

EXHIBIT 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE NO: 08-17699

JOHN DOE 1 and JOHN DOE 2, on
behalf of themselves and all
other persons similarly situated,

Plaintiffs-Appellees,

vs.

ABBOTT LABORATORIES,

Defendant-Appellant.

**CERTIFIED
TRANSCRIPT**

SERVICE EMPLOYEES INTERNATIONAL UNION
HEALTH AND WELFARE FUND, on behalf of
themselves and all other persons
similarly situated,

Plaintiffs-Appellees,

vs.

ABBOTT LABORATORIES,

Defendant-Appellant.

San Francisco, California
May 13, 2009

BEFORE:

PAMELA ANN RYMER, Circuit Judge
STEPHEN REINHARDT, Circuit Judge
MARY M. SCHROEDER, Circuit Judge

1 ARGUED BY:

2

3 On behalf of Defendant-Appellant:

4

JAMES F. HURST, ESQUIRE
WINSTON & STRAWN, LLP
Chicago, Illinois

6

7

8 On behalf of Plaintiffs-Appellees:

9

RICHARD R. WIEBE, ESQUIRE
LAW OFFICE OF RICHARD R. WIEBE
San Francisco, California

10

11

12

13

14

INDEX

15

16

PAGE

17

Argument by Mr. Hurst3

18

Argument by Mr. Wiebe17

19

Rebuttal Argument by Mr. Hurst31

20

21

22

23

24

25

1 (Transcription from audio file from
2 United States Court of Appeals for the Ninth
3 Circuit.)

4 - - -

5

6 Thereupon:

7 MR. HURST: May it please the Court.

8 Jim Hurst on behalf of Abbott

9 Laboratories.

10 JUDGE RYMER: Would you raise the
11 microphone a little and speak up, please.

12 MR. HURST: Absolutely.

13 JUDGE RYMER: Thank you.

14 MR. HURST: Jim Hurst on behalf of Abbott

15 Laboratories.

16 Abbott was entitled to summary judgment
17 below for any one of three independent reasons.

18 On plaintiffs' Sherman Act claim, they
19 failed as a matter of law, in our view, to
20 establish either exclusionary conduct, monopoly
21 power or antitrust injury.

22 If Abbott is correct in any one of those
23 three issues, we were entitled to summary
24 judgment.

25 I would like to start with the issue of

1 exclusionary conduct, where the question is
2 whether Abbott's unilateral pricing decisions
3 can qualify as exclusionary conduct as a matter
4 of law when there is no evidence nor allegation
5 of below-cost pricing.

6 Our view is the law is uniform and
7 unequivocal. LinkLine, Brooke Group,
8 Weyerhaeuser, Cascade. In a variety of
9 circumstances, whenever this Court or the
10 Supreme Court has addressed the issue, it has
11 found that pricing cannot be exclusionary unless
12 below cost. There is no recognized exception
13 either in this Court or in the Supreme Court.

14 I want to emphasize today three reasons
15 why this Court should not create a brand new
16 exception to the fundamental "below cost" rule.

17 First, without the "below cost" rule,
18 there is no meaningful way to determine whether
19 Abbott's pricing is exclusionary or not. This
20 Court or a jury would be forced into the role of
21 regulating prices, determining whether Abbott's
22 prices are sufficiently fair to pass muster
23 under the Sherman Act.

24 Look, right now, the difference between
25 Kaletra's price and Norvir's price is about 13

1 bucks, 22 for Kaletra, eight fifty-seven for
2 Norvir. Plaintiff's theory is: That's too
3 narrow. It disadvantages our rivals.

4 Well, what's the right difference? Is it
5 \$15? Is it \$18? Is it \$20? Who decides, and
6 on what basis? What criteria do you use to
7 determine if the pricing is exclusionary?
8 Below, neither the District Court nor the
9 plaintiffs offered any answer to that question.

10 This Court and the Supreme Court have
11 been crystal clear that antitrust rules ought to
12 be clear and predictable. The "below cost" rule
13 is the only test that provides a clear and
14 predictable rule, and it ought to apply.

