IRELL & MANELLA LLP
Alexander F. Wiles (CA 73596) awiles@irell.com
Brian Hennigan (CA 86955) bhennigan@irell.com
Trevor V. Stockinger (CA 226359) tstockinger@irell.com
S. Albert Wang (CA 250163) awang@irell.com
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Telephone: (310) 277-1010
Facsimile: (310) 203-7199

ARNOLD & PORTER LLP
Kenneth A. Letzler (*Admitted Pro Hac Vice*) Kenneth_Letzler@aporter.com
Daniel S. Pariser (*Admitted Pro Hac Vice*) Daniel_Pariser@aporter.com
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

Attorneys for Plaintiff GlaxoSmithKline

[Additional Attorneys and Plaintiffs on Signature Page]

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,

v.

ABBOTT LABORATORIES,

Defendant.

Case No. C07-5470 (CW)
PLAINTIFFS' JOINT SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO ABBOTT'S OMNIBUS MOTION TO DISMISS ANTITRUST CLAIMS

Date: October 15, 2009
Time: 2:00 p.m.
Courtroom: 2 (4th Floor)
Judge: Hon. Claudia Wilken

MEIJER, INC. & MEIJER DISTRIBUTION, INC., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ABBOTT LABORATORIES,

Defendant.

(Caption continued on next page)

Case No. C 07-5985 CW

CONSOLIDATED CASE

PLAINTIFFS' JOINT SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO ABBOTT'S OMNIBUS MOTION TO DISMISS ANTITRUST CLAIMS

Date: October 15, 2009
Time: 2:00 p.m.
Courtroom: 2 (4th Floor)
Judge: Hon. Claudia Wilken

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, L.L.C., Plaintiffs, v. ABBOTT LABORATORIES, Defendant.	**Case No. C 07-6120 (CW)** **PLAINTIFFS' JOINT SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO ABBOTT'S OMNIBUS MOTION TO DISMISS ANTITRUST CLAIMS** Date: October 15, 2009 Time: 2:00 p.m. Courtroom: 2 (4th Floor) Judge: Hon. Claudia Wilken
SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE, Plaintiff, v. ABBOTT LABORATORIES, Defendant.	**Case No. C 07-5702 (CW)** **PLAINTIFFS' JOINT SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO ABBOTT'S OMNIBUS MOTION TO DISMISS ANTITRUST CLAIMS** Date: October 15, 2009 Time: 2:00 p.m. Courtroom: 2 (4th Floor) Judge: Hon. Claudia Wilken

Abbott's supplemental memorandum highlights the weakness of its position. It is a classic example of setting up, and knocking down, a straw man.

Abbott attributes to all Plaintiffs here the position that Plaintiffs "can state a claim for a violation of Section 2 *based on refusal to deal* by alleging that Abbott had an intent to monopolize, without identifying conduct that would be considered exclusionary (also referred to as 'predatory' or 'anticompetitive' in the case law)." Abbott Supp. Memo. at 1 (emphasis added). But, of course, Plaintiffs are not arguing that merely alleging an intent to monopolize is sufficient to state a claim based on a violation of a duty to deal. There is a long history of antitrust case law establishing that a monopolist's refusal to deal—or, as in this case, a drastic change in the terms on which it is willing to deal that unnecessarily handicaps or excludes its competitors— ***is*** exclusionary conduct capable of supporting a section 2 claim. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359 (1927); *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383 (1912). Thus, the very statement of Plaintiffs' position identifies the conduct that "would be considered exclusionary."

While Plaintiffs have never contended that proof of intent without exclusionary conduct is sufficient to state a claim under Section 2, it is well-established that evidence of intent is admissible, and often critical, in Sherman Act cases "because knowledge of intent may help the court to interpret facts and to predict consequences." *Bd. of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918). Thus, "[t]he intentions underlying the defendant's conduct have long played an important role in Sherman 2 [sic] cases." 1 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 242 (6th ed. 2007).

This proposition applies to claims, such as those at issue here, that the alleged monopolist has violated a duty to deal. The Supreme Court's opinion in *Aspen Skiing*, while acknowledging Ski Co.'s (and Abbott's) position that "an 'anticompetitive intent' does not transform nonexclusionary conduct into monopolization," 472 U.S. at 600, nevertheless emphasizes repeatedly the critical importance of Ski Co.'s intent in assessing the lawfulness of its challenged

conduct. *See id.* at 602 ("evidence of intent is . . . relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . . or 'predatory'"); *id.* at 605 ("[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory") (footnote omitted); *id.* at 608 (describing as "[p]erhaps most significant" Ski Co.'s failure to "persuade the jury that its conduct was justified by any normal business purpose"); *see also* GSK Opposition to Abbott Laboratories' Motion to Dismiss, Docket # 182, at 10-11. This is in accordance with longstanding antitrust case law. *See Lorain Journal*, 342 U.S. at 155 (a refusal to deal "as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act"); *Eastman Kodak*, 273 U.S. at 375 (Kodak's refusal to sell to competing retailer was "in pursuance of a purpose to monopolize").

