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June 15, 2012

*Via Hand-delivery and
E-mail at Pharmalaw@courts.phila.gov*

The Honorable John W. Herron
Administrative Judge
First Judicial District of Pennsylvania
Philadelphia Court of Common Pleas
Room 300, City Hall
Philadelphia, Pennsylvania 19107

The Honorable Sandra Mazer Moss
Coordinating Judge
Complex Litigation Center
First Judicial District of Pennsylvania
Philadelphia Court of Common Pleas
Room 392, City Hall
Philadelphia, Pennsylvania 19107

The Honorable Arnold L. New
Coordinating Judge
Complex Litigation Center
First Judicial District of Pennsylvania
Philadelphia Court of Common Pleas
Room 606, City Hall
Philadelphia, Pennsylvania 19107

Re: Comment on Punitive Damages Deferral in Pharmaceutical Cases

Dear Judges Herron, Moss and New:

As two of the law firms with an active mass tort practice involving pharmaceutical cases, we respectfully submit this comment on the Court's proposal to defer punitive damages. We join

the comments offered by the other members of the Plaintiff bar including the Philadelphia Trial Lawyers Association (PTLA).

First, we note our understanding that the idea to defer punitive damages was adopted from the practice in the asbestos litigation. The purpose of deferring punitive damages in asbestos was to preserve resources needed to compensate sick claimants in the face of mounting asbestos related bankruptcies.¹ This factual predicate (looming bankruptcies resulting in unequal compensation for Claimants) was unique in asbestos and, as discussed below, is not present in pharmaceutical litigation involving drug companies with balance sheets that reflect huge profits and sound financial health.

Unlike in the unique situation in asbestos, no mechanism is required in pharmaceutical litigation to preserve assets for financially weak defendants. A review of the balance sheets of any of the major pharmaceutical companies like Bayer, Johnson & Johnson (McNeil), Mylan, Pfizer, Merck, GlaxoSmithkline, Eli Lilly, Novartis, Roche, Janssen and many others, demonstrates that unlike the defendants in asbestos, these companies are financially healthy with no risk of bankruptcy. Even in these difficult economic times, Big Pharma is doing quite well. One need look no further than to the salaries and other compensation of their executives in the multi-million dollar ranges,² the use of private corporate jets by drug company executives for private travel,³ and their corporate filings to recognize that the pharmaceutical defendants,

¹ This was recognized by Judge Richard Klein in *Yancey v. Raymark Indus., Inc.* No. 1186 (832), slip op. at 5 (Ct. Com. Pl., Phila, Nov. 12, 1986), who found that both the plaintiffs and the non-bankrupt defendants . . . suffered from the bankruptcy petitions filed by major participants in the asbestos litigation." Judge Klein noted that "If punitive damages are allowed in the face [of] so many major defendants filing for bankruptcy, it is very possible that some plaintiffs will get the windfall of punitive damages while others find that the money is gone by the time their cases come to trial." *Id.* at 10.

² For example, according to CBS Money-watch, J&J (McNeil) CEO, William Weldon's total compensation in 2009 was \$22.8 million; 2010 was \$28.7 million and in 2012 was \$26.7 million even though he was replaced as CEO by William Gosky following the Risperdal verdicts and other problems and a series of recalls including for Tylenol). The Wall-Street Journal reported that Mr. Weldon stands to collect pension benefits and deferred compensation currently valued at \$143.5 million after his retirement. Novartis CEO, Daniel Vasella's compensation for 2010 was \$27.0 million Robert Courey, Mylan CEO was paid \$22.9 million in 2010 and Wyeth's CEO Bernard Poussot received a 69 percent compensation raise in 2008, to \$21.3 million, in addition to a \$24 million change-in-control bonus for selling his company to Pfizer.

³ For example, according to press reports, Merck's former CEO Richard Clark received personal use of the Merck corporate aircraft for "security" reasons and he even built a helipad on top of his office; Mylan CEO Robert J. Courey is "entitled" to use the company-owned aircraft for his personal vacations due to "security" reasons. Elan Pharmaceutical's CEO Kelly Martin is the poster boy for excessive private jet travel -- he spread his corporate offices between Ireland, Pennsylvania and California. Bloomberg reported that the company had given up its NetJets account last year but a more recent report from Reuters shows Kelly and crew have a part ownership of a Gulfstream G-400 jet, which they use to deliver layoff notices.

singularly or as an industry, are not on the brink of bankruptcy and therefore not in need of the protection that was afforded the asbestos defendants. Because of this, an award of punitive damages to a plaintiff who meets the burden-of-proof in one of the early tried cases would not present a risk that the claims of plaintiffs that are tried later (or settled) would not be compensated because the pharmaceutical defendant had gone bankrupt.

Second, a rule that would defer the trial of a claim for punitive damages in the earliest tried pharmaceutical cases would create a host of problems and issues, including whether such a rule is constitutional, violates the Rules of Civil Procedure, is overly prejudicial, is unreasonable as well as logistical issues such as when the deferred claim for punitive damages would be tried and before what jury.⁴ As to this latter point, since there would be a large overlap of evidence to support general liability as well as punitive liability there would be a duplication of effort and waste of resources were a deferred punitive damages trial to occur after the dismissal of the jury that heard the initial compensatory damages case. Empanelling another jury to hear much of the same evidence would hardly be efficient. But beyond this, there is the issue of whether the Plaintiff's specific evidence would be heard again and the participation of the plaintiff in a deferred trial. Punitive damage claims, by their nature, necessarily require a "face-to-the-case," in the courtroom, and were a deferred punitive damages trial to occur in the abstract and without a plaintiff's case-specific evidence, that approach would so enfeeble the plaintiff's ability to present a case and meet the burden of proof that defendants would have an unfair advantage before a jury.

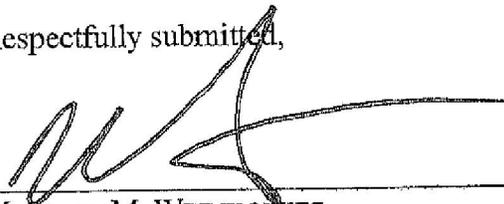
⁴These points are set forth persuasively and in great detail in the comments submitted by PTLA and the other Plaintiffs firms.

June 15, 2012

Page 4

For the forgoing reasons, we join the rest of the Plaintiffs' bar and respectfully request that the protocol relating to the deferral of punitive damages be set aside.

Respectfully submitted,



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/ams

cc:

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