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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' OPPOSITION TO ABBOTT'S OMNIBUS MOTION TO DISMISS ANTITRUST CLAIMS

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

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

Plaintiffs,

v.

ABBOTT LABORATORIES,

Defendant.

Case No. C 07-5985 CW

CONSOLIDATED CASE

PLAINTIFFS' OPPOSITION TO ABBOTT'S OMNIBUS MOTION TO DISMISS ANTITRUST CLAIMS

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

(Caption continued on next page)

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' OPPOSITION TO ABBOTT'S OMNIBUS MOTION TO DISMISS ANTITRUST CLAIMS

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

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INTRODUCTION

Abbott argues in its motion that the Ninth Circuit's decision in Doe requires dismissal of these cases. Yet, at oral argument in the *Doe* case, Abbott's counsel conceded that a narrow ruling disposing of *Doe* on the basis of *linkLine* would not result in dismissal of these cases.[1] Referring specifically to the *Safeway*, *Meijer*, *Rite Aid* and *GSK* cases, Abbott pleaded with the Ninth Circuit not to limit its consideration to the *Doe* case itself, but instead to reach out and decide the three broader issues this Court originally certified to the Court of Appeals, including the issue of whether *Cascade* applies to these facts (as Abbott used to contend), and, if so, whether it is the exclusive means of establishing section 2 liability in cases to which it applies (as Abbott also used to contend). The Ninth Circuit declined Abbott's request and, a few months after oral argument, issued the narrow opinion that Abbott resisted.

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[1] The question of how far the Court of Appeals needed to go to dispose of the *Doe* case came up several times during the argument. Early in the argument, the following exchange occurred:

> Judge Rymer: Okay. If that's correct and if linkLine applies, controls, is there any reason to go any further to consider monopoly power in the boosted market, or to consider antitrust injury, or to consider what the appropriate measure of below-cost pricing is for this case?
>
> Mr. Hurst: This Court has the discretion to go beyond . . .
>
> Judge Rymer: That's not my question. I understand that. My question is, is there any need to?
>
> Mr. Hurst: The answer to your question is no. If you agree with us on the below-cost—that the "below cost" rule applies, it would end this case. That's true.

At the end of the argument, Abbott returned to the same subject:

> Mr. Hurst: Last point. Judge Rymer, you were absolutely correct. You do not need to reach all three issues in this case to end this particular case. But, in your discretion, if I can make a pitch. There are copycat cases, seventeen plaintiffs, allegations of damages exceeding a billion dollars, where resolving the three issues could potentially, as a matter of judicial economy, end those cases definitively.

Oral arg. Tr. 8-9, 32. An audio recording of the oral argument is available on the Ninth Circuit's website at http://www.ca9.uscourts.gov/media/view_subpage/php?pk_id=0000003427. A transcript prepared from the audio recording is attached as Exhibit 1.

Abbott's motion to dismiss ignores this history and attempts to transform the Ninth Circuit's narrow opinion into the broader ruling that Abbott asked for and did not get. That attempt fails. As the Ninth Circuit recognized in *Doe*, the *linkLine* decision shields a monopolist from liability only when two critical factors are present: (1) the monopolist lacks an antitrust ***duty to deal*** in the "upstream" or leveraging market; *and* (2) the monopolist refrains from ***pricing below "an appropriate measure of the seller's costs"*** in the "downstream" or leveraged market.[2] The Supreme Court reasoned that, in the absence of a duty to deal, the monopolist's "high" prices in the upstream market are not subject to antitrust scrutiny, and, in the absence of below-cost pricing, the monopolist's "low" prices in the downstream market are not subject to antitrust scrutiny either. Conversely, antitrust scrutiny is appropriate where *either* a duty to deal *or* below-cost pricing is present. And the Ninth Circuit's opinion in *Doe* merely applied the Court's reasoning to a case in which neither a duty to deal nor below-cost pricing had been alleged.

In these cases, Plaintiffs have alleged facts that supply *both* of the critical factors the Supreme Court deemed to be absent in *linkLine*. Plaintiffs have alleged facts giving rise to an antitrust ***duty to deal*** in the boosting protease inhibitor market (the upstream or leveraging market), and have alleged that Abbott engaged in ***below-cost pricing*** in the boosted protease inhibitor market (the downstream or leveraged market), as that concept was defined by the Ninth Circuit only last year in *Cascade*. As the Supreme Court recognized in *linkLine*, either a duty-to-deal violation or below-cost pricing gives Plaintiffs "a remedy under existing law." *Pacific Bell Tel. Co. v. linkLine Comm's, Inc.*, 129 S. Ct. 1109, 1122 (2009). Accordingly, neither *linkLine* nor *Doe* controls the outcome here. Plaintiffs' complaints are not subject to dismissal, and Abbott's motion should be denied.

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[2] As explained below, nothing in *linkLine* (or *Doe*) addresses the appropriate test for below-cost pricing in bundled-discount cases (i.e., cases not involving a single product or service), such as this one. That question was addressed and definitively answered by the Ninth Circuit in *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008).

ARGUMENT[3]

I. *LINKLINE* DOES NOT APPLY TO CASES ALLEGING EITHER A DUTY TO DEAL IN THE UPSTREAM MARKET OR BELOW-COST PRICING IN THE DOWNSTREAM MARKET.

