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

**ROBERT CIMATO and MICHAEL S.  
ANDERS,**

**Plaintiffs,**

**v.**

**MERCK & CO., INC., MANAGEMENT  
PENSION INVESTMENT COMMITTEE, ,  
RAYMOND V. GILMARTIN, RICHARD T.  
CLARK, JOHNETTA B. COLE, THOMAS  
H. GLOCER, STEVEN F. GOLDSTONE,  
WILLIAM B. HARRISON, HARRY R.  
JACOBSON, WILLIAM N. KELLEY,  
ROCHELLE B. LAZARUS, THOMAS E.  
SHENK, ANNE M. TATLOCK, SAMUEL  
O. THEIR, WENDELL P. WEEKS, PETER  
C. WENDELL, JUDY C. LEWENT,  
MARCIA J. AVEDON, CAROLINE  
DORSA, BRADLEY T. SHEARES, PETER  
N. KELLOGG, MARK E. McDONOUGH, J.  
CHRISTOPHER SCALET, MIRIAN  
GRADDICK-WEIR, and JOHN and JANE  
DOE 1-30.**

**Defendants.**

**Civil Action No.**

**CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE EMPLOYEE  
RETIREMENT INCOME SECURITY ACT**

For their Class Action Complaint for Violations of the Employee Retirement Income Security Act (the "Complaint"), Plaintiffs allege as follows:

## I. INTRODUCTION

1. This is a class action brought by participants in the Merck & Co., Inc. Employee Savings & Security Plan (the “Salaried Plan”), the Merck & Co., Inc. Employee Stock Purchase & Savings Plan (the “Hourly Plan”) and the Merck Puerto Rico Employee Savings & Security Plan (the “Puerto Rico Plan”)(collectively the “Plans”), pursuant to §§ 502(a)(2) and (a)(3) of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1132(a)(2) and (a)(3), against the fiduciaries of the Plans for the violations of ERISA.

2. The Salaried and Hourly Plans are sponsored by Merck & Co., Inc. (“Merck” or the “Company”), and the Puerto Rico Plan is sponsored by Merck Sharp & Dohme Quimica De Puerto Rico (“Merck Sharp”).

3. Plaintiffs’ claims arise from the failure of Defendants, who are fiduciaries of the Plans, to act solely in the interest of the participants and beneficiaries of the Plans, and to exercise the required skill, care, prudence and diligence in administering the Plans and the Plans’ assets during the period July 26, 2004 through March 31, 2008 (the “Class Period”).

4. During the Class Period, Defendants failed to take action to protect the Plans from misrepresentations and omissions regarding the health and financial risks associated with Vytorin, Merck’s prescription anti-cholesterol drug, which is a combination of the prescription drug Zetia (generically known as ezetimibe) and the prescription drug Zocor (generically known as simvastatin). As a result of the failure to disclose that Vytorin was being promoted in the absence of evidence that it had any medical benefit over taking Zocor alone, the value of Merck stock and the Plans’ investments in the Merck Common Stock Fund (“Fund” or “Stock”) have been substantially diminished. Plaintiffs allege that it was imprudent for the Plans to invest in the Fund because the price of shares of the Fund was artificially inflated as a result of

undisclosed material adverse information concerning Vytorin's lack of medical benefit.

Plaintiffs also allege that Defendants breached their fiduciary duties by negligently failing to disclose material information about Vytorin necessary for participants to make informed decisions concerning the Plans' assets and benefits and investing in the Fund.

5. Specifically, Plaintiffs allege in Count I that the Defendants who were responsible for the investment of the assets of the Plans breached their fiduciary duties to Plaintiffs and the Plans, in violation of ERISA, by failing to manage the Plans' investments in the Fund prudently and loyally. In Count II, Plaintiffs allege that the Defendants who were responsible for communicating with participants regarding the Plans' assets failed to provide participants with complete and accurate information regarding Merck sufficient to advise participants of the true risks of investing Plan assets in the Fund. In Count III, Plaintiffs allege that the Defendants who were responsible for the selection, removal, and, thus, monitoring of the Plans' other fiduciaries failed to monitor the performance of their fiduciary appointees properly and to remove and replace those whose performance was inadequate. In Count IV, Plaintiffs allege that Defendants breached their duties and responsibilities as co-fiduciaries by failing to prevent breaches by other fiduciaries of their duties of prudent and loyal management, complete and accurate communications, and adequate monitoring.

6. This action is brought on behalf of the Plans and seeks losses to the Plans for which Defendants are personally liable pursuant to ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109, and 1132(a)(2). In addition, under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), Plaintiffs seek other equitable relief from Defendants, including, without limitation, injunctive relief and, as available under applicable law, a constructive trust, restitution, equitable tracing, and other monetary relief.

7. As a matter of substantive law, ERISA §§ 409(a) and 502(a)(2) authorize participants such as Plaintiffs to sue in a representative capacity on behalf of the Plans for losses suffered by the Plans as a result of breaches of fiduciary duty. Since an appropriate procedural vehicle to assert such claims is a class action pursuant to Fed. R. Civ. P. 23, Plaintiffs also bring this action as a class action on behalf of all participants and beneficiaries of the Plans during the Class Period.

8. Because the information and documents on which Plaintiffs' claims are based are, for the most part, solely in Defendants' possession, certain of Plaintiffs' allegations are, by necessity, made upon information and belief. At such time as Plaintiffs have had the opportunity to conduct sufficient discovery, Plaintiffs will, to the extent necessary and appropriate, amend this Complaint, or, if required, seek leave to amend, to add such other additional facts as are discovered that further support their claims.

## II. JURISDICTION AND VENUE

9. **Subject Matter Jurisdiction.** This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

10. **Personal Jurisdiction.** ERISA provides for nation-wide service of process. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All of the Defendants are either residents of the United States or subject to service in the United States, and this Court therefore has personal jurisdiction over them. This Court also has personal jurisdiction over them pursuant to Fed. R. Civ. P. 4(k)(1)(A) because they would all be subject to the jurisdiction of a court of general jurisdiction in the State of New Jersey.

11. **Venue.** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plans are administered in this district, some or all of the fiduciary

breaches for which relief is sought occurred in this district, and/or some Defendants reside and/or transact business in this district.

### III. PARTIES

#### A. Plaintiffs

12. **Plaintiff Robert Cimato (“Cimato”)** is a resident of the State of New Jersey and was at all relevant times and is a participant in the Salaried Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7). During the Class Period, Cimato invested in shares of the Merck Common Stock Fund in his Plan account.

13. **Plaintiff Michael S. Anders (“Anders”)** is a resident of the State of Missouri and was at all relevant times and is a participant in the Salaried Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7). During the Class Period, Anders invested in shares of the Merck Common Stock Fund in his Plan account.

#### B. Defendants

14. The Defendants are identified in paragraphs 15 to 22 below. All of the Defendants are fiduciaries of the Plans within the meaning of ERISA, as is explained below in Section V (“Defendants’ Fiduciary Status”), and all of them breached their fiduciary duties in various ways as is explained in Section IX (“Causes of Action”).

15. **Defendant Merck** is a New Jersey Corporation with its principal place of business located at One Merck Drive, Whitehouse, NJ 08889-0100.

16. **Defendant Raymond V. Gilmartin (“Gilmartin”)** was, during some of the Class Period, the Chief Executive Officer, President and Chairman of the Board of Directors of Merck, a member of the Management Committee, a director of the Company, and the Chairperson of the Executive Committee. Gilmartin retired from the Company on or about May 5, 2005.

17. **Defendant Richard T. Clark (“Clark”)** has served as the Company’s President and Chief Executive Officer from May 2005 to the present, Chairman of the Board since April 2007 and is a member of the Executive Committee.

18. **Members of the Merck Board of Directors (the “Board”).** The Merck Board of Directors is the governing body of Merck under its charter, its bylaws, and applicable New Jersey law. The Board appointed the members of a subcommittee of the Board, the Compensation and Benefits Committee (the “CBC”), through which the Board had the authority and duty to appoint, monitor, supervise, remove and accept the resignation of members of the Management Pension Investment Committee (the “MPIC”). In addition to Defendants Gilmartin and Clark, the members of the Board during the Class Period included:

(a) **Defendant Johnetta B. Cole (“Cole”)** served as a director of the Company from 1994 to the present and served as a member of the Compensation and Benefits Committee, Finance Committee and the Public Policy and Social Responsibility Committee during the Class Period.

(b) **Defendant Thomas H. Glocer (“Glocer”)** served as a director of the Company since November 2007 to the present.

(c) **Defendant Steven F. Goldstone (“Goldstone”)** served as a director of the Company since 2007 to the present.

(d) **Defendant William B. Harrison (“Harrison”)** served as a director of the Company from 1999 to the present and served as member of the Compensation and Benefits Committee and Public Policy and Social Responsibility Committee during the Class Period.

(e) **Defendant Harry R. Jacobson (“Jacobson”)** served as a director of the Company since December 2007 to the present.

(f) **Defendant William N. Kelley (“Kelley”)** served as a director of the Company from 1992 to the present and served as a member of the Compensation and Benefits Committee, the Audit Committee, the Corporate Governance Committee, the Committee on Directors and as the Chairperson of the Research Committee during the Class Period.

(g) **Defendant Rochelle B. Lazarus (“Lazarus”)** served as a director of the Company since 2004 to the present. Lazarus has served as a member of the Audit Committee and Committee on Public Policy and Social Responsibility during the Class Period.

(h) **Defendant Thomas E. Shenk (“Shenk”)** served as a director of the Company from 2001 to the present and served as a member of the Research Committee, Audit Committee and the Public Policy and Social Responsibility Committee during the Class Period.

(i) **Defendant Anne M. Tatlock (“Tatlock”)** served as a director of the Company from 2000 to the present and served as the Chairperson of the Finance Committee and Chairperson of the Compensation and Benefits Committee and as a member of the Corporate Governance Committee during the Class Period.

(j) **Defendant Samuel O. Thier (“Thier”)** served as a director of the Company from 1994 to the present and served as a member of the Executive Committee, Research Committee, Corporate Governance Committee, Audit Committee and the Chairperson of the Public Policy and Social Responsibility Committee during the Class Period.

(k) **Defendant Wendell P. Weeks (“Weeks”)** served as a director of the Company from 2004 to the present and served as a member of the Audit Committee and the Finance Committee during the Class Period.

(l) **Defendant Peter C. Wendell (“Wendell”)** served as a director of the Company from 2003 to the present and served as the Chairperson of the Audit Committee and as

a member of the Compensation and Benefits Committee and Research Committee during the Class Period.

19. As is explained in more detail below, the Board had certain appointment and oversight responsibilities with respect to the Plans. The Board and its members listed above, including Defendants Gilmartin and Clark, are referred to as the “Merck Director Defendants.”

20. **Defendant Management Pension Investment Committee (the “MPIC”).** The MPIC was a committee responsible for selecting and monitoring investments made by the Plans. The MPIC was established on December 5, 1981 by Special Resolution of the Merck Board of Directors No. 84-1981.

21. Upon information and belief, the following individuals were members of the MPIC during some part of the Class Period:

- (a) **Defendant Judy C. Lewent (“Lewent”)** was the Executive Vice President and Chief Financial Officer of Merck. Lewent served as a member of the Merck Management Committee
- (b) **Defendant Marcia J. Avedon (“Avedon”),** Senior Vice President, Human Resources, and Treasurer, Merck (appointed on March 23, 2004).
- (c) **Defendant Caroline Dorsa (“Dorsa”),** Vice President and Treasurer, Merck.
- (d) **Defendant Dr. Bradley T. Sheares (“Sheares”),** President, U.S. Human Health.
- (e) **Defendant Peter N. Kellogg (“Kellogg”),** has served as Executive Vice-President and Chief Financial Officer since August 14, 2007 and as a member of the Executive Committee during the Class Period.

