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Exam No.

**520 Business Associations
Fall Semester 2004**

**UNM School of Law
Final Examination
Three Credits**

**Professor Mathewson
Friday, December 17, 2004
1:30 p.m. – 4:30 p.m. (3 hours)**

Examination Format

1. **Laptop** computer users: Start the Secureexam program entering your examination number, course name, professor's name, & date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam.

2. **Bluebooks** for writing: write on every-other line and only on the front page of each sheet. On the front of bluebook record the class name, professor's name, & date of exam. Make sure to number each bluebook in order. **DO NOT WRITE YOUR NAME ON BLUEBOOKS.**

Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

Professor's Instructions

You may not collaborate with each other. The written product you turn in should be solely your work. Your answers may be handwritten or typed,

Answer each question. If you use bluebooks, please use a separate bluebook for each question. If you type, start each question at the top of a page.

You may use your casebook, statutory supplement, handouts from the professor, course notes, and any course outline that you have prepared for this course. You may not use any other materials.

Factual information used in a previous question may be used in subsequent questions.

[END OF INSTRUCTIONS]

QUESTION ONE
[40 Minutes]

Dear Associate

We represent Elizabeth Browning, a wealthy heiress who resides in Corrales. Ms. Browning frequently invests in the production of plays. Last year, she invested \$1,000,000 in a play entitled "The Taming of Ovitz." She put up the cash for a limited partnership interest in Seraphim Ltd. After an exchange of letters with Michael Eisner, the president of Ovitz LLC, the general partner of Seraphim, she has become concerned that she may lose her immunity from liability. It has been her custom to advise the general partner in other productions. Consequently, she has asked for an opinion as to whether she will be deemed to be participating in control by virtue of her rights under the limited partnership agreement or her exercise of those rights. It is my view that her concerns are warranted.

Please read the attached file and prepare a letter with our opinion that she will be deemed to be participating in control and consequently be subject to personal liability for the debts of the limited partnership. The letter should contain a statement of the relevant facts, your conclusion, and an explanation of the extent of her liability and the bases for your conclusions including relevant case and statutory law.

SERAPHIM LTD.

SELECTED LIMITED PARTNERSHIP AGREEMENT PROVISIONS

AGREEMENT made as of the 1st day of March, 2003, between and among Ovitz LLC, a limited liability company organized under the Uniform Limited Liability Company Act and the parties who have signed below as limited partners.

1. *Partnership*: The parties hereto hereby form a limited partnership (herein called the Partnership) pursuant to the provisions of Revised Uniform Limited Partnership Act, for the purpose of producing, presenting and managing the Play, and exploiting the rights of the Partnership in it, and for no other purpose.

3. *Name of Partnership*: The name of the Partnership is Seraphim Ltd.

8. *Duration of Partnership*: The Partnership shall commence on the day upon which, pursuant to the Revised Uniform Limited Partnership Act, the Certificate of Limited Partnership is duly filed, and shall continue until terminated as in this agreement provided.

11. *Force Majeure*: If by reason of an act of God, fire, flood, war, strikes, governmental order or regulation, or any other extraordinary event beyond the General Partner's control, the cost of opening the production of the Play in New York City is increased above the estimated production requirements, the General Partner shall not be obligated to contribute or obtain additional contributions made necessary by any such event, but he shall exert his best endeavors to do so.

20. *Books and Records; Statements*: At all times during the continuance of the Partnership, the General Partner shall keep or cause to be kept full and faithful books and records of account that shall fully and accurately reflect each transaction of the Partnership.

(a) All such books of account shall at all times be open to the inspection of the Limited Partners or their representatives.

(b) The General Partner shall likewise have available for the inspection of the Limited Partners or their representatives at any time, box office statements received from the theater (or theaters, as the case may be) at which the Play shall be shown.

(c) Not later than [30] days after the opening of the Play in New York City, the General Partner shall deliver to the Limited Partners a complete statement of Production Expenses duly audited.

(d) As long as the Play is being presented as a first- or second-class production by the Partnership, the General Partner shall also deliver to the Limited Partners a monthly statement of operations duly audited.

(e) The General Partner shall also deliver to each Limited Partner all so-called information returns required by the Federal and State governments showing the income of the Partnership and of each Partner.

(f) Within [30] days after the close of all companies presenting the Play, the General Partner shall deliver to each Limited Partner a final detailed statement of the operations of each company.

(g) Within [90] days after such close, the General Partner shall deliver to each Limited Partner a final detailed liquidation statement.