The Supreme Court's decision in *linkLine* dealt with a fact pattern that made its first appearance in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945): the wholesale/retail "price squeeze." In this fact pattern, a company without competition at the wholesale level that also operates with competition at the retail level is accused of raising its wholesale prices and lowering its retail prices in such a way that its competitors at the retail level, which are also its customers at the wholesale level, are unable to make a reasonable profit.

This was the fact pattern before the Court in *linkLine*. In that case, AT&T was accused of setting a high wholesale price for DSL service and a low retail price for the same service so that the plaintiffs, four smaller companies that purchased DSL service from AT&T and resold it in competition with AT&T's retail service, were unable to compete. The plaintiffs did not contend *either* that AT&T had a duty to deal at the wholesale level *or* that its retail prices were below an appropriate measure of costs. The Supreme Court held that, under these circumstances, the plaintiffs could not prevail on a section 2 claim.

The absence of either a duty to deal (at the wholesale level) or below-cost pricing (at the retail level) is emphasized repeatedly throughout the Court's opinion. The Court began by noting that, while below-cost pricing is an established theory of liability under section 2, the plaintiffs' complaint in *linkLine* contained no such allegations. 129 S. Ct. at 1118. The Court also noted that there are circumstances in which a monopolist has a duty to deal imposed by the antitrust laws but that the district court had found no such duty, and the plaintiffs had not challenged that holding on appeal. *Id.* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-11 (1985)). Thus, the legal issue before the Court involved "retail prices—where there is no predatory pricing—and the terms of dealing—where there is no duty to deal." 129 S. Ct. at 1118.

[3] Given the Court's familiarity with the facts of this case, Plaintiffs have not included a summary of those facts. Particular factual allegations relevant to Plaintiffs' arguments are summarized or quoted below.

Like the dissenting judge in the Ninth Circuit, the Court believed that the two components of the plaintiffs' claims—AT&T's high wholesale DSL price and its low retail DSL price—should be analyzed separately. With respect to the former, the Court held that a firm with no antitrust duty to deal at all has no duty to deal on terms that its competitors prefer. *Id.* at 1119 ("a firm with no duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors"). That is, the Court reasoned that the greater power to stop selling wholesale DSL service altogether included the lesser power to sell it on whatever terms AT&T selected: "If AT&T had simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act. Under these circumstances, AT&T was not required to offer this service at the wholesale prices the plaintiffs would have preferred."[4] *Id.* Of course, if the antitrust laws *had* imposed a duty on AT&T to continue selling DSL at wholesale—*i.e.*, if AT&T could *not* have "simply stopped providing DSL transport service" at wholesale—this reasoning obviously would not apply.

With respect to the second component of the plaintiffs' claims (AT&T's low retail price), the Court simply noted that the plaintiffs had failed to allege that AT&T's low retail prices were predatory under the single-product predatory-pricing standard announced in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). 129 S. Ct. at 1120. The low pricing at issue in *linkLine* was the retail pricing of a single product (DSL service), *not* bundled discounting, and the Supreme Court had no occasion to consider, much less decide, the appropriate test for below-cost pricing in a bundled discounting case.[5] As the Court summarized

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[4] This line of reasoning—that the greater power to ban or cease an activity altogether includes the lesser power to ban or cease it in part—arises in a variety of contexts. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510-13 (1996) (state's greater power to ban the sale of alcoholic beverages altogether did not include the lesser power to prohibit advertising their prices); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (greater power to proscribe an entire category of speech did not include lesser power to proscribe only instances of that speech expressing a particular point of view); *Meyer v. Grant*, 486 U.S. 414, 424-25 (1988) (greater power to end voter initiatives did not include lesser power to prohibit paid circulation of initiative petitions). As these citations illustrate, the reasoning has its limits.

[5] The Court's brief discussion of the "transfer price test" toward the end of its opinion was plainly not intended to establish the appropriate antitrust analysis of bundled discounting—an issue not raised by the facts of the case, not briefed by the parties and not encompassed by the Court's grant of certiorari. *See* 129 S. Ct. at 1116 ("We granted certiorari to resolve a conflict over

its holding: "If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price *both* of these services in a manner that preserves its rivals' profit margins." *Id.* (emphasis in original).

II. THE *DOE* DECISION DID NOT EXTEND *LINKLINE* TO CASES IN WHICH THERE IS EITHER A DUTY TO DEAL OR BELOW-COST PRICING AND DID NOT DISTURB THE *CASCADE* TEST FOR BELOW-COST PRICING.

As explained above, *linkLine* involved the relationship between the wholesale and retail price of a single service sold by the same firm (DSL transport service), while this case involves the relationship between the wholesale price of one drug (Norvir) and the wholesale price of a closely related drug sold by the same firm (Kaletra). In *Doe v. Abbott Laboratories*, 571 F.3d 930, 935 (9th Cir. 2009), the Ninth Circuit ruled that the conduct challenged by the *Doe* plaintiffs is the "functional equivalent" of a "price squeeze" and that the appropriate antitrust analysis of such conduct is the analysis set forth in *linkLine*. The Ninth Circuit did *not*, however, alter any of the reasoning relied on in *linkLine*. That is to say, the Court of Appeals recognized that *linkLine* permits liability in cases in which the plaintiffs have alleged *either* an antitrust duty to deal in the upstream or leveraging market *or* below-cost pricing in the downstream or leveraged market. These factors appear prominently throughout the Ninth Circuit's opinion. Nor did the Court of Appeals silently overrule the test for below-cost pricing applicable to bundled discounting that the same Court had selected in an exhaustive and well-reasoned opinion only a year earlier in *Cascade*.

