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October 28, 2014

VIA ECF

Marcia M. Waldron, Esq.
Clerk of the Court
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Submission of Letter Pursuant to Rule 28(j), *King Drug Co. of Florence, Inc. v. SmithKline Beecham Corporation*, No. 14-1243

Dear Ms. Waldron:

Since the conclusion of briefing, several courts have, like the court below, granted motions to dismiss antitrust challenges to patent litigation settlements. These decisions support affirmance. They reinforce that *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), did not disturb the longstanding legality of patent litigation settlements, but held that only settlements with a large, unexplained “reverse payment” from the patent holder to the patent challenger are subject to antitrust scrutiny. These cases also recognize the narrow meaning of “payment,” limiting it to cash or—at most—consideration whose value has been reliably and concretely estimated.

Two decisions in this Circuit have dismissed antitrust challenges to settlements that, like the one here, did not include a cash payment. *See In re Effexor XR Antitrust Litig.*, 2014 WL 4988410 (D.N.J. Oct. 6, 2014); *In re Lipitor Antitrust Litig.*, __ F. Supp. 3d __, 2014 WL 4543502 (D.N.J. Sept. 12, 2014). These decisions held that where the allegations include non-cash payments, under *Actavis* the “pleading must show some reliable foundation for estimating the alleged reverse payment.” 2014 WL 4543502, at *19. *Effexor* explained that it does not suffice to allege, as plaintiffs did here, “some sort of value of a no-authorized generic agreement, absent a reliable foundation supporting that value.” 2014 WL 4988410, at *21.

Another court agreed with the decision below that *only* consideration in the form of cash can constitute a payment for reasons “dictated by ... *Actavis* and considerations of public policy.” *In re Loestrin 24 Fe Antitrust Litig.*, __ F. Supp. 2d __, 2014 WL 4368924, at *11

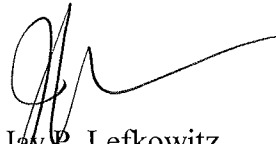
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(D.R.I. Sept. 4, 2014). The court therefore dismissed an antitrust challenge to a settlement that, like the one here, granted an exclusive early-entry license to the patent challenger.

In re Niaspan Antitrust Litig., __ F. Supp. 2d __, 2014 WL 4403848 (E.D. Pa. Sept. 5, 2014), is not to the contrary. The court concluded that plaintiffs plausibly alleged a reverse payment, but the settlement included alleged cash payments for delayed market entry, disguised as compensation for services. *Id.* at *12. That is not true of the settlement here.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jay P. Lefkowitz', with a long horizontal flourish extending to the right.

Jay P. Lefkowitz
*Counsel for Appellees Teva Pharmaceutical
Industries, Ltd. and Teva Pharmaceuticals
USA, Inc.*

cc: counsel of record (via ECF)