- (f) **Defendant Mark E. McDonough (“McDonough”)**, has served as Vice-President and Treasurer during the Class Period. McDonough executed the Company’s Form 5500, filed with the Department of Labor and the Department of the Treasury, as well as the Company’s Form 11-K, as Plans’ Administrator, during the Class Period.
- (g) **Defendant J. Christopher Scalet (“Scalet”)**, has served as Executive Vice President, Global Services, and Chief Information Officer (“CIO”) and Senior Vice President, Global Services, and CIO.
- (h) **Defendant Mirian Graddick-Weir, Ph.D. (“Graddick-Weir”)** has served as the Company’s Executive Vice-President, Human Resources since January 2008. Graddick-Weir also served as Senior Vice President, Human Resources from September 2006 to January 2008. Graddick-Weir served as a member of the Executive Committee during the Class Period.
- (i) **Defendants John and Jane Doe 1-10.** Plaintiffs do not currently know the identity of all the MPIC members during the Class Period. Therefore, some of the members of the MPIC are named fictitiously, as Defendants John and Jane Doe 1-10. Once their true identities are ascertained, Plaintiffs will seek leave to join them under their true names.

22. The MPIC and its members (Defendants Kellogg, McDonough, Scalet and John and Jane Does 1-10) are referred to as the “MPIC Defendants.”

#### IV. THE PLANS

##### A. Nature of the Plans

23. The Plans are “employee pension benefit Plan[s]” within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). Further, they are “eligible individual account Plan[s]” within the meaning of ERISA § 407(d)(3), 29 U.S.C. § 1107(d)(3), and are also “qualified cash or deferred arrangements” within the meaning of I.R.C. § 401(k), 26 U.S.C. § 401(k). While the Plans are not parties to this action, pursuant to ERISA, the relief requested in this action is for the benefit of the Plans, pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

24. At all relevant times, the Plans had two separate components: (1) a contributory portion, which consisted of participant contributions, and (2) a matching component, which consisted entirely of employer contributions.

##### B. The Plan Documents

25. An employee benefit plan, including the Plans here, must be “established and maintained pursuant to a written instrument.” ERISA § 402(a)(1), 29 U.S.C. 1102(a)(1). During the Class Period, the Plans were maintained under the following instruments:

- the Merck & Co., Inc. Employee Savings and Security Plan (the “Salaried Plan”);
- the Merck & Co., Inc. Employee Stock Purchase and Savings Plan, (the “Hourly Plan”);
- the Merck Puerto Rico Employee Savings Plan (the “Puerto Rico Plan”); and

26. As required by ERISA, the Plan Administrators for the Plans provided every participant with a Summary Plan Description (“SPD”).

27. ERISA and the Internal Revenue Code require that Plan Administrators file a Form 5500 with the Department of Labor and the Department of the Treasury, which were filed by the Plans’ Administrators.

28. The assets of an employee benefit Plan, such as the Plans, must be “held in trust by one or more trustees.” ERISA § 403(a), 29 U.S.C. § 1103(a).

**C. Plan Contributions**

**1. Participant Contributions**

29. The Salaried, Hourly and Puerto Rico Plans permitted participants to contribute to the Plans.

**a. Salaried Plan**

30. For the Salaried Plan, participants were able to contribute from 2% to 25% of their base pay. Employees earning less than \$90,000 could contribute a maximum of 25% of base pay. Employees earning \$90,000 or more are limited to maximum contributions of 15% of base pay. However, pre-tax contributions could not exceed the statutory limit for pre-tax deferrals ((\$13,000 in 2004, \$14,000 in 2005 and \$15,000 in 2006).

**b. Hourly Plan**

31. Depending on the terms of the applicable collective bargaining agreements, employees earning less than \$90,000 could contribute a maximum of 25% of base pay. Employees earning \$90,000 or more were limited to maximum contributions of 15% of base pay. However, pre-tax contributions could not exceed the statutory limit for pre-tax deferrals ((\$13,000 in 2004, \$14,000 in 2005 and \$15,000 in 2006).

**c. Puerto Rico Plan**

32. For the Puerto Rico Plan, participants could contribute from 2% up to 15% of their base pay, provided that pre-tax contributions shall not exceed 10% of base compensation or \$8,000.

## **2. Employer Contributions**

33. Merck offered various company matching contributions depending on the Plan.

Each of the Plans' matching contributions are reviewed below:

### **a. Salaried Plan**

34. For the Salaried Plan, throughout the Class Period, the Company matched 75% of employee contributions up to 6% of base pay per pay period.

35. During 2004, the Company match was invested in the Merck Company Stock Fund as follows: with respect to Salaried Plan participants under age 50, 50% of the matching contribution was required under the Plan to be automatically invested in the Merck Common Stock Fund and 50% was invested in the funds to which the participant currently contributed. If the participant was over age 50, he or she could invest the entire match in any fund (including the Merck Common Stock Fund).

36. After January, 2005, all Company matching contributions were invested according to a participant's elections.

### **b. Hourly Plan**

37. For the Hourly Plan, the Company matched 60% or 65% of an employee's contributions up to a maximum of 6% of base pay per pay period as negotiated with each bargaining group.

38. During 2004, the Company match was invested in the Merck Company Stock Fund as follows: with respect to Salaried Plan participants under age 50, 50% of the matching contribution was required under the Plan to be automatically invested in the Merck Common Stock Fund and 50% was invested in the funds to which the participant currently contributed. If the participant was over age 50, he or she could invest the entire match in any fund (including

the Merck Common Stock Fund). However, the allocation remained the same (i.e. the age 50+ participant still received the 50% of the Company match in the Merck Company Stock Fund). If the age 50+ participant wanted to change the allocation, he/she had to make a separate designation.

39. After January, 2005, all Company matching contributions were invested according to a participant's elections.

**c. Puerto Rico Plan**

40. For the Puerto Rico Plan, the Company matched 50% of pre-tax and after-tax contributions up to 5% of each participant's base compensation applicable to the pay period in which the contribution is being made.

41. Under the Puerto Rico Plan, during 2004, the matching contribution was required to be invested entirely in the Merck Common Stock Fund and could not be reallocated into any other investment option.

42. After January 2005, company matching contributions were invested according to a participant's elections.

**D. Investment Options**

43. Effective January 1, 2002, the Salaried, Hourly and Puerto Rico Plans, offered 21 investment options (20 mutual funds and the Merck Common Stock Fund). During 2004, the Plans offered 17 mutual funds, the Medco Health Common Stock Fund and the Merck Common Stock Fund. During 2005, the Plans offered 17 mutual funds, the Medco Health Common Stock Fund and the Merck Common Stock Fund. During 2006, the Plans offered 16 mutual funds, a commingled fund, a separately managed fund and the Merck Common Stock Fund.

44. The Merck Common Stock Fund holds the Plans' shares of Merck stock. The Fund was designed to invest primarily, not exclusively, in Merck stock and expressly allows investment in cash and other short-term investment options.

45. Throughout the Class Period, over a billion dollars of Plan assets was invested in the Fund.

#### **E. The Plans' ESOP Status**

46. An ESOP is an ERISA plan that invests primarily in "qualifying employer securities." 29 U.S.C. § 1107(d)(6)(A). For a plan to qualify as an ESOP, the plan must meet numerous requirements set forth in both ERISA and the Internal Revenue Code. Based on documents reviewed to date, it is not apparent that any of the Plans qualify as an ESOP. Even if the Plans do qualify as an ESOP, the Plan fiduciaries may not invest in employer securities regardless of the circumstances. To the contrary, while the duty to diversify does not apply to company stock investments *per se* in an ESOP, the fiduciaries remain bound by the other core ERISA fiduciaries duties, including the duties to act loyally, prudently and for the exclusive purpose of providing benefits to Plan participants.

### **V. DEFENDANTS' FIDUCIARY STATUS**

47. ***Named Fiduciaries.*** ERISA requires every Plan to provide for one or more named fiduciaries of the Plans pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The person named as the "administrator" in the Plans instrument is automatically a named fiduciary, and in the absence of such a designation, the Sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

48. ***De Facto Fiduciaries.*** ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), but also any other persons who in fact perform fiduciary

functions. Thus, a person is a fiduciary to the extent: “(i) he exercises any discretionary authority or discretionary control with respect to management of such Plans or exercises any authority or control with respect to management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such Plans, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such Plans.”

ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

49. Each of the Defendants was a fiduciary with respect to the Plans and owed fiduciary duties to the Plans and its participants under ERISA in the manner and to the extent set forth in the Plans’ documents, through their conduct, and under ERISA.

50. As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) to manage and administer the Plans, and the Plans’ investments solely in the interest of the Plans’ participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

51. Instead of delegating fiduciary responsibility for the Plans to external service providers, Merck chose to comply with the requirement of ERISA § 402(a)(1) by assigning the appointment and removal of fiduciaries to its CEO, and members of its Board of Directors. These persons and entities in turn selected Merck officers, employees, and agents to perform relevant fiduciary functions. Although the Plans had an institutional trustee unrelated to Merck, the Trust Agreement required the trustee to take directions from Merck.

**A. Merck's Fiduciary Status**

52. The 2006 Form 5500 for the Salaried and Hourly Plans indicates that Merck is the Plan Administrator of both the Salaried and Hourly Plans.

53. Under the terms of the Salaried and Hourly Plans, as amended as amended in January 1997, Merck was designated "the administrator of the Plan[s] only to the extent that such term is used in ERISA, and in any regulations issued thereunder." (Salaried Plan, § 15.1); (Hourly Plan, § 15.1 Hourly Plan).

54. The "Administrative Information" section within the Summary Plan Description for the Salaried Plan also provided that Merck was the Plan Administrator:

The plan administrator for each of the plans under the Merck Benefits Program is Merck & Co., Inc.

\* \* \*

Merck & Co. Inc., as Plan Administrator, has the exclusive discretionary authority to construe and interpret the plans, to decide all questions of eligibility for benefits and to determine the amount of such benefits, and its decisions on such matters are final and conclusive. Merck & Co., Inc., as plan administrator, has reserved the right to delegate its discretionary authority to construe and interpret the plans, to decide all questions of eligibility for benefits, and to determine the amount of such benefits to a representative . . . and such representative's decisions on such matters are final and conclusive.

55. The "Administrative Information" section within the Summary Plan Description for the Hourly Plan also provided that Merck was the Plan Administrator.

56. According to public filings by Merck, "The day-to-day design and administration of pension, savings, health, welfare and paid time-off plans and policies applicable to salaried U.S.-based employees in general are handled by teams of Company Human Resources, Finance and Legal Department employees. The Committee (or Board) remains responsible for certain fundamental changes outside the day-to-day requirements necessary to maintain these plans and policies."

57. Under Section 14.1 of the Salaried and Hourly Plans, Merck was responsible for entering into a trust agreement with the Trustee to be designated by the Management Pension

Investment Committee (the MPIC”). The Trust Agreement for the Salaried and Hourly Plans provided Merck with the authority to remove the Trustee and amend, modify or terminate the agreement.

58. Upon information and belief, at all times during the Class Period, Merck’s SEC filings were incorporated into and a part of the SPDs, the Prospectus and/or the Form S-8 registration statements.

59. Upon information and belief, Merck was responsible for preparing and distributing communications to participants regarding the Plans, including the preparation of (a) the Summary Plan Descriptions (“SPDs”), (b) the Prospectus, (c) the Form S-8 registration statement, (d) the SEC filings incorporated by reference into the SPDs, the Prospectus and the Form S-8 registration statements and (e) other material related to the Plans.

