James F. Hurst *(Admitted Pro Hac Vice)*
David J. Doyle *(Admitted Pro Hac Vice)*
Samuel S. Park *(Admitted Pro Hac Vice)*
Stephanie S. McCallum *(Admitted Pro Hac Vice)*
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601-9703
Telephone: (312) 558-5600
Facsimile: (312) 558-5700
Email: jhurst@winston.com; ddoyle@winston.com; spark@winston.com; smccallum@winston.com

Nicole M. Norris (SBN 222785)
WINSTON & STRAWN LLP
101 California Street, Suite 3900
San Francisco, CA 94111-5894
Telephone: 415-591-1000
Facsimile: 415-591-1400
Email: nnorris@winston.com

Charles B. Klein *(Admitted Pro Hac Vice)*
Matthew A. Campbell *(Admitted Pro Hac Vice)*
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20007
Telephone: (202) 282-5000
Facsimile: (202) 282-5100
Email: cklein@winston.com

Jeffrey I. Weinberger (SBN 56214)
Stuart N. Senator (SBN 148009)
David M. Rosenzweig (SBN 176272)
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
Email: jeffrey.weinberger@mto.com; stuart.senator@mto.com; david.rosenzweig@mto.com;

Michelle Friedland (SBN 234124)
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, CA 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077
Email: michelle.friedland@mto.com

Attorneys for Defendant
ABBOTT LABORATORIES

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)

DEFENDANT ABBOTT LABORATORIES' REPLY BRIEF IN SUPPORT OF OMNIBUS MOTION TO DISMISS ANTITRUST CLAIMS IN PLAINTIFFS' AMENDED COMPLAINTS PURSUANT TO RULE 12(B)(6)

[THIS REPLY BRIEF RESPONDS TO OPPOSITION BRIEF OF DIRECT PURCHASER PLAINTIFFS ONLY]

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

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)

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The direct purchaser plaintiffs (hereafter, the "DP plaintiffs" or simply "plaintiffs") and GSK have filed separate briefs in opposition to Abbott's omnibus motion to dismiss their amended complaints. Abbott files this reply brief with respect to the DP plaintiffs' opposition brief. Abbott is filing a separate reply brief with respect to GSK's opposition brief.

I. INTRODUCTION

Abbott showed in its opening brief that, under the Ninth Circuit's holding in *Doe*, plaintiffs fail to state a claim. In *Doe*, the Ninth Circuit squarely held that *linkLine* "controls" in evaluating Abbott's conduct here. *John Doe 1 v. Abbott Labs.*, 571 F.3d 930, 933 (9th Cir. 2009). Therefore, to plead exclusionary conduct, the central element of any monopolization claim, plaintiffs would need to allege facts that would show either (1) a dangerous probability of recoupment and below-cost pricing of the Kaletra pill under the *Brooke Group* test, or (2) a duty-to-deal violation. *Id.* at 932, 934. Abbott showed in its opening brief that plaintiffs' amended complaints contain no factual allegations that would establish any of these points.

GSK's amended complaint fails to allege below-cost pricing under any standard, and the DP plaintiffs now concede that their complaints fail to allege facts that would establish recoupment or below-cost pricing of the Kaletra pill. In fact, the DP plaintiffs' amended complaints do not include any allegation of recoupment whatsoever, and their brief makes little mention of this requisite element. Instead, these plaintiffs' sole arguments are that (1) *linkLine* and *Doe* supposedly left open the possibility that exclusionary conduct could be found here based upon a *Cascade* analysis, and (2) Abbott violated a duty to deal under *Aspen Skiing*. The DP plaintiffs rely on GSK's briefing with respect to second of these two arguments (*See* Opp. at 12:19-20 ("As explained more fully in GSK's opposition, which plaintiffs here incorporate by reference . . ."), so Abbott responds to this argument in its reply to GSK's opposition brief and does not repeat that response here. The current brief responds to the first of the DP plaintiffs' arguments—that *linkLine* and *Doe* supposedly left open the possibility that exclusionary conduct could be found here based upon a *Cascade* analysis.

