Case No. 14-15000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: APPLE IPHONE ANTITRUST LITIGATION

ROBERT PEPPER; STEPHEN H. SCHWARTZ;
EDWARD W. HAYTER; ERIC TERRELL,
Plaintiffs-Appellants,

v.

APPLE INC.,
Defendant-Appellee.

On Appeal from an Order of the United States District Court
for the Northern District of California
The Honorable Yvonne Gonzalez Rogers
(No. C 11-06741-YGR)

BRIEF OF DEFENDANT-APPELLEE

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Dated: July 11, 2014

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee Apple Inc. hereby states that it is a California corporation, it has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

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INTRODUCTION

Plaintiffs are consumers of software applications ("Apps") that run on Apple's iPhone. They complain that Apple requires Apps developers to distribute iPhone Apps only though Apple's App Store, and that Apple imposes a 30% distribution fee on Apps developers' sale of paid Apps. They argue that these *developer restrictions* affect the prices developers charge for their Apps, thereby injuring consumers.

The district court dismissed the complaint as alleging a pass-through theory barred by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Crayton v. Concord EFS, Inc. (In re ATM Fee Antitrust Litigation)*, 686 F.3d 741 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 257 (2013) ("*ATM Fee*"). Prior to doing so, the district court gave Plaintiffs every opportunity to plead a direct injury theory. The closest they ever came was a statement in a brief that Apple itself adds a 30% fee on top of the developer's price for an App. But when the court challenged them to make actual allegations of fact supporting that characterization, they could not. When Plaintiffs' fourth and final complaint confirmed that *developers* set the price of their Apps, and that the fee or "commission" Apple charges developers may (or may not) be passed-on by the developers in the price they set for their Apps, the district court found that Plaintiffs were advancing an indirect injury theory foreclosed as a matter of law, and dismissed the complaint with prejudice.

On appeal as below, Plaintiffs play games with language in an effort to make it seem that Apple imposes a separate 30% charge directly on consumers when they purchase Apps through Apple's App Store. The district court saw through these obfuscations, and this Court should as well. There is not the slightest bit of doubt as to how Apple's App Store works, and Plaintiffs' own allegations confirm that Apple charges *software developers* a "30% commission" for distributing Apps, taken as "a share of the third party [developer]'s sales proceeds," and that the alleged consumer injury is because developers "mark-up the price to cover Apple's 30%." Excerpts of Record ("EOR") 70, 69 (Second Amended Consolidated Complaint ("SACC") ¶¶ 40, 32); Appellants' Br. 35 n.10. These are classic allegations of "pass through" harm. Indeed, this case is on all fours with this Court's recent decision, *ATM Fee*, which held that consumer plaintiffs could not challenge anticompetitive conduct that directly affected a fee that banks pay to each other—even though that fee was fully passed on to consumers, and even though the party that collected the money from consumers was one of the alleged conspirators. 686 F.3d 750-51. The district court's decision is a routine application of this precedent, and Plaintiffs' suggestion that it will somehow leave Apple's policies immune from antitrust scrutiny is wrong.

The district court's decision should also be affirmed on alternative grounds because Plaintiffs have not—and cannot—plead an antitrust violation. Plaintiffs'

novel theory is based on a misreading of this Court's decision in *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008) ("*Newcal*"), that should be rejected on the pleadings.

Plaintiffs' procedural arguments are similarly flawed. This Court does not need to order a remand for the district court to re-issue the same decision under Federal Rule of Civil Procedure 12(c) rather than Rule 12(b)(6). Rule 12(g) does not mandate this inefficient result, particularly where the focus of the case changed and this Court issued its opinion in *ATM Fee after* Apple filed its initial motion to dismiss. Nor did the district court abuse its discretion in denying Plaintiffs an opportunity to file a fifth complaint in this case, when it is clear that they cannot allege anything that could survive a motion to dismiss.

The district court's judgment should be affirmed.

STATEMENT OF FACTS

The material facts of this case are simple, but its procedural history is anything but. The following statement summarizes the key allegations relating to the *Illinois Brick* issues and Plaintiffs' argument concerning Rule 12(g). Additional facts relating to the alternative grounds for affirmance are presented in Section III of the Argument, below. This summary is based on Plaintiffs' Second Amended Consolidated Complaint ("Complaint" or "SACC"), supplemented by

allegations from Plaintiffs' earlier Amended Consolidated Complaint ("ACC"),[1] public filings in the related litigation, and other materials that are appropriate for judicial notice. *See generally, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568-70 & n.13 (2007); *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

A. The iPhone and App Store

In June 2007, Apple introduced the iPhone, the company's first cellular telephone product. EOR 63 (SACC ¶ 2). Apple made two initial entry strategy decisions that have been attacked by Plaintiffs' counsel in the three cases they have brought.

First, Apple granted AT&T Mobility ("ATTM") the right to be the sole provider of iPhone voice and data cellular services to iPhone consumers for several years. EOR 96 (ACC ¶ 28). This initial ATTM iPhone exclusivity (now long passed) has been the primary target of Plaintiffs' counsel for the last seven years,

[1] Plaintiffs' allegations in their earlier complaints, including the ACC, remain relevant and can be considered by this Court on appeal. The "'amendment of a pleading does not make it any the less an admission of the party.'" *Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1024 n.12 (E.D. Cal. 2012) (quoting *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 707 (2d Cir. 1989)). While a pleading may be "superseded" by a later pleading, the original pleading remains "admissible . . . as an admission or prior inconsistent statement" that a court may consider on a motion to dismiss, *id.*, and "courts may, and have, looked to a plaintiff's prior allegations when deciding whether the plaintiff's operative allegations suggest … plausible claims." *State Nat'l Ins. Co. v. Khatri*, No. C 13-00433 LB, 2013 U.S. Dist. LEXIS 132167, at *20-21 (N.D. Cal. Sept. 13, 2013).

and is the subject of a pending appeal before this Court, *Ward v. Apple Inc.*, No. 12-17805 (9th Cir.), that is fully briefed and awaiting oral argument.

Second, Apple originally designed the iPhone operating system ("iOS") as what Plaintiffs pejoratively call a "closed system"—a system in which Apple would curate the third party Apps that could be downloaded and run on the iPhone. EOR 63, 68-69, 71 (SACC ¶¶ 3, 30, 43). Apple's design decisions and "Apps" policy have now become the sole focus of this particular case.

The iPhone was a "novel," "revolutionary," and "breakthrough" product that "shifted the paradigm for smartphones, and … changed the entire cell phone manufacturing industry." EOR 64, 63, 68 (SACC ¶¶ 7, 2, 26). One of the most significant innovations concerned Apps. Approximately nine months after Apple first began selling the iPhone, Apple released a "software development kit" ("SDK") to assist and enable developers to create Apps for the iPhone—something we take for granted today but which was quite new at the time. EOR 63, 70 (SACC ¶¶ 2, 38-39). Apple also created the App Store, which made it easy for consumers to find and download reliable software applications. EOR 70 (SACC ¶¶ 38-39). Apple prominently announced the launch of the App Store, the availability of the SDK to third party Apps developers, and related policies on March 6, 2008. As Plaintiffs summarize that announcement:

> Apple inform[ed] its prospective apps developers … that the developers' apps cannot be sold anywhere except in the App

> Store. Apple also inform[ed] its developers … that Apple will charge iPhone consumers a 30% commission for any non-free app sold in the App Store.

