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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.

(Caption continued on next page)

CASE NO. C 07-5470 (CW)

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

AMENDED NOTICE OF MOTION AND MOTION TO CERTIFY ISSUES FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(B)

Judge: **Honorable Claudia Wilken**
Date: **March 18, 2010**
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)**
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

PLEASE TAKE NOTICE THAT on March 18, 2010 at 2:00 p.m., or as soon thereafter as the matter may be heard in Courtroom 2, before the Honorable Claudia Wilken, in the United States District Court for the Northern District of California, Oakland Division, Abbott Laboratories will move this Court pursuant to 28 U.S.C. § 1292(b) to certify three issues for interlocutory appeal to the Ninth Circuit.

I. INTRODUCTION

Abbott Laboratories respectfully suggests that this Court's denial of its omnibus motion to dismiss Plaintiffs' antitrust claims is contrary to the letter and spirit of the Ninth Circuit's decision in *John Doe 1 v. Abbott Laboratories*, 571 F.3d 930, 933 (9th Cir. 2009). At a minimum, this Court's decision raises a "substantial ground for difference of opinion" on a "controlling question of law," and "an immediate appeal from [the Court's] order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). An interlocutory appeal of the Court's ruling is appropriate based on three controlling issues over which there is at least a substantial ground for disagreement:

1. Whether Plaintiffs have properly stated a predatory pricing antitrust claim even though they admittedly have not satisfied the standard set forth by the Supreme Court in *linkLine*, which requires allegations of a dangerous probability of recoupment and below-cost pricing for the retail product in the challenged market?

2. Whether Plaintiffs have properly stated a refusal-to-deal antitrust claim without any actual refusal to deal in the challenged market, based on the allegation that the combined pricing of products in two separate markets makes it difficult for rivals to compete?

3. Whether Plaintiffs can state an antitrust claim based on a theory that Abbott charged a low (but not below-cost) price for Norvir® to discourage innovation by rivals?

In *Doe*, the Ninth Circuit held that Abbott's pricing conduct—"[h]owever labeled"—did not amount to an antitrust violation as a matter of law. *Doe*, 571 F.3d at 935. On appeal, the *Doe* plaintiffs labeled that conduct "monopoly leveraging," while the direct purchasers (in an *amici* brief) and Abbott analogized the plaintiffs' theory to "bundled discounting" under *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008). The Ninth Circuit held that, "*[h]owever*

labeled," Abbott's pricing conduct was the "functional equivalent of the price squeeze the [Supreme] Court found unobjectionable" in *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, ___ U.S. ___, 129 S. Ct. 1109 (2009). *Doe*, 571 F.3d at 935.

The Ninth Circuit thus found that *linkLine* "controls the outcome here." *Id.* at 933. It accordingly held that the plaintiffs could state an antitrust claim only if they allege a "refusal to deal at the booster level" (Norvir®) or "below cost pricing at the boosted level" (Kaletra®), and that the plaintiffs had done neither. *Id.* at 935. The Ninth Circuit also made it clear that the standard two-prong test for predatory pricing applied here: "[G]iven Does' failure to allege the first prong of the test for a § 2 price-based claim (below-cost pricing), we have no need to reach the second (dangerous probability [of recoupment]) prong." *Id.* at 935.

When denying Abbott's omnibus motion to dismiss, this Court acknowledged that "*Doe* involved the same conduct alleged here" (1/12/10 Order at 6), and there is no dispute that the Plaintiffs have not satisfied the *linkLine* standard. But this Court nevertheless sustained the cause of action by holding that different standards apply in this case. Specifically, the Court found that *linkLine* does *not* control, that *linkLine*'s two-prong predatory pricing standard does not apply here, and that Abbott's conduct could properly be characterized as either "bundled discounting" under *Cascade* or a "refusal to deal" under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), even though the Ninth Circuit had held that the *Doe* plaintiffs' essentially identical allegations had not stated a refusal-to-deal claim.

There is at least a close question as to whether this decision conflicts with the Ninth Circuit's decision in *Doe*. First, this Court held earlier that these cases are "*not* governed by *Cascade*." (7/06/06 Order at 10 (emphasis added)). The Ninth Circuit essentially ruled the same way in *Doe*, noting that "[t]ime, and the United States Supreme Court, have overtaken this case" and that it was "understandable that the district court did not follow *linkLine* as at the time it ruled *linkLine* had not yet been decided." *Doe*, 571 F.3d at 931 n.1, 933. When addressing the exact same conduct—conduct the Court found "functionally equivalent" to a price squeeze "however labeled"—the Ninth Circuit held that if "predatory pricing is at issue" (as here), the "plaintiff *must demonstrate*" both below-cost pricing of Kaletra and a "'dangerous probability' that the defendant will be able to

recoup its 'investment' in below-cost prices." *Id.* at 934 (Supreme Court citations omitted) (emphasis added). In Abbott's view, the Ninth Circuit's mandatory language did not leave room for this Court to depart from that ruling where, as here, predatory pricing is alleged.