In making this argument, plaintiffs must also concede that the language of the *Doe* decision itself does not support their position. Indeed, plaintiffs concede that *Doe* found Abbott's

conduct here to be the "functional equivalent" of the "price squeeze" in *linkLine* (Opp. at 5:9-11), and "framed its discussion of the second factor emphasized in *linkLine* (below-cost pricing) primarily in terms of the single-product analysis [of below-cost pricing] set forth in *Brooke Group*" (Opp. at 7:7-9)—never stating that *Cascade*'s discount attribution test has any possible application to Abbott's conduct. Plaintiffs construct their argument against dismissal based upon an elaborate web of contentions about how one might read *Doe* and *linkLine* if the conclusion that *Cascade* should apply here were predetermined and the question was how best to get to that result.

As shown below, plaintiffs' contentions and their tortured readings of *Doe* and *linkLine* are untenable and should be rejected. The Ninth Circuit and the Supreme Court cannot be presumed to have meant something different from what they said in *Doe* and *linkLine*. The Court should therefore dismiss plaintiffs' amended complaints based on plaintiffs' concessions that their complaints fail to allege predatory pricing under *Brooke Group* and, as explained elsewhere, plaintiffs have failed to allege a cognizable refusal-to-deal claim.

II. ARGUMENT

A. Plaintiffs' Boosted Market Monopolization Claim Fails.

As just noted, it is now undisputed that the DP plaintiffs' amended complaints fail to allege monopolization of the boosted market based upon purported predatory pricing under the *Brooke Group* standard adopted by *Doe* for the conduct at issue here. For example, the DP plaintiffs have failed to allege the necessary element of a dangerous probability of recoupment. Further, Abbott is showing in its separate reply to GSK's opposition brief that plaintiffs make no viable allegation of a violation of an *Aspen Skiing*-based duty to deal here. As demonstrated below, the DP plaintiffs cannot save their claim of monopolization of the boosted market by arguing that *Cascade*, as opposed to *Doe* and *linkLine*, controls here.

1. *Doe* Squarely Precludes A *Cascade*-Type Predatory Pricing Claim Here.

As shown in Abbott's opening brief, *Doe* squarely precludes a *Cascade*-based predatory pricing claim here. The first argument section of plaintiffs' opposition brief is a discussion of

whether such a claim might survive *linkLine* that is written as if the Ninth Circuit had not already interpreted that decision and determined how it applies to Abbott's conduct here. But of course that is not the situation at all. As shown in Abbott's opening brief, the Ninth Circuit has specifically held that, under *linkLine*, "allegations of monopoly leveraging through pricing conduct in two markets" do not state a Section 2 claim "absent an antitrust *refusal* to deal (or some other exclusionary practice) in the monopoly market or below-cost pricing in the second market." *Doe*, 571 F.3d at 931 (emphasis added). The Ninth Circuit further explained that, "[w]hen predatory pricing is at issue, a plaintiff must 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 defendant will be able to recoup its investment in below-cost prices.*'" *Id.* at 934 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993)) (emphasis added).

The Ninth Circuit specifically considered and rejected the idea that another, "monopoly leveraging" analysis could apply here instead of the wholesale-retail price squeeze analysis in *linkLine* (with its *Brooke Group* standard for evaluating predatory pricing). As the Ninth Circuit stated:

> However labeled, Abbott's conduct is the functional equivalent of the price squeeze the Court found unobjectionable in *Linkline*. Abbott sells Norvir as a standalone inhibitor and as part of a boosted inhibitor instead of selling Norvir to its competitors at a high price for use with their own protease inhibitors while attributing a lower price to the product when used as part of its own boosted inhibitor. Either way, the alleged vice is that Abbott is using its monopoly position in the booster market to raise the price of Norvir while selling its own boosted inhibitor at too low a price. And either way, this puts the squeeze on competing producers of protease inhibitors that depend on Norvir for their boosted effectiveness and consumer acceptance.