15 Second. LinkLine, in our view, Your
16 Honors, controls. That case is analytically
17 indistinguishable from this case.

18 JUDGE RYMER: Well --

19 MR. HURST: Here --

20 JUDGE RYMER: How do you decide whether
21 it's analytically -- its rationale is
22 analytically the same?

23 Would you just clarify exactly what
24 Abbott does? My understanding is, basically,
25 that Abbott sells Kaletra, which is a

1 single-pill combination --

2 MR. HURST: True.

3 JUDGE RYMER: -- Norvir and its own
4 protease inhibitor, and it also sells at retail
5 Norvir as a stand-alone protease inhibitor.

6 MR. HURST: That's correct.

7 JUDGE RYMER: Is that correct?

8 MR. HURST: That is absolutely correct,
9 Your Honor.

10 JUDGE RYMER: To, to some extent, which I
11 don't understand, Norvir licenses its
12 competitors to, what, promote their own protease
13 inhibitors as -- with, with Norvir?

14 MR. HURST: Yes.

15 JUDGE RYMER: Is that right?

16 MR. HURST: Norvir is a --

17 There's a dual-ingredient product,
18 Kaletra, which includes Norvir's active
19 ingredient, plus a standalone --

20 JUDGE RYMER: Right.

21 MR. HURST: -- plus a protease inhibitor.

22 And also on the market is Norvir, which
23 is just this booster agent.

24 We, we, in fact, our -- It's our --

25 It's our product, Norvir is our product.

1 JUDGE RYMER: Yes, I understand.

2 MR. HURST: We license our competitors to
3 promote --

4 JUDGE RYMER: Promote it.

5 MR. HURST: -- actually encourage them to
6 promote the combination of Norvir, plus their
7 protease inhibitors, together.

8 JUDGE RYMER: But if you're a consumer,
9 you go into your pharmacy with a prescription
10 for a regimen that would include buying Norvir,
11 in effect, separately --

12 MR. HURST: That's right.

13 JUDGE RYMER: -- from the competitor's --

14 MR. HURST: That's right.

15 JUDGE RYMER: -- protease inhibitor.

16 MR. HURST: Yeah.

17 JUDGE RYMER: Right?

18 MR. HURST: That's exactly correct.

19 JUDGE RYMER: That is, at least
20 technically or structurally, a different
21 scenario from the classic price-squeezing which
22 occurs both at the wholesale level and at the
23 retail level.

24 MR. HURST: It is a difference, but it is
25 not a material difference in our view for the

1 following reason. The reason that our -- the
2 plaintiffs are saying that our rivals are
3 disadvantaged is because the difference in price
4 between Norvir and Kaletra is too narrow. It's
5 \$13. It doesn't give room for these standalone
6 protease inhibitors to profitably compete.
7 That -- That's the argument.

8 In linkLine, it was the exact same
9 argument. AT&T sold -- There was allegedly an
10 overly narrow difference between the wholesale
11 price for DSL and the retail price for DSL, and
12 that difference wasn't sufficiently wide to
13 allow rival DSL retail sellers to compete.

14 In our case, the consumer pays for
15 Norvir. In linkLine, the competitors paid for
16 wholesale DSL. But in both cases, the theory is
17 the same, that the differential isn't wide
18 enough to allow the competitors to compete
19 profitably.

20 In linkLine, the Supreme Court held that
21 the "below cost" rule applies. It ought to
22 apply here for the very same reason.

23 JUDGE RYMER: Okay. If that's correct
24 and if linkLine applies, controls, is there any
25 reason to go any further to consider monopoly

1 power in the boosted market, or to consider
2 antitrust injury, or to consider what the
3 appropriate measure of below-cost pricing is for
4 this case?

5 MR. HURST: This Court has the discretion
6 to go beyond --

7 JUDGE RYMER: That's not my question. I
8 understand that.

9 My question is, is there any need to?

10 MR. HURST: The answer to your question
11 is no. If you agree with us on the
12 below-cost -- that the "below cost" rule
13 applies, it would end this case. That's true.

