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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

SAFEWAY INC; WALGREEN CO.; THE KROGER CO.; NEW ALBERTSON'S, INC.; AMERICAN SALES COMPANY, INC.; AND HEB GROCERY COMPANY, LP,

Plaintiffs,

vs.

ABBOTT LABORATORIES,

Defendant.

CASE NO. C 07-5470 (CW)

Related per November 19, 2007 Order to Case No. C 04-1511(CW)

NOTICE OF MOTION AND OMNIBUS MOTION TO DISMISS ANTITRUST CLAIMS IN PLAINTIFFS' AMENDED COMPLAINTS PURSUANT TO RULE 12(B)(6)

Judge: Honorable Claudia Wilken
Date: October 15, 2009
Time: 2:00 PM
Location: Courtroom 2 (4th Floor)

(Caption continued on next page)

MEIJER, INC. & MEIJER DISTRIBUTION, INC.; ROCHESTER DRUG CO-OPERATIVE, INC.; AND LOUISIANA WHOLESALE DRUG COMPANY, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs, vs. ABBOTT LABORATORIES, Defendant.	CASE NO. C 07-5985 (CW) (Consolidated Cases) Related per November 30, 2007 Order to Case No. C 04-1511 (CW)
RITE AID CORPORATION; RITE AID HDQTRS CORP.; JCG (PJC) USA, LLC; MAXI DRUG, INC D/B/A BROOKS PHARMACY; ECKERD CORPORATION; CVS PHARMACY, INC.; AND CAREMARK LLC, Plaintiffs, vs. ABBOTT LABORATORIES, Defendant.	CASE NO. C 07-6120 (CW) Related per December 5, 2007 Order to Case No. C 04-1511 (CW)
SMITHKLINE BEECHAM CORPORATION, d/b/a GLAXOSMITHKLINE, Plaintiff, vs. ABBOTT LABORATORIES, Defendant.	CASE NO. C 07-5702 (CW) Related per December 5, 2007 Order to Case No. C 04-1511 (CW)

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on October 15, 2009 at 2:00 pm., or as soon thereafter as the matter may be heard, before the Honorable Claudia Wilken in Courtroom 2 on the Fourth Floor of the above-entitled Court, defendant Abbott Laboratories will move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss:

- Safeway Inc., et al.'s Second Amended Complaint, filed August 13, 2009;
- Rite Aid Corporation, et al.'s Second Amended Complaint, filed August 13, 2009;
- Meijer, Inc., et al.'s Second Amended Class Action Complaint, filed August 13, 2009; and
- Count 1 (Sherman Act § 2) and Count 4 (State Law Prohibition on Monopolization) of SmithKline Beecham Corporation d/b/a GlaxoSmithKline's ("GSK's") Amended Complaint, filed August 13, 2009.
- Count 3 (State Law Unfair Competition) of GSK's Amended Complaint to the extent it is based on the same allegations of anticompetitive conduct underlying Plaintiffs' antitrust claims.

All of the claims that Abbott is moving to dismiss are antitrust claims. Herein, the plaintiffs in the Safeway, Rite Aid, Meijer, and GSK cases are collectively referred to as "Plaintiffs."

Dismissal of Plaintiffs' antitrust claims pursuant to Rule 12(b)(6) is appropriate because Plaintiffs have not alleged any form of exclusionary conduct, the central element in any monopolization claim. This Motion is based upon the Memorandum of Points and Authorities attached hereto and such additional authority and argument as may be presented in Abbott's reply and at any hearing on this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Ninth Circuit has now considered the precise conduct alleged here—that, in 2003, Abbott substantially increased the price of its patented HIV drug Norvir while maintaining the price of its drug Kaletra—and found that this was not exclusionary conduct under Section 2 of the Sherman Act. *See John Doe 1 v. Abbott Labs.*, 571 F.3d 930, 932 (9th Cir. 2009).

Like the plaintiffs in *Doe*, Plaintiffs here previously based their claims on a

"monopoly leveraging" theory, claiming that Abbott's pricing decisions forced consumers to use Kaletra over other manufacturers' protease inhibitors that are taken with Norvir to "boost" their effectiveness. The Ninth Circuit rejected that theory outright in *Doe*. 571 F.3d at 933. Plaintiffs now have amended their complaints in a vain attempt to plead around the Ninth Circuit's decision. But their changes do nothing to alter the fundamental fact that, under applicable law, the conduct here was not exclusionary.

The Ninth Circuit held in *Doe* that "Abbott's conduct [in pricing Norvir and Kaletra] is the functional equivalent of the price squeeze the [Supreme] Court found unobjectionable in *linkLine*." 571 F.3d at 935. In *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 129 S. Ct. 1109 (2009), independent Internet service providers that competed with AT&T in the retail DSL market and also leased DSL transport service from AT&T at the wholesale level alleged that their profit margins were unfairly squeezed by AT&T's practice of setting high prices in the wholesale transport market while keeping retail prices for its own DSL service low. *Id.* at 1115. The Supreme Court held that a price squeeze is not an independent "theory of liability" under the Sherman Act, so plaintiffs "ha[d] a remedy" only if they could show "a duty-to-deal violation at the wholesale level or predatory pricing at the retail level." *Id.* at 1122; *see also id.* at 1120-21 ("Institutional concerns also counsel against recognition of [price squeeze] claims."). Applying *linkLine*, the Ninth Circuit in *Doe* held that because the plaintiffs had not alleged a duty to deal violation in the Norvir "booster" market or a predatory pricing claim with regard to Kaletra in the "boosted" market, they had not stated a claim. *Doe*, 571 F.3d at 935. Despite the new conclusory allegations that Plaintiffs here have made in an attempt to re-label the same underlying facts, Plaintiffs' claims fail for the same reason.

The Plaintiffs other than GSK assert that Abbott engaged in predatory pricing of Kaletra. But none of their amended complaints includes allegations that, if proven, would demonstrate the recoupment element of a predatory pricing claim. And with good reason. To demonstrate recoupment, Plaintiffs would have to show that Abbott has driven its competitors from the market, or is "dangerously close" to driving its competitors from the market, so that it

then can raise Kaletra's price to "recoup" the losses from earlier "below-cost pricing." But Abbott's competitors include some of the biggest pharmaceutical companies in the world, and Plaintiffs do not allege that *any* competitor has been forced from the market in the six years since Norvir's price increase. Plaintiffs' failure to allege recoupment or a dangerous probability of recoupment is by itself fatal to a predatory pricing claim here.