All such statements and reports shall be prepared by a certified public accountant experienced in the theatrical business, upon proper audit of the Partnership's books.

21. *Control and Management:* Subject to the rights of the author of the Play, and except as otherwise herein provided, the General Partner shall have complete control of the production and presentation of the Play, and of the exploitation of all rights therein, including, without limiting the generality of the foregoing, making changes in the script and the title of the Play, choice of cast, directors and designers, properties, sets, price of tickets, the fixing of the opening and closing date of the New York City company or any other company, and organizing and arranging for additional companies as provided in clause 23 of this Article III.

(a) The General Partner shall, in connection with the Play, render such services to the Partnership as are customarily rendered by theatrical producers, and shall devote as much time thereto as may be necessary.

(b) The General Partner shall not, on behalf of the Partnership, enter into any contract or make any commitment other than those that may be reasonably necessary for the production of the Play and the exploitation of the subsidiary rights therein.

(c) Notwithstanding the foregoing, the General partner shall consult the limited partners about matters regarding the choice of cast, directors and designers. No member of the cast shall be hired or dismissed unless the General partner first consults with the limited partners.

December 1, 2004

Michael Eisner
Ovitz LLC, General Partner of Seraphim Ltd.
1200 Avenue of the Americas
Wilmington, Delaware

Dear Mr. Eisner:

As you know, I invested in Seraphim Ltd with the understanding that Arnold Schwarzenegger and Danny De Vito were going to play the leads in The Taming of Ovitz. Mr. Schwarzenegger would play Disney's Michael Eisner --are you related by the way--and Mr. De Vito would play Mr. Ovitz. How awful of Mr. Schwarzenegger to consider politics more important than appearing in this great work. Mr. DeVito is no longer acceptable without the former. It has been several months now and the production of the play has come to a standstill. It 's time to move forward. Dismiss Mr. DeVito and come up with replacements for both. How about Matthew Broderick and Nathan Lane? They were absolutely wonderful in The Producers. I look forward to hearing from you soon.

Love,

Elizabeth Barrett Browning

December 15, 2004

Ms. Elizabeth Barrett Browning
1000 Rio Grande Boulevard
Corrales, New Mexico

Dear Ms. Browning:

I received your letter of inquiry dated December 1, 2004. Let me remind you that you are a limited partner in this undertaking and Ovitz LLC, my wholly owned LLC, is the general partner. It has the authority to make all personnel decisions under the terms of the Limited Partnership Agreement. Contrary to your belief, Messrs. DeVito and Schwarzenegger were never cast in those roles. Now I have spoken to our very expensive lawyers and they have advised me that your continued meddling may cause you to have personal liability for the Seraphim's debts. Unless I am able to cast this play soon, those debts may be considerable.

So be a good limited partner and butt out.

Love,

Michael Eisner

QUESTION TWO
[100 Minutes]

Dear Associate:

Ms. Browning has also come to us with another matter. She informs us that the general partner of Seraphim Ltd. has invested partnership funds in the stock of Merck & Co., a Delaware corporation. Seraphim has about \$50,000 worth of stock. Ms. Browning has been following the Vioxx controversy and is concerned about its effect on the value of the stock and is even more concerned about the direction in which the company is going. She is interested in suing the directors for breach of fiduciary duty in connection with the decision to continue to market Vioxx without conducting additional clinical trials once cardiovascular concerns arose, its approach to defending against Vioxx lawsuits and the severance payments approved for executives last month. She is interested in pursuing damages and, in the case of the latter two issues, injunctive relief as well.

In addition, we have been consulted by Vendi, Cate & Soon, a law firm representing some of the plaintiffs in the Vioxx litigation against Merck. Their clients reside in Revised Model Business Corporation Act jurisdictions. They have asked us for an opinion as to whether their clients may have a cause of action against the directors for breach of fiduciary duty as well in connection with Merck's litigation strategy and the severance payment plan. It is their view that these actions may harm them as creditors of Merck.

Please review the attached news clippings and corporate documents that our paralegal has assembled and prepare a memo with your evaluation of the potential causes of action that Ms. Browning and the Vendi Cate & Soon clients may have against the Merck directors. I really want to continue working with the law firm as it could prove to be very beneficial relationship. So I want you to try hard to come up with strategies that will get Ms. Browning and their clients to trial on the breach of fiduciary duty issues. You may assume that all directors will be sued for their involvement in these decisions.