It is exactly this use of evidence of intent that explains the language on which Abbott relies from *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 408-09 (2004). Abbott argues that, through this discussion, the Court has set out three specific requirements for claims based on allegations like those in *Aspen Skiing.* But, as counsel for GSK demonstrated in its opposition brief and at oral argument, the discussion in *Trinko* upon which Abbott relies was actually a search by the Court for anticompetitive intent that would justify viewing the defendant's failure to cooperate as sufficiently suspicious to warrant the kind of full evaluation of the record that occurred in *Aspen Skiing*. *See, e.g.*, 540 U.S. at 409 ("the defendant's prior conduct sheds no light upon the motivation of its refusal to deal"); s*ee also* GSK Opposition, at 15-17. Having found no such evidence in *Trinko,* the Court concluded that dismissal without a full examination of the record was appropriate. In this case, by contrast, Plaintiffs have provided ample, and highly specific, evidence of Abbott's anticompetitive intent.

None of the cases cited by Abbott in its Supplemental Memorandum calls into question the viability of Plaintiffs' claim that Abbott violated an antitrust duty to deal. Abbott cites those cases for the proposition, irrelevant here, that anticompetitive intent, standing alone, cannot result in a violation of section 2. *See* Abbott Supp. Memo. at 2 (referencing parts of *Rural Telephone Service Co., Inc. v. Feist Publications, Inc.*, 957 F.2d 765, 769 (10th Cir. 1992); *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990); and *Ocean State*

Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island, 883 F.2d 1101, 1113 (1st Cir. 1989), dealing with uses of intent "alone" or "standing alone"). What Abbott fails to say is that these cases recognize that, as Plaintiffs have consistently argued, the monopolist's intent does play a role in the liability determination where violation of a duty to deal is at issue, just as it does in other section 2 cases. *See Rural Telephone*, 957 F.2d at 768 & n.4 (observing that Tenth Circuit applies a two part test in such cases, assessing first the competitive effects of the challenged conduct then the motivation of the monopolist); *JamSports & Entm't, LLC v. Paradama Prods., Inc.*, 336 F. Supp. 2d 824, 842-43 (N.D. Ill. 2004) (explaining that *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986)—a Seventh Circuit case also cited by Abbott—does not contradict the proposition that the trier of fact is entitled to look to the defendant's intent in assessing whether its conduct had a valid business justification).

Abbott's supplemental brief adds nothing to its argument. Its motion to dismiss should be denied.

Dated: October 27, 2009

Respectfully submitted,

IRELL & MANELLA LLP

By: */s/ Alexander F. Wiles*

Alexander F. Wiles
Email: awiles@irell.com
Brian Hennigan
Email: bhennigan@irell.com
Trevor V. Stockinger
Email: tstockinger@irell.com
S. Albert Wang
Email: awang@irell.com
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Telephone: (310) 277-1010
Facsimile: (310) 203-7199

ARNOLD & PORTER LLP
Kenneth A. Letzler (pro hac vice)
Email: Kenneth_Letzler@aporter.com
Daniel S. Pariser (pro hac vice)
Daniel_Pariser@aporter.com
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

Counsel for Plaintiff GlaxoSmithKline

KENNY NACHWALTER, P.A.
Scott E. Perwin (pro hac vice)
Email: sperwin@kennynachwalter.com
Lauren C. Ravkind (pro hac vice)
Email: lravkind@kennynachwalter.com
1100 Miami Center
201 South Biscayne Boulevard
Miami, FL 33131
Telephone: (305) 373-1000
Facsimile: (305) 372-1861

Lead Counsel for Safeway Inc. et al.

HANGLEY ARONCHICK SEGAL & PUDLIN
Steve D. Shadowen (pro hac vice)
Email: sshadowen@hangley.com
Monica L. Rebuck (pro hac vice)
Email: mrebuck@hangley.com
30 North Third Street, Suite 700
Harrisburg, PA 17101-1701
Telephone: (717) 364-1007
Facsimile: (717) 362-1020

Lead Counsel for Rite Aid Corp. et al.

DILLINGHAM & MURPHY, LLP

William Francis Murphy
Email: wfm@dillinghammurphy.com
Barbara Lynne Harris Chiang
Email: bhc@dillinghammurphy.com
225 Bush Street, Sixth Floor
San Francisco, CA 94104-4207
Telephone: (415) 397-2700
Facsimile: (415) 397-3300

Local Counsel for Safeway Inc., et al., and Rite Aid Corp., et al.

BERGER & MONTAGUE, P.C.
Eric L. Cramer, Pro Hac Vice
Email: ecramer@bm.net
Daniel Berger
Email: danberger@bm.net
David F. Sorensen
Email: dsorensen@bm.net
1622 Locust Street
Philadelphia, PA 19103
Telephone: (215) 875-3000
Facsimile: (215) 875-4604

Lead Counsel for Rochester Drug Cooperative, Inc.

