12-1183

United States Court of Appeals for the Federal Circuit

RITZ CAMERA & IMAGE, LLC,

Plaintiff-Appellee,

v.

SANDISK CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR STATES OF NEW YORK, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, ILLINOIS, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, AND THE DISTRICT OF COLUMBIA AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF APPELLEE

BARBARA D. UNDERWOOD
Solicitor General
C. SCOTT HEMPHILL
Chief, Antitrust Bureau
STEVEN C. WU
LESLIE B. DUBECK
Assistant Solicitors General
SAAMI ZAIN
Assistant Attorney General of Counsel

(*counsel listing continued on signature page*)

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
Attorney for State of New York
120 Broadway
New York, New York 10271
(212) 416-6390

Dated: May 24, 2012

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Ritz Camera & Image, LLC v. SanDisk Corporation

No. 2012-1183

CERTIFICATE OF INTEREST

Counsel for the amicus curiae Leslie B. Dubeck certifies the following:

1. The full name of every party or amicus represented by me or on whose behalf I am submitting this certification is:

State of Arizona, State of Arkansas, State of California, State of Colorado, State of Connecticut, State of Delaware, District of Columbia, State of Hawaii, State of Idaho, State of Illinois, State of Iowa, Commonwealth of Kentucky, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of Missouri, State of Nevada, State of New Hampshire, State of New Mexico, State of New York, State of North Dakota, State of Ohio, State of Oregon, Commonwealth of Pennsylvania, Commonwealth of Puerto Rico, State of Rhode Island, State of South Carolina, State of Tennessee, State of Utah, State of Vermont, State of Washington, State of West Virginia, and State of Wyoming.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: **NONE**

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: **NONE**

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

The following attorneys are appearing in this court and are filing on behalf of the Attorneys-General listed on signature page: C. Scott Hemphill, Esq., Steven C. Wu, Esq., Leslie B. Dubeck, Esq., and Saami Zain, Esq.

Dated: May 24, 2012

_____

Leslie B. Dubeck

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Federal Statutes

Rules

Miscellaneous Authorities

INTRODUCTION AND INTEREST OF AMICI CURIAE

The States of New York, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming, and the District of Columbia and Puerto Rico submit this brief as amici curiae in support of plaintiff-appellee.[1]

At issue in this appeal is whether direct purchasers who have indisputably been injured by anticompetitive conduct are barred from seeking relief under federal antitrust laws simply because the underlying conduct involved enforcement of a fraudulently obtained patent. Direct purchasers have long had broad standing to seek recovery from wrongdoers under the federal antitrust laws. The district court here correctly rejected defendant's attempt to create an exception to this rule that would limit standing in patent-related antitrust

---

[1] Amici States submit this brief pursuant to Federal Rule of Appellate Procedure 29(a).

litigation only to a wrongdoer's competitors, and not direct purchasers of patented products.

Amici States have an interest in this issue because they regularly seek relief under federal antitrust laws, both on their own behalf and on behalf of consumers and public purchasers. To protect their citizens from the effects of antitrust violations, Amici States often investigate and assert antitrust claims to redress consumer injuries. *E.g.*, *In re Buspirone Antitrust Litig.*, MDL No. 1413 (S.D.N.Y.) ($100 million settlement); *Ohio v. Bristol-Myers Squibb Co.*, No. 02-1080 (D.D.C.) ($50 million settlement). Amici States are also major purchasers of patented products—for example, they spent over $10 billion for prescription drugs in 2009[2]—and thus have an interest in ensuring that they have a remedy for antitrust violations.