SELECTED PROVISIONS OF MERCK & CO.'S CERTIFICATE OF INCORPORATION

ARTICLE III: OBJECTS AND PURPOSES

The objects and purposes of the Corporation shall be:

To carry on the business of exercising, performing, developing, manufacturing, producing, obtaining, promoting, selling and distributing rights, services, goods, wares, and merchandise of all kinds, including but not by way of limitation, those in the chemical, mineral, pharmaceutical, biological, medicinal, agricultural, mechanical and electrical fields;

To carry on such business alone, in, with or as agent for other individuals, partnerships, joint ventures, corporations, syndicates or other forms of enterprise; and

To borrow or lend money and to make guarantees insofar as such powers may now or hereafter be lawfully exercised by a corporation subject to Title 14A of the New Jersey statutes.

The enumeration herein of the objects and purposes of the Corporation shall be construed as powers as well as objects and purposes and shall not be deemed to exclude by inference any powers, objects or purposes which any corporation subject to Title 14A of the New Jersey statutes may now or hereafter be empowered to exercise.

ARTICLE XII: DIRECTOR AND OFFICER LIABILITY

To the fullest extent permitted by the laws of the State of New Jersey, as they exist or may hereafter be amended, directors and officers of the Corporation shall not be personally liable to the Corporation or its stockholders for damages for breach of any duty owed to the Corporation or its stockholders, except that the provisions of this Article XII shall not relieve a director or officer from liability for any breach of duty based upon an act or omission (a) in breach of such person's duty of loyalty to the Corporation or its stockholders, (b) not in good faith or involving a knowing violation of law or (c) resulting in receipt by such person of an improper personal benefit.

SELECTED PROVISIONS OF MERCK & CO.'S BYLAWS

ARTICLE II. BOARD OF DIRECTORS.

SECTION 10. Committees. The Board of Directors shall appoint from among its members and shall designate the powers and functions of the Executive Committee which may exercise the powers of the Directors in the management of the affairs, business and property of the Company during the intervals between meetings of the Board of Directors. The Chairman of the Board shall be a member of the Executive Committee which shall consist, in addition, of such number of other Directors as will assure that the majority of the Executive Committee will not be employees of the Company. Regular meetings of the Executive Committee shall be held at such time and on such notice as the Directors may from time to time determine. Special meetings of the Executive Committee may be held at any time upon the call of the Chairman of the Executive Committee or Chairman of the Board. The quorum requirements and other rules of procedure for this Committee shall be determined by resolution of the Board of Directors.

The Board of Directors may also appoint from time to time from among its members other committees with such powers and functions as the Board may delegate and specify.

ARTICLE V.

INDEMNIFICATION OF DIRECTORS AND OTHERS.

SECTION 1. *Directors, Officers and Employees of Merck & Co., Inc.* Any former, present or future Director, officer or employee of the Company or the legal representative of any such Director, officer or employee shall be indemnified by the Company

(a) against reasonable costs, disbursements and counsel fees paid or incurred where such person has been successful in the defense on the merits or otherwise of any pending, threatened or completed civil, criminal, administrative or arbitratve action, suit or proceeding, and any appeal therein and any inquiry or investigation which could lead to such action, suit or proceeding, or in defense of any claim, issue or matter therein, brought by reason of such person's being or having been such Director, officer or employee, and

(b) with respect to the defense of any such action, suit, proceeding, inquiry or investigation for which indemnification is not made under (a) above, against reasonable costs, disbursements (which shall include amounts paid in satisfaction of settlements, judgments, fines and penalties, exclusive, however, of any amount paid or payable to the Company) and counsel fees if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Company, and in connection with any criminal proceeding such person also had no reasonable cause to believe the conduct was unlawful, with the determination as to whether the applicable standard of conduct was met to be made by a majority of the members of the Board of Directors (sitting as a Committee of the Board) who were not parties to such inquiry, investigation, action, suit or proceeding or by any one or more disinterested counsel to whom the question may be referred by the Board of Directors; provided, however, in connection with any proceeding by or in the right of the Company, no indemnification shall be provided as to any person adjudged by any court to be liable to the Company except as and to the extent determined by such court.

The termination of any such inquiry, investigation, action, suit or proceeding by judgment, order, settlement, conviction or upon a plea of *nolo contendere* or its equivalent shall not of itself create a presumption that such person did not meet the standards of conduct set forth in subsection (b) above.