Second, in Abbott's view, this Court's refusal-to-deal ruling conflicts with *Doe*, as well as the Court's earlier observation in the *Doe* action that this "is not a failure to deal, or failure to cooperate, case." (*Doe*, 7/06/06 Order at 10). In response to Abbott's argument in its recent motion to dismiss that nobody has alleged it "refused outright to sell Norvir" (one of the best-selling HIV drugs in the United States), this Court found that Abbott has "essentially refused to deal" based on the claim that Abbott's pricing of HIV drugs in two distinct markets "placed GSK and Abbott's other competitors in the untenable position of selling their boosted [protease inhibitors ('PIs')] at a price that could not compete with Kaletra." (1/12/10 Order at 15). But that conduct is precisely what the Ninth Circuit described as a price squeeze, and the exact allegation the Ninth Circuit found insufficient in *Doe*—namely, that Abbott's conduct in these two markets "puts the squeeze on competing producers of protease inhibitors that depend on Norvir." *Doe*, 571 F.3d at 935. Merely labeling the same "price squeeze" conduct at issue in *Doe* a "refusal to deal" is not sufficient to avoid the Ninth Circuit's ruling.

This Court's refusal-to-deal ruling also conflicts with the Supreme Court's decision in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and the Ninth Circuit's holding in *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124 (9th Cir. 2004), which clarified what must be alleged to support a claim under *Aspen Skiing*. The Ninth Circuit in *MetroNet*, applying *Trinko*, held quite specifically that there was no refusal to deal under *Aspen Skiing* when, like here, there is neither the "sacrifice of short-term profits for long-term gain from the exclusion of competition" nor a "refus[al] to deal ... on the same terms that [the defendant] deals with direct consumers." *MetroNet*, 383 F.3d at 1134.

Finally, the Court's decision to sustain the direct purchasers' "booster market monopolization claim" depends upon an unprecedented antitrust theory that has no support in established antitrust jurisprudence. The Court found that this claim "assert[s] an antitrust theory based on deceptive conduct that induced reliance, a theory that was not at issue in either *Linkline* or *Doe*." (1/12/10

Order at 17). Abbott respectfully asserts, however, that there is no precedent for such an antitrust theory. It is truly novel and clearly inconsistent with cases recognizing that a monopolist is free to increase its price and, indeed, that such increased pricing is procompetitive because it stimulates new competition. Because the Court found that Plaintiffs can allege an antitrust theory based on the allegation that Abbott's low pricing for Norvir discouraged innovation, that ruling likewise conflicts with the holding in *Doe*, which held that "a § 2 price-based claim" must be based on below-cost pricing.

Resolution of these issues in Abbott's favor would defeat all antitrust allegations in these cases, mooting the need for a highly complex jury trial involving 18 plaintiffs, some on behalf of a greater class. Thus, an interlocutory appeal "may materially advance the ultimate termination of this litigation." 28 U.S.C. § 1292(b).

II. BACKGROUND

As discussed in the January 12 decision, Plaintiffs have attempted to characterize Abbott's conduct as either "bundled discounting," a "refusal to deal," or "deceptive conduct." According to all Plaintiffs, Abbott has refused to deal with its competitors by raising the price of Norvir substantially (in the "boosting market") without increasing the price of Kaletra (in the separate "boosted market"). They allege that this pricing combination made Kaletra comparatively less expensive than rival PI-Norvir combinations, thus preventing rivals from competing with Kaletra in the boosted market (a wholly implausible allegation since Kaletra has now fallen from the clear market leader in 2003 to a distant second to the Reyataz-Norvir combination.)

The direct purchasers, but not GSK, alternatively allege that Abbott has excluded competition in the boosted market by pricing Kaletra below its cost under the *Cascade* discount-attribution theory. They admittedly failed to allege below-cost pricing under the standard test adopted in *linkLine*. And, in any event, none of the Plaintiffs has alleged that Abbott has any likelihood of recoupment, meaning the ability to recoup its investment in its alleged below-cost pricing by driving competitors from the market and then raising Kaletra's price. *Doe*, 571 F.3d at 934.

The direct purchasers, but again not GSK, also allege "booster market monopolization" under

the theory that Abbott purportedly deceived its rivals by implying through historic pricing conduct that future Norvir price increases would be modest. They further allege—without any factual support—that these rivals delayed innovation of alternative PI boosters based on this purported deception, thus allowing Abbott to maintain a monopoly in the boosting market.