---

[2] *See* Henry J. Kaiser Family Foundation, *Medicaid Payment for Outpatient Prescription Drugs* (Sept. 2011), available at http://www.kff.org/medicaid/upload/1609-04.pdf (reporting net Medicaid expenditures of $15.7 billion for prescription drugs by state and federal governments in 2009); Generic Pharmaceutical Association, *National Brand and Generic Prescription (Rx) Medicaid Drug Utilization and Expenditures by State in 2009Q1 - Q4* (July 2010), available at http://www.gphaonline.org/sites/default/files/2009%20Q1-Q4%20CMS%

(*continued on the next page*)

Depriving direct purchasers of standing to bring antitrust claims involving the anticompetitive use of fraudulently procured patents would threaten the ability of Amici States and others to recover damages for purchasers when they are the victims of anticompetitive conduct and allow supracompetitive prices to persist, injuring consumers. Accordingly, Amici States urge this Court to confirm that direct purchasers have standing to bring antitrust claims under *Walker Process*.

20Generic%20Drug%20Summary_0.pdf (calculating brand-name drug expenditures as more than 80% of total expenditures).

ISSUE PRESENTED

Whether direct purchasers who pay artificially inflated prices for patented products have standing to assert antitrust claims that arise out of the defendant's anticompetitive use of a patent procured by fraud? (J.A. 127-128.)

Amici States take no position on any other question.

STATEMENT OF THE CASE

In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, the Supreme Court held that a party violates federal antitrust law if it uses a fraudulently obtained patent to acquire or maintain monopoly power. 382 U.S. 172, 174 (1965).

Plaintiff Ritz Camera & Image, LLC, is a direct purchaser of NAND, a flash memory product manufactured by defendant SanDisk Corporation. (J.A. 68, 71.) According to the complaint, SanDisk used fraudulently obtained patents to prevent other companies from producing competing flash memory products. (J.A. 103-104.) Ritz alleges that, as a result, SanDisk has a monopoly in the flash memory market, and consumers and other purchasers, including Ritz, have been forced to pay supracompetitive prices for NAND flash memory (J.A. 68-71, 73, 76-77, 88, 98, 101-104).

Ritz asserts *Walker Process* claims against SanDisk pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15, alleging that SanDisk used fraudulently obtained patents to acquire and maintain its market power. SanDisk moved to dismiss and argued, in relevant part, that Ritz did not have standing to assert a *Walker Process* claim as a direct

purchaser. The district court denied defendant's motion, explaining that "the Supreme Court decision in *Walker Process* places no limitation on the class of plaintiffs eligible to bring a *Walker Process* claim[.]" (J.A. 128 (quotation marks omitted).)

Amici States address only the certified question and take no position on the other issues decided by the district court or on the question of this Court's jurisdiction over this appeal.

ARGUMENT

This Court should confirm that direct purchasers of patented products—like direct purchasers of other products—have standing to bring an antitrust claim when they allege that they have paid more for an item because of antitrust violations.

A *Walker Process* claim is an antitrust claim, not a patent claim. *Walker Process*, 382 U.S. at 176; *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 685, 688 (2d Cir. 2009), *cert. denied Ferring B.V. v. Meijer, Inc.*, 130 S.Ct. 3505 (2010). The gravamen of the claim is the wrongful acquisition or assertion of market power and the resulting injury to the competitive marketplace. *Walker Process*, 382 U.S. at 176. Antitrust law extends significant remedies to purchasers who pay prices artificially inflated by anticompetitive conduct. And there is no basis for depriving direct purchasers of those remedies merely because the underlying conduct involved the anticompetitive use of a fraudulently obtained patent.

One "who obtains a patent by defrauding the patent office deserves no immunity" from the antitrust laws. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1356 (Fed. Cir. 2004), *rev'd on*

other grounds, 546 U.S. 394 (2006); *see also Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed. Cir. 1998). By arguing that direct purchasers lack standing to assert a *Walker Process* claim, SanDisk improperly seeks immunity from direct purchasers' antitrust claims for those who obtained a patent through fraud. But antitrust law recognizes no such limitation on direct purchaser standing.

To the contrary, courts have long recognized that direct purchasers are often the ideal plaintiffs to assert antitrust claims—indeed, they may sometimes be the *only* parties sufficiently motivated to do so. Because artificially inflated prices paid by purchasers make antitrust violations profitable for sellers, purchasers are typically the intended victims of anticompetitive conduct—and they are indisputably injured by such conduct.