60. Merck exercised discretionary authority with respect to the Plans by determining or participating in decisions about the substantive content of (a) the SPDs, (b) the Prospectus, (c) the Form S-8 registration statements, (d) the SEC filings incorporated by reference into the SPDs, the Prospectus and the Form S-8 registration statements and (e) any other Plan material or communications, all of which were intended to communicate to participants information necessary for participants to manage their retirement benefits under the Plans.

61. Merck was not required under the Plans to cause the Plans to offer the Fund as an investment option, or to incorporate all of Merck’s SEC filings into the Plan documents, but once it elected to do so, it made the disclosures in those documents to the Plan participants in a fiduciary capacity.

62. Merck was also a fiduciary to the extent that its employees served on Plan committees within the scope of their employment and Merck possessed and exercised control over their conduct as set forth in paragraphs below. In particular, Merck personnel participated in (a) appointing and monitoring those who administered the Plans, (b) administering the Plans and Plan assets, (c) monitoring the Plans’ investment options and (d) determining the substantive

content of Plan communications, including SEC filings that, upon information and belief, were incorporated by reference into the Plan documents.

63. The Merck Director Defendants, the CBC Defendants and the MPIC Defendants were Merck's agents because these committee members acted on behalf of Merck. On information and belief, all the MPIC Defendants were employees of Merck who acted at the direction and control of and in the ordinary course of their duties with Merck. Based on these facts, Merck had control over the actions of the MPIC and its members and is liable for their actions.

64. Merck was also a fiduciary during the Class Period because the members of its Board of Directors were fiduciaries during that time, and the Board is, by definition, an agent of the corporation.

65. Upon information and belief, through the express and/or implied use of its power to compensate, demote and discharge individuals working for Merck or its subsidiaries, Merck made it clear, to all those who both served the Plans in a fiduciary capacity and became aware of the risks associated with Vytarin, that taking any steps on behalf of the Plans, its participants and beneficiaries, or otherwise, that would jeopardize the success of Vytarin was unacceptable and would lead to dire consequences for such individual, thereby effectively precluding any action by any designated Plan fiduciary. Such steps could have included (a) efforts to eliminate or at least limit the Plans' investment in Merck stock, and (b) disclosure of the true health risks associated with Vytarin's lack of medical benefit, to fellow fiduciaries who were unaware of them or only partly aware of them, to Plan participants and beneficiaries, and/or to the United States Department of Labor.

66. Further, on information and belief, the designated fiduciaries of the Plans understood that their separate designation as Plan fiduciaries with defined functions under the documents and instruments governing the Plans was, in large measure, a formality, and that in fact decisions concerning the Plans' investments and the extent of disclosures between and among fiduciaries and to participants and beneficiaries were made on a routine basis by Merck's

regular chain of command. By making such decisions through the Merck chain of command rather than in the designated fiduciary committees, Merck became a *de facto* fiduciary of the Plans by, in fact, exercising discretionary authority and control over the Plans' administration and the investment and disposition of their assets.

67. Consequently, in light of the foregoing duties, responsibilities, and actions, Merck was both a named fiduciary of the Plans pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and a *de facto* fiduciary within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that it exercised discretionary authority or discretionary control with respect to management of the Plans, exercised authority or control with respect to management or disposition of the Plans' assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

#### **B. Defendant Gilmartin's Fiduciary Status**

68. As Chairman of the Board of Merck, Gilmartin's responsibilities included determining the "structure, composition and responsibilities" of the Committees of the Board, including the composition of the Compensation and Benefits Committee of the Board (the "CBC"), which appointed members of the MPIC, who were responsible for selecting and monitoring investment options for each of the Plans.

69. Gilmartin, as Chief Executive Officer of Merck, had the responsibility of meeting with the members of the CBC "as appropriate."

70. Upon information and belief, Gilmartin exercised discretionary authority with respect to the Plans as a result of his involvement in the selection of members of the MPIC. During the Class Period, Gilmartin exercised his discretion in that he exerted his influence over the CBC in connection with the CBC's appointment of MPIC members. Upon information and belief, Gilmartin took part in the appointment process by recommending persons that the CBC

should appoint to the MPIC. Thereafter, based -- at least in part -- on Gilmartin's recommendation, such persons were appointed to the MPIC.

71. Gilmartin also exercised discretionary authority with respect to the Plans by: (a) determining or participating in decisions about the substantive content of Merck's SEC filings, which, on information and belief, were incorporated by reference into the SPDs, Prospectus and Form S-8 registration statements, and (b) upon information and belief, participating in Merck's decision to incorporate these communications into disclosures to Plan participants. Such filings were intended to communicate to participants information necessary for participants to manage their retirement benefits under the Plans.

72. With respect to the Salaried and Hourly Plans, Gilmartin, as the Chief Executive Officer of Merck, had the responsibility for appointing and monitoring members of the Salaried and Hourly Plan Employee Benefits Committee who "administered" the Salaried and Hourly Plans.

73. Consequently, in light of the foregoing duties, responsibilities, and actions, Gilmartin, as the Company's CEO, was a fiduciary of the Plans within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that he exercised discretionary authority or discretionary control with respect to management of the Plans, exercised authority or control with respect to management or disposition of the Plans' assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

### **C. Defendant Clark's Fiduciary Status**

74. As Chairman of the Board of Merck, Clark's responsibilities included determining the "structure, composition and responsibilities" of the Committees of the Board, including the composition of the Compensation and Benefits Committee of the Board (the

“CBC”), which appointed members of the MPIC, who were responsible for selecting and monitoring investment options for each of the Plans.

75. Clark, as Chief Executive Officer of Merck, had the responsibility of meeting with the members of the CBC “as appropriate.”

76. Upon information and belief, Clark exercised discretionary authority with respect to the Plans as a result of his involvement in the selection of members of the MPIC. During the Class Period, Clark exercised his discretion in that he exerted his influence over the CBC in connection with the CBC’s appointment of MPIC. Upon information and belief, Clark took part in the appointment process by recommending persons that the CBC should appoint to the MPIC. Thereafter, based -- at least in part -- on Clark’s recommendation, such persons were appointed to the MPIC.

77. Clark also exercised discretionary authority with respect to the Plans by: (a) determining or participating in decisions about the substantive content of Merck’s SEC filings, which, on information and belief, were incorporated by reference into the SPDs, Prospectus and Form S-8 registration statements, and (b) upon information and belief, participating in Merck’s decision to incorporate these communications into disclosures to Plan participants. Such filings were intended to communicate to participants information necessary for participants to manage their retirement benefits under the Plans.

78. With respect to the Salaried and Hourly Plans, Clark, as the Chief Executive Officer of Merck, had the responsibility for appointing and monitoring members of the Salaried and Hourly Plan Employee Benefits Committee who “administered” the Salaried and Hourly Plans. (Salaried Plan, § 2.1 (Definition of “Plan Committee”)); (Hourly Plan, § 2.1 (Definition of “Plan Committee”)).

79. Consequently, in light of the foregoing duties, responsibilities, and actions, Clark, as the Company's CEO, was a fiduciary of the Plans within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that he exercised discretionary authority or discretionary control with respect to management of the Plans, exercised authority or control with respect to management or disposition of the Plans' assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

**D. Merck Director Defendants' Fiduciary Status  
(Including Gilmartin and Clark as Directors)**

80. Under relevant New Jersey law and Merck's charter and bylaws, Merck's Board of Directors had the authority to manage the business and affairs of Merck. Because Merck was, as alleged above, a fiduciary of the Plans during the Class Period, so, necessarily, was the Board and its members, which had the ultimate authority for the affairs of Merck.

81. In addition, the Merck Director Defendants, including Gilmartin and Clark, appointed and monitored the members of the Compensation and Benefits Committee of the Board of Directors ("CBC"), which was a subcommittee of the Merck Board that acted under the direction and control of the Merck Board. The CBC was composed of three or more non-employee directors of Merck. With respect to each of the Plans, the Board, through the CBC, had the authority to appoint, remove and accept the resignation of members of the MPIC, who was a named fiduciary under each of the Plans.

82. During the Class Period, the following Merck Director Defendants were members of the CBC: (a) Defendant Thomas H. Glocer, (b) Defendant Steven F. Goldstone, (c) Defendant William B. Harrison, Jr., (d) Defendant William N. Kelley, (e) Defendant Anne M. Tatlock (Chairperson), and (f) Defendant Peter C. Wendell. (collectively the "CBC Defendants").

83. The Merck Director Defendants, acting through the CBC, had the duty to monitor the performance of the MPIC. In particular, the CBC adopted guidelines for the MPIC, provided approvals regarding the Plan determinations submitted by the MPIC and reviewed reports prepared by the MPIC.

84. Each Merck Director Defendant exercised his or her discretionary authority with respect to the Plans by determining or participating in decisions about the substantive content of Merck's SEC filings, which, on information and belief, were incorporated by reference into the SPDs, Prospectus and Form S-8 registration statements. Such filings were intended to communicate to participants information necessary for participants to manage their retirement benefits under the Plan.

85. Consequently, in light of the foregoing duties, responsibilities, and actions, the Merck Director Defendants (including Gilmartin and Clark) and the CBC Defendants were fiduciaries of the Plans within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period, in that they exercised discretionary authority or discretionary control with respect to management of the Plans, exercised authority or control with respect to management or disposition of the Plans' assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plans, including the appointment, removal and monitoring of the CBC and the MPIC.

#### **E. MPIC Defendants' Fiduciary Status**

86. The Management Pension Investment Committee (the "MPIC") was established on December 15, 1981, with the initial members appointed by the CBC. The members of the MPIC were named fiduciaries of each of the Plans.

87. Under the Salaried and Hourly Plans' Trust Agreement, the members of the MPIC were identified as named fiduciaries of the Plans.

88. Under each of the Plans, the MPIC was charged with the authority to select investment alternatives and vehicles for the Plans. Section 9.1 of the Salaried, Hourly and Puerto Rico Plans and Section 8.1 of the Medco Plan contain identical language that provides:

MPIC shall determine from time to time which investments, funds and mutual funds offered by the Trustee or another party may be permitted investments under the Plan.

89. Section 15.1 of the Salaried and Hourly Plans also expressly states that the MPIC had the authority to select the investment alternatives and vehicles for the Plans. Under the Salaried Plan, Section 15.1 provides:

MPIC shall have the authority to select investment alternatives and vehicles for the Plan and to designate the Trustee.

Under the Puerto Rico Plan, Section 15.1 states:

The Management Pension Investment Committee of Merck ("MPIC") shall have the authority to select investment alternatives and vehicles for the Plan.

90. In addition, under each of the Plans, the MPIC was given the authority to determine the investments within the Merck Common Stock Fund, including the amount the Fund would invest in Merck Common Stock and the amount the Fund would invest in other short term or liquid investment media. Section 9.2 of the Salaried, Hourly and Puerto Rico Plans and Section 8.2 of the Medco Plan contain identical language that provides:

[A] fund or investment which includes shares of Merck Common Stock, and such other investments (such as short term, liquid investments) **as determined by the MPIC**, shall be permitted under the plan.

(emphasis added).

91. The duties of MPIC are described in the MPIC Administrative Procedures as follows:

(i) to direct the investment of assets; (ii) select appoint and remove the trustee or trustees; (iii) select and establish other funding media; (iv) set policy guidelines for and monitor results of the investment of Plan assets; and (v) establish a funding policy and method consistent with the objectives of the Company's pension plans and the requirements of the law.