In an interlocutory appeal in the *Doe* case, which this Court authorized in part to help clarify the legal standards for the present cases, the parties here fully briefed the issue of whether Kaletra represented a bundled discount under *Cascade*. Before *linkLine* issued, Abbott's main point on appeal had been that Plaintiffs' theory was analogous to the bundled discount under *Cascade*, arguing for instance that "the fact that lopinavir is offered only as part of the bundled product Kaletra does not make Kaletra any less of a bundle and is not a legitimate basis for the district court's refusal to apply *Cascade's* controlling test." (Hurst Decl., Ex. 1, Abbott's App. Br. at 29). In their amicus brief, the direct purchasers likewise argued that "Abbott's conduct would be found anticompetitive under *Cascade*" had below-cost pricing been alleged in *Doe*. (*Id.*, Ex. 2, Amici Br. at 11).

The Ninth Circuit thus construed the very same pricing decisions at issue here and considered the same argument that *Cascade* applies to those facts, but held that the Supreme Court's "decision in *linkLine*, a price-squeezing case, … controls the outcome here." *Doe*, 571 F.3d at 933. The Court of Appeals found Abbott's pricing conduct the "functional equivalent of [a] price squeeze" where a wholesale monopolist charges a high price for the wholesale product while charging a low price for the retail product. *Id*. at 935. Rivals who need the high-priced wholesale product as an input to their retail product are "squeezed"—*i.e*., they cannot compete on price at the retail level. Here, Norvir is essentially a high-priced "input" sold in the boosting market, whereas Kaletra (which contains Norvir's active ingredient) is a low-priced retail product sold in the boosted market along with rival boosted PIs.

Applying *linkLine*, the Ninth Circuit held that Abbott's conduct in these two alleged markets must by "analyzed … separately" to determine whether a cognizable antitrust violation has been alleged. *Id.* at 934. Thus, Plaintiffs must allege either a refusal to deal with regard to Norvir's allegedly high price in the boosting market, or predatory pricing with respect to Kaletra's low price

in the boosted market. *Id.* Without limiting its holding to any particular kind of predatory pricing, the Ninth Circuit further held that "when predatory pricing is at issue, a plaintiff must demonstrate "(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.* (citing *linkLine*, 129 S. Ct. at 1118 & *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993)).

After the Ninth Circuit ruled, Plaintiffs amended their complaints essentially by just re-labeling the same conduct alleged in *Doe* as a refusal to deal and, in the direct purchaser cases, bundled discounting. Based primarily on *Doe* and *linkLine*, Abbott moved to dismiss. This Court acknowledged that "*Doe* involved the same conduct alleged here." (1/12/10 Order at 6). But it denied Abbott's motion because Plaintiffs were proceeding "on a different antitrust theory." (*Id.*).

With regard to the predatory pricing theory, the Court held that the Ninth Circuit's bundled discounting decision in *Cascade*, not *linkLine*, controls this case even though, as noted, this Court previously held that these cases are "*not* governed by *Cascade*." (7/7/2008 Order at 5 (emphasis added)). The Court's current holding that *Cascade* applies was important for two reasons. First, Plaintiffs alleged below-cost pricing only under *Cascade*'s specialized discount-attribution theory. They admittedly did not allege below-cost pricing under the *linkLine* standard, which rejected a *Cascade*-type method of determining below-cost pricing. Second, unlike in *Doe* and *linkLine*, *Cascade* noted as *dictum* in a footnote that recoupment is not a required element for showing exclusionary conduct in the bundled discounting context. *See Cascade*, 515 F.3d at 910 n.21. Plaintiffs admittedly never alleged any probability of recoupment.

With regard to the refusal-to-deal theory, this Court held "that liability under Section 2 can arise when a defendant voluntarily alters a course of dealing and 'anticompetitive malice' motivates the defendant's conduct." (1/12/10 Order at 13). The Court found that Plaintiffs satisfied this standard by alleging that Abbott altered a course of conduct (raising Norvir's price) with "anticompetitive malice" in the sense that Abbott allegedly wanted to improve market share by "imped[ing] its 'competitors' ability to compete with Kaletra" by making it comparatively less expensive. (*Id.* at 14).

Ultimately, the Court sustained this theory despite the absence of any actual refusal to deal. Because Norvir is among the highest-selling HIV drugs in the United States, Plaintiffs have not alleged, and cannot plausibly allege, that Abbott has *actually* "refused to deal" Norvir. Nor did Plaintiffs allege that any competitor to Kaletra has been driven out of the market by Abbott's price increase, or otherwise been unable to continue competing with Kaletra. This Court nevertheless found that Plaintiffs had alleged that "Abbott *essentially* refused to deal with its competitors" by charging a high price for Norvir and a low price for Kaletra—thus placing "GSK and Abbott's other competitors in the untenable position of selling their boosted PIs at a price that could not compete with Kaletra." (*Id.* at 15 (emphasis added)).