Walker Process recognized that the victims of anticompetitive conduct—including direct purchasers—may assert antitrust claims that arise from the enforcement of a fraudulently procured patent; it did not, as SanDisk contends here, simply give competitors an additional ground for resisting a patent infringement suit. Thus, antitrust law allows both purchasers and competitors to assert claims based on the same

anticompetitive conduct, and a defendant who has enforced a patent procured by fraud is not immune from either claim.

A. Antitrust Law, Not Patent Law, Defines Who Has Standing to Assert *Walker Process* Claims.

"A patent . . . is an exception to the general rule against monopolies and to the right to access to a free and open market." *Walker Process*, 382 U.S. at 177 (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945)). "Since patents are privileges restrictive of a free economy, the rights which Congress has attached to them must be strictly construed so as not to derogate from the general law beyond the necessary requirements of the patent statute." *United States v. Masonite Corp.*, 316 U.S. 265, 280 (1942).

The Supreme Court has consistently admonished that even a *valid* patent does not provide a general "exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly." *United States v. Line Material Co.*, 333 U.S. 287, 308 (1948); *see, e.g.*, *United Shoe Mach. Co. v. United States,* 258 U.S. 451 (1922) (holding that patentee cannot extend patent monopoly by contract or agreement); *United States v. Univis Lens Co.,* 316 U.S. 241 (1942) (similar); *Int'l*

Salt v. United States, 332 U.S. 392, 396 (1947) (finding conduct to be illegal where defendant "engaged in a restraint of trade for which its patents afford no immunity from the anti-trust laws"), *abrogated on other grounds by Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *United States v. New Wrinkle*, 342 U.S. 371, 378 (1952) (observing that "[p]atents give no protection from the prohibitions of the Sherman Act . . . when the licenses are used, as here, in the scheme to restrain"). And in *Walker Process*, the Court squarely held that one "who obtains a patent by defrauding the patent office deserves *no immunity*" at all from the antitrust laws. *Unitherm Food Sys.*, 375 F.3d at 1356 (emphasis added) (citing *Walker Process*, 382 U.S. at 174).

Notwithstanding these clear principles, SanDisk contends that it is protected from antitrust suits by direct purchasers because such purchasers do not have independent standing to challenge the validity of its patents. Appellant's Br. at 29. But the rules for standing under the patent laws do not supersede the well-established rules for antitrust standing. *Walker Process* itself recognized this distinction. Although when *Walker Process* was decided "only the United States [could] sue to

cancel or annul a patent,"[3] the Court held that this restrictive rule of patent standing did not bar Walker Process's claims under the Clayton Act. 382 U.S. at 175-76. Similarly, the Court has held that "the public interest in enjoining violations of the Sherman Act" entitles the United States to challenge a patent in an antitrust action, even in situations when the federal government is "'without standing to bring a suit in equity to cancel a patent on the ground of invalidity.'" *United States v. Glaxo Group Ltd.*, 410 U.S. 52, 57 (1973) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 387 (1948)). And the Court has permitted foreign nations to bring antitrust claims premised in part on "fraud upon the United States Patent Office"—even though the foreign nations were not competitors with independent standing to challenge the patent in question. *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 310, 317-18 (1978); *see also Charles Pfizer & Co., Inc. v. FTC*, 401 F.2d 574, 577 (6th Cir. 1968).

---

[3] Today suits between private parties achieve a similar result because a finding of patent invalidity in private litigation bars later enforcement of that patent through collateral estoppel. *See Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971).