92. According to the Administrative Procedures, the MPIC was required to hold regular quarterly meetings and report to the CBC. With respect to their reporting requirements, the MPIC was required to provide the CBC with "quarterly and annual reports covering the investment results on all pension assets" and provide information or reports on the Investment Policy adopted by the Committee. The MPIC was to meet with the CBC in accordance with the schedule determined by the CBC.

93. Moreover, the MPIC was required to receive and review the following reports prepared by the Office of Vice President and Treasurer: (1) Quarterly Merck Pension Trust Investment Report, (2) Annual Retirement Plan Report, (3) Annual Medical/Dental/Long-Term Disability Trust (501(c)(9)) Report, and the (4) Annual Summary Audit Report on Pension and Benefit Plans.

94. Consequently, in light of the foregoing duties, responsibilities, and actions, the MPIC Defendants were both named fiduciaries of the Plans pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and *de facto* fiduciaries within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that they exercised discretionary authority or discretionary control with respect to management of the Plans, exercised authority or control with respect to management or disposition of the Plans' assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

## VI. FACTS BEARING ON FIDUCIARY BREACH

### A. Merck's Decision to Bet Its Future on Vytorin

95. In the late 1980's and early 1990's, Merck faced a crisis because patents on several of its major "blockbuster" drugs -- including Vasotec, Prinivil, Mevacor, Pepcid, Prilosec, and Zocor -- were expiring. No pharmaceutical company had ever had this many billion-dollar drugs going off patent at approximately the same time.

96. Defendant Gilmartin became Merck's President and CEO in 1994. Gilmartin, a Harvard-trained businessman, was the first non-doctor or non-scientist to run Merck since Merck's establishment in 1891. At the time he admitted that, while the "safe thing would have been to seek a merger, emphasize generics, stay diversified and cut costs across the board," he "went against the conventional wisdom" and staked the company's future on the productivity of its labs.

97. While paying lip service to Merck's longstanding values, Gilmartin's real aim was that of a nearsighted entrepreneur. He pushed Merck to bring drugs to market when Merck knew that their drug could cause serious health risks or, at the very least, provided no benefits. He sought to maximize short-term Vytorin sales through marketing -- regardless of the lack of evidence that it had any medical benefit over 'statins' like Zocor alone. Both of these decisions would ultimately damage Merck's reputation and long-term financial health significantly.

98. The appointment of Gilmartin signaled a culture change in Merck's focus from a science-driven to a marketing- and sales-driven company. Other changes accompanied this shift. For example, traditionally, Merck's marketing executives had not been allowed to participate in scientific-planning meetings. Gilmartin's predecessor, P. Roy Vagelos, first persuaded scientists to accept the attendance of marketers at such meetings by promising that they would not speak. Under Vagelos's, and then Gilmartin's, tenure, marketing personnel became more active

participants in scientists' development decisions. When Clark, a Merck insider for 32 years—but without experience in drug marketing or research—took over for Gilmartin as CEO of Merck, the *New York Times* reported that Clark planned to “stick to Mr. Gilmartin's policy.” In this regard, it quoted Tony Butler, a Lehman analyst as writing in a research note that Clark “was likely to relentlessly focus on improving [Merck's] bottom line.”

99. Merck desperately needed “blockbuster” drugs to fill the revenue vacuum left by imminent patent expirations and to alleviate skepticism about the company's stability and future.

100. In 2002, when Merck's own study on Vioxx -- its prescription painkilling drug -- revealed increased cardiovascular risks, Merck began directing its efforts to preserving patent protection for a new formulation of another one of its blockbuster drugs—Zocor—which would lose its patent protection in 2006. The new form of Zocor from which Merck sought salvation ultimately became known as Vytorin. Vytorin was approved by the FDA for marketing in 2004—only weeks before Merck announced that it was withdrawing Vioxx from the market.

## **B. The Evolution of Anti-Cholesterol Drugs to Vytorin**

### **The Cholesterol Problem**

101. Cholesterol is a soft, fat-like, waxy substance found in the bloodstream and in all cells in the body. The body uses cholesterol for producing cell membranes and some hormones, and to serve other needed bodily functions.

102. The medical community has, however, long regarded too much cholesterol in the blood as a major factor for heart attacks and strokes. This is because cholesterol cannot dissolve in the blood and has to be transported to and from the cells by carriers called lipoproteins.

103. When too much low-density lipoprotein cholesterol (commonly referred to as “LDL” or “bad” cholesterol) circulates in the blood, it can slowly build up in the inner walls of

the arteries that feed the heart and brain. Together with other substances, it can form plaque, a thick, hard deposit that can narrow the arteries and make them less flexible. This condition is known as atherosclerosis. If the arteries get blocked, heart attack or stroke can result.

104. In addition, when too little high-density lipoprotein cholesterol (commonly referred to as “HDL” or “good” cholesterol) circulates in the blood, this condition is also thought to be a risk factor for heart attack and stroke. HDL cholesterol is believed to remove excess cholesterol from arterial plaque, slowing its buildup, and to carry cholesterol away from the arteries and back to the liver, where the cholesterol is passed from the body.

105. The levels of LDL and HDL cholesterol in the blood can be determined through a blood test.

106. Reducing serum cholesterol was thought to be a potential way to reduce the deposition of atherosclerotic plaque in the walls of arteries, which in turn would reduce heart attacks and strokes.

### **LDL Cholesterol-Lowering Drugs**

107. The first results of a cholesterol-lowering drug trial came in 1984. At that time, researchers were able to show after a seven-year trial that patients who ingested the drug Questran, had a 12% drop in LDL.

108. In 1991, the FDA approved a cholesterol-lowering drug for marketing in the United States under the trade name Zocor (generically known as simvastatin), which was manufactured by Merck. Zocor belongs to a class of drugs known as HMG-COA reductase inhibitors or statins, which reduce cholesterol in the blood by blocking the rate-limiting enzyme in cholesterol in the liver.

### **Proving Reductions in Heart Attack and Stroke Through Statins Like Zocor**

109. LDL Cholesterol-lowering drugs did not become blockbuster drugs until large studies of statins were completed in the mid-1990s that showed reductions in the risk of death for patients from heart attack and stroke. Specifically, in 1994 and 1995, studies of Merck's Zocor and another statin drug showed a 30% reduction in the risk of death for patients with established heart disease.

110. By 1998, the statin market was reported to be a \$5 billion market. By 2000, this market had tripled, and by 2002 this market had become the best-selling drug class in the world.

**Zetia: A Non-Statins LDL-Lowering Drug**

111. In May 2000, Merck and Schering-Plough Corporation entered into agreements to develop and market new prescription medicines in the cholesterol-management area. The cholesterol agreements provide for the sharing of operating income generated based upon percentages that vary by product, sales level and country.

112. One drug to result from this joint venture was an LDL lowering drug jointly marketed and sold by Merck and Schering-Plough in the United States under the trade name Zetia (generically known as ezetimibe), and jointly marketed and sold by Merck and Schering-Plough outside of the United States under the additional trade names of Ezetrol and Ezemibe.

113. Zetia attempts to reduce cholesterol in the blood by blocking the absorption of dietary cholesterol in the small intestine and reabsorption of cholesterol in the bile as opposed to blocking the production of cholesterol in the liver like statins.

114. The FDA approved Zetia for marketing on October 25, 2002. In approving Zetia, the FDA did not demand or obtain any proof that it has any effect on the buildup of plaque in arteries, or that it actually reduces the risk of heart attacks or stroke. Instead, the FDA approved Zetia on the basis of trials that showed it could lower LDL (low-density lipoprotein) cholesterol by 15 to 20 percent.

**Vytorin: A Combination of Statin Drug Zocor and Non-Statins Drug Zetia**

115. Schering-Plough did not believe Zetia would sell well by itself. However, Schering-Plough believed that sales would increase if Zetia was combined with a statin like Zocor. Accordingly, Schering-Plough proposed through its joint venture with Merck to create a new combination of Zetia and Zocor in a single drug. This new combined drug was jointly marketed and sold by Merck and Schering-Plough in the United States under the trade name Vytorin and marketed and sold outside the United States under the trade name Inegy.

116. The belief that Zetia would not sell well by itself was well-founded. About 70% of patients who take Zetia (ezetimibe) do so in the form of the combination drug Vytorin (or Inegy, as this drug is known outside the United States).

117. The FDA approved Vytorin for marketing in the United States on July 23, 2004. It approved Vytorin on the basis of trials that showed it could lower LDL (low-density lipoprotein) cholesterol more than certain statins against which it had been compared.

118. The purported mechanism of reducing cholesterol and the reason why a patient would want to decrease cholesterol in his or her bloodstream is set out by Defendant Merck in its Physician's Desk Reference listing for Vytorin:

**What Is Vytorin?** Vytorin contains two cholesterol-lowering drugs, ezetimibe [Zetia] and simvastatin [Zocor] \* \* \* Vytorin works to reduce your cholesterol in two ways. It reduces the cholesterol absorbed in your digestive tract, as well as the cholesterol your body makes by itself.

\* \* \*

**What Should I Know About High Cholesterol?** Cholesterol is a type of fat found in your blood. Cholesterol comes from two sources. It is produced by your body and it comes from the food you eat. Your total cholesterol is made up of both LDL and HDL cholesterol. LDL cholesterol is called "bad" cholesterol because it can build up in the wall of your arteries and form plaque. Over time, plaque build-up can cause a narrowing of the arteries. This narrowing can slow or block blood flow to your heart, brain, and other organs. High LDL cholesterol is a major cause of heart disease and stroke.

2006 Physician's Desk Reference Listing for Vytorin, Patient Information About Vytorin, at 2089-90.

**C. Merck's Knowledge of and Attempts to Conceal Vytorin Problems**

119. In 2002, cardiologists in the medical community were starting to believe (despite a lack of supporting medical evidence) that the lower they could get cholesterol with statins, the better for patient cardiovascular outcomes.

120. Faced with the prospect of losing sales from blockbuster drug Vioxx and losing sales from its other key blockbuster drug Zocor as a result of patent expiration in 2006, Merck decided to begin a new Zocor trial in 2002 that compared Zocor alone to a proposed new form of Zocor plus Zetia (Vytorin), which would have been patent protected for many years. Merck and Schering-Plough had originally discussed the protocol for this trial in late 2000 and early 2001 as part of the Zetia clinical development program. Merck hypothesized that Vytorin would lead to lower LDL cholesterol and atherosclerosis more than soon to be off-patent Zocor alone.

121. The Zocor trial was known as the ENHANCE trial. ENHANCE is an acronym for "Effect of Combination Exetimibe and High-Dose Simvastatin v. Simvastatin Alone on the Atherosclerotic Process in Patients with Heterozygous Familial Hypercholesterolemia." The purpose of the ENHANCE trial was to prove that Vytorin was more effective than Zocor alone in reducing cholesterol.

122. The problem for Merck, however, was that studies sufficient to prove that a drug reduces deaths caused by heart attacks and strokes are expensive and can take half a decade or more. Since Zocor was going to lose its patent protection in 2006, Merck did not have enough time to complete such a study.

123. Merck thus sought to reproduce an ultrasound study (Atorvastatin versus Simvastatin on Atherosclerosis Progression or ASAP) that Pfizer had previously performed on its statin drug Lipitor, which—within two years—produced data that showed that Lipitor decreased wall thickness in the carotid artery and retarded the progression of atherosclerosis in the femoral artery.

124. This ASAP trial was designed to measure a marker of early atherosclerosis known as intima [inner layer of the arterial wall] media thickness (IMT). The intima-media of an artery can thicken and thereby restrict blood flow. This process is known as atherosclerosis. Plaque buildup causes such thickening. Measures of IMT are now widely accepted as a standardized validated marker for atherosclerotic vascular disease. Changes in IMT and arterial lumen diameter—as measured by B-mode high-resolution ultrasonography and quantitative coronary angiography, respectively—are currently the only surrogate markers for progression of atherosclerotic disease recognized by regulatory authorities in the United States and Europe.

