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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

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

Plaintiffs,

vs.

ABBOTT LABORATORIES,

Defendant.

Case No. C07-5470 (CW)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO ABBOTT'S MOTION TO CERTIFY ISSUES FOR INTERLOCUTORY APPEAL

Date: N/A
Time: N/A
Courtroom: N/A
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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO ABBOTT'S MOTION TO CERTIFY ISSUES FOR INTERLOCUTORY APPEAL

CONSOLIDATED CASE

Date: N/A
Time: N/A
Courtroom: N/A
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' MEMORANDUM IN OPPOSITION TO ABBOTT'S MOTION TO CERTIFY ISSUES FOR INTERLOCUTORY APPEAL

Date: N/A
Time: N/A
Courtroom: N/A
Judge: Hon. Claudia Wilken

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Abbott's motion to certify the Court's January 12, 2010 ruling for interlocutory appeal continues its practice of rehashing arguments the Court has convincingly and correctly rejected. The motion is a procedural reflex, based on recycled briefs (as evidenced by Abbott's assertion that an interlocutory appeal in this case could avoid "an incredibly complex and lengthy jury trial involving 18 defendants" and that "the parties" are seeking certification under section 1292(b)).[1] Abbott's motion should be denied.

The issues on which Abbott seeks interlocutory review are not close questions. Notwithstanding Abbott's long and confusing presentation of the issue, the first issue identified in Abbott's motion boils down to a single, straightforward question: Did *linkLine* overrule *Cascade*? The answer to that question is "no." *linkLine* dealt with single-product predation and did not purport to address, much less resolve, the appropriate antitrust analysis of bundled discounting. The Court of Appeals has already recognized that *Cascade* continues to be the controlling precedent regarding bundled discounting in this Circuit. *See Masimo Corp. v. Tyco Health Care Group, L.P.*, Nos. 07-55960 & 07-56017, 2009 WL 3451725 (9th Cir. Oct. 28, 2009). And Abbott *does not dispute* that Plaintiffs have alleged below-cost pricing under the economic and legal standards set forth in *Cascade*.

Likewise, there is no substantial ground for difference of opinion as to whether Plaintiffs have stated a claim under *Aspen Skiing*. As the Court recognized, Plaintiffs' allegations are perfectly analogous to the facts found sufficient to support a section 2 claim in *Aspen Skiing*, which itself involved an offer to deal on predictably unacceptable terms rather than an outright refusal to deal. Abbott's only argument on this point is that the Ninth Circuit's decision in *Doe* somehow forecloses Plaintiffs from pursuing an *Aspen Skiing* claim—despite the fact that the *Doe* plaintiffs were not pursuing such a claim and the Ninth Circuit did not address it.

The third issue on which Abbott seeks interlocutory review—whether Plaintiffs have adequately alleged monopolization of the boosting market—is not an issue of law, much less a controlling issue, and, again, not an issue on which there is a substantial ground for difference

[1] Amended mot. at 18, 19.

of opinion. The Court's January 12th opinion correctly rejected Abbott's perfunctory arguments directed toward this claim.

Finally, an interlocutory appeal at this point would delay rather than advance the resolution of the litigation. This case is well into expert discovery and is set for trial in approximately a year. The median time to complete an appeal in the Ninth Circuit (as of 2008) is 19.4 months.[2] It is likely that this case can be tried to final judgment before an interlocutory appeal can be completed. It would be far more efficient to allow the parties to proceed through summary judgment and to trial rather than disrupting the orderly progress of the case with an immediate interlocutory appeal.[3]

