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March 20, 2018

Via CM/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
Response to Appellant's Citation of Supplemental Authority under Fed. R. App. P. 28(j)

Dear Mr. Agnello:

The recent Massachusetts Supreme Court ("MSC") decision *Rafferty v. Merck & Co.*, No. SJC-12347 ("Rafferty") undermines many aspects of GlaxoSmithKline, Inc.'s ("GSK") appeal. It is hardly supportive.

First, *Rafferty* rejected Merck's argument, similarly made by GSK, that all drug claims must be viewed through the lens of products liability law. *Rafferty* at 13; *accord* Dolin.Br. at 32-33.

Second, *Rafferty* endorsed imposition of duty, holding "[w]ith generic drugs, it is not merely foreseeable but certain that the warning label provided by the brand-name manufacturer will be identical …, and [] that it will be relied on, not only by users of its own product, but also by users of the generic product." *Rafferty* at 17 (emphasis added). Thus, "[w]here a brand-name drug manufacturer provides an inadequate warning for its own product, it knows or should know that it puts at risk not only the users of its own product, but also the users of the generic product." *Id.* at 18.

Third, the MSC expressed skepticism about whether liability would deter innovation. *Id.* at 22. And, importantly, the MSC agreed with Plaintiff-Appellee, *see* Dolin.Br. at 44-45, that "imposing such a duty on brand-name manufacturers would have undeniable benefits" because it would create "a greater financial incentive to revise their warnings[.]" *Rafferty* at 23-24. Otherwise, "no one—neither the generic manufacturer nor the brand-name manufacturer—would have a complete incentive to maintain safe labels[.]" *Id.* at 24. Indeed, disallowing relief "would be especially troubling given that, as discussed, generic drugs represent close to ninety per cent of the prescription drug market" and consumers rarely make the choice between brand or generic. *Id.* at 25; *accord* Dolin.Br. at 35.

Finally, under *Rafferty* liability is appropriate where "the failure is not merely inadvertent and the risk of harm is most serious." *Rafferty* at 25. Here, GSK knew there was a serious suicide risk and chose not to take the meeting with the FDA or press for inclusion of adequate warning information. GSK knew the warning could have fatal outcomes, but left it as-is. Under *Rafferty*, *and* Illinois law, GSK would still be liable.

Respectfully submitted,

/s/ R. Brent Wisner
R. Brent Wisner
Counsel for Plaintiff-Appellee

CERTIFICATE OF FILING AND SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that on March 20, 2018, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Seventh Circuit via the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and service was accomplished on counsel of record by that means.

/s/ R. Brent Wisner
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Counsel for Plaintiff-Appellee