and interactive telephone response system prompts the caller through an Interactive Voice Recording ("IVR") that provides detailed information and key terms of the Settlement. Id.; Warfarin, 391 F.3d 516, 536 (finding that "publishing summary notice in publications likely to be read by consumer claimants, along with a call-center and a website" was the "best notice practicable"). In addition, a neutral press release was distributed broadly over PR Newswire's US1 English and Hispanic news lines as well as a 100 character

networking post. See Dowd Decl. at ¶ 23. A total of 380 articles were published concerning the proposed settlement. Id.

d. The Notice and Claim Form Provided Settlement Class Members with the Required Information in a Comprehensive and Clear Format

The Settlement Class Notice and Claim Form provide all reasonably identifiable Settlement Class Members with a clear and succinct description of the Settlement Class and the terms of the preliminarily approved Settlement. See Dowd Decl. at ¶ 18. The Settlement Class Notice, as well as the Settlement Website, "clearly and concisely state[s]" and contains all of the information necessary to apprise Settlement Class Members of the terms of the settlement, dates and deadlines, their rights and options and what the Court is being asked to do, satisfying the requirements of Fed. R. Civ. P. 23(c)(2)(B). See Federal Judicial Center's illustrative notices at www.FJC.gov; see also In re Prudential Ins. Co. of America Sales Practices Litig., 962 F. Supp. 450, 526, 527 (D.N.J. 1997), aff'd, 148 F.3d 283 (3d Cir.1998) ("Prudential I"). Because the Settlement Class Notice and Settlement Website provided Settlement Class Members with the information required by Rule 23, and because notice was disseminated in such a way as to reach virtually the entire Settlement Class multiple times, Merck submits that the notice provided was the best practicable notice under the circumstances and satisfied due process, Rule 23 and all other requirements.

e. The Notice Requirements of the Class Action Fairness Act Have Been Satisfied

Notice under the Class Action Fairness Act or CAFA, 28 U.S.C. § 1715, has been satisfied. On September 28, 2012, the Notice and Settlement Administrator, at Merck's direction, timely and properly caused the notice to be sent to the 50 States' Attorney Generals and the office of the U.S. Attorney General informing them of this proposed settlement. See Dowd Decl. at ¶ 19. More than 90 days have passed from "the dates on which the appropriate Federal office and the appropriate State official are served." See 28 U.S.C. § 1715(d); Kay Co. v. Equitable Prod. Co., No. 06 Civ. 00612, 2010 WL 1734869, at *4 (S.D. W.Va. Apr. 28, 2010) ("Since more than 100 days have passed since service was perfected and since there have been no adverse comments from any of the aforesaid State or Federal officials, the Court FINDS that compliance with CAFA is satisfactory."). At this time, there have been no responses and/or objections from the state and federal officials relating to this Settlement.

D. The Settlement Is Fair, Reasonable and Adequate and Merits Final Approval

As discussed below, the Court should finally approve the settlement because it is fair, reasonable and adequate, satisfying the requirements of Rule 23(e) and the factors set out in Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975) and In re Ins.

Brokerage Antitrust Litigation, 579 F.3d 241, 258 (3d Cir. 2009). These factors, discussed in more detail below, include:

(i) the complexity, expense, and likely duration of the litigation;

(ii) the reaction of the class to the settlement;

(iii) the stage of the proceedings and the amount of discovery completed;

(iv) the risks of establishing liability;

(v) the risks of establishing damages;

(vi) the risks of maintaining the class action through the trial;

(vii) the ability of the defendants to withstand a greater judgment;

(viii) the range of reasonableness of the settlement fund in light of the best possible recovery; and

(ix) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.[8]

[8] Other factors by which to measure to fairness, reasonableness and adequacy of a class action settlement include, among others: "the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved--or likely to be achieved--for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable." Prudential II, 148 F.3d at 323. For the reasons stated herein and to the extent that these factors apply, they also support the final approval of the settlement.