ARGUMENT

I. WHETHER *LINKLINE* OVERRULED *CASCADE* IS NOT AN ISSUE ON WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION.

It is important to recognize the points on which the parties agree. The parties agree that, under *Cascade*, an antitrust plaintiff alleging exclusionary bundled discounting need not allege *either* that the bundled product is sold below cost (as Abbott construes that term) *or* that the defendant has a dangerous probability of recouping its below-cost "investment." *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 904, 910 n.21 (9th Cir. 2008); Amended mot. at 10 (acknowledging these statements in *Cascade*).[4] Moreover, Abbott does not dispute that Plaintiffs have adequately alleged below-cost pricing under the "discount attribution" test adopted in *Cascade*. Conversely, Plaintiffs do not dispute that they have *not* alleged below-cost

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[2] U.S. Court of Appeals Judicial Caseload Profile, Ninth Circuit, page 2 (available at www.uscourts.gov/cgi-bin/cmsa2008.pl/cmsa2008.pl). This is the median time from filing of a notice of appeal to final disposition. 2008 is the most recent year for which data are available.

[3] In addition to the arguments set forth herein, Plaintiffs adopt and incorporate by reference the arguments made by GlaxoSmithKline in its opposition brief.

[4] Contrary to Abbott's contention, these are holdings of the case and not *dicta*. Moreover, Abbott's contention that Plaintiffs have failed to adequately allege an "adverse effect on competition" (Amended mot. at 11) is entirely new and was not argued in its motion to dismiss. It is also incorrect. *See, e.g.*, *Safeway* Second Amended Complaint ¶¶ 28, 56, 63, 69; *Meijer* Second Amended Complaint ¶¶ 45-46, 52, 69, 74; *Rite Aid* Second Amended Complaint ¶¶ 26, 53, 60, 66.

pricing in the single-product sense (i.e., that Kaletra itself is priced below cost) or a dangerous probability of Abbott recouping its "investment" in below-cost pricing. Thus, the issue presented to the Court in Abbott's motion to dismiss, and the issue which Abbott now seeks to have certified for immediate appellate review, is whether the legal analysis of bundled discounting adopted by the Ninth Circuit in *Cascade* was silently overruled by the Supreme Court's decision in *linkLine*.

Abbott characterizes this issue as a "close question." It is not. In fact, *all* of the available evidence indicates that *linkLine* did not silently overrule *Cascade*, and there is *no* evidence to support Abbott's contention that it did.

To begin with, *linkLine* itself did not purport to address the proper antitrust analysis of bundled discounting. As we explained in our opposition to Abbott's motion to dismiss, the issue on which the Supreme Court granted certiorari in *linkLine* was whether a price-squeeze claim is viable in the absence of a duty to deal with the plaintiff. *See Pacific Bell Tel. Co. v. linkLine Communications, Inc.*, 129 S. Ct. 1109, 1116-17 (2009) ("We granted certiorari to resolve a conflict over whether a plaintiff can bring price-squeeze claims under § 2 of the Sherman Act when the defendant has no antitrust duty to deal with the plaintiff"). As the Court explained, a price squeeze occurs when the defendant sells a single product or service both at wholesale and at retail and has the ability to "squeeze" the profits of its retail competitors by raising the wholesale price while simultaneously lowering the retail price. *Id.* at 1118. The appropriate antitrust analysis of bundled discounting was not raised by the facts of the case, was not briefed or argued by the parties, and is not addressed in the Court's opinion. Bundled discounting has been the subject of a lively and extensive debate in both the federal courts and the scholarly literature, *see Cascade*, 515 F.3d at 894-909 (summarizing the cases and the literature),[5] and one would expect the Supreme Court to have given some hint if it intended to take a stand in

[5] This debate continues today, refuting Abbott's suggestion that it was resolved by *linkLine*. *See, e.g.*, N. Economides & I. Lianos, *The Elusive Antitrust Standard on Bundling in Europe and in the United States in the Aftermath of the* Microsoft *Cases*, 76 ANTITRUST L. J. 483, 508 (2009) (discussing *linkLine*). *See also* E. Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 466-67 (Dec. 2009) (arguing that *linkLine* does not affect the traditional analysis of bundled discounts).

that debate. There is no such hint in *linkLine*.