Reasonable costs, disbursements and counsel fees incurred by such person in connection with any inquiry, investigation, action, suit or proceeding may be paid by the Company in advance of the final disposition of such matter if authorized by a majority of the Board of Directors (sitting as a Committee of the Board) not parties to such matter or, if there are no such members of the Board of Directors, a majority of the members of the Board of Directors, in each case upon receipt by the Company of an undertaking by or on behalf of such person to repay such amount unless it is ultimately determined that such person is entitled to be indemnified as set forth herein.

SECTION 2. Directors, Trustees, Officers and Employees of Other Companies. The Board of Directors may, at any regular or special meeting of the Board, by resolution, accord similar indemnification (prospective or retroactive) to any director, trustee, officer or employee of any other company who is serving as such at the request of the Company and any officer, director or employee of any constituent corporation absorbed by the Company in a consolidation or merger, or the legal representative of any such director, trustee, officer or employee.

SECTION 3. Indemnification Not Exclusive. The indemnification and advancement of expenses provided for in this Article V shall not exclude any other rights to which any person contemplated by this Article V may be entitled as a matter of law or which may be lawfully granted; provided that no indemnification shall be made to or on behalf of such person if a judgment or other final adjudication adverse to such person establishes that his or her acts or omissions (a) were in breach of his or her duty of loyalty to the Company or its stockholders, (b) were not in good faith or involved a knowing violation of law or (c) resulted in receipt by such person of an improper personal benefit.

SECTION 4. Insurance. The Company may purchase and maintain insurance to protect itself and any person contemplated by this Article V against any expenses incurred in any proceeding and any liabilities asserted against him or her by reason of his or her being or having been a director, officer or employee, whether or not the Company would have the power to indemnify him or her against such expenses and liabilities under the provisions of this Article V. The Company may purchase such insurance from, or such insurance may be reinsured in whole or in part by, an insurer owned by or otherwise affiliated with the Company, whether or not such insurer does business with the Company, whether or not such insurer does business with other insureds.

Merck Inc.

COMPENSATION AND BENEFITS COMMITTEE CHARTER

The Committee is comprised solely of independent directors, to serve at the pleasure of the Board.

PURPOSES, DUTIES AND RESPONSIBILITIES

PURPOSES

The purposes of the Compensation and Benefits Committee of the Board are (a) to establish and maintain a competitive, fair and equitable compensation and benefits policy designed to retain personnel, to stimulate their useful and profitable efforts on behalf of the Company and to attract necessary additions to the staff with appropriate qualifications; (b) to discharge the Board's responsibilities for compensating the Company's executives; (c) to oversee the competency and qualifications of senior management of the Company, provision for senior management succession, the soundness of the organization structure and other related matters necessary to insure the effective management of the business; (d) to produce an annual report on executive compensation for inclusion in the Company's proxy statement; (e) to carry out its responsibilities under the terms of the Company's benefit plans; and (f) to act on specific matters within delegated authority.

DUTIES AND RESPONSIBILITIES

1. The Committee shall:

- a. Review and approve corporate goals and objectives relevant to the Chief Executive Officer's compensation, evaluate the Chief Executive Officer's performance against these goals and objectives, and, based on its evaluation, set the Chief Executive Officer's compensation.
- b. Recommend to the Board of Directors or approve changes in individual base salary rates where Board or Committee approval is required in accordance with General Corporate Resolution No. 2.
- d. Have sole responsibility for the engagement and termination of compensation consultants in the areas of director or executive compensation and sole authority to approve engagement fees and terms.
- e. Recommend to the Board of Directors or approve severance payments where Board or Committee approval is required in accordance with General Corporate Resolution No. 2.
- f. Approve payments to former employees for consulting or similar services, and payments to surviving spouses of deceased employees where Committee approval is required in accordance with General Corporate Resolution No. 2.

MEMBER QUALIFICATIONS; APPOINTMENT AND REMOVAL

Membership shall be limited to the independent Directors of the Company. Members must have an understanding of and interest in compensation and benefits issues relevant to the Company's workforce, derived from substantial management responsibility or relevant training or education.

Members shall be appointed to the Committee by a vote of a majority of the Board. Members shall serve on the Committee for such period as the Board may determine, and may be removed from the Committee at any time upon the vote of a majority of the Board. The Chairperson shall be appointed by a vote of the majority of the Board.

