

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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RITZ CAMERA & IMAGE, LLC,  
Appellee,

v.

SANDISK CORPORATION,  
Appellant .

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On Appeal From the United States District Court  
for the Northern District of California  
(The Honorable Jeremy Fogel)

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BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE  
COMMISSION AS AMICI CURIAE IN SUPPORT OF APPELLEE

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**WILLARD K. TOM**  
General Counsel

**JOSEPH F. WAYLAND**  
Acting Assistant Attorney General

**JOHN F. DALY**  
Deputy General Counsel  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

**CATHERINE G. O'SULLIVAN**  
**KRISTEN C. LIMARZI**  
Attorneys  
U.S. Department of Justice  
Antitrust Division  
950 Pennsylvania Ave., N.W.  
Room 3224  
Washington, D.C. 20530-0001  
202-353-8629

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## STATEMENT OF INTEREST

The United States and the Federal Trade Commission enforce the federal antitrust laws and have a strong interest in the substantive and procedural aspects of those laws. This interest includes the proper

¶¶ 16, 19 (FAC). Ritz claims that SanDisk monopolized the market for NAND flash memory products in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, enabling SanDisk to charge higher prices for NAND flash memory. FAC ¶¶ 131-35. Ritz alleges that SanDisk’s founder tortiously converted flash memory technology from his former employer and obtained the patents at issue by intentionally failing to disclose invalidating prior art and making affirmative misrepresentations to the PTO. *Id.* ¶¶ 35-73, 93-102, 132. Ritz also alleges that SanDisk brought infringement actions based on these invalid patents “so as to exclude competition.” *Id.* ¶ 132. Ritz relies on *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), in which the Supreme Court held that “the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present,” *id.* at 174.

The complaint alleges SanDisk’s actions harmed competition and enabled SanDisk to sell flash memory products “at above-competitive, monopoly prices to members of the proposed Class in the relevant market.” FAC ¶ 122. Ritz claims that it and the putative class



members were injured in their business and property by these overcharges, and it seeks treble damages for these injuries. *Id.* ¶¶ 134-35.<sup>1</sup>

2. SanDisk moved to dismiss this monopolization claim for failure to state a claim, arguing not only that Ritz lacks antitrust standing and

3. The district court denied the motion to dismiss the monopolization claim. *Ritz Camera & Image, LLC v. SanDisk Corp.* , 772 F. Supp. 2d 1100 (N.D. Cal. 2011). The court acknowledged that Walker Process claims typically are brought by competitors as counterclaims in patent infringement actions, *id.*

STMicroelectronics, Inc. (STM), alleging infringement of the same patents at issue here. STM brought a Walker Process counterclaim “identical to the claim asserted by Ritz in this case,” and on a motion for summary judgment, the district court found evidence that the patent was obtained by fraud sufficient to allow STM’s counterclaim to proceed to trial. *Id.* at 1105 n.9. The district court concluded here that, “because of the heightened evidentiary requirements necessary for a showing of fraud, few Walker Process claims survive summary judgment” and those that do “raise at least some question as to the validity of the subject patent.” *Id.* at 1105.

The district court also rejected SanDisk’s claim that granting Ritz standing would result in “an avalanche of patent challenges.” *Id.* To the contrary, the court observed that “viable Walker Process claims are rare,” and it is “unlikely that many direct purchasers will be in the same position as Ritz is here.” *Id.* Thus, the district court concluded that Ritz has standing to assert its Walker Process claim.

4. On September 7, 2011, the district court granted SanDisk’s motion to certify the ruling on the motion to dismiss for interlocutory

appeal. On January 13, 2012, this Court granted SanDisk's petition for permission to appeal.

