

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 07-05470 CW

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.

ORDER DENYING
CUSTOMER PLAINTIFFS'
MOTION TO DIVIDE
TRIAL INTO TWO
PHASES AND
DEFENDANT'S MOTION
FOR ORDER SHORTENING
TRIAL, RULING ON
MOTIONS IN LIMINE
AND DIRECTING
PARTIES TO FILE
FURTHER BRIEFING ON
JURY INSTRUCTIONS
(Docket Nos. 265 and
299)

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,

v.

ABBOTT LABORATORIES,

Defendant.

No. C 07-05985 CW

(Docket Nos. 368 and
401)

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,

v.

ABBOTT LABORATORIES,

Defendant.

No. C 07-06120 CW

(Docket Nos. 245 and
279)

1 SMITHKLINE BEECHAM CORPORATION, d/b/a
2 GLAXOSMITHKLINE,

No. C 07-05702 CW

(Docket No. 354)

3 Plaintiff,

4 v.

5 ABBOTT LABORATORIES,

6 Defendant.
7 _____/

8 As discussed at the final pre-trial conference, held on
9 February 8, 2011, the Court DENIES Customer Plaintiffs' motion to
10 divide the trial into two phrases and Abbott's motion for an order
11 shortening the trial's length. The parties' cases-in-chief shall
12 conclude by March 17, 2011, and legal arguments will be addressed
13 on March 18, 2011, after which the trial will be adjourned until
14 March 24, 2011. On March 24, the jury will be given its final
15 instructions and the parties may make their final arguments.

16 By February 14, 2011, the parties may file additional briefing
17 regarding any changes, required by law, to the February 11, 2011
18 version of the preliminary jury instructions. GSK and Customer
19 Plaintiffs may file a single brief, not to exceed five pages.
20 Abbott may also file a brief, not to exceed five pages.

21 By February 16, 2011, the parties shall exchange information
22 concerning which subject areas will be discussed by their expert
23 witnesses. At trial, the parties shall not proffer cumulative
24 expert witness testimony.

25 Finally, by February 16, 2011, the parties shall file a joint
26 statement concerning their efforts toward settlement.
27 Specifically, the joint statement shall address GSK's participation
28 in mediation with Dr. Eric D. Green. The statement shall not

1 exceed two pages.

2 The Court rules on the parties' motions in limine as follows:

3 **Plaintiffs' Motions in Limine**

4 1. Preclude Abbott from introducing evidence of or making
5 argument concerning Mick Kolassa's "Commercial Reasonableness"
6 analysis

6 GRANTED. Kolassa shall not use the phrase "commercial
7 reasonableness," but he may offer expert testimony relevant to
8 the appropriate legal standards.

8 2. Preclude Abbott from introducing evidence of or making
9 argument concerning Joel Hay's opinion regarding relevant
10 market definition

10 DENIED. Hay will be subject to cross-examination, during
11 which Plaintiffs may attempt to challenge his opinions.

11 3. Preclude Abbott from introducing evidence of or making
12 argument concerning Richard Gilbert's opinion on the issues of
13 anticompetitive conduct and effects

13 DENIED. Gilbert will be subject to cross-examination, during
14 which Plaintiffs may attempt to challenge his opinions.

14 4. Preclude Abbott from offering opinions of Richard Gilbert
15 concerning monopoly bundling

15 DENIED, with respect to the motion's first and second
16 subparts; GRANTED with respect to the third. Gilbert's
17 opinion regarding "selling, general and administrative" costs
18 does not have sufficient indicia of reliability. Kumho Tire
19 Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999).

19 5. Preclude Abbott from introducing evidence of or making
20 argument concerning Douglas Richman's opinions or testimony

20 DENIED. However, Abbott may not reveal that he previously
21 served as an expert witness for Plaintiffs, unless they
22 challenge Richman's qualifications as an expert. Richman may
23 testify as an expert witness only if his opinions are not
24 cumulative of those presented by Abbott's other testifying
25 expert witnesses. Richman may testify as a fact witness, to
26 the extent he has personal knowledge of the matters to which
27 he will testify.