EOR 70 (SACC ¶ 40, 38). Prospective Apps developers enter into contracts with Apple establishing these terms and conditions for the relationship. *See id.*; Appellants' Br. 7-8.

As a result, if the third party Apps developer chooses to charge for an App, "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." EOR 70-71 (SACC ¶ 41). Importantly, Apps developers alone set the price that consumers must pay to purchase their Apps. *See, e.g.*, Appellants' Br. 35 n.10 ("*Apps developers*, who compete with other apps developers for App Store sales, *will price their products* at cost plus a marginal rate of return … [;] they will mark-up the price to cover Apple's 30% …." (emphasis added)). This leads to a classic pass-through dynamic, as explained by Plaintiffs' counsel at argument on the motion to dismiss below: "So what's the developer going to do? *The developer is going to increase its price to cover Apple's—Apple's demanded profit*." EOR 57-58, 59-60 (Nov. 5, 2013 Hearing on Motion to Dismiss Tr. at 10:24-11:1, 12:20-13:3) (emphasis added); *see also* EOR 69 (SACC ¶ 32) ("Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple *a share of the third party's sales proceeds*." (emphasis added)).

The SDK, App Store and Apps polices governing Apple's Apps ecosystem have resulted in an explosion of output and supply in Apps. "Apple now offers more than 850,000 apps, and iPhone consumers worldwide have downloaded apps more than 50 billion times since July 2008." EOR 65 (SACC ¶ 9).[2] And "the majority" of those 850,000 iPhone Apps "are now free," *id.*, with Apple bearing the costs of reviewing, hosting and distributing such Apps to consumers.

B. Procedural Background

This case is the second of three putative class actions filed by the same counsel alleging that Apple violated the Sherman Act by putting in place certain limitations on consumers' lawful use of the iPhone. Initially, a single case focused on the allegation that Apple had unlawfully granted ATTM a "monopoly" over voice and data cellular services for the iPhone. Apps claims were pleaded, but treated as an afterthought. Then, in that original action, the district court ruled that Plaintiffs' claims must be arbitrated pursuant to an arbitration clause found in ATTM's Wireless Services Agreement. That led Plaintiffs' counsel to line up new plaintiffs asserting two additional lawsuits, each in their own way trying to

[2] Since Plaintiffs filed their SACC, hundreds of thousands of additional Apps are now available on the App Store: more than 1.2 million different Apps can now be downloaded through Apple's App Store and Apps have been downloaded more than 75 billion times. *See* Press Release, Apple, *Apple Releases iOS 8 SDK With Over 4,000 New APIs* (June 2, 2014), apple.com/pr/library/2014/06/02Apple-Releases-iOS-8-SDK-With-Over-4-000-New-APIs.html.

circumvent the arbitration ruling. (The claims of the initial plaintiffs lie fallow and have not been brought to arbitration.) This case (the second filed) started out as an effort to see if arbitration could be avoided by not naming ATTM as a defendant, and then, when the district court ruled that ATTM was an indispensable party, was re-pleaded with an Apps-only focus. A third case was filed solely to obtain appellate review of the indispensable party ruling.

1. *iPhone I*. Shortly after the first sale of the iPhone in 2007, Plaintiffs' counsel in this case filed a class action against Apple and ATTM. The complaint alleged, among other things, monopolization of so-called "aftermarkets" for: (i) iPhone-compatible voice and data cellular services, and (ii) iPhone-compatible software applications. *In re Apple & AT&TM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1294-96 (N.D. Cal. 2008) ("*iPhone I*"). The focus of *iPhone I* was almost entirely on the voice and data aftermarket claims against Apple and ATTM, with just a few paragraphs out of more than a hundred devoted to the Apps claims. Moreover, the Apps claims in the *iPhone I* complaint were notably different than the claims here, making no mention of Apple's App Store or Apple's 30% "commission." Instead, Plaintiffs alleged that Apple prohibited all third party applications and "bricked" iPhones of users who had downloaded unauthorized third party applications. *Id.*; *iPhone I* Complaint ¶¶ 5, 8-9, 12, 49, 56, 73, 96-106, 112, 123, 128, No. C-07-5152 (N.D. Cal.), ECF No. 1.

Most of the long history of *iPhone I* is not relevant here. What is relevant is that Plaintiffs' antitrust theory of monopoly power relied heavily on the Wireless Services Agreement ("WSA") that ATTM required all of its customers to accept. The WSA contained an arbitration clause. In 2011, the Supreme Court addressed that arbitration clause in *AT&T Mobility LLC v. Concepcion*, holding the clause enforceable against arguments that it improperly waived class actions. 131 S. Ct. 1740, 1747-52 (2011). By then, the district court in *iPhone I* had certified the case as a class action. After *Concepcion* it decertified the class and ordered all claims arbitrated. *In re Apple & AT&TM Antitrust Litig.*, 826 F. Supp. 2d 1168, 1175-76, 1178 (N.D. Cal. 2011). Since this decision, the *iPhone I* plaintiffs have taken no steps to proceed with the arbitration.

It also bears mention that during the course of *iPhone I, Illinois Brick* issues came up once, in the context of class certification. The district court's certification order rejected Apple's contention that Plaintiffs' Apps theory had evolved into one that was barred by *Illinois Brick*. *iPhone I*, No. C 07-05152 JW, 2010 U.S. Dist. LEXIS 98270, at *40-42 n.27 (N.D. Cal. July 8, 2010). The district court's brief treatment of the issue noted that Plaintiffs dealt directly with Apple and stated that "the Court is not aware of any Ninth Circuit case that applied *Illinois Brick* in this manner [meaning where plaintiffs dealt directly with the defendant], and the Court declines to do so here." *Id.* at *42 n.27.

2. iPhone II (this case). In December 2011, four weeks after the order compelling arbitration of *iPhone I*, Plaintiffs' counsel filed a second class action on behalf of a new group of named individuals. This *iPhone II* complaint was nearly identical in all material respects to the *iPhone I* complaint, but in an effort to avoid arbitration, it dropped ATTM as a defendant. "iPhone Apps aftermarket" claims were again included, but only in a few paragraphs. Plaintiffs alleged that Apple acquired or attempted to acquire monopoly power by: "(a) 'approving' only applications that generate revenues for Apple, and/or that are submitted to Apple for approval after the developer pays Apple an annual fee of $99; (b) discouraging iPhone customers from using competing Third Party Apps by spreading misinformation; and (c) programming the iPhone operating system in a way that prevents iPhone customers from downloading Third Party Apps, disables Third Party Apps, and/or disables or destroys the full functionality of the iPhones of users who download Third Party Apps." EOR 143 (Consolidated Complaint ¶ 86).

On March 2, 2012, Apple moved to dismiss the complaint under Rule 12(b)(7) because Plaintiffs had failed to join ATTM, a necessary party under Rule 19. EOR 150-58. It also moved to dismiss for failure to state a claim and to compel arbitration, for reasons similar to those it had asserted in *iPhone I*.[3]

[3] Apple refiled its motion on April 16, 2012, after the Court consolidated the case with another case and, as ordered, plaintiffs filed a Consolidated Complaint. EOR 115-49.