The predatory pricing claim also fails for the separate and independent reason that none of the Plaintiffs has successfully alleged below-cost pricing under the *linkLine* standard. GSK makes no effort to allege below-cost pricing, under any standard. The other Plaintiffs invoke the below-cost pricing mantra, but they do not (and could not) allege that Abbott's variable cost of producing Kaletra exceeds the price at which Abbott sells Kaletra. Instead, these Plaintiffs allege only that under the legally inapplicable "discount attribution rule" that the Ninth Circuit applied to bundled discounting in *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883 (9th Cir. 2008), the difference between the prices of Kaletra and Norvir is smaller than Abbott's variable cost of producing Kaletra. But the Ninth Circuit held in *Doe* that *linkLine*'s price-squeeze standard "controls" in evaluating the legality of Abbott's conduct here. *Doe*, 571 F.3d at 933. And far from endorsing the discount attribution rule in *linkLine*, the Supreme Court specifically rejected a *Cascade*-type test, holding that "it lacks any grounding in our antitrust jurisprudence." 129 S. Ct. at 1121-22. To prevail on a predatory pricing claim here, Plaintiffs would be required to allege that Kaletra's price is below cost. No Plaintiff does or can make any such allegation.

Some Plaintiffs have now attempted to convert their challenge to Abbott's pricing into a "refusal to deal" claim under the Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), which recognized a limited exception to the general rule that companies have no duty to deal. GSK and the Meijer Plaintiffs claim that Abbott violated a "duty to deal, *i.e.*, to continue to sell Norvir as a stand-alone product at a reasonable price," which they do not define. Meijer SAC ¶ 47; *see also* GSK AC ¶ 63. There are several problems fatal to such a claim.

First, *Aspen Skiing*'s limited "duty to deal" exception potentially applies only to

situations where one competitor refuses to deal with another competitor, not to situations in which the allegation is that the defendant refused to deal with customers (here, people with HIV). No court has ever extended the doctrine to an allege failure to sell to customers at a so-called "reasonable price." Nor is there any legitimate basis to do so.

Second, no Plaintiff alleges that Abbott actually has refused to deal with *anyone*. To the contrary, the allegations here are not about a refusal to deal but rather are about the price at which Abbott *did deal* in selling Norvir to patients. Indeed, as Plaintiffs also allege, Abbott licensed its competitors to promote their PIs for use with Norvir.

Third, Plaintiffs' allegations also fail to meet additional specific requirements for invoking the *Aspen Skiing* exception. Plaintiffs do not allege that Abbott refused to sell Norvir to competitors at a price that Abbott was offering to retail customers. Nor do Plaintiffs allege that Abbott's actions reflected a sacrifice of short-term profits. Under *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), both would be required for the *Aspen Skiing* exception to apply. *Id.* at 409-10 ("The refusal to deal alleged in the present case does not fit within the limited exception recognized in *Aspen Skiing*. . . . In *Aspen Skiing*, the defendant turned down a proposal to sell at its own retail price. . . . Verizon [did not do so]. . . . In *Aspen Skiing*, what the defendant refused to provide to its competitor was a product that it already sold at retail. . . . In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public.").

Fourth, the direct purchaser Plaintiffs alone allege the alternative theory that Abbott illegally monopolized the booster market for Norvir (as opposed to the boosted PI market for Kaletra and its competitors). This claim fails for the straightforward reason that these Plaintiffs have alleged neither predatory pricing of Norvir nor any other form of anticompetitive conduct with respect to the booster market.

Plaintiffs have failed to state an antitrust claim as a matter of law and, therefore, those claims should be dismissed under Rule 12(b)(6).

II. BACKGROUND

This motion addresses antitrust allegations brought by two groups of plaintiffs: (1)

Abbott's competitor, GSK; and (2) direct purchasers of Abbott's HIV drugs—including a class of pharmaceutical retailers and wholesalers that purchased Norvir and Kaletra directly from Abbott or are pursuing direct purchaser claims by assignment (Meijer, et. al), and two groups of chain pharmacies that opted out of the Meijer class. *See* GSK AC ¶ 2; Meijer SAC ¶¶ 1-3; Safeway SAC ¶¶ 1-6; Rite Aid SAC ¶¶ 1-4. All Plaintiffs allege violations from Abbott's December 2003 re-pricing of Norvir.

A. Plaintiffs' Allegations

As this Court is already aware from *Doe*, Norvir is a protease inhibitor ('PI') that was approved for use to stop HIV's replication. Safeway SAC at 1; Rite Aid SAC at 1; Meijer SAC at 1; *see also* GSK AC ¶ 15. Norvir was originally sold as a standalone PI, but, "[a]fter Norvir's release, it was discovered that" Norvir is more effective "when used in small quantities with another PI [to] boost the anti-viral effects of the other PI." Safeway SAC ¶¶ 13, 15; Rite Aid SAC ¶¶ 11, 13; GSK AC ¶¶ 12, 13; *see also* Meijer SAC ¶ 16. Abbott also sells Kaletra, "a combination drug consisting of Norvir and another Abbott PI, whose chemical or generic name is lopinavir." Safeway SAC ¶ 13; Rite Aid SAC ¶ 11; *see also* Meijer SAC ¶ 16; GSK AC ¶ 15.

Plaintiffs allege that there are two relevant antitrust markets: the "boost*er* market" (sometimes referred to as the "boost*ing* market") and the "boost*ed* market." Safeway SAC ¶ 19; Rite Aid SAC ¶ 17; Meijer SAC ¶ 17; *see also* GSK AC ¶ 42.[1] The booster market allegedly is a one-product market consisting solely of Norvir when used to boost the effects of PIs. Safeway SAC ¶ 19; Rite Aid SAC ¶ 17; Meijer SAC ¶ 17; GSK AC ¶ 44. The boosted market allegedly consists of Kaletra and a number of non-Abbott PIs, "each of which is prescribed and taken in conjunction with Norvir." Safeway SAC ¶ 19; Rite Aid SAC ¶ 17; *see also* Meijer SAC ¶ 17; GSK AC ¶ 18-19. Abbott licenses competitors to promote their PIs for use with Norvir. Safeway SAC ¶ 17; Rite Aid SAC ¶ 15; Meijer SAC ¶ 15; GSK AC ¶ 17.

Plaintiffs' antitrust claims can be grouped into three categories:

[1] Throughout this brief, emphasis is added unless otherwise noted.

1. Monopolization of Alleged *Boosted* Market.

All Plaintiffs assert that Abbott monopolized or attempted to monopolize the boosted market in violation of Section 2 of the Sherman Act. Safeway SAC ¶¶ 61-72; Rite Aid SAC ¶¶ 58-70; Meijer SAC ¶¶ 67-77; GSK AC ¶¶ 59-67. In support of this theory, Plaintiffs allege that Abbott raised the wholesale price of Norvir in December 2003 from $1.71 to $8.57 for a 100 milligram capsule while, at the same time, not raising the price of Kaletra, which includes the active ingredient of Norvir. Safeway SAC ¶ 27; Rite Aid SAC ¶ 25; Meijer SAC ¶ 24; GSK AC ¶ 1. In Plaintiffs' words, Abbott "disadvantaged its competitors in the boosted market" by selling Norvir "at a much lower price when used as one component of Abbott's own boosted PI, Kaletra" than when "used to boost a non-Abbott PI." Safeway SAC ¶ 63; Rite Aid SAC ¶ 60; *see also* Meijer SAC ¶ 71; GSK AC ¶ 63. Among the Plaintiffs' complaints, two purported reasons are put forth for labeling this exclusionary conduct—first, because Abbott allegedly engaged in predatory pricing of Kaletra; second, because Abbott allegedly violated a duty to deal in Norvir.