#### SUMMARY OF ARGUMENT

For over a century, courts have held that direct purchasers have standing to recover overcharges paid to unlawful monopolists. There is no sound reason to depart from that well-settled principle when the anticompetitive conduct creating or maintaining the monopoly is the enforcement of a patent obtained through intentional fraud on the PTO. As the Supreme Court held in

claim also must satisfy the requirements imposed on a plaintiff seeking a declaratory judgment of patent invalidity. App. Br. 20-21, 29. But neither Walker Process nor any court of appeals decision justifies such a rule, which is inconsistent with the holding of the only appellate decision to have considered the issue: *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677 (2d Cir. 2009). A plaintiff seeking a declaratory judgment of patent invalidity ordinarily must demonstrate that it has been threatened with an infringement suit in order to meet the constitutional requirement of a “case or controversy.” But a properly alleged Walker Process claim for damages under the antitrust laws creates a justiciable controversy whether or not there is a threat of patent enforcement against the plaintiff.

Well-settled principles of antitrust standing support granting plaintiff standing here. Ritz has alleged precisely the type of injury the antitrust laws were intended to redress. As a direct purchaser, Ritz’s injury is entirely distinct from that of an excluded competitor, and its damages—the overcharges it paid for the monopolized product—do not overlap the lost profits that an excluded competitor might seek.

The district court declined to decide whether direct purchasers generally have standing to bring Walker Process claims, holding only that Ritz has standing because its claim involves patents “tarnished” by a determination in a separate proceeding that there were “triable issues of fact as to whether SanDisk procured the patents by fraud.” *Ritz Camera & Image, LLC v. SanDisk Corp.*, 772 F. Supp. 2d 1100, 1105 (N.D. Cal. 2011). This Court should not adopt a rule making direct purchaser standing turn on a separate proceeding over which the direct purchaser has no control. Such a rule could encourage holders of fraudulently procured patents to settle Walker Process claims made by excluded competitors, allowing the excluded competitors to share in any monopoly profits and the defendant to deny direct purchasers their right to recover damages under the Clayton Act. Moreover, limiting the class of direct purchasers with standing to bring a Walker Process claim is not necessary to reconcile the goals of antitrust and patent law. Rather, enforcement of a patent obtained through intentional fraud contravenes the pro-competition and pro-innovation policies of both statutory schemes. Cf. *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 234 (1892) (“It is as important to the public that competition should not be

repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly.”).

paid directly to an illegal cartel or monopoly is seldom doubted.” 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 345, at 156 (3d ed. 2007).

Direct purchaser standing in antitrust damages cases was established over a century ago. In *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), the Supreme Court explained that the city of Atlanta had standing to sue for treble damages under the predecessor to the current Section 4 because it was injured when it purchased price-fixed water pipe from the defendant, *id.* at 395-96. More recently, the Supreme Court explained that the standing inquiry should focus on the nature of the plaintiff’s injury in light of the Sherman Act’s purpose of “assur[ing] customers the benefits of price competition.” *Associated Gen. Contractors of Cal., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519, 538 (1983) (AGC).

Courts determining standing under Section 4 generally consider five factors: (1) whether the alleged injury is the type the antitrust laws were intended to redress, (2) the directness of the injury, (3) the speculative nature of the harm, (4) the risk of duplicative recovery, and (5) the complexity of apportioning damages. See AGC, 459 U.S. at 535; *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1054 (9th



Cir. 1999). Although a plaintiff need not satisfy each of these factors to establish standing, all of them weigh in favor of Ritz's standing here.

Ritz has alleged that it paid higher prices because the defendant achieved a monopoly through the enforcement of a fraudulently obtained patent. FAC ¶¶ 122, 134-35. Monopoly overcharges are precisely the type of injury the antitrust laws were intended to redress. AGC, 459 U.S. at 530 ("Congress was primarily interested in creating

guard against duplicative recovery and complex apportionment of damages makes no sense if only one type of plaintiff has standing to sue for their antitrust injuries. Nor are excluded competitors favored over direct purchasers as antitrust plaintiffs. To the contrary, injury to competitors sometimes arises not from the elimination of competition but from too much competition, and in such circumstances, competitors have been denied standing. See *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Moreover, competitors of a monopolist that are excluded by enforcement of a fraudulently procured patent may have strong incentives to settle their claims on terms that benefit themselves but do not open the market up to competition. See *infra* pp. 31-32. Customers' interests, on the other hand, are more likely to align with the purposes of the antitrust laws, which are "to preserve competition for the benefit of consumers." *Am. Ad Mgmt.*, 190 F.3d at 1055.