14 The third reason, I just want to --

15 In terms of whether the "below cost" rule
16 applies, the plaintiffs haven't offered any
17 principal reason to create a new exception to
18 the "below cost" rule. Their main argument is
19 that the "below cost" rule ought not apply when
20 the case involves price increases. That's their
21 argument.

22 But Cascade, itself, involved price
23 increases. In PeaceHealth -- PeaceHealth was
24 the hospital there -- they raised their prices,
25 but they raised their prices less for the

1 bundled service than for the unbundled service,
2 thereby creating the discount that was
3 challenged. So that was a price increase test,
4 and yet, this Court held the "below cost" rule
5 applies.

6 Fundamentally, it also doesn't matter.
7 It's irrelevant whether the challenged price
8 structure resulted from a price increase or a
9 price decrease. Why?

10 Remember what the focus is. The question
11 is whether the price structure that's challenged
12 excludes an equally efficient competitor. That
13 turns on whether there is a marginal profit in
14 that competitor's continued or future sales,
15 i.e., it doesn't matter what the historical
16 structure was, whether it was higher or lower in
17 the past. The question is, does the current
18 structure exclude the equally efficient
19 competitor.

20 So, yes, the price -- the "below cost"
21 rule of course should apply regardless of
22 whether the case involves price increases or
23 price decreases.

24 Quick, before I move on to monopoly
25 power, very --

1 JUDGE REINHARDT: All right. Before you
2 do that, let me --

3 MR. HURST: Yes.

4 JUDGE REINHARDT: -- ask you one
5 question.

6 The Norvir itself, which is in this case
7 combined with something by your company and its
8 competitors -- and you license the use of Norvir
9 to the competitors -- you sell Norvir also as a
10 separate product? Is that --

11 MR. HURST: We do. That is correct, Your
12 Honor.

13 JUDGE REINHARDT: And what, what do
14 people do with the Norvir if the, you know, the
15 finished product seems to be the thing that
16 works well? What do they do with the Norvir?

17 MR. HURST: There's two choices for
18 patients out there. They can take Kaletra,
19 which is the booster, plus a PI, a
20 dual-ingredient drug --

21 JUDGE REINHARDT: Yes.

22 MR. HURST: -- and they work together.

23 Alternatively -- There's more than two
24 choices. But, alternatively, they can buy
25 Norvir from us and they can buy a competitor's

1 P.I. together and just take two pills.

2 JUDGE REINHARDT: Mm-hmm.

3 MR. HURST: In fact, that's what most
4 plaintiffs -- I mean, that's what most patients
5 are doing nowadays. They are taking Reyataz,
6 which is the number one prescribed P.I., along
7 with Norvir. So they just take two pills, and
8 they get the same effect, the boosting effect
9 from Norvir.

10 JUDGE RYMER: Mr. Hurst, just to clarify,
11 because I heard Judge Reinhardt ask, ask the
12 question somewhat differently, and that's why,
13 when I started out, I wanted to clarify what,
14 what was going on here.

15 He asked about a competitor's using
16 Norvir.

17 JUDGE REINHARDT: Mm-hmm.

18 JUDGE RYMER: And I understand they don't
19 use it, except they can promote it --

20 MR. HURST: That's exactly correct, Your
21 Honor.

22 JUDGE RYMER: -- as helpful to their own
23 protease inhibitor.

24 MR. HURST: That is -- You are exactly
25 correct.

1 The only license is --

2 JUDGE REINHARDT: They use it along with
3 their own product?

4 MR. HURST: The, the compet --

5 JUDGE REINHARDT: Two separate pills?

6 MR. HURST: Two separate pills.

7 The competitors don't actually use Norvir
8 themselves. All they have is a license to our
9 patent over Norvir, and we give them a right to
10 go out to the doctors and say: You ought to,
11 you ought to encourage your patients to use
12 Reyataz, a competitive P.I., and Abbott's Norvir
13 together.