Although all Plaintiffs other than GSK invoke the mantra of "predatory pricing," no Plaintiff alleges that Abbott has recouped any investment in below-cost pricing of Kaletra, or that there is a dangerous probability that Abbott will do so. Indeed, no Plaintiff alleges that Kaletra itself is priced below Abbott's cost of producing it. Instead, the Plaintiffs other than GSK allege only that "the effective or imputed price of the lopinavir component of Kaletra (i.e., the price of Kaletra minus the post-December 2003 price of Norvir) is $1.64," and that "[t]hat price is below Abbott's average variable cost for lopinavir." Safeway SAC ¶ 53; Rite Aid SAC ¶ 50; *see also* Meijer SAC ¶ 51. GSK does not even make this allegation.

Turning to the duty to deal allegations, the Meijer Plaintiffs and GSK allege that the price increase on Norvir violated a "duty to deal, *i.e.*, to continue to sell Norvir as a stand-alone product at a reasonable price . . ., in accordance with [Abbott's] continuing course of conduct over several years." Meijer SAC ¶ 47; *see also* GSK AC ¶ 63. These Plaintiffs do not allege, however, that Abbott ever refused to sell Norvir to anyone or that Abbott's Norvir price increase involved Abbott's forgoing short-term profits. The Safeway and Rite Aid Plaintiffs allege that "Abbott has a duty to deal . . ., i.e., a duty to continue selling Norvir separately rather

than merely as a component of Kaletra," but they do not allege that Norvir is not available separately, or that Abbott violated that "duty." Safeway SAC ¶ 48; Rite Aid SAC ¶ 46.

2. Monopolization of Alleged *Boosting* Market.

All Plaintiffs other than GSK, claim that Abbott has monopolized the booster market in violation of Section 2 of the Sherman Act. Safeway SAC ¶¶ 73-76; Rite Aid SAC ¶¶ 71-74; Meijer SAC ¶¶ 78-81. Specifically, these Plaintiffs allege that, "[o]n information and belief, in reliance on the expectation that Abbott would [not substantially increase Norvir's price] . . . GSK and other PI manufacturers materially delayed developing, testing, and/or launching other potential Boosted PIs that could be effective with substantially less Norvir . . . or could be used with another boosting drug entirely." Safeway SAC ¶ 44; Rite Aid SAC ¶ 42; *see also* Meijer SAC ¶ 41. These Plaintiffs further allege that after "deceptively induc[ing] rivals to forego developmental alternatives and instead standardize around the use of Norvir for boosting purposes," Abbott "exercised its monopoly power . . . by raising the price of Norvir." Safeway SAC ¶ 74; Rite Aid SAC ¶ 72; *see also* Meijer SAC ¶ 76. Notably, the sole "rival" of Abbott who is a plaintiff here, GSK, neither joins in the "information and belief" allegation nor alleges monopolization of the booster market. Indeed, GSK's pleading is noticeably silent on the issue of whether, as alleged in conclusory terms by the other Plaintiffs, GSK itself delayed developing a boosted PI that would not depend on Norvir, in reliance on Norvir's original pricing. Regardless, none of the Plaintiffs alleges that Abbott ever priced Norvir below cost, or that Abbott engaged in any other recognized form of predatory conduct in the booster market.

3. North Carolina Law Antitrust Claims.

GSK claims that Abbott's conduct violated North Carolina's antitrust-monopolization law, N.C. Gen. Stat. § 75-2.1, and the state's Unfair and Deceptive Trade Practices Act ("UDTPA"), N.C. Gen. Stat. § 75-1.1. GSK bases this claim on the same allegations that underlie its boosted market monopolization claim. GSK AC ¶¶ 78-81.

B. Procedural History

Plaintiffs filed their original Complaints in late 2007, nearly four years after Norvir's price increase and three and a half years after HIV patients and third-party payors

brought suit under the same facts as Plaintiffs challenge here.[2] *See In re Abbott Labs. Norvir Anti-Trust Litig.* ("*Doe*"), No. C-04-1511 CW. Plaintiffs then obtained a determination that their cases be deemed "related" to *Doe*, on the basis that their cases "concern substantially the same parties, property, transaction or event" as *Doe*. N.D. Cal. Local Rule 3-12(a)(1).

In April 2008, this Court denied Abbott's motions to dismiss Plaintiffs' original complaints. In that motion, Abbott took the position that Plaintiffs could not satisfy the predatory conduct element of a monopolization claim. Abbott argued that *Cascade* and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), prohibited a monopolization claim here, absent an allegation of below-cost pricing. *See* Omnibus Mot. to Dismiss at 5-10, *Safeway v. Abbott Labs.*, No. C 07-5470 CW (Jan. 31, 2008) (No. 29); Reply ISO Omnibus Mot. to Dismiss at 1-6, *Safeway v. Abbott Labs.*, No. C 07-5470 CW (Feb. 21, 2008) (No. 38). Plaintiffs opposed the motion, arguing strenuously that the *Cascade* holding applied only to bundled discounting and their antitrust theory cannot be characterized as bundled discounting, as well as that *Cascade* should not apply to the pharmaceutical industry. *See* Opp. to Omnibus Mot. at 4-11, *Safeway v. Abbott Labs.*, No. C 07-5470 CW (Feb. 14, 2008) (No. 34); Opp. to Abbott's Supplemental Br. ISO Omnibus Mot. at 2-5, *Safeway v. Abbott Labs.*, No. C 07-5470 CW (Mar. 20, 2008) (No. 45). In response, the Court noted in its opinion that "it is far from clear that Abbott's sale of Kaletra represents a bundled discount." *See* Order Denying Abbott's Motion to Dismiss ("4/11/08 Order") at 12, *Safeway v. Abbott Labs.*, No. C 07-5470 CW (April 11, 2008) (No. 50). The Court then held that, "[e]ven if Kaletra represents a bundled discount such that these cases fall within the general purview of *Cascade*, . . . Abbott's sale of Kaletra – if it represents a bundled discount – is a strong candidate for the exception contemplated by the Ninth Circuit." *Id.* at 13. This Court thus allowed Plaintiffs to pursue their monopolization claim without needing to allege or show below-cost pricing, under the discount-attribution rule or otherwise. *Id.* at 16-17.

As part of a settlement in the *Doe* case, the Court certified the issue of *Cascade*'s

[2] We assume the truth of Plaintiffs' allegations solely for purposes of this motion, and our discussion of "facts" should be interpreted to mean only Plaintiffs' allegations.

applicability, among other issues, for interlocutory appeal.[3] *See* Order Certifying Issues and Granting Leave to Seek Interlocutory Appeal, *Doe*, No. C 04-1511 CW (Aug. 27, 2008) (No. 611). This Court explained that a ruling from the Ninth Circuit on the applicability of *Cascade* would "be helpful in clarifying the issues in the" present related cases. *See id.* at 5.