125. Pfizer's ASAP study used ultrasound to measure the thickness of the wall of the carotid artery in the neck as well as the wall of the femoral artery in the leg and compared patients on the statin Lipitor to patients on the statin Zocor.

126. The ASAP study showed that taking Lipitor helped patients with a genetic cholesterol disease—familial hypercholesterolemia—to both lower their LDL cholesterol by 50% and decrease carotid artery thickness.

127. Notably, however, while Pfizer's ASAP study showed that taking Zocor helped patients lower their LDL cholesterol, it resulted in a slight *increase* in carotid artery thickness.

128. As with Pfizer's ASAP study, the ENHANCE study used ultrasound to measure the thickness of the wall of the carotid artery in the neck and studied patients with familial

hypercholesterolemia. Instead of the statin Lipitor, these patients were given the statin Zocor or a combination of Zetia and Zocor (Vytorin). The ENHANCE trial was designed to prove that Vytorin could slow the growth of plaque in carotid arteries, which supply blood to the brain, more than generic Zocor (simvastatin) alone. The trial studied 720 people with heterozygous familial hypercholesterolemia, an inherited form of high cholesterol that affects about 0.2% of the population. The study compared Vytorin (simvastatin 80 mg and ezetimibe 10 mg) with Zocor (simvastatin 80 mg) alone.

129. The protocol for ENHANCE was finalized in April 2002. The first study site for ENHANCE was initiated in June 2002 and the first patient was randomized in the study in October 2002. The last patient entered ENHANCE in April 2004, but the study continued for another two years and the last patient's last visit in ENHANCE occurred in April 2006.

130. Several weeks before Merck announced that it was withdrawing Vioxx from the market, on July 23, 2004, the FDA approved Vytorin for marketing in the United States. Pursuant to patent, Vytorin was to be protected from generic competition until 2013.

131. Merck touted the benefits of Vytorin as the "first and only product approved to treat two sources of cholesterol" in a July 26, 2004 press release announcing the FDA's approval of Vytorin.

132. In addition, in an attempt to offset the significant negative financial effect of losing Vioxx, Merck heavily advertised and marketed Vytorin in a \$150-million-a-year ad campaign to the public as a superior treatment for lowering cholesterol, and thus lowering the risk of heart attack and stroke. Merck embarked on that campaign despite the fact that it had not yet completed its ENHANCE trial.

133. In fact, however, there was no evidence of any kind to support a claim that Vytorin reduces (or slows the buildup of) arterial plaque any better than generic simvastatin or Zocor alone. To the contrary, the ENHANCE study proved the opposite of what Merck had been telling the medical community and the public for years – Vytorin did no better than simvastatin in reducing the deposition of arterial plaque.

134. In this regard, Rodney Hayward, a clinical researcher at the University of Michigan's School of Public Health wrote in a 2005 issue of *Annals of Internal Medicine* that "[t]here is no valid clinical evidence to suggest that using treatments other than statins to pursue proposed LDL cholesterol goals is safe or effective."

135. Indeed, it was not until three years after Zetia was approved for marketing that Merck and Schering-Plough in 2005 first *began* a sufficient trial to test whether adding Zetia to Zocor would prevent heart attacks and strokes and save lives. This study will not be complete until 2011.

136. Thus, to date, there is still no proof that Zetia, the drug Merck added to Zocor (which was soon to lose its patent) to make Vytorin has any positive effect on clinical outcomes. In an article dated November 21, 2007, the *New York Times* quoted Dr. Eric J. Topol, a cardiologist and director of the Scripps Translational Science Institute in La Jolla, California, as saying, "Statins have diverse effects beyond simple LDL cholesterol lowering, such as potent anti-inflammatory actions. There has yet to be a clinical trial to show that ezetimibe improves clinical outcomes."

137. Nevertheless, Merck reported to the *New York Times* that global sales of Zetia and Vytorin had reached \$793 million by April 2006. By March 31, 2008, Vytorin had more than \$5 billion in sales.

138. The success of Vytorin was critical to Merck, as it was faced with the loss of patent protection for Zocor in June 2006, from which it expected to lose \$2 billion in revenue later that year.

139. While the ENHANCE trial was completed in April 2006, Merck did not release the results at that time.

140. Notwithstanding Merck's claims that it was blinded to the results of ENHANCE until January 2008, Merck learned in 2006 that ENHANCE was a failed study in that showed that Vytorin does not reduce arterial plaque or the rate of atherosclerotic progression (primarily as measured by thickness in the carotid artery) that can cause adverse cardiovascular events such as heart attack and stroke any better than Zocor, an older and much less expensive, generically available drug.

141. Merck and Schering-Plough led cardiologists to expect to see results of ENHANCE at a medical conference in November 2006 and then at another in March 2007. Ultimately, however, those results were not presented until the American College of Cardiology Conference on March 30, 2008.

142. Harlan Kumholz, a cardiologist at Yale University, has observed that the delays publicizing the results of the ENHANCE trial could well have been caused by commercial—not scientific—concerns. As he remarked to *Forbes*: “By the summer of 2005, their marketing division is so successful that it already is a blockbuster drug. There was only downside [to analyzing the results of ENHANCE].”

143. Merck claimed that delays were necessitated by problems in the quality of its IMT measurement data. However, on January 26, 2007, Dr. Michael L. Bots of the University Medical Center in Utrecht, the Netherlands, an independent consultant commissioned to review

these data, issued a report stating: “The CIMT [carotid IMT] measurements in ENHANCE have been done in a consistent manner, leading to reproducibility findings that compare well with that of published studies from other multi-centre randomized trials. . . [T]he evidence shown to me is sufficient to indicate that the CIMT data in ENHANCE are fine; i.e., no better, no worse than what has been reported in the literature.”

144. In March 2007, anonymous postings by pharmaceutical sales representatives began to appear on Cafépharma.com. These postings indicate that some sales representatives knew about the ENHANCE trial’s lack of efficacy results at this time, making comments such as “the study is a bust.”

145. More than a year after the ENHANCE study had been completed, in July 2007, John Kastelein, principal investigator of the ENHANCE trial sent an email to Schering-Plough, referring to the ENHANCE study as a “trial out of hell” and asking why its results were not going to be disclosed as planned, but would be delayed until 2008:

Is it correct that SP has decided not to present at AHA, but to await the two other, completely unvalidated, endpoints, which analysis is going to take us straight into 2008??!!?? If this is true, SP must have taken this decision without even the semblance of decency to consult me as PI of the study. I can tell you that if this is the case, our collaboration is over... This starts smelling like extending the publication for no other [than] political reasons and I cannot live with that.

\* \* \*

I have been traveling half the globe in the last 6 months to a number of large and important meetings at the strong wish of Merck to chair them or to present ezetimibe data. At every single one of them I was cleared to say that ENHANCE would be presented at AHA. There is no reason whatsoever to include femorals; you will be seen as a company that tries to hide something and I will be perceived as being in bed with you!

146. On November 19, 2007, Merck announced that it had changed the ENHANCE trial's “primary endpoint” to consist of measurements of the common carotid artery. The original data analysis plan called for measurements at three points of the carotid artery—the right and left

common carotid arteries, carotid bulbs, and the internal carotid arteries—at the beginning of the study and after two years. Merck took that step, it stated in a press release it issued that day, because “an independent panel of clinical and biostatistics experts [that] was convened on November 16, 2007, to offer advice about the prospective analysis of the ENHANCE trial . . . recommended focusing the primary endpoint to the common carotid artery to expedite the reporting of the study findings.”

147. A member of the expert panel that met on November 16, 2007, in Washington, D.C., James W. Stein, a cardiac-imaging expert at the University of Wisconsin objected to this public characterization of the panel’s work, stating in an email to Merck: “This really overstates our recommendation. We did not vote on this. . . The tone here implies that we strongly recommended this when in reality, we just advised you on what the scientifically valid approaches would be. . . . It was the decision of the company to change the endpoint.” Stein concluded his email to Merck by telling Merck he would not approve its version of the November 16, 2007 meeting as reflected in Merck’s version of the “minutes” for this meeting—which were not created until December.

148. Analysts at *Forbes* observed that much of the controversy surrounding the *ad hoc* group meeting on November 16, 2007 could have been avoided if the study had a steering committee, as a group of experts who regularly convened to discuss the trial and its data, or a data safety monitoring board, which carefully watches study information to make sure patients are not harmed. According to Eric Topol, chief academic officer at the Scripps Health in California: “Every real trial should have both.”

149. After several news reports about the delay of the results and an outpouring of criticism, Merck announced that it would not change the primary endpoints after all.

150. On December 12, 2007, the *New York Times* observed “[i]ndependent scientists have viewed ENHANCE as crucial because it is the first trial that would answer whether Zetia's ability to lower cholesterol has real biological benefits for patients.”

151. Finally, on January 14, 2008, Merck issued a press release that disclosed that the ENHANCE researchers found that while Vytorin lowered LDL cholesterol more than Zocor alone, it did not slow the growth of carotid-artery plaques more than Zocor, the statin (simvastatin) that was available as a much less expensive generic drug. In fact, the ENHANCE trial showed that patients who took Vytorin had a *greater* increase in plaque than the patients who took simvastatin alone, although Merck reported that the increased deposition rate of plaque was not statistically significant. In effect, the study demonstrated that despite significantly higher cost to the public, there was no evidence that Vytorin had any more clinical benefit than generic simvastatin.

152. In response to this press release, *MedPage Today* reported that, Dr. Steven Nissen, chairman of cardiovascular medicine at the Cleveland Clinic and a past president of the American College of Cardiology, “said the ENHANCE results were “stunning,” adding that “on the basis of this evidence there was no good reason to prescribe ezetimibe [i.e., Zetia], because ‘if it doesn’t work in [heterozygous familial hypercholesterolemia], why use it?’”

153. The next day, *The New York Times* reported that Dr. Nissen stated: “This is as bad a result for the drug as anybody could have feared.” The article continued: “Millions of patients may be taking a drug that does not benefit them, raising their risk of heart attacks and exposing them to potential side effects, he said. Patients should not be given prescriptions for Zetia unless all other cholesterol drugs have failed.”

154. In addition, William Boden, a top cardiologist at the University of Buffalo, responded to the press release by telling *Forbes* that Merck and Schering-Plough had “gotten a long-overdue pass on marketing a drug where there was no outcomes data.”

155. Moreover, *Forbes* reported on January 25, 2008, that the American College of Cardiology, which had earlier issued a statement warning that patients and physicians should not draw too many conclusions from ENHANCE, issued a new statement clarifying that Zetia and the Vytorin combo pill should be used only after other medicines with more evidence of benefit have been tried. This new statement came partly as a response to full-page advertisements from Merck and Schering defending Zetia and Vytorin and telling patients not to overreact to the ENHANCE study’s findings.

156. As such, Merck sold the medical community and patients on the concept that because the patented, more-expensive Vytorin was “different,” it would lower “bad” cholesterol even further, thus reducing the development of arterial plaque more than generic statins like simvastatin. That sales job was not based on evidence, but on Merck’s need to replace the soon-to-be generic Zocor with another patented drug. In truth, according to Merck’s own ENHANCE trial, the “different” way that Vytorin lowered LDL provided no additional clinical benefit in exchange for its patent-protected higher price—a price that was four times higher than generic versions of Zocor.