14 So they encourage -- We, we license our
15 competitors to encourage that combination.

16 JUDGE REINHARDT: Okay.

17 MR. HURST: They're not actually using
18 Norvir itself, Your Honor.

19 JUDGE REINHARDT: I see.

20 MR. HURST: Now, let me turn to one quick
21 issue. There has been a lot of ink spilled in
22 the briefs about whether or not Kaletra is a
23 bundled product and, therefore, falls within the
24 Cascade case.

25 Just two quick points. One is that, in

1 our view, is a red herring. It's not relevant.

2 Whether Kaletra is a bundled product,
3 it's important only to determining how you
4 calculate below-cost pricing. That's all it's
5 relevant to. If Kaletra is a bundled product, a
6 Cascade-type calculation would apply. If
7 Kaletra is not a bundled product, a Brooke Group
8 type Cas -- calculation would apply. But in
9 either case, you have to show below-cost
10 pricing, and there is no evidence or allegation
11 of that in this case.

12 Monopoly --

13 JUDGE SCHROEDER: Do you think --

14 Let me just ask you a question.

15 The District Court relied on our Eastman
16 Kodak case for a market leveraging theory.

17 Let me just -- Do you -- Where do
18 you --

19 What validity do you think Eastman Kodak
20 still has, in what area, if any?

21 MR. HURST: We have our views that
22 Eastman Kodak was wrongly decided, but it's the
23 law --

24 JUDGE SCHROEDER: I understand that.

25 MR. HURST: -- in this, in this Circuit,

1 and so it remains the law. It just happens to
2 be irrelevant.

3 Eastman Kodak dealt with a different type
4 of exclusionary conduct, a refusal to deal.

5 Our case deals with pricing issues, and
6 there is no exclusionary conduct here. And
7 that's why Kodak does not control --

8 JUDGE SCHROEDER: Okay.

9 MR. HURST: -- in these circumstances.

10 Not only is there not a refusal to deal,
11 the idea was that us increasing Norvir's price
12 would force people to go elsewhere and not take
13 Norvir.

14 Well, Norvir's sales have quadrupled
15 since the price increase. So there has been no
16 refusal to deal. It's out in the marketplace in
17 enormous quantities.

18 I'm running out of time. Let me just
19 make three quick points on monopoly power that I
20 believe are definitive.

21 First, far from being a monopolist, our
22 competition has overtaken the market. Reyataz
23 is now the number one prescribed P.I., with
24 17 percent more prescriptions than Abbott's
25 Kaletra.

1 There is no case in Sherman Act history
2 where the number two player in the market has
3 been accused of monopoly, as far as we have been
4 able to determine.

5 Number two, our competitors are taking
6 market share from us in large volumes, despite
7 increasing their own prices. That is a sign of
8 not a market over which Abbott has a
9 monopolistic stranglehold, but rather a market
10 that we are losing rapidly.

11 Finally, and this is dispositive under
12 Rebel Oil, there is absolutely no evidence in
13 the record -- And I think it's agreed between
14 the parties, our competitors have the ability to
15 fully supply this market. That is dispositive.

16 A monopolist is a monopolist only if they
17 can, by reducing their own output, reduce
18 marketwide output. If the competitors can come
19 in and supply product to respond to a company's
20 efforts to reduce supply in the market, there is
21 no monopoly, by definition.

22 Here, our competitors are seven of the
23 largest pharmaceutical companies in the world.
24 It's agreed between the parties that they could
25 fully supply the marketplace and, in fact,

1 Bristol-Myers Squibb has quadrupled its output
2 since the Norvir price increase.

3 I'm going to reserve my remaining time
4 for rebuttal. Let the --

5 JUDGE RYMER: "The market" being the --

6 MR. HURST: Boosted.

7 JUDGE RYMER: -- boosters.

8 MR. HURST: As, as we accepted the
9 definition for purposes of summary judgment.

10 Thank you, Your Honor.

11 MR. WIEBE: Good morning, Your Honor.

12 Richard Wiebe for the plaintiffs in this
13 case, who are a class of HIV patients and health
14 plans who pay for their drugs.