1. The Complexity, Expense, and Likely Duration of the Litigation

This litigation, having commenced over nine years ago, has already been a costly and lengthy process for both sides. As reflected in section II.B above, the parties have been litigating various factual and complex legal issues in the Coordinated Proceeding for over nine years. It is reasonable to expect that if this case continues through trial, it will require additional discovery, extensive pretrial motions addressing complex factual and legal questions such as those presented in the Coordinated Proceeding, and ultimately a complicated, lengthy trial, as this action involves hundreds of thousands of Settlement Class Members and multiple legal claims and defenses. Without this settlement, Plaintiffs are left the formidable task of proving that Merck breached express and implied warranties and violated other state laws.

For example, if the litigation continues, Merck will strenuously argue that a single nationwide litigation class could not be certified here as it would "create intractable management problems if it were to become a litigation class, and therefore be decertified."[9] Warfarin, 391 F.3d at 537. In fact, Merck would argue that Settlement Class Counsel would be left with filing and prosecuting numerous single-state class actions, each of which would suffer from fatal defects inherent

[9] These arguments would apply to the Girsh factor relating to the risks of maintaining a class through trial.

with trying to apply the laws of all 50 states to highly individualized claims that require a class member-by-class member factual inquiry. Even if a class were certified, Merck would appeal the decision pursuant to Fed. R. Civ. P. 23(f).

Additionally, Plaintiffs would have the burden of proving damages, which would "likely involve conceptually difficult economic theories and complex calculations" based on experts with "diametrically opposed opinions." In re AT&T Corp. Sec. Litig., 455 F.3d 160, 166 (3d Cir. 2006) (finding this factor weighed heavily in favor of approval in a securities case).[10]

Finally, if Plaintiffs were to obtain class certification and defeat a motion for summary judgment, pretrial and trial preparation would be necessary to continue to prosecute this action, which would be time-consuming, uncertain and expensive. Weiss v. Mercedes-Benz of N. Am., Inc., 899 F. Supp. 1297, 1301 (D.N.J. 1995).

Instead, the Settlement provides the Settlement Class with substantial and certain cash relief. The proposed Settlement provides immediate benefit to Settlement Class Members, "secur[ing] a prompt and efficient resolution of the Class' claims permitting substantial recovery without further litigation, delay, expense or uncertainty." Varacallo, 226 F.R.D. at 237. For these reasons, the

[10] The trial court in the Coordinated Proceeding expressed great skepticism as to whether Plaintiffs could ever prove damages, even if they could overcome the hurdles of certification and liability.

settlement here, if finally approved, would avoid all of the lengthy, costly and uncertain aspects of litigation.

2. The Reaction of the Class to the Settlement

Pursuant to the Court's Order, the Parties will provide a supplemental brief on January 31, 2013 with information regarding claims, objections and requests for exclusions.

3. The Stage Of Proceedings And The Amount Of Discovery

As reflected above, the Parties have conducted discovery and extensive motion practice, which has enabled them to evaluate the merits of the case, the risk of litigation and the value of the settlement. In re Cendant Corp. Litig., 264 F.3d 201, 235 (3d Cir. 2001) (quoting GM Trucks, 55 F.3d at 813). As stated in GM Trucks, 55 F.3d at 813, the Parties here had a tremendous "appreciation of the merits of the case before negotiating." See Desantis v. Snap-On Tools Co., LLC, 06-cv-2231, 2006 WL 3068584, at *7 (D.N.J. Oct. 27. 2006); O'Keefe v. Mercedes-Benz, 214 F.R.D. 266, 300 (E.D. Pa. 1997) ("[p]arties familiarized themselves with the facts of the cases, such that they understand the facts and can accurately estimate the risks and rewards that a trial may bring").

Additionally, the Parties have been guided by court opinions in these and other consumer protection cases to enable the parties to be "fully aware of the strengths and weaknesses of their case" and to make "an informed decision as to

the fairness and reasonableness of the settlement." Lazy Oil Co. v. Witco, 95 F. Supp. 2d 290, 308 (W.D. Pa. 1997). Thus, this factor weighs strongly in favor of final approval of the settlement.