Abbott's argument to the contrary is based almost exclusively on the Court's summary rejection of a "transfer price test" proposed by "some amici" as a means of overcoming the difficulty of identifying a "fair" or "reasonable" margin between the wholesale price and the retail price in price-squeeze cases. This brief discussion cannot bear the weight Abbott seeks to put on it. As explained in our prior submissions, the Court's statement that this test "lacks any grounding in our antitrust jurisprudence" was based on nothing more than its earlier observation that "[a]n upstream monopolist *with no duty to deal* is free to charge whatever wholesale price it would like." 129 S. Ct. at 1122 (emphasis supplied). This observation has no relevance here because Abbott *does* have a duty to deal.[6] Moreover, the test adopted in *Cascade* identifies situations in which an equally efficient competitor is left with *no margin at all*, so there is no need for an antitrust court to identify a "fair" or "adequate" margin.[7]

Abbott also quotes supposedly categorical language from the *linkLine* opinion in which the Court emphasized the importance of avoiding antitrust liability in cases where the defendant's prices are above cost or where the defendant has no realistic opportunity to recoup its investment in below-cost pricing. Amended mot. at 8. These principles were not new to *linkLine*; they derive from *Brooke Group* and prior cases. The Court's discussion of below-cost pricing in *linkLine* is simply a brief recap of the far more comprehensive discussion in *Brooke Group*. And yet the Ninth Circuit had no difficulty in holding, post-*Brooke Group*, that "above-cost prices are not per se legal." *Cascade*, 515 F.3d at 905. This holding, which is the crux of Abbott's disagreement with *Cascade*, recognizes that *Brooke Group* (and, by extension, *linkLine*) simply does not dictate the proper antitrust analysis of bundled discounts. As the Ninth Circuit explained in *Cascade*, bundled discounts pose a "unique anticompetitive risk" not posed by single-product predation—"the risk of excluding firms that are as efficient as the defendant" but

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[6] Abbott acknowledges that Plaintiffs have alleged a duty to deal. Amended mot. at 13.

[7] In fact, as we pointed out in our opposition to Abbott's motion to dismiss, there is no distinction at all with respect to judicial administrability between the *Cascade* test and the original, single-product *Brooke Group* test. Both tests involve a comparison of prices to costs. Neither requires a court to select a fair or adequate margin for the defendant's competitors.

have a less extensive product line. *Id.* Accordingly, as *Cascade* expressly holds, the proper antitrust treatment of single-product predation does not determine the proper antitrust treatment of bundled discounts. *Id.* at 904-05.

II. WHETHER PLAINTIFFS HAVE ALLEGED AN *ASPEN SKIING* CLAIM IS NOT AN ISSUE ON WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION.

The second issue on which Abbott seeks interlocutory review—whether Plaintiffs have adequately alleged a duty-to-deal claim under *Aspen Skiing*—is likewise not a close question and not appropriate for certification under section 1292(b).

Abbott's argument on this point ignores both the actual allegations in Plaintiffs' complaint and the *Aspen Skiing* case and focuses exclusively on the Ninth Circuit's decision in *Doe*. As Abbott notes, the Court of Appeals concluded in *Doe* that Abbott's conduct in raising the price of Norvir by 400% while leaving the price of Kaletra unchanged was the "functional equivalent" of the price squeeze considered by the Supreme Court in *linkLine*. *linkLine* in turn held that succeeding on such a claim requires the plaintiff to establish either a duty to deal in the "upstream" or leveraging market or below-cost pricing in the "downstream" or leveraged market. As the Ninth Circuit noted in *Doe*, the plaintiffs in that case did not allege *either* a duty to deal in the boosting market *or* below-cost pricing in the boosted market. *See Doe v. Abbott Laboratories*, 571 F.3d 930, 935 (9th Cir. 2009). Plaintiffs in these cases have alleged both. Indeed, Abbott ***admits in its motion*** that "Plaintiffs here allege a duty to deal in the boosting market . . ." Amended mot. at 13. This is an admission that *linkLine* is distinguishable from these cases and, accordingly, that its motion to dismiss was properly denied.