The *Doe* plaintiffs made the very same factual allegations. Yet, the Ninth Circuit found there was no issue about a purported "refusal to deal." This Court previously reached the same conclusion in the *Doe* case, finding that "*Aspen Skiing Co.*, involving a defendant's refusal to cooperate with its smaller rival, is inapposite. This is not a failure to deal, or failure to cooperate, case." (7/06/06 Order at 10).

III. ARGUMENT

The Court should certify for interlocutory appeal under § 1292(b) the issues addressed in its January 12 ruling—in particular, whether Plaintiffs have properly alleged predatory pricing, refusal-to-deal, and deception theories of exclusionary conduct.

A. This Court Should Certify For Interlocutory Appeal Three Controlling Questions Of Law On Which There Is Substantial Ground For Difference Of Opinion.

Certification under § 1292(b) is appropriate where, as here, there is a serious question as to whether a ruling on controlling questions of law conflicts with an interlocutory appellate decision. The Court should certify its decision for interlocutory review for this reason, and because an immediate appeal may materially advance the ultimate termination of this litigation. 28 U.S.C. § 1292(b); *see also In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982) (An issue is controlling if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court.").

There is a substantial, controlling question of law as to whether *Doe* and *linkLine* preclude

the Section 2 claims here, where Plaintiffs have failed to allege, among other things: (1) a dangerous probability of recoupment after below-cost pricing in the alleged boosted market and below-cost pricing under the *linkLine* standard; (2) a refusal to deal in the alleged boosting market independent of Kaletra's pricing in the boosted market, or (3) any form of anticompetitive conduct to support their claim of monopolization of the boosting market. These issues go to the heart of Plaintiffs' alternative theories of antitrust liability—predatory pricing and a refusal to deal. And all three issues, in Abbott's view, conflict with the *Doe* decision.

1. Whether Plaintiffs Properly Allege Predatory Pricing Is A Controlling Question Of Law On Which There Is Substantial Ground For Difference Of Opinion.

The first issue justifying certification is whether Plaintiffs' complaint can survive in light of *Doe*, which held that the *linkLine* standard controls. If Abbott prevails on this issue, it will defeat the direct purchasers' predatory pricing theory as a matter of law because they have made no attempt to allege recoupment or, for that matter, that Kaletra is priced below cost under the *linkLine* test.

There is, at the very least, a substantial ground for difference of opinion as to whether recoupment must be pleaded here. In Abbott's view, *linkLine* (which was decided after *Cascade*) could not have been more clear. It held that for *all* below-cost theories—not just price squeeze cases—recoupment allegations are required, broadly explaining that, "[t]o avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low"—exactly the allegations here—to cases where "(1) 'the prices complained of are below an appropriate measure of its rivals' costs'; *and (2) there is a 'dangerous probability' that the defendant will be able to recoup its 'investment' in below-cost prices*." *linkLine*, 129 S. Ct. at 1120 (citing *Brooke Group*, 509 U.S. at 222-24) (emphasis added). The Supreme Court applied these requirements to price-squeeze claims because "[r]ecognizing a price-squeeze claim where the defendant's retail price remains above cost would invite the precise harm we sought to avoid in *Brooke Group*: Firms might raise their retail prices . . . to avoid potential antitrust liability." *Id.* This concern applies directly here because raising Kaletra's price would eliminate Plaintiffs' claim entirely—*i.e.*, it would permit other boosted PIs to

compete on price with Kaletra.

The Ninth Circuit ruled the very same way in *Doe.* Using mandatory language, the Ninth Circuit stated, in addressing the same allegations, that "when predatory pricing is at issue, a plaintiff *must* demonstrate that … *there is a 'dangerous probability' that the defendant will be able to recoup its 'investment' in below-cost prices*." *Doe*, 571 F.3d at 934 (citing *linkLine*, 129 S. Ct. at 1118 & *Brooke Group*, 509 U.S. at 222-24) (emphasis added).

This Court nevertheless sustained the direct purchasers' predatory pricing theory without allegations of recoupment, finding that this case is governed by *Cascade*, not *linkLine* and *Doe*. In support, the Court cited Plaintiffs' allegation that "Kaletra, which contains lopinavir as well as ritonavir, constitutes a bundled product" and, therefore, "should be scrutinized" under *Cascade*. (1/12/10 Order at 8-9). In contrast to what Abbott believes is *Doe*'s binding holding, the Court instead followed *dictum* where the Ninth Circuit stated in a footnote in *Cascade* that it would "not require that a plaintiff plead dangerous possibility of recoupment, which is required in single-product pricing cases." (*Id.* at 9).