Understandably, Apple focused on the procedural impropriety of trying to circumvent the arbitration decision by refiling the same case without ATTM as a defendant. Despite this modification, the focus of Plaintiffs' case was still ATTM (cast as the "monopolist"), the WSA, and the same alleged conspiracy between ATTM and Apple to monopolize a claimed aftermarket for voice and data services. *See In re Apple iPhone Antitrust Litig.*, 874 F. Supp. 2d 889, 892-93, 901 n.27 (N.D. Cal. 2012) ("*iPhone II*"). The district court granted Apple's Rule 12(b)(7) motion, though it also gave Plaintiffs leave to amend their complaint to add ATTM. *Id.* at 899, 901-02 ("[I]t is feasible for ATTM to be joined," and thus "ATTM is a necessary party which can, and therefore must, be joined" under Rule 19.).[4]

The *iPhone II* plaintiffs then filed their Amended Consolidated Class Action Complaint. EOR 90-114. The ACC was mostly (and improperly) another rehash of the voice and data claims, which were clearly a non-starter because ATTM was again not named as a party. On November 2, 2012, Apple filed a motion to strike the allegations related to the voice and data claims. EOR 80-89. At that time Apple also moved to dismiss the Apps claims under *Illinois Brick* and this Court's decision in *ATM Fee*—issued the day *after* the district court had granted Apple's

[4] The court denied, without prejudice, Apple's motion to compel arbitration and denied as "premature" Apple's motion to dismiss for failure to state a claim. *iPhone II*, 874 F. Supp. 2d at 898-99, 901 n.27.

12(b)(7) motion. *ATM Fee* plainly resolved the district court's earlier concern that there was no Ninth Circuit decision applying *Illinois Brick* where the plaintiffs and defendant dealt directly with one another. The case was practically on all fours, and Apple moved to dismiss under its authority at the earliest possible moment.

On August 15, 2013, Judge Gonzalez Rogers, who had taken over management of this Case after Chief Judge Ware's retirement, granted Apple's motion to strike and also its motion to dismiss Plaintiffs' First Amended Complaint, with leave to amend. EOR 14. The district court dismissed the Apps claims on two grounds. It first held that Plaintiffs had failed to plead Article III standing because they had not alleged "facts showing that each named Plaintiff has *personally suffered* an injury-in-fact based on Apple's alleged conduct." EOR 23. Judge Gonzalez Rogers also addressed antitrust standing under the "indirect purchaser" doctrine of *Illinois Brick*. She explained that Plaintiffs could not assert "a mark-up" theory by which a cost to developers was passed-on to the Plaintiffs. She noted Plaintiffs' inconsistent contentions as to whether "iPhone consumers were forced to pay Apple a 30% fee *on top of* the cost for the apps." EOR 32 (italics in original, underscoring added); *see also* Supplemental Excerpts of Record ("SER") 47 (Opp. to Mot. to Dismiss ACC 11). Judge Gonzalez Rogers therefore gave Plaintiffs another opportunity to amend, reserving judgment as to whether Plaintiffs would have standing if Plaintiffs pleaded that Apple added fees to prices

set by developers, but making it crystal clear that Plaintiffs' claims would be barred if they did not plead that. EOR 32-33.

The district court rejected Plaintiffs' suggestion that Federal Rule of Civil Procedure 12(g)(2) barred Apple from challenging Plaintiffs' standing and failure to state a claim because it had not done so in its earlier motion. The court emphasized that Apple had not waived its Rule 12(b)(1) and 12(b)(6) defenses, and that Apple would be entitled to file a Rule 12(c) motion on the exact same grounds. The court therefore exercised its discretion to consider Apple's arguments rather than waiting for a 12(c) filing.

Plaintiffs were unable to amend to include the allegations they had told the district court they intended to make. The SACC substantially reformulates Plaintiffs' Apps claims, among other things taking square aim at Apple's design decision to make iPhone a so-called "closed system." *See, e.g.*, EOR 63-66, 70-73 (SACC ¶¶ 4, 6-8, 14, 40-41, 48, 50); *see also* EOR 65-66, 72-73, 76-77 (SACC ¶¶ 9, 12, 15, 46, 49, 51, 72-73). But on the *Illinois Brick* issues, the SACC never alleges that consumers pay Apple a 30% fee "on top of the cost for the apps." There are no allegations that ever state that Apple adds a fee—any fee—to the price set by developers for their Apps, or that Apple somehow sets the price for those developers' Apps. Instead, Plaintiffs continued to plead facts making clear that developers set the price of their Apps knowing that *they* will have to pay

Apple a 30% commission. *See* EOR 70-72 (SAC ¶¶ 41, 48); EOR 60 (Hearing on Motion to Dismiss) (Plaintiffs arguing that in response to Apple's 30% commission, "[*t*]*he developer is going to increase its price* to cover Apple's—Apple's demanded profit" (emphasis added)).

Apple moved to dismiss again, and this time the district court granted the motion without leave to amend. EOR 3-13. The district court recognized that Plaintiffs' other new allegations simply repackaged their argument that the *developer*'s share of the price it sets for its App is burdened by Apple's commission. EOR 12. Because Plaintiffs are affected indirectly (if at all) by that commission, the district court concluded that Plaintiffs lacked antitrust standing under *Illinois Brick* and *ATM Fee*.

In light of the court's dismissal on standing grounds, the court "decline[d] to address the additional arguments raised by Apple" that Plaintiffs had failed to plead a relevant antitrust market, failed to adequately allege that Apple possessed monopoly power in the claimed relevant market, and failed to allege any unlawful anticompetitive conduct. EOR 33.

This appeal followed.

3. *iPhone III*. In October 2012, after the district court's rulings on Apple's 12(b)(7) motion regarding ATTM and the voice and data claims, Plaintiffs' counsel filed *Ward v. Apple Inc.*, No. C 12-05404-YGR (N.D. Cal.) ("*iPhone III*").

iPhone III is nearly the same as the initial complaint in *iPhone II*, with the only real difference being a change in the named Plaintiffs and deletion of any claims relating to Apps. Plaintiffs' counsel admittedly filed *iPhone III* to create a vehicle for obtaining immediate appellate review of the district court's *iPhone II* 12(b)(7) order, and they offered to stipulate to dismissal of the case for the reasons stated in that order. In December 2012, the District Court accepted the stipulation and entered final judgment (ECF No. 26), dismissing *iPhone III* with prejudice for Plaintiffs' failure to join ATTM. Plaintiffs' appeal of that case, *Ward v. Apple Inc.*, No. 12-17805 (9th Cir.), has been fully briefed and is awaiting oral argument before this Court.

SUMMARY OF ARGUMENT

The district court correctly determined that Plaintiffs lack antitrust standing because they are complaining about a charge that is imposed on software developers and passed through to consumers in the price of Apps. They also have failed to allege any cognizable antitrust market or to state any viable claim on the merits—issues this Court should reach if it finds that Plaintiffs have antitrust standing. The district court also did not abuse its discretion in deciding to entertain Apple's motion, or in denying Plaintiffs yet another opportunity to replead. This Court should affirm the judgment below.

I. The district court did not abuse its discretion by entertaining a new 12(b) motion from Apple in response to Plaintiffs' First and Second Amended Consolidated Complaints. Apple appropriately raised its antitrust standing argument when, after the district court rejected Plaintiffs' initial Consolidated Complaint as a transparent attempt to circumvent claims previously ordered to arbitration, the First Amended Consolidated Complaint necessarily shifted the focus of the case for the first time to Plaintiffs' Apps claims. And it was particularly appropriate for Apple to raise its antitrust standing argument then because this Court had just issued its decision in *ATM Fee*, which is the dispositive Ninth Circuit case that the district court had been seeking. The purpose of Rule 12(g) is to *reduce* delay in the resolution of dispositive motions, not promote it. The district court correctly recognized that there was no improper purpose or undue delay on Apple's part in raising its antitrust standing argument when it did, and that delaying consideration of Apple's argument until a Rule 12(c) motion would frustrate Rule 12(g)'s goal of promoting judicial efficiency.

