

No. 2008-1097

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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IN RE CIPROFLOXACIN  
HYDROCHLORIDE ANTITRUST LITIGATION

(CAPTION CONTINUED ON INSIDE COVER)

APPEAL FROM THE UNITED STATES DISTRICT COURT  
1:00 – MD – 01383 - Senior Judge David G. Trager

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*AMICI CURIAE* BRIEF SUBMITTED BY THE STATES OF ALABAMA,  
ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO,  
CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, IOWA, KANSAS,  
KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA,  
MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW  
MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA,  
OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT,  
WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING  
SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

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**Plaintiffs-Appellants,**

**- against -**

**BAYER AG AND BAYER CORP.,**

**Defendants-Appellees,**

**- and -**

**HOECHST MARION ROUSSEL, INC., THE RUGBY GROUP, INC. (DOING BUSINESS AS RUGBY LABORATORIES, INC.), AND WATSON PHARMACEUTICALS, INC.**

**Defendants-Appellees,**

**- and -**

**BARR LABORATORIES, INC.**

**Defendants-Appellees.**

## CERTIFICATE OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1 and Federal Circuit Rule 47.4, counsel for *amici curiae* certifies the following:

1. The full name of every party or *amicus* represented by counsel is: ATTORNEYS GENERAL FROM THE FOLLOWING STATES: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and 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 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:

Those attorneys general of the states listed on the signature page.



Cheryl Lee Johnson  
Deputy Attorney General  
California Dept. of Justice

January 24, 2008

*Counsel for Amici Curiae*

## TABLE OF CONTENTS

INTEREST OF THE AMICI STATES .....	1
INTRODUCTION.....	3
ARGUMENT .....	5
I.    State Antitrust Actions Based on <i>Walker Process</i> And Sham-Litigation Theories Are Not Preempted by Federal Patent Law.....	5
A.    As A Matter Of Federal Jurisprudence, <i>Walker Process</i> and Sham-Litigation Antitrust Claims Are Neither Patent Claims Nor Actions to Invalidate Patents. ....	5
B.    State Antitrust <i>Walker Process</i> and Sham-Litigation Claims Do Not Conflict with Federal Patent Law. ....	9
C.    Preemption of State Antitrust Law Deprives Consumers and Indirect Purchasers of a Remedy for Damages in Direct Contravention of State Policy. ....	14
II.   State Law Determines Whether Plaintiffs Have Standing To Assert <i>Walker Process</i> -Type Claims.....	16
CONCLUSION .....	20
CERTIFICATE OF INTEREST	

## TABLE OF AUTHORITIES

### **Cases**

<i>Abbott Laboratories v. Teva Pharmaceuticals USA, Inc</i> , 432 F. Supp. 2d 408 (D. Del. 2006).....	4
<i>Animal Legal Defense Fund v. Quigg</i> , 900 F.2d 195 (9 <sup>th</sup> Cir. 1990) .....	9
<i>Arthur v. Microsoft Corp.</i> , 676 N.W. 2d 29 (Neb. 2004) .....	17
<i>Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.</i> , 289 F. Supp. 2d 986 (N.D. Ill. 2003).....	18
<i>Blue Shield of Va. v. McCready</i> , 457 U.S. 465 (1982).....	19
<i>Bonito Boats, Inc. v. Thunder Craft Boats</i> , 489 U.S. 141 (1989).....	10
<i>California v. ARC America</i> , 490 U.S. 93 (1989).....	10, 14, 15
<i>Cellular Plus, Inc. v. Super. Ct.</i> , 18 Cal.Rptr.2d 308 (Cal. Ct. App. 1993).....	16
<i>Christianson v. Colt Industries Operating Corp.</i> , 486 U.S. 800 (1988).....	6, 9
<i>Comes v. Microsoft Corp.</i> , 646 N.W. 2d 440 (Iowa 2002) .....	17
<i>D. R. Ward Const. Co. v. Rohm and Haas Co</i> , 470 F. Supp. 2d 485 (E.D. Pa. 2006).....	16
<i>Dow Chem. Co. v. Exxon Corp.</i> , 139 F.3d 1470 (Fed. Cir. 1998). .....	12

TABLE OF AUTHORITIES (cont'd)