4. The Risks Of Establishing Liability And Damages

As recognized in In re Metropolitan Life Ins. Co. Sales Practices Litigation, 1999 WL 33957871, at *28, and in language equally applicable here, there are a "number of ... potential legal and factual obstacles that plaintiffs would [face] if this litigation [were to proceed] to a trial on the merits." The settlement avoids the potential downsides if this Action were to continue as a litigation. Cendant, 264 F.3d at 237. The six named plaintiffs in the Coordinated Proceeding faced a number of legal and factual obstacles on the issues of preemption, damages, reliance and causation and only one, Mr. Gaston, was able to survive summary judgment. Merck expects that if litigation proceeds in this case, it would bring similar dispositive motions against the named Plaintiffs here.

In order for Plaintiffs here to prove their counts, they will need to succeed on each of several "complex and hotly disputed legal and factual issues." In re Relafen Antitrust Litigation, 231 F.R.D. 52, 73 (D. Mass. 2005). As set forth below, this is likely to be an arduous task because Merck will raise many of the same defenses that have been proven successful in other cases in this District.

a. Plaintiffs' Consumer Fraud Act Count Fails

Plaintiffs' Consumer Fraud Act ("CFA") claim fails because of a lack of particularity in the Complaint and a failure to identify an ascertainable loss, among other arguments. The CFA requires that unlawful practices fall into one of three general categories: (1) affirmative acts; (2) knowing omissions; and (3) regulation violations. Frederico v. Home Depot, 507 F.3d 188, 202 (3d Cir. 2007).[11] In this case, Plaintiffs have failed to plead the alleged circumstances constituting the fraud in sufficient detail. Because Plaintiffs' CFA claims "sound in fraud or misrepresentation," Rule 9(b) of the Federal Rules of Civil Procedure applies. See Smajlaj v. Campbell Soup Co., 782 F. Supp. 2d 84, 91 (D.N.J. 2011); see also F.D.I.C. v. Bathgate, 27 F.3d 850 (3d Cir. 1994). Here, Plaintiffs have each failed to allege the "date, place or time" of the claim. Lum v. Bank of Am., 361 F.3d 217, 224 (3d Cir. 2004). Under this standard, Plaintiffs generic and entirely conclusory allegations are insufficient to "nudge[] their claims across the line from conceivable to plausible" and, thus, would not survive a motion to dismiss. Ashcroft v. Iqbal, 556 U.S. 662, 683 (2009) (quoting Bell Atlantic Corp. v.

[11] Specifically, the New Jersey Consumer Fraud Act defines unlawful conduct broadly, as "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise." N.J.S.A. 56:8-2.

Twombly, 550 U.S. 544, 570 (2007)); Complaint ¶ ¶ 10-12 (Plaintiff "purchased Coppertone sunscreen products in the State . . . after viewing misleading statements and representations . . . .").

In addition, Plaintiffs cannot demonstrate an ascertainable loss as required by the CFA. In this case, Plaintiffs are alleging that they received a product that was worth less than what they paid. Plaintiffs each allege that they "paid a premium price for the product." See, Complaint ¶ ¶ 10-12. However, other courts have found this legally insufficient and have dismissed CFA claims where plaintiffs allege that the ascertainable loss is merely because of "disappointed" expectations.[12] For example, in Mason v. The Coca-Cola Company, 774 F. Supp. 2d 699, 704 (D.N.J. 2011), the court expressly rejected this argument and held that [d]issatisfaction with a product, however, is not a quantifiable loss that can be remedied under the" CFA. Id. (citing cases dismissing CFA claims where the ascertainable loss was insufficient).

Similarly, the price differential alleged by Plaintiffs may be explained by other factors, such as a recognized brand name, and/or other benefits provided by the Coppertone sunscreen products. If so, then Plaintiffs' CFA count cannot be

[12] For all of the paragraphs alleged in Plaintiffs' Complaint relating to the regulatory background, Plaintiffs, in fact, do not allege any violation of FDA regulations. Complaint ¶ ¶ 29-45. Plaintiffs' citation to a consent decree has nothing to do with the issues in this case. Id. ¶ 44.

maintained. In Crozier v. Johnson & Johnson Consumer Companies, Inc., ___ F. Supp. 2d ___, Civ. A. Nos. 12-0008 (JBS/KMW) and 12-0010 (JBS/KMW), 2012 WL 4507381 at *12 (D.N.J. Sept. 28, 2012), the court dismissed the CFA count because plaintiffs, on behalf of a putative class, could not demonstrate that the "extraordinary and unreasonable price difference" was not due to other factors.[13] Id.