15 The central question here is harmed
16 competition. A rational juror could easily find
17 from the evidence in the record that Abbott
18 harmed competition in the boosted P.I. market by
19 raising the price of Norvir 400 percent.

20 JUDGE RYMER: It strikes me that the
21 question is slightly different from that, that
22 the question is whether you've got a monopoly
23 leveraging theory that can stand by itself
24 without any showing either of exclusionary
25 conduct, like a refusal to deal, or predatory

1 below-cost pricing, neither of which has been
2 alleged or shown.

3 MR. WIEBE: Monopoly leveraging itself is
4 a form of exclusionary conduct.

5 By raising the price of Norvir here
6 400 percent, they were able to increase the cost
7 to consumers of using --

8 JUDGE RYMER: Sure --

9 MR. WIEBE: -- their competitor's
10 product.

11 JUDGE RYMER: -- so was (unintelligible).

12 I mean, so it's a -- so there's a price
13 squeeze. More so, it's a bundled discount.
14 Maybe this is kind of a hybrid of both, but it
15 sure walk -- you know, waddles and quacks like a
16 classic price squeeze.

17 I mean, that's the competitive effect, is
18 to put pressure on the competitors, right?

19 MR. WIEBE: No, Your Honor. With all due
20 respect, I think it's instructive to look at
21 Image Tech., this Court's decision in Image
22 Tech.

23 JUDGE RYMER: Well, Image Tech. isn't
24 worth, isn't worth anything in light of
25 linkLine, to the extent that it is not based on

1 a refusal to deal. LinkLine was a refusal to
2 deal case.

3 MR. WIEBE: LinkLine was not a monopoly
4 leveraging case.

5 Monopoly leveraging involves the use of
6 monopoly power in one market --

7 JUDGE RYMER: Sure.

8 MR. WIEBE: -- to monopolize a second
9 different market. You're taking that monopoly
10 power, you're extending it into a second market.
11 The products in the second market are no longer
12 competing on their merits.

13 One product, in this case Kaletra, is
14 being sheltered from head-to-head competition by
15 this extension of monopoly power.

16 In Kodak, the monopoly -- the two markets
17 were the market for parts for Kodak copiers, the
18 market for servicing those copiers. Kodak
19 refused to sell its parts to independent
20 servicers of those products. Therefore, Kodak's
21 service was no longer competing on its merits
22 with the service of those competitors because
23 they couldn't have access to the parts.

24 Now, look at the injunctive relief that
25 this Court approved in Kodak. What was it? It

1 was a requirement that Kodak not discriminate in
2 its pricing of its parts, that it sell the parts
3 to its competitors in the service market at the
4 same price that it sold them to its own
5 customers when it provided service.

6 Now, why is that important? It
7 illustrates that monopoly leveraging can be
8 exercised in a number of different ways. One
9 way of exercising your monopoly power in that
10 first market is to refuse to deal.

11 A second way, which this Court recognized
12 when it saw that it had to require
13 nondiscriminatory pricing, was that you can
14 exercise that monopoly power in the first market
15 simply by raising the price so high that you're
16 impairing the competition in the second market.

17 Those are both ways of leveraging your
18 monopoly power in that first market into the
19 second market.

20 LinkLine. LinkLine, there was no
21 monopoly in the second market, there was
22 attempted monopoly in the second market. What
23 were the two markets?

24 JUDGE RYMER: But you don't get there
25 unless there is some kind of exclusionary

1 practice or predatory pricing that's below an
2 appropriate measure of cost, which we don't have
3 to decide here.

4 MR. WIEBE: Predatory pricing is a
5 completely distinct theory. The --

6 JUDGE RYMER: Well, yes, but your --
7 I mean, here's the point, it seems to me.
8 Your, your claim is price-based.

9 MR. WIEBE: Our claim --

10 JUDGE RYMER: You're not claiming a group
11 boycott, you're not claiming a tie-in, you're
12 not claiming all sorts of other things that
13 might be exclusionary.