The Ninth Circuit accepted the appeal, and this Court stayed the present cases after the close of fact discovery, pending the appeal. When staying Plaintiffs' cases, this Court explained that "the appeals court must determine whether the Supreme Court's recent decision in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, [129 S. Ct. 1109 (2009)] is applicable to the plaintiffs' Sherman Act claims." *See* Order Granting Defendant's Motion for Stay at 9 n.1, *Safeway v. Abbott Labs.*, No. C 07-5470 CW (Mar. 18, 2009) (No. 105). The Plaintiffs in the current cases participated in the interlocutory appeal as *amici*, both in opposing Abbott's petition for interlocutory appeal and in filing briefs on the merits. Mot. to File Amicus Br., *Doe*, No. C 04-1511 CW (May 13, 2008) (No. 504); *Doe*, No. 08-17699 (9th Cir.) (Nos. 27, 39).

On July 7, 2009, the Ninth Circuit issued its decision in *Doe* and held that *linkLine* "controls" on these facts. *Doe*, 571 F.3d at 933. Plaintiffs determined that they needed to amend their complaints in light of *Doe*, and Abbott consented to the filing of those amendments. *See, e.g.*, Stipulation re Am. Compl., *Safeway v. Abbott Labs.*, No. C 07-5470 CW (Aug. 13, 2009) (No. 169). The panel unanimously denied the *Doe* plaintiffs' subsequent petition for rehearing, and no active judge requested an *en banc* vote. The Ninth Circuit's mandate recently issued. *Doe*, No. 08-17699 (9th Cir. Aug. 27, 2009) (No. 53).

III. ARGUMENT

In *Doe*, the Ninth Circuit held that *linkLine* "controls the outcome here." *Doe*, 571 F.3d at 933. Under *linkLine*, to state a claim that Abbott's pricing here constituted exclusionary

[3] "A district court may take judicial notice of pleadings in a related action without converting a motion to dismiss into a motion for summary judgment." *Thomas v. Housing Authority of County of Los Angeles*, No. CV 04-6970 MMM (RCx), 2006 WL 5670938, at *3 n.25 (C.D. Cal. Feb. 28, 2006); *see also MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (taking judicial notice of pleadings filed in a prior action in reviewing a motion to dismiss).

conduct under Section 2 of the Sherman Act, plaintiffs would need to allege facts establishing (a) below-cost pricing of Kaletra and a dangerous probability of recoupment in the "boosted" market, or (b) a duty to deal and a refusal to deal in the Norvir "booster" market. *Doe*, 571 F.3d at 934-35. Plaintiffs have done neither. Their antitrust claims therefore fail as a matter of law.

A. Legal Standard

A complaint should be dismissed if its factual allegations do not raise the "right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. While detailed factual allegations are not required, a complaint must present "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id.* at 555.

This year, the Supreme Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), further clarified the proper motion to dismiss analysis. The Court noted that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id*. at 1949; *see also Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (A court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged"). Thus, a trial court should begin its analysis by weeding out mere legal conclusions and then consider whether the remaining factual allegations "plausibly suggest an entitlement to relief." *Iqbal*, 129 S. Ct. at 1951.

B. Plaintiffs fail to state claim based upon boosted market pricing.

The Plaintiffs other than GSK attempt to allege predatory pricing to satisfy the exclusionary conduct element of a monopolization claim.[4] But the allegations in these Plaintiffs' amended complaints do not meet the standards for a predatory pricing claim articulated by the Ninth Circuit in *Doe*. There, the Ninth Circuit emphasized *linkLine*'s statement that "predatory pricing . . . [requires] a plaintiff [to] demonstrate that (1) 'the prices complained of are below an appropriate measure of its rival's costs'; and (2) there is a 'dangerous probability' that the

[4] In this brief, Abbott's arguments apply equally to attempted monopolization claims.

defendant will be able to recoup its 'investment' in below-cost prices'." *Doe*, 571 F.3d at 934 (quoting *linkLine*, 129 S. Ct. at 1120, quoting *Brooke Group*, 509 U.S. at 222-24). Because the *Doe* plaintiffs had not alleged any form of below-cost pricing, the Ninth Circuit "ha[d] no need to reach the second (dangerous probability) prong." *Id.* at 935. However, court made clear that both prongs would have been required to state a claim of predatory pricing. *Id*. Plaintiffs here have not satisfied either prong, because they have not alleged a probability of recoupment or that the price of the Kaletra pill was below cost.

By specifically mentioning the element of recoupment in its reasoning in *Doe*, the Ninth Circuit again emphasized that *linkLine* controls on these facts. By contrast, *Cascade* stated that the discount attribution test for bundled discounts did not require proof of a dangerous probability of recoupment. *See Cascade*, 515 F.3d at 910 n.21 ("[W]e do not adopt the element of recoupment."). The Safeway, Rite Aid, and Meijer Plaintiffs nevertheless proceed as if *Cascade* controlled. These Plaintiffs have not even tried to allege a dangerous probability of recoupment, and they allege below-cost pricing only under *Cascade*'s discount attribution standard for bundled discounts, not *linkLine*'s. *Doe* thus makes clear that plaintiffs' allegations fail to state a cognizable claim of predatory pricing.

1. Plaintiffs have not alleged a dangerous probability of recoupment.

Plaintiffs' attempt to state a monopolization claim based upon predatory pricing fails for the threshold reason that none of their complaints attempts to allege a probability of recoupment, let alone the requisite "dangerous probability of recoupment." *See Doe*, 571 F.3d at 934; *linkLine*, 129 S. Ct. at 1120; *Brooke Group*, 509 U.S. at 222-24. Without recoupment, low prices are not a concern of the antitrust laws, because "the substantive evil that antitrust reprehends is not the injury to rivals, but the subsequent injury to consumers. The recoupment requirement enables the tribunal to determine whether a particular price cut is calculated to injure . . . consumers." IIIA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 726 at 57-58 (3d ed. 2008). As the Ninth Circuit explained, low prices that eliminate rivals—even below-cost prices—are "of no concern to the antitrust laws" unless and until the alleged monopolist charges, or is likely to charge "supracompetitive prices—prices above competitive levels" in the relevant

market. *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433-34 (9th Cir. 1995) ("[B]elow-cost pricing is not anticompetitive in itself.").

Accordingly, the Supreme Court held in *Brooke Group* that, to prove predatory pricing, "[t]he plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on predation, including the time value of the money invested in it." 509 U.S. at 225.

Only rarely can a price cutter expect to be able to achieve recoupment, and allegations or "[e]vidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment." *Id.* at 226. As the Supreme Court has explained, "losses [from below-cost pricing] are like investments, which must be recovered with compound interest. [Yet] [i]f the defendants should try to raise prices to . . . a level [high enough to recoup], they would attract new competition." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986); *see also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986) (discussing the need to keep competitors out of the market long enough to recoup investment in predatory pricing and the difficulty of doing so). "The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses *and to harvest some additional gain*." *Matsushita*, 475 U.S. at 589 (first emphasis in original).