b. Plaintiffs' Warranty Counts Fail

Plaintiffs' counts for breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose also suffer from fatal defects. To state a claim for breach of an express warranty, "Plaintiffs must properly allege: (1) that Defendant made an affirmation, promise or description about the product; (2) that this affirmation, promise or description became a part of the basis of the bargain for the product, and (3) that the product did not ultimately conform to the affirmation, promise or

[13] Finally, to the extent that the language at issue is considered mere puffery, it also would not be actionable under the CFA. See, e.g., In re Toshiba America HD DVD Marketing and Sales Practices Litigation, Civ. No. 08–939, 2009 WL 2940081, at *10 (D.N.J. Sept. 11, 2009) ("Advertising that amounts to 'mere' puffery is not actionable because no reasonable consumer relies on puffery.")

description."[14] Snyder v. Farnam Cos., Inc., 792 F. Supp. 2d 712, 721 (D.N.J. 2011).

As a threshold matter, Plaintiffs have failed to allege the terms of the actual express warranty. Plaintiffs' Complaint contain allegations of statements made by Merck regarding its Coppertone products but do not identify such as express warranties. See, e.g., Complaint § III, ¶ 39 ("Defendants have deceptively labeled, advertised, marketed and otherwise represented . . . ."). In Ackerman v. The Coca-Cola Co., No. CV-09-0395 (JG) (RML), 2010 WL 2925955 at *24 (E.D.N.Y. July 21, 2010), a federal court dismissed a New Jersey breach of express warranty count in a putative class action where plaintiffs failed to specifically identify the words creating the express warranty. That holding is equally

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[14] An express warranty claim is codified under N.J.S.A. 12A:2-313, which provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. N.J.S.A. 12A:2-313.

applicable here as Plaintiffs averments in this Complaint do not rise to the level of creating a warranty and must be dismissed. Pappalardo v. Combat Sports, Inc., Civ. A. No. 11-1320, 2011 WL 6756949, at *8-9 (D.N.J. Dec. 23, 2011) (dismissing breach of express warranty claim in putative class action); Simmons v. Stryker Corp., No. 08-3451 (JAP), 2008 WL 4936982, at *2 (D.N.J. Nov. 17, 2008) (dismissing breach of express warranty claim where plaintiff did not identify source of warranty).

Similar fatal defects affect Plaintiffs' counts alleging breach of implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose. To state a claim for breach of the implied warranty of merchantability, Plaintiffs must allege "(1) that a merchant sold goods, (2) which were not 'merchantable' at the time of the sale, (3) injury and damages to the plaintiff or its property, (4) which were caused proximately and in fact by the defective nature of the goods, and (5) notice to the seller of the injury."[15] In re

[15] N.J. Stat. Ann. 12A:2-314 provides that merchantable goods must (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any." N.J.S.A. 12A:2-314.

Samsung Elecs. Am., Inc. Blu-Ray Class Action Litig., No. 08-663, 2008 WL 5451024, at *6 (D.N.J. Dec. 31, 2008). To state a claim for a breach of the implied warranty of fitness for a particular purpose, Plaintiffs must allege that (1) the seller had reason to know the buyer's particular purpose; (2) the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish appropriate goods; and (3) the buyer must actually rely upon the seller's skill or judgment.[16] Gumbs v. Int'l Harvester, Inc., 718 F.2d 88, 92 (3d Cir. 1983).

These two counts cannot be maintained because Plaintiffs' claims are based solely on allegedly misleading advertising and do not, in fact, relate to the functionality of the Coppertone products as sunscreens. Crozier, 2012 WL 4507381 at *14 (dismissing with prejudice these two counts in putative class actions). Furthermore, there is no dispute that Plaintiffs were able to use and receive a benefit from the Coppertone sunscreen products they purchased, notwithstanding any alleged issues with the labeling and advertising . Pappalardo, 2011 WL 6756949, at *10 (dismissing count where products were still usable).

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16 N.J. Stat. Ann. 12A:2-315 provides that "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose." N.J.S.A. 12A:2-315.