14 In fact, you're claiming a price-based
15 conduct and effect, right?

16 MR. WIEBE: I don't think that you can
17 lump all price, price-based conduct together,
18 Your Honor.

19 Predatory pricing is a distinct kind of
20 scheme where you're in -- you're operating in a
21 single market, you are trying to undercut the
22 prices of your competitors, drive them out of
23 the market, then come back and recoup it later.

24 The beauty of a monopoly leveraging
25 scheme from Abbott's point of view is they don't

1 have to cut their price. They didn't have to
2 cut their price of Kaletra. They can achieve
3 the same exclusionary conduct by --

4 JUDGE RYMER: It's not a question --

5 MR. WIEBE: -- raising the price of
6 Norvir.

7 JUDGE RYMER: -- of raising the price or
8 lowering the price. It's a question of whether
9 the price is below an appropriate measure of
10 cost, isn't it?

11 MR. WIEBE: No, Your Honor.

12 JUDGE RYMER: Okay. Well --

13 MR. WIEBE: Not in, not in a leveraging
14 case. It, it -- The --

15 And that's why it's so important to look
16 at linkLine and to realize that the two markets
17 there, the first market was the market for DSL
18 services. AT&T monopolized that. That was the
19 so-called upstream market.

20 The downstream market, where AT&T
21 competed with its distributors to whom it was
22 selling the DSL service, was the market for all
23 Internet services, that includes cable,
24 wireless. No monopoly there.

25 The Supreme Court says it in section --

1 in footnote two. And if you look at footnote
2 two, this is what is crucial. The Supreme Court
3 says if there had been monopoly power in that
4 second market, there would have been a
5 monopolization claim. That's the crucial
6 difference between this case and linkLine.

7 Monopoly leveraging remains the law of
8 this Circuit, it remains a viable claim.
9 LinkLine does not affect it because it was not a
10 monopoly leveraging case.

11 The -- This Court's decision in Cascade
12 does not control here for two reasons. The
13 first reason is Cascade [sic] is not a bundle of
14 separate products. Lopinavir cannot be sold
15 separately. It's illegal to sell it separately.
16 Abbott doesn't sell it separately.

17 Abbott's own financial analyst says it's
18 impossible to determine whether the cost of
19 Lopinavir -- what the cost of a hypothetical
20 Lopinavir pill would be. And without knowing
21 the actual cost of a hypothetical Lopinavir --
22 of an actual Lopinavir pill, you can't apply the
23 Cascade test.

24 Abbott's economic expert says Kaletra is
25 not a bundled discount.

1 Now, because Kaletra is not a bundle of
2 two separate products, that defeats the whole
3 policy purpose of the Cascade test, which is to
4 provide a bright-line rule.

5 Cascade says its test, quote, "provides
6 clear guidance," close quote, because, quote, "a
7 seller can easily ascertain its own prices and
8 costs of production to calculate whether its
9 discounting practices run afoul of the rule."

10 That's at page 907.

11 But that's not the case here.

12 There is no way a company in advance, or
13 a Court after the fact, can look at a
14 hypothetical cost that doesn't exist.

15 The second reason why Cascade doesn't
16 apply is the same reason linkLine doesn't apply.
17 Below-cost pricing and monopoly leveraging are
18 two fundamentally different types of harm,
19 market harm.

20 Cascade seeks to prevent the harm by
21 below-cost pricing that undercuts equally
22 efficient competitors and excludes them from the
23 market.

24 JUDGE SCHROEDER: Okay. Well, let me,
25 let me -- Let me ask this in a kind of

1 simple-minded way.

2 You represent people, essentially, who
3 purchase drugs, medicines.

4 MR. WIEBE: Yes.

5 JUDGE SCHROEDER: Now, the conduct here
6 that you are objecting to is Norvitra [sic] --
7 Abbott's essential -- has a, has a monopoly of
8 this product Novitra [sic].

9 MR. WIEBE: Norvir.

10 JUDGE SCHROEDER: Norvir, okay.

11 Norvir. I got all -- Norvir.

12 Now, the conduct that you objected to is,
13 is the increase in the price of that product,
14 which you say -- your claim is results in what?