There are substantial grounds for difference of opinion about this Court's holding. First, when previously certifying the *Cascade* issue, this Court already held "there is substantial ground for a difference of opinion" about whether that case applied here. (*Doe*, 8/27/08 Order at 4-5). This is confirmed by other opinions from this Court. For instance, as noted, the Court previously held that the instant cases are "*not* governed by *Cascade*." (7/7/08 Order at 5 (emphasis added)). The Court similarly held that it is "far from clear" that this is a bundled discounting case, because it was "not readily apparent that Kaletra consists of two products at all":

> As an initial matter, it is far from clear that Abbott's sale of Kaletra represents a bundled discount. Consumers do not purchase Kaletra because it provides them with a way to save on two products they would otherwise have to purchase separately. In fact, it is not readily apparent that Kaletra consists of two products at all — ritonavir and lopinavir are combined in a single pill. Abbott does not offer lopinavir for sale independently of ritonavir; lopinavir is not licensed by the FDA for use

> except as part of Kaletra. Thus, it is not possible for Abbott to offer an actual discount on lopinavir when sold as part of Kaletra.

(4/11/2008 Order at 12). GSK likewise argued on appeal in *Doe* that "*Cascade*'s rule[] could not have been satisfied here precisely because Kaletra is not a bundle of two products sold separately." (Hurst Decl., Ex. 3, at 11). Plaintiffs' amended complaints added no additional allegations with regard to this issue. Certainly, the *Doe* decision did not make it more likely that *Cascade* applies here. Thus, this Court's finding of a substantial ground for difference of opinion before leads directly to the conclusion that there is such a ground here as well.

Second, in finding now that *Cascade* controls, the Court's reliance on Abbott's earlier arguments was erroneous. The Court noted: "In its previous omnibus motion to dismiss, Abbott agreed that *Cascade* controls in such cases." (1/12/10 Order at 9). But that was *before linkLine* issued in February 2009, and *before* the Ninth Circuit held that "[t]ime, and the United States Supreme Court, have overtaken this case," and that *linkLine* now "controls the outcome here." Since *Doe*, Abbott has maintained—consistent with the Ninth Circuit's decision—that *linkLine* controls. Moreover, Abbott certainly never agreed with the footnote in *Cascade* suggesting there may be no recoupment requirement. A party's prior argument, since superseded by a Supreme Court decision and intervening interlocutory decision, is no basis on which a court should determine the appropriate legal standard.

Third, even *Cascade*'s footnote does not support the conclusion that Plaintiffs escape the requirement of proving a dangerous probability that the defendant will raise prices after driving competitors from the market. In *Cascade*, the Court of Appeals devised a discount-attribution method of measuring below-cost pricing that captured even *above-cost* pricing on the bundled product, meaning, as the Ninth Circuit explained, "exclusionary bundling does not necessarily involve any loss of profits for the bundled discounter." *See Cascade*, 515 F.3d at 910 n.21. In that context, the court merely explained that it would make no sense to talk of "recouping" losses never incurred. This is all the court meant when stating that "we do not adopt the element of recoupment, which we think may be inapplicable in some cases." *Id.* There is absolutely no reason to believe the Ninth Circuit also intended to eliminate the need to show a dangerous probability that the defendant

would raise prices after driving competitors from the market—a point it made clear when noting that showing an "adverse effect on competition" was already part of the "pre-existing requirement of antitrust injury." *Id.* Plaintiffs here have made no such allegations, which go to the very purpose of the antitrust laws. *See Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) ("Though rivals may suffer financial losses or be eliminated as a result of the below-cost pricing, injury to rivals at this stage of the predatory scheme is of no concern to the antitrust laws," which are concerned only such schemes that "drive rivals from the market.").

Finally, this Court held that *Cascade*'s test for below-cost pricing for bundled goods applies, even though *linkLine* specifically rejected the use of the sort of discount 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. As the Court explained, such a test would be impractical, 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?" *Id.* The Supreme Court made clear that, rather than using an imputed-price test or any other test comparing wholesale and retail prices, 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.

The Supreme Court emphasized that "[i]f both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price happens to be greater than or equal to its retail price." *Id.* at 1122.

But Plaintiffs have failed to allege that either Norvir's price or Kaletra's price is independently unlawful—*i.e.*, without reference to the price of the other. Instead, they allege below-cost pricing based on a combination of independently lawful prices. The Supreme Court's rejection of the very type of "transfer price test" upon which Plaintiffs' predatory pricing claim relies raises, at a minimum, a close question as to whether the direct purchasers can rely on *Cascade*'s functionally equivalent discount attribution test.

2. Whether Plaintiffs Properly Allege A Refusal To Deal Is A Controlling Question Of Law On Which There Is Substantial Ground For Difference Of Opinion.

