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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)

REPLY MEMORANDUM IN SUPPORT OF ABBOTT'S MOTION TO CERTIFY ISSUES FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(B)

Honorable Claudia Wilken

3/18/2010 Hearing Vacated Pursuant to the Court's 2/12/10 Clerk's Notice

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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I. INTRODUCTION

Plaintiffs never directly address the Ninth Circuit's specific holding in *Doe* that "*[h]owever labeled*, Abbott's conduct is the functional equivalent of the price squeeze the [Supreme] Court found unobjectionable in *linkLine*." *John Doe 1 v. Abbott Laboratories*, 571 F.3d 930, 933 (9th Cir. 2009) ("*Doe*") (citing *Pac. Bell Tel. Co v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109 (2009). Under that holding, placing a different label on Abbott's conduct – whether "bundled discounting" or an "effective refusal to deal" – cannot take that conduct outside the scope of the Ninth Circuit's mandatory ruling.

Instead of confronting that key issue, Plaintiffs mischaracterize the main question as whether "*linkLine* overruled *Cascade*." (DP Opp'n at 2) (citing *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008)). On the contrary, the question is simply whether Plaintiffs' claims are barred by *Doe*. And that question can be answered without addressing, let alone overruling, *Cascade*. In fact, even though both *Cascade* and *linkLine* were fully briefed in *Doe*, the Ninth Circuit found *linkLine* controlling without even considering whether *linkLine* overruled *Cascade.*

For their extreme position that Abbott has failed to show reasonable grounds for disagreement, the Direct Purchaser Plaintiffs also ignore this Court's holding in 2008 that the very pricing conduct now at issue is "not governed by *Cascade*" because it is "far from clear that Abbott's sale of Kaletra represents a bundled discount." (7/7/08 Order at 5; 4/11/2008 Order at 12). Plaintiffs previously endorsed that view. Given that reasonable minds – including this Court – have actually differed on *Cascade*'s applicability, it is hardly credible for Plaintiffs now to deny that there are reasonable grounds for disagreement about whether *Cascade* or *linkLine* applies.

Definitive resolution of that single issue could effectively end this case. On their predatory pricing claim, the Direct Purchasers candidly concede they cannot meet the *Doe/linkLine* standard. And on a refusal to deal claim, the *Doe* court held "that Does' claim falls short" under *linkline* because "[t]hey allege no refusal to deal *at the booster level*." *Doe*, 571

F.3d at 935 (emphasis added). Plaintiffs by their own admission never allege (and the Court has not found) a refusal to deal in Norvir at the booster level. Instead, Plaintiffs allege an "*effective*" refusal to deal only when the price of Norvir is considered in comparison to the price of Kaletra in the boosted market. Notwithstanding Plaintiffs' protestations, that pricing comparison is exactly the kind of "price squeeze" that the Ninth Circuit, applying *linkLine*, held does *not* violate the antitrust laws. Thus, even if there were some real-world support for the notion that Abbott is "effective[ly]" refusing to deal Norvir – notwithstanding the fact that Norvir is one of the best-selling HIV drugs in the United States – Plaintiffs cannot avoid *Doe* and *linkLine* merely by changing labels to a so-called "effective" refusal to deal.

The only other claim Direct Purchasers have asserted – monopolization of the "booster" market – is also refuted by both *Doe* and *linkLine*. Both of those cases, and many earlier cases, make the basic point that low prices are not actionable under the antitrust laws unless they are below cost. Plaintiffs' argument, without a single supporting case, that Abbott monopolized the booster market by initially charging too *low* a price for Norvir (thus purportedly deceiving rivals into delaying innovation of competing boosters) is simply impossible to square with the Supreme Court's and the Ninth Circuit's clear admonition that a low price is not actionable unless it is below cost.