157. Merck shares fell by 15% in the weeks following Merck’s January 14, 2008 press release.

158. Full results of the ENHANCE study were to be presented on March 30, 2008 at the annual meeting of the American College of Cardiology. Wall Street analysts expressed hopes that a scientific discussion of data at that meeting would convince doctors that the controversy

surrounding the delay in presenting the results of the ENHANCE study was “media-driven,” quiet doubters and stabilize sales of Zetia and Vytorin. At the same time, the potential danger to Merck and Schering from this meeting was not simply that the full data from the study would cause doctors to decide that Zetia did not work and that Zetia conferred no medical benefit over much less expensive generic Zocor, but also that many doctors could decide that they do not have enough data and use other drugs instead while awaiting the big trial that Merck and Schering-Plough were conducting to test whether adding Zetia to Zocor in the combination drug Zyprexa would reduce the risk of death from heart attack and stroke that would not be completed until 2011.

159. To coincide with presentations at a meeting of the American College of Cardiology, on March 30, 2008, *The New England Journal of Medicine (NEJM)* published the full results of the ENHANCE study. At that time it took the unusual step of printing not one but two editorials about it, both recommending doctors only turn to Zetia and Vytorin after they have exhausted other options. The *NEJM* report of ENHANCE study results by Dr. Kastelein and others entitled, “Simvastatin with or without Ezetimibe in Familial Hypercholesterolemia” revealed that intima-media thickness to be consistently higher in patients receiving Vytorin than simvastatin, with an even greater disparity between these groups measured in the femoral than carotid artery. In an accompanying *NEJM* paper, “Does ENHANCE Diminish Confidence in Lowering LDL or in Ezetimibe?”, cardiologists Dr. B. Greg Brown of the University of Washington School of Medicine and Dr. Allen J. Taylor of Walter Reed Army Medical Center, Washington, D.C., wrote: “Thus, although a reduction in intima-media thickness does not guarantee a reduction in the rate of events, it seems unlikely that a reduction in events can be expected without a reduction in the progression of intima-media thickness.”

160. While a panel of experts was expected to debate at the March 30, 2008 annual meeting of the American College of Cardiology how the ENHANCE study should impact the behavior of doctors, the panel arrived at a consensus *before* the meeting and issued a *unanimous* statement calling on cardiologists to rein in the use of Zetia and Vytorin. The panel chose Harlan Krumholz of Yale University to speak for it. He said that “the most likely explanation is that in this study the compound did not work” and urged doctors to turn back to generically available statins which had been proven in big studies to prevent heart attacks and strokes and save lives. In addition, Dr. Steven Nissen, chairman of cardiology at the Cleveland Clinic, said, “We’ve got a drug that has no clinical outcome trials . . . I advise my colleagues essentially to use this drug only as a last resort.”

161. On or about March 31, 2008, Chuck Grassley of the Senate Finance Committee sent a letter to the CEO of Merck revealing evidence that Merck knew that the ENHANCE study showed Vytorin was no more effective than Zocor at slowing arterial thickening and requested further information about Merck’s knowledge of Vytorin.

162. Merck shares fell nearly 15% to 37.95 on March 31, 2008, bringing down Merck’s total share price for 2008 by 35%. Analysts have attributed this drop largely to Merck’s Vytorin disclosures in 2008.

163. As reported by *Investor’s Business Daily* on April 7, 2008, Joel Hay, professor of pharmaceutical economics at the University of Southern California explained the negative reaction of the market to the ENHANCE study as follows:

In the case of Merck you really have to wonder. This isn’t their first situation along these lines. It’s really starting to hurt their reputation. They seem to get into stonewalling mode, which is not in the best interests of the company. It needs to promote science above all else. . . . This will add to the backlash that’s occurred ever since Merck’s Vioxx situation. . . . Beyond these clinical findings, why on earth should anyone pay \$3 a day for a medication that is not

proven as better than a generic with a tremendous track record for pennies a day?

164. Analysts at *Forbes* agreed, noting that when safety concerns had arisen previously in relation to Vioxx, Merck spent a lot of time defending its actions instead of looking for new opportunities for growth. It concluded that Merck's "main job now is restoring faith," which is even "harder than investing a blockbuster."

165. As of April 11, 2008, Merck's stock had dipped to a 12-year low.

#### **VII. DEFENDANTS KNEW OR SHOULD HAVE KNOWN THAT VYTORIN-RELATED RISKS WERE NOT DISCLOSED**

166. Upon information and belief, each of the Defendants, in the performance of their fiduciary duties, knew or should have known that Merck had failed to disclose material adverse information concerning the lack of medical benefits of Vytorin and that as a consequence of such failure the price of Fund shares was artificially inflated, and ultimately, that the Fund was an imprudent investment for the Plans.

167. In addition to the Company, Defendants were Merck Directors and/or its most senior employees. Upon information and belief, Defendants had knowledge regarding the undisclosed health and financial risks associated with Vytorin.

168. Upon information and belief, at all times material hereto, Defendants also knew that the commercial success of Vytorin was essential to the future profitability and earnings growth upon which Merck's soaring stock prices were based.

169. By virtue of their positions, Defendants were aware or should have been aware of public statements regarding Vytorin that the Company disseminated to the medical and financial communities as well as the reaction of analysts and others to this information. Defendants were

also aware or should have been aware of the inflationary effect such information had on Merck's stock price and profitability.

170. Defendants, upon information and belief, knew or should have known that patients would receive no medical benefit from Vytorin over Zocor or generic simvastatin. Yet Merck continued to issue false and misleading statements regarding the drugs and permitted others to do so, even though Defendants knew or should have known that when the truth was ultimately revealed, Vytorin's profitability would be destroyed, taking with it much of the value of Merck's stock.

171. The precarious dependence of Merck stock on the undisclosed lack of medical benefit of Vytorin throughout the Class Period made it an imprudent investment for a retirement portfolio. Yet, Defendants failed to take appropriate measures to protect Plan participants from the dangers of which he was aware, nor did he instruct others to do so.

172. In the absence of discovery, Plaintiffs cannot now know the extent of each Defendant's actual knowledge of Vytorin risks. However, Defendants were Merck's most senior personnel. To the extent that they did not know of the risks associated with Vytorin, Defendants did not conduct an appropriate investigation into whether the Fund was a prudent investment for the Plans.

173. Such an adequate investigation by any of the Defendants would have revealed to a reasonable fiduciary that investment by the Plans in the Fund, under the circumstances described herein, was imprudent.

## **VIII. DEFENDANTS FAILED TO DISCLOSE THE IMPRUDENCE OF INVESTING IN THE FUND**

### **A. Defendants Were Required to Furnish Participants with Complete and Accurate Information**

174. The fiduciaries of the Plans were required under ERISA to furnish certain information to participants. For example, ERISA § 101, 29 U.S.C. § 1021, requires that fiduciaries furnish a SPD to participants. ERISA § 102, 29 U.S.C. § 1022, provides that the SPD must apprise participants of their rights under the Plan. The SPD and all information contained or incorporated therein constitutes a representation in a fiduciary capacity upon which participants were entitled to rely in determining the identity and responsibilities of fiduciaries under the Plans and in making decisions concerning their benefits and investment and management of assets allocated to their accounts:

The format of the summary plan description must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description the page on which the restrictions are described is noted.

29 C.F.R. § 2520.102-2(b).

175. Defendants regularly communicated with employees, including Plan participants, about Merck's performance, future financial and business prospects, and Merck stock, the largest single asset in the Plans. These communications were directed specifically at employees/Plan participants at all-employee meetings, on the Company's website, and in Plan documents and materials which were disseminated to all participants and beneficiaries, and which expressly incorporated by reference the Company's misrepresentations and nondisclosures regarding

associated with Vytorin. These communications were acts of Plans administration, and the persons responsible for the communications were ERISA fiduciaries in this regard.

176. As a consequence of these communications, the Company fostered an inaccurately rosy picture of the soundness of the Fund or Merck stock as a Plan investment. Accordingly, Plan participants could not appreciate the true risks presented by investments in the Fund and therefore could not make informed decisions regarding investments in the Fund.

177. Despite Defendants' communications with participants regarding Merck stock, Defendants failed to disclose the significant financial risks posed by ineffectiveness of Vytorin. Defendants knew or should have known that this information was likely to have an extreme impact on the Plans and the value of Plan assets. Therefore, under ERISA, Defendants had an affirmative duty to disclose this information so that participants and other Plan fiduciaries could make informed decisions regarding Plan assets.

178. Upon information and belief, Defendants communicated material information necessary for participants to make informed decisions with respect to the investment of Plan assets in the Fund and in an attempt to comply with ERISA Section 404(c) by referencing and incorporating Merck's SEC filings into documents intended to convey plan related information to participants. Merck's SEC filings were incorporated into Form S-8 registration statements, SPDs, prospectuses and/or other fiduciary communications.

179. These SEC filings incorporated into Plan documents were representations made to participants in a fiduciary capacity. Moreover, Defendants exercised discretion in determining or participating in decisions regarding the substantive content of the SEC filings which were incorporated into the SPDs, Prospectuses or S-8 Forms.

180. The SEC filings which were incorporated by reference into these Plan communications negligently failed to disclose and/or negligently misrepresented the efficacy profile and the financial risks associated with Vytorin. Negligent misrepresentations and omissions were contained in at least the following SEC filings:

- a. Forms 10-K filed with the SEC on 3/11/05, 3/13/06, 2/28/07 and 2/28/08;

- b. Forms 10-Q filed with the SEC on 11/8/04, 5/9/05, 8/8/05, 11/8/05, 5/9/06, 8/7/06, 11/7/06, 5/8/07, 8/8/07 and 1/11/07;
- c. Forms 8-K filed with the SEC on 12/14/04, 1/25/05, 2/28/05, 4/21/05, 7/21/05, 10/24/05, 12/15/05, 1/31/06, 2/28/06, 4/20/06, 7/24/06, 10/20/06, 12/12/06, 1/30/07, 4/19/07, 7/23/07, 10/22/07, 12/11/07 and 1/30/08.

181. The statements in these SEC filings were false and misleading because they failed to disclose the efficacy and financial risks associated with Vytorin as alleged above. In particular, these misrepresentations and omissions concerned:

- a. statements and omissions concerning the efficacy of Vytorin which presented only the Company's positive "spin" on the data while simultaneously mischaracterizing or omitting material facts questioned the efficacy of Vytorin (e.g., the "ENHANCE" trial), which were not publicly disclosed for almost two years; and
- b. statements and omissions Vytorin sales, marketing and approvals together with optimistic forecasts for future growth made while simultaneously mischaracterizing or omitting material facts about the financial risks and the potential legal liabilities created by Vytorin.

## IX. CAUSES OF ACTION

### A. **Count I: Failure to Prudently and Loyalily Manage the Plans and Plans Assets And Share Material Information with Fellow Fiduciaries**

182. Plaintiffs incorporate by reference the paragraphs above.

183. This Count alleges fiduciary breach against the following Defendants: Merck, Gilmartin, Clark and the MPIC Defendants (the "Prudence Defendants").

184. As alleged above, during the Class Period, the Prudence Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

185. As alleged above, the scope of the fiduciary duties and responsibilities of the Prudence Defendants included managing the Plans' assets for the sole and exclusive benefit of the Plans' participants and beneficiaries, and with the care, skill, diligence, and prudence required by ERISA. The Prudence Defendants were directly responsible for, among other things, selecting prudent investment options, eliminating imprudent options, determining how to invest the assets of the Fund and directing the trustee regarding the same, evaluating the merits of the Plans' investments on an ongoing basis, and taking all necessary steps to ensure that the Plans' and the Funds' assets were invested prudently.