II. The Supreme Court held in *Illinois Brick* that the Clayton Act gives a damage claim *only* to the party that is first and directly injured by the conduct challenged as anticompetitive. A party that is injured only because an anticompetitive charge is "passed on" to them in the pricing decisions of the directly injured party lacks standing. In *ATM Fee*, this Court applied those

principles to hold that consumers lacked standing to challenge an allegedly fixed interbank fee that was passed on to consumers in the fee charged for withdrawing money from "foreign" ATMs (*i.e.*, ATMs not owned by the consumer's bank). Plaintiffs stand in exactly that position—they are challenging a commission that Apple charges software developers, and that software developers pass on to consumers, if at all, in how they price Apps. The district court applied *ATM Fee* faithfully after taking great care to make sure it applied.

Plaintiffs labor to recharacterize the commission that developers agree to pay as a charge that Apple imposes on consumers, but the district court recognized that for *Illinois Brick* purposes one cannot beat around that particular bush. It challenged Plaintiffs to make the specific allegation that the commission is added by Apple *on top* of the developer's price, rather than considered by the developers when setting *their own* price. Plaintiffs cannot make that allegation (because it is not true), and indeed have alleged the opposite. That makes this an easy case.

Plaintiffs' various criticisms of the district court's reasoning are unfounded. The fact that Apple collects the entire price from the consumer does not distinguish *ATM Fee* or, indeed, many classic "pass through" situations in which *Illinois Brick* is applied. Nor is there the slightest merit to Plaintiffs' contention that no one but Plaintiffs could file this suit. The software developers who are directly impacted by Apple's 30% commission absolutely would have antitrust standing to bring a

monopolization case, if they wanted to; it should hardly be to Apple's detriment that none of the over 275,000 iOS Apps developers have elected to do so. Plaintiffs are also off-base claiming that the district court required them to prove that Apple's full commission is "passed through" to consumers; in the passage cited, the court's point was that the impossibility of untangling that issue is precisely why *Illinois Brick* denies standing to potential litigants in Plaintiffs' position. And the district court did not rely on *or even mention* the Eighth Circuit's decision in *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), which Plaintiffs devote so much energy to attacking on appeal. *Campos* addresses a more difficult antitrust standing problem that is not presented here. As the district court recognized, this case is much easier and on all fours with this Court's decision in *ATM Fee*.

III. The district court's decision should be affirmed in any event, because Plaintiffs have not stated any viable antitrust claim. Apple faces massive competition in the cellular telephone market, including from other smartphones that can run Apps. Consumers that do not like Apple's policies with regard to third party Apps can buy a different phone, such as one of many that run Google's Android platform. A claim that Apple has "monopolized" a separate "market" for iPhone Apps therefore can proceed, under well-settled precedent, only if somehow the "aftermarket" for iPhone Apps has become economically disconnected from

the broader competitive environment. Plaintiffs have never made the necessary allegations to plausibly suggest such economic disconnection, and cannot. Their aftermarket power theory is based on an utterly implausible reading of this Court's decision in *Newcal* that this Court should reject in full.

Plaintiffs also have not alleged any conduct that the law would regard as anticompetitive. When Apple launched the iPhone, it had *zero percent* market share. Plaintiffs themselves explain that the iPhone massively broadened consumer choice and expanded markets and competition. Plaintiffs think that Apple should have designed the iPhone differently (as an "open system") and should not charge developers anything for the opportunity to sell Apps through the App Store. But the antitrust laws do not permit or entertain claims that new, innovative technology products should have been designed differently in order to potentially benefit consumers even more.

IV. The district court did not abuse its discretion in denying Plaintiffs leave to file a *fifth* complaint in this case. They have had every opportunity to allege whatever they like and it is crystal clear at this point that they cannot plead any legally viable claim.

There is no need to remand for the district court to consider whether injunctive relief is appropriate. Plaintiffs did not oppose summary judgment on

that ground, and they have not stated any claim that could justify the relief they seek.

STANDARD OF REVIEW

Challenges to a dismissal for failure to state a claim under Rule 12(b)(6) are reviewed *de novo*. *Carlin v. Dairy Am., Inc.*, 705 F.3d 856, 866 (9th Cir. 2013). The decision of whether to consider arguments raised in a "second motion to dismiss" is within "the discretion of the district court." *Diaz-Buxo v. Trias Monge*, 593 F.2d 153, 154 (1st Cir. 1979); *see also Phillips v. Ornoski*, 673 F.3d 1168, 1179 (9th Cir. 2012) (A "district court's procedural rulings … are reviewed for abuse of discretion."), *cert. denied*, 133 S. Ct. 2020 (2013). A district court's decision to dismiss a complaint without leave to amend is reviewed for abuse of discretion. *AE v. County of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY CONSIDERING APPLE'S STANDING ARGUMENTS

Plaintiffs invoke Rule 12(g) and wrap themselves in the mantle of judicial "efficiency," while asking this Court to reverse and remand on the emptiest of technicalities in order to introduce a pointless delay. Judge Gonzalez Rogers understood the convoluted history of this litigation, recognized that the delay Plaintiffs sought would be pointless and would disserve the efficiency goals of Rule 12(g), and appropriately rejected Plaintiffs' arguments.

Rule 12(g)(2) is intended to prevent a party that has already made one 12(b) motion from purposely delaying the action by making "another motion … raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2). "Rule 12(g) is designed to avoid repetitive motion practice, delay, and ambush tactics." *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1175 (C.D. Cal. 2011); *see also Davidson v. Countrywide Home Loans, Inc.*, No. 09-CV-2694-IEG (JMA), 2011 WL 1157569, at *4 (S.D. Cal. Mar. 29, 2011) (Rule 12(g) is designed for cases "in which a party files successive motions under Rule 12 '*for the sole purpose of delay* ….'" (quoting *Kilopass Tech. Inc. v. Sidense Corp.*, No. C 10-02066 SI, 2010 WL 5141843, at *3 (N.D. Cal. Dec. 13, 2010))).

The district court did not credit Plaintiffs' arguments that Apple withheld arguments in bad faith or for purposes of delay, and this Court should reject those arguments as well. Plaintiffs' original Consolidated Complaint was overwhelmingly focused on an alleged conspiracy between Apple and ATTM to give ATTM a monopoly over iPhone voice and data services, *see, e.g.*, EOR 130-39 (Consolidated Complaint ¶¶ 25-66), with the "Apps" claims at most an afterthought.[5] By pleading exactly the same claims and omitting ATTM as a

[5] Indeed, Plaintiffs' opposition to Apple's motion to dismiss mentioned their Apps claims only in a single footnote, asserting that "ATTM also is not a necessary party because it is not alleged to have conspired with Apple to monopolize the

defendant, Plaintiffs' aim was to circumvent Judge Ware's decision that the *iPhone I* claims had to be arbitrated. But it was apparent that the Consolidated Complaint would have to be dismissed for failure to join an indispensable party, ATTM, so Apple sensibly moved to dismiss on that threshold ground. Apple's original motion to dismiss thus focused on the voice and data issues that had dominated the litigation for years. If there was any untoward motive or "delay," it was not on the part of Apple, but on the part of *Plaintiffs*, who deliberately sought to end-run the district court's earlier order, and forced Apple to file a motion to call out the ploy.

