No. 13-8096

IN THE

United States Court of Appeals for the Third Circuit

A.S., a Minor, by SALLEE MILLER, Guardian, and SALLEE MILLER, Individually,

Plaintiffs-Petitioners,

v.

SMITHKLINE BEECHAM CORPORATION d/b/a GlaxoSmithKline,

Defendant-Respondent.

On Petition for Permission to Appeal From the United States District Court for the Middle District of Pennsylvania in Case No. 1:13-CV-2382

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF THEIR PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(B)

Joseph E. O'Neil
LAVIN, O'NEIL, RICCI, CEDRONE & DISIPIO
190 N. Independence Mall West, Suite 500
Philadelphia, PA 19106
(215) 627-0303

Andrew T. Bayman
KING & SPALDING LLP
1180 Peachtree Street NE
Atlanta, GA 30309
(404) 572-4600

Jeffrey S. Bucholtz
KING & SPALDING LLP
1700 Pennsylvania Avenue NW, Suite 200
Washington, DC 20006
(202) 747-0500

Counsel for Defendant

January 15, 2014

Defendant GlaxoSmithKline LLC, formerly SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("GSK"), respectfully submits this response to Plaintiffs' motion for leave to file a reply in support of their petition for permission to appeal under 28 U.S.C. § 1292(b).

Plaintiffs do not identify any basis for their proposed reply. Their motion acknowledges that the applicable rule does not provide for a reply. Mot. at 2 (citing Fed. R. App. P. 5). Instead, they ask the Court to look to the Supreme Court's Rules, which permit a reply in support of a petition for certiorari. *Id*. (citing S. Ct. R. 15.6). But far from helping Plaintiffs, the Supreme Court's different rule shows that when the drafters of the Federal Rules intend to permit a reply, they say so. The Appellate Rules themselves prove this point: Rule 27(a)(4) provides for a reply in support of a motion, but Rule 5(b) conspicuously does not provide for a reply in support of a petition for permission to appeal.

Plaintiffs also do not identify any need for their proposed reply. While Plaintiffs make a point of noting in their motion that GSK electronically filed its response on January 7, Mot. at 1, they do not suggest that that fact gives them a basis to file a substantive reply in support of their petition.[1] Nor do Plaintiffs even

[1] In addition to being irrelevant to their motion for leave to file a reply, Plaintiffs' statement that GSK filed its response on January 7 "[r]eportedly due to electronic-filing related difficulties" on January 6, *id*., is disingenuous. Plaintiffs know that GSK's response was complete and ready for filing on January 6 because GSK e-

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contend that GSK's response introduced new material that Plaintiffs could not have anticipated in their petition. Nor, indeed, does Plaintiffs' proposed reply add anything to their petition. Most of it is devoted to arguing that delaying appeal until after final judgment could mean that a retrial is required in state court, *see* Proposed Reply at 2-7, but Plaintiffs already made that argument in their petition (and in all events *every* denial of remand can be said to raise that possibility). *See* Pet. at 9-10, 16-20. Plaintiffs' only other proposed reply argument is that the district court erred by denying remand, *see* Proposed Reply at 8-9, which Plaintiffs likewise argued at length in their petition, *see* Pet. at 12-15.[2]

In short, Plaintiffs have no justification for going outside the rules to help themselves to a substantive reply in support of their petition. But while Plaintiffs' proposed reply is unjustified, it is also immaterial because it merely rehashes the same unpersuasive arguments already made in the petition. As a result, whether or not the Court chooses to allow the proposed reply, the Court should deny the

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mailed it to them and the assigned Case Manager on that date and explained – to Plaintiffs as well as the Clerk's Office – the problem with the ECF system that was preventing GSK from filing it electronically.

[2] Plaintiffs feign surprise that GSK responded to their petition by explaining why the requirements for interlocutory appeal are not met, rather than with a lengthy defense of Judge McLaughlin's order on the merits. *See* Proposed Reply at 1, 8-9. Plaintiffs' petition seeks permission to appeal, so it is hardly "[n]otabl[e]," *id*. at 8, that GSK's response focused on the standards for permission to appeal.

petition. Plaintiffs are wrong to dismiss the final-judgment rule as an "illegitimate roadblock[] to the lawful resolution of litigation," *id*. at 6, and – even with the benefit of an unauthorized reply – they still have failed to show that this case presents extraordinary circumstances that justify departing from that rule.

DATED: January 15, 2014

Respectfully submitted,

By: _/s/___Joseph E. O'Neil_____

Joseph E. O'Neil (PA ID 29053)
Lavin, O'Neil, Ricci, Cedrone & DiSipio
190 N. Independence Mall West, Suite 500
Philadelphia, PA 19106
(215) 627-0303

-and-

Andrew T. Bayman
King & Spalding LLP
1180 Peachtree Street NE
Atlanta, GA 30309
(404) 572-4600

Jeffrey S. Bucholtz
King & Spalding LLP
1700 Pennsylvania Avenue NW, Suite 200
Washington, DC 20006
(202) 747-0500

Attorneys for Defendant-Respondent GlaxoSmithKline LLC, formerly SmithKline Beecham Corporation d/b/a GlaxoSmithKline

CERTIFICATE OF BAR MEMBERSHIP

I hereby that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: January 15, 2014 /s/ Joseph E. O'Neil

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2014, I caused to be served a true and correct copy of the foregoing **DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF THEIR PETITION FOR PERMISSION TO APPEAL** on counsel for Plaintiffs/Petitioners via the Third Circuit's ECF system and/or US mail:

FELDMAN & PINTO
Rosemary Pinto, Esquire
Laura Feldman, Esquire
1604 Locust Street, 2R
Philadelphia, PA 19103

BAILEY PERRIN BAILEY
Adam D. Peavy, Esquire
440 Louisiana Street, Suite 2100
Houston, TX 77002

Howard J. Bashman, Esquire
2300 Computer Avenue
Suite G-22
Willow Grove, PA 19090

Counsel for Plaintiffs/Petitioners

/s/ Joseph E. O'Neil