Consumer Group Demands Merck Disclose Amount of Executive Payouts; Golden Parachutes Cost Seniors & Patients in Higher Drug Prices

SANTA MONICA, Calif., Nov. 30 /U.S. Newswire/ -- A consumer group demanded today that pharmaceutical giant Merck disclose how much money it plans to pay top executives if the company is taken over and how those payouts will affect prescription drug prices. The Foundation for Taxpayer and Consumer Rights called on the Federal Trade Commission and company shareholders to require Merck to disclose the total cost of the planned payout.

The executive compensation plan comes as Merck stock plummets and a buyout becomes more likely in the wake of the removal of Merck's top-selling arthritis medication, Vioxx, from the market following studies showing patients taking the drug had higher incidence of heart attacks and other medical problems. "The public and shareholders have a right to know how drug prices and stock values will be affected by golden parachutes for company executives. At a time when one out of four seniors must choose between buying medications and paying for food and rent, it is unconscionable that a drug company would reward executives that allowed a dangerous drug to go to market," said Jerry Flanagan of the Foundation for Taxpayer and Consumer Rights, which recently organized two chartered train trips taking seniors to Canada to buy lower cost medications. Drug companies often blame high research and development (R&D) costs as the driving force behind double-digit annual increases in drug expenditures. However, data shows that drug companies spend twice as much money or more on salaries, marketing and profit than they do on developing new drugs. For example, in 2003, Merck recorded revenue of \$22.5 billion. Of this, it spent \$3.2 billion (14 percent of revenue) on research and \$6.4 billion (28 percent of revenue) on marketing. After other charges and taxes, the company still recorded a profit of \$6.8 billion (30 percent of revenue).

The executive payout plan will award 230 executives with a cash payment equivalent to 1.5 to three times their annual salary and bonuses if the company is taken over and the executives quit or are fired within two years of the takeover. Though Merck did not disclose the cost of the executive payouts, industry analyst expect it to total hundreds of millions of dollars.

LINKS HIGH DRUG PRICES TO ADVERTISING, PROFITS, AND ENORMOUS EXECUTIVE SALARIES

Washington, D.C. - A new report by the consumer health organization Families USA refutes the pharmaceutical industry's claim that high and increasing drug prices are needed to sustain research and development. The report documents that drug companies are spending more than twice as much on marketing, advertising, and administration than they do on research and development; that drug company profits, which are higher than all other industries, exceed research and development expenditures; and that drug companies provide lavish compensation packages for their top executives.

The report comes on the heels of a recent Families USA analysis that found prices rose more than twice the rate of inflation last year for the 50 most-prescribed drugs to seniors. Among the nine pharmaceutical companies examined in the report - Merck, Pfizer, Bristol-Myers Squibb, Pharmacia, Abbott Laboratories, American Home Products, Eli Lilly, Schering-Plough, and Allergan - all but one (Eli Lilly) spent more than twice as much on marketing, advertising, and administration than they did on research and development, and Lilly spent more than one and one-half times as much. Six out of the nine companies made more money in net profits than they spent on research and development last year.

The report also documents profligate spending on compensation packages for top pharmaceutical executives. The executive with the highest compensation package in the year 2000, exclusive of unexercised stock options, was William C. Steere, Jr., Pfizer's Chairman, who made \$40.2 million. The executive with the highest amount of unexercised stock options was C.A. Heimbold, Jr., Bristol-Myers Squibb's Chairman and CEO, who held \$227.9 million in unexercised stock options.

"Pharmaceutical companies charging skyrocketing drug prices like to sugar coat the pain by saying those prices are needed for research and development," said Ron Pollack, Families USA's executive director. "The truth is high prices are much more associated with record-breaking profits and enormous compensation for top drug company executives."

Pollack added, "Drug companies' commitments to research and development are dwarfed by those companies' expenditures for marketing, advertising, and administration."

In 2000, the pharmaceutical industry was, once again, the most profitable U.S. industry, and profit margins in the industry were nearly four times the average of Fortune 500 companies. According to the Families USA report, three companies - Merck, Bristol-Myers Squibb, and Abbott Laboratories - received twice as much in net profits than they spent on research and development. Three other companies - Eli Lilly, Schering-Plough, and Allergan - received more money in net profits than they spent on research and development.

"The pharmaceutical industry's repetitious cry that research and development would be curtailed if drug prices are moderated is extraordinarily misleading," said Pollack. "If meaningful steps are taken to ameliorate fast-growing drug prices, it is corporate profits, expenditures on marketing, and high executive compensation that are more likely to be affected, not research and development."

