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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAFEWAY INC.; WALGREEN CO.; THE KROGER CO.; NEW ALBERTSON'S, INC.; AMERICAN SALES COMPANY, INC.; and HEB GROCERY COMPANY, LP, Plaintiffs, v. ABBOTT LABORATORIES, Defendant.	Case No.: C 07-5470 CW **SECOND AMENDED COMPLAINT** **JURY TRIAL DEMANDED**

NATURE OF THE ACTION

This a civil antitrust action challenging Abbott Laboratories' unlawful monopolization and attempted monopolization of the markets for Boosting and Boosted protease inhibitors,drugs used to treat medical disorders caused by the human immunodeficiency virus, or HIV. Abbott Laboratories ("Abbott"), the sole provider of Norvir, a protease inhibitor ("PI") that is used to boost the therapeutic effects of other protease inhibitors, has unlawfully abused its monopoly position in the Boosting Market in order to disadvantage its competitors and restrict competition in the closely related Boosted Market.

This unlawful scheme has resulted in a suppression of competition in the Boosted and Boosting Markets and has caused Plaintiffs and other purchasers to pay supracompetitive prices for the relevant drugs.

PARTIES

1. Plaintiff Safeway Inc. ("Safeway") is a Delaware corporation having its principal place of business in Pleasanton, California, which is located in the Oakland Division of this Court. Safeway owns and operates retail stores in several states at which it dispenses prescription drugs to the public, including Norvir and Kaletra. Safeway brings this action in its own behalf and as the assignee of McKesson Corporation ("McKesson"), a pharmaceutical wholesaler, which during the relevant period purchased those drugs directly from Abbott for resale to Safeway and which has assigned its claims arising out of those purchases to Safeway.

2. Plaintiff Walgreen Co. ("Walgreen") is an Illinois corporation having its principal place of business in Deerfield, Illinois. Walgreen owns and operates retail stores in several states at which it dispenses prescription drugs to the public, including Norvir and Kaletra. Walgreen purchased Norvir and/or Kaletra directly from Abbott during the relevant period. Walgreen brings this action in its own behalf and as the assignee of two pharmaceutical wholesalers, Cardinal Health, Inc. ("Cardinal") and AmerisourceBergen Drug Corporation, which during the relevant period purchased those drugs directly from Abbott for resale to Walgreen and which have assigned their claims arising out of those purchases to Walgreen.

3. Plaintiff The Kroger Co. ("Kroger") is an Ohio corporation having its principal place of business in Cincinnati, Ohio. Kroger owns and operates retail stores in several states at which it dispenses prescription drugs to the public, including Norvir and Kaletra. Kroger purchased Norvir and/or Kaletra directly from Abbott during the relevant period. Kroger brings this action in its own behalf and as the assignee of Cardinal, which during the relevant period purchased those drugs directly from Abbott for resale to Kroger and which has assigned its claims arising out of those purchases to Kroger.

4. Plaintiff New Albertson's, Inc. ("Albertson's") is a Delaware corporation

having its principal place of business in Boise, Idaho. Albertson's owns and operates retail stores in several states at which it dispenses prescription drugs to the public, including Norvir and Kaletra. Albertson's brings this action in its own behalf and as the assignee of two pharmaceutical wholesalers, McKesson and Cardinal, which during the relevant period purchased those drugs directly from Abbott for resale to Albertson's (or an affiliate) and which have assigned their claims arising out of those purchases to Albertson's.

5. Plaintiff American Stores Company, Inc. ("ASC") is a Delaware corporation having its principal place of business in Lancaster, New York. ASC purchases pharmaceutical and other products and distributes those products to retail stores owned and operated by affiliated companies. ASC purchased Norvir and/or Kaletra directly from Abbott during the relevant period. ASC brings this action in its own behalf and as the assignee of Cardinal, which during the relevant period purchased Norvir and Kaletra directly from Abbott for resale to ASC or an affiliate and which has assigned its claims arising out of those purchases to ASC.

6. Plaintiff HEB Grocery Company, LP ("HEB") is a Texas limited partnership having its principal place of business in San Antonio, Texas. HEB owns and operates retail stores in several states at which it dispenses prescription drugs to the public, including Norvir and Kaletra. HEB brings this action in its own behalf and as the assignee of Cardinal, which during the relevant period purchased Norvir and Kaletra directly from Abbott for resale to HEB and which has assigned its claims arising out of those purchases to HEB.