**Cases**

*English v. General Electric Co.*,  
496 U.S. 72 (1990)..... 10

*Hillsborough County v. Automated Medical Laboratories, Inc.*,  
471 U.S. 707 (1985)..... 9

*Hines v. Davidowitz*,  
312 U.S. 52 (1941)..... 11

*Hunter Douglas, Inc v. Harmonic Design, Inc*,  
153 F.3d 1318 Fed. Cir. 1998)..... 10, 11

*Illinois Brick Co. v. Illinois*,  
431 U.S. 720 (1977)..... 2, 15

*In re Ciprofloxacin Hydrochloride Antitrust Litig.*,  
363 F. Supp. 2d 514 (E.D.N.Y. 2005) ..... 3

*In re DDAVP Direct Purchaser Antitrust Litig.*,  
No. 06-5525-cv (2d Cir. filed May 25, 2007) ..... 19

*In re Netflix Antitrust Litigation*,  
506 F. Supp. 2d 308 (N.D. Cal. 2007)..... 7, 19

*In re Remeron Antitrust Litigation*,  
335 F. Supp. 2d 522 (D.N.J. 2004)..... 18, 19

*Kewanee Oil Co. v. Bicron Corp.*,  
416 U.S. 470 (1974)..... 11

*Lorix v. Crompton Corporation*,  
736 N.W. 2d 619 (Sup. Ct. Minn. 2007). ..... 2, 16

*Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*,  
24 F.3d 1368 (Fed. Cir. 1994) ..... 11

TABLE OF AUTHORITIES (cont'd)

**Cases**

*Maryland v. Louisiana*,  
451 U.S. 725 (1981)..... 9

*Midwest Indus., Inc. v. Karavan Trailers, Inc.*,  
175 F. 3d 1356 (Fed. Cir. 1999) ..... 10

*Molecular Diagnostic Labs. v. Hoffman-La Roche, Inc.*,  
402 F. Supp. 2d 276 (D.D.C. 2005)..... 7, 19

*Noblepharma AB v. Implant Innovations, Inc.*,  
141 F. 3d 1059 (Fed.Cir. 1998). ..... 4, 7, 12

*Oetiker v. Jurid Werke GMBH*,  
671 F.2d 596 (D.C. Cir. 1982)..... 18

*Precision Instruments Mfg. Co. v. Automotive Maintenance Mach.*,  
324 U.S. 806 (1945)..... 12

*Puerto Rico v. Shell Co.*,  
302 U.S. 253 (1937)..... 10

*Rice v. Santa Fe Elevator Corp.*,  
331 U.S. 218 (1947)..... 10

*Union Carbide Corp .v. Superior Court*,  
36 Cal. 3d 15 (1984) ..... 15

*Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*,  
375 F.3d 1341 (Fed. Cir. 2004) ..... 7

*Walker Process Equip. Co. v. Food Mach. & Chem. Corp.*,  
382 U.S. 172 (1965)..... 4, passim

*Watson v. Buck*,  
313 U.S. 387 (1941)..... 15

TABLE OF AUTHORITIES (cont'd)

**Cases**

*Exxon Corp. v. Governor of Maryland*,  
437 U.S. 117 (1978)..... 15

*Will v. Michigan Dept of State Police*,  
491 U.S. 58 (1989)..... 10

*Zenith Electronics Corp. v. Exzec, Inc.*,  
182 F.3d 1340 (Fed. Cir. 1999) ..... 13

**Statutes**

15 U.S.C. § 1125(a)..... 11

15 U.S.C. § 15(a)..... 19

**Miscellaneous**

Antitrust Modernization Committee, *Report and Recommendations*, (April 2007)  
..... 15

Calkin, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J.  
673 (2003) ..... 14

Charles Alan Wright, Arthur Miller & Edward Cooper *Federal Practice and  
Procedure*, § 3531.14 (2d ed. 1984) ..... 16

Daniel Karon, “*Your Honor, Tear Down that Illinois Brick Wall!*” *The National  
Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice*,  
30 Wm. Mitchell L. Rev. 1351, 1361-62 (2004) ..... 2

## INTEREST OF THE AMICI STATES

Amici Curiae, the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, by and through their Attorneys General, respectfully submit this brief in support of the appeal filed by Appellants. Amici States seek 1) reversal of the District Court's holding that federal patent law preempts state antitrust claims based upon monopolization achieved through exploiting fraudulently obtained patents and filing sham litigation; and 2) disavowal of the *dictum* that consumers lack standing to assert state antitrust claims based upon fraudulent procurement and use of patents.