As these cases demonstrate, a *Walker Process*-type claim arises under the antitrust laws, not the patent laws. *See Walker Process*, 382 U.S. at 176 ("Walker counterclaimed under the Clayton Act, not the patent law."); *In re DDAVP*, 585 F.3d at 685, 688 (explaining that, because a *Walker Process* suit is "an antitrust suit, patent law does not create the cause of action"); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 989 (9th Cir. 1979) (characterizing a *Walker Process* suit as one "alleging antitrust liability"). Such a claim targets the abusive *use* of the patent to restrain free-market competition, rather than the patent itself. Herbert Hovenkamp, et al., *IP and Antitrust* § 11.2e, at 11-18 (2d ed. 2011 Supp.) ("[I]t is not the fraudulent patent itself that gives rise to antitrust problems, but the use of the patent to affect the market in some way.") And, in contrast to a lawsuit under the patent laws, a *Walker Process* action "does not directly seek the patent's annulment," but rather asks for the statutory remedies that the antitrust laws provide to "those injured by monopolistic action taken under the fraudulent patent claim." *Walker Process*, 382 U.S. at 176.

In short, because a *Walker Process* claim is an action for damages "under the Clayton Act, not the patent laws," *Walker Process*, 382 U.S.

at 176, it is irrelevant whether patent law provides a direct purchaser with a mechanism to challenge patent validity.[4] Rather, the ordinary principles of antitrust standing determine who may bring such claims.

B. Permitting Direct Purchasers to Pursue *Walker Process* Claims Properly Provides a Remedy to the Direct and Intended Victims of Anticompetitive Conduct.

SanDisk's argument (Appellant's Br. at 36-38) that patent validity challenges by direct competitors adequately deter anticompetitive conduct misses the point. Ritz is not seeking to invalidate the patent. Rather, it seeks compensation for its overpayment as a purchaser of SanDisk's product. SanDisk's argument ignores the material distinction between the interests of competitors and direct purchasers, as well as the "expansive remedial purpose" of the antitrust laws, *Blue*

---

[4] For similar reasons, SanDisk's argument (Appellant's Br. at 18) that Congress provided a mechanism—a petition to the Patent Office—for parties like Ritz to challenge patent validity is irrelevant. Congress also provided a remedy for Ritz's antitrust injury under the Clayton Act, and as in *Walker Process*, Ritz seeks relief "under the Clayton Act, not the patent laws." *Walker Process*, 382 U.S. at 176. Violating the patent laws should not immunize one from the antitrust laws.

Shield of Va. v. McCready, 457 U.S. 465, 472-73 (1982) (quotation marks omitted).

Section 4 of the Clayton Act, 15 U.S.C. § 15, the antitrust treble-damages provision, provides that:

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover three fold damages by him sustained.

"[T]he legislative history of the Sherman Act demonstrates that Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning." *Pfizer*, 434 U.S. at 312. Thus, "[t]he Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices." *Id.* (quotation marks omitted).

Among those victims, "purchasers of the defendants' product who allege being forced to pay supra-competitive prices as a result of the defendants' anticompetitive conduct" have stated a claim that "plainly is 'of the type the antitrust laws were intended to prevent.'" *In re DDAVP*, 585 F.3d at 688 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977)); *see also Assoc. Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 530 (1983) ("Congress was primarily interested in creating an effective remedy for consumers who

were forced to pay excessive prices."). Indeed, direct purchasers are the "preferred plaintiffs in private antitrust litigation" because "protecting consumers from monopoly prices is the central concern of antitrust." 2A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 345, at 156 (3d ed. 2007).

The injury to a direct purchaser is cognizable under section 4 even if the anticompetitive conduct alleged—in this case, enforcement of an allegedly fraudulent patent—was targeted at competitors. "[H]arming competitors [is] simply a means for the defendants to charge the plaintiffs higher prices." *In re DDAVP*, 585 F.3d at 688; *see also In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395 (3d Cir. 2000). Antitrust remedies "cannot reasonably be restricted to those competitors whom the [defendant] hoped to eliminate from the market." *McCready*, 457 U.S. at 479.