7. Defendant Abbott is a corporation organized and existing under the laws of the State of Illinois and having its principal place of business in Abbott Park, Illinois. Abbott is engaged in the development, manufacture and sale of pharmaceutical and nutritional products. Abbott has facilities in 14 states, including several in this District.

JURISDICTION AND VENUE

8. This action arises under section 2 of the Sherman Act, 15 U.S.C. § 2, and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15(a) and 26. The Court has subject-matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1337(a).

9. Venue is proper in this Court pursuant to section 12 of the Clayton Act, 15 U.S.C. §22, because Abbott is an inhabitant of this District or is found or transacts business there. Venue is also proper pursuant to 28 U.S.C. §1391.

TRADE AND COMMERCE

10. The pharmaceutical products at issue in this case are sold in interstate commerce, and the unlawful activities alleged in this Complaint have occurred in, and have had a substantial effect upon, interstate commerce.

FACTUAL BACKGROUND

11. PIs are considered the most powerful treatment in the medical battle against HIV and the disorders it causes, including acquired immune deficiency syndrome (AIDS). These drugs work by blocking the action of protease, an enzyme needed for HIV to reproduce and infect other cells.

12. Although PIs present an effective treatment, they have several impediments, including pill burden, dietary requirements and severe side effects. Each PI presents different degrees of impediment and efficacy. In addition, patients develop resistance to certain PIs—a significant challenge to the treatment of HIV—as the disease progresses.

13. There are several PIs currently on the market, including Norvir, manufactured by Abbott and introduced in 1996, and Kaletra, also manufactured by Abbott and introduced in 2000. Kaletra is a combination drug consisting of Norvir and another Abbott PI, whose chemical or generic name is lopinavir (a Boosted drug). As explained below, while Norvir was introduced as a stand-alone treatment, its principal use today is to boost the therapeutic effects (and reduce the required dosage) of other PIs.

14. Abbott developed Norvir with the assistance of a National Institutes of Health grant and spent only about $15 million of its own funds on pre-approval clinical trials for the drug. By the end of 2001, Norvir had generated cumulative sales for Abbott of more than $1 billion.

15. After Norvir's release, it was discovered that, when used in small quantities with another PI, Norvir would boost the anti-viral effects of the other PI. Not only did a small

dose of Norvir make other PIs more effective and decrease side effects associated with high doses, but it also slowed down the rate at which HIV developed resistance to the effects of PIs. Norvir is the only PI known to have such properties and, as a result, for such "boosting" purposes, there is no substitute for Norvir. Physicians recognize that Norvir is the only effective boosting compound available and is an essential component to almost every PI-based treatment for HIV/AIDS In addition to its direct therapeutic benefits, a regimen consisting of a PI boosted by Norvir improves convenience for patients in comparison to an unboosted regimen by reducing the required dosage of the PI and lessening food restrictions, both important factors in ensuring adherence to HIV antiviral therapy.

16. Recent research has also shown significant benefits from the use of boosted PI regimens, especially for patients who experience failure of treatment regimens combining PIs with other anti-HIV drugs. Such treatment failures are marked by the emergence of drug-resistant mutations that limit the benefits of other drugs in the future, because of cross-resistance among HIV medications.

17. Abbott has never sought to use its intellectual property to prevent other manufacturers from creating and selling Boosted PIs that rely on Norvir's use. Instead, Abbott has disclaimed such a use from the exclusionary scope of its patent rights. *See In re Abbott Laboratories Norvir Antitrust Litigation*, 442 F. Supp.2d 800, 807-10 (N.D. Cal. 2007). Abbott profited by licensing competitors—both explicitly and implicitly—the right to market PIs to be co-administered with Norvir. Based on Abbott's course of conduct. Abbott knowingly created the conditions for Norvir to become the de facto standard boosting agent.

18. As noted above, Abbott also markets Kaletra, which consists of Norvir and another Abbott PI, lopinavir, combined in a single pill. Kaletra is lopinavir boosted by Norvir. Although effective and widely used, Kaletra has significant side effects, including hyperlipidemia, which renders patients more vulnerable to heart attacks and strokes.