The courts do not require perfection in the products at issue. For example, the court in Greene v. BMW of North America, Inc., Civ. No. 2:11-04220 (WJM), 2012 WL 5986457 at *3 (D.N.J.Nov. 28, 2012), aptly stated that the "implied warranty comes nowhere close to guaranteeing perfection." The Greene court dismissed the breach of implied warranty of merchantability count in the putative class action and noted that only a "'minimium level of quality'" is required. Id. (quoting Green v. Green Mountain Coffee Roasters, Inc., 279 F.R.D. 275, 282-83 (D.N.J. 2011)). Here, there are insufficient allegations that the Coppertone sunscreen products fall below a minimum level of quality and cannot be used at all for their intended purpose. Thus, if this Action were being litigated, Merck would argue that the breach of implied warranty of merchantability count should be dismissed.

In addition "New Jersey's Uniform Commercial Code does not contemplate the imposition of liability under both the implied warranty of merchantability and the implied warranty of fitness for a particular purpose where the proponent argues that the ordinary purpose and the particular purpose are the same." Crozier, 2012 WL 4507381 at *10 (citing cases). Thus, at least one of these counts would have to be dismissed and the other count, as argued above, would not survive a dispositive motion.

c. Plaintiffs' Unjust Enrichment Count Fails

Finally, Plaintiffs' claims for unjust enrichment should also be dismissed. To establish a claim of unjust enrichment in New Jersey, "a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust."[17] Iliadis v. Wal-Mart Stores, Inc., 922 A.2d 710, 723 (2007). Plaintiffs' unjust enrichment claim fails because there is no direct relationship between Plaintiffs and Merck. Cooper v. Samsung Elec. Am., Inc., No. 07–3853, 2008 WL 4513924, at *10 (D.N.J. Sept. 30, 2008) ("[A]lthough [plaintiff] alleges that Samsung was unjustly enriched through the purchase of the television, there was no relationship conferring any direct benefit on Samsung through [plaintiff's] purchase, as the purchase was through a retailer, Ultimate Electronics.").

The unjust enrichment count fails for the additional reason that a plain reading of the allegations supporting it, namely those in paragraph 61 of the Complaint that Merck profited by its "wrongful and deceptive conduct," sound in tort and are thus not cognizable under New Jersey law. See Pappalardo, 2011 WL 6756949, at *11 (citing Warma Witter Kreisler, Inc. v. Samsung Elec. Am., Inc., No. 08–5380, 2009 WL 4730187, at *7 (D.N.J. Dec.3, 2009) (holding that unjust

[17] Initially, "New Jersey law does not recognize unjust enrichment as an independent tort cause of action." Pappalardo, 2011 WL 6756949, at *11.

enrichment claim of plaintiff claiming to have been misled by defendant as to fitness of purchased product "sound[ed] in tort" and thus was not cognizable under New Jersey law).

d. The Benefits of the Settlement Outweigh the Risks And Associated Costs of Further Litigation

Given all of the problems Plaintiffs face with trying to prove liability against Merck, the Court must balance the likelihood of success if the case were taken to trial, including the results of any dispositive motions raising the arguments discussed above, against the benefits of immediate settlement. In re Ins. Brokerage Antitrust Litigation, MDL No. 1663, 2007 WL 542227, at *6 (D.N.J. Feb. 16, 2007) (quoting In re Safety Components, Inc. Sec. Litig., 166 F. Supp. 2d 72, 89 (D.N.J. 2001)); see Bussie v. Allmerica Fin. Corp., SMA, 50 F. Supp. 2d 59, 76 (D. Mass. 1999) (citation omitted) ("The very real risk that the Class would not recover if this Action proceeded to trial [] supports approval of the settlement because '[b]asic to the [fairness] inquiry is the need to compare the terms of the compromise with the likely rewards of litigation.'").