It would be an enormous waste of resources to proceed with this case without first seeking clarification from the Ninth Circuit on the import of the *Doe* decision here. Contrary to Plaintiffs' contention, there is no reason to believe that getting such clarification would take eighteen months. The Ninth Circuit decided *Doe* only *seven months* after accepting the appeal, and the targeted clarification Abbott now seeks should be able to be resolved even more quickly, particularly because it can be decided by the same appellate panel that decided *Doe.*

It is true, as Plaintiffs note, that Abbott has sought interlocutory appeal before on several occasions. And, in fact, both this Court and the Ninth Circuit granted interlocutory relief in *Doe*, and the appeal worked exactly as the statute envisions: the Ninth Circuit quickly and efficiently set forth the analysis that should apply to the conduct at issue. An interlocutory appeal here

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would again advance the purposes of § 1292(b) given the strong possibility of dramatically streamlining, if not eliminating, these complex cases before trial.

II. ARGUMENT

A. The Three Issues Raise By Abbott Are Controlling Questions Of Law That Raise Substantial Grounds For Difference Of Opinion.

Abbott's motion seeks certification based upon three issues of law that are dispositive of Plaintiffs' claims.

1. Plaintiffs Misconstrue The First Issue, Which Is Simply Whether *Doe* Requires Application Of The *Doe*/*linkLine* Predatory Pricing Standard Here, *Not* Whether *linkLine* Overruled *Cascade*.

The Direct Purchasers concede that the first issue – whether *Doe* requires application of the *linkLine* predatory pricing standard – is a controlling question of law by explicitly acknowledging that they failed to satisfy the *Doe/linkLine* standard. They admit that "they have not alleged below-cost 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." (DP Opp'n at 2-3). Thus, the issue of whether *Doe*/*linkLine* applies here is a controlling legal issue because a determination in Abbott's favor would terminate the Direct Purchasers' predatory pricing claim. *See 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.").

The first issue also is, at the very least, a question of law about which there are substantial grounds for disagreement. Plaintiffs' argumentative re-characterization of the issue as whether *linkLine* overruled *Cascade* should be rejected. Abbott did not argue that *Cascade* has been overruled. Abbott argued merely that *linkLine* controls on the facts here – just as the Ninth Circuit found that *linkLine* controlled in *Doe* without discussing the continuing vitality of *Cascade* with respect to other conduct.

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Indeed, both Plaintiffs and this Court previously suggested that the *Cascade* analysis might not apply even before the Supreme Court decided *linkLine* – because Kaletra is significantly different from a traditional multi-product bundle. As this Court wrote, "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." (4/11/08 Order at 12).

In contrast, this case is just like the price squeeze in *linkLine*, in which the plaintiff complained about the high price of an essential input that had to be purchased at wholesale in order to sell the plaintiff's product at retail. Here, Plaintiffs are likewise complaining about the high price of Norvir as an allegedly essential input that has to be purchased in order to boost competitive PIs (such as Lexiva and Reyataz). Plaintiffs have failed to identify any difference that could possible matter to an antitrust analysis, and thus, *linkLine* controls. *Cf. linkLine*, 129 S. Ct. at 1119 ("There is no meaningful distinction between the 'insufficient assistance' claims we rejected in [*Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004)] and the plaintiffs' price-squeeze claims in the instant case. The *Trinko* plaintiffs challenged the quality of Verizon's interconnection service, while this case involves a challenge to AT&T's pricing structure. But for antitrust purposes, there is no reason to distinguish between price and nonprice components of a transaction.")

Indeed, the Ninth Circuit already decided that *linkLine* is controlling. The parties fully briefed both *Cascade's* and *linkLine*'s potential applicability. After considering that briefing – including amicus briefs by the Plaintiffs here – the Ninth Circuit specifically found that *linkLine* controls, explaining that "[t]ime, and the United States Supreme Court['s *linkLine* decision], have overtaken this case." *Doe*, 571 F.3d at 933. The Ninth Circuit then concluded: "[h]owever labeled, Abbott's conduct is the functional equivalent of the price squeeze the Court found unobjectionable in *linkLine*." *Id*. at 935. While the Direct Purchasers disagree that *linkLine*

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controls, they make no serious effort to explain how the pure issue of law is not at least a close question.