19. Thus, in the "Boosting Market", Norvir is the only product available, while in the "Boosted Market," Kaletra competes with other PIs, each of which is prescribed and taken in conjunction with Norvir. This creates a situation in which the same firm participates

in two closely related markets, with the product sold in one of the two markets being an input or component of the product sold in the other market. If such a firm lacks competition in the market for sales of the input or component product, it may be able to use its monopoly position in that market to disadvantage its competitors in the related market and dampen competition in the related market and monopolize or attempt to monopolize the related market. That is exactly what Abbott has done here.

20. Abbott's anticompetitive conduct involves both of these markets. First, Abbott has abused its monopoly position in the Boosting Market to disadvantage its competitors and impede competition in the Boosted Market. And second, by improperly impeding the development of potential rivals to Norvir (and/or by delaying the development of technologies that would have permitted Norvir to be used as a PI-Boosting drug in substantially lesser amounts far earlier and thus effectively brought lower prices to purchasers earlier) in the Boosting Market, Abbott artificially maintained and/or enhanced and exploited Norvir's monopoly position in the Boosting Market**.**

ABBOTT'S ANTICOMPETITIVE CONDUCT

21. Prescriptions for Kaletra rose steadily from its introduction in September 2000 through mid-2003, at which point it enjoyed approximately a 75% share of the Boosted Market. However, Kaletra's dominance of the Boosted Market was about to be threatened.

22. On information and belief, in 2001 (or earlier), Abbott came to realize that Kaletra's dominance of the Boosted Market would soon be challenged by new boosted-PIs that were then expected to be coming to market imminently.

23. At least as early as 2002, Abbott was becoming increasingly concerned about the competitive threat to Kaletra posed by soon-to-be-introduced boosted PIs, and began to formulate plans to thwart the impact on Kaletra of those new products. Abbott considered various strategies for using Norvir's dominance to impair Kaletra's rivals including, *e.g.* removing Norvir from the market as a stand-alone product and raising Norvir's price substantially

24. In June 2003, Bristol-Myers Squibb ("BMS") introduced Reyataz, a PI

designed to be boosted by Norvir. In October 2003, GlaxoSmithKline ("GSK"0 introduced Lexiva, another PI designed to be boosted by Norvir. Studies showed that, when boosted with Norvir, the new PIs were as effective as Kaletra, and were more convenient. This caused concern at Abbott that Kaletra's market share would be threatened by these new Boosted PI competitors. And, in fact, Kaletra's share of the Boosted Market began to decline.

25. Beginning in the second half of 2003, both Reyataz and Lexiva began to make steady inroads into Kaletra's share of the Boosted Market.

26. Faced with the prospect of new competition to Kaletra, Abbott's boosted PI, Abbott declined to engage in legal and procompetitive approaches to defending Kaletra's market share (such as reducing Kaletra's price). Instead, Abbott formulated an anticompetitive monopolization scheme using Abbott's control of the Boosting Market (Norvir) to maintain and/or enhance Kaletra's dominant market position. Abbott was well aware that Abbott had encouraged the use of Norvir as a booster and had caused patients, physicians and competitors to rely on the availability of Norvir through Abbott's past conduct and formally through licensing its competitors to promote their PIs with Norvir,. Abbott's executives realized that if Abbott could make Norvir unavailable or less desirable when paired with its competitors' PIs—by actually pulling it from the market (which it seriously considered) or by drastically raising its price (which it did)—then its competitors' products in the Boosted Market would cease to be a significant competitive threat.

27. On December 3, 2003, Abbott raised the wholesale price of Norvir by approximately 400%, from $205.74 to $1,028.71 for a 120-count bottle of 100 mg capsules. However, Abbott did not raise the price of Kaletra, which incorporates Norvir. In effect, Abbott raised the price of Norvir only when it is used to boost a non-Abbott PI. By instituting this enormous price hike, Abbott drastically increased the cost of regimens using Norvir to boost competing PIs. The annual cost of Norvir needed in such a regimen increased by $6,258 per year for PIs such as Lexiva requiring twice-daily dose of Norvir. For Aptivus (tipranavir), a new PI marketed by Boehringer Ingelheim, the optimal Norvir booster dose increased by more than $12,000 per year.