The state Attorneys General, as the primary enforcers of state antitrust, unfair trade practices, and unfair competition laws (collectively referred to hereafter as state antitrust laws), have a substantial interest in ensuring that their laws are respected and interpreted in harmony with state policies and other law. The Attorneys General are the primary protectors of their citizens, consumers, and state agencies from the excessive prices and other harmful effects of antitrust

violations. To that end, they often assert state antitrust claims much like the one dismissed below to recover overcharges and deter antitrust violations.

State antitrust law forms a critical bulwark in stopping anticompetitive conduct, particularly where federal law provides limited relief. Under *Illinois Brick v. Illinois*, for example, victims of antitrust violations who do not purchase directly from the violator may have no damage remedy under federal antitrust law. Many states, either legislatively or by judicial interpretation, have adopted laws or policies that effectively neutralize the standing limitation of *Illinois Brick*, insofar as state antitrust actions are concerned. Thus some states have enacted legislation allowing consumers injured by antitrust violations to recover damages, regardless whether they purchased directly or indirectly from the antitrust violator, and others reach the same result by judicial decision. See e.g., *Lorix v. Crompton Corporation*, 736 N.W. 2d 619, 626-27 (Sup. Ct. Minn. 2007). It is the law of twenty-five of these states providing recovery for indirect purchasers that forms the basis for Count V<sup>1</sup> which the court below dismissed.

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<sup>1</sup> The *Amici* States had no role in identification of the twenty-five states whose laws are cited in Count V. The *Amici* note that the laws of additional states provide for monetary relief for the benefit of indirect purchasers. See, e.g., Antitrust Modernization Committee, *Report and Recommendations*, Chap.III.B, at 269 & n.22 (April 2007) (counting 36 states and the District of Columbia as allowing indirect-purchaser actions); Daniel Karon, “*Your Honor, Tear Down that Illinois Brick Wall!*” *The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice*, 30 Wm. Mitchell L. Rev. 1351, 1361-62 (2004).

The lower court's preemption ruling and standing *dictum*<sup>2</sup> thwart the states' express intention to provide monetary recovery to their consumers for antitrust violations. The lower court acted without considering the important state policies that animate and inform these state laws, intruded on traditional areas of state regulation, and denied consumers and indirect purchasers the protection and rights expressly granted them by their states.

## INTRODUCTION

The district court erred in ruling that federal patent law preempts a state antitrust claim for anticompetitive conduct utilizing patent fraud and sham litigation. While the court correctly concluded that federal patent law preempts state-law claims resting entirely on patent law and alleging only conduct before the Patent Office (*Cipro*, at 544), that legal conclusion cannot properly apply to the dismissed Count V. The Count is a state monopolization claim that does not arise solely under patent law, and alleges both marketplace impact and competitive injury in addition to Patent Office fraud. As a state antitrust law action, Count V's monopolization claim, based upon fraudulent procurement and enforcement of

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<sup>2</sup> The district court also granted summary judgment to the defendants as to claims that the defendants entered into an illegal agreement in restraint of trade. *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 363 F. Supp. 2d 514, 520-40 (E.D.N.Y. 2005)(*Cipro*). This brief does not address that aspect of the court's decision.

patents, is not preempted by federal patent law and does not enjoy any patent law exemption from antitrust laws.

Clearly, federal antitrust claims can be predicated upon allegations of fraudulently obtained patents and baseless litigation instituted to defeat competition. *Walker Process Equip. Co. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) (*Walker Process*);<sup>3</sup> *Abbott Laboratories v. Teva Pharmaceuticals USA, Inc.*, 432 F. Supp. 2d 408, 427 (D. Del. 2006) (sham-litigation and *Walker Process* theories provide alternative legal grounds on which a patentee may be stripped of its immunity from the antitrust laws). It follows, then, that these federal antitrust claims are permitted, and not “trumped” by federal patent law. *Walker Process*, 382 U.S. at 176-77; *Noblepharma AB v. Implant Innovations, Inc.*, 141 F. 3d 1059, 1067-68 (Fed.Cir. 1998). There is no logical reason, therefore, why federal patent law would preempt *state* antitrust claims based on patent fraud and sham litigation, while permitting *federal* antitrust claims based upon the same conduct. Nor does any precedent support this asymmetrical treatment of federal and state antitrust law. State antitrust claims based upon patent fraud neither frustrate nor conflict