15 MR. WIEBE: By exercising its monopoly
16 power over Norvir to raise it to a
17 super-competitive price, something that it could
18 only do because it had a monopoly in Norvir,
19 it's raising the cost of using -- Abbott is
20 raising the cost of using the products that
21 compete with Kaletra, the product -- the P.I.s
22 of other drug companies.

23 Norvir --

24 JUDGE SCHROEDER: Yes, but that really is
25 doing that because of the price increase of

1 Norvir.

2 MR. WIEBE: Yes.

3 JUDGE SCHROEDER: And we know that in a
4 market economy, if it -- increasing a price, you
5 know, is something that's done if you, if you
6 can, in order to make more money. So that can't
7 in and of itself be bad. And, and I'm having
8 trouble seeing, because, because the increase is
9 caused by the increase to Norvir, how we get
10 a --

11 It doesn't seem like there is really a --

12 MR. WIEBE: It be --

13 JUDGE SCHROEDER: -- from your purposes,
14 a separate market there to leverage into.

15 MR. WIEBE: Norvir is a separate market
16 and, for purposes of this appeal, that's
17 settled. That's not in dispute on appeal.
18 Norvir is one separate market.

19 JUDGE SCHROEDER: Well, I do understand
20 that.

21 MR. WIEBE: For boosted P.I.s is a second
22 market.

23 Where price hiking becomes objectionable
24 in a market economy is where you, is where you
25 have, first of all, a monopoly in the product

1 whose price you're raising, and second of all,
2 you're raising it for the purpose and with the
3 effect of impairing competition in an entirely
4 separate market. That's what happened in Kodak,
5 in the Image Tech. case.

6 JUDGE SCHROEDER: Well, but they say that
7 there's no, you know, there's really no
8 monopoly.

9 You haven't had any -- All, all that's
10 happened is that, that Norvir price has gone up,
11 but the -- but it -- the product that it's
12 producing in that second market is -- isn't --
13 hasn't, hasn't achieved any monopoly, and
14 because the other people are doing it better, it
15 so lost out.

16 MR. WIEBE: That's a question of monopoly
17 power. And that's a classic question of fact.

18 The, the District Court ruled that there
19 were fundamental factual disputes. We dispute
20 their market share calculations.

21 There is no doubt that, that when the
22 price hike occurred in December of 2003, Kaletra
23 had a monopoly market share in the boosted P.I.
24 market. It has continued to have that share --

25 JUDGE SCHROEDER: Yeah, but the booster

1 people --

2 MR. WIEBE: -- according to our expert.

3 JUDGE SCHROEDER: -- themselves are all
4 competing.

5 MR. WIEBE: They're competing --

6 JUDGE SCHROEDER: I mean, you --

7 MR. WIEBE: -- with the handicap of
8 having Abbott put a big ball and chain around
9 their legs, while Kaletra races ahead. Norvir
10 is that ball and chain.

11 Norvir is essential to using any of these
12 other boosted P.I.s. By raising the price of
13 Norvir, they have handicapped those competitors
14 in that entirely separate market, the boosted
15 P.I. market.

16 JUDGE REINHARDT: Well, it sounds like
17 bad policy to allow this, but it doesn't seem to
18 violate antitrust laws. As I understand it
19 anyway, the Supreme Court said that unless you
20 either claim there is a duty to sell to your
21 competitor -- which is not involved in this
22 case -- or unless your ultimate price is below
23 cost, there is nothing that violates the
24 antitrust law.

25 Now, it may -- There may be other laws

1 that should prohibit this type of conduct from
2 regulating drugs, but it doesn't seem to violate
3 the general policies of antitrust law.

4 MR. WIEBE: Here, I believe Your Honor is
5 referring to the linkLine decision. And it --
6 Again, it's essential that the Court go back and
7 look very closely at footnote two of linkLine.

8 Footnote two explains that there was
9 monopolization or threat of monopolization in
10 that second market. AT&T had a monopoly in the
11 first market, no monopoly power in the second
12 market.