First, the Ninth Circuit's decision in *Doe* recognized the two fundamental premises emphasized repeatedly by the Supreme Court in *linkLine*. The *Doe* opinion begins by posing the question the Court went on to answer: "Do allegations of monopoly leveraging through pricing

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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") (citation omitted). The Court's discussion simply addressed the use of a "transfer price test" as a means of overcoming the difficulty of identifying a "fair" or "adequate" margin for the monopolist's retail competitors in price-squeeze cases. It did not address the use of that test or any other test as a way of identifying exclusionary conduct or below-cost pricing in bundled-discount cases. In any event, the Court's criticism of the "transfer price test" merely repeats 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. As explained in the text, this observation has no application here, because Abbott is subject to a duty to deal.

conduct in two markets state a claim under § 2 of the Sherman Act . . . ***absent an antitrust*** [duty[6]] ***to deal . . . in the monopoly market or below-cost pricing in the second market***?" *Id.* at 931 (emphasis supplied). Following *linkLine*, the Court of Appeals held that they do not, and found this holding sufficient to dispose of the *Doe* case. In so holding, the Court emphasized that the *Doe* plaintiffs had not alleged *either* a duty to deal at the booster level *or* below-cost pricing at the boosted level. *Id.* at 935. In a footnote immediately following this observation, the Court pointed out that leave to amend was "not an issue because of the parties' settlement." *Id.* at 935 n.4. These statements clearly imply that, had the *Doe* plaintiffs been able to amend and add allegations supporting either a duty to deal or below-cost pricing, the result of the appeal would have been different.

It is true, as Abbott notes, that the Ninth Circuit sometimes uses the term "refusal to deal" rather than "duty to deal" in describing the first of the two limiting factors identified in *linkLine*. But the Court's tendency to use these terms interchangeably in a context where there was no reason to distinguish between them is understandable and does not evidence a deliberate intent to alter the Supreme Court's reasoning in *linkLine*. The Court of Appeals clearly understood that the Supreme Court's reasoning in *linkLine* depended on the presence or absence of an antitrust ***duty*** to deal—not the presence or absence of a ***refusal*** to deal. *See* 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 has been violated, that supplies the critical initial

[6] As in certain other parts of its opinion, the Ninth Circuit did not distinguish between a *duty* to deal and a *refusal* to deal, even though a duty to deal is the critical factor identified by the Supreme Court in *linkLine*. This issue is discussed in the text below. The distinction was not important for purposes of the *Doe* case because the *Doe* plaintiffs had alleged neither a duty to deal nor a refusal to deal.

premise in the Supreme Court's reasoning.[7] If there is a duty to deal, *i.e.*, if Abbott here had a duty to sell Norvir, then *linkLine's* holding that the right not to sell at all includes the right not to sell at any particular price would not apply. The Ninth Circuit certainly understood the Court's reasoning in *linkLine*, and its tendency to use the terms "duty to deal" and "refusal to deal" interchangeably should not be taken as an indication that the Court intended to alter the reasoning of *linkLine* in a way that contradicts not only *linkLine* itself but much of the Doe opinion as well.

It is also true, as Abbott points out, that the Ninth Circuit framed its discussion of the second factor emphasized in *linkLine* (below-cost pricing) primarily in terms of the single-product analysis set forth in *Brooke Group*. But that is because the Court of Appeals had no occasion in *Doe* to mention, let alone analyze, the application of the *Brooke Group* below-cost pricing test to a multi-product bundle—something the Ninth Circuit had done explicitly and definitively only a year earlier in *Cascade*.[8] As the Court is aware, the Doe plaintiffs were proceeding exclusively under a monopoly leveraging theory and disclaimed reliance on predatory pricing of any kind, whether of the single-product or bundled-discount sort. As a result, the Court of Appeals had no reason to differentiate between these alternative approaches. As Judge Rymer noted at oral argument, the Court had no reason "to consider what the appropriate measure of below-cost pricing is [in order to decide the Doe] case," and Abbott's counsel agreed. Oral arg. Tr. 9.

In *Cascade*, the Ninth Circuit recognized that bundled discounting can exclude equally efficient rivals even where the bundle itself and each of the products in it are priced above cost. *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 896-97, 904 (9th Cir. 2008). Noting that the concern animating *Brooke Group* was a monopolist's use of pricing to exclude equally efficient rivals, the Court of Appeals explicitly adapted *Brooke Group*'s single-product test to

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[7] Indeed, a price squeeze by definition does not involve an outright refusal to deal. Therefore, the presence or absence of such a refusal cannot distinguish lawful price squeezes from unlawful ones.