Doe, 571 F.3d at 935.

In short, the Ninth Circuit has foreclosed plaintiffs' argument about how *linkLine* should not apply to Abbott's conduct here. In *Doe*, the Ninth Circuit squarely held that, for a predatory pricing claim to go forward here, it would have to satisfy the *Brooke Group* prerequisites that plaintiffs concede their complaints do not allege.

2. *linkLine* Rejects A *Cascade*-Type Imputed Price Analysis For Price Squeeze Claims.

Abbott also showed in its opening brief that plaintiffs' predatory pricing claim fails for the independent reason that, at least in the context of price squeezes and their functional equivalents, *linkLine* has specifically rejected the use of the sort of attribution or imputed price test set forth in *Cascade*. *linkLine* stated that such a test "lacks any grounding in our antitrust jurisprudence." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109, 1121-22 (2009). 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 (here Kaletra) to determine whether the product is priced below cost. *Id.* In response, plaintiffs deride the Supreme Court's clear statement as dictum, and argue that the issue of bundled discounts was not briefed in *linkLine*. (Opp. at 10:11-22.) But even were this true, "that would be of little significance because [Ninth Circuit] precedent requires that we give great weight to dicta of the Supreme Court." *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 683 (9th Cir. 2004). Plaintiffs' procedural arguments about the Supreme Court's rejection of an imputed price test only highlight that plaintiffs have no substantive basis to quarrel with the fact that the Supreme Court has spoken clearly on the issue. And plaintiffs have no below-cost pricing argument other than through reliance on *Cascade*'s imputed price test. They concede that they do not claim recoupment or that the Kaletra pill is priced below cost, both of which are required under *Doe*, *linkLine* and *Brooke Group*.

3. *linkLine* Involved A Bundled Product.

Plaintiffs claim that Kaletra should be viewed as a bundle of products rather than a single product. Plaintiffs then attempt to distinguish the low pricing at issue in *linkLine* from the Kaletra pricing at issue here based upon a characterization of the pricing at issue in *linkLine* as "the retail pricing of a single product (DSL service), *not* bundled discounting." (Opp. at 4:18-19 (emphasis in original).) This argument is meritless. Regardless of whether Kaletra should be viewed as a bundle, plaintiffs are wrong in arguing that *linkLine* could be distinguished as not involving a bundle. The operative complaint in *linkLine* specifically alleged that the retail product at issue in

that case was a bundle:

> Because PBI combines DSL with both online services and equipment (e.g., free modem), ***which PBI provides as bundled package to end use [sic] customers***, and because PBI has taken in excess of 80% of the DSL market, independent ISPs are under competitive pressure to meet defendants' prices and service combinations in the marketplace. When as here the monopolist wholesale prices are set too high relative to its low retail prices - indeed, here for period of substantial time defendants wholesale DSL transport prices charged to independent ISPs actually exceeded ***the retail price defendants charged end-users for providing a bundle package of DSL-Internet service and necessary equipment*** - independent ISPs are placed in a price squeeze that puts them at a seriously unfair disadvantage vis-a-vis the vertically integrated SBC monopoly entities and rendering those independent ISPs such as plaintiffs unable to compete with SBC defendants in the retail market for DSL service.