25 6. Preclude Abbott from introducing evidence of or making
26 argument concerning Joel Hay's prior legal work for GSK

26 GRANTED. Hay's prior legal work for GSK, apparently in AIDS
27 Healthcare Foundation v. GlaxoSmithKline, PLC, is not relevant
28 to this action, so long as Plaintiffs do not challenge Hay's

1 qualifications as an expert. Abbott does not demonstrate that
2 this evidence is otherwise probative; the circumstances of
that case are not before the Court.

3 7. Preclude Abbott from arguing that the lack of a pricing term
4 in the license agreement bars GSK's claim under the implied
covenant of good faith and fair dealing

5 GRANTED. However, Abbott may proffer evidence that a pricing
6 term was not present in the Norvir license agreement and argue
the relevance of that fact.

7 8. Preclude Abbott from introducing evidence or making argument
8 to the effect that Norvir's initial price did not reflect its
value as a booster

9 DENIED, except Abbott shall not proffer testimony or discovery
10 that it has not previously disclosed.

11 9. Preclude Abbott from arguing that Plaintiffs contend Kaletra
was priced too low

12 DENIED. Plaintiffs may argue that Abbott's representation of
13 their theory is incorrect.

14 10. Preclude Abbott from arguing that its patents provide it an
unfettered right to price Norvir as it wishes

15 GRANTED. However, Abbott may proffer evidence that it has a
16 patent over Norvir and argue consistently with the law, as
instructed by the Court.

17 11. Preclude Abbott from introducing evidence or arguing that the
18 Norvir price increase is justified because it spent the
proceeds on research and development or used the proceeds in
19 any other way

20 DENIED. However, such evidence would be relevant only if
Abbott also offers evidence that any such use was its reason
21 for the price increase.

22 12. Preclude all parties from introducing evidence of or making
23 argument concerning legal proceedings involving any of the
related parties that have no connection to the Norvir price
increase

24 GRANTED.

25 13. Preclude Abbott from introducing evidence of or arguing
26 whether others have or have not sued it in response to the
Norvir price hike

27 GRANTED.

28

1 14. Preclude Abbott from introducing evidence or making argument
2 barred by Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977),
and its progeny

3 GRANTED.

4 **Abbott's Motions in Limine**

5 1. Bar expert opinion on Abbott's intent or state of mind

6 GRANTED, as phrased. However, expert witnesses may opine as
7 to their interpretation of facts.

8 2. Bar references to the FDA warning letter

9 DENIED. The letter is hearsay subject to the exception
10 provided in Federal Rule of Evidence 803(8)(C). Sullivan v.
11 Dollar Tree Stores, Inc., 623 F.3d 770 (9th Cir. 2010), does
12 not require a contrary conclusion; the FDA letter does not
13 offer pure legal conclusions, nor does it lack
14 trustworthiness. Although the letter does not constitute a
15 final agency action on which the FDA can be sued, it
16 "communicates the agency's position on a matter." Food & Drug
17 Admin., Regulatory Procedures Manual at 4-1-1. Toole v.
18 McClintock is also distinguishable; the letter does not
19 contain only "'proposed findings.'" 999 F.2d 1430, 1434 (11th
20 Cir. 1993). Also, the portions of the letter addressing the
21 misleading cost chart are relevant, for instance, to Abbott's
22 arguments concerning the need to raise the price of Norvir.
23 Because only portions are relevant, only a version of the
24 letter, with irrelevant material redacted, may be proffered.
25 Alternatively, the parties may stipulate to facts concerning
26 the letter or Plaintiffs may proffer one of Abbott's
27 "Correction of Drug Information" letters, which were posted to
28 the norvir.com website on or about November 30, 2004. If
Plaintiffs wish to proffer one of these posted letters,
irrelevant information must be redacted.