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<sup>3</sup> In *Walker Process Equip. Co. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), the Supreme Court concluded that, under certain circumstances, a party who fraudulently obtained a patent from the Patent & Trademark Office can be held liable for violations of the antitrust laws. To establish a *Walker Process*-type claim, the plaintiff must establish that the patent was obtained by fraud, that the patent was used to monopolize or attempt to monopolize a market, and that the plaintiffs suffered damages and antitrust injury.

with federal patent law. Patent law, like antitrust law, condemns fraudulently obtained or used patents. As this Court repeatedly has emphasized, patents obtained or used with fraud will find no refuge in or immunity under federal patent law. *Id.*

The lower court also suggested that the state antitrust claims in Count V should be dismissed for lack of standing, though the issue was never briefed. Had the issue been briefed, it would be clear that state law, not federal law, controls the question whether plaintiffs have standing under the state antitrust statutes --- and that state law provides standing to consumers. However, the district court did not look to state law to assess the standing of the plaintiffs.

## ARGUMENT

### **I. State Antitrust Actions Based on *Walker Process* And Sham-Litigation Theories Are Not Preempted by Federal Patent Law.**

#### **A. As A Matter Of Federal Jurisprudence, *Walker Process* and Sham-Litigation Antitrust Claims Are Neither Patent Claims Nor Actions to Invalidate Patents.**

Judge Trager's ruling on preemption proceeds from a fundamental misconception about the nature of the claim asserted in Count V. His decision describes the claim as one that "rests entirely on patent law"; "arises under federal patent law"; and concerns actions directed to the Patent Office, not the marketplace. *Cipro*, 363 F. Supp. 2d at 543-545. These observations -- decidedly

at odds with the allegations of Count V, as well as established jurisprudence -- led the court to the erroneous conclusion that the claim is preempted by federal patent law.

Accepting Count V as pled, as the court must on a motion to dismiss (*Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 811 (1988)), leaves no doubt that Count V is based on state antitrust and consumer laws, not federal patent law. Count V captioned “Monopolization and Deceptive Conduct under the Antitrust and Consumer Protection Statutes,” alleges that defendants obtained a patent by extensive material misrepresentations to the Patent Office, and then used the fraudulently obtained patent to bring baseless litigation, all for the purpose of unlawfully excluding competition in the market for ciprofloxacin. Second Amended Complaint, page 94, ¶¶ 297-306. Count V further alleges, as a direct consequence of Defendants’ unlawful monopolization and violations of state antitrust and consumer protection laws, that plaintiffs, consumers and indirect purchasers of ciprofloxacin “had to pay more for Cipro.” *Id.*, ¶¶ 305-308. Neither Count V nor the Prayer for Relief in the Second Amended Complaint seeks to invalidate any patent, but rather seeks damages and equitable relief for the resulting harm to and overcharges in the ciprofloxacin market. The underlying fraud on the Patent Office and the sham litigation are merely vehicles by which that market was wrongfully monopolized.

In short, Count V is a typical state law antitrust pleading, albeit based, in part, upon a *Walker Process* theory --- a pleading that the Supreme Court recognizes sounds in antitrust, not patent law. *Walker Process*, 382 U.S. at 176 ([t]he claim is “under the Clayton Act, not the patent laws” . . . The “gist of Walker’s claim” is “monopolistic action taken under the fraudulent patent claim.”). See also *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1349 (Fed. Cir. 2004) (recognizing that claims under *Walker Process* are not patent law claims but are instead “antitrust claims premised on the bringing of a patent infringement suit”), *rev’d in part on other grounds*, 546 U.S. 394 (2006); *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d at 1067 (“antitrust claim premised on stripping a patentee of its immunity from the antitrust laws”); *Molecular Diagnostics Labs v. Hoffman La-Roche, Inc.*, 402 F. Supp. 2d 276, 280 (D.C. Cir. 2005) (“*Walker Process* claims are intended to address antitrust injury, thus the requirement that a plaintiff be able to allege a violation of Section 2 of the Sherman Act. . . . A *Walker Process* claim is not a fraud claim. . . but an antitrust violation. The harm is not the invalid patent, but the use of the invalid patent to establish a monopoly.”); *In re Netflix Antitrust Litigation*, 506 F. Supp. 2d 308, 316 (N.D. Cal. 2007) (“harm in a *Walker Process* claim comes not from fraudulently obtaining a patent, it comes from creating or maintaining an unlawful monopoly using that patent” and the “harm still accrues directly to the consumers”). Though one