[8] The Ninth Circuit recognized and specifically noted that the *Cascade* analysis relied upon the reasoning of *Brooke Group*. *See Doe*, 571 F.3d at 933 (citing *Cascade's* citation of *Brooke Group*).

cases involving multi-product bundles.[9] *Id.* at 903; *see also Meijer, Inc. v. Abbott Laboratories*, 544 F. Supp. 2d 995, 1001 (N.D. Cal. 2008) ("The court [in *Cascade*] believed this standard was in line with the Supreme Court's direction in *Brooke* and other cases that low prices, which generally benefit the consumer, should not be condemned unless they are below some measure of the defendant's cost"). The Court of Appeals therefore applied the reasoning behind the test that applies in single-product predatory pricing cases (*i.e.*, the *Brooke Group* test) to formulate the "discount attribution" test, which recognizes the economic differences between single-product predation and bundled discounting and allows a plaintiff in a bundled-discount case to prove below-cost pricing in a manner that is consistent with those differences. *See id.* at 904-09. In so doing, as Abbott acknowledges (Mot. at 11), the Ninth Circuit also explicitly rejected any requirement that the plaintiff prove recoupment. *Id.* at 910 n.21.

The Court of Appeals' terse and unelaborated opinion in *Doe* plainly was not intended to overrule the same court's lengthy, well-reasoned and recent decision in *Cascade*. Nor could it have done so, given that one panel of the Ninth Circuit cannot overrule a prior panel decision absent an intervening Supreme Court decision that squarely addresses and decides the legal issue in question. [10] In any event, the opinion does not indicate any intention to overrule *Cascade*. On the contrary, the Court held that it "*need not* discuss *Cascade's* impact on [the *Doe*] case or others pending in the district court." 571 F.3d at 935 (emphasis supplied). This is hardly the language of overruling. The Ninth Circuit did not need to discuss *Cascade's* impact because the *Doe* plaintiffs had disclaimed any reliance on below-cost pricing.

Indeed, at oral argument in Doe, which of course occurred after *linkLine* was decided,

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[9] The Court first rejected an alternative approach adopted by the Third Circuit, which would allow antitrust liability based on bundled discounting even when the discounting does not result in prices below the defendant's costs. 515 F.3d at 900-03. Following a number of Supreme Court decisions cited by Abbott, including *Brooke Group*, the Ninth Circuit held that "the exclusionary conduct element of a claim arising under § 2 of the Sherman Act cannot be satisfied by reference to bundled discounts unless the discounts result in prices that are below an appropriate measure of the defendant's costs." *Id.* at 903.

[10] *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). As noted in the text, *linkLine* did not purport to resolve the question of what standard should be used to determine whether a bundled discount results in below-cost pricing.

Abbott's counsel ***conceded*** that the *Cascade* test continues to govern the issue of below-cost pricing in bundled-discount cases, while the original *Brooke Group* test governs the same issue in single-product cases. As Abbott's counsel explained:

> Mr. Hurst: Now, let me turn to one quick issue. There has been a lot of ink spilled in the briefs about whether or not Kaletra is a bundled product and, therefore, falls within the Cascade case.
>
> Just two quick points. One is that, in our view, is a red herring. It's not relevant.
>
> Whether Kaletra is a bundled product, it's important only to determining how you calculate below-cost pricing. That's all it's relevant to. ***If Kaletra is a bundled product, a Cascade-type calculation would apply.*** If Kaletra is not a bundled product, a Brooke Group type . . . calculation would apply. But in either case, you have to show below-cost pricing, and there is no evidence or allegation of that ***in this case***.

Oral arg. Tr. 13-14 (emphasis supplied).

Abbott of course has argued strenuously in this litigation that Kaletra is a "bundled product,"[11] and Plaintiffs agree. *Safeway* SAC ¶ 51; *Meijer* SAC ¶ 49-50; *Rite Aid* SAC ¶ 49. Accordingly, as Abbott concedes, a *Cascade*-type calculation would apply to determine whether Abbott has engaged in below-cost pricing in the boosted market. As explained in the next section, Plaintiffs have explicitly alleged (and can prove) that Abbott's post-December 2003 pricing of Norvir and Kaletra fails the below-cost pricing test set out in *Cascade*.

Ignoring its concession at the *Doe* oral argument, Abbott now argues that *linkLine* silently overruled *Cascade*. Mot. at 14. This argument is fanciful. *linkLine* did not discuss, much less reject, the long line of cases (including *Cascade*) that have recognized both the potential harm to competition that can result from bundling and the viability of anticompetitive bundling as a theory of liability under section 2. *See Cascade*, 515 F.3d at 896 (explaining that a dominant firm may "use a bundled discount to exclude an equally or more efficient competitor and thereby

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[11] Notice of Motion and Omnibus Motion of Abbott Laboratories to Dismiss Plaintiffs' Sherman Act Claims Pursuant to Rule 12(b)(6) at 2 (Jan. 31, 2008) ("According to Plaintiffs, Abbott's bundled discounting constitutes anti-competitive or exclusionary conduct in violation of the Sherman Act"). *See also Meijer, Inc. v. Abbott Laboratories*, 544 F. Supp. 2d 995, 1000 (N.D. Cal. 2008) ("Abbott has filed an omnibus motion to dismiss based on the Ninth Circuit's recent decision [on bundled discounting] in *Cascade*").

