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December 29, 2004

Re: Vioxx Litigation

Dear Counselor:

While you are probably already familiar with Weitz & Luxenberg's groundbreaking work in asbestos litigation, please be aware that Weitz and Luxenberg is actively pursuing Vioxx cardiac and stroke injury cases, as well as injuries caused by Celebrex and Bextra. We are well situated to do so due to our extensive experience with pharmaceutical liability litigation and the fact that we have two offices in northern and southern New Jersey devoted primarily to pharmaceutical litigation, in addition to our main office in New York. We believe that the New Jersey Superior Court will be the most advantageous forum for the litigation of Vioxx claims. Set forth below is a detailed analysis of why we believe this so strongly. The analysis includes the key citations for your own review. If you would like, we would be happy to provide a packet of the pertinent cases and statutes cited since choice of forum is such a critical issue.

While an MDL is in formation, NJ state court is a far better venue for numerous reasons including speed of resolution, the standards of admissibility of the scientific evidence, a ruling forbidding *ex parte* interviews with treating doctors, the potential avoidance of the learned intermediary defense due to NJ law on direct marketing and a very liberal discovery statute of limitations that even includes wrongful death cases.

Merck is a New Jersey company so plaintiffs throughout the country can file their case in state court New Jersey with no risk of removal to federal court in accordance with 28 U.S.C. 1441(b). There has already been a "mass tort" court assigned to it (NJ Supreme Court appoints certain judges to supervise and try mass torts such as Diet Drugs, PPA, Hormone Replacement, and Vioxx). The Judge, Carole Higbee of Atlantic County has already issued several excellent decisions including a denial of *forum non conveniens* motions involving out of

state Vioxx plaintiffs holding "NJ has a substantial interest in policing the conduct and protecting the interests of its citizen corporations, such as Merck. While it's unfortunate that Merck and other large corporations generate litigation, that is a burden that any largely industrial state like NJ has to bear in order to receive the benefits that those same industries provide....NJ has a greater interest in allegedly fraudulent action that may have been committed by one of its citizens."

Additionally, Judge Higbee ruled last week that Merck lawyers may not conduct any *ex parte* conversations with any plaintiffs' treating doctors. Judge Higbee relied upon the decision in our case in the PPA litigation *Smith v. American Home Products Corp.*, 372 N.J. Super. 105 (Law Div. 2003). As you know, if the drug company gets access to discuss the case *ex parte* with the doctors, there is great potential for poisoning the causation and learned intermediary testimony. Many federal districts do permit *ex parte* discussions so this is a huge advantage over the MDL.

Given the background incidence of heart attacks and strokes in the older population -- the typical plaintiff who would have been prescribed Vioxx -- we believe federal court is a perilous venue. While the general causation issue -- can Vioxx cause heart attack and stroke -- should be winnable in a *Daubert* hearing, federal courts could dismiss many cases because of the myopic *Daubert* decisions on specific causation where a doctor can not absolutely rule out all alternative causes. However, in New Jersey, neither *Daubert*, nor the general acceptance *Frye* test is applied. Instead, in *Rubanick v. Witco Chemical Corp.*, 125 N.J. 421 (1991), the "New Jersey Supreme Court held that the trial court must not "directly and independently" determine the soundness even of the methodology, much less of the study itself. *Id.*, at 451. Rather, the "critical determination is whether comparable experts accept the soundness of the methodology..." *Id.* The court explained the policy reasons behind this liberal outlook: because of the extremely high level of proof required before scientists will accept a new theory, and particularly because of the current inability of science to fully comprehend [carcinogenesis], plaintiffs in toxic-tort litigation, despite strong and indeed compelling indicators that they have been tortiously harmed by toxic exposure, may never recover if required to wait general acceptance by the scientific community of a reasonable, but as yet not certain, theory of causation." Id. at 434

Accordingly, the Court rejected the general acceptance test in favor of the more liberal standard of whether comparable experts accept the methodology.

