

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

**RONNA DEE KITSMILLER,
Individually, and on behalf of herself
and all others similarly situated,**

Plaintiff,

v.

**MERCK & CO. INC., and
SCHERING-PLOUGH CORPORATION,**

Defendants.

PLAINTIFF'S ORIGINAL CLASS ACTION COMPLAINT

Plaintiff Ronna Dee Kitsmiller (“Kitsmiller” or “Plaintiff”), individually and as class representative, by and through her undersigned attorneys, as and for her Original Class Action Complaint alleges upon personal knowledge as to herself and her own acts, and upon information and belief derived from, among other places, publicly available documents as to all other matters, as follows:

NATURE OF THE ACTION

1. This is a class action on behalf of certain customers of Merck & Co, Inc. (“Merck”) and Schering-Plough Corporation (“Schering”) [collectively, referred to as “Defendants”], who have taken the drug Zetia and/or Vytorin that is manufactured by Defendants.

2. Defendants aggressively marketed Zetia and Vytorin as effective cholesterol-lowering drugs.

3. On January 14, 2008, Merck and Schering belatedly disclosed the results of a April 2006 “ENHANCE” study that reflected, among other things, that Zetia and/or Vytorin were not only ineffective but potentially harmful.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1332(d)(2). Plaintiff is a citizen of the State of Colorado. Merck and Schering are both incorporated, and have their principal places of business, in New Jersey. the State of New Jersey with their principal place of business in New York. On information and belief, the amount of controversy between the members of the proposed class and Merck and Schering exceeds \$5,000,000, exclusive of interest and costs.

5. This Court has venue of this matter pursuant to 28 U.S.C. § 1391(b), because a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated in this district.

PARTIES

6. Plaintiff, a Colorado resident, with a principle address in Jefferson County, state of Colorado at 2591 South Field Court, Lakewood, Colorado 80227 was prescribed and has been taking Zetia.

7. Merck has appointed Corporation Service Company, 1675 Broadway, Suite 1200, Denver, Colorado, 80202 as its registered agent for purposes of service of process.

8. Schering does business in the State of Colorado or otherwise has sufficient contacts with Colorado to be subject to personal jurisdiction to Colorado courts within the meaning of Col. Rev. Stat. 13-1-124 (“Colorado Long Arm Statute”). Schering is a non-resident of Colorado, which

engages in business in Colorado, but does not maintain a regular place of business in this state or a designated agent for service of process. Accordingly, pursuant to the Colorado Long Arm Statute the Secretary of State of Colorado is the agent of Schering for service of process and may be served with process by serving Fred Hassan, CEO of Schering at its principal place of business at 2000 Galloping Hill Road, Kenilworth, NJ 07033.

SUBSTANTIVE ALLEGATIONS

9. This Class Action Complaint arises from Defendants' marketing, advertising, promotion, and sale of the prescription drugs Zetia and Vytorin, which purport to be cholesterol-lowering drugs. Vytorin is a compound containing Zocor and Zetia. Zocor is another cholesterol-lowering drug manufactured by Schering.

10. Defendants misrepresented and concealed material information from end-users and physicians concerning the lack of effectiveness and harmful effects of Zetia and Vytorin.

11. The purpose of Defendants' misrepresentations and omissions, in combination with Defendants' aggressive marketing schemes, was to create, and thereafter, increase end-user and physician demand for Zetia and Vytorin in a highly-competitive and crowded market for cholesterol-lowering drugs.

12. As a result of Defendants' fraudulent commercial practices in connection with the marketing and sale of Zetia and Vytorin, Defendants intended that physicians and end-users would rely on their marketing, advertisements and promotional efforts to and misrepresentations to the detriment of end-users, such as Plaintiff.

13. Defendants aggressively marketed Zetia and Vytorin as providing substantial benefits over other cholesterol-lowering drugs by engaging in a massive direct-to-consumer advertising blitz using television and print media to induce them to use or request these drugs. On information and belief, Defendants also engaged in an aggressive marketing campaign aimed at physicians. Defendants manipulated and controlled information and knowledge as to the efficacy and safety through its direct to consumer advertising, aggressive marketing to physicians and the uniform suppression of its studies, such as the ENHANCE analysis, that reflected the inefficacy and potentially harmful effects of these drugs. Through the use of these marketing strategies, Defendants intended to and did induce end-users to use Zetia and Vytorin over other cholesterol drugs that Defendants knew, or should have known, were significantly less expensive, more efficacious and safer than Zetia and Vytorin.

14. As a result of Defendants' mis-marketing scheme, Defendants gained a significant share of the highly lucrative cholesterol-lowering prescription drug market that it would not have gained if it had not suppressed information about Zetia and Vytorin an/or made false representations about their superiority, safety, and efficacy.

PLAINTIFF'S CLASS ACTION ALLEGATIONS

15. Plaintiff brings this action as a class action pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of all persons (the "Class") who were prescribed Zetia or Vytorin and have paid any person or entity for the purchase of either Zetia or Vytorin since April 2006. Excluded from the Class are (i) employees of Defendants, including their officers and directors; (ii) Plaintiffs' Counsel; and (iii) the Judge of this Court to whom this case is assigned.

16. The members of the Class are so numerous that the joinder of all members is

impractical. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believes that there at least 1 million members of the Class.