element of a *Walker Process* claim is proof that the patent was procured by fraud on the Patent Office, this requirement does not convert what is an antitrust claim into a patent claim. *Walker Process*, 382 U.S. at 176.

In viewing state antitrust claims as patent law claims, the district court mistakenly concluded that “federal patent law preempts any state antitrust cause of action premised on Bayer's alleged bad faith conduct before the PTO because Count V does not allege any conduct other than conduct before the PTO.” *Cipro*, 363 F. Supp. 2d at 544. On the contrary, Count V alleges marketplace misconduct, namely use of a fraudulently procured patent to gain a monopolistic advantage, as well as sham litigation to maintain that monopoly. Both the *Walker Process*-type and sham-litigation monopolization theories require proof of monopolization, and antitrust injury and consumer harm resulting from that anticompetitive conduct. The sham-litigation claims that are a part of Count V also requires additional proof, namely that Defendants instituted patent infringement litigation without any reasonable basis and that the baseless litigation caused consumers and indirect purchasers of ciproflaxin to pay artificially high prices. See *Abbott*, 432 F. Supp. 2d at 427 (sham litigation and *Walker Process* provide alternative legal grounds on

which a patentee may be stripped of its immunity from the antitrust laws).<sup>4</sup>

**B. State Antitrust *Walker Process* and Sham-Litigation Claims Do Not Conflict with Federal Patent Law.**

As an antitrust claim, Count V is not preempted by federal patent law. In fact, it is presumed that the state claim is not preempted. Thus, when Congress does not expressly state its intent to preempt state law, there is a legal presumption against preemption. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The presumption is even stronger in matters related to health and safety, which states have traditionally regulated. *See Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985). Thus, when Congress legislates in a field traditionally regulated by the states, courts must start with the assumption that the states' historic police powers are not superseded by federal acts, unless there is

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<sup>4</sup> In determining that jurisdiction over Count V lies exclusively in federal court, the district court concluded that Count V “arises under” patent law because a construction of patent law is necessary to each theory thereunder, *Cipro*, 363 F. Supp. 2d at 544. The court cited to *Christianson v. Colt Inds. Operating Corp.*, 486 U.S. 800, 808 n.2, 809-811 (1988), in which the Supreme Court addressed the issue of which of two federal appellate courts had jurisdiction over the claims in that case. The question whether a cause of action “arises under” patent law such as to invoke the exclusive jurisdiction of this Court is separate from the question whether it is *preempted* by patent law as well. *Animal Legal Defense Fund v. Quigg*, 900 F.2d 195, 197 (9<sup>th</sup> Cir. 1990) (preemption and jurisdiction are different legal issues). That antitrust claims may “arise under” patent law for purposes of federal court jurisdiction does not mean that they are preempted by patent law. *See, e.g., Hunter Douglas*, 153 F.3d 1318, 1329, 1336-37 (Fed. Cir. 1998); *Dow Chem. Co. v. Exxon Corp.*, 139 F.3d 1470, 1477 (Fed. Cir. 1998).

“clear” and “manifest” evidence to the contrary. *California v. ARC America*, 490 U.S. 93, 101 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see also *Will v. Michigan Dept of State Police*, 491 U.S. 58, 65 (1989). Against this backdrop, the Supreme Court has long upheld the broad application of state antitrust law from attack by preemption arguments. See, e.g., *California v. ARC America*, 490 U.S. at 101; *Puerto Rico v. Shell Co.*, 302 U.S. 253, 261-62 (1937).

There are three bases upon which federal law may be said to preempt state law: explicit preemption, field preemption, and conflict preemption. *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990); *Hunter Douglas, Inc v. Harmonic Design, Inc*, 153 F.3d 1318, 1332 (Fed. Cir. 1998), *overruled on other grounds*, *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F. 3d 1356 (Fed. Cir. 1999). None is found here.

