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May 14, 2018

**VIA ECF**

Gino J. Agnello, Clerk
Office of the Clerk
United States Court of Appeals for the Seventh Circuit
Everett McKinley Dirksen United States Courthouse
219 South Dearborn Street, Room 2722
Chicago, IL 60604

Re: *Dolin v. GlaxoSmithKline*, No. 17-3030
Citation of Supplemental Authority under Fed. R. App. P. 28(j)

Dear Mr. Agnello:

Under Rule 28(j), Appellant GlaxoSmithKline (GSK) submits the recent decision of the West Virginia Supreme Court of Appeals in *McNair v. Johnson & Johnson*, No. 17-0519. Applying "traditional products liability and tort principles," Op.22, *McNair* holds that West Virginia law does not "permit[] a claim of failure to warn [or] negligent misrepresentation against a branded drug manufacturer when the drug ingested was produced by a generic manufacturer," Op.1. That holding joins the overwhelming consensus of courts refusing to recognize a negligent-failure-to-warn claim against brand manufacturers where the plaintiff consumed a generic drug. Br.19-35; Reply 2-13.

Echoing *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324 (Ill. 1990), *McNair* holds that brand manufacturers owe no duty of care "to those allegedly injured by a competitor's product." Op.18. *McNair* relied on *In re Darvocet, Darvon, & Propoxyphene Prod. Liab. Litig.*, 756 F.3d 917 (6th Cir. 2014), which "correctly predicted" that West Virginia would reject innovator liability. Op.16. *Darvocet* predicted that Illinois (and twenty other states) would do the same. 756 F.3d at 939, 943-45. *McNair* also relied on the

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numerous other state and federal decisions rejecting innovator liability, including *Foster v. American Home Products, Corp.*, 29 F.3d 165 (4th Cir. 1994). *McNair* found the few decisions to the contrary—including the decision below here—"not … persuasive." Op.20 n.11; *see* Br.19-27; Reply 2-5, 7-8.

*McNair* also relied upon "policy considerations." Op.22. Because brand manufacturers receive no revenue from generic sales, the court explained, innovator liability "would sever the connection between risk and reward … that forms the basis of products liability law." Op.24. Innovator liability also would add "significant litigation costs … to the price of new drugs to the disadvantage of consumers." Op.25. Increased costs "could stifle the development of new drugs, which would have negative health consequences for society." *Id.* The court also "refuse[d] to interfere in the delicate calculus of Congress in crafting the Hatch-Waxman Act." Op.26. "[T]he proper remedy for consumers harmed by generic drugs," *McNair* concludes, "rests with Congress or the FDA." Op.27; *see* Br.22-23, 29-35; Reply 4-5, 8-13.

Respectfully submitted,

*/s/ Lisa S. Blatt*

Lisa S. Blatt

Enclosure: *McNair v. Johnson & Johnson*, No. 17-0519 (W. Va. May 11, 2018).

**CERTIFICATE OF SERVICE**

I hereby certify that on May 14, 2018, I electronically filed the foregoing Supplemental Authority with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: */s/ Lisa S. Blatt*
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