Joint Appendix, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, No. 07-512, 2008 WL 4055222, at *33 (¶ 20) (emphasis added) (U.S. Sup. Ct. Aug. 28, 2008); *see also linkLine Commc'ns, Inc. v. SBC Cal., Inc.*, 503 F.3d 876, 879 (9th Cir. 2007) (summarizing allegations of first amended complaint in *linkLine* as including allegation that "if defendants themselves charged their retail affiliates the same wholesale costs for DSL transport that they charged their wholesale ISP customers (such as plaintiffs), defendants could not cover their wholesale costs and make a profit from DSL service at their low retail prices for their ***bundled offering*** of DSL, Internet Service and necessary equipment (e.g., free modem and installation), that were in some cases, and for some period, even below the wholesale DSL transport cost") (emphasis added); *linkLine*, 129 S. Ct. at 1115 (Supreme Court characterizing claim as involving a price squeeze between a high wholesale price for "DSL transport" and "a low retail price for DSL Internet service"); *linkLine Commc'ns, Inc. v. SBC Cal., Inc.*, CV 03-5265 SVW, 2004 WL 5503772, at *2 (C.D. Cal. Oct. 20, 2004) (finding that the defendants sold "a bundled package," which combined DSL, online services, and equipment, to consumers)...

In short, to the extent that the current case involves a bundled product sold at a discount when compared to the price at which one component is sold separately, so did *linkLine.* Contrary to plaintiffs' argument, this case cannot be distinguished from *linkLine* on the basis that Kaletra is allegedly a bundled product that is sold at a discount from the price at which Abbott sells Norvir.

4. Plaintiffs' Allegations Of A Duty To Deal Are Irrelevant To The Standard for Evaluating their Predatory Pricing Claim.

As noted, the Ninth Circuit in *Doe* squarely stated: "we ***hold*** that no [Section 2] claim may be brought" for "monopoly leveraging through pricing conduct in two markets . . . absent an antitrust refusal to deal (or some other exclusionary practice) in the monopoly market or below-cost pricing in the second market," and further found that any claim of below-cost pricing in the second market should be evaluated under the *Brooke Group* standard. *Doe*, 571 F.3d at 931, 933-34 (emphasis added). Nevertheless, plaintiffs contend that what the Ninth Circuit really meant was that if there is an allegation of a duty to deal in the monopoly market, the claim of below-cost pricing in the second market can still be evaluated under the *Cascade* standard. In other words, separate and apart from the claim of a violation of an *Aspen Skiing* type duty to deal (refuted in Abbott's reply to GSK's opposition brief), the DP plaintiffs argue that their mere allegation of a duty to deal (regardless of whether there is a violation of that purported duty) fundamentally changes the standard under which the below-cost pricing claim is analyzed. This argument fails on multiple levels.

a. There is no basis for linking the existence of a duty to deal in the monopoly market to the question of the appropriate standard for analyzing below-cost pricing in the second market.

Doe's reasoning cannot be squared with a rule that would link the appropriate standard for analyzing below-cost pricing in what *Doe* called the second market to whether there was a duty to deal, allegedly violated or not, with respect to the product in the monopoly market. *Doe* held that, under *linkLine*, the two markets should be analyzed "separately." *Doe*, 571 F.3d at 934. *Doe* therefore discussed refusals to deal in the monopoly market, like below-cost pricing in the second market, as *independent* potential bases for satisfying the exclusionary conduct element of a monopolization claim. *Doe* never suggested that the appropriate test for whether actionable below-cost pricing exists in the second market should turn on whether one element of a refusal to deal claim with respect to the monopoly market is also present.

Plaintiffs likewise present no rationale for tying the potential applicability of *Cascade*'s discount attribution test to the question of whether there was a duty to deal in the monopoly market. *Cascade*'s stated rationale for using the discount attribution test (having to do with exclusion of equally efficient competitors) does not have anything to do with whether there was a duty to deal in the monopoly market. *See Cascade Health Solutions v. Peacehealth*, 515 F.3d 883 (9th Cir. 2008).

Plaintiffs' only apparent argument in support of their contention that *Doe* supports linking the question of the appropriate standard for determining whether there was predatory pricing in the second market to the question of whether there was a duty to deal in the monopoly market is that *Doe* was not intended to overrule *Cascade*. (Opp. at 8:12-13.) But Abbott has not argued that *Doe* overruled *Cascade*.[1] Abbott's argument on this point is merely that *Doe* held that that *linkLine* and *Brooke Group*, rather than *Cascade*, applies to Section 2 claims that involve price squeezes or their functional equivalents (which were not at issue in *Cascade* itself).[2]

b. Plaintiffs present no basis to ignore the Ninth Circuit's express reference to a "refusal" to deal in *Doe*.