In stark contrast to the risks of establishing liability and/or demonstrating damages if this Action were to continue as hotly contested litigation are the certain, tangible and significant benefits that would be promptly delivered to Settlement Class Members if this settlement were finally approved. In addition to requiring Merck to implement changes to the labeling and advertising of its Coppertone

sunscreen products, the Settlement Agreement provides Settlement Class Members with the ability to participate in a streamlined, transparent, objective, and efficient claim process at no cost to the individual Settlement Class Members. The streamlined Claim Form is consumer-friendly and can be completed in just a few minutes on line or printed out. Any Settlement Class Member who timely submits a properly completed Claim Form will receive cash relief based on the terms of the Agreement. See Settlement Agreement at § III. As in Bussie, "the reality that the Class would encounter significant, and potentially insurmountable, obstacles to a litigated recovery" with all of the attendant risks and uncertainties "underscores the reasonableness of the compromise set forth in the Settlement Agreement." Bussie, 50 F. Supp. 2d at 76. Here, the concrete benefits of the proposed settlement clearly outweigh the risks, "uncertainties of recovery", and costs, in both time and money, of continuing this litigation. In re Elec. Carbon Prods. Antitrust Litig., 447 F. Supp. 2d 389, 400-401 (D.N.J. 2006).

5. Ability of Defendant to Withstand Greater Judgment

This factor is not applicable to the facts of this case. O'Keefe, 214 F.R.D. at 301 ("[p]lacing undue emphasis on this factor when the defendant is financially stable may lead to the disapproval of appropriate, fair and reasonable settlement"); Lazy Oil Co., 95 F. Supp. 2d at 319 (presuming defendants would have resources

to withstand greater judgment but according factor little weight in light of risks that plaintiffs would not be able to achieve greater recovery at trial).

6. The Range of Reasonableness of the Settlement Fund

As discussed above, Plaintiffs face substantial hurdles in obtaining any relief. If Merck succeeds on any one of several different motions, there will be no relief to the Settlement Class. Accordingly, this settlement represents a "compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution." In re Safety Components, 166 F. Supp. 2d at 92.

Additionally, the settlement is "highly tailored to the alleged damage that class members might suffer." O'Keefe, 214 F.R.D. at 302-03. In particular, Plaintiffs have consistently alleged in the litigations that Settlement Class Members paid too much for Merck's sunscreen products – up to 15.4 percent too much. As standard sized Coppertone sunscreens are sold by Merck at an average retail price of approximately $10, the $1.50 per unit settlement amount constitutes 100% of the damages Plaintiffs have been seeking. Because any Settlement Class Member who believes he or she has a claim may submit a claim form and receive cash relief without any cost to the Settlement Class Member, the certainty and the reasonable amount of the relief provided in the Settlement clearly "benefits class members more than litigation would." Prudential I, 962 F. Supp. at 541.

As indicated above, Merck has agreed to pay into a Settlement Fund a minimum of $3 million and a maximum of $10 million to be used to pay timely, valid, and approved Claims; (b) claim administration costs, (c) payments to Named Plaintiffs for incentive awards and (d) the guaranteed *cy pres* awards. If the total amount of payments from the Settlement Fund is less than $3 million, then any residual will be paid to the *cy pres* recipients and will not revert back to Merck.

Thus, in light of all the Girsh factors and Fed. R. Civ. P. 23(e), the settlement merits final approval.

E. This Court Should Issue a Permanent Injunction

The rights and interests of the Settlement Class Members and the jurisdiction of this Court will be impaired if Settlement Class Members who have not opted out of the Settlement Class are allowed to file and/or proceed with other actions alleging substantially similar claims to those asserted and released in this Action. Numerous federal courts have recognized their power to enjoin class members who did not opt out of a settlement from filing or continuing to prosecute state court actions that would interfere with the implementation of a finally approved class action settlement. See In re Am. Honda Motor Co., Inc. Dealership Relations Litig., 315 F.3d 417, 441-42 (4th Cir. 2003); In re Diet Drugs, 282 F.3d 220, 235 (3d Cir. 2002); Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266, 275 (7th Cir. 1998). The fact that Settlement Class Members have been afforded an

opportunity to opt out of the Settlement justifies the issuance of an injunction to aid the Court in its management of the Settlement. See Carlough v. Amchem Prods., Inc., 10 F.3d 189, 197, 198 (3d Cir. 1993).