Not only do the amended complaints fail to allege recoupment, the amended complaints affirmatively demonstrate that no showing of a likelihood of recoupment could be made here. To show recoupment, Plaintiffs here would have to provide evidence that Abbott can "drive competitors from the market and then maintain monopoly power long enough to recoup the losses" from below-cost pricing. *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1460 (9th Cir. 1993). Any such theory would be potentially viable only if the targeted competitors were too weak to survive in the face of below-cost pricing. But here, as Plaintiffs admit, Abbott's competitors are some of the biggest pharmaceutical companies in the world, including GSK and Bristol-Myers Squibb. *See* Safeway SAC ¶ 24; Rite Aid SAC ¶ 22; GSK AC ¶¶ 22, 23; Meijer SAC ¶ 22.

Plaintiffs have failed to allege that *any* rival has been driven from the market since Abbott's pricing decision in 2003, let alone as a result of the price of Norvir. Nor has any Plaintiff alleged that competing PIs are likely to be driven from the market, let alone that, if they were, Abbott could then raise the price of Kaletra to a sufficiently high level and for a long enough time to recoup any investment in purported below-cost pricing (assuming there were below-cost pricing). Plaintiffs' monopolization claim therefore fails as a matter of law.

2. Plaintiffs have not alleged that Abbott priced Kaletra below cost.

Plaintiffs' monopolization claim based upon predatory pricing fails for the additional reason that none of their complaints alleges facts that would show below-cost pricing under applicable law. GSK—the only Plaintiff that itself produces a PI—makes no allegations whatsoever about below-cost pricing. The other Plaintiffs also do not allege that Kaletra is priced below cost. They merely allege that if Kaletra were treated as a bundle of two separate products, lopinavir and ritonavir, and if *Cascade*'s discount attribution test were used to come up with an imputed price for these components, then the imputed price of lopinavir would be below Abbott's average variable cost of producing the lopinavir component. *See* Safeway SAC ¶¶ 52, 53; Rite Aid SAC ¶ 50; Meijer SAC ¶¶ 50, 51; *see also Cascade*, 515 F.3d at 910 ("To prove that a bundled discount was exclusionary or predatory . . . the plaintiff must establish that, after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant sold the competitive product or products below its average variable cost of producing them."). The Safeway and Rite Aid Plaintiffs claim that "the effective or imputed price of the lopinavir component of Kaletra (i.e., the price of Kaletra minus the post-December 2003 price of Norvir) is $1.64" and that "[t]hat price is below Abbott's average variable cost for lopinavir." Safeway SAC ¶ 53; Rite Aid SAC ¶ 50. The Meijer Plaintiffs likewise claim that "[i]f the penalty a purchaser would pay on the required dosage of Norvir for buying a Boosted PI from a supplier other than Abbott were subtracted from the imputed price of the Boosted PI portion of Kaletra, then the resulting price would be below Abbott's average variable costs relating to the Boosted PI portion of Kaletra." Meijer SAC ¶ 49.[5] None of the

[5] The Meijer Plaintiffs do not mention below-cost pricing when describing their causes of action

Plaintiffs alleges that Kaletra's price was below Abbott's average variable cost of producing the pill as a whole.

Plaintiffs' below-imputed-price allegations are irrelevant, because the Ninth Circuit held in *Doe* that *linkLine* controls on these facts. *Doe*, 571 F.3d 933 ("*linkLine* . . . controls the outcome here."). *linkLine* specifically rejected the use of the sort of attribution or imputed price test set forth in *Cascade*:

> Some amici . . . propos[e] a "transfer price test" for identifying an unlawful price squeeze: A price squeeze should be presumed if the upstream monopolist could not have made a profit by selling at its retail rates if it purchased inputs at its own wholesale rates. Whether or not that test is administrable, it lacks any grounding in our antitrust jurisprudence.

linkLine, 129 S. Ct. at 1121-22 (internal citations omitted).

The Supreme Court also rejected any test that would have required "the defendant [to] leave its rivals a 'fair' or 'adequate' margin between the wholesale price and the retail price." *Id.* at 1121. The Court explained that such a test would be impractical by asking rhetorically: "How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price 'gap?' Must it be large enough for all independent competing firms to make a 'living profit?'" *Id.*

Instead of an imputed-price test or any other test comparing wholesale and retail prices, the Supreme Court made clear that courts should look only to the retail price of the final product to determine whether the product is priced below cost. *Id.* at 1121-22. Because *linkLine* controls here, the relevant question is simply whether the price of a Kaletra pill has been alleged to be lower than the marginal cost of producing that pill. And as this Court has noted, "the cost of manufacturing Kaletra pills is negligible—most likely only a few cents per pill." 4/11/08 Order

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for monopolization or attempted monopolization of the boosted PI market, so it is unclear whether they actually are attempting to state a predatory pricing claim. *See* Meijer SAC ¶¶ 67-77.

at 14. The price of Norvir as a stand-alone product is simply irrelevant. Plaintiffs' monopolization claims fail for the independent reason that no Plaintiff has alleged (or could allege) that the price of Kaletra is below cost.

C. Plaintiffs fail to state a claim for a violation of a duty to deal in Norvir.

As an alternative to their predatory pricing allegations, Plaintiffs have amended their complaints to allege a duty to deal in Norvir. As demonstrated below, however, Plaintiffs' allegations cannot satisfy the exclusionary conduct element required of their boosted market monopolization claims, because Plaintiffs have not alleged a cognizable duty to deal violation.

1. The Safeway and Rite Aid Plaintiffs do not allege a duty to deal violation.

The Ninth Circuit in *Doe* held squarely that a Section 2 claim for monopolization of the boosted market based on pricing in the booster market must allege a "refusal to deal at the booster level." 571 F.3d at 935. The Safeway and Rite Aid Plaintiffs do not attempt to meet this threshold requirement.

The Safeway and Rite Aid Plaintiffs assert that Abbott has a "duty to continue selling Norvir as a stand-alone product." Safeway SAC ¶ 50; Rite Aid SAC ¶ 48. But they fail to allege that Abbott *breached* that supposed duty. *See* Safeway SAC ¶¶ 61-76; Rite Aid SAC ¶¶ 58-74. To the contrary, Plaintiffs expressly allege that Abbott "seriously considered" but discarded a suggestion that it stop selling Norvir, in favor instead of keeping the drug on the market and raising its price. Safeway SAC ¶¶ 26-27, 43; Rite Aid SAC ¶¶ 24-25, 41.