Abbott's further contention that *Doe* requires not only a duty to deal but an outright refusal to deal is incorrect. The Ninth Circuit recognized in *Doe* that the first step in the Supreme Court's reasoning in *linkLine* was the absence of a *duty* to deal, not the absence of a *refusal* to deal. *See Doe v. Abbott Laboratories*, 571 F.3d at 934 ("'if a firm has no antitrust ***duty to deal*** with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous'") (quoting *linkLine*, 129 S. Ct. at

1119) (emphasis supplied). The Ninth Circuit understood that, under the Supreme Court's greater-power-includes-the-lesser-power rationale, the critical question is whether AT&T "*could have* stopped providing DSL transport service without violating § 2," 571 F.3d at 934 (emphasis supplied)—not whether it actually did stop providing the service. It is the absence of a legal duty to deal, and not whether that duty was violated through an outright refusal, that supplies the critical initial premise in the Supreme Court's reasoning. As noted above, Abbott admits that Plaintiffs in these cases have alleged a duty to deal and, as a result, the Supreme Court's reasoning in *linkLine* simply does not apply.

Abbott is equally mistaken in contending that Plaintiffs have failed to allege a violation of Abbott's duty to deal. A duty-to-deal violation may involve conduct less extreme than an outright refusal to deal, since "[a]n offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal." *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004). The Supreme Court considered such an offer in *Aspen Skiing*. In that case, the defendant changed a longstanding course of dealing with its smaller competitor by making the competitor an offer it knew the competitor "could not accept." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 592 (1985). The defendant also raised the price of its own single-mountain ski ticket to $22 while simultaneously lowering the price of its bundled six-day, three-mountain ticket to $114, a price structure that made the plaintiff's attempt to recreate the product they had previously marketed together "unprofitable." *Id.* at 594 n.15. Neither of these actions amounted to an outright refusal to deal, and yet the Supreme Court affirmed the imposition of antitrust liability based on the proposition that the defendant had violated an antitrust duty to deal.

The balance of Abbott's argument rests on the assertion that *Aspen Skiing* should be "narrowly construed" because the Court and the Ninth Circuit have reached different conclusions in other cases involving different facts. Given the parallel between the facts alleged in these cases and the facts of *Aspen Skiing*, however, Plaintiffs' claims fall squarely within the bounds of that

precedent. As such, *Aspen Skiing* directly controls this case, and the Court properly followed it.[8]

III. WHETHER PLAINTIFFS HAVE ADEQUATELY ALLEGED MONOPOLIZATION OF THE BOOSTING MARKET IS NOT A CONTROLLING QUESTION OF LAW.

A "question of law" for purposes of section 1292(b) is generally an abstract legal question that can be answered without delving deeply into the facts or evidence of the particular case before the court, *see Ahrenholz v. Board of Trustees of Univ. of Illinois*, 219 F.3d 674, 676-77 (7th Cir. 2000),[9] and a "controlling question of law" is a question of law whose resolution "could materially affect the outcome of the litigation in the district court." *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982). The third issue identified by Abbott lacks even these most basic requisites of an issue suitable for interlocutory review under section 1292(b).