Providing antitrust remedies to both competitors and direct purchasers properly acknowledges that competitors cannot be relied upon to vindicate purchasers' antitrust interests. Because the injury to a direct purchaser is distinct from the injury to competitors ("competitors, unlike [direct purchasers], would be seeking lost profits,

not overcharges"), denying direct purchasers "a remedy in favor of a suit by competitors [is] 'likely to leave a significant antitrust violation undetected or unremedied.'" *In re DDAVP*, 585 F.3d at 689 (quoting *Assoc. Gen. Contractors*, 459 U.S. at 542). Moreover, direct purchasers may have broader interests in a competitive marketplace, or greater incentives or resources to pursue litigation against patent holders, than competitors. *See In re DDAVP*, 585 F.3d at 691 (noting that competitors "may not have the strategic interest or the resources to start or win [a patent validity] battle, or . . . may be presented with strong incentives to settle"); Areeda & Hovenkamp, *supra*, ¶ 706, at 194 (2011 Supp.) (noting that consumers "have a better incentive than the settling rival to achieve greater competition in the market in question"). Finally, it is not uncommon for competitors to settle patent litigation on terms that serve their interests, but that provide no remedy to purchasers and consumers who have paid (and who may very well continue to pay) an overcharge for a fraudulently procured patent.[5]

---

[5] *See* Federal Trade Commission Report, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions* (2010), available at http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf.

If SanDisk prevails here, direct purchasers would lose their existing ability under the federal antitrust laws to address their distinct interests and to seek a remedy for their distinct injuries. Instead, a competitor's unilateral decision not to pursue a *Walker Process* claim or challenge a fraudulently obtained patent for *whatever* reason—including lack of resources or a favorable settlement—would allow illegal anticompetitive conduct to persist without remedy. Such a restrictive rule conflicts with the broad remedial purposes of federal antitrust law.

C. *Walker Process* Claims By Direct Purchasers Support, Rather Than Undermine, Patent Law Policy.

SanDisk contends that restrictions on *Walker Process* standing are necessary to preserve "the delicate balance between the patent and antitrust laws." Appellant's Br. at 19, 22. But the Supreme Court struck that balance in favor of *permitting* antitrust claims based on the anticompetitive enforcement of "a special class of patents, *i.e.,* those procured by intentional fraud." *Walker Process*, 382 U.S. at 176. Permitting private antitrust suits for "monopolization knowingly practiced under the guise of a patent procured by deliberate fraud" does

not "impinge upon the policy of the patent laws to encourage inventions and their disclosure." *Id.* at 179-80 (Harlan, J., concurring). To the contrary, as this Court has recognized, there is a "policy consistency between penalizing patent misuse and stripping antitrust immunity from patentees who defraud the PTO." *Unitherm*, 375 F.3d at 1356 (citing *Walker Process*, 382 U.S. at 176); *see also Walker Process*, 382 U.S. at 176-77 (observing that "[t]o permit recovery of treble damages for the fraudulent procurement of the patent coupled with violations of [§] 2 accords with these long-recognized procedures").[6]

Limiting antitrust standing under *Walker Process* to parties who would otherwise have standing to challenge patent validity disregards *Walker Process* and its objective of ridding the marketplace of wrongful monopolies. The letter and objective of *Walker Process* is served only by

---

[6] SanDisk relies on this same passage, taken out of context, to argue that *Walker Process* "was careful not to disturb established limits on who has standing to challenge patent validity" and "was in accord with existing limitations on who could challenge the validity of a patent." Appellant's Br. at 20-21. This is not a fair reading of *Walker Process*, which explained that an antitrust remedy was "in accord" with the policy of penalizing patent misuse. *Walker Process* did not suggest—through this language or otherwise—that antitrust remedies are available only to plaintiffs with standing to challenge the validity of a patent. *Walker Process*, 382 U.S. at 176.

recognizing that a fraudulently obtained patent may result in antitrust liability to anyone who suffers an injury cognizable under antitrust law. As the Supreme Court has explained, 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." *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 234 (1892). Denying direct purchasers relief under the antitrust laws improperly extends protection to a patent holder's monopoly in the very situation when the public is most clearly being "repressed by worthless patents."