2. Binding Precedents Raise Substantial Doubts As To The Viability Of Plaintiffs' Refusal To Deal Theory.

In its moving papers, Abbott also showed that Plaintiffs' refusal to deal theory conflicts directly with the holdings in both *linkLine* and *Doe*, as well as other binding precedents such as the Ninth Circuit's decision in *MetroNet Services Corp. v. Qwest Corp*., 383 F.3d 1124 (9th Cir. 2004). It is meritless for Plaintiffs to argue that it is not even a close question.

First, there is at least a strong argument that *Doe* and *linkLine* preclude a refusal to deal theory, such as the one alleged here, which is based upon a combination of pricing in two separate markets. Both *Doe* and *linkLine* emphasized that each market must be analyzed separately to determine whether pricing conduct is exclusionary. *See Doe*, 571 F.3d at 934-35; *linkLine*, 129 S. Ct. at 1120. The Ninth Circuit in *Doe* specifically found that the plaintiffs' claims failed because they "allege[d] no refusal to deal *at the booster level*." *Doe*, 571 F.3d at 935 (emphasis added). Likewise, here, Plaintiffs admittedly do not and cannot allege a refusal to deal at the booster level. Indeed, Norvir is one of the best selling HIV drugs in the United States.

Instead of alleging a refusal to deal at the booster level, as *Doe* requires, Plaintiffs allege that the combination of prices charged for Norvir in the booster market and Kaletra in the boosted market leave rivals with too small a margin to compete. (*See* 1/12/10 Order at 15). But regardless of how Plaintiffs label this allegation, it is, as *Doe* recognized, the functional equivalent of the price squeeze claim that the Supreme Court rejected in *linkLine*. Plaintiffs' pricing-combination allegations also raise the very type of "moving target" concerns that *linkLine* cited as one of many bases for rejecting a price squeeze claim. Just as in *linkLine*, Plaintiffs are unable to explain how the Court (or a jury) could make an objective determination of a reasonable combination of prices for Norvir and Kaletra at any given point in time.

Plaintiffs try in vain to distinguish *Doe* and *linkLine* on the ground that the plaintiffs in those cases did not allege a duty to deal. It is true that the Plaintiffs here use the words "duty to

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deal." But Plaintiffs' invocation of this legal conclusion does not mean that such a duty exists here – let alone that any such purported duty could have been violated here. The Supreme Court in *linkLine* specifically cautioned: "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency." *linkLine*, 129 S. Ct. at 1121 (citations and quotations omitted) (alteration in original). The Supreme Court then specifically determined that duty-to-deal violations cannot be based on the alleged interplay of pricing in two markets – the precise circumstance on which Plaintiffs here attempt to state a violation of a duty to deal: "It is difficult enough for courts to identify and remedy an alleged anticompetitive practice at one level, such as … a violation of the duty-to-deal doctrine at the wholesale level." *Id.* Courts should not simultaneously "police both the wholesale and retail prices to ensure that rival firms are not being squeezed" because "courts would be aiming at a moving target, since it is the *interaction* between these two prices that may result in a squeeze." *Id.* (emphasis in original). This analysis led directly to the Supreme Court's ultimate conclusion: "If both the wholesale and the retail price *are independently lawful*, there is no basis for imposing antitrust liability…." *Id.* at 1122 (emphasis added).

Contrary to Plaintiffs' assertion, *linkLine* – not *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) – controls the issue of whether any such combination of pricing violates the antitrust laws. GSK badly distorts *linkLine* to contend otherwise. According to GSK, "the Supreme Court implicitly recognized that the plaintiffs in *linkLine* would have stated a claim had they alleged an antitrust duty to deal." (GSK Br. at 9, 11). But the Supreme Court recognized no such thing, implicitly or otherwise. To the contrary, the Supreme Court *dismissed* antitrust claims that attempted to conflate legal pricing actions within two separate markets and repeatedly emphasized that the actions in the two markets must be analyzed separately. *See linkLine*, 129 S. Ct. at 1120 ("Plaintiffs' price-squeeze claim, looking to the

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relation between retail and wholesale prices, is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level.").[1]

There also exists at least a close question as to whether Plaintiffs' allegations conflict with binding precedent in *MetroNet*, which expressly limited *Aspen Skiing*. The Direct Purchasers argue, without analysis, that the facts in *Aspen Skiing* are "perfectly analogous" to their allegations. (DP Opp'n at 1). But Plaintiffs' fail to confront the very distinctions that provided the basis for dismissal in MetroNet. For example, contrary to the situation in *Aspen Skiing*, here there is neither an alleged forsaking of short-term profits nor a refusal to sell to competitors on the terms available to consumers. On that very basis, the Ninth Circuit in *MetroNet* rejected a refusal to deal allegation as a matter of law, finding that key aspects of the plaintiff's allegations "do[] not fit comfortably in the *Aspen Skiing* mold." 383 F.3d at 1132.