3. Bar testimony beyond expertise of GSK expert

GRANTED. Dolan shall not testify beyond his expertise in
marketing.

4. Exclude suggestion that development of any drug was halted as
a result of the Norvir repricing

GRANTED, but Plaintiffs may offer evidence that Norvir price
increase reduced incentives for innovation in the boosted PI
market.

5. Exclude "HIV Communications Plan" prepared by third party
public relations firm

DENIED, so long as Plaintiffs lay a foundation to show that
statements in the document can be considered admissions by

1 Abbott. See Fed. R. Evid. 801(d)(2).

2 6. Exclude Cascade calculations based on costs that would be
3 avoided by cessation of production of lopinavir/Kaletra

4 DENIED. Plaintiffs' experts will be subject to cross-
5 examination, during which Abbott may attempt to challenge
6 their opinions, which are not contrary to law.

7 7. Exclude Norvir "overcharges" as not "flowing from" that which
8 allegedly made Abbott's pricing anticompetitive

9 DENIED. Abbott does not establish, as a matter of law, that
10 the alleged Norvir overcharges did not flow from its alleged
11 anticompetitive conduct in the boosted PI market. Customer
12 Plaintiffs' theory is that they were required to pay a
13 "penalty price" to purchase Norvir for use with a boosted PI.
14 This price, Customer Plaintiffs argue, was part of Abbott's
15 alleged anticompetitive conduct in the boosted PI market.

16 8. Exclude evidence and arguments about "overcharge" damages
17 because Plaintiffs failed to segregate between lawful and
18 unlawful pricing levels

19 DENIED. The jury shall decide whether it can, with certainty,
20 determine damages based on Plaintiffs' calculations.

21 9. Exclude evidence and arguments about GSK's purported "lost
22 profits" damages because GSK failed to segregate between
23 losses due to lawful and unlawful conduct

24 DENIED. The jury shall decide whether it can, with certainty,
25 determine damages based on Plaintiffs' calculations.

26 10. Bar reference to publications about the repricing

27 GRANTED IN PART as unopposed and DENIED IN PART. Plaintiffs
28 state that they will not proffer as part of their case-in-
chief the Wall Street Journal article to which Abbott objects.
Plaintiffs, however, may proffer publications for a non-
hearsay purpose or those that fall within an exception to the
hearsay rule.

11. Bar references to Abbott wealth, including salaries

GRANTED.

12. Exclude Dr. Leffler's damages calculations because he admitted
they were unreliable due to errors and data gaps

DENIED. By February 11, 2011, Plaintiffs are to provide a
final supplement to their disclosures concerning Dr. Leffler's
damages calculations and the related assignments. If
necessary, Abbott may re-depose Dr. Leffler.

- 1 13. Exclude GSK's alternative restitution theory
2 DENIED, so long as GSK offers at trial a previously disclosed
3 damages calculation that quantifies the partial restitution to
4 which it is entitled based on Abbott's alleged partial breach.
5
6 14. Bar argument that public payors were harmed
7 DENIED.
8
9 15. Preclude references to a "task force" that was never created
10 DENIED.
11
12 16. Bar speculation that patients were harmed
13 GRANTED. Although speculation may not be offered, Plaintiffs
14 may offer either competent expert opinion or direct evidence
15 of harm to patients.
16
17 17. Exclude suggestion that pricing above marginal cost is
18 evidence of monopoly power.
19 DENIED. Pricing above marginal cost may be a factor to be
20 considered in determining whether monopoly power exists, so
21 long as the pricing is also supracompetitive.
22
23 18. Bar references to prior litigation arguments
24 DENIED. Arguments related to the parties' prior views of
25 Kaletra, as a bundled product or not, are relevant because
26 they were raised in Doe v. Abbott Laboratories, which
27 concerned the same facts as these cases.

28 IT IS SO ORDERED.



CLAUDIA WILKEN
United States District Judge

Dated: February 11, 2011