Moreover, the particular *Illinois Brick* and *ATM Fee* argument that Apple made in its motion to dismiss Plaintiffs' ACC was not available to Apple at the time Apple filed its original motion to dismiss. Judge Ware had rejected an *Illinois Brick* standing argument that Apple had presented in the class certification proceedings in *iPhone I*, stating (prior to this Court's decision in *ATM Fee*) that there was no circuit precedent establishing that consumers should be regarded as indirect purchasers in circumstances like these, where they are dealing directly with an "alleged antitrust violator" (here, Apple, through its App Store). 2010 U.S. Dist. LEXIS 98270, at *40-42 n.27. Between Plaintiffs' Consolidated Complaint (and Apple's motion to dismiss that complaint) and Plaintiffs' First Amended

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applications aftermarket." SER 82 (Opp. to Mot. to Dismiss 18 n.16). Plaintiffs did not ask the district court to sever that claim and treat it differently. *Id.* And it was far from clear at that point that they even wanted to proceed with the litigation if it was narrowed to that claim.

Consolidated Complaint, this Court decided *ATM Fee*—which was *exactly* the circuit precedent Judge Ware had been asking for. Of course Apple had a right to bring that decision to the district court's attention—it was not available before, under Rule 12(g)—and a motion to dismiss was a perfectly appropriate way to do so.

As the district court recognized, applying Rule 12(g) in this context would also serve no useful purpose. Even Plaintiffs cannot deny that Apple would be entitled to present these same arguments in a Rule 12(c) motion subject to the exact same standard of review. EOR 35. When the defect is clear on the face of the complaint, requiring the parties and the court to wait for a 12(c) motion merely forces "the parties [to] repeat the briefing they have already undertaken, and the Court would have to address the same questions in several months." *Allstate Ins. Co.*, 824 F. Supp. 2d at 1175. "That is not the intended effect of Rule 12(g), and the result would be in contradiction of Rule 1's mandate that the Rules, 'should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.'" *Id.* (quoting Fed. R. Civ. P. 1).[6]

[6] In addition, a remand would simply prolong this litigation and bring it back to this Court for a second round of briefing and preparation in a functionally identical posture. *See Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989) (Rule 12(b)(6) motion to dismiss and Rule 12(c) motion for judgment on the pleadings are "functionally identical" and require the same standard of review.).

In these circumstances, the district court properly followed the "'substantial amount of case law which provides that successive Rule 12(b)(6) motions may be considered where they have not been filed for the purpose of delay, where entertaining the motion would expedite the case, and where the motion would narrow the issues involved.'" *Id.* at 1175 (citation omitted); *see also FTC v. Innovative Mktg., Inc.*, 654 F. Supp. 2d 378, 383-84 (D. Md. 2009) ("[M]any courts have interpreted [Rules 12(g) and 12(h)(2)] permissively and have accepted subsequent motions on discretionary grounds.") (collecting cases); *Kruska v. Perverted Justice Found. Inc. Org.*, No. CV-08-00054-PHX-SMM, 2010 U.S. Dist. LEXIS 126765, at *9-10 (D. Ariz. Nov. 18, 2010); *Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, No. C 10-05696 CRB, 2011 U.S. Dist. LEXIS 73853, at *6 n.1 (N.D. Cal. July 8, 2011). Judge Gonzalez Rogers acted well within her discretion by concluding that consideration of Apple's arguments under *ATM Fee* would "promote[] efficiency and expedite[] disposition of the action on the merits." EOR 35.

II. PLAINTIFFS ARE INDIRECT PURCHASERS WHO LACK ANTITRUST STANDING UNDER *ILLINOIS BRICK*

The district court's conclusion that Plaintiffs lack antitrust standing is entirely correct—indeed, dictated by circuit precedent—and their policy arguments misunderstand the governing law. The district court's decision should be affirmed.

A. Plaintiffs' Complaint Alleges a Commission Charged to Developers and Passed On to Consumers

Plaintiffs are trapped by their own allegations, which clearly establish that they are injured, if at all, only when software developers "pass through" Apple's allegedly anticompetitive 30% commission in the price of the Apps that developers sell. Plaintiffs allege that developers who wish to sell Apps through the App Store may do so upon the "third party's agreement to give Apple a share of the [app developer] *third party's sales proceeds.*" EOR 69 (SACC ¶¶ 31-32) (emphasis added). Apple agrees to collect the proceeds of developers' Apps sales, after which "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." EOR 70-71 (SACC ¶ 41). Plaintiffs allege that App developers "mark-up the price [of their Apps] to cover Apple's 30%." Appellants' Br. 35 n.10; *see also* EOR 60 (Hearing on Motion to Dismiss) ("The developer is going to increase its price to cover Apple's—Apple's demanded profit.").

These are paradigmatic allegations of "pass through" harm. Indeed, Judge Gonzalez Rogers correctly recognized that they are functionally identical to the allegations this Court considered in *ATM Fee*. In that case, ATM cardholders complained that ATM owners and the banks that issued their ATM cards "engaged in horizontal price fixing," colluding to set a fee (the "interchange fee") that the card-issuing bank paid to the ATM owner. 686 F.3d at 745-46. The plaintiffs

alleged that the card-issuing bank *passed on* that supra-competitive interchange fee when it charged another fee (the "foreign ATM fee") to cardholders when they used an ATM owned by another bank. This Court held that plaintiffs have antitrust standing only if they are complaining about collusion that "sets the price directly paid, not a price latter [sic] passed-on as part of the price at issue." *Id.* at 752-53. "[I]n the context of *Illinois Brick*, fixing an upstream cost [does] not equate to fixing the price paid by the plaintiffs." *Id.* at 754. Even "fixing one fee *for the purpose and effect* of inflating another fee does not make the purchaser a direct purchaser under *Illinois Brick*." *Id.* (emphasis added).

The anticompetitive conduct alleged in this case is monopolization rather than price-fixing, but the exact same point dooms Plaintiffs' case here. Plaintiffs have alleged that Apple takes an anticompetitive 30% commission as "a share of the [developer] third party's sales proceeds," and that consumers are injured when App developers then "mark-up the price [of their Apps] to cover Apple's 30%." EOR 69 (SACC ¶ 32); *see* Appellants' Br. 35 n.10. As the district court recognized, "[d]espite Plaintiffs' efforts, the SAC is fairly read to complain about a fee created by agreement and borne *by the developers* to pay Apple 30% from their own proceeds—an amount which is passed-on to the consumers as part of the purchase price." EOR 12.

Judge Gonzalez Rogers generously gave plaintiffs leave to amend their complaint a fourth time to see if they could support, with actual allegations of fact, their assertion (made "for the first time" in their opposition to Apple's motion to dismiss) that "'iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps.'" EOR 32 (citation omitted). Plaintiffs did not make that allegation in their final complaint because it simply is not true. Plaintiffs themselves have repeatedly acknowledged that developers set the price of their apps and "mark-up the price to cover Apple's 30%," Appellants' Br. 35 n.10, and that "[w]hen an iPhone customer buys an app from [the App Store] it pays the full purchase price, *including Apple's 30% commission*," EOR 70 (SACC ¶ 41) (emphasis added).