reduce consumer welfare in the long run"); *LePage's, Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003) (en banc); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1065 (3d Cir. 1978); *Ortho Diagnostic Sys., Inc. v. Abbott Laboratories, Inc.*, 920 F. Supp. 455, 467 (S.D.N.Y. 1996). Nor did *linkLine* discuss or address the wealth of scholarly economic and legal analysis underpinning antitrust scrutiny of bundled discounts where, for example, the "discount attribution" test (or another appropriate test of the likelihood of exclusion) is satisfied. *See Cascade*, 515 F.3d at 894-97. Significantly, leading commentators agree that *linkLine* did not intend to wipe away decades of bundled-discount case law, pointing out that elimination of the unadorned, stand-alone price-squeeze claim rejected in *linkLine* is entirely compatible with recognizing bundled-discount claims under section 2 in the presence of either an antitrust duty to deal or below-cost pricing.[12]

Abbott's specific contention—that the *Cascade* analysis is irrelevant because *linkLine* rejected a "transfer price test" as a means of overcoming the difficulty of identifying a "fair" or "reasonable" profit in price-squeeze cases—borders on the frivolous. The Supreme Court's grant of certiorari in *linkLine* had nothing to do with the appropriate antitrust analysis of bundled-discount cases. *See* 129 S. Ct. at 1116-17 ("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") (citations omitted). That issue was not raised by the facts of the case or briefed by the parties. And the Supreme Court's *dictum* that the transfer price test lacks "any grounding in our antitrust jurisprudence" was based on nothing more than its earlier holding that "[a]n upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like." *Id.* at 1122. As explained below, Plaintiffs here have alleged facts giving rise to a duty to deal.[13]

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[12] *Compare* E. Elhauge & D. Geradin, GLOBAL ANTITRUST LAW & ECONOMICS 457-58 (2007) (questioning viability of stand-alone price-squeeze claims) *with* E. Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. ___, ___ (forthcoming Dec. 2009) (arguing that *linkLine* does not affect the traditional analysis of bundled discounts).

[13] The Supreme Court's dissatisfaction with any test that would require a monopolist to "leave its rivals a 'fair' or 'adequate' margin between the wholesale price and the retail price" (129 S. Ct. at 1121) is likewise irrelevant. First, this case has nothing to do with the margin between a wholesale price and a retail price. Second, the "discount attribution" test adopted in *Cascade*

Thus, the combined effect of *linkLine* and *Doe* is to permit Plaintiffs' claims for monopolization of the boosted PI market to proceed so long as Abbott (i) had a duty to deal in the boosting market or (ii) engaged in below-cost pricing in the boosted market. As we show next, Plaintiffs have alleged both a duty to deal in the boosting market and below-cost pricing in the boosted market. Those allegations, which must be accepted as true for purposes of Abbott's motion, require that Abbott's motion be denied.[14]

III. PLAINTIFFS HAVE ALLEGED BOTH A DUTY TO DEAL IN THE BOOSTING MARKET AND BELOW-COST PRICING IN THE BOOSTED MARKET.

A. Plaintiffs Have Alleged a Duty to Deal in the Boosting Market.

The Supreme Court reasoned in *linkLine* that, if a monopolist has the right under the antitrust laws to stop selling the monopolized product or service altogether, then it has the right to sell the product or service on terms that are unfavorable to its competitors. Conversely, if the monopolist does *not* have the right under the antitrust laws to stop selling the monopolized product altogether, then the terms on which it sells may be subject to antitrust scrutiny. In this case, based on the allegations in Plaintiffs' complaints, Abbott had an antitrust duty to deal in the boosting PI market and violated that duty.

1. Plaintiffs have alleged a duty to deal under *Aspen Skiing* and a violation of that duty.

In *linkLine* itself, the Supreme Court recognized that a monopolist may incur an antitrust duty to deal with its rivals through a course of conduct that renders those rivals dependent on the continuation of that conduct. 129 S. Ct. at 1118 (citing *Aspen Skiing*). Plaintiffs' allegations mirror the facts that the Supreme Court found sufficient to impose section 2 liability in *Aspen*

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identifies situations in which an equally efficient competitor is left with no profit margin at all, so there is no need for an antitrust court to determine a "fair" or "adequate" margin. *See Cascade*, 515 F.3d at 903. On the issue of judicial administrability, there is in fact *no* difference at all between the *Cascade* test formerly favored by Abbott and the test now favored by Abbott (the original, single-product *Brooke Group* test). Both tests are based on a comparison of the defendant's prices to its costs, and neither requires an antitrust court to determine a fair or adequate margin for the defendant's competitors.

[14] In addition to the arguments set forth in the text, Plaintiffs adopt and incorporate by reference the arguments made in GSK's brief.

Skiing.

In *Aspen Skiing*, the Supreme Court affirmed a judgment imposing antitrust liability on a firm with monopoly power in the Aspen, Colorado ski resort market that dramatically changed the terms on which it had previously done business. The defendant in that case (Ski Co.) owned and operated three of the four ski resorts in Aspen, Colorado, and the plaintiff (Highlands) owned the fourth. Prior to the events that led to the lawsuit, Ski Co. and Highlands had jointly marketed an "all-Aspen" lift ticket that allowed skiers to ski at any of the four mountains. The two companies allocated the revenues generated from the ticket based on usage. *See Aspen Skiing*, 472 U.S. at 590-92. In early 1978, Ski Co. concluded that its long-term interests were threatened by this arrangement and offered to continue the arrangement only if Highlands would agree to a fixed 12.5% percentage of the revenue (a figure that was well below its historical usage). A member of Ski Co.'s board of directors admitted that this was an offer Highlands "could not accept." *Id.* at 592.[15] In an effort to recreate the all-Aspen ticket, Highlands began issuing its customers vouchers that could be redeemed by Ski Co. for full retail value, but Ski Co. refused to accept them. *Id.* at 594.[16] Ski Co. also raised the price of its single ticket to $22 while discounting its bundled 6-day, 3-area ticket to $114, a price structure which made Highland's efforts to recreate the all-Aspen ticket "unprofitable." *Id.* at 594 n.15. As a result of these measures, Highland's share of the Aspen market declined precipitously. *Id.* at 594-95.