As the Court correctly noted in its January 12th opinion, Plaintiffs' claim for monopolization of the boosting market is based on the allegation that Abbott deceptively induced its competitors to forego development of alternative boosting therapies by creating the impression that Norvir would continue to be made available to its competitors' patients on reasonable terms. There are a variety of precedents supporting the imposition of antitrust liability against a monopolist on the basis of deceptive, reliance-inducing conduct, *see Aspen Skiing*, *supra*; *Walker Process Equipment v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 786-88 (6th Cir. 2002), and the Court correctly ruled that Plaintiffs' allegations fit within the holdings and rationales of these cases. In doing so, the Court rejected the four specific arguments made by Abbott: (1) Plaintiffs' allegations are implausible; (2) Plaintiffs' allegations are inconsistent with *linkLine*; (3) Plaintiffs' allegations are

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[8] Abbott's suggestion that courts cannot rely on "anticompetitive malice" as a means of distinguishing lawful from unlawful conduct is completely unpersuasive. There is a significant difference between a monopolist attempting to increase its market share by offering a better product or lower prices and the same firm attempting to increase market share by imposing costs on its competitors. Plaintiffs have alleged, and Abbott's internal documents make clear, that this case falls in the latter category rather than the former.

[9] For example, whether the plaintiff has presented sufficient evidence to survive summary judgment, while an issue of law in the sense that it is decided by the court, is not generally considered an issue suitable for interlocutory appeal under section 1292(b). *See Ahrenholz*, 219 F.3d at 676.

an improper attack on Abbott's licensing practices; and (4) Plaintiffs have failed to allege actionable deception in the standard-setting context.

Whether these rulings were correct is not an "issue of law" appropriate for interlocutory appeal under section 1292(b), and certainly not a "controlling" issue of law. The validity of Abbott's arguments is not an abstract question of constitutional or statutory law with significance beyond the particular circumstances of this case. *Cf. Ovando v. City of Los Angeles*, 92 F. Supp. 2d 1011, 1025 (C.D. Cal. 2000) (certifying order that decided whether a child can bring a substantive due process claim based on imprisonment of and injuries to a parent). Even if the issue were to be considered an issue of law, it is not a *controlling* issue of law because an appellate ruling on Plaintiffs' boosting market monopolization claim will have no effect on Plaintiffs' other, and principal, claims. *See United States Rubber Co. v. Wright*, 359 F.2d 784 (9th Cir. 1966); *cf. Ovando*, 92 F. Supp. 2d at 1025 (certifying substantive due process issue where that claim was the only federal claim asserted in the case).

In addition, the Court's rejection of Abbott's arguments is not an issue on which there is substantial ground for difference of opinion. As the courts have noted, "[a] party's strong disagreement with the court's ruling is not sufficient for there to be a 'substantial ground for difference [of opinion];' the proponent of an appeal must make some greater showing." *Hansen v. Schubert*, 459 F. Supp. 2d 973, 1000 (E.D. Cal. 2006). Abbott makes no real attempt to show that Abbott's four specific arguments were wrongly rejected, preferring instead to disparage Plaintiffs' legal theory as "novel." It is not, and the Court correctly denied Abbott's motion to dismiss Plaintiffs' boosted market monopolization claim.

IV. AN IMMEDIATE APPEAL WOULD NOT MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.

Finally, Abbott's motion should be denied because an immediate interlocutory appeal is not likely to "materially advance" the termination of this litigation. As noted above, the median time from filing a notice of appeal to final disposition of an appeal in the Ninth Circuit is

19.4 months (as of 2008).[10] This case is set for trial in approximately 12 months. Thus, it is likely that the case can be tried to judgment and then appealed before an interlocutory appeal can be accepted, briefed, argued and disposed of. And of course further proceedings in the district court may resolve the case in a way that moots the issues on which Abbott seeks to appeal and makes the appeal unnecessary. Under these circumstances, an immediate appeal is more likely to delay resolution of the case than to speed it up and should be denied. *See Hansen v. Schubert*, 459 F. Supp. 2d at 1000 (denying motion for certification where case was four years old and was set for trial the following year).

CONCLUSION

For the reasons stated above, Abbott's motion to certify issues for interlocutory appeal under section 1292(b) should be denied.

Dated: February 25, 2010

Respectfully submitted,

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[10] This figure has been steadily increasing for the past several years and is likely greater than 19.4 months today.

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