The Safeway and Rite Aid Plaintiffs' failure to allege any breach of a duty to deal is fatal. Antitrust liability for an alleged refusal to deal can attach only if an alleged monopolist actually refuses to deal. *See, e.g., MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1134 (9th Cir. 2004) (applying "existing *refusal* to deal precedents") (emphasis added); *Doe*, 571 F.3d at 935 (plaintiffs' boosted market monopolization claim based on pricing in the booster market necessarily failed under *linkLine* because the plaintiffs had "allege[d] no *refusal* to deal at the booster level.") (emphasis added). Indeed, the Ninth Circuit explicitly rejected the *Doe* plaintiffs' attempt to argue that *linkLine* was distinguishable because there was no duty to deal

there, indicating that any such distinction would be irrelevant because the *Doe* plaintiffs "ha[d] not alleged a refusal to deal in this case." *Doe*, 571 F.3d at 935 n.5. The Safeway and Rite Aid Plaintiffs likewise allege no refusal to deal here, nor could they, because they allege that they (or their assignors, in whose name they are suing as direct purchasers) have continued to purchase Norvir since 2003 repricing. *See* Safeway SAC ¶¶ 1-6; Rite Aid SAC ¶¶ 1-4.

2. Meijer and GSK fail to allege a cognizable refusal to deal.

Unlike the Safeway and Rite Aid Plaintiffs, the Meijer Plaintiffs and GSK allege that Abbott violated a duty to sell Norvir "at a reasonable price" or "on reasonable terms." Meijer SAC ¶ 49 (asserting that Abbott has a duty "to continue to sell Norvir as a stand-alone product at a reasonable price." Meijer SAC ¶ 47. Similarly, GSK asserts that Abbott has a "duty to deal on reasonable terms with respect to Norvir."). GSK AC ¶ 63. Each complaint goes on to assert that Abbott's December 2003 price increase violated this supposed duty to deal. Meijer SAC ¶ 48; GSK AC ¶ 63. Neither formulation, however, states a claim under Section 2, because antitrust law does not impose a duty to deal of the sort alleged.

a. Antitrust law imposes no generalized duty to deal.

The Supreme Court has repeatedly emphasized that "there is no duty," even for a monopolist, "to aid competitors." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004). "The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985). As the Ninth Circuit has observed, the Supreme Court has articulated at least three reasons not to impose such a duty to deal. *See MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124 (9th Cir. 2004). First, contrary to the GSK and Meijer Plaintiffs' allegations of a duty to sell Norvir on "reasonable" terms, the Supreme Court noted that imposition of a duty to deal would "require[] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited." *Trinko*, 540 U.S. at 408. Second, a judicially-imposed duty to deal would be "in some tension with the underlying purpose of antitrust law, since it [could] lessen the incentive for the

monopolist, the rival, or both to invest in . . . economically beneficial facilities." *Id.* at 407-08. Third, "compelling negotiation between competitors [could] facilitate the supreme evil of antitrust: collusion." *Id.* at 408. For all these reasons, the Supreme Court has been "very cautious" in recognizing exceptions to the baseline rule that there is no duty to deal. *Id.*

The Tenth Circuit recently confirmed the general rule that a firm has no duty to assist its competitor. In *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188 (10th Cir. 2009), the court rejected a challenge to a ski resort owner's decision to revoke the plaintiff's lease to operate a ski rental shop on the owner's property—a decision the owner made after it opened its own ski rental operation at the resort. *Id.* at 1196. Despite the fact that the defendant, presumably profitably, had allowed the plaintiff to operate its rental business at the resort for fifteen years, the Tenth Circuit held that revoking the lease did not violate any duty to deal. The court explained: "The Sherman Act does not force [defendant] to assist a competitor in eating away its own customer base." *Id.* at 1197.

b. The *Aspen Skiing* exception does not apply here.

One limited exception to the baseline rule that competitors have no duty to deal with one another, which Plaintiffs apparently seek to invoke here, was recognized by the Supreme Court in *Aspen Skiing*. There, the Court upheld a Section 2 jury verdict in favor of Highlands, the operator of a ski resort on one mountain in the Aspen area, against Aspen Skiing Company, the operator of resorts on three other mountains in the area, based on the Aspen Skiing Company's refusal to continue participating in an all-mountain, multi-day ticket program. *Id.* at 593-94, 608. The parties had jointly offered the all-mountain ticket for years, allowing customers to ski on any or all four mountains during their visits to the Aspen area. *Id.* at 589-90. Eventually, Aspen Skiing Company decided to terminate the joint arrangement—to the Highlands' detriment. Aspen Skiing informed Highlands it would only continue participating in the joint ticket program if Highlands agreed to new, unfavorable, revenue-sharing arrangements. *Id.* at 592. When Highlands refused, Aspen Skiing terminated the program. Highlands then sought to institute its own all-mountain pass, but Aspen Skiing refused to sell Highlands any lift tickets for its three mountains, even when Highlands offered to pay full retail price. *Id.* at 593-94. The Supreme

Court upheld a Section 2 verdict on these facts, noting that the "jury may well have concluded that [Aspen Skiing] elected to forego these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor." *Id.* at 608.

The Supreme Court's more recent decision in *Trinko* strictly cabined *Aspen Skiing*. In *Trinko*, the plaintiff alleged that Verizon had denied competitors access to support services necessary to allow the competitors to interconnect with Verizon's local telephone lines, as required under the federal Telecommunications Act of 1996. 540 U.S. at 407. The Court held that Verizon had no antitrust duty to deal with its rivals, and therefore no duty to deal with the rivals on particular terms that the rivals claimed best suited their own business needs. *Id.* at 409-10. Distinguishing and limiting *Aspen Skiing*, the Court focused in *Trinko* on the fact that unlike Aspen Skiing and Highlands, Verizon had not engaged in any behavior that the Court found suggested a willingness to "forsake short-term profits" in the hopes of long-term monopolization. *Id.* at 409. The Court also found that Verizon had done nothing analogous to Aspen Skiing's refusal "to renew the ticket *even if compensated at retail price*." *Id.* (emphasis in original). Emphasizing that "*Aspen Skiing* is at or near the outer boundary of § 2 liability," the Court found that the case did not "fit within the limited exception recognized in *Aspen Skiing*" and held that the Section 2 claim should have been dismissed. *Trinko*, 540 U.S. at 409-11.

The Meijer Plaintiffs' and GSK's allegations here go well beyond the "outer boundary" of Section 2 liability as articulated in *Trinko*. For the following several independent reasons, their allegations fall outside the *Aspen Skiing* exception.

(1) *Aspen* did not recognize any duty to sell to non-competitors, or any duty to sell at a "reasonable" price.

The Meijer Plaintiffs and GSK complain that Abbott raised the price *consumers and direct purchasers* from Abbott must pay for Norvir. But the limited duty to deal recognized in *Aspen Skiing* extends only to a monopolist's duty to deal with its *rivals*, not its customers. *See linkLine*, 129 S. Ct. at 1118 ("There are also limited circumstances in which a firm's unilateral refusal to deal *with its rivals* can give rise to antitrust liability.") (citing *Aspen Skiing*) (emphasis added); *Trinko*, 540 U.S. at 408 ("Under certain circumstances, a refusal to cooperate *with rivals*

can constitute anticompetitive conduct and violate § 2.") (emphasis added).