3. Ritz's injury is not derived from or duplicative of the injury to SanDisk's competitors, as SanDisk contends. See App. Br. 36-38. A monopolist's successful exclusionary conduct has two material consequences—it deprives the excluded competitors of profits on sales

they would have made, and it facilitates monopoly overcharges to customers. These two injuries are related only in that they are both caused by the same anticompetitive conduct. The injury to customers is not derivative of—that is, it does not flow from—the injury to competitors. See *Andrx Pharm. v. Biovail Corp. Int'l*, 256 F.3d 799, 816 (D.C. Cir. 2001) (distinguishing monopoly’s injury to competitors and consumers). Indeed, because all unlawful monopolies are obtained or maintained through the exclusion of competitors, SanDisk’s argument would deny antitrust standing to all direct purchasers seeking to recover monopoly overcharges—a result that cannot be reconciled with established law. Cf. *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) (rejecting “pass on” defense to a direct purchaser’s claim for damages reflecting a monopoly overcharge).

Although courts have denied standing to plaintiffs whose injuries are indirect or remote, the injury suffered by direct purchasers is neither. Courts deny standing to an antitrust victim’s shareholders whose holdings are diminished in value because of anticompetitive conduct. See, e.g., *Vinci v. Waste Mgmt., Inc.*, 80 F.3d 1372, 1375 (9th Cir. 1996). Similarly, indirect purchasers who seek damages for that

portion of the monopoly overcharge allegedly passed on to them by direct purchasers are generally denied standing. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The plaintiffs in these cases suffered injury only because some of the harm to another victim was passed on to them: some portion of the lost profits was passed on to the shareholder in the form of diminished share value or smaller dividends, while some portion of the overcharge was passed on to the indirect purchaser in the form of higher downstream prices.

In contrast, Ritz's alleged harm is not "the secondary consequences arising from an injury to a third party," *Sanner v. Bd. of Trade of Chicago*, 62 F.3d 918, 929 (7th Cir. 1995), but a direct injury from paying inflated prices to an allegedly unlawful monopolist. No precedent holds such an injury is too remote for recovery under the antitrust laws.<sup>3</sup> Indeed, the Clayton Act's primary purpose was to

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<sup>3</sup> *Association of Washington Public Hospital Districts v. Philip Morris Inc.*, 241 F.3d 696 (9th Cir. 2001), on which SanDisk relies, illustrates the distinction between Ritz's alleged injury and injuries that are too remote to confer standing. In *Washington Public Hospitals*, the court denied standing to hospital districts seeking to recover damages from tobacco companies for the cost of treating patients for tobacco-related illnesses. The alleged injury was derivative of the

provide a remedy for customers “forced to pay excessive prices” because of anticompetitive conduct. *AGC*, 459 U.S. at 530; see also *Reiter*, 442 U.S. at 344.

Moreover, because excluded competitors and customers of an unlawful monopolist suffer entirely distinct injuries, granting standing to both presents no risk of duplicative recovery. A direct purchaser’s damages are the overcharges it paid for the monopolized product. These are measured by the difference between the monopoly price actually paid and the price it would have paid for the units purchased but for the defendant’s anticompetitive conduct. An excluded competitor’s damages, on the other hand, are the profits it would have earned on each unit it would have sold but for the unlawful conduct.

Because these damages are not duplicative, this case does not require any apportionment. SanDisk’s reliance on Illinois Brick and Hanover Shoe is thus misplaced. See App. Br. 42. In Hanover Shoe, the Court rejected the defense that the plaintiff had passed on some portion of the alleged overcharge to subsequent purchasers, explaining that allowing such a defense would unduly complicate antitrust damage litigation. 392 U.S. at 491. Illinois Brick extended this reasoning to bar indirect purchasers from recovering damages for injuries suffered when direct purchasers passed on a portion of the overcharge. 431 U.S. at 735. The Court’s concerns about the difficulty of apportioning overcharge damages between direct and indirect purchasers do not apply, however, when only direct purchasers claim overcharge damages. Excluded competitors’ claims for lost profits would not be based on the overcharge to purchasers, but on a wholly separate and distinct injury.