Judge Gonzalez Rogers saw through Plaintiffs' semantic games, and this Court should too. Plaintiffs repeatedly characterize Apple's 30% commission as "*Apple*'s 30% mark-up," but they cannot identify any separate charge imposed by Apple directly on consumers, and they know there is none. There are over 275,000 registered iOS developers in the United States alone, and there have been over 75 *billion* downloads. There is no possible way that a separate Apple fee would go unnoticed. Plaintiffs do not plead it because it does not exist.

Plaintiffs also repeatedly describe Apple as a "middleman," Appellants' Br. 9, 21, 30-31, 33, and suggest that Apple is the "direct seller of the monopoly-

priced apps," *id.* at 35. But they concede that "[*a*]*pps developers* sell apps," and that "Apple does *not* purchase apps," making the Apps developer's sale to the consumer "the first and *only* sale in the entire distribution chain." *Id.* at 9, 31, 33 (emphasis added). As Plaintiffs allege, Apple sells software distribution services to developers, much in the way that a shopping mall leases physical space to various stores. The fact that Apple's charge for those distribution services is expressed as a percentage of the developer's sales proceeds is immaterial. Judge Gonzalez Rogers correctly recognized that Plaintiffs' SACC alleges that it is "*the developers'* obligation to pay or share the thirty percent [commission] with Apple," EOR 12 (emphasis added), and that App purchasers are injured by that obligation only indirectly by way of its effect on the developer's pricing.

Plaintiffs fixate on the fact that Apple collects the entire purchase price from consumers. Appellants' Br. 2, 8-9, 17, 20, 32-33; EOR 70-71 (SACC ¶¶ 38-41). But the same was true in *ATM Fee*. As this Court explained, "card-issuing banks (including Bank Defendants) pay interchange fees and then include them when they charge foreign ATM fees (alleged by Plaintiffs to be artificially inflated). In other words, the Bank Defendants pass on the cost of the interchange fees through the foreign ATM fees." *ATM Fee*, 686 F.3d at 749-50. This Court squarely held that those plaintiffs *did not* directly pay the interchange fee even though they paid the "foreign ATM fee" directly to the defendant, and even though that foreign

ATM fee fully included and passed on the disputed interchange fee. Nor does it distinguish *ATM Fee* to say, as Plaintiffs do, that Apple is the alleged wrongdoer. The card-issuing banks were alleged conspirators with regard to the allegedly fixed interchange fee. Under *Illinois Brick* the issue is not whether the defendant violated the antitrust laws, but whether the impact of the alleged violation falls first and directly on the plaintiff.

Because Plaintiffs' allegations unequivocally establish that they are complaining about a fee that Apple imposes on third-party developers, which allegedly causes apps developers to "mark-up the price [of their apps]," Appellants' Br. 35 n.10, Plaintiffs are classic indirect purchasers within the meaning of *Illinois Brick* and *ATM Fee*.

B. Plaintiffs Mischaracterize the District Court's Decision

Plaintiffs' brief on appeal attempts to distract attention from the real issues by mischaracterizing the basis of the district court's decision. Those efforts are unfair and unpersuasive.

First, Plaintiffs contend that the district court erroneously believed that they were required to "allege that Apple's 30% fee was the product of price-fixing to state a monopolization claim." Appellant's Br. 42. This is completely unfair and also ignores the fact that Plaintiffs described the conduct they were challenging as

price fixing in their own briefing.[7] The circuit precedent on point—*ATM Fee*—is a price-fixing case, and therefore any direct quotes from that decision will use price-fixing language. But the district court obviously understood that this was a monopolization case, and that Plaintiffs' core allegation is that "'Apple's 30% fee is a supracompetitive price that exceeds the prices consumers otherwise would pay for apps had Apple not unlawfully monopolized the iPhone apps aftermarket.'" EOR 9 (quoting SER 6 (Opp. to Mot. to Dismiss SACC 1)). And Plaintiffs themselves acknowledge that "[w]hile *In re ATM Fee* conducted a direct purchaser analysis in a price-fixing case, *the same analysis applies in the same manner in a monopolization case*." Appellants' Br. 42 (emphasis added). The district court's holding was that Plaintiffs lack standing because the 30% fee they complain about is "created by agreement and borne *by the developers*" and then "passed-on to the consumers as part of the purchase price." EOR 12. The court did not require Plaintiffs to prove that Apple's commission was somehow the product of collusion.

Second, Plaintiffs wrongly contend that the district court required Plaintiffs to allege "that they bore the entirety of Apple's supracompetitive profit." Appellants' Br. 43. The Court did not do so. It merely rejected *Plaintiffs'*

[7] *See, e.g.*, SER 14 (Opp. Motion to Dismiss SACC 9) ("Here, the 'price-fixed products' are the apps and Apple is the 'alleged antitrust violator.'" (quoting *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 911 F. Supp. 2d 857, 864 (N.D. Cal. 2012))); *id.* ("Plaintiffs are the only party in the chain that buys the price-fixed product." (emphasis omitted)).

conclusory assertion that Apple's entire commission is ultimately borne by consumers, and therefore should be regarded as a charge paid directly by consumers. *See* EOR 12. As the district court recognized, that is not how *Illinois Brick* works. The whole point of the doctrine is that untangling whether an upstream charge has been passed on to consumers is such a murky and complex exercise that indirect purchaser damages claims should not be recognized at all. *See ATM Fee*, 686 F.3d at 748 (noting that key purpose of *Illinois Brick* was "'to eliminate the complications of apportioning overcharges between direct and indirect purchases'" (citation omitted)). The district court correctly recognized that evaluating Plaintiffs' allegation that "developers would necessarily charge only 70% of the purchase price if not for Apple" would require exactly the sort of speculation into "developers' pricing structure, their costs, ability to find a distribution chain," and so forth that *Illinois Brick* forbids.

Third, Plaintiffs labor to tie the district court's reasoning to controversy about the Eighth Circuit's decision in *Campos*. As they ultimately admit, however, the district court did not even *mention* that case—let alone rely on it. *See* Appellants' Br. 21. *Campos* is an interesting case and we submit that it was correctly decided, but the facts there were much different than here and presented a much harder case. *Campos* involved allegations that Ticketmaster imposed supracompetitive fees for ticket distribution services directly on plaintiff

consumers. In sharp contrast from this case, *ATM Fee*, and the classic *Illinois Brick* fact pattern, there was no specific upstream fee that was allegedly passed along to consumers in Ticketmaster's ticket distribution fee. But Ticketmaster was able to charge the fees that it did only as a result of Ticketmaster's antecedent arrangements with concert venues, which allegedly gave Ticketmaster "ironclad control over ticketing for any large-scale popular music concert at major venues in the United States." *Campos*, 140 F.3d at 1169. As the Eighth Circuit recognized, the *Campos* plaintiffs were substantively alleging a pass-through of a different kind, because "[t]he plaintiffs' inability to obtain ticket delivery services in a competitive market is simply the consequence of the antecedent inability of venues to do so." *Id*. at 1171.

