

EXHIBIT 1

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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **OAKLAND DIVISION**

13 IN RE ABBOTT LABS NORVIR)
ANTITRUST LITIGATION)

Case No. C-04-1511 CW

14)
15) **REBUTTAL EXPERT REPORT OF JOEL**
W. HAY, PH.D.

16) **HIGHLY CONFIDENTIAL**
17)

1 Also in contrast to a tying arrangement, there are more sales of the stand alone product, Norvir, than
2 of the bundled product, Kaletra. In September 2007, for instance, there were 63,805 prescription of
3 Norvir, compared to 51,463 prescriptions of Kaletra.¹⁸ The fact that 55% of patients that are
4 prescribed ritonavir in some form purchase ritonavir separate from lopinavir (*i.e.* purchase Norvir
5 instead of Kaletra), indicates that Abbott's pricing structure is not equivalent to a tying arrangement
6 nor does it in any way approximate a tying arrangement.

7 16. In fact, the entire plaintiffs' class, which is defined as "persons or entities ... who
8 purchased or paid for ... Norvir as a booster to other protease inhibitors," purchases ritonavir
9 independent of lopinavir (*i.e.* purchases Norvir rather than Kaletra).¹⁹ Thus, Prof. Greer's claim that
10 Abbott's pricing structure is equivalent to a tie is inconceivable given that not a single class member
11 has been prescribed ritonavir and lopinavir as a bundle.

12 **2. Abbott does not offer bundled discounts, nor is the challenged pricing structure**
13 **economically equivalent to bundled discounts.**

14 17. Prof. Greer also claims that, although Abbott's pricing structure does not "fit"
15 "exactly" into the category of bundled discounts, it is a "first cousin" to bundled discounts.²⁰
16 Bundled discounts occur when a firm gives discounts on one product (say product A) contingent on
17 the customer also buying a second product (product B) from the firm. In the case of Abbott, a
18 bundled discount would require that Abbott provide a significant discount on Norvir contingent on
19 the patient also purchasing lopinavir. However, Abbott does not offer such discounts on Norvir for
20 patients that purchase lopinavir. Nor does it sell lopinavir as a stand-alone PI. Rather, Abbott's
21 pricing structure, according to Prof. Greer, is a *high* price of Norvir and a "too low" price of Kaletra.

22 18. Moreover, bundled discounts can only be anticompetitive if conditional discounts on
23 product A are large enough such that the implicit price on product B is predatory (*i.e.* below cost)

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25 ¹⁸ Source: TRX Data.

26 ¹⁹ *In Re Abbott Laboratories Antitrust Litigation*, Plaintiffs' Notice of Motion and Motion for Class
27 Certification Pursuant to Rule 23 of the Federal Rules of Civil Procedure; Memorandum in Support
28 Thereof ("Plaintiffs' Motion for Class Certification"), p. 1.

²⁰ Greer Report, p. 43.

1 For instance, if a patient taking a rival's PI boosted by Norvir does not switch to Kaletra, Abbott
2 would lose the sale of Norvir, but not gain a sale of Kaletra, by driving the PI rival out of the market.
3 The economic evidence indicates that, even if (counterfactually) Abbott's pricing revision did shift
4 sales away from rival PIs boosted by Norvir, many of these patients would switch to NNRTI and
5 unboosted PI regimens because these other regimens are close substitutes to boosted PI regimens
6 (see Section III.B). Thus, the exclusionary strategy hypothesized by Prof. Greer seems to make no
7 economic sense because it entails significant losses, but little or no gains, for Abbott. Prof. Greer
8 provides no reasonable explanation why such a leveraging strategy would be profitable.

9 *2. Prof. Greer cites several anticompetitive theories of leveraging that do not fit*
10 *the facts of this case.*

11 39. Rather than explaining the economic logic behind his proposed leveraging strategy,
12 Prof. Greer cites several theories of how tying and bundled discounts can profitably leverage a firms'
13 market power into another market.⁴⁷ However, these theories are completely inapplicable to Abbott.
14 First of all, as I describe above, Abbott has not engaged in tying or bundled discounts. Nor is
15 Abbott's pricing structure in any way equivalent to a tie because all class members are prescribed
16 ritonavir (Norvir) without also being prescribed lopinavir. Abbott's pricing structure is also not
17 equivalent to a bundled discount because it does not offer discounts on Norvir contingent on a
18 patient purchasing lopinavir, and because the implicit price of lopinavir is not below cost. Second,
19 the theories cited by Prof. Greer require that tying and bundled discounts drive rival manufacturers
20 out of the market. But Abbott's pricing structure has not driven any rivals out of the so-called
21 "Boosted Market" nor impeded their sales growth. Moreover, as I discuss below, the
22 anticompetitive theories of tying and bundled discounts cited by Prof. Greer are wholly inapplicable
23 to Norvir and Kaletra for other significant reasons.

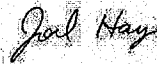
24 40. One anticompetitive theory of leveraging cited by Prof. Greer is Carlton and
25 Waldman (2002).⁴⁸ In the Carlton and Waldman theory, tying is used by a monopolist to drive

26 ⁴⁷ Greer Report, p. 40.

27 ⁴⁸ Dennis W. Carlton and Michael Waldman, *The Strategic Use of Tying to Preserve and Create*
28 *Market Power in Evolving Industries*, 33 RAND J. OF ECON. 194 (2002).

1 Sales of Norvir comprised only 0.1% of all U.S. drug sales in 2004.²⁹⁴ Since drugs only represented
2 10.0% of health care expenditures that same year, even a 400% increase in the price of Norvir would
3 add only 0.008% to the average premium increase for a third-party payor in 2005.²⁹⁵ Given that
4 third-party payors raised their premiums by an average of 9.2% between 2004 and 2005, this 0.008%
5 increase in premiums is negligible in terms of impacting the competitiveness of a third-party
6 payor.²⁹⁶ Accordingly, third-party payors also are unlikely to have been affected by the Norvir price
7 increase when such pass-through is taken into account.

8 201. I declare under penalty of perjury that the foregoing is true and correct.

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October 31, 2007

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Joel W. Hay, Ph.D.

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Date

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26 ²⁹⁴ Norvir sales from Drug Topics (www.drugtopics.com); U.S. drug sales from Health Affairs
(www.healthaffairs.org).

27 ²⁹⁵ Percentage of health care expenditures accounted for by drugs from www.healthaffairs.org.

28 ²⁹⁶ Increase in premiums from KFF Survey, p. 17.