186. According to DOL regulations and ERISA case law, a fiduciary's investment or investment course of action is prudent if: (a) he has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the Plans' investment portfolio with respect to which the fiduciary has investment duties; and (b) he has acted accordingly.

187. Again, according to DOL regulations, "appropriate consideration" in this context includes, but is not necessarily limited to:

- A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the Plans portfolio with respect to which the fiduciary has investment duties), to further the purposes of the Plans, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action; and
- Consideration of the following factors as they relate to such portion of the portfolio:

- The composition of the portfolio with regard to diversification;
- The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the Plans; and
- The projected return of the portfolio relative to the funding objectives of the Plans.

188. Yet, contrary to their duties and obligations under the Plan documents and ERISA, the Prudence Defendants failed to manage the assets of the Plans loyally and prudently. Specifically, during the Class Period, these Prudence Defendants knew or should have known that the Fund and Merck stock were not suitable and appropriate investments because the prices of Fund shares and Merck stock were artificially inflated as a result of undisclosed material adverse information regarding the lack of benefits Vytorin. Nonetheless, during the Class Period, these Prudence Defendants continued: (a) to offer the Fund shares as an investment option for participant contributions; (b) to match employer contributions in the Fund; (c) to require and/permit the Plans to invest in the Fund; (d) to restrict the Plans' ability to sell shares of the Fund, and; (e) to invest Fund assets in Merck stock. They did so despite evidence that the Company was misrepresenting and failing to disclose the lack of medical benefit associated with Vytorin, and was issuing misleading and inaccurate statements, that artificially inflated the value of the stock and the Fund, and exposed the Plans' investment in the Fund and the Fund's investment in Merck stock to huge risk and certain losses once the truth was revealed, all in violation of their duty of prudence as set forth in ERISA section 404(a)(1)(A) and (B).

189. The Prudence Defendants were obliged to manage all of the Plans' assets prudently and loyally. Accordingly, the Prudence Defendants were obliged to have in place a regular, systematic procedure for evaluating the prudence of company stock.

190. The Prudence Defendants had no such procedure. Moreover, they failed to conduct an appropriate investigation of the merits of continued investment in the Fund and Merck stock, even in light of the Company's highly risky and inappropriate practices, and the particular dangers that these practices posed to the Plans. Such an investigation would have

revealed to a reasonably prudent fiduciary the imprudence of continuing to make and maintain such investments.

191. In connection with the duty to conduct such an investigation, Defendants who had actual knowledge of the risks posed by the marketing Vytorin had a duty of prudence and loyalty, pursuant to section 404(a)(1)(A) and (B) of ERISA, to disclose their knowledge of facts material to the prudence of the Plans' investment in Merck stock to their fellow fiduciaries, so they could protect the Plans from continuing to invest in inflated Merck stock, and failed to do so.

192. Likewise, any fiduciary of the Plans whose authority or *de facto* exercise of fiduciary responsibility made him a fiduciary with responsibility for the Plans' investments, disclosure to participants of information about those investments, or the appointment and monitoring of fiduciaries who had such responsibilities, had a duty, pursuant to 404(a)(1)(A) and (B) of ERISA, to disclose their knowledge to their fellow fiduciaries who were in a position to protect the Plans from further investment in Merck stock. On information and belief, Defendants had such knowledge and made no such disclosure to the Prudence Defendants, which would have assisted them in taking action to protect the Plans from continuing to invest in inflated Merck stock, in breach of their fiduciary duties.

193. The fiduciary duty of loyalty entails, among other things, a duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a Plan with single-minded devotion to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the Plan sponsor. On information and belief, the compensation and tenure of the Prudence Defendants was tied to the performance of Merck stock and/or the publicly reported financial performance of Merck. Fiduciaries laboring under such conflicts, must, in order to comply with the duty of loyalty, make special efforts to assure that their decision-making process is untainted by the conflict and conducted in a disinterested fashion, typically by seeking independent financial and legal advice obtained only on behalf of the Plans.

194. The Prudence Defendants breached their duty to avoid conflicts of interest and to promptly resolve them by, *inter alia*: (a) failing to engage independent advisors who could make independent judgments concerning the Plans' investment in the Fund; (b) failing to notify appropriate federal agencies, including the DOL, of the facts and circumstances that made the Fund an unsuitable investment for the Plans; (c) failing to take such other steps as were necessary to ensure that participants' interests were loyally and prudently served; (d) with respect to each of these above failures, doing so in order to avoid adversely impacting their own compensation or drawing attention to Merck's inappropriate practices, and; (e) by otherwise placing their own and Merck's improper interests above the interests of the participants with respect to the Plans' investment in the Fund.

195. Moreover, a fiduciary's duties of loyalty and prudence require it to disregard Plan documents or directives that it knows or reasonably should know would lead to an imprudent result or would otherwise harm Plan participants or beneficiaries. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Thus, a fiduciary may not blindly follow Plan documents or directives that would lead to an imprudent result or that would harm Plan participants or beneficiaries, nor allow others, including those whom they direct or who are directed by the Plans, to do so.

196. The Prudence Defendants breached this duty by: (a) continuing to offer the Fund as an investment option for the Plans for participant contributions, and requiring certain participants matching contributions to be invested in the Fund; (b) continuing to invest employer matching contributions in the Fund; (c) permitting the Plans to invest both employee and employer contributions in the Fund; (d) for employer contributions, continuing to impose restrictions on the ability of participants to divest their Plan accounts of holdings of Merck stock, and; (e) investing Fund assets in Merck common stock and for each of these actions doing so when the Prudence Defendants knew or should have known that Merck stock no longer was a prudent investment for participants' retirement savings.

197. As a consequence of the Prudence Defendants' breaches of fiduciary duty alleged in this Count, the Plans suffered tremendous losses. If the Prudence Defendants had discharged

their fiduciary duties to invest the Plans' assets prudently, the losses suffered by the Plans would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plans, and indirectly Plaintiffs and the other Class members, lost millions of dollars of retirement savings.

198. Pursuant to ERISA §§ 409 and 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (a)(3), the Prudence Defendants are liable to restore the losses to the Plans caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

**B. Count II: Failure to Provide Complete and Accurate Information to Participants and Beneficiaries**

199. Plaintiffs incorporate by reference the allegations above.

200. This Count alleges fiduciary breach against Merck, Gilmartin, Clark, the MPIC Defendants and the Merck Director Defendants (the "Communications Defendants").

201. As alleged above, during the Class Period, the Communications Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

202. As alleged above, the scope of the Communications Defendants' duties included disseminating Plan documents and/or Plan-related information to participants regarding the Plans and/or assets of the Plans, including information as to whether the Plans' investments in the Fund were made prudently and at an appropriate price reflecting available information about the risk and value of such investment. One way to fulfill these duties was to make appropriate disclosures to each other and to the Plans' participants.

203. The duty of loyalty under ERISA requires fiduciaries to speak truthfully to participants, not to mislead them regarding the Plans or the Plans' assets, and to disclose information that participants need in order to exercise their rights and interests under the Plans.

This duty to inform participants includes an obligation to provide participants and beneficiaries of the Plans with complete and accurate information, and to refrain from providing false information or concealing material information regarding the Plans' investment options, such that participants can make informed decisions with regard to investment options available under the Plans. This duty applies to all of the Plans' investment options, including investment in the Fund and Merck stock.

204. The Communications Defendants breached their ERISA duty to inform participants by failing to provide complete and accurate information, regarding the lack of medical benefit that accompanied Vytorin and the prudence of investing retirement contributions in the Fund, which they knew or should have known.

205. These failures were particularly devastating to the Plans and the participants, as a significant percentage of the Plans' assets were invested in the Fund during the Class Period, with acquisitions of Fund shares occurring at significantly inflated prices. Thus, the Fund's precipitous decline had an enormous impact on the value of participants' retirement assets. Had such disclosures been made to participants, or Plan fiduciaries, if any, who were not aware Vytorin's lack of medical benefit and the inevitable impact of such risks on Merck's stock price, they could have taken action to protect the Plans. The disclosure to participants necessarily would have been accompanied by disclosure to the market and would have assured that any further acquisitions of Merck stock by the Plans would have occurred at an appropriate price.

206. As a consequence of the failure of the Communications Defendants to satisfy their duty to provide complete and accurate information under ERISA, participants lacked sufficient information to make informed choices regarding investment of their retirement savings in the Fund.

207. The Communications Defendants' failure to provide complete and accurate information regarding Merck and the Fund was uniform and Plan-wide, and impacted all Plan participants the same way, in that none of the participants received crucial, material information

regarding the risks of the Fund as a Plan investment option and that all Plan acquisitions of employer stock during the Class Period occurred at inflated prices.

208. As a consequence of the Communications Defendants' breaches of fiduciary duty, the Plans suffered tremendous losses. If the Communications Defendants had discharged their fiduciary duties to prudently disclose material information, the losses suffered by the Plans would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plans, and indirectly Plaintiffs and the other Class members, lost millions of dollars of retirement savings.

209. Pursuant to ERISA §§ 409 and 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (a)(3), the Communications Defendants are liable to restore the losses to the Plans caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

### **C. Count III: Failure to Monitor Fiduciaries**

210. Plaintiffs incorporate by reference the allegations above.

211. This Count alleges fiduciary breach against the following Defendants: Gilmartin, Clark, the CBC Defendants and any other members of the CBC during the Class Period named as Jane and John Does (the "Monitoring Defendants").

212. As alleged above, during the Class Period the Monitoring Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

213. As alleged above, the Monitoring Defendants assumed a duty to monitor the performance of other fiduciaries through (a) their responsibility to appoint, and remove those fiduciaries; (b) the discretionary authority obtained by their actions in connection the Plans, or; (c) their actual control of their employees and agents in the performance of their fiduciary duties and responsibilities under the Plans:

214. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of Plan assets, and must take prompt and effective action to protect the plan and participants when they are not.

215. The monitoring duty further requires that appointing fiduciaries have procedures in place, so that on an ongoing basis they may review and evaluate whether the “hands-on” fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work and the Plans’ performance, and by ensuring that the monitored fiduciaries have an appropriate process for obtaining the information and resources they need). In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to plan participants or for deciding whether to retain or remove them.

216. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with complete and accurate information in his/her possession that he/she knows, or reasonably should know, that the monitored fiduciaries must have in order to prudently manage the Plan and plan assets, or that may have an extreme impact on the plan and the fiduciaries’ investment decisions regarding the plan.

217. The Monitoring Defendants breached their fiduciary monitoring duties by, among other things: (a) failing, at least with respect to the Plans’ investment in the Fund, to monitor their appointees, to evaluate their performance, or to have any system in place for doing so, and standing idly by as the Plans suffered enormous losses as a result of their appointees’ imprudent actions and inaction with respect to company stock; (b) failing to ensure that the monitored fiduciaries appreciated the true extent of Merck’s misrepresentations and nondisclosures regarding Vytarin, and the likely impact of such misrepresentations on the value of the Plans’ investment in the Fund; (c) to the extent any appointee lacked such information, failing to provide complete and accurate information to all of their appointees such that they could make sufficiently informed fiduciary decisions with respect to the Plans’ assets, and; (d) failing to

remove appointees whose performance was inadequate in that they continued to make and maintain huge investments in the Fund, despite their knowledge of misrepresentations and nondisclosures that rendered the Fund an imprudent investment during the Class Period for participants' retirement savings in the Plans.

218. As a consequence of the Monitoring Defendants' breaches of fiduciary duty, the Plans suffered tremendous losses. If the Monitoring Defendants had discharged their fiduciary monitoring duties as described above, the losses suffered by the Plans would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plans, and indirectly Plaintiffs and the other Class members, lost millions of dollars of retirement savings.