This case does not present any occasion or reason to consider the outer limits of that sort of reasoning for the simple reason that the district court found no cause to rely on *Campos* and therefore didn't. This is a much easier case because, as the district court recognized, it features the kind of paradigmatic "pass through" harm considered in *ATM Fee* and *Illinois Brick* itself: Plaintiffs are complaining about a specific charge (Apple's 30% commission) that was imposed on an upstream party (the developers) and then allegedly passed through as a component of a consumer's ultimate price.

To the extent that Plaintiffs claim that *Illinois Brick* must somehow be applied without considering whether an "antecedent transaction" occurred upstream from a plaintiff consumer, that theory is either just a repackaging of their flawed assertion that consumers are necessarily paying the 30% commission to Apple because Apple collects the sales price, or it is inconsistent with *ATM Fee*, inconsistent with Plaintiffs' own legal theory, and nonsensical. In *ATM Fee* the "foreign ATM fee" directly paid by consumers was alleged to constitute antitrust injury only because the banks had (in an "antecedent transaction") allegedly conspired to fix an upstream interchange fee. Here Plaintiffs contend that the prices they paid for Apps were too high only because they were influenced by antecedent transactions between Apple and developers. And more broadly, it simply is not possible to consider who was selling what, to whom, without considering the substance of the parties' legal and commercial arrangements. The district court can hardly be faulted for basing its analysis in Plaintiffs own allegations about the very commercial arrangements that Plaintiffs contend violate the antitrust laws.

C. Plaintiffs' Policy Arguments For Creating a New Exception to the *Illinois Brick* Rule Are Misplaced and Unpersuasive

Finally, Plaintiffs make the bold claim that "Apps Developers Cannot Sue Apple" because they "contractually *agreed* to permit Apple to charge the 30% fee," and that therefore, "Apple will be immunized from suit" if the Plaintiffs' suit

cannot proceed. Appellants' Br. 48, 49 (emphasis in original); *see also id.* at 35 (the purposes of the *Illinois Brick* rule would be "disserved" and "antitrust enforcement would be undermined" if a monopoly distributor "could avoid liability to its direct customers simply by using a consignment sales model"). According to Plaintiffs, unless this Court in essence creates a new exception to the *Illinois Brick* rule that allows indirect consumer plaintiffs in an "aftermarket" monopolization case to sue, Apple will "'retain the fruits of [its] illegality because no one [will be] available who would bring suits against them,'" *id.* at 50 (quoting *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968)), and "[t]his result would contravene the goal of promoting the 'vigorous enforcement of the antitrust laws,'" *id.* at 51 (quoting *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 214 (1990)).

Plaintiffs' policy arguments are meritless. As an initial matter, the Supreme Court has rejected (in the same cases Plaintiffs cite) the very exercise of seeking to justify "'exceptions'" to the *Illinois Brick* rule for particular types of markets and circumstances:

> The rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to "carve out exceptions to the [direct purchaser] rule for particular types of markets." *Illinois Brick*, 431 U.S. at 744. The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule.

UtiliCorp, 497 U.S. at 216 (alteration in original). Plaintiffs do not attempt to explain why their proposed exception is different, nor do they cite to any law allowing such an exception even for the reasons Plaintiffs purport exist. The analysis of Plaintiffs' policy arguments can and should end here.

Moreover, Plaintiffs' claims that "Apps Developers Cannot Sue Apple" and that "under the law of this Circuit" an "unlawful aftermarket monopolization" claim "can only be asserted by customers of a defendant who have been unlawfully 'locked in' to the defendant's aftermarket monopoly" are flatly wrong, and reflect a complete misunderstanding of relevant authority. Appellants' Br. 48, 2. To be sure, Apple does not believe that Apps developers would have a meritorious antitrust claim against Apple, because they (like Plaintiffs here) would never be able to properly allege, let alone prove, the elements of a monopolization claim. But just because Apps developers could not *win* an antitrust case against Apple does not mean, as Plaintiffs state, that Apps developers are somehow barred by law or lack *standing* to pursue such a case.

First, Plaintiffs' assertion simply refuses to acknowledge Plaintiffs' own allegations about how Apple's App Store works. If a company charges product manufacturers for distribution services, but does not buy and sell the goods itself, then its "direct customers" are the product manufacturers, not the ultimate consumers who purchase the goods. Those manufacturers have standing under

Illinois Brick to sue for any allegedly monopolistic distribution charge, and any suits by consumers regarding the impact of the distribution arrangement on consumer prices would be duplicative and squarely barred by the rule. If Apps developers sold their goods in a physical store, it would be obvious that any costs associated with distributing through that location are costs imposed directly on the developers, which they could elect to pass through to consumers or not. The result is no different because developers sell through Apple's online App Store. *Illinois Brick* prevents the indirect purchasers (plaintiff consumers) from bringing their claim, not the Apps developers.

Second, the cases on which Plaintiffs rely for their claim that aftermarkets can "only be asserted by customers" of the allegedly monopolizing defendant—*Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992), and *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008)—say no such thing. Appellants' Br. 2, 49-50.

To begin with, most of the cases alleging monopolization of so-called "aftermarkets"—including *Kodak* and *Newcal* themselves—*are in fact* brought by a frustrated competitor that allegedly was *locked out* of the aftermarket, rather than by consumers complaining that they were *locked in*. In *Kodak*, for example, the antitrust plaintiffs were independent service organizations that competed with Kodak to sell assistance servicing "Kodak copying and micrographic equipment."

504 U.S. at 455. "The antitrust theory was that Kodak was engaging in illegal practices to prevent independent service companies from competing with Kodak in the aftermarket for service of Kodak-brand equipment." *Newcal*, 513 F.3d at 1048. And in *Newcal* five lessors of copy equipment "which compete[d] with IKON both in the primary market for equipment leases and in the aftermarket for equipment upgrades" challenged Ikon's alleged monopolization of the aftermarket for equipment initially leased from Ikon. *Id.* at 1044. Plaintiffs' argument that only consumers can bring aftermarket monopolization claims is mystifying.

Plaintiffs' suggestion that developers are barred from challenging Apple's 30% commission because they "contractually agreed" to it also reflects a fundamental misunderstanding of substantive antitrust law. To be frank, it is an artifact of Plaintiffs' own misconceptions about what *Kodak* and *Newcal* mean. Regrettably, the only way to understand the argument is to take a trip down the rabbit hole of Plaintiffs' fundamentally flawed legal theory in these cases.

Plaintiffs are trying to shoehorn this case into the antitrust doctrine concerning an "aftermarket," which is "a type of derivative market consisting of consumable goods or replacement components that must be used for the proper functioning of some primary good." Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 564b (last updated 2014). In *Kodak*, the Supreme Court held that firms with competition

in the primary good market (in that case for copiers) can sometimes have monopoly power in a derivative aftermarket (copier repair parts) if the aftermarket becomes economically disassociated from the primary market. 504 U.S. at 476. That is not, however, normally the case. *See id.* at 477 n.24; *SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 17 (1st Cir. 1999) ("[I]t ordinarily captures the reality of the marketplace to envision a firm's behavior in the aftermarket as having a direct effect on the 'cross-elasticity of demand,' with respect to its products in the primary market." (citation omitted)). In *Newcal*, this Court recognized that the ordinary "economic presumption" is that aftermarket power is constrained by competition in the *primary* market because "consumers make a knowing choice to restrict their aftermarket options when they decide in the initial (competitive) market" to purchase a product in the primary market that restricts their later choices. 513 F.3d at 1050.