Plaintiffs recognize that their argument runs into the hurdle that, in *Doe*, the Ninth Circuit stated its holding (as quoted at the beginning of this Section) in terms of whether there was a *refusal* to deal, not whether there was a *duty* to deal. So plaintiffs contend that the Ninth Circuit had "no reason to distinguish" between a "duty to deal" and a "refusal to deal" in *Doe*, and that the Circuit used the two phrases "interchangeably." (Opp. at 6:11-15.) This contention reflects a fundamental misunderstanding of *Doe*'s holding. In fact, the Ninth Circuit had every reason to

[1] It is a separate question whether *linkLine* overruled *Cascade*. As discussed in Section 2 above, at least in the context of price squeezes, *linkLine* does appear to have rejected the type of imputed pricing analysis that *Cascade* employs for bundled discounts, and that is a basis on which plaintiffs' complaints should fail. However, there are other independently-sufficient bases on which dismissal is necessary so the Court need not reach that issue.

[2] A price squeeze exists in the situation in which the products that compete in the second market depend for their utility at least to some extent on being used with the monopoly product. By contrast, products can be bundled together even if they have totally separate uses. For example, in *Cascade*, primary and secondary hospital care were bundled with tertiary hospital care. But primary and secondary hospital care can be used separate and apart from tertiary hospital care. Thus, *Cascade* involved bundling but not a price squeeze.

distinguish between the two phrases and every reason not to use the two phrases interchangeably.

The whole point of the Ninth Circuit's holding was to enumerate two particular forms of conduct that could potentially be considered exclusionary within the meaning of Section 2. It made sense for the Ninth Circuit, after using the phrase "refusal to deal" (*Doe*, 571 F.3d at 931), to add the parenthetical "(*or some other exclusionary practice*)" (*id.*), only because the Ninth Circuit was enumerating types of conduct that can be considered exclusionary. A refusal to deal can be an exclusionary practice; a duty to deal is not a practice at all, let alone a potential exclusionary practice. A duty to deal is merely a prerequisite to a finding of a refusal to deal. In other words, the phrase "duty to deal" clearly would not be interchangeable with the phrase "refusal to deal" in the Ninth Circuit's holding, and there is no basis for interpreting the Ninth Circuit to have meant to phrase its holding in terms of whether there was a duty to deal—a phrasing that would have been wholly contrary to the structure of that holding.

Thus, plaintiffs cannot get around the hurdle to their argument that the Ninth Circuit expressly phrased its holding in *Doe* in terms of whether there was a refusal to deal in the monopoly market, not in terms of whether there was a duty to deal in that market.

c. The existence of a "duty to deal" in the monopoly market cannot be a basis for scrutiny of prices that are not alleged to violate that duty.

Plaintiffs also cannot find support for their argument in *linkLine*'s reasoning. Plaintiffs emphasize *linkLine*'s recognition that if a defendant lacks an antitrust duty to deal, the defendant certainly can have no antitrust duty to deal on the pricing and other terms that a competitor would prefer. The first time that plaintiffs discuss the point (Opp at 4), they note only that if a defendant has an antitrust duty to deal, it cannot be said that there are *no* antitrust constraints on the terms on which the defendant must deal with a competitor. (Opp. at 4:1-13.) But this shows nothing of any relevance. So long as the defendant's pricing (and other terms of dealing) do not violate any alleged antitrust duty to deal, there are no further antitrust constraints on the terms on which the defendant must deal with a competitor.