The facts in *MetroNet* are quite analogous to the facts here. Qwest, a telecommunications company, allowed volume discounts for businesses with more than 20 phone lines. The plaintiff took advantage of this discount by purchasing multiple phone lines at the discount, then re-selling them to small businesses at a higher price – but a price lower than what Qwest charged for individual lines. *Id*. at 1126. Quest lost significant profits to the plaintiff as a result of this price arbitrage. To recapture these lost profits, it imposed a new rule permitting the volume discount only to businesses with more than 20 phone lines in a single location, thus thwarting the plaintiff's resale business. *Id*.

Although Qwest refused to sell phone lines to MetroNet at the volume discount consistent with its prior course of dealing, the Ninth Circuit found no refusal to deal under *Aspen Skiing* because Qwest (1) "was not forsaking short-term profits…, but rather was attempting to increase its short-term profits"; and (2) Qwest proposed dealing with its competitor on precisely the same terms on which it dealt with consumers. *Id*. at 1132, 1134. For these reasons, the Ninth Circuit held that "MetroNet does not have an actionable antitrust claim under the Supreme

[1] Despite GSK's argument, Abbott preserved this issue in its omnibus motion to dismiss. *See* Dkt. 180, No. 07-5702, at 20 (arguing that plaintiffs did not "allege a 'refusal to deal *at the booster level*'") (emphasis added).

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Court's existing refusal to deal precedents as explained and limited by [*Trinko*]." *Id.* at 1134 (citing *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004)). The Ninth Circuit rejected the refusal to deal claim despite evidence in the record that the defendant changed its pricing policy "to win back market share" from the plaintiff (*id*. at 1128) by "set[ting] its retail price in a way that has made it unprofitable for MetroNet to buy and resell" phone lines at the volume discount. (*Id*. at 1132).[2]

Plaintiffs here also do not allege that Abbott has forsaken short-term profits by increasing the price of Norvir. In fact, Abbott's profits on Norvir have *increased* since the price increase. Nor do Plaintiffs allege that Abbott has refused to deal with its competitors on the same basis that it deals with consumers. Plaintiffs do not even allege that Abbott has refused to deal (actually or "effectively") in any way with its competitors. (Consumers are purchasing Norvir in record amounts for combination treatment with rival PIs.) Instead, Plaintiffs rely exclusively on allegations that Abbott set its prices for Norvir and Kaletra in a way that made it unprofitable to sell rival PIs, and that Abbott did so in order to take market share from its rivals. But, as noted, that is the very situation *linkLine* held does *not* violate the antitrust laws. At the very least, particularly in light of *MetroNet*, this presents a close legal question on the basis of which certification is appropriate.

3. The Direct Purchasers Have Failed To Explain How Their Booster Market Monopolization Claim Has Any Basis In Antitrust Jurisprudence.

Abbott cited multiple cases that conflict directly with Direct Purchasers' booster market monopolization claim – that is, the claim that Abbott illegally monopolized the alleged market for Norvir (when used as a booster) by keeping the price so low that competitors were allegedly

[2] GSK argues incorrectly that *MetroNet* is distinguishable because the defendant merely returned to a previous course of conduct. (GSK Opp'n at 12). The decision clearly indicates that from the time Qwest began offering the volume discounts, it had always priced on a "per system" basis until the change to "per location" pricing that precipitated the antitrust litigation. *MetroNet*, 383 F.3d at 1127. In any event, there is no suggestion in the decision that this factor was in any way relevant to the Ninth Circuit's decision.

lulled into not attempting to develop competitive PI boosters. Direct Purchasers do not and cannot reconcile the authorities that Abbott cited with this Court's decision.