The second issue justifying certification is whether *Doe*, *linkLine*, and other precedents preclude a refusal-to-deal claim premised on the allegation that the combined pricing of products in two separate markets make it difficult for rivals to compete. The Court's ruling on this issue raises at least a close controlling issue of law.

As discussed above, the Ninth Circuit in *Doe* found that the plaintiffs in that case "allege[d] no refusal to deal *at the booster level*." *Doe*, 571 F.3d at 935 (emphasis added). Both *Doe* and *linkLine* emphasized that each market must be analyzed separately for exclusionary conduct. *See Doe*, 571 F.3d at 934-35. This Court did not find that the Norvir price increase, in and of itself, qualifies as a refusal to deal at the booster level. Nor could it have done so, given that Norvir is one of the highest selling HIV drugs in the United States. Instead, the Court found a refusal to deal "essentially" has been alleged here based on a combination of pricing in two separate markets—*i.e.*, the allegedly high price of Norvir at the booster level plus the allegedly low price of Kaletra at the boosted level. As the Court explained: "Here, the 400 percent price increase on Norvir placed GSK and Abbott's other competitors in the untenable position of selling their boosted PIs *at a price that could not compete with Kaletra*. By setting such unattractive terms, Abbott *essentially* refused to deal with its competitors." (1/12/10 Order at 14 (emphasis added)).

The Ninth Circuit construed this precise pricing conduct in *Doe* and found no cognizable antitrust claim. Rather, it held that Abbott's combination of pricing in the two markets was the functional equivalent of a "price squeeze" that the Supreme Court deemed lawful in *linkLine*,

regardless of how the facts are labeled:

> *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 (emphasis added).

Calling a "price squeeze" a "refusal to deal" does not make Plaintiffs' claims actionable. The *Doe* plaintiffs alleged: "By means of this staggering price hike, Abbott added drastically to the cost of regimens using Norvir to boost competing PIs.… In a *coup de grace* against competitors' PIs, Abbott did not raise the price of the Norvir used in its own Kaletra. As a result, Kaletra became the least expensive boosted regimen in the Boosted Market." (Hurst Decl., Ex. 4, Doe First Am. Compl. ¶¶ 20-21). Indeed, on appeal in *Doe*, GSK argued to the Ninth Circuit that "[t]he evidence in this case [*i.e.*, the *Doe* case] is sufficient to allow a trier of fact to conclude that Abbott has violated … *Aspen Skiing*…." (*Id.*, Ex. 3, at 9). But the Ninth Circuit held that the plaintiffs' allegations did not state a Sherman Act claim.

Even though Plaintiffs here allege a duty to deal in the boosting market (*i.e.*, Abbott's purported duty to allow rivals to market their PIs with Norvir), they allege no actual violation of the duty, let alone a *refusal* to deal *in the boosting market* as required by *Doe*. Again, the Ninth Circuit in *Doe* focused on whether Abbott's conduct constituted a "refusal to deal *at the booster level*." *Doe*, 571 F.3d at 935 (emphasis added). As the Ninth Circuit explained, "there is no independently cognizable harm to competition when the wholesale price [i.e., Norvir's price] and the retail price

[*i.e.*, Kaletra's price] are independently lawful." *Id.* at 934-35. In other words, there can be no antitrust violation unless Norvir's price increase itself constitutes a refusal to deal *in the boosting market*, or Kaletra's price is predatory in the boosted market: "Two wrong claims do not make one that is right." *Id.* at 934 (quoting *linkLine*, 129 S. Ct. at 1123); *see also id.* at 931 (rejecting monopoly leveraging theory "absent an antitrust refusal to deal (or some other exclusionary practice) *in the monopoly market* or below-cost pricing in the second market") (emphasis added).

Indeed, this is the essence of the holding in *linkLine*. The Supreme Court rejected the notion that a defendant's independently lawful conduct in two markets could be combined to support an antitrust claim:

> It is difficult enough for courts to identify and remedy an alleged anticompetitive practice at one level, such as predatory pricing in retail markets or a violation of the duty-to-deal doctrine at the wholesale level…. Recognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. And courts would be aiming at a moving target, since it is the *interaction* between these two prices that may result in a squeeze.

linkLine, 129 S. Ct. at 1121 (emphasis in original); *see also Doe*, 571 F.3d at 934 ("The Court [in *linkLine*] analyzed each market separately.").

Despite this holding, Plaintiffs' entire refusal-to-deal theory hinges on the interaction of Abbott's pricing conduct in two markets. Plaintiffs argue that a "refusal to deal" occurred based solely on the notion that Norvir's allegedly high price in the boosting market *in combination with Kaletra's allegedly low price in the separate boosted market* makes it difficult for rivals to price-compete in the boosted market. Plaintiffs allege no refusal to deal "at the booster level" as required by *Doe*. *Doe*, 571 F.3d at 935. Accordingly, they are still alleging a mere price squeeze, which both *linkLine* and *Doe* have held is *not* an antitrust violation.