The Families USA report is based exclusively on the annual reports submitted by the pharmaceutical companies to the Securities and Exchange Commission (SEC). Since

Questions loom over Merck's severance plan

NEW YORK (AP) — What does it take to stop executives from lining their own pockets? Not much, at least when you look at the recent decision by Merck & Co. to give fat severance packages to 230 of its top managers if there is a buyout or a merger. These are tough times for Merck, the struggling pharmaceutical giant that recently pulled its blockbuster Vioxx painkiller from the market after concerns were raised over its safety. It now faces billions of dollars in potential liabilities as a result. Still, Merck, which has a plant in Riverside, Pa., has been trying to spin the issuance of those "golden parachutes" in its favor, saying the promise of generous severance would help retain employees. And while that very well might be true, the devil of this compensation plan comes in its details.

It is understandable that Merck wants to prevent a mass employee exodus. The last thing it needs is crucial workers especially in areas of research and marketing to flee for better opportunities at companies with deeper pockets and without such looming uncertainties.

Vioxx was withdrawn two months ago after a study showed patients taking it for 18 months had double the risk of heart attacks and strokes than those taking a placebo. Vioxx had contributed \$2.5 billion, or 11 percent, to Merck's total annual revenues. Merck must now contend with hundreds of lawsuits that threaten to further damage the company's finances and reputation. Some estimates put the potential legal costs as high as \$18 billion.

With so much to weigh, Merck investors have bailed out. The company's stock has fallen by more than a third since the recall announcement, from about \$45 to the high \$20s. And that's raised speculation the company could be an acquisition target. Given all this, the company disclosed earlier this week in a filing with the Securities and Exchange Commission that it had adopted a new compensation plan for top executives. It offers one-time severance payments of up to triple their salary and bonus as well as other perks like health benefits if Merck was acquired and they lost their jobs. Merck was quick to say the severance plan was first considered months before the Vioxx withdrawal, and it pointed out that 90 percent of large companies and most of its competitors have similar change-of-control protections in place.

The Whitehouse Station, N.J.-based company also said the plan was adopted by Merck's board to avoid "the distraction and loss of key management personnel that may occur in connection with rumored or actual" corporate changes. Merck has denied it is in merger talks.

But using a change-of-control provision for employee retention isn't something often seen, said Paul Hodgson, senior research associate at governance watchdog group The Corporate Library. The company instead could have used incentives such as bonuses for retention. In addition, Merck's compensation plan is richer than most. Only about 50 percent of companies with such plans promise executives three times their cash compensation, down from 80 percent three years ago as pressure from shareholder groups has spurred companies to rein in such payouts, according to The Corporate Library. And just because other companies have similar plans, that doesn't mean Merck should do the same. "They say they were thinking about this for some time, which means they had the benefit of seeing where the trend was going," Hodgson said. "This was Merck's

chance to lead the way with best practices rather than through typical practices." Also problematic is how the company defines what would trigger such payments. It doesn't require another company to complete a full takeover, but instead allows executives to be entitled to such payments if another company buys 20 percent of Merck's stock — not an extraordinary amount by most measures. It is also worth noting that those getting such cushy incentives to stick around happen to be the same people who were the decision-makers when the company's troubles emerged in the first place. "This is just another nail in the coffin, another way to drag down Merck's reputation rather than build it up," said Paul Argenti, professor of corporate communication at the Tuck School of Business at Dartmouth. "Companies need to understand how damaging risk to reputation can be." So while Merck might want you to think this is all about employee retention, there seems to be more to this plan than just that.

**Merck Anticipates Full-Year 2005 Earnings Per Share Range of \$2.42 to \$2.52;
(From Merck's Website)**

WHITEHOUSE STATION, N.J., Dec. 8, 2004 - Merck & Co., Inc. today announced that it anticipates full-year 2005 earnings per share (EPS) of \$2.42 to \$2.52. Merck also reaffirmed its fourth-quarter and full-year 2004 EPS guidance. Merck anticipates fourth-quarter 2004 EPS of \$0.48 to \$0.53, which includes the impact of approximately \$700 to \$750 million in foregone sales of VIOXX and potential additional fourth-quarter costs for the withdrawal of VIOXX. As a result, Merck anticipates full-year 2004 EPS guidance of \$2.59 to \$2.64, which includes the expectation that the impact of the withdrawal will negatively affect full-year EPS by \$0.50 to \$0.55.