Later in their brief, plaintiffs fundamentally transform this irrelevant argument into a much more substantial, but utterly misguided, claim. Plaintiffs once again start with *linkLine*'s recognition that if a defendant lacks an antitrust duty to deal, the defendant certainly can have no antitrust duty to deal on the competitor's preferred terms. (Opp. at 11:10-11.) But at this juncture, plaintiffs no longer merely contend that if there is an antitrust duty to deal, there must be some constraints on the terms on which a defendant will deal with its competitors. Instead, plaintiffs now contend that if the defendant "does not have the right under the antitrust laws to stop selling the monopolized product altogether, then the terms on which it sells may be subject to antitrust scrutiny." (Opp. at 11:12-14.) Plaintiffs present this argument in a single sentence. Plaintiffs call this the "converse[]" to the proposition in *linkLine*, and present it as if such a "converse[]" is self-evident.

But what plaintiffs mean by this supposed converse proposition is not just that, if there is a duty to deal, the antitrust scrutiny for the terms on which the defendant sells will extend to whether those terms constitute a violation of that duty. Rather, plaintiffs' contention—fundamental to their overall argument but not explicitly stated at the critical point at which they introduce the concept into their brief—is that, if there is a duty to deal, the antitrust scrutiny for the terms on which the defendant sells will extend beyond a determination of whether those terms constitute a violation of that duty.

This is a wholly unjustified leap of logic, presented with no support whatsoever. It is slipped into the argument as if it follows tautologically from what came before it. Of course, that is not true at all. There is no reason whatsoever to suppose that the bare existence of an un-violated duty to deal should create additional antitrust constraints on the pricing and other terms on which the defendant can choose to do business, let alone that an un-violated duty to deal changes the below-cost pricing test from that enunciated in *Brooke Group* to that enunciated in *Cascade*.

For example, in *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997),[3] the Ninth Circuit upheld a judgment that Kodak's refusal to sell spare parts for Kodak copies to independent sales organizations (ISOs) constituted an actionable refusal to deal under Section 2 of the Sherman Act. At the same time, however, the Ninth Circuit reversed that portion of the district judge's injunction that "impose[d] utility-like regulation of [Kodak's] prices." *Id.* at 1225. Notwithstanding that Kodak had an antitrust duty to deal with the ISOs, that duty meant only that Kodak had to sell to the ISOs at the same price that it was charging to others—so-called "nondiscriminatory pricing." With respect to the particular nondiscriminatory prices that Kodak would charge, however, the Ninth Circuit held that "Kodak should be permitted to charge all of its customers, including end users (both self-servicers and those under service contracts with Kodak), service companies contracting with Kodak, and ISOs, ***any nondiscriminatory price that the market will bear***." *Id. at* 1225-26 (emphasis added). In other words, the scope of the duty to deal defined the scope of the antitrust scrutiny that would be applied to Kodak's pricing. Because the scope of the antitrust duty to deal was limited to the issue of whether Kodak's prices were nondiscriminatory, the scope of the antitrust scrutiny of Kodak's pricing was likewise so limited.

Similarly, the Elhauge article on which plaintiffs rely (Opp. at 10 n.12) characterizes *linkLine* as having "held that a price squeeze was not illegal when the downstream price for a finished product [Here, Kaletra] exceeded cost unless the high upstream price [here, for Norvir] ***amounted to a constructive refusal to deal and*** the other conditions for a duty to deal were met." Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, at 69 (text accompanying n.197) (emphasis added) (forthcoming, 123 Harv. L. Rev., Dec. 2009), *available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/Elhauge_629_revised.pdf. In other

[3] Plaintiffs rely upon the Supreme Court's prior opinion in that case establishing that the plaintiffs were entitled to a trial on their claim that Kodak violated Section 2 by refusing to sell to them. (Opp. at 16:6-10.) But as discussed in the text, it is the Ninth Circuit's review of the judgment entered during that trial, rather than the Supreme Court's prior ruling, that is relevant to plaintiffs' argument here.

words, the existence of a duty to deal matters only to the extent that such a duty was violated—either by an outright refusal to deal in the monopoly product or by pricing that product so high that it had the same economic effect.