The Court's ruling also raises an independently close question as to the elements of a refusal-to-deal claim. This Court relied primarily on *Aspen Skiing*, but more recent Supreme Court and

Ninth Circuit decisions have addressed—and sharply limited—*Aspen Skiing*'s reach. In *Trinko*, the Supreme Court confirmed the general rule that a firm has the right "freely to exercise [its] own independent discretion as to parties with whom [it] will deal." *Trinko*, 540 U.S. at 408. While the Supreme Court explained that *Aspen Skiing* is the leading case that establishes an exception to this general rule, it emphasized: "We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Id.* As a result, the Court held that *Aspen Skiing* must be narrowly construed because it "is at or near the outer boundary of § 2 liability." *Id.* at 409.

Following *Trinko*, the Ninth Circuit also expressly limited *Aspen Skiing* in *MetroNet.* In *MetroNet*, Quest selectively eliminated a volume discount on phone lines for the express purpose of preventing wholesalers (which bought in bulk under the volume discounts for resale) from competing at the retail level. *MetroNet*, 383 F.3d at 1132. The Ninth Circuit rejected the refusal-to-deal claim for the very same reasons that Abbott argued in this case:

> In sum, MetroNet does not fall within the *Aspen Skiing* exception to the general "no duty to deal" rule, because Qwest's switch to per location pricing does not entail a sacrifice of short-term profits for long-term gain from the exclusion of competition and because Qwest has not refused to deal with MetroNet on the same terms that it deals with direct consumers. Therefore, MetroNet does not have an actionable antitrust claim under the Supreme Court's existing refusal to deal precedents as explained and limited by Verizon.

Id. at 1134. Here, there is no allegation of either sacrificing short-term profits (Norvir's price hike *increased* Abbott's profits on Norvir), or a refusal to sell to competitors at the same price it sells Norvir to consumers. As Judge Easterbrook noted in *Schor*, "Abbott will sell to anyone willing to pay its price: there is no refusal to deal." *Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006).

Even though Plaintiffs' theory flunks the *MetroNet* test, this Court relied on *Aspen Skiing* to find that "liability under Section 2 can arise when a defendant voluntarily alters a course of dealing and 'anticompetitive malice'"—shown through internal "documents and emails"—"motivates the

defendant's conduct." (1/12/10 Order at 13-15). Abbott submits that the Court's standard cannot be the law because it is overbroad. It could cover virtually any change in business strategy designed to beat rivals in the marketplace, including the very conduct found not actionable in *MetroNet* and *Trinko*. Here, for instance, the alleged "anticompetitive malice" was simply that Abbott's pricing decisions were supposedly designed to increase Kaletra's market share through lower comparative prices. But an intent to increase market share based on lower prices is standard fare in the business world and does not distinguish between aggressive competition (encouraged by the antitrust laws) and anticompetitive conduct (which is prohibited). For that reason, allegations of intent to steal market share were adjudged legally insufficient to state a refusal-to-deal claim in both *MetroNet* (where Quest eliminated a volume discount to take retail business from MetroNet) and *Trinko* (where Verizon allegedly denied adequate access to DSL infrastructure to reduce retail DSL competition). *MetroNet*, 383 F.3d at 1132-34; *Verizon*, 540 U.S. at 407-11.

For all of these reasons, at the very least there is a substantial ground for difference of opinion as to whether Plaintiffs have pleaded a cognizable refusal to deal given *linkLine*, *Doe*, *Trinko* and *MetroNet*.

3. Whether Plaintiffs Properly Allege A "Deceptive Conduct" Antitrust Theory Is A Controlling Question Of Law On Which There Is Substantial Ground For Difference Of Opinion.

The third issue justifying certification is whether the Court's finding that the direct purchasers have adequately alleged a booster market monopolization theory raises a substantial ground for difference of opinion. Abbott believes that it does. Indeed, Abbott has not found—and neither Plaintiffs nor this Court have cited—a single decision holding that the antitrust laws can prevent a purported monopolist from raising the price of a patented product because rivals purportedly relied on historic low pricing for that product.