As explained more fully in GSK's opposition, which Plaintiffs here incorporate by reference, these facts parallel the facts alleged in these cases. *See Safeway* SAC ¶¶ 39-43; *Meijer* SAC ¶¶ 34-39; *Rite Aid* SAC ¶¶ 37-41. Plaintiffs have alleged that Abbott, after encouraging its competitors over many years to develop and market products that could be boosted with Norvir,

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[15] Hence, Ski Co. did not refuse to deal with Highlands but rather offered to deal on terms that it knew Highlands would find unacceptable.

[16] This contradicts Abbott's contention that *Aspen Skiing* involved only Ski Co.'s refusal to deal with Highlands rather than a refusal to deal with its own customers. Mot. at 18. In any event, there is no economic difference between refusing to deal with a competitor and refusing to deal with customers who deal with a competitor. The *Doe* decision is based on the economic equivalence of these two actions. *See also Aspen Skiing*, 472 U.S. at 601-03 (relying on *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), a case in which a monopolist refused to deal with advertisers that purchased advertising from a competing radio station).

suddenly changed course and raised the price of Norvir to a level that many patients taking those products "could not accept." Plaintiffs have also alleged that Abbott changed course in order to disadvantage its competition. Plaintiffs' allegations include the following:

- "At the very same time that Abbott was planning to limit Norvir's availability (either by physically removing it from the market or raising its price to make it effectively unavailable), Abbott was approaching BMS, GSK and other actual and potential Boosted PI competitors to induce them to take licenses from Abbott for the right to label and market their PIs to be boosted by, or co-administered with, Norvir." *Safeway* SAC ¶ 39; *Meijer* SAC ¶ 34; *Rite Aid* SAC ¶ 37.[17]

- "By mandating that its competitors enter into licensing agreements for the sale of Norvir—agreements that covered the vast majority of its competitors in the Boosted Market—Abbott created a framework within which Norvir would remain on the market for co-administration with competing boosted PIs. Abbott also created an expectation that it would deal in accordance with its prior conduct and that Norvir would continue to be available to its competitors in the Boosted Market and to their patients for use in conjunction with competing PIs. This expectation included the expectation that Abbott would (a) continue to market Norvir as a separate product; and (b) implement normal, inflation-level price increases for Norvir." *Safeway* SAC ¶ 41; *Meijer* SAC ¶ 36; *Rite Aid* SAC ¶ 39.

- "Prior to Norvir's launch in 1996, Abbott was aware of Norvir's boosting properties as a use for Norvir. By the time Kaletra had launched in 2000, it was well-established and Abbott knew that Norvir was used almost exclusively as a boosting agent and not as a stand-alone treatment, that the daily average consumption of the drug was significantly lowered, and that Norvir had become the industry standard of care for boosting agents . . . . Knowing all this, Abbott nevertheless continued its prior course of conduct by implementing inflation-level price increases on Norvir and by opening the market through license agreements with competitors. Abbott's course of conduct toward its competitors continued until December 2003, at which time

[17] Contrary to Abbott's contention, these allegations appear in all three Direct Purchaser complaints.

it drastically changed course and implemented a radically different strategy that crippled its competitors' ability to compete with Kaletra." *Safeway* SAC ¶ 42; *Meijer* SAC ¶ 38; *Rite Aid* SAC ¶ 40.

- "Faced with increasing competition in the Boosted Market through the introduction of Reyataz and Lexiva, Abbott abandoned its prior course of conduct and planned to change direction in how it would make Norvir available. Abbott's change in direction was narrowed to two options: remove Norvir from the United States market or increase the price of Norvir by 200%, 300%, 400%, or possible 600%. In choosing the 400% price increase, Abbott went from encouraging the promotion of Norvir with its competitors' PIs that had existed for years to imposing an anticompetitive price increase on Norvir." *Safeway* SAC ¶ 43; *Meijer* SAC ¶ 39; *Rite Aid* SAC ¶ 41.

Indeed, the parallel between *Aspen Skiing* and this case is even closer than these quotations would make it appear. Ski Co.'s anticompetitive conduct in *Aspen Skiing* included a "price squeeze" analogous to the one considered many years later by the same Court in *linkLine*: Ski Co. raised the price of a single ticket (the upstream input needed by Highlands) while simultaneously discounting the price of its 3-area ticket (the downstream product with which Highlands was trying to compete), rendering Highland's attempt to replicate the all-Aspen ticket "unprofitable." 472 U.S. at 594 n.15. This is perfectly analogous to AT&T charging a high wholesale price for DSL service and a low retail price for the same service. The difference in outcome between *Aspen Skiing* and *linkLine* reflects the fact that Ski Co., like Abbott and unlike AT & T, was subject to an antitrust duty to deal.