**Merck Financial Guidance for 2005 Anticipates Continued Growth
for Newer Products**

In 2005, Merck plans to continue growth in newer franchises, extend the recent successful launches of ZETIA and VYTORIN, launch new products, file several products currently in Phase III and prepare for their launch. During the second half of 2005, Merck plans to submit three vaccines for FDA approval. The three vaccines are: ROTATEQ, a vaccine to protect against rotavirus, a highly contagious virus that causes gastroenteritis and results in the hospitalization of nearly 50,000 children under age 5 each year in the United States; a vaccine to reduce the incidence of human papillomavirus (HPV) infection and the associated development of cervical cancer - the second-leading cause of cancer deaths in women - and genital warts; and a vaccine to reduce the pain that accompanies shingles, which afflicts 1 million American adults each year.

The company recently announced submission to the U.S. Food and Drug Administration (FDA) of PROQUAD, a new childhood vaccine that adds chickenpox to the existing measles, mumps and rubella vaccine. Merck also anticipates the submission later this month of muraglitazar, the first-in-class dual PPAR agonist for the treatment of Type 2 diabetes in which Merck is in collaboration with Bristol-Myers Squibb.

The company also announced 2005 guidance for the following items:

Worldwide net sales will be driven by the company's major in-line products, including the impact of new studies and indications. Sales forecasts for those products for 2005 are as follows:

<u>PRODUCT</u>	<u>WORLDWIDE 2005 NET SALES</u>
ZOCOR (Cholesterol modifying)	\$4.1 to \$4.4 billion
FOSAMAX (Osteoporosis)	\$3.3 to \$3.6 billion
COZAAR/HYZAAR (Hypertension)	\$2.9 to \$3.2 billion
SINGULAIR (Respiratory)	\$2.9 to \$3.2 billion
Other reported products*	\$5.7 to \$6.2 billion

This guidance does not reflect the establishment of reserves for any potential liability for settlements relating to the VIOXX lawsuits. Given these guidance elements, Merck anticipates fourth-quarter 2004 EPS of \$0.48 to \$0.53, which includes the impact of approximately \$700 to \$750 million in foregone sales of VIOXX and potential additional fourth-quarter costs for the withdrawal of VIOXX. As a result, Merck anticipates full-year 2004 EPS guidance of \$2.59 to \$2.64, which includes the expectation that the impact of the withdrawal will negatively affect full-year EPS by \$0.50 to \$0.55.

On The Firing Line At Embattled Merck

With claims against Vioxx mounting, Ken Frazier is in for the fight of his career

Merck & Co. general counsel Kenneth C. Frazier isn't scared off by tough odds. The 49-year-old lawyer will lead Merck's defense against a mounting avalanche of lawsuits surrounding its painkiller Vioxx. Merck yanked the drug off the market in September after a company study confirmed it raised the risk of heart attack and stroke. If Frazier has a soft spot for the underdog, he certainly has a doozy on his hands now.

AFFAIRS OF THE HEART

Concerns about Vioxx surfaced in 2000, when a study showed the risk of heart attack was higher in patients taking the drug than in those who took an older painkiller called naproxen. Merck scientists argued that the difference was that naproxen protected the heart, not that Vioxx harmed it. Yet Merck had an unpublished study showing an increased risk of cardiovascular problems with Vioxx -- proof, critics say, that the company was downplaying the risks. Merck says regulators had data on that study, which Frazier contends were not statistically significant. Still, Merck continued to market Vioxx aggressively to consumers, racking up \$2.5 billion in sales in 2003.

Now, Merck's future is in question. The bill for settling Vioxx lawsuits could run as high as \$18 billion, Merrill Lynch & Co. estimates. And if a Justice Dept. investigation finds criminal wrongdoing, the cost could be even higher. Merck's stock has plunged 38%, to \$28, since September. And corporate governance experts slammed Merck's board for its recent approval of golden parachutes for the top 230 managers, including Frazier. The lawyer's ability to lessen the damage from Vioxx will help determine whether Merck is left with enough capital to regain its status as an innovative drugmaker or if it will be nothing more than an also-ran waiting to be snapped up by a stronger player.

Frazier has an ambitious plan for fighting the coming wave of claims. He says Merck will vigorously argue that the recent study only showed an increased risk of cardiovascular problems after 18 months of continuous Vioxx use. Furthermore, he says, many taking the drug may have had other risk factors for heart attack or stroke, including obesity or smoking habits. "They are going to have to produce [medical evidence] to exclude those other potential causative factors," Frazier insists. "And I don't think that is easy to do."