Plainly no provision of federal patent law explicitly preempts state antitrust laws. Field preemption occurs when state law regulates within a field that Congress intended the Federal Government to occupy exclusively. See *English v. General Electric Co.*, 496 U.S. at 79. That state antitrust law and federal patent law have coexisted as distinct and independent bodies of law for almost 200 years without any indication of inconsistency, demonstrates that Congress has not preempted the field. See *Hunter Douglas*, 153 F.3d at 1334; *Bonito Boats, Inc. v.*

*Thunder Craft Boats*, 489 U.S. 141, 166 (1989); *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368, 1373 (Fed. Cir. 1994) (“the laws of unfair competition, despite some federal encroachment, see 15 U.S.C. § 1125(a) (1988), remains largely free from federal exclusivity”).

Conflict preemption occurs when “it is impossible for a private party to comply with both state and federal requirements,” when the state claim is based upon protected federal conduct, or when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479 (1974) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *Hunter Douglas*, 153 F.3d. at 1335. In the event of a conflict, the court must, in essence, weigh the respective interests served by the “conflicting” laws, and determine the relative importance of those interests. The district court identified no conflict between state antitrust law and patent law and, therefore, engaged in no weighing of competing interests.

In any event, there is no conflict between patent law, which forbids patent fraud, and state antitrust law, which forbids monopolization of markets through patent fraud. Case law expressly recognizes patent fraud is against public policy

and inconsistent with patent law itself.<sup>5</sup> Indeed, although the Supreme Court’s opinion in *Walker Process* is not couched in terms of preemption or immunity, the opinion necessarily forecloses any notion that an antitrust claim is somehow trumped by patent law merely because the claim alleges the enforcement of a fraudulently procured patent.

Likewise, this Court’s precedent also unambiguously precludes preemption of antitrust claims that are based upon fraudulent procurement or enforcement of patents. *Noblepharma AB v. Implant Innovations, Inc.*, 141 F.3d at 1067-68 (plaintiff patentee liable for anticompetitive effects of suit if either patent was obtained by fraud or infringement suit is a sham); *Hunter Douglas*, 153 F.3d at 1337 (plaintiff escapes preemption if fraud on the PTO is alleged); *Dow Chemical*, 139 F.3d at 1475-77 (state law claim that requires additional elements of proof not found in patent law, and that does not clash with the objectives of the patent laws, is not preempted. A state tort of interference with contractual relations based upon

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<sup>5</sup> “The far-reaching social and economic consequences of a patent . . . give the public a paramount 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.” *Precision Instruments Mfg. Co. v. Automotive Maintenance Mach.*, 324 U.S. 806, 816 (1945). In *Walker Process*, Justice Harlan’s concurring opinion specifically rejected the very same argument that underlies the District Court’s preemption ruling, stating that to permit private antitrust damage actions for “monopolization knowingly practiced under a guise of a patent procured by deliberate fraud, *cannot well be thought to impinge upon the policy of the patent laws to encourage innovations and their disclosure.*” *Walker Process*, 382 U.S. at 180 (emphasis added).

an inequitably obtained patent has such additional elements, noting the tort “occurs not in the PTO, but later in the marketplace.”); *Zenith Electronics Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1351 (Fed. Cir. 1999) (state unfair competition claims are not preempted by the patent laws, despite the fact that the claims required proof the patent was obtained through inequitable conduct “because the state law causes of action did not clash with the objectives of the patent laws, and because they included additional elements not found in the patent law remedy”) (emphasis added) (citing *Dow Chemical*, 139 F.3d at 1473-77).

Claims brought under state antitrust law may be based upon the same theories used in federal antitrust claims, including patent fraud and sham litigation theories. To distinguish between such similar federal and state antitrust actions for purposes of patent-preemption analysis, defies logic and finds no support in the case law. Indeed, the lower court acknowledges that a number of such state antitrust claims based upon patent fraud have been allowed to proceed. *Cipro*, 363 F. Supp. 2d at 545, n.27. Yet the court summarily dismissed these cases on the ground they did not expressly address preemption. *Id.* Instead, the court should have recognized that these cases demonstrate that patent-law preemption has no proper application to state antitrust claims predicated on familiar *Walker Process* and sham-litigation theories.