2. Plaintiffs have alleged a duty to deal under the antitrust laws governing tying, monopolization and attempted monopolization.

In addition to alleging facts giving rise to a duty to deal under *Aspen Skiing*—a duty that is part of Plaintiffs' affirmative case—Plaintiffs have alleged facts giving rise to a duty to deal under the antitrust laws proscribing tying arrangements and actual and attempted monopolization. Specifically, Plaintiffs have alleged that Abbott would have violated those laws if it had taken Norvir off the market entirely rather than raising its price by 400%. *See Safeway* SAC ¶¶ 48-49.

These antitrust duties to deal, while not the basis for imposing liability on Abbott, demonstrate that Abbott could not have "simply stopped" selling Norvir and that the initial premise of *linkLine* therefore does not apply. *Cf. linkLine*, 129 S. Ct. at 119 ("If AT & T had simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act").

As the Court is aware, ritonavir is the active ingredient in Norvir and one of two active ingredients in Kaletra, the other being lopinavir. Norvir is the only PI with so-called "boosting" properties. *Safeway* SAC ¶ 15. If Abbott were to stop selling Norvir as a separate product, patients who wanted to take ritonavir (the tying product) would be required to take lopinavir (the tied product) as well. *Id.* ¶ 49. This would be a so-called "functional" or "technological" tie: the tying product literally cannot be purchased separately from the tied product. *See United States v. Microsoft Corp.*, 253 F.3d 34, 84-85 (D.C. Cir. 2001) (en banc) (Microsoft's sale of a single software package containing both its Windows operating system and its Internet Explorer browser was a technological or functional tie).

Under traditional tying law, a tying arrangement is *per se* illegal if the plaintiff can prove: (1) "that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market." *Cascade*, 515 F.3d at 913.[18] Under the hypothetical circumstances we are considering here—removal of Norvir from the market—each of these elements would be present. Abbott would have tied together the sale of two separate products (ritonavir and lopinavir); Abbott would have sufficient economic power in the boosting market to coerce customers into purchasing lopinavir rather than another boosted PI; and the arrangement would affect a substantial volume of commerce in the boosted PI market. *See Safeway* SAC ¶¶ 19-20, 49, 58. Thus, Abbott was subject to an antitrust duty to continue selling

[18] Proving a tying violation under the rule of reason requires proof of a fourth element: harm to competition in the tied product market (here, the boosted PI market). *See Microsoft*, 253 F.3d at 95. Plaintiffs have alleged this element as well. *E.g.*, *Safeway* SAC ¶¶ 19-20, 23, 26, 47, 49.

Norvir as a separate product.[19]

For much the same reasons, Abbott was also under an antitrust duty to deal imposed by the antitrust laws proscribing monopolization and attempted monopolization (namely, section 2 of the Sherman Act). Under the circumstances alleged in Plaintiffs' complaint, removal of Norvir from the market entirely would constitute not only tying but also an act of monopolization or attempted monopolization of the boosted PI market. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482-87 (1992) (a jury could find that Kodak's tying of service to parts in order to eliminate competition in the market for servicing Kodak copiers constituted monopolization and attempted monopolization of the service market absent a valid business justification); *Microsoft*, 253 F.3d at 64-67 (actions taken by Microsoft to integrate Windows and Internet Explorer and thereby prevent Windows buyers from using a competitive internet browser were anticompetitive and violated section 2).

It is correct, of course, that Plaintiffs have not alleged that Abbott actually took Norvir off the market. Nor do they need to make such an allegation. As explained above, it was the absence of a duty to deal, and not whether AT&T had refused to deal, that was critical to the Court's reasoning in *linkLine*. In this case, Plaintiffs have alleged that Abbott was subject to an antitrust duty to deal, so the Court's reasoning in *linkLine* simply does not apply.

B. Plaintiffs Have Alleged Below-Cost Pricing in the Boosted PI Market.

The other critical factor emphasized in *linkLine* was the absence of below-cost pricing by AT&T in the downstream (retail) DSL market. *See linkLine*, 129 S. Ct. at 1119-20. In this case, Plaintiffs have alleged that Abbott has engaged in below-cost pricing in the boosted PI market. *Safeway* SAC ¶¶ 51-55; *Meijer* SAC ¶¶ 49-51; *Rite Aid* SAC ¶¶ 49-52.

As the Court is aware, Abbott argued strenuously in a prior motion to dismiss that its pricing of Norvir and Kaletra should be viewed as bundled discounting and evaluated under

[19] Indeed, Plaintiffs could have asserted a tying claim against Abbott on the basis of what Abbott actually did (*i.e.*, raising the price of Norvir by 400% rather than taking it off the market entirely). *See Cascade*, 515 F.3d at 914 (jury could find that hospital illegally tied primary and secondary hospital services to tertiary services by engaging in bundled discounting that encouraged insurers to buy all three services from the same source). However, Plaintiffs have elected to proceed under different antitrust theories.