4. Finally, SanDisk suggests that Ritz lacks standing because determining the amount of damages attributable to SanDisk’s anticompetitive conduct is too difficult. App. Br. 42. Assessing antitrust damage awards is often difficult and imprecise because “[t]he vagaries of the marketplace usually deny [courts] sure knowledge of

what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981); see also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). But, as the Supreme Court long ago observed: "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts" just because the damages are uncertain and difficult to measure. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); see also *Aurora Enters., Inc. v. NBC*, 688 F.2d 689, 694 (9th Cir. 1982) ("Mere uncertainty as to the extent or amount of damage will not bar recovery under the antitrust laws."). The challenge in assessing damages in this direct purchaser action—estimating the price that would have prevailed but for SanDisk's anticompetitive conduct—is not unusual in antitrust cases, nor is it a valid reason to deny direct purchasers standing to recover for overcharges.

II. No Additional Standing Requirements Apply to Plaintiffs Asserting *Walker Process* Claims

The Supreme Court held in *Walker Process* that "the enforcement of a patent procured by fraud on the Patent Office may be violative of





applies equally to SanDisk's argument that direct purchasers should be barred from pursuing Walker Process claims.

The Walker Process Court noted that the prohibition on private suits to cancel or annul a patent<sup>4</sup> does not bar private parties from litigating the validity of the patent in other contexts, for example, in a patent infringement suit. *Id.* at 176. Allowing private plaintiffs injured by the enforcement of fraudulently procured patents to seek damages under the antitrust laws "accords with these long-recognized procedures" that allow courts to determine a patent's validity when that is a disputed issue in a justiciable case.<sup>5</sup> *Id.* at 176-77.

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<sup>4</sup> Although private parties may not sue to cancel or annul a patent, under a recent amendment to the patent law they may petition the PTO to cancel one or more claims of an issued patent on various grounds of invalidity. 35 U.S.C. § 321.

<sup>5</sup> Patent validity may be an issue in other lawsuits as well. For example, a legal malpractice suit alleging errors in patent prosecution may raise a question of patent validity.

The Court emphasized that a monopolization claim arises “under the Clayton Act, not the patent laws.” *Id.* at 175-76. “While one of [the antitrust action’s] elements is the fraudulent procurement of a patent, the action does not directly seek the patent’s annulment.” *Id.* at 176. And the interest in protecting patentees from vexatious challenges to their patents is not a sufficient reason “to frustrate the assertion of rights conferred by the antitrust laws.” *Id.* Antitrust actions challenging the enforcement of fraudulently procured patents, the Court declared, promote the public interest “in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope.” *Id.* at 177 (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945)).

2. Nor is there merit to SanDisk’s argument that plaintiffs lack standing to bring Walker Process antitrust claims unless they have standing to seek a declaration of patent invalidity under the Declaratory Judgment Act, 28 U.S.C. § 2201. See App. Br. 20-21, 29. The requirement that a party seeking a declaratory judgment of patent invalidity be affected by the allegedly invalid patent—ordinarily

through a threat of enforcement or the payment of fees under protest—

potential for enforcement of the fraudulently procured patent against the plaintiff itself, but the use of that patent to establish a monopoly. Walker Process, 382 U.S. at 176; Molecular Diagnostics Labs. v. Hoffmann-La Roche Inc. , 402 F. Supp. 2d 276, 280 (D.D.C. 2005). And purchasers who pay monopoly prices for a patented product suffer an injury that does not depend upon the anticipation of an infringement suit. Thus, there is no reason to apply antitrust standing rules differently when the monopoly is obtained by enforcing a fraudulently procured patent than when the monopoly is obtained by any other exclusionary conduct. *Id.* at 281.

Walker Process plaintiffs must prove, as elements of the monopolization claim, that the patent holder has enforced or threatened to enforce fraudulently obtained patents and that these actions enabled it to obtain or maintain a monopoly. And, as SanDisk notes, App. Br. 29, this Court has found that the level of enforcement that provides the necessary controversy for an action seeking a declaratory judgment of patent invalidity is the same “minimum level of ‘enforcement’ necessary to expose the patentee to a Walker Process claim for attempted monopolization.” *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.* , 375

F.3d 1341, 1358 (Fed. Cir. 2004), rev'd on other grounds, 546 U.S. 394 (2006). But nothing in Walker Process or this Court's precedents indicates that the plaintiff's antitrust standing turns on whether it is the object of that enforcement action.