28. Abbott's December 3, 2003 price increase was an attempt to use its monopoly position in the Boosting Market in order to disadvantage competitors and maintain its dominant position in the Boosted Market. Abbott's 400% Norvir price increase not only impeded competition by inflating the costs of using rivals' Boosted PI products, but it also caused its Boosted PI competitors to forgo responding to Abbott's conduct by lowering price. After December 2003, Abbott's Boosted PI competitors knew that any price reductions they took could immediately be undercut by further Norvir price increases. In other words, by using its monopoly in the Boosting Market, Abbott could react to price cuts by its Boosted PI rivals not with price reductions of its own on its Boosted PI product, as one would expect in a competitive market, but rather with price increases on a different product. Abbott's Boosted PI rivals therefore had little incentive to get into a competitive battle with Abbott in the Boosted market given that Abbott controlled the Boosting Market. By undermining competitors' incentives to price compete, Abbott's conduct reduced price competition as a whole in the Boosted Market. Consequently, the December 2003 Norvir price increase not only raised the costs of using rivals' products, but also reduced the overall degree of price competition in the Boosted Market, thereby further reducing competitive pressure on Abbott to reduce Kaletra's prices.

29. As reported in the Wall Street Journal, internal Abbott documents reveal, among other things, that: a) Abbott understood the illegal nature of the price-increase scheme and contemplated other strategies, like ceasing sales of Norvir, to "minimize any federal investigations regarding price increases in the US"; b) Abbott understood the adverse consequences of the scheme, including that it would "tarnish" the reputation of Abbott's CEO, "[p]osition [Abbott] as [a] big, bad, greedy pharmaceutical company," "[f]uel[] perception[s] regarding lack of Abbott commitment to HIV," and create a "[b]acklash from [the] advocacy community, legislators, [and] physicians"; and c) Abbott floated pretextual rationales for the price increase but worried about its "[e]xposure on price if forced to open [its] books." Furthermore, removing Norvir from the U.S. market would potentially expose Abbott to the significant financial risk that the NIH would use its "march-in" rights under the Bayh-Dole Act

to grant licenses to numerous competitors to allow rivals to manufacture ritonavir and/or to co-formulate their boosted PIs with ritonavir in a single pill or capsule.

30. According to internal Abbott emails and other documents released by the Wall Street Journal, one Abbott executive explained Abbott's concern in the following manner: Abbott could not "continue to trade a prescription of Kaletra for a prescription of Norvir at 100 mg." Rather than rely on any competitive advantage in the medicinal characteristics of Kaletra, or on lowering Kaletra's price so that it was more attractive to patients, this executive outlined alternative anticompetitive plans that had been discussed among Abbott management and warned other senior Abbott employees not to be "stunned by the outcome of the thought process."

31. The emails outlined two potential scenarios for increasing the price of Norvir in an effort to artificially decrease demand for its competitors' PIs. In both scenarios, they suggested leaving the price of Kaletra unchanged, thus giving Abbott a huge price advantage over PIs boosted by Norvir. They outlined a "rationale" for the proposed Norvir price increase, suggesting that Abbott mislead the public into believing that "it is no longer feasible for Abbott to provide a production line of Norvir capsules at the current price." The emails, however, frankly admit the "weakness" of this "rationale" – its falsity.

32. The Abbott emails also suggested an alternative approach to the price increase: withdraw Norvir capsules from the market entirely, leaving HIV patients with only a liquid form of Norvir that Abbott's own executives admit "taste[s] like someone else's vomit." Other materials reveal that Abbott planned to make up a justification for this withdrawal. Executives considered misleading the public into believing that Abbott was diverting the capsules for humanitarian efforts in "the developing world (i.e. Africa)."

33. An Abbott slide presentation created around the time of these emails further illustrates the anticompetitive and illegitimate motives behind Abbott's price hike. The presentation reveals, for example, that Abbott sought to "[p]osition Kaletra as a more economical option for boosted ARV [anti-retroviral] therapy."

34. Abbott acknowledged the illegitimacy of its plan, but Abbott apparently

found it easier to mislead the public regarding an anticompetitive price increase than to try to explain a complete withdrawal of Norvir capsules from the market.