**C. Preemption of State Antitrust Law Deprives Consumers and Indirect Purchasers of a Remedy for Damages in Direct Contravention of State Policy.**

Count V is based upon state antitrust law, an area of historic and traditional state regulation that plays a vital role in protecting citizens from restraints of trade causing artificially high prices for goods and services. The point is clearly recognized by the Supreme Court in *California v. ARC America Corporation*, 490 U.S. at 101: “Given the long history of state common-law and statutory remedies against monopolies and unfair business practices . . . it is plain that this is an area traditionally regulated by the States.” That historical role pre-dates even the Sherman Act. Indeed, by the time the first federal antitrust statute (the Sherman Act) was enacted in 1890, twenty-one states already had antitrust laws on the books. *California v. ARC America*, 490 U.S. at 101 n.4; Calkin, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 676 (2003). In enacting the federal antitrust laws, Congress expressly intended to supplement, not displace, state antitrust remedies. *California v. ARC America.*, 490 U.S. at 102 (“[s]tate [antitrust laws] . . . are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct.”)

Not only are the states free to enact their own antitrust laws, but they are free to reach the same, different, or broader conduct and to provide greater remedies

than are available under federal law. See, e.g., *Watson v. Buck*, 313 U.S. 387, 403 (1941); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978). Notably, following the Supreme Court’s decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), more than half of the states chose to adopt more expansive antitrust laws in respect to indirect purchasers. See Antitrust Modernization Committee, *Report and Recommendations*, Chap.III.B, at 269 & n.22 (April 2007); see also *California v. ARC America*, 490 U.S. at 98 n.3; *Union Carbide Corp .v. Superior Court*, 36 Cal. 3d 15, 21-22, 201 Cal. Rptr. 580, 583-84 (1984) (California state legislature implicitly incorporated the dissenting view of *Illinois Brick*, and mandated that all unnecessary procedural barriers to indirect purchasers’ prosecution of California antitrust suits be avoided so there could be a “viable and effective means of enforcing California’s antitrust laws”). As the Supreme Court recognized in *California v. ARC America*, states must be free to protect their consumers where federal law does not. 490 U.S. at 103. Preempting state antitrust laws that grant consumers a right to sue parties who perpetrate patent fraud and engage in sham litigation, deprives consumers injured as a result of these antitrust violations of remedies to recover overcharges expressly given them by their states.

In sum, under prevailing precedent, as well as longstanding antitrust doctrine addressing state-federal antitrust enforcement, the district court erred in concluding that state antitrust *Walker Process*-type claims are preempted by the patent laws.

## II. State Law Determines Whether Plaintiffs Have Standing To Assert *Walker Process*-Type Claims.

In *dictum*, the district court questioned whether consumers—such as the indirect purchasers in this case—may bring state-law monopolization claims against a monopolist that enforced a fraudulently-obtained patent to preserve its monopoly. First, the court failed to apply state law, which determines standing to bring state antitrust claims. Second, the court misapplied and misinterpreted federal law on standing. Although the court did not dismiss Count V for lack of standing, the Amici States nevertheless address the issue because of its importance.

State law governs whether a plaintiff has standing to sue under state antitrust law. *See D. R. Ward Const. Co. v. Rohm and Haas Co.*, 470 F. Supp. 2d 485, 494-96 (E.D. Pa. 2006) (collecting cases); *see also Lorix v. Crompton Corp.*, 736 N.W. 2d 619, 626-27 (Minn. 2007) (rejecting federal law and applying its own to determine standing under Minnesota’s antitrust statute); *see also generally* 13A Charles Alan Wright, Arthur Miller & Edward Cooper, *Federal Practice and Procedure*, § 3531.14 (2d ed. 1984) (“Federal courts have stated that state law of standing should be applied as to state rights . . . .”) In discussing the Appellants’ standing to bring state-law claims, however, the district court cited federal law, which differs from the standards of many states in many respects. Indeed, state antitrust law on standing is often much broader than federal law. *See, e.g., Cellular Plus, Inc. v. Super. Ct.*, 18 Cal.Rptr.2d 308, 313 (Cal. Ct. App. 1993) (stating that