Indeed, this Court has previously recognized that "a valid Walker Process claim may be based upon enforcement activity directed against the plaintiff's customers." *Hydril Co. LP v. Grant Prideco LP*, 474 F.3d 1344, 1350 (Fed. Cir. 2007). The plaintiff in *Hydril* was not itself threatened with enforcement, but the Court concluded that the defendant's enforcement of the fraudulently obtained patent against plaintiff's customers was a sufficient basis for the Walker Process claim. *Id.* Although the Court had previously held in *Microchip Technology, Inc. v. The Chamberlain Group*, 441 F.3d 936 (Fed. Cir. 2006), that a district court lacked jurisdiction under the Declaratory Judgment Act because "the threats of enforcement litigation directed against the patentee's customers failed to satisfy [this Court's] test for declaratory judgment jurisdiction," the Court in *Hydril* "decline[d] to extend that ruling to invalidate a Walker Process claim alleging threats of infringement litigation directed against a supplier's customers by the

holder of a patent allegedly procured by fraud on the Patent Office.”

*Hydril* , 474 F.3d at 1350.<sup>6</sup> Noting that the plaintiff in *Hydril* had alleged “the kind of economic coercion that the antitrust laws are intended to prevent,” *id.* , the Court apparently found no need to impose the requirements of a declaratory judgment action as well.

3. Decisions from other circuits provide no basis to accept SanDisk’s argument that only plaintiffs with standing to challenge a patent’s validity under the patent laws have standing to bring a Walker Process claim. In the only appellate decision on the issue, the Second Circuit held that direct purchasers had antitrust standing to bring a Walker Process claim even though they could not challenge the patent’s validity under the patent laws, although the court’s holding was limited to circumstances in which the patent had already been held

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<sup>6</sup> Similarly, in *In re Ciprofloxacin Hydrochloride Antitrust Litigation* , 544 F.3d 1323 (Fed. Cir. 2008), indirect purchasers of the drug Cipro asserted a Walker Process type claim under state antitrust law. The district court had dismissed the claim as preempted by federal patent law, *id.* at 1340, but on appeal, this Court determined that it need not decide whether the claim was preempted because the plaintiffs had failed to prove the defendant obtained the patent through fraud, *id.* at 1341. Notably, the Court did not affirm the dismissal based on lack of standing, even though, as indirect purchasers of the drug, plaintiffs were not threatened with an infringement action and thus, likely could not have sought a declaratory judgment of the patent’s invalidity.

unenforceable due to inequitable conduct. *DDAVP*, 585 F.3d at 690-92. SanDisk relies on several district court cases as authority for imposing special standing requirements on plaintiffs asserting Walker Process claims (App. Br. 23-24 & n.3), but only one of those decisions is on point, and none offers persuasive support for SanDisk's argument.

The district court in *In re Remeron Antitrust Litigation*, 335 F. Supp. 2d 522 (D.N.J. 2004), concluded that only potential or actual competitors threatened with patent infringement suits have standing to bring Walker Process claim, *id.* at 529. That conclusion, however, is based on a misreading of two cases involving actual and potential competitors that failed to allege they were excluded from the market by the defendant's unlawful conduct. *Id.* (citing *Carrot Components Corp. v. Thomas & Betts Corp.*, 1986 U.S. Dist. LEXIS 29723 (D.N.J. 1986); *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 566 F. Supp. 1344, 1352-53 (N.D.N.Y. 1983)). *Carrot Components* and *Indium* merely stand for the proposition that plaintiffs asserting Walker Process damage claims, like all other antitrust damages plaintiffs, must demonstrate that they

suffered injury caused by the defendant's conduct.<sup>7</sup> They provide no support for the Remeron court's conclusion that only plaintiffs against whom the fraudulently obtained patent has been enforced have standing to bring a Walker Process claim. Cf. *Hydril*, 474 F.3d at 1350.