The Court should issue a permanent injunction pursuant to its authority under the All Writs Act and the exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283. Courts may issue a permanent injunction pursuant to the "necessary in aid of" exception to the Anti-Injunction Act. 28 U.S.C. § 2283. This exception allows a federal court to effectively prevent its jurisdiction over the settlement from being undermined by pending parallel litigation in state courts. See In re Asbestos School Litig., No. 83-0628, 1991 WL 61156, at *2 (E.D. Pa. Apr. 16, 1991), aff'd mem., 950 F.2d 723 (3d Cir. 1991). In addition, another exception to the Anti-Injunction Act permits courts to issue injunctions where it is necessary 'to protect or effectuate [a court's] judgment[]." Id. at *1, 3. Federal courts have issued similar injunctions in other class action settlements, in cases in which the court has finally approved a class action settlement. Id.

This Court also has the authority to issue the requested injunction under the All Writs Act, 28 U.S.C. § 1651(a). The All Writs Act permits this Court to issue "all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The All Writs Act permits a federal district court to protect its jurisdiction by enjoining parallel actions by class

members that would interfere with the court's ability to oversee a class action settlement. In re Linerboard Antitrust Litigation, 361 Fed. Appx. 392, 396 (3d Cir. 2010); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1025 (9th Cir. 1998). The Court may issue an injunction as soon as "the litigation reaches the settlement stage" in order to "effectuate a final settlement." In re Mexico Money Transfer Litig., Nos. 98-C-2407 and 98-C-2408, 1999 WL 1011788, at *3 (N.D. Ill. Oct. 19, 1999).

The present circumstances warrant the Court's issuance of a permanent injunction pursuant to the All Writs Act and the exceptions to the Anti-Injunction Act. See, e.g., Larson v. AT&T Mobility LLC, Civil Action No. 07–5325 (JLL), 2011 WL 1085255 at *1-2 (D.N.J. March 21, 2011) (noting the issuance of a permanent injunction in class action settlement). Accordingly, this Court should issue a permanent injunction in order to prevent those Settlement Class Members who did not opt out of the Settlement from interfering with the implementation of the Settlement and jeopardizing the rights and interests of the Settlement Class Members and the jurisdiction of this Court.

V. CONCLUSION

The Court should finally approve the Settlement as fair, reasonable and adequate pursuant to Federal Rule of Civil Procedure 23 and issue related orders, in light of the substantial benefits provided to Settlement Class Members under the Settlement and satisfaction of the Girsh factors.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STEVEN BRODY, CHAIM HIRSCHFELD, and SUZANNE GRUNSTEIN, on behalf of themselves and all others similarly situated, Plaintiffs, v. MERCK & CO., INC., f/k/a SCHERING-PLOUGH CORPORATION, MSD CONSUMER CARE, INC., f/k/a SCHERING-PLOUGH HEALTHCARE PRODUCTS, INC., MERCK SHARP & DOHME CORP., AS SUCCESSOR IN INTEREST TO SCHERING CORPORATION, SCHERING-PLOUGH HEALTHCARE PRODUCTS SALES CORPORATION, AND SCHERING-PLOUGH HEALTHCARE PRODUCTS ADVERTISING CORPORATION, Defendants.	CIVIL ACTION NO. 3:12-cv-04774-PGS-DEA *DOCUMENT ELECTRONICALLY FILED* **CERTIFICATE OF SERVICE**

I hereby certify that on this date, I caused to be filed, via electronic filing, the following document with the United States District Court for the District of New Jersey:

1. Defendants' Memorandum Of Law In Support Of Final Approval of Class Action Settlement; and

2. Declaration of Lael D. Dowd, APR, Concerning Implementation of Settlement Class Notification Program.

I hereby certify that on this date, I caused copies of the foregoing documents to be served via ECF and a copy of the foregoing documents were sent by first class postage prepaid U.S. Mail to:

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I further certify that on this date, I served a copy of the foregoing documents on the following by first class postage prepaid U.S. Mail and by electronic mail:

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I further hereby certify that I have provided courtesy copies of the foregoing documents by first class postage pre-paid U.S. Mail to the Honorable Peter G. Sheridan, U.S.D.J., pursuant to Local Civil Rule 5.2 and Electronic Case Filing Policies and Procedures.

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Dated: January 17, 2013