The Plaintiffs do not allege, however, that Abbott ever refused to deal with its competitors. To the contrary, GSK and other Plaintiffs affirmatively trumpet the fact that Abbott licensed its competitors to promote the use of Norvir as a booster for the competitors' PIs. And, even if there were such an allegation, there is no basis under *Aspen Skiing* or *Trinko* for an alleged duty to sell to competitors "at a reasonable price," Meijer SAC ¶ 47, or on "reasonable terms," GSK AC ¶ 63. As the leading antitrust treatise emphasizes: "*Aspen* . . . certainly does not hold that a monopolist must make its goods, services, or facilities available at a competitive rather than a monopolistic price." IIIB Areeda & Hovenkamp, Antitrust Law ¶ 772 at 213 (3d ed. 2008); *cf. City of College Station, Tex. v. City of Bryan, Tex.*, 932 F. Supp. 877, 888 (S.D. Tex. 1996) ("[W]hen the reasonableness of a rate is at issue [in a denial of essential facility claim], the reasonableness standard of the access factor cannot be read to mean that the courts will secure a better deal for an antitrust plaintiff . . . . [T]he reasonableness standard [does] not guarantee that antitrust plaintiffs would make profit."); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 597 (7th Cir. 1996) (reversing district court decision that the fee the NBA charged to a television station for telecasting games was too high: "the antitrust laws do not deputize district judges as one-man regulatory agencies"). Indeed, the Supreme Court in *linkLine* warned against the imposition of antitrust standard that was not clearly administrable, such as requiring a defendant to charge a "fair" or "adequate" price. *linkLine*, 129 S. Ct. at 1121.

(2) Abbott's price increase was not a refusal to deal.

Even if Plaintiffs had articulated a potentially cognizable duty to deal, which they have not, the Norvir price increase would not be considered a refusal to deal under *Aspen Skiing*. The Supreme Court in *Trinko* and the Ninth Circuit in *MetroNet* emphasized that, for defendant's conduct to constitute a violation of a duty to deal under *Aspen Skiing*, the defendant must refuse to sell a product to the plaintiff even when the plaintiff offers to pay full retail price. *Trinko*, 540 U.S. at 409 (requiring "willingness to forsake short-term profits to achieve an anticompetitive end"); *MetroNet*, 383 F.3d at 1134 ("MetroNet does not fall within the *Aspen Skiing* exception to the general 'no duty to deal' rule, because [the defendant's change in pricing terms] . . . does not

entail a sacrifice of short-term profits for long-term gain from the exclusion of competition"); *see also* IIIB Areeda & Hovenkamp ¶ 772 at 224 (*Trinko* "limited liability for refusal to deal to those situations where the defendant was already selling some particular product or service to others but refused to sell the same product or service to the plaintiff."). The Ninth Circuit has explained why such a refusal is a required element of a cognizable Section 2 violation:

> The importance . . . relates to the Court's concern about the administrability of a judicial remedy. One of the reasons for a general "no duty to deal" rule is that enforced sharing "requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing-a role for which they are ill-suited." If the defendant already sells the product in an existing market to certain customers but merely refuses to sell to its competitors, the court can impose a judicial remedy that does not require the court to "assume the day-to-day controls characteristic of a regulatory agency." The court can simply order the defendant to deal with its competitors on the same terms that it already deals with others in the existing retail market, without setting the terms of dealing. In contrast, if the defendant does not already provide the product in an existing market or otherwise make it available to the public, the court will have to delineate the defendant's sharing obligations, and "[a]n antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations."

MetroNet, 383 F.3d at 1133 (quoting *Trinko*, 540 U.S. at 879, 883). Here, Plaintiffs have not alleged that Abbott ever refused to sell Norvir to *anyone* willing to pay Norvir's price, and certainly not to any of its competitors. They have therefore not alleged a cognizable refusal to deal.

Further, the Supreme Court and the Ninth Circuit have made clear that to violate a duty to deal under *Aspen Skiing*, the defendant must demonstrate a "willingness to forsake short-

term profits to achieve an anticompetitive end"—namely the exclusion of competitors in the long run. *Trinko*, 540 U.S. at 409; *MetroNet*, 383 F.3d at 1132 (finding that the fact that "Qwest was not forsaking short-term profits" showed that the *Aspen Skiing* exception did not apply); *see also* IIIB Areeda & Hovenkamp ¶ 772 at 223 ("[B]efore a unilateral refusal to deal is unlawful under §2, the refusal must be 'irrational' in the sense that the defendant sacrificed an opportunity to make a profitable sale only because of the adverse impact the refusal would have on a rival."); *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004) ("[A] refusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws, even if that refusal injures competition."). Plaintiffs do not allege that Abbott *raised* the price of Norvir to forsake short-term profits, or that its pricing conduct is otherwise economically irrational. Thus, their allegations fail this test as well.

In sum, the Meijer Plaintiffs and GSK fail to allege a cognizable antitrust duty on Abbott's part, let alone a cognizable refusal to deal. As the Seventh Circuit correctly recognized, "there is no refusal to deal" because "Abbott will sell to anyone willing to pay its price." *Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006). Plaintiffs' amended allegations of a supposed refusal to deal therefore cannot satisfy the anticompetitive conduct element of their Sherman Act claims.

D. Plaintiffs fail to allege predatory conduct to support a booster market monopolization claim.

The direct purchasers (but not GSK) assert a separate claim for monopolization of the booster market based on many of the same allegations that form the basis of theirs and GSK's boosted market claims. They allege that "Abbott deceptively induced rivals to forgo developmental alternatives and instead standardize around the use of Norvir for boosting purposes" and then raised the price of Norvir after competitors were "lock[ed] in."[6] Safeway SAC ¶ 74; Rite Aid SAC ¶ 72; Meijer SAC ¶ 79. They allege further that Abbott monopolized the booster market and created a duty to deal by "(a) voluntarily taking incremental price

[6] Revealingly, GSK does not even allege that it delayed production of alternative PIs, despite its incentive to make this allegation if it were true.

increases over many years even as market conditions changed; (b) encouraging manufacturers of other PIs to market their products for use in conjunction with Norvir; (c) licensing competitors to market other Boosted PIs for use in conjunction with Norvir; and (d) taking steps to ensure that Norvir became the standard PI booster in the United States." Meijer SAC ¶ 47; *see also* Safeway SAC ¶ 50 (omitting allegation in clause (a) above); Rite Aid SAC ¶ 48 (same). This claim, like the boosted market monopolization claim, also fails because none of the alleged conduct constitutes a recognized form of predatory conduct.