New Jersey law also recognizes that a contributory cause can be a substantial factor even if it is only a small percentage at fault. The New Jersey Supreme Court has held that even a 5% responsibility was a sufficient basis for liability, *Stephenson v. R.A. Jones & Co.* 103 N.J. 194 (1986). Similarly, the New Jersey courts have upheld verdicts that both cigarette smoking and asbestos exposure smoking were concurrent and contributory causes . *Goss v. American Cyanamid*, 278 N.J. Super. 227, 346-348 (App. Div. 1994) Thus, even though a client may have underlying heart problems and be a smoker, Vioxx could still be deemed a substantial contributory factor. In many a federal court, the case would get dismissed at the *Daubert* stage just because the expert could not rule out the other contributory causes.

New Jersey also has a very liberal statute of limitations - two years from discovery of injury *and* cause, *and* arguably, wrongdoing. **This even applies to wrongful death cases.** Indeed, in *Martinez v. Cooper Hospital*, 161 N.J. 45 (2000) the New Jersey Supreme Court held that in a wrongful death case the statute of limitations began to run not from the date of the patient's death, but from the date more than three years later when the mother received an anonymous letter indicating that hospital personnel failed to promptly treat the decedent patient.

New Jersey does *not* have a borrowing statute. In the leading choice of law case the New Jersey Supreme Court refused to apply an out-of-state statute of repose which would have barred the claim because "the action is materially connected to New Jersey by the fact that the allegedly defective product was manufactured in and then shipped from this State by the defendant-manufacturer." The court when on to rule that:

> We are satisfied, therefore, that New Jersey in this case has a cognizable and substantial interest in deterrence that would be furthered by the application of its statute of limitations, and that interest is not outweighed by countervailing concerns over creating unnecessary and discriminatory burdens on domestic manufacturers or by fears of forum shopping and increased litigation in the courts of this State.

Gantes v. Kason Corporation, 145 N.J. 478, 492-493 (1995)

The New Jersey Supreme Court also has held that the "learned intermediary doctrine" does not apply to the direct marketing of drugs to consumers and that when the drug manufacturer has advertised its drug directly to consumers, the role of the prescribing doctor does *not* break the chain of causation for a drug company's failure to adequately warn patients of harmful side effects. *Perez v. Wyeth Labs., Inc.*, 161 N.J. 1, 27 (1999). Given the huge direct to consumer advertising of Vioxx, we believe the learned intermediary defense will be minimized or avoided.

We also believe New Jersey will be the jurisdiction that will have the quickest resolution. The Judge has been handling Vioxx claims for approximately two years already, millions of documents have been exchanged, many Merck depositions have transpired and trials are tentatively set for this Spring. In the federal arena, an MDL court has not even been assigned yet and as you know, no case can be tried by the MDL judge unless the plaintiff happens to reside in that jurisdiction. Thus, your cases probably could not get tried until after the MDL generic discovery is complete and the case remanded, which is years away.

You are probably wondering what are the negative points of filing in New Jersey. The only disadvantage to the client that comes to mind is the limited ability to obtain punitive damages. Under New Jersey law, we must show that important data was withheld from the FDA in order to get punitive damages in cases involving a drug that had been FDA approved. We believe factually that burden can be met. In any event, as a practical matter, due to the United States Supreme Court's *State Farm v. Campbell 123 S. Ct. 1513* (2003) and related cases finding that large punitive verdicts violate the due process clause, large punitive verdicts are

increasingly unlikely or if obtained, are reversed or reduced, especially in a case of a mass tort such as this.

Weitz & Luxenberg would welcome the opportunity to work with you on Vioxx cases and file them on your behalf in Atlantic County, where the court is venued. Fortunately, Atlantic County (home to Atlantic City) is sufficiently far from Merck (125 miles away) and other drug company headquarters so that the jury should not have a pharmaceutical taint. Atlantic County is considered a reasonable county for plaintiffs.

We should note that there may be some situations where we recommend filing a case in the MDL, depending on the details of the case and what we learn about the MDL, but we want you to be aware of the enormous advantages of the New Jersey option which at this juncture we believe is the optimal venue. We will naturally make a decision on a case specific basis after we review the records and when we know more about the MDL option.

If you have Vioxx cases you want us to review or have questions, please contact Glenn Zuckerman, Esq. at (800) 438-9786 extension 583.

Very truly yours,

Arthur Luxenberg