13 JUDGE RYMER: Is there any decision in
14 any other circuit that supports this theory now?

15 MR. WIEBE: That supports monopoly
16 leveraging?

17 JUDGE RYMER: Yeah.

18 MR. WIEBE: It -- It is still
19 recognized in the Second Circuit, for example.

20 JUDGE RYMER: Since, since linkLine, has
21 anybody --

22 JUDGE SCHROEDER: What Circuit? I'm
23 sorry.

24 JUDGE RYMER: The Second.

25 MR. WIEBE: The Second Circuit.

1 But I, I do not believe there have been
2 any monopoly leveraging decisions post linkLine.
3 LinkLine just came out a little more than a
4 month ago, I believe. And --

5 But, again, the -- What the Supreme
6 Court says in that footnote is if there had been
7 monopoly power in both markets -- Which is what
8 we're alleging here and what the District Court
9 found we had demonstrated facts from which the
10 jury could find monopoly power in both markets.
11 The Supreme Court said if there's monopoly power
12 in both markets, then you can have a
13 monopolization claim.

14 That's the crucial distinction of
15 linkLine from this case.

16 And that's the whole purpose of monopoly
17 leveraging law, is to look at cases where that
18 monopoly power is being extended into a second
19 market to assist or to impair competition in
20 that market.

21 The --

22 JUDGE RYMER: You're in the red now.

23 MR. WIEBE: Yeah. Okay.

24 JUDGE RYMER: So, thank you.

25 MR. WIEBE: Thank you, Your Honor.

1 MR. HURST: Your Honors, I just want to
2 make three brief points.

3 First, Counsel has still not identified
4 any exclusionary conduct. He argued that
5 monopoly leveraging itself is a form of
6 exclusionary conduct. This Court rejected that
7 very argument in Alaska Airlines. The Supreme
8 Court rejected that very argument in Verizon
9 versus Trinko in 2004.

10 Point two. Counsel said that linkLine
11 doesn't control because it's not a monopoly
12 leveraging case. That's not correct. LinkLine
13 is a monopoly leveraging case. AT&T had a
14 monopoly over wholesale DSL, and they allegedly
15 used that monopoly, through pricing decisions,
16 to leverage a -- to leverage it to gain a
17 stranglehold over a different market that they
18 were allegedly attempting to monopolize, a
19 regional DSL market. That was the allegation.
20 It was a monopoly leveraging case.

21 Third, I understand that --

22 JUDGE RYMER: It came out of which
23 Circuit?

24 MR. HURST: It came out of this Circuit,
25 Your Honor.

1 JUDGE RYMER: Here?

2 MR. HURST: Yes.

3 Last point. Judge Rymer, you were
4 absolutely correct. You do not need to reach
5 all three issues in this case to end this
6 particular case. But, in your discretion, if I
7 can make a pitch --

8 There are copycat cases, seventeen
9 plaintiffs, allegations of damages exceeding a
10 billion dollars, where resolving the three
11 issues could potentially, as a matter of
12 judicial economy, end those cases definitively.

13 Thank you, Your Honors.

14 JUDGE RYMER: Thank you.

15 The case just argued is submitted for
16 decision.

17 (End of recording transcription.)

18

19

20

21

22

23

24

25

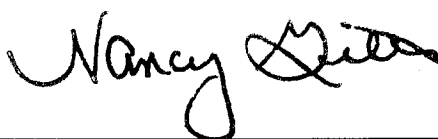
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

HEARING CERTIFICATE

I, NANCY GILBERT, Registered Merit Reporter, Registered Diplomate Reporter, Certified Realtime Reporter, Florida Professional Reporter, certify that I was authorized and did stenographically transcribe from an audio recording the foregoing proceedings, and that this transcript is a true record of my transcription of the recorded proceedings before the Court.

I further certify that I am not a relative, employee, attorney, or counsel for any of the parties nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 1st day of September, 2009.



NANCY GILBERT
Florida Professional Reporter
Registered Merit Reporter
Registered Diplomate Reporter
Certified Realtime Reporter