Two other district court decisions, cited by SanDisk, denied direct purchasers standing, but for reasons that do not apply here. In *Kaiser Foundation v. Abbott Laboratories*, No. CV 02-2443-JFW, 2009 WL 3877513 (C.D. Cal. Oct. 8, 2009), direct purchasers of a branded drug alleged they would be forced to pay higher prices because of the enforcement of fraudulently obtained patents against would-be competitors seeking approval to market a generic version of the drug. The court denied standing, explaining that "[b]ecause there is no infringing product yet on the market and the act of infringement and the specified consequences are artificial, it would be impossible for Plaintiff to suffer the sort of 'direct' injury necessary for antitrust standing." *Id.* at \*4. The Kaiser court acknowledged that its reasoning did not apply in cases, as here, where the allegedly infringing product

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<sup>7</sup> In *Indium Corp. of America v. Semi-Alloys, Inc.*, 591 F. Supp. 608 (N.D.N.Y. 1984), the court found plaintiff's amended complaint alleged a sufficient causal link.



already exists. *Id.* In any event, the court was wrong to suggest that such plaintiffs could never suffer the requisite direct injury: the threat of an infringement action could prevent generic entry, thereby enabling the branded manufacturer to maintain a monopoly and charge its customers monopoly prices. See *DDAVP*, 585 F.3d 677 (granting direct purchaser standing where patent holder's infringement suit prevented generic entry).

In *Kroger Co. v. Sanofi-Aventis*, 701 F. Supp. 2d 938 (S.D. Ohio 2010), a district court denied a direct purchaser standing to assert a Walker Process claim, stressing that, unlike here, the patent at issue in *Kroger* re patent holder's purchase of generic entry was a validly obtained

Other cases on which SanDisk relies are simply irrelevant. In *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986 (N.D. Ill. 2003), the court found that a drug ingredient supplier lacked standing, following the “general rule [] that suppliers do not have ‘standing’ . . . to complain about a violation of the antitrust laws at the customer level,” *id.* at 990, but said nothing about whether direct purchasers—who traditionally have antitrust standing—can assert a Walker Process claim. See also *In re K-Dur Antitrust Litig.*, No. 01-1652, 2007 WL 5297755, \*19 (D.N.J. Mar. 1, 2007) (emphasizing the difficulty indirect purchasers asserting Walker Process claims would have in satisfying the ordinary requirements of antitrust standing and contrasting them with more direct victims like competitors and direct purchasers).<sup>8</sup>

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<sup>8</sup> SanDisk quotes *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 363 F. Supp. 2d 514 (E.D.N.Y. 2005), for the proposition that “non-infringing consumers of patented products who may feel that they are being charged supracompetitive prices by the patentee have no cause of action to invalidate the patent,” App. Br. at 24 n.3 (quoting *Cipro*, 363 F. Supp. 2d at 541). But the court, at that point, was not addressing Walker Process claims, but the desirability of granting consumers a cause of action to seek patent invalidation.



Although the district court's and Second Circuit's limited holdings sufficed to grant standing to the direct purchasers in the cases before them, a continued focus on whether a patent has been tarnished in other proceedings could significantly distort the development of the law and undermine the goal of both antitrust and patent law to encourage free competition in the use of ideas in the public domain. Accordingly, we urge this Court to hold that direct purchasers have standing to bring Walker Process antitrust damage claims without regard to whether the patent has been tarnished in another proceeding.

1. Limiting standing in Walker Process cases to direct purchasers whose claims rest on so-called tarnished patents would create an odd regime in which a plaintiff's standing depends upon claims, counterclaims, or defenses raised by separate parties in a separate proceeding. Cf. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an

opportunity to be heard.”).<sup>9</sup> Direct purchasers who pay monopoly overcharges suffer an injury separate and distinct from that of excluded competitors. Such direct purchasers do not lose the right to redress that injury simply because an excluded competitor fails to press its own claim.