GARWIN GERSTEIN & FISHER, LLP
Bruce E. Gerstein, Pro Hac Vice
Email: bgerstein@garwingerstein.com
Joseph Opper, Pro Hac Vice
Email: jopper@garwingerstein.com
1501 Broadway, Suite 1416
New York, New York 10036
Telephone: (212) 398-0055
Facsimile: (212) 764-6620

Lead Counsel for Louisiana Wholesale Drug Co., Inc.

LIEFF, CABRASER, HEIMANN & BERNSTEIN LLP
Joseph R. Saveri (State Bar No. 130064)
Email: jsaveri@lchb.com
Eric B. Fastiff (State Bar No. 182260)
Email: efastiff@lchb.com
Brendan Glackin (State Bar No. 199643)
Email: bglackin@lchb.com
Jordan Elias (State Bar No. 228731)
Email: jelias@lchb.com
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Local Counsel for Rochester Drug Cooperative, Inc.

SPIEGEL LIAO & KAGAY, LLP
Charles M. Kagay (State Bar No. 73377)
Email: cmk@slksf.com
Wayne M. Liao (State Bar No. 66591)
Email: wml@slksf.com
388 Market Street, Suite 900
San Francisco, California 94111
Telephone: (415) 956-5959
Facsimile: (415) 962-1431

Local Counsel for Louisiana Wholesale Drug, Co. Inc.

KAPLAN FOX & KILSHEIMER LLP
Laurence D. King (SBN 206423)
Email: lking@kaplanfox.com
Linda M. Fong (SBN 124232)
Email: lfong@kaplanfox.com
350 Sansome Street, Suite 400
San Francisco, CA 94104
Telephone: (415) 772-4700
Facsimile: (415) 772-4707

Linda P. Nussbaum, *Pro Hac Vice*
Email: lnussbaum@kaplanfox.com
John D. Radice, Pro Hac Vice
Email: jradice@kaplanfox.com
850 Third Avenue, 14th Floor
New York, NY 10022
Telephone: (212) 687-1980
Facsimile: (212) 687-7714

Lead Counsel for Meijer, Inc. and Meijer Distribution, Inc.

Additional Counsel for Plaintiffs (Client Not Specified):

ODOM & DES ROCHES, LLP
John Gregory Odom, Pro Hac Vice
Email: greg@odrlaw.com
Stuart E. Des Roches, Pro Hac Vice
Email: stuart@odrlaw.com
John Alden Meade, Pro Hac Vice
Email: jmeade@odrlaw.com.
Suite 2020, Poydras Center
650 Poydras Street
New Orleans, LA 70130
Telephone: (504) 522-0077
Facsimile: (504) 522-0078

PERCY SMITH & FOOTE, LLP
David P. Smith, Pro Hac Vice
Email: dpsmith@psfllp.com
W. Ross Foote, Pro Hac Vice
Email: rfoote@psfllp.com
720 Murray Street
P.O. Box 1632
Alexandria, LA 71309
Telephone: (318) 445-4480
Facsimile: (318) 487-1741

KOZYAK TROPIN & THROCKMORTON
Tucker Ronzetti, Pro Hac Vice
Email: tr@kttlaw.com
Adam Moskowitz, Pro Hac Vice
Email: amm@kttlaw.com
2800 Wachovia Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2335
Telephone: (305) 372-1800
Telecopier: (305) 372-3508

AUBERTINE DRAPER ROSE, LLP
Andrew E. Aubertine, Pro Hac Vice
Email: aa@adr-portland.com
1211 SW Sixth Avenue
Portland, Oregon 97204
Telephone: (503) 221-4570
Facsimile: (503) 221-4590

LAW OFFICES OF JOSHUA P. DAVIS
Joshua P. Davis (State Bar No. 193254)
Email: davisj@usfca.edu
437A Valley Street
San Francisco, CA 94131
Telephone: (415) 422-6223

VANEK, VICKERS & MASINI, P.C.
Joseph M. Vanek, Pro Hac Vice
Email: jvanek@vaneklaw.com
David P. Germaine, Pro Hac Vice
Email: dgermaine@vaneklaw.com
111 South Wacker Drive, Suite 4050
Chicago, IL 60606
Telephone: (312) 224-1500
Facsimile: (312) 224-1510

SPERLING & SLATER
Paul E. Slater, Pro Hac Vice
Email: pes@sperling-law.com
55 West Monroe Street, Suite 3200
Chicago, Illinois 60603
Telephone: (312) 641-3200
Facsimile: (312) 641-6492

Pursuant to General Order No. 45, Section X, I attest under penalty of perjury that concurrence in the filing of this document has been obtained from Alexander F. Wiles.

Dated: October 27, 2009

By: */s/ S. Albert Wang*
S. Albert Wang
IRELL & MANELLA LLP
Attorneys for GlaxoSmithKline