35. Abbott's scheme effectively halted the decline in market share of Kaletra. By 2006, Kaletra's share of the boosted PI market had risen to approximately 75%, the same share it held prior to the introduction of Reyataz. This change of course was due entirely to the competitive disadvantage imposed on non-Abbott PIs by the December 2003 price increase.

36. Abbott further attempted to manage the fallout from its Norvir price increase by publishing misleading comparisons of PI prices. In promotional and informational materials about Norvir after the price increase, Abbott represented that Norvir was the lowest-priced PI on the market.

37. The Department of Health & Human Services ("DHHS") responded with a Warning Letter to Abbott about such materials, calling Abbott's price comparison chart "false or misleading in violation of section 502(a) of the Federal Food, Drug, and Cosmetic Act (Act) (21 U.S.C. 352(a))." Specifically, DHHS stated that the price chart was misleading because it compared a "subtherapeutic dose of Norvir (100 mg once daily) to the labeled dosing regimens of other antiretroviral agents" and it "implies that Norvir may be used other than in combination therapy, when it is not labeled for such use." Abbott did not contest the FDA letter, choosing instead to send a letter to healthcare providers retracting and "clarifying" its false statements.

38. Internal Abbott documents state Abbott's intentions: the huge price increase for the PI-Boosting drug Norvir would create the "[p]otential for increased market share for Kaletra." Abbott's December 3, 2003 price increase was an attempt to use its monopoly position in the Boosting Market in order to dampen competition in the Boosted Market and artificially maintain and/or enhance Kaletra's share of the Boosted Market. The attempt succeeded.

39. At the very same time that Abbott was planning to limit Norvir's availability (by either 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. In 2001, Abbott approached GSK to demand that GSK secure a license from Abbott to allow GSK to promote GSK's existing PIs, as well as PIs it had under development, with Norvir. Abbott and GSK continued to negotiate over such a license during 2001 and 2002 until GSK ultimately acquiesced to this demand, procuring a license from Abbott in December 2002. Under the license, GSK paid substantial sums of money and other valuable consideration in exchange for the right to promote the use and administration of its PIs with Norvir

40. Abbott never disclosed to GSK and other licensees and potential licensees that Abbott might either remove Norvir from the market or raise its price to make it financially unavailable to many patients. When GSK entered into the Norvir license with Abbott in December 2002, GSK relied on Abbott's good faith not to materially deviate from its prior course of conduct with regard to selling and pricing Norvir. Up until that point, Abbott had never increased Norvir's price by more than 4% per year. The largest price increase in HIV therapies had been a 10.4% increase for the price of Combivir and Trizivir in January 2002. Abbott's overnight 400% price increase for Norvir was unprecedented and – especially when considering Abbott's prior conduct of encouraging and facilitating licensing of Norvir for use in the Boosted Market – totally unexpected.

41. 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.

42. 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. Shortly after Kaletra's launch, Kaletra gained a dominant share in the Boosted PI market. Abbott boasted that Kaletra was the #1 selling boosted PI in the world. After the launch of Kaletra and years before the December 2003 price increase, Abbott was aware of additional, significant market changes, e.g., the impending launch of PIs that would compete with Kaletra. 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 it drastically changed course and implemented a radically different strategy that crippled its competitors' ability to compete with Kaletra.

43. Faced with increasing competition in the Boosted Market through the introduction of Reyataz and Lexiva and recognizing that it had underestimated the competitive impact 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 possibly 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 anticompetive price increase on Norvir.

44. On information and belief, in reliance on the expectation that Abbott would act in good faith, and because Abbott concealed its strategy to reduce Norvir's availability and/or dramatically raise its prices, GSK and other PI manufacturers materially delayed developing, testing, and/or launching other potential Boosted PIs that could be effective with substantially less Norvir (and thus be less susceptible to impairment by a Norvir price increase) or could be used with another PI Boosting drug entirely, i.e., not Norvir. As a result of Abbott's conduct, no currently available PI has been approved for co-administration with any booster other than Norvir.