The same is true here. If there were a duty to deal in Norvir, that duty would only implicate the question of whether Norvir's pricing was so high that the Norvir pricing constituted a violation of that duty. It would not change the test for whether the price of Kaletra was below cost.

In sum, there is no authority whatsoever for plaintiffs' boot-strapping argument that the mere allegation of an un-violated duty to deal in Abbott's pricing of Norvir means that Abbott's pricing of Kaletra should be evaluated under *Cascade*'s discount attribution test rather than under the *Brooke Group* standard that *Doe* found applicable.

5. The Arguments Made By The Parties In *Doe* Are Irrelevant.

At the outset of their opposition brief, plaintiffs quote snippets of the *Doe* oral argument. Plaintiffs' apparent contention is that because Abbott argued that the Ninth Circuit could decide *Doe* in a way that would not dispose of the current cases, the Ninth Circuit must be interpreted to have decided *Doe* in such a manner. This argument is a *non sequitur*. The question is not, as plaintiffs contend, "how far the Court of Appeals needed to go to dispose of the *Doe* case." (Opp. at 1 n.1.) Rather, the question is how far the Court of Appeals *actually went in* disposing of the *Doe* case. And the answer to that question is supplied by the *Doe* decision itself, not by exchanges at oral argument that were uniformed by the as-yet-unwritten *Doe* decision.

Likewise, later in their opposition brief, plaintiffs quote Abbott's previous arguments in *Doe* to try to establish that Abbott took one position or another about how *Cascade* would or would not apply in various hypothetical scenarios. (Opp. at 9:1-18.) This is all irrelevant as well. Abbott made its arguments; plaintiffs made their arguments; and the Ninth Circuit determined which arguments were correct. Once again, it is the language of the *Doe* opinion that controls, not the arguments that the parties made. The same is true with respect to the arguments made in this litigation before the Supreme Court decided *linkLine*. Just as the Ninth Circuit recognized in *Doe*, "Time, and the United States Supreme Court, have overtaken this case." *Doe*, 571 F.3d at

933. Plaintiffs have amended their complaints to take account of the new legal landscape, and both parties are now making their arguments based upon the new legal landscape.

B. Plaintiffs' Booster Market Monopolization Claim Fails.

Plaintiffs cite not a single case—not one—to support their claim that Abbott's increasing the price of Norvir constitutes actionable monopolization of the alleged booster market. (*See* Opp. at 18-19.) Plaintiffs disclaim a variety of bases for this claim, and say only that the claim is based upon Abbott's "inducing potential competitors to forgo [sic] development of alternative boosters because they expected Abbott to continue making Norvir available to their patients on reasonable terms." (Opp. 18:18-20.) But this is at most a disguised way of stating that, previously, the pricing of Norvir was too low or that the new price of Norvir is so high that it constitutes an actual refusal to deal. But the former claim (too low previous Norvir pricing) would not be actionable without an allegation that the prior price was so low that it was below cost. And the latter claim (too high current Norvir pricing) would not be actionable without an allegation that the current price is so high that consumers are simply economically unable to purchase the product. Neither allegation has been made. There is no antitrust doctrine that a plaintiff can be prohibited from unilaterally raising the price of a product in which it has a monopoly because others have come to expect that the price will not be increased significantly (but not significantly enough to amount to an actual refusal to deal).

III. CONCLUSION

For each of the foregoing reasons, and the reasons stated in Abbott's moving papers and its reply brief with respect to GSK's opposition, this Court should grant Abbott's motion to dismiss the direct purchasers' amended complaints.

DATED: October 2, 2009

MUNGER, TOLLES & OLSON LLP
WINSTON & STRAWN LLP

By: */s/ Stuart N. Senator*
STUART N. SENATOR
Attorneys for Defendant Abbott Laboratories