Most significantly, both *Doe and linkLine* squarely hold that for low prices to be actionable as exclusionary conduct under Section 2 of the Sherman Act, that pricing must be below an appropriate measure of the defendant's cost of production. There has never been any claim in this litigation that Abbott's price for Norvir before 2003 was below Abbott's cost. On the other side of the coin, for high prices to be even potentially actionable under Section 2 of the Sherman Act, that pricing must be so high that it results in the product being unavailable. There are no facts alleged here that would support the idea that Norvir is unavailable; indeed, as noted, the product is being sold in record quantities. All of this squarely disposes of Plaintiffs' booster market monopolization claim.p

Direct Purchasers also do not and cannot cite any other case law that supports their theory. The cases they do cite do not stand for the proposition that low pricing can be actionable as exclusionary conduct even if that pricing is not so low as to be below cost. Indeed, other than *Aspen Skiing* (discussed in the prior section), none involved pricing conduct at all.

B. Resolution of These Issues May Materially Advance The Litigation

The issues on which Abbott's certification request is based go to the heart of the antitrust theories advanced in this case. If the Ninth Circuit applies *linkLine* and *Doe* as Abbott believes is already mandated, all of the Direct Purchasers' complaints must be dismissed as a matter of law. Likewise, GSK's antitrust claims (which turn only on the refusal to deal theory and do not allege predatory pricing or booster market monopolization) fail as a matter of law under *linkLine* and *Doe*.[3] Even if the Court of Appeals were to affirm the denial of Abbott's motion to dismiss,

[3] GSK and the Direct Purchasers suggest that they might assert other antitrust theories as a last resort. But this Court recognized during oral argument on the motions to dismiss that the attempt to state a "sabotage theory" is a "stretch." (10/15/09 H'ring Tr. at 41). As a practical matter, Plaintiffs' antitrust claims turn on the theories that they have enunciated in their opposition briefs. Regardless, Plaintiffs' generalized suggestions about how they might proceed if their current theories are rejected are insufficient to make certification inappropriate where, as here, the statutory criteria are clearly met based upon the actual order that is the subject of the certification request. Section 1292(b) requires a showing merely that the appeal "may materially advance the ultimate termination of the litigation," not that the appeal will resolve all issues that may come up in the litigation. 28 U.S.C. § 1292(b); *Stong v. Bucyrus-Erie Co.*, 476 F. Supp.

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the Ninth Circuit can be expected to clarify the relationship among *linkLine, Doe*, *Cascade*, *Aspen Skiing* and *MetroNet* in a way that will materially affect the legal standard under which this case is tried. On the other hand, to try the case without any appellate resolution of how to reconcile all of these cases invites an automatic retrial in the event of a judgment in Plaintiffs' favor. That is not a sensible use of the resources of the parties or of the Court.

Plaintiffs primarily complain about the delay that will supposedly result from an interlocutory appeal, relying on Ninth Circuit statistics regarding the average time for resolution of an appeal. But this is not the average case. The *Doe* interlocutory appeal was certified and decided in less than a year. And the Ninth Circuit is already familiar with this case from its relationship to *Doe* (including the amicus briefing filed in *Doe* by Plaintiffs here). The interlocutory appeal likely will be assigned to the same panel that decided *Doe*, and that panel could address the impact of its prior decision at least as quickly it rendered that decision. Thus, trial – currently scheduled for February 28, 2011, need not be delayed at all by an interlocutory appeal. Further, were some modest delay to result, it would be more than made up for by the avoidance of the incredible waste of resources that would occur from a trial under a potentially incorrect legal standard.

III. CONCLUSION

For the foregoing reasons, and for the reasons states in its opening brief, Abbott respectfully moves this Court to certify for interlocutory appeal its January 12, 2010 Order denying Abbott's motions to dismiss the amended complaints.

Dated: March 4, 2010

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224, 225 (D. Wis. 1979) (noting that even if interlocutory decision is not reversed, "such review may expedite the termination of the litigation").