Cascade. *See Meijer, Inc. v. Abbott Laboratories*, 544 F. Supp. 2d 995, 1000 (N.D. Cal. 2008); Notice of Motion and Omnibus Motion of Abbott Laboratories to Dismiss Plaintiffs' Sherman Act Claims Pursuant to Rule 12(b)(6) at 7 (Jan. 31, 2008) ("*Cascade* controls this case"). In *Cascade*, after an exhaustive analysis, the Ninth Circuit held that bundled discounting by a monopolist violates section 2 of the Sherman Act if it results in below-cost pricing, and that whether such conduct results in below-cost pricing should be determined using the "discount attribution" test. 515 F.3d at 894-910. In so holding, the Court of Appeals expressly rejected Abbott's argument that the single-product below-cost pricing test set forth in *Brooke Group* is the appropriate test for below-cost pricing in a bundled-discount case. *Id.* at 903-04, 910 n.21.

Plaintiffs have alleged that Abbott's post-December 2003 pricing of Norvir and Kaletra resulted in below-cost pricing under the "discount attribution" test adopted in *Cascade*. Under that test, a bundled discount results in below-cost pricing if the discount given to a purchaser for buying the bundle, when applied entirely to one of the products in the bundle, results in that product being sold at a price below the firm's average variable cost. *See Cascade*, 515 F.3d at 906-10. Plaintiffs have alleged that the discount given to purchasers of Kaletra after December 2003, when applied entirely to lopinavir, results in lopinavir being sold at a price below Abbott's average variable cost. *Safeway* SAC ¶ 53; *Meijer* SAC ¶ 50; *Rite Aid* SAC ¶ 50.

While this allegation would be sufficient to withstand Abbott's motion to dismiss, Plaintiffs have also alleged that, in this case, the discount-attribution test substantially understates the actual effects of Abbott's bundled discounting on its competitors. As explained in Plaintiffs' complaints, more than half of the AIDS drugs dispensed in the United States are paid for by governmental payors, and the complex pricing rules that apply to government purchases of these drugs ensured that government payors were not adversely affected by the December 2003 Norvir price increase. *Safeway* SAC ¶ 54. As a result, the PIs sold by Abbott's competitors were not at a competitive disadvantage with respect to government purchasers. Nevertheless, in order to offer private purchasers a price that was equivalent to the imputed or effective price of lopinavir after December 2003, Abbott's competitors would have had to drop their price not only to private purchasers, but to government purchasers as well. *Id.* ¶ 55. Such a competitor would not only

have had to sell its product below average variable cost, but would also have had to give up millions of dollars in revenue from government purchasers even though the competitor was not at a pricing disadvantage with respect to those purchasers. These circumstances would make it even more irrational for a competitor to attempt to match Abbott's post-December 2003 pricing than in a normal market. *Id.*

IV. PLAINTIFFS HAVE ALLEGED MONOPOLIZATION OF THE BOOSTING MARKET.

Finally, Plaintiffs have adequately alleged that Abbott successfully monopolized the *boosting*—as opposed to the *boosted*—market. *Safeway* SAC ¶¶ 46, 74-76; *Meijer* SAC ¶¶ 40, 79-81; *Rite Aid* SAC ¶¶ 44, 72-74. In a prior order, the Court correctly ruled that this claim could not be dismissed at the pleading stage because Abbott's asserted patent rights do not appear on the face of Plaintiffs' complaints. *Meijer v. Abbott*, 544 F. Supp. 2d at 1005.

Abbott now argues that Plaintiffs' claim is (i) "implausible," (ii) inconsistent with *linkLine*, (iii) defeated by Abbott's asserted patent rights and (iv) missing essential allegations relating to liability for standard-setting. All four arguments are without merit.

Abbott's first and second arguments are based on a misunderstanding of Plaintiffs' claim. Plaintiffs' claim is based neither on Abbott's supposed failure to sell Norvir nor on its sale of Norvir at "too low a price," but rather on Abbott's course of conduct in inducing potential competitors to forgo development of alternative boosters because they expected Abbott to continue making Norvir available to their patients on reasonable terms. Abbott's "implausibility" and predation arguments do not address what Plaintiffs actually allege.

Abbott's third argument fails for the reason identified by the Court in its order denying Abbott's prior motion to dismiss: Abbott's supposed patent rights do not appear on the face of Plaintiffs' complaints. In any case, Plaintiffs are not challenging Abbott's right to license its patents. Abbott was entitled to license its patents; it was not entitled to deceive its competitors into forgoing development of alternative drugs that would have competed with Norvir.

Abbott's final argument is based on a factual assertion that is inconsistent with the premise of Plaintiffs' claim—that Norvir would have been the only available booster regardless

of Abbott's conduct. Mot. at 23. Plaintiffs allege the contrary. *Safeway* SAC ¶ 44 ("As a result of Abbott's conduct, no currently available PI has been approved for co-administration with any booster other than Norvir"); *Meijer* SAC ¶ 41 (same); *Rite Aid* SAC ¶ 42 (same). Whether Plaintiffs or Abbott is correct is an issue of fact that cannot be decided on a motion to dismiss. *See Meijer*, 544 F. Supp. 2d at 998.

CONCLUSION

As demonstrated above, Plaintiffs have alleged both that Abbott violated a duty to deal in the boosting PI market and that it engaged in below-cost pricing in the boosted PI market. Neither of these circumstances was present in *linkLine*, and neither was alleged in *Doe*. For the foregoing reasons, Abbott's motion to dismiss should be denied.

Dated: September 24, 2009

Respectfully submitted,

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