Nor is there any merit to SanDisk's speculation that direct purchaser standing to bring *Walker Process* claims independent of any patent infringement suit would improperly expose patent holders to a flood of litigation. Appellant's Br. at 31. Litigation is a permissible means to remedy the overcharges to purchasers caused by antitrust violations. As the Supreme Court explained in *Walker Process*, "the interest in protecting patentees from 'innumerable vexatious suits' [cannot] be used to frustrate the assertion of rights conferred by the antitrust laws." *Walker Process*, 382 U.S. at 176.

Indeed, patent validity is already commonly litigated outside of patent infringement actions or declaratory judgment actions seeking to invalidate a patent. *See, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) (licensee can challenge obligation to pay royalties under a license agreement by denying the validity of the patent); *Warrior Sports, Inc. v. Dickinson Wright, P.L.L.C,* 631 F.3d 1367, 1371 (Fed. Cir. 2011) (addressing patent malpractice cases in which "the adjudication of the malpractice claim requires the court to address the merits of the plaintiffs underlying patent infringement lawsuit"). As long as the plaintiffs in such lawsuits otherwise prove the claims that they are bringing, there is "no good reason, either in terms of the patent system or of judicial administration, for refusing to hear and decide" a challenge to the validity of a patent. *Glaxo Group*, 410 U.S. at 60.

If problems arise in a particular litigation, patent holders can rely on well-established antitrust doctrines and procedural rules to defend themselves, without resorting to unjustifiably restrictive standing rules. Antitrust law already insulates defendants from claims for remote injuries, *see Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489 (1977) (permitting recovery only for an "injury of the type the

antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"), and from claims based on honest mistakes in the patent application process, *see Walker Process*, 382 U.S. at 176-77; *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1364-65 (Fed. Cir. 1998) ("Fraud in the procurement of a patent requires proof of the elements of fraud as developed in the common law"). Moreover, the Federal Rules of Civil Procedure protect all defendants from having to defend against frivolous lawsuits, Fed. R. Civ. P. 11(b)(2), and conclusory allegations, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (complaint must allege "plausible"—not merely "conceivable"—right to relief); Fed. R. Civ. P. 9(b); *MedImmune, Inc. v. Genentech, Inc.*, 427 F.3d 958, 967 (Fed. Cir. 2005) ("*Walker Process* allegations are subject to the pleading requirements of Fed. R. Civ. P. 9(b)."), *rev'd on other grounds*, 549 U.S. 118 (2007).

Against this background, SanDisk's categorical rule against direct purchaser standing is unjustified. That rule would ignore antitrust law and bar, not just vexatious claims, but also meritorious challenges to egregiously anticompetitive behavior. The broad remedial purpose of federal antitrust laws, and the lack of any countervailing interest in

permitting enforcement of a fraudulently obtained patent, thus supports direct purchaser standing to bring *Walker Process* claims.

CONCLUSION

For the reasons set forth above, the district court's order holding that direct purchasers have standing to pursue *Walker Process* antitrust claims should be affirmed.

Dated: New York, NY
May 24, 2012

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
Attorney for Amici Curiae

By: _____
LESLIE B. DUBECK
Assistant Solicitor General

120 Broadway, 25th Floor
New York, NY 10271
(212) 416-6390

BARBARA D. UNDERWOOD
Solicitor General
C. SCOTT HEMPHILL
Chief, Antitrust Bureau
STEVEN C. WU
Assistant Solicitor General
SAAMI ZAIN
Assistant Attorney General
of Counsel

THOMAS C. HORNE
Attorney General
State of Arizona
1275 W. Washington St.
Phoenix, AZ 85007-2923

DUSTIN MCDANIEL
Attorney General
State of Arkansas
200 Tower Bldg.
323 Center St.
Little Rock, AR 72201

KAMALA D. HARRIS
Attorney General
State of California
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

JOHN W. SUTHERS
Attorney General
State of Colorado
1525 Sherman St.
Denver, CO 80203

GEORGE JEPSEN
Attorney General
State of Connecticut
55 Elm St.
Hartford, CT 06106