45. Had GSK and other competitors known that Abbott was planning to substantially reduce Norvir's availability (either by raising its prices to prohibitive levels or pulling it from the market entirely), GSK and other competitors would not have delayed or postponed efforts to develop alternative boosted PI drugs that did not depend upon using 200 mg of the Norvir product as a PI boosting drug. For example, due to Abbott's misconduct as described above, GSK was delayed in receiving FDA labeling approval for the use of its boosted PI Lexiva with only 100 mg of Norvir per day, rather than 200 mg of Norvir per day to achieve the same clinical results. Lexiva with only 100 mg of Norvir per day entered the market, belatedly, in October 2007. A result of this new FDA approval for use of Lexiva with only 100 mg of Norvir is that the cost to purchasers of boosting Lexiva with Norvir dropped by one-half. Because GSK (and potentially others) delayed development, testing and FDA-approval of boosted PIs that would be effective with lower amounts of Norvir: (a) purchasers in the Boosted Market paid more for Norvir than they otherwise would have; and (b) GSK's rival boosted PI products were rendered more expensive (and therefore less of a competitive threat to Kaletra).

46. Abbott's exclusionary conduct has unlawfully caused the Boosted Market to standardize on Norvir for boosting purposes, thereby enabling Abbott to sell Norvir at artificially inflated prices.

47. Abbott's anticompetitive scheme effectively halted the decline in market share of Kaletra. By 2006, Kaletra's share of the Boosted Market had risen to approximately 75%, the same share it held prior to the introduction of Reyataz. This change of course was due entirely to the competitive disadvantage imposed on non-Abbott PIs by the December 2003 price increase on Norvir.

DUTY TO DEAL IN THE BOOSTING MARKET

48. Abbott has a duty to deal in the Boosting Market, i.e., a duty to continue selling Norvir separately rather than merely as a component of Kaletra. Abbott's decision to continue selling Norvir rather than removing it from the market entirely was based in whole or in part on its recognition of such a duty to deal.

49. Removing Norvir from the market as a separate, stand-alone product would mean that ritonavir would no longer be available separately from lopinavir and, as a result, purchasers who desired to obtain ritonavir would be required to buy lopinavir as well. Ritonavir and lopinavir are distinct products. Given the dominant position of ritonavir in the Boosting Market, and the effects of such an arrangement on Abbott's competitors in the Boosted Market, removing Norvir from the market as a separate product would subject Abbott to liability under the antitrust laws governing tying arrangements as well as the laws governing monopolization and attempted monopolization.

50. In addition, as explained in detail above, Abbott created a duty to continue selling Norvir as a stand-alone product through its prior course of conduct, including (a) encouraging manufacturers of other PIs to market their products for use in conjunction with Norvir; (b) licensing competitors to market other PIs for use in conjunction with Norvir; and (c) taking steps to ensure that Norvir became the standard PI booster in the United States.

BELOW-COST PRICING IN THE BOOSTED MARKET

51. Abbott's pricing of Norvir and Kaletra after December 2003 can be viewed as a bundled discount—a package of two or more products that is sold at a lower price than the price at which the products are sold separately. Kaletra can be viewed as a bundle of ritonavir plus lopinavir, and Abbott sells ritonavir at a lower price when it is purchased as part of Kaletra than when it is sold as a stand-alone product (Norvir). Abbott itself has argued strenuously in this litigation that its pricing of Norvir and Kaletra amounts to bundled discounting. Such pricing arrangements have the potential to exclude equally efficient firms which seek to compete with respect to only one of the products in the bundle. *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 893-911 (9th Cir. 2008). Because of the size of the December 2003 price increase on Norvir, in conjunction with the decision to leave the price of Kaletra unchanged, Abbott's December 2003 price increase on Norvir resulted in Abbott engaging in below-cost pricing in the Boosted Market.

52. Whether a bundled discount results in below-cost pricing is determined using the "discount attribution" test. Under that test, a bundled discounter is guilty of below-

cost pricing if the discount given to purchasers 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. Stated differently but equivalently, such a firm is guilty of below-cost pricing if the effective or imputed price of one component of the bundle, i.e., the price of the bundle minus the price of the other component when sold separately, is below the firm's average variable cost of producing and selling that component.