Moreover, such a restriction on direct purchaser standing may prompt a patentee to settle competitors’ Walker Process claims in order to bar similar claims by direct purchasers. In certain circumstances, it may be mutually profitable for the holder of a fraudulently obtained patent to settle Walker Process claims brought by competitors on terms that permit the patent holder and the competitor to share in any monopoly profits that the settlement may preserve. Limiting standing to direct purchasers that challenge previously tarnished patents may increase the patent holder’s incentive to enter into such a settlement because, by doing so early in the litigation—that is, before the patent is “tarnished” by a finding that it was procured through fraud or even a finding that there are triable issues of fact on that score—the patent

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<sup>9</sup> For the same reason, *Kroger*, supra p. 27, erred in stating that a decision holding a patent valid and enforceable in a separate litigation robs non-parties to that litigation of standing. 701 F. Supp. 2d at 963.

holder can also foreclose any Walker Process claims by direct purchasers.

In this case, SanDisk's competitor, STM, settled its Walker Process counterclaim against SanDisk on undisclosed terms. If such a settlement can be used to prevent direct purchasers from bringing an antitrust claim, the injury suffered by direct purchasers may never be redressed.

2. SanDisk argues that allowing antitrust suits by direct purchasers will lead to increased litigation against patent holders and thereby diminish the patent system's incentive for innovation. App. Br. 30-31. But litigation of Walker Process claims does not threaten "the honest patentee who brings an enforcement action." *Id.* at 31 (quoting *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 876 (Fed. Cir. 1985)). And litigation to enforce patents obtained by fraud undermines the "important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain." *Lear, Inc. v. Adkins*

thought to impinge upon the policy of the patent laws to encourage inventions and their disclosure.” Walker Process

misrepresentation or omission.” *Dippin• Dots v. Mosey*, 476 F.3d 1337, 1347 (Fed. Cir. 2007).

Courts also require a plaintiff asserting a Walker Process claim to plead the alleged fraud with particularity. *MedImmune, Inc. v. Genentech, Inc.*, 427 F.3d 958, 967 (Fed. Cir. 2005) (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003)), *rev’d on other grounds*, 549 U.S. 118 (2007). Even if a plaintiff can satisfy the heightened pleading requirements, the burden of proving knowing and intentional fraud on the PTO likely discourages many direct purchasers from bringing such a claim and defeats most that do. Moreover, a plaintiff asserting a Walker Process claim must plead and prove the other elements of a monopolization claim, including the patent holder’s monopoly power in a relevant market. *Walker Process*, 382 U.S. at 174. Not surprisingly, while Walker Process-type claims by purchasers are not unheard of, see e.g., *Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308, 310 (1978); *Molecular Diagnostics*, 402 F. Supp. 2d 276, they are hardly commonplace.

Accordingly, there is no basis in precedent or sound policy for limiting antitrust standing to only those direct purchasers whose



Walker Process claims concern so-called tarnished patents. As the Supreme Court cautioned, concerns about vexatious lawsuits cannot “be used to frustrate the assertion of rights conferred by the antitrust laws.” Walker Process, 382 U.S. at 176.

#### CONCLUSION

The district court’s decision denying the motion to dismiss should be affirmed. The Court should further hold that plaintiff’s standing does not depend upon the patents at issue being tarnished in a prior proceeding.

Respectfully submitted.

**WILLARD K. TOM**  
General Counsel

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**JOSEPH F. WAYLAND**  
Acting Assistant Attorney General

**JOHN F. DALY**

May 22, 2012

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,988 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

May 22, 2012

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Attorney

CERTIFICATE OF SERVICE

I, Kristen C. Limarzi, hereby certify that on May 22, 2012, I served two copies of the foregoing Brief for the United States and Federal Trade Commission as Amici Curiae in Support of Appellee, by first-class mail upon the following counsel of record:

Steven F. Benz  
Joseph H. Hall  
Kellogg, Huber, Hansen,  
Todd, Evans & Figel, P.L.L.C.  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036

Raoul D. Kennedy  
David W. Hansen  
Skadden, Arps, Slate, Meagher  
& Flom LLP  
525 University Ave., Suite 1100  
Palo Alto, CA 94301

May 22, 2012

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Attorney