while both California and federal antitrust law require plaintiffs to have antitrust injury to have standing, the scope of that term is much broader under California state law and includes all those who dealt either directly or indirectly with the offender). For example, as noted above, federal law does not grant standing to indirect purchasers, while most state laws do. Antitrust Modernization Committee, *Report and Recommendations*, Chap.III.B., at 269 & n.22 (April 2007) (counting 36 states and the District of Columbia as allowing indirect-purchaser actions). In those states, indirect purchasers have standing because state policy provides consumers with a broader right to relief than is available under federal law. *See e.g., Lorix*, 736 N.W.2d at 627 (“Minnesota antitrust law contains an ‘expansive grant of standing’ designed to protect Minnesota citizens from ‘sharp commercial practices’”); *Arthur v. Microsoft Corp.*, 676 N.W. 2d 29, 35 (Neb. 2004) (Nebraska Consumer Protection Act allows indirect purchaser suits because “[t]he clear purpose of the Act is to provide consumer protection against the monopolization of trade or commerce”); *Comes v. Microsoft Corp.*, 646 N.W. 2d 440, 450 (Iowa 2002) (holding that “to facilitate enforcement of the policies behind the Iowa Competition Law, indirect purchasers, the real victims, must be authorized to bring a cause of action in state court”). The district court, therefore, erred in failing to evaluate the Appellants’ standing under the law of each of the states whose law forms the basis for Count V.

The court not only erred in looking to federal rather than state law, but also cited two federal cases that are inapposite, and a third that was wrongly decided. In *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986 (N.D. Ill. 2003), the court denied standing to suppliers—not consumers. The *Asahi* court held that suppliers do not have antitrust standing to assert claims for antitrust violations that affect consumers, including a monopolization charge based on *Walker Process* fraud. *Id.* at 990, 995. The *Asahi* court never denied standing to consumers. Likewise, *Oetiker v. Jurid Werke GMBH*, 671 F.2d 596 (D.C. Cir. 1982), did not deny consumer standing. In *Oetiker*, the court acknowledged that competitors may sue a company for monopolization based on *Walker Process* fraud, provided that the other elements of monopolization are satisfied. *Id.* at 599. Further, the *Oetiker* court recognized standing not only for competitors but also for “other persons injured,” presumably consumers. *Id.*

The third federal case cited by the district court, *In re Remeron Antitrust Litigation*, 335 F. Supp. 2d 522 (D.N.J. 2004), is simply wrong. The *Remeron* court limited standing to sue for monopolization to those parties who were excluded from the market by the *Walker Process* fraud—specifically, the alleged monopolist’s actual and potential competitors. *Id.* at 528-29 (denying standing to purchasers because they neither produced nor would have produced the patented product). But antitrust standing is not limited to competitors excluded from the

market. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 479 (1982). The Clayton Act grants standing to “any person who shall be injured in his business or property.” Clayton Act § 4, 15 U.S.C. § 15(a). That includes consumers who pay higher prices because a monopolist eliminates competition—by *Walker Process* fraud or otherwise. Courts and antitrust enforcement agencies alike have criticized *Remeron* for that reason. See *Molecular Diagnostic Labs. v. Hoffman-La Roche, Inc.*, 402 F. Supp. 2d 276, 280 (D.D.C. 2005) (“A *Walker Process* claim is not a fraud claim, as the [*Remeron*] court intonates, but an antitrust violation. The harm is not the invalid patent, but the use of the invalid patent to establish a monopoly.”); *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 316 (N.D. Cal. 2007); *see also*, Brief for the United States and the Federal Trade Commission as *Amici Curiae* at 11-13, *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 06-5525-cv (2d Cir. filed May 25, 2007) (urging recognition of standing for purchasers to assert antitrust claims based on *Walker Process* fraud); Brief of *Amici States*, *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 06-5525-cv (2d Cir. filed May 30, 2007) (same).<sup>6</sup>

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<sup>6</sup> The issue of consumer standing in a federal *Walker Process* antitrust case is currently pending before the Second Circuit in the *DDAVP* case cited in the accompanying text.

## CONCLUSION

Amici States respectfully urge the Court to reverse the judgment below.

Dated: January 24, 2008

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Date: January 24, 2008

  
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## CERTIFICATE OF SERVICE

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