First, to the extent Plaintiffs are complaining that Abbott violated a duty to deal in Norvir, they have failed to state a claim for the reasons discussed above. *See supra* Section III.C. In any event, refusing to sell Norvir is implausible and illogical as a theory for monopolizing the boost*er* market. This is because it is difficult to understand how Abbott could monopolize a market by allegedly refusing to sell in that market, and in any event, were Norvir unavailable, it would encourage more competitors to enter into the booster market. For these additional reasons, Plaintiffs fail to state a refusal to deal claim in the booster market that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Second, to the extent Plaintiffs are complaining that Abbott monopolized the booster market by initially charging too low a price for Norvir, their claim runs counter to *linkLine* and the Ninth Circuit's decision in *Doe*. Those cases make clear that the antitrust laws do not prohibit prices that remain above cost. *See linkLine*, 129 S. Ct. at 1120; *Doe*, 571 F.3d at 934; *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) ("[A] plaintiff seeking to establish competitive injury resulting from a [defendant's] low prices must prove that the prices complained of are below an appropriate measure of [the defendant's] costs."). Thus, because Plaintiffs have not alleged that Norvir was ever priced below cost, they have failed to state a booster market monopolization claim based on Abbott's pricing of Norvir.

Third, to the extent Plaintiffs' booster market monopolization theory is based on allegations that Abbott encouraged rivals to market their products for use with Norvir and entered into licenses with those rivals, they have failed to allege a cognizable form of predatory conduct.

The mere act of licensing a patent does not violate the antitrust laws. On the contrary, licensing *increases*—rather than decreases—competition. Further, one of the "essential rights of a patentee" is the right "to license others." *United States v. Studiengesellschaft Kohle, m.b.H.*, 670 F.2d 1122, 1127 (D.C. Cir. 1981). "The right to license [a] patent, exclusively or otherwise, or to refuse to license at all, is 'the untrammeled right' of the patentee." *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 647 (9th Cir. 1981) (citation omitted).

Fourth, to the extent Plaintiffs' booster market monopolization claim depends on their allegations that Abbott took steps "to ensure that Norvir became the standard PI booster in the United States" (Meijer SAC ¶ 47), they have failed to allege any facts that would bring this case within the ambit of a Third Circuit case finding potential Section 2 liability for deceiving a standard-setting organization into adopting the defendant's technology as the industry standard. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 313 (3d Cir. 2007).[7] Plaintiffs do not allege that any official industry standard was ever adopted here. Abbott's licenses permitted manufacturers to promote their PIs with Norvir, but Plaintiffs do not allege that any official standard required competitors to do so, or that any standard prevented competitors from developing alternative boosters.

Moreover, whereas a standard-setting organizations' very role is to "make an objective comparison between competing technologies, patent positions, and licensing terms before an industry becomes locked in to a standard," *id.* at 309, nothing of the sort occurred here, because, as Plaintiffs allege, Norvir was the only available booster. As the D.C. Circuit has held, if a standard-setting body "would have standardized the very same technologies [regardless of a defendant's alleged deception], [that] deception cannot be said to have had an effect on competition in violation of the antitrust laws." *Rambus*, 522 F.3d at 466-67. The D.C. Circuit further held that even if the deception of the standards-setting organization allowed a defendant who is a lawful monopolist to charge higher prices than it otherwise could for its technology, that

[7] *But see Rambus Inc. v. FTC*, 522 F.3d 456, 466 (D.C. Cir. 2008) ("[T]o the extent that [*Broadcom*] may have rested on a supposition that there is a cognizable violation of the Sherman Act when a lawful monopolist's deceit has the effect of raising prices (without an effect on competitive structure), it conflicts with *NYNEX* [*Corp. v. Discon, Inc.*, 525 U.S. 128 (1998)].").

"is not as such an antitrust harm." *Id.* at 467.

In sum, Plaintiffs have failed to allege any recognized anticompetitive conduct in the booster market. Instead their amended complaints are an unsuccessful attempt to recast their square-peg allegatios to fit *linkLine* and *Doe's* round hole. Accordingly, they have failed to state a Sherman Act claim for monopolization of the booster market. *Trinko*, 540 U.S. at 407.

E. GSK's state antitrust claim falls with its Sherman Act claim.

GSK also asserts a violation of North Carolina's statutory prohibition on monopolization and attempted monopolization, N.C. Gen. Stat. § 75-2.1. *See* GSK AC ¶¶ 78-81. That statute has been interpreted to be co-extensive with the Sherman Act, so this claim falls with GSK's Sherman Act claim. *See R. J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362, 396 (M.D.N.C. 2002) ("Because Plaintiffs do not allege any facts that suggest that Defendant's conduct is unlawful beyond the conduct that is the basis for their failed federal claims, Plaintiffs' state . . . statutory claims [including under N.C. Gen. Stat. § 75-2.1] fail as well."); *Adams v. Aventis, S.A.*, No. 01 CVS 2119, 2003 WL 22015384, at *6 (N.C. Super. Aug. 26, 2003) (N.C. Gen. Stat. § 75-2.1 "mirrors the monopolization language used in the federal Sherman Act"). Indeed, this Court previously found that there is "no basis for the Court to apply a different antitrust standard [to the North Carolina claims] than that which it has applied to GSK's Sherman Act claim." 4/11/08 Order at 23.

F. GSK's State-Law Unfair Competition Claim Fails To The Extent It Turns On The Same Allegations Of Anticompetitive Conduct.

In Count 3, GSK also alleges that Abbott engaged in unfair and deceptive practices because, among other things, its actions "violate antitrust laws." GSK SAC ¶ 74. As discussed above, however, Plaintiffs' allegations do not state a viable claim for relief under the antitrust laws. This Court previously held in the motion to dismiss context that it would apply the same antitrust standard to North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), N.C. Gen. Stat. § 75-1.1, that it applies to GSK's Sherman Act claim. (4/11/08 Order at 23). Thus, dismissal of GSK's Sherman Act claim under the Ninth Circuit's ruling in the *Doe* case also dooms GSK's UDTPA claim to the extent it is based on the same allegations.

North Carolina courts have reached this same conclusion under similar circumstances. *See, e.g, R. J. Reynolds Tobacco Co.*, 199 F. Supp. 2d at 396 (M.D.N.C. 2002) (granting summary judgment on a deceptive trade practices claim because it merely alleged the same facts as a failed antitrust claim); *Sea-Roy Corp. v. Parts R Parts*, 1997 U.S. Dist. LEXIS 21809, 64 n.25 (M.D.N.C. Dec. 2, 1997) (dismissing UDPTA trade practices claim based on failed federal antitrust claims). This makes sense. If the law were otherwise, the UDTPA would chill conduct that is, or at least potentially is, *pro*-competitive—such as comparatively low, but not below-cost, pricing. Thus, the UDTPA claim cannot survive to the extent it is based on GSK's failed antitrust allegations.

IV. CONCLUSION

For the foregoing reasons, Abbott respectfully requests that this Court dismiss with prejudice the Second Amended Complaints filed by Safeway, et al., Rite Aid, et al., and Meijer, et al., and Counts 1 and 4 of the Amended Complaint filed by GSK.

DATED: September 10, 2009

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