JOSEPH R. BIDEN, III
Attorney General
State of Delaware
Carvel State Office Bldg.
820 N. French St.
Wilmington, DE 19801

DAVID M. LOUIE
Attorney General
State of Hawaii
425 Queen St.
Honolulu, HI 96813

LAWRENCE G. WASDEN
Attorney General
State of Idaho
700 W. Jefferson St.
P.O. Box 83720
Boise, ID 83720-1000

LISA MADIGAN
Attorney General
State of Illinois
100 W. Randolph St.
12th Floor
Chicago, IL 60601

THOMAS J. MILLER
Attorney General
State of Iowa
Hoover State Office Bldg.
1305 E. Walnut St.
Des Moines, IA 50319

JACK CONWAY
Attorney General
Commonwealth of Kentucky
700 Capitol Ave., Suite 118
Frankfort, KY 40601

WILLIAM J. SCHNEIDER
Attorney General
State of Maine
State House Station 6
Augusta, ME 04333

DOUGLAS F. GANSLER
Attorney General
State of Maryland
200 St. Paul Place
Baltimore, MD 21202-2202

MARTHA COAKLEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108-1698

BILL SCHUETTE
Attorney General
State of Michigan
P.O.Box 30212
525 W. Ottawa Street
Lansing, MI 48909-0212

LORI SWANSON
Attorney General
State of Minnesota
State Capitol, Suite 102
St. Paul, MN 55155-1609

CHRIS KOSTER
Attorney General
State of Missouri
Supreme Ct. Bldg.
207 W. High St.
Jefferson City, MO 65101

CATHERINE CORTEZ MASTO
Attorney General
State of Nevada
Old Supreme Ct. Bldg.
100 N. Carson St.
Carson City, NV 89701

MICHAEL DELANEY
Attorney General
State of New Hampshire
State House Annex
33 Capitol St.
Concord, NH 03301-6397

GARY K. KING
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508

WAYNE STENEHJEM
Attorney General
State of North Dakota
State Capitol
600 E. Boulevard Ave.
Bismarck, ND 58505-0040

MICHAEL DEWINE
Attorney General
State of Ohio
State Office Tower
30 E. Broad St.
Columbus, OH 43266-0410

JOHN R. KROGER
Attorney General
State of Oregon
Justice Bldg.
1162 Court St., NE
Salem, OR 97301

LINDA KELLY
Attorney General
Commonwealth of Pennsylvania
1600 Strawberry Square
Harrisburg, PA 17120

PETER F. KILMARTIN
Attorney General
State of Rhode Island
150 S. Main St.
Providence, RI 02903

ALAN WILSON
Attorney General
State of South Carolina
Rembert C. Dennis Office Bldg.
P.O. Box 11549
Columbia, SC 29211-1549

ROBERT E. COOPER, JR.
Attorney General
State of Tennessee
425 5th Avenue North
Nashville, TN 37243

MARK L. SHURTLEFF
Attorney General
State of Utah
Utah State Capitol
Suite #230
P.O. Box 142320
Salt Lake City, UT 84114-2320

WILLIAM H. SORRELL
Attorney General
State of Vermont
109 State St.
Montpelier, VT 05609-1001

ROBERT M. MCKENNA
Attorney General
State of Washington
1125 Washington St. SE
P.O. Box 40100
Olympia, WA 98504-0100

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia
State Capitol, Room 26-E
1900 Kanawha Blvd. E.
Charleston, WV 25305

IRVIN B. NATHAN
Attorney General
District of Columbia
John A. Wilson Building, Ste 409
1350 Pennsylvania Ave., NW
Washington, DC 20009

GREGORY A. PHILIPS
Attorney General
State of Wyoming
State Capitol Bldg.
Cheyenne, WY 82002

GUILLERMO SOMOZA-COLOMBANI
Attorney General
Commonwealth of Puerto Rico
GPO Box 902192
San Juan, PR 00902-0192

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,759 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

_____

Oren L. Zeve