Frazier will also fight to prevent the cases from being consolidated in a class action -- preferring instead to take each one on separately. Legal experts say he's probably betting the company can settle the most troubling cases first and then bring a few cases to trial that it has a good shot at winning. If it does indeed win them, that might discourage other lawyers from going ahead with their claims.

UNASSUMING ROOTS

Merck's approach is fraught with peril, though. Some attorneys say juries might scoff at its argument that it's not responsible for heart damage in people who had other risk factors. In addition, Dr. Eric J. Topol, chairman of cardiovascular medicine at the Cleveland Clinic and a longtime Vioxx critic, calls Merck's argument that the increased

cardiac risk only surfaces after 18 months on Vioxx "indefensible." He points out that the trial comparing Vioxx to naproxen showed a difference in heart attack rates starting after just one month of use. If any early cases go against Merck, trial lawyers will be emboldened to drive the cost of settling future cases through the roof.

Although he has kept a low profile, Frazier is no stranger to high-profile cases. During his 14 years as a litigator and then partner at Drinker Biddle & Reath, he represented companies such as AlliedSignal and Lorillard Tobacco Co. in asbestos claims. He also handled a number of cases for Merck. One of the toughest was brought by the family of a girl who developed a fatal neurological disease after being injected with Merck's vaccine for measles, mumps, and rubella. Frazier won the case by arguing that Merck had contracted to provide the vaccine to the Centers for Disease Control & Prevention, which in turn was responsible for warning the public about its risks. Frazier's success in such cases prompted Merck to hire him as general counsel at its Astra Merck joint venture in 1992. He joined Merck in 1994.

Frazier's rise to the upper ranks at Merck belies his unassuming roots. His father, the son of a sharecropper, moved to Philadelphia as a teen with the equivalent of a third-grade education. Frazier's mother died when he was 12, leaving his dad to raise three children alone in a rough North Philadelphia neighborhood on a modest salary from United Parcel Service where he worked as a janitor.

Some who have worked with Frazier speculate the lawyer will eventually abandon corporate life to devote himself to his favorite social causes. Frazier says he wouldn't dream of leaving anytime soon. "I'm committed to seeing this through," he says of the Vioxx cases. How he handles the Vioxx morass will surely determine how long Merck remains on the critical list.

QUESTION THREE

[40 Minutes]

Dear Associate:

Ms. Browning continues to be a significant source of revenue for our firm. She owns a ten percent interest in Poets of America, Inc., a corporation organized under the Revised Model Business Corporation Act. The corporation operates a small chain of hotels that cater to a clientele who enjoy a poetic environment when away from home. All hotel staff, including desk clerks, the bellhops, dishwashers, etc. recite poetry upon request as they carryout their duties. The other shareholders are Phyllis Wheatley, Sylvia Plath, Nikki Giovanni and Robert Frost. Mr. Frost and Ms. Giovanni were the founders of the corporation. They own 60 percent of the stock. However, they borrowed their initial contributions from Fleet Financial. Their shares of stock were put up as collateral for the loan. Ms. Browning and the other shareholders came on board afterwards.

Ms. Browning convinced the others that an investment in Seraphim Ltd. would be beneficial to the corporation. Although Robert and Nikki liked the idea, they voted against it as directors. They comprise two of the three members of the board. The third member is an officer of Fleet Financial. Robert and Nikki voted no at the insistence of Fleet Financial pursuant to the loan agreement. The relevant provision is attached.

Ms. Browning wants to know if the relevant provision of the loan agreement is enforceable under the corporate law of the state of incorporation. Please give me a brief with your conclusions and analysis. (Answers in the form of a poem are acceptable).

SELECTED PROVISION OF LOAN AGREEMENT

10. **Special Covenant.** Borrowers agree that they will not vote their shares in Poets of America, Inc. (Poets) to approve transactions that the Lender determines may jeopardize the value of the collateral. Borrowers further agree that they will vote their shares in the election of the directors of Poets such that they will constitute a majority of the board of directors until the loan has been repaid. In addition, Borrowers agree that they will not vote or otherwise take action as directors to cause Poets to enter into transaction that the Lender disapproves.

Email communication:

To rfrost@poetsoa.com

From: Lender

Re: Loan

We have considered your proposal to have Poets of America, Inc. invest in Seraphim Ltd., a limited partnership, that will produced the play The Taming of Ovitz on Broadway. As we have financed other plays on Broadway at this time that may be adversely affected by the proposed play, we do not approve the proposal and would consider your approval of it at this time as a default of the loan agreement.

GOOD LUCK AND HAPPY HOLIDAYS