In Abbott's view, this novel booster market monopolization theory conflicts not just with *Doe*'s requirement that "a § 2 price-based claim" be supported with an allegation of predatory pricing, which is not alleged under this theory, but also basic antitrust jurisprudence. As the D.C. Circuit explained: "The rare case of price predation aside, the antitrust laws do not condemn even a

monopolist for offering its product at an attractive price." *United States v. Microsoft Corp*., 253 F.3d 34, 68 (D.C. Cir. 2001). Consistent with this basic tenet of antitrust law, the Ninth Circuit in *United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990), rejected the notion that unlawful monopolization occurs when a defendant "offer[s] a better product at a lower price." *Id*. at 663. As the Court of Appeals put it: "When a producer deters competitors by supplying a better product at a lower price, when he eschews monopoly profits . . . , the goals of competition are served, even if no actual competitors see fit to enter the market at a particular time." *Id*. at 668 (emphasis added).

The law also is well established that allegations of deception, or of business torts generally, do not state an antitrust claim. *See Brooke Group*, 113 S. Ct. at 2589; *Nynex Corp. v. Discon, Inc.*, 119 S. Ct. 493, 499 (1998). And, with regard to Abbott's decision to raise Norvir's price, courts have recognized that charging monopoly prices within a lawfully-obtained monopoly is not actionable. As the Supreme Court explained in *linkLine*: "Simply possessing monopoly power and charging monopoly prices does not violate § 2." 129 S. Ct. at 1118. To the contrary, the ability to charge monopoly prices provides an affirmative incentive to innovate and, in that sense, is pro-competitive. *E.g., Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 549 (9th Cir. 1991) ("Every act exploiting monopoly power to the disadvantage of the monopoly's customers hastens the monopoly's end by making the potential competition more attractive.").

It thus makes sense to certify this close controlling issue of law for appeal as well before proceeding to a resource-intensive jury trial involving classwide allegations alleging more than a billion dollars in damages. *See Paiute-Shoshone Indians v. City of L.A.*, 2007 U.S. Dist. LEXIS 56904 (E.D. Cal. July 27, 2007) (finding substantial grounds for difference of opinion when no other cases "concerned factual circumstances similar enough to this case to provide clear guidance").

B. Immediate Appeal May Materially Advance The Ultimate Termination Of This Litigation.

Resolution of these issues through interlocutory appeal most certainly could materially advance the ultimate termination of this litigation. As this Court has noted in the related cases, "[w]hether an appeal may materially advance the litigation is linked to whether an issue of law is 'controlling' in that the court should consider the effect of a reversal on the management of the

case." (*Doe*, Related Case No. 04-1511, 7/7/08 Order at 3). As discussed above, the issues for appeal are controlling in that they go to the heart of Plaintiffs' antitrust theories. Reversal by the Ninth Circuit on the issues Abbott proposes be certified for appeal would resolve the antitrust claims asserted in this case, thus avoiding an incredibly complex and lengthy jury trial involving 18 defendants and a class action on myriad issues of law and fact.

In Abbott's view, particularly given the Ninth Circuit's mandatory language ("must demonstrate"), these cases cannot proceed unless they comply with the *Doe* standard. *Doe*, 571 F.3d at 934. This Court concluded, by contrast, that the Ninth Circuit left open the option of declining to follow *linkLine*'s standard. Under these circumstances, the most sensible and efficient course is an interlocutory appeal. That way, before spending the enormous resources it will require to litigate this massive consolidated case, the parties and this Court can quickly determine for sure whether this case can proceed under different standard than the *Doe* standard.

At a minimum, guidance on these controlling issues from the Court of Appeals at this procedural juncture would substantially mitigate the very real possibility of a retrial. The Court made this very point when it previously certified issues for interlocutory appeal in *Doe*. It held that resolving questions about *Cascade*'s application to the facts of this case "on appeal would … be helpful in clarifying the issues in the related antitrust cases brought against Abbott by direct purchasers and by one of its competitors." (*Doe*, 8/27/08 Order at 5). This is particularly true here, given "the novelty of the legal theories presented in this case and the lack of precedent directly on point" supporting any of the Plaintiffs' legal theories. (*Id.*).

Importantly, an interlocutory appeal is unlikely to result in any material trial delay. Abbott would be willing to join Plaintiffs in a motion to expedite the interlocutory appeal in the hope of minimizing any effect on the trial date, which is more than a year away (February 28, 2011). As a point of reference, the *Doe* interlocutory appeal was certified and decided in less than a year. There is good reason to believe that the Ninth Circuit, which already is familiar with this case, can address these discrete issues and clarify the scope of its *Doe* decision in an even shorter period of time. To the extent any delay in trial even occurred, the delay would be modest. Thus, the proposed interlocutory appeal falls squarely within the purpose of § 1292(b), which should be invoked to

"avoid protracted and expensive litigation." *In re Cement Antitrust Litigation*, 673 F.2d at 1026.

IV. CONCLUSION

For the foregoing reasons, the parties respectfully request that this Court certify for interlocutory appeal three issues addressed in the January 12 decision.

Respectfully submitted,

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