17. Plaintiff's claims are typical of the claims of the other members of the Class, and all members of the Class including Plaintiff was prescribed and has taken Zetia.

18. Plaintiff will fairly and adequately protect the interests of the Class and has chosen counsel experienced in class action litigation. Plaintiff has no interests antagonistic to, or in conflict with, the other members of the Class she seeks to represent. As such, Plaintiff and her counsel are adequate representatives of the Class.

19. The questions of law and fact common to the other members of the Class, and which predominate over any questions affecting individual members, include the following:

- A. Whether Defendants concealed material information from end-users and physicians regarding the safety and efficacy of Zetia and Vytorin;
- B. Whether Defendants targeted specific end-users and physicians through direct-to-consumer advertising and an aggressive marketing campaign to induce individuals to purchase and consume Zetia and Vytorin over other cholesterol-lowering drugs;
- C. Whether Defendants misrepresented the safety and efficacy of Zetia and Vytorin to the public;
- D. Whether as a result of Defendants' misrepresentations and failure to disclose material information regarding the efficacy and safety of Zetia and Vytorin, Plaintiff was damaged and/or suffered ascertainable loss;

20. A class action is superior to other available methods for the fair and efficient adjudication of this controversy for at least the following reasons:

- A. Without a class action, class members will continue to suffer damage, Defendants' violations of law will proceed without remedy, and Defendants will continue to retain the proceeds of its misconduct; and
- B. This action presents no difficulty that would impede the Court's management of it as a class action, and it is the best available means by which members of the class can seek redress for the harm caused to them by Defendants.

**CAUSE OF ACTION
Count I**

Violations of New Jersey Consumer Fraud Act (N.J.S.A. §56:8-1 et seq)

21. Plaintiff reasserts the allegations contained in the above paragraphs as if fully set forth herein.

22. At all relevant times, Defendants conducted trade and commerce within the meaning of the New Jersey CFA.

23. Plaintiff, the putative class members and Defendants are "persons" within the meaning of N.J.S.A. 56:8-1.

24. Section 56:8-2 of the New Jersey CFA provides that unconscionable and deceptive conduct in connection with the sale or marketing of a product is unlawful.

25. Defendants' practices that all arose, were directed, and emanated from New Jersey in connection with the marketing and sale of Zetia and Vytorin violate the New Jersey CFA for, among other things, the following reasons:

- A. Defendants knowingly suppressed and concealed from Plaintiff, the putative class, the medical community and end-users truthful and complete efficacy and safety information regarding Zetia and Vytorin, particularly

comparative information between these drugs and other prescription cholesterol-lowering drugs;

- B. Defendants provided, disseminated, marketed and otherwise distributed direct-to-consumer advertising and other information to end-users and physicians that suppressed material information regarding Zetia and Vytorin; and
- C. Defendants misrepresented the safety and efficacy of Zetia and Vytorin in advertising, promotional, and safety materials and information disseminated to end-users and physicians.

26. Defendants' omissions, misrepresentations, and practices had the tendency, capacity, and likelihood to deceive Plaintiff and the putative class.

27. The foregoing omissions, misrepresentations and practices caused Plaintiff and the putative class to suffer ascertainable losses in that they purchased Zetia and Vytorin without knowing the true and complete risks and benefits of these medications, in general, and specifically in comparison to or alternatively to other less expensive cholesterol-lowering drugs.

Count II

Unjust Enrichment

28. Plaintiff reasserts the allegations contained in the above paragraphs as if fully set forth herein.

29. Defendants have been, and continue to be, unjustly enriched as a result of their wrongful conduct as described herein, to the detriment of Plaintiff and members of the Class.

30. Defendants have been unjustly benefitted through the wrongful collection of payments for the purchase of Zetia and Vytorin and continue to so benefit to the detriment and at the expense of Plaintiff and the members of the Class.

31. Accordingly, Plaintiffs and members of the Class seek full restitution of Defendants' enrichment, benefits and ill-gotten gains acquired as a result of the wrongful conduct alleged herein.

JURY TRIAL DEMANDED

32. Plaintiff demands a trial by jury on all issues so triable.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against Defendants and each of them jointly and severally as follows:

- A. That this Court certify this action as a class action and appoint Plaintiff as the representative and her counsel as Lead Counsel pursuant to Rule 23 of the Federal Rules of Civil Procedure;
- B. That Plaintiff and Class members recover actual damages, treble damages, costs, and attorneys' fees;
- C. That the Court award equitable relief, as appropriate;
- D. That Plaintiff and Class members recover pre- and post-judgment interest; and
- E. Such other and further relief as the Court may deem necessary or appropriate.

Respectfully submitted,

PODOLL & PODOLL, P.C.

By: /s Robert A. Kitsmiller
Richard B. Podoll, Esq.
Robert A. Kitsmiller, Esq.

Terrace Tower II
5619 DTC Parkway, Suite 1100
Greenwood Village, CO 80111-3064

Stephen L. Hubbard, Esq.
Robert W. Biederman, Esq.
David M. Grossman, Esq.
HUBBARD & BIEDERMAN, LLP
1601 Elm Street, Suite 1995
Dallas, Texas 75201

ATTORNEYS FOR PLAINTIFF