53. Abbott's post-December 2003 pricing of Norvir and Kaletra fails the discount attribution test adopted by the Ninth Circuit in *Cascade*. According to Abbott's documents, the effective or imputed price of the lopinavir component of Kaletra (i.e., the price of Kaletra minus the post-December 2003 price of Norvir) is $1.64. That price is below Abbott's average variable cost for lopinavir.

54. Abbott's bundled discounting and its effects on equally efficient competitors are exacerbated by the complex pricing rules that apply to the pricing of AIDS drugs. More than half of the PIs (and other AIDS drugs) sold in the United States are paid for by governmental payors (Medicaid, the Public Health Service, AIDS Drug Assistance Programs and others). The prices paid by these payors are strictly controlled under complex pricing and rebate rules. As a result of these rules, Abbott's price increase did not adversely affect government payors.

55. Given that Abbott's post-December 2003 pricing of Norvir and Kaletra brought the imputed or effective price of lopinavir below Abbott's average variable cost, Abbott's equally efficient competitors could not effectively compete with lopinavir after December 2003. However, the rules that apply to the pricing of AIDS drugs compounded the effects of Abbott's pricing and made such competition even less possible than it otherwise would have been. In order to reduce the price of their competing PIs to private purchasers, Abbott's competitors would also have had to reduce the price to government purchasers. However, Abbott's competitors were not at a pricing disadvantage with respect to government purchasers. Therefore, in order to offer a price that was equivalent to the effective or imputed price of lopinavir, an equally efficient competitor would not merely have had to sell its

competing product below average variable cost. In addition, such a competitor would have had to forgo millions of dollars in revenue from government purchasers even though the competitor was not at a pricing disadvantage with respect to those purchasers. Hence, any attempt by Abbott's competitors to match Abbott's post-December 2003 pricing would have been even more irrational than in a "normal" market (i.e., a market without the special pricing rules that apply to AIDS drugs).

EFFECT OF ABBOTT'S UNLAWFUL CONDUCT

56. As a direct and proximate result of Abbott's unlawful conduct, Plaintiffs have been deprived of the benefit of free and open competition in both the Boosting and Boosted Markets and have been injured in their business and property by paying more for the relevant products than they would have in the absence of Abbott's unlawful, anticompetitive conduct.

RELEVANT MARKETS

57. There are two product markets relevant to Plaintiffs' antitrust claims: the Boosting Market, which consists of Norvir, and the Boosted Market, which consists of Kaletra and a number of non-Abbott PIs, each of which is prescribed and used in conjunction with Norvir. The relevant geographic market is the United States. With respect to both product markets, a firm that was the only seller of such products in the United States would have the ability to sell those products at a price substantially above marginal cost without losing significant sales.

58. At all relevant times, Abbott has had a 100% share of the Boosting Market and a dominant share of the Boosted Market. At all relevant times, Abbott possessed monopoly power—the ability to raise price significantly above marginal cost without losing significant sales—in both relevant markets.

59. There are barriers to entry in both the Boosted and Boosting Markets. The products in these markets require significant investments of time and money to design, develop and distribute. In addition, both markets require government approvals to enter and/or may be covered by patents or other forms of intellectual property. Thus, existing and potential market

entrants lack the ability to expand output quickly in the short run in response to higher prices or reductions in output by the dominant firm.

60. The unlawful actions alleged above were taken for the purpose of maintaining Abbott's dominant share of the Boosted Market.

FIRST CAUSE OF ACTION

Monopolization (15 U.S.C. § 2)

61. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 60 above.

62. At all relevant times, Abbott has had monopoly power in both the Boosting Market and the Boosted Market.

63. Abbott has willfully maintained its monopoly power in the Boosted Market through exclusionary and anticompetitive means, including below-cost pricing. As described in more detail above, Abbott induced competitors in the Boosted Market to rely upon Norvir, then overnight raised the price of Norvir by approximately 400% in December 2003, and has maintained that price to the present day, but only when Norvir is used to boost a non-Abbott PI. Norvir is sold at a much lower price when used as one component of Abbott's own boosted PI, Kaletra. By engaging in this conduct and instituting such a price increase, Abbott has used its monopoly position in the Boosting Market to gain an artificial competitive advantage and disadvantage its competitors in the Boosted Market. The purpose and effect of Abbott's conduct have been to suppress rather than promote competition on the merits Abbott also has impeded price competition as a whole in the Boosted Market by undermining competitors' incentives to price compete. Abbott's conduct would make no economic sense, absent its effect of impairing competition in the Boosted Market.

