James F. Hurst *(Admitted Pro Hac Vice)*
David J. Doyle *(Admitted Pro Hac Vice)*
Samuel S. Park *(Admitted Pro Hac Vice)*
Stephanie S. McCallum *(Admitted Pro Hac Vice)*
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601-9703
Telephone: (312) 558-5600
Facsimile: (312) 558-5700
Email: jhurst@winston.com; ddoyle@winston.com; spark@winston.com; smccallum@winston.com

Nicole M. Norris (SBN 222785)
WINSTON & STRAWN LLP
101 California Street, Suite 3900
San Francisco, CA 94111-5894
Telephone: 415-591-1000
Facsimile: 415-591-1400
Email: nnorris@winston.com

Charles B. Klein *(Admitted Pro Hac Vice)*
Matthew A. Campbell *(Admitted Pro Hac Vice)*
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20007
Telephone: (202) 282-5000
Facsimile: (202) 282-5100
Email: cklein@winston.com

Jeffrey I. Weinberger (SBN 56214)
Stuart N. Senator (SBN 148009)
David M. Rosenzweig (SBN 176272)
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
Email: jeffrey.weinberger@mto.com; stuart.senator@mto.com; david.rosenzweig@mto.com;

Michelle Friedland (SBN 234124)
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, CA 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077
Email: michelle.friedland@mto.com

Attorneys for Defendant
ABBOTT LABORATORIES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

SMITHKLINE BEECHAM CORPORATION, d/b/a GLAXOSMITHKLINE,

Plaintiff,

vs.

ABBOTT LABORATORIES,

Defendant.

(Caption continued on next page)

CASE NO. C 07-5702 (CW)

Related per December 5, 2007 Order to Case No. C 04-1511 (CW)

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ABBOTT'S OMNIBUS MOTION TO DISMISS

Judge: Honorable Claudia Wilken
Date: October 15, 2009
Time: 2:00 PM
Location: Courtroom 2 (4th Floor)

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. C 07-5470 (CW) Related per November 19, 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)
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)

At the hearing on Abbott's motions to dismiss, counsel for GSK stated that the prerequisites for a refusal-to-deal claim identified in the Supreme Court's *Trinko* decision did not have to be pled or proven, but were only means to establish the defendant's intent to monopolize. Plaintiffs suggest that they can state a claim for a violation of Section 2 based on refusal to deal by alleging that Abbott had an intent to monopolize, without identifying conduct that would be considered exclusionary (also referred to as "predatory" or "anticompetitive" in the case law). Abbott offers this supplemental memorandum to provide the Court with citations to cases addressing this issue.

Predatory conduct is an essential and independent element of any Section 2 claim:

> [A] claim for monopolization of trade has two elements: the possession of monopoly power in the relevant market and the acquisition or perpetuation of this power by *illegitimate 'predatory' practices*. Similarly, to state a claim for attempted monopolization, the plaintiff must allege facts that, if true, will prove: (1) that the defendant has engaged in *predatory or anticompetitive conduct* with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 567 F.3d 1084, 1093 (9th Cir. 2009) (emphasis added and citations omitted). Predatory conduct requires more than acts by the defendants taken with a subjective intent to monopolize. Those acts must be objectively anticompetitive without reference to the defendant's subjective intent.

The Supreme Court has held specifically that, even where there is proof of intent to monopolize, the other elements of a Section 2 claim must be satisfied. For example, in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*, 509 U.S. 209 (1993), the Court rejected the idea that "a mere showing that the defendant intended to harm competition" could state a claim under Section 2 of the Sherman Act or under the Robinson-Patman Act, and held that, even where evidence of such intent exists, the plaintiff must still prove predatory conduct (in that case, below-cost pricing and a dangerous probability of recoupment). *Id.* at 221-24.

The Ninth Circuit has also repeatedly held that showing intent to monopolize is insufficient; instead, there must be an independent showing of predatory conduct. In *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), for example, the Ninth Circuit emphasized that "*Brooke Group*[] . . . put to rest any notion that predation can be proven through

evidence of intent alone." *Id.* at 910 n.20; *see also Oahu Gas Serv., Inc. v. Pacific Res., Inc.*, 838 F.2d 360, 371 (9th Cir. 1988) (finding no "liability even though we accept the jury's conclusion that Gasco intended the campaign to harm Oahu and thereby to increase its market share"). Consistent with this, in *John Doe 1 v. Abbott Laboratories*, 571 F.3d 930 (9th Cir. 2009), the court held that the plaintiffs had failed to allege exclusionary conduct even though plaintiffs' central allegation was that Abbott intended to monopolize (*i.e.*, the *Doe* plaintiffs, like the plaintiffs here, had alleged an intent to monopolize). *Id.* at 932 ("Abbott allegedly leveraged its Norvir monopoly to attempt to monopolize the boosted market for Kaletra.").

Courts require more than a mere intent to monopolize because "the same manifestations of intent can accompany competitive, socially beneficial acts (such as aggressive but remunerative price cutting) and anticompetitive, harmful acts (such as properly defined predatory pricing)." III Areeda & Hovenkamp, Antitrust Law ¶ 601, at 5 (3d ed. 2008). For this reason, *Delaware & Hudson Railway. Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), upon which GSK relies, recognized that direct proof of intent to monopolize "standing alone," could not satisfy the "anti-competitive conduct" element. *Id.* at 179; *see also Rural Tel. Serv. Co., Inc. v. Feist Publ'ns, Inc.*, 957 F.2d 765, 769 (10th Cir. 1992) ("[Even] [a]ssuming Rural Telephone's refusal to deal was motivated by an intent to exclude Feist Publications from the yellow pages advertising market, anti-competitive intent alone is insufficient to establish a violation of § 2."); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) ("[I]f conduct is not objectively anticompetitive[,] the fact that it was motivated by hostility to competitors . . . is irrelevant."); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101, 1113 (1st Cir. 1989) ("[T]he desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws. . . . As long as Blue Cross's course of conduct was itself legitimate, the fact that some of its executives hoped to see Ocean State disappear is irrelevant. Under these circumstances Blue Cross is no more guilty of an antitrust violation than a boxer who delivers a perfectly legal punch—*hoping* that it will kill his opponent—is guilty of attempted murder."). Accordingly, Plaintiffs' allegations of Abbott's subjective intent cannot remedy Plaintiffs' failure to allege any form of exclusionary conduct.

DATED: October 20, 2009

MUNGER, TOLLES & OLSON LLP
WINSTON & STRAWN LLP

By: /s/ Jeffrey I. Weinberger
JEFFREY I. WEINBERGER
Attorneys for Defendant Abbott Laboratories