219. Pursuant to ERISA §§ 409 and 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (a)(3), the Monitoring Defendants are liable to restore the losses to the Plans caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

**D. Count IV: Co-Fiduciary Liability**

220. Plaintiffs incorporate by reference the allegations above.

221. This Count alleges co-fiduciary liability against all Defendants (the "Co-Fiduciary Defendants").

222. As alleged above, during the Class Period the Co-Fiduciary Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

223. As alleged above, ERISA § 405(a), 29 U.S.C. § 1105, imposes liability on a fiduciary, in addition to any liability which he may have under any other provision, for a breach of fiduciary responsibility of another fiduciary with respect to the same Plan, if he/she knows of a breach and fails to remedy it, knowingly participates in a breach, or enables a breach.

224. **Knowledge of a Breach and Failure to Remedy.** ERISA § 405(a)(3), 29 U.S.C. § 1105, imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary if, he has knowledge of a breach by such other fiduciary, unless he/she makes reasonable efforts under the circumstances to remedy the breach. Upon information and belief, Defendants knew of the breaches by the other fiduciaries and made no efforts, much less reasonable ones, to remedy those breaches. In particular, they did not communicate their knowledge of the Company's illegal activity to the other fiduciaries.

225. Merck, through its officers and employees withheld material information from the market, provided the market with misleading disclosures, and profited from such practices, and, thus, knowledge of such practices is imputed to Merck as a matter of law.

226. In particular, Defendants by virtue of their positions at Merck, and by virtue of their knowledge of Vytorin's ineffectiveness -- participated in and/or knew about the Company's misrepresentations regarding Vytorin and their consequences, including the artificial inflation of the value of Merck stock.

227. Because Defendants knew of the Company's misrepresentations, they also knew: (a) that the Prudence Defendants were breaching their duties by continuing to invest in company stock, and; (b) that the Communication Defendants were breaching their duties by providing incomplete and inaccurate information to participants. Yet, they failed to undertake any effort to remedy these breaches. Instead, they compounded them by downplaying the significance the lack of medical benefits of Vytorin, and obfuscating the risk Vytorin posed to the Company, and, thus, to the Plans.

228. **Knowing Participation in a Breach.** ERISA § 405(a)(1), 29 U.S.C. § 1105(1), imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary with respect to the same Plan, if he/she participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach. Merck knowingly participated in the fiduciary breaches of the Prudence Defendants in that it benefited from the sale or contribution of its stock at artificially inflated prices. Merck also, as a

*de facto* fiduciary, as alleged above, participated in all aspects of the fiduciary breaches of the other Defendants, which it controlled. Likewise, Defendants Gilmartin and Clark knowingly participated in the breaches of the Communications and Prudence Defendants because, as alleged above, they had actual knowledge of the Company's misrepresentations and nondisclosures regarding the lack of medical benefit of Vytarin and the impact such disclosures would have on Company's stock price. Yet, ignoring their fiduciary responsibilities, Defendants Gilmartin and Clark permitted the Prudence and Communications Defendants to breach their duties.

229. **Enabling a Breach.** ERISA § 405(a)(2), 29 U.S.C. § 1105(2), imposes liability on a fiduciary if, by failing to comply with ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled another fiduciary to commit a breach.

230. The Communications Defendants enabled the breaches of the MPIC Defendants, because they failed to provide complete and accurate information to the MPIC or the participants that would have protected the Plans and Plan participants from harm.

231. The Monitoring Defendants failure to monitor the Director Defendants, and the MPIC Defendants enabled those Defendants to breach their duties.

232. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plans, and indirectly Plaintiffs lost millions of dollars of retirement savings.

233. Pursuant to ERISA §§ 409 and 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (a)(3), the Co-Fiduciary Defendants are liable to restore the losses to the Plans caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

## X. CAUSATION

234. The Plans suffered hundreds of millions of dollars in losses because substantial assets of the Plans were imprudently invested or allowed to be invested by Defendants in the Fund during the Class Period, in breach of Defendants' fiduciary duties.

235. Defendants are liable for the Plans' losses in this case because: (a) a significant portion of the Plans' investment in the Fund was the result of the Prudence Defendants' decisions to invest matching contributions in Merck stock, and to severely restrict the ability of certain participants under the age of 50 to sell or diversify the Company's matching contribution in the Merck Stock Fund, and; (b) as to the portion of Plans assets invested in Merck stock as a result of participant contributions, the Prudence Defendants are liable for the losses because they failed to take the necessary and required steps to ensure effective and informed independent participant control over the investment decision-making process, as required by ERISA § 404(c), 29 U.S.C.

§ 1104(c), and the regulations promulgated thereunder. The Communications Defendants withheld material, non-public facts from participants, and provided inaccurate and incomplete information to them regarding the lack of medical benefit of Vytorin, the ongoing profitability of Merck, and the soundness of Merck stock as an investment vehicle.

236. As a result, the participants made the decision to contribute to the Plans, resulting in the Plans' purchase of Fund shares with both participant contributions and matching contributions (or the contribution of stock as a matching contribution) with incomplete information about the risks and value of the Fund, and the Fund itself remained overvalued. Had the Communications Defendants made appropriate disclosures, the Plans would not have purchased overvalued shares. The Prudence Defendants also are liable for losses that resulted from their decision to invest nearly all of the assets of the Merck Stock Fund in Merck stock rather than cash or other short-term investment options, as authorized by the Plans, and clearly prudent under the circumstances presented here.

237. Had the Defendants properly discharged their fiduciary and co-fiduciary duties, including the provision of full and accurate disclosure of material facts concerning investment in the Fund, eliminating the Fund as an investment alternative when it became imprudent, and divesting the Plans of Fund shares when maintaining such an investment became imprudent, the Plans would have avoided some or all of the losses that it, and indirectly, the participants, suffered.

#### **XI. REMEDY FOR BREACHES OF FIDUCIARY DUTY**

238. The Defendants breached their fiduciary duties in that they knew or should have known the facts as alleged above, and therefore knew or should have known that the Plans' assets should not have been invested in the Fund during the Class Period.

239. As a consequence of the Defendants' breaches, the Plans suffered significant losses.

240. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) authorizes a Plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. Section 409 requires "any person who is a fiduciary...who breaches any of the...duties imposed upon fiduciaries...to make good to such Plan any losses to the Plan..." Section 409 also authorizes "such other equitable or remedial relief as the court may deem appropriate..."

241. With respect to the calculation of the losses to the Plans, breaches of fiduciary duty result in a presumption that, but for the breaches of fiduciary duty, the Plans would not have made or maintained its investments in the challenged investment and, instead, prudent fiduciaries would have invested the Plans' assets in the most profitable alternative investment available to them. Alternatively, losses may be measured, not only with reference to the decline in Fund share price relative to alternative investments, but also by calculating the additional Fund shares that the Plans would have acquired had the Plan fiduciaries taken appropriate steps to protect the Plans. The Court should adopt the measure of loss most advantageous to the Plans. In this way,

the remedy restores the Plans' lost value and puts the participants in the position they would have been in if the Plans had been properly administered.

242. Plaintiffs and the Class are therefore entitled to relief from the Defendants in the form of: (1) a monetary payment to the Plans to make good to the Plans the losses to the Plans resulting from the breaches of fiduciary duties alleged above, in an amount to be proven at trial, based on the principles described above, as provided by ERISA § 409(a), 29 U.S.C. § 1109(a); (2) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a) and 502(a)(2) and (3), 29 U.S.C. §§ 1109(a) and 1132(a)(2); (3) injunctive and other appropriate equitable relief, pursuant to ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3), for knowing participation by a non-fiduciary in a fiduciary breach; (4) reasonable attorney fees and expenses, as provided by ERISA § 502(g), 29 U.S.C. § 1132(g), the common fund doctrine, and other applicable law; (5) taxable costs and interest on these amounts, as provided by law, and; (6) such other legal or equitable relief as may be just and proper.

243. Under ERISA, each Defendant is jointly and severally liable for the losses suffered by the Plans in this case.

## **XII. CLASS ACTION ALLEGATIONS**

244. **Class Definition.** Plaintiffs bring this action as a class action, pursuant to Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of themselves and the following class of persons similarly situated (the "Class"):

All persons, other than Defendants, who were participants in, or beneficiaries of, the Plans at any time between July 26, 2004 and March 31, 2008 and whose accounts included investments in Merck.

245. **Class Period.** The fiduciaries of the Plans knew or should have known at least by the beginning of the Class Period that the Company's improper conduct was so pervasive that Merck stock could no longer be offered as a prudent investment for any of the retirement Plans. Based upon the Company's improper conduct in relation to Vytorin, which the fiduciaries of the

Plans knew or should have known, Merck stock should not have been offered as a prudent investment for any of the retirement Plans through at least March 31, 2008.

246. **Numerosity.** The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown, according to Merck's Form 10-K for the fiscal year ended December 31, 2003, Merck had 33,200 employees in the United States, including Puerto Rico. Plaintiffs believe that a significant number of those employees participated in, or were beneficiaries of, the Plans during the Class Period.

247. **Commonality.** Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class.

Among the questions of law and fact common to the Class are:

- (a) whether Defendants each owed a fiduciary duty to Plaintiffs and members of the Class;
- (b) whether Defendants breached their fiduciary duties to Plaintiffs and members of the Class, by failing to act prudently and solely in the interests of the Plans' participants and beneficiaries;
- (c) whether Defendants violated ERISA, and;
- (d) whether the members of the Class have sustained damages and, if so, what is the proper measure of damages.

248. **Typicality.** Plaintiffs' claims are typical of the claims of the members of the Class because Plaintiffs' and the other members of the Class each sustained damages arising out of the Defendants' wrongful conduct in violation of federal law as complained of herein.

249. **Adequacy.** Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class action, complex, and ERISA litigation. Plaintiffs have no interests antagonistic to or in conflict with those of the Class.

250. **Rule 23(b)(1)(B) Requirements.** Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the

Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

251. **Other Rule 23(b) Requirements.** Class action status is also warranted under the other subsections of Rule 23(b) because: (a) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants; (b) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole, and; (c) questions of law or fact common to members of the Class predominate over any questions affecting only individual members and a class action is superior to the other available methods for the fair and efficient adjudication of this controversy.

### **XIII. PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for:

- A. A Declaration that the Defendants, and each of them, have breached their ERISA fiduciary duties to the participants;
- B. A Declaration that the Defendants, and each of them, are not entitled to the protection of ERISA § 404(c)(1)(B), 29 U.S.C. § 1104(c)(1)(B);
- C. An Order compelling the Defendants to make good to the Plans all losses to the Plans resulting from Defendants' breaches of their fiduciary duties, including losses to the Plans resulting from imprudent investment of the Plans' assets, and to restore to the Plans all profits that the Defendants made through use of the Plans' assets, and to restore to the Plans all profits which the participants would have made if the Defendants had fulfilled their fiduciary obligations;
- D. Imposition of a Constructive Trust on any amounts by which any Defendant was unjustly enriched at the expense of the Plans as the result of breaches of fiduciary duty;

E. An Order enjoining Defendants, and each of them, from any further violations of their ERISA fiduciary obligations;

F. An Order requiring Defendants to appoint one or more independent fiduciaries to participate in the management of the Plans' investment in Merck stock;

G. Actual damages in the amount of any losses the Plans suffered, to be allocated among the participants' individual accounts in proportion to the accounts' losses;

H. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

I. An Order awarding attorneys' fees pursuant to 29 U.S.C. § 1132(g) and the common fund doctrine; and

J. An Order for equitable restitution and other appropriate equitable and injunctive relief against the Defendants.

DATED: June 20, 2008

Respectfully submitted:

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