64. There is no procompetitive justification for Abbott's conduct.

65. Plaintiffs (or their assignors) have been injured in their business and property by reason of Abbott's unlawful monopolization. Plaintiffs' injury consists of paying higher prices to purchase Norvir and Kaletra than they would have paid absent Abbott's conduct. This injury to Plaintiffs' business and property is injury of the type the antitrust laws

were designed to prevent and flows from that which makes Abbott's conduct unlawful.

66. Abbott's unlawful conduct threatens continuing loss and damage to Plaintiffs if not enjoined by this Court.

SECOND CAUSE OF ACTION

Attempt to Monopolize (15 U.S.C. § 2)

67. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 60 above.

68. At all relevant times, Abbott has had monopoly power in the Boosting Market and a dangerous probability of achieving monopoly power in the Boosted Market.

69. Abbott has attempted to monopolize the Boosted Market through exclusionary and anticompetitive means, including below-cost pricing. As described above, Abbott induced competitors in the Boosted Market to rely upon Norivi, then overnight raised the price of Norvir by 400% in December 2003, and has maintained that price to the present day, but only when Norvir is used to boost a non-Abbott PI. Norvir is sold at a much lower price when used as one component of Abbott's own boosted PI, Kaletra. By engaging in this conduct and instituting such a price increase, Abbott has used its monopoly position in the Boosting Market to gain an artificial competitive advantage and disadvantage its competitors in the Boosted Market. Abbott also has impeded price competition as a whole in the Boosted Market by undermining competitors' incentives to price compete. The purpose and effect of Abbott's conduct have been to suppress rather than promote competition on the merits. Abbott's conduct would make no economic sense, absent its effect of impairing competition in the Boosted Market.

70. At all relevant times, Abbott has had the specific intent to monopolize the Boosted Market.

71. There is no procompetitive justification for Abbott's conduct.

72. Plaintiffs (or their assignors) have been injured in their business and property by reason of Abbott's unlawful attempted monopolization. Plaintiffs' injury consists of paying higher prices to purchase Norvir and Kaletra than they would have paid absent

Abbott's conduct. This injury to Plaintiffs' business and property is injury of the type the antitrust laws were designed to prevent and flows from that which makes Abbott's conduct unlawful. Abbott's unlawful conduct threatens continuing loss and damage to Plaintiffs if not enjoined by this Court.

THIRD CAUSE OF ACTION

Monopolization of the Boosting Market (15 U.S.C. § 2)

73. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 60 above.

74. Abbott has willfully enhanced and maintained its monopoly power in the Boosting Market through exclusionary and anticompetitive means. As described in more detail above, Abbott deceptively induced rivals to forego developmental alternatives and instead standardize around the use of Norvir for boosting purposes. After inducing competitors to lock into using Norvir, Abbott exercised its monopoly power in the Boosting Market by raising the price of Norvir approximately 400% in December 2003. Abbott has maintained that inflated price to the present day. The purpose and effect of Abbott's conduct has been to suppress rather than promote competition on the merits.

75. There is no procompetitive justification for Abbott's conduct.

76. Plaintiffs (or their assignors) have been injured in their business and property by reason of Abbott's unlawful monopolization. Plaintiffs' injury consists of paying higher prices to purchase the relevant products than they would have paid absent Abbott's conduct. This injury to Plaintiffs' business and property is injury of the type the antitrust laws were designed to prevent and flows from that which makes Abbott's conduct unlawful.

WHEREFORE, Plaintiffs pray for judgment against Defendants and for the following relief:

A. A judgment for three times the damages sustained by Plaintiffs, as determined by a jury;

B. A declaration that Abbott has violated the antitrust laws in the ways described above;

C. Permanent injunctive relief which enjoins Abbott from continuing its unlawful conduct, and requires Abbott to take affirmative steps to dissipate the anticompetitive effects of its prior violations;

D. The costs of this suit, including a reasonable attorneys' fee; and

E. Such other and further relief as the Court deems just and proper.

Jury Trial Demand

Plaintiffs demand a trial by jury of all issues so triable.

Dated: August 13, 2009

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