The mobile phone market is illustrative. Consumers may elect to purchase an iPhone, which offers users access to third-party Apps only through a single, unified App Store ensuring consistent standards of quality, functionality, and content. Or they may elect to purchase the iPhone's many competitors, some of which similarly restrict the availability of third-party Apps and some of which do not. To the extent that there is market pressure to make third-party Apps available directly and without restriction, that market pressure will be felt by Apple in the

primary market. The aftermarket for iPhone Apps is a relevant antitrust market only if it has become so disassociated from the primary market that consumer choice in the primary market cannot discipline the seller's behavior in the aftermarket. There is a rich economic literature concerning aftermarkets and theories of plausible aftermarket monopolization, and it confirms that so long as consumers have reasonably good information about a seller's aftermarket practices, the dynamics of "systems competition" usually links rather than disassociates primary markets and derivative aftermarkets. *See, e.g.*, Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of* Kodak, 63 Antitrust L.J. 483, 493-94 (1995).[8]

That is the context in which *Newcal* explains that an aftermarket monopolization claim is not viable if "consumers make a knowing choice to restrict their aftermarket options when they decide [what to purchase] in the initial (competitive) market." 513 F.3d at 1050. The Court was saying that where consumers can reasonably discover the restrictions on their aftermarket options, the aftermarket is not a proper antitrust market at all, as a matter of law. The Court

[8] In fact, the case law consistently holds that where consumers can "reasonably discover" aftermarket practices (irrespective of whether they contractually agree to them), the aftermarket is not the relevant antitrust market. *See PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 819-20 (6th Cir. 1997); *see also Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 763 (7th Cir. 1996); *Universal Avionics Sys. Corp. v. Rockwell Int'l Corp.*, 184 F. Supp. 2d 947, 956 (D. Ariz. 2001), *aff'd*, 52 F. App'x 897 (9th Cir. 2002).

noted two cases in which, without more, a court can conclude that an aftermarket is *not* a relevant antitrust market: where the aftermarket restriction is found in a contract entered into in the primary market, and where consumers can, "at the time of purchase, reasonably discover" that the aftermarket restriction exists, which the Court characterized as the "functional equivalent of a contractual commitment." *Id.* at 1048-49.

Plaintiffs mangle this into the extraordinary claim that aftermarket monopoly always exists unless the plaintiff contractually consented to confer the monopoly on the seller. They point to a passage in *Newcal* stating that "the law prohibits an antitrust claimant from resting on market *power* that arises *solely* from contractual rights that consumers *knowingly and voluntarily gave to the defendant.*" *Id.* at 1048 (first emphasis in original). Plaintiffs seek to flip that around and draw the negative inference that *without contractual consent* there necessarily is aftermarket power, as a matter of law. This is why, supposedly, the iPhone Apps aftermarket is *not* a relevant market for Apps developers—they signed contracts with Apple—but *is* a relevant market for Plaintiffs, who did not sign contracts.

Plaintiffs' argument is baseless. There might be a dozen reasons why Apps developers have no claim against Apple (including that the iPhone and Apple's Apps policies have created massive opportunities for those developers, and consumers can reasonably discover restrictions on their Apps "aftermarket"

options), but this made-up argument about signing or not signing contracts is the least of them. Apps developers have standing under *Illinois Brick* to argue whatever they want because they are direct purchasers of distribution services from Apple, and if they want to argue, for example, that their consent was coerced by Apple's market power, they can. What neither they nor consumers like Plaintiffs may argue is that Apple has monopoly power *irrespective of all other competitive considerations* just because it failed to get some kind of contractual consent. That is nothing but a figment of Plaintiffs' imagination.

For the purpose of resolving the *Illinois Brick* issues, the Court need go no further. App developers are the ones who have antitrust standing to bring any claim about Apple's "monopolization" of Apps distribution.[9] Plaintiffs are indirect purchasers who have no standing.

III. PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM

The district court's judgment independently should be affirmed for failing to state a claim. Among other core deficiencies, Plaintiffs' complaint fails to allege a cognizable aftermarket or any anticompetitive conduct that could give rise to an antitrust violation. Because those deficiencies are plain on the face of Plaintiffs' complaint, a remand for further delay in the resolution of this case is unnecessary.

[9] The Supreme Court has rejected the argument that there should be an exception to the indirect purchaser rule in situations where direct purchasers may not be incentivized to bring an action. *See, e.g., Illinois Brick*, 431 U.S. at 746-47; *Utilicorp*, 497 U.S. at 216-18.

A. Plaintiffs Have Not Alleged a Cognizable Aftermarket

For all of the reasons that Plaintiffs' policy arguments in this case misunderstand the law, *see supra* Section II.C, they have not alleged a cognizable antitrust market.

Plaintiffs do not even attempt to allege that they or other iPhone purchasers could not "reasonably discover" Apple's allegedly "closed" App Store policies. Plaintiffs do not allege that the iPhone was ever what they call an "open" system, and Plaintiffs admit that "Apple informs its prospective apps developers" that the developers' Apps cannot be distributed to iPhones except through the App Store. EOR 70 (SACC ¶ 40).

Plaintiffs have also never denied that Apple's policies regarding the App Store were widely reported and available to consumers when they were announced. They could never do so, in good faith. The iPhone was the subject of a "massive advertising campaign" by Apple in Spring 2007. EOR 63, 68 (SACC ¶¶ 2, 26); RJN 4-5.[10] Throughout this process, Apple's policies were widely disseminated

[10] The district court granted Apple's motion to dismiss below on *Illinois Brick* grounds without taking judicial notice of Apple's press releases relating to its Apps policies, in an apparent abundance of caution that the factual contents of the press releases may be in dispute. *See* EOR 27-28 ("The fact of the issuance of press releases may be undisputed, but the contents therein may nonetheless be subject to a reasonable dispute."). As set forth in Apple's separate Request for Judicial Notice ("RJN"), Apple is not seeking judicial notice of a press release or related Apps media articles for purposes of establishing the truth of any statement contained therein, but only for the purpose of establishing that the materials were

and discussed: immediately following the January 2007 announcement, newspapers such as the *New York Times* reported that the iPhone would not be an "open platform," that Apple would "define everything that is on the phone," and that Apps would be handled through an Apple-curated and controlled environment. RJN 5 & Ex. C at 2; Ex. B at 2; Exs. D-G.[11] Customers were also directly reminded about Apple's Apps policies: when "clever third party programmers," upon the first sale of the iPhone, began circumventing the iPhone's "security measures" to allow unauthorized "Third Party Apps," Apple updated its iOS and directly issued warnings to its customers. EOR 69 (SACC ¶¶ 33, 34). And approximately nine months after Apple first began selling the iPhone, Apple

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publicly available to consumers (and thus reasonably discoverable). Judicial notice for the limited purpose of establishing the undisputed "fact of the issuance of" such materials is thus appropriate. *See Yang v. Dar Al-Handash Consultants*, 250 F. App'x 771, 772 (9th Cir. 2007); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

[11] As set forth in the RJN, these articles include the following: John Markoff, *Steve Jobs Walks the Tightrope Again*, N.Y. Times, Jan. 12, 2007, *available at* nytimes.com/2007/01/12/technology/12apple.html; Steven Levy, *Apple Computer is Dead: Long Live Apple*, Newsweek, Jan. 9, 2007, *available at* http://www.newsweek.com/steven-levy-apple-computer-dead-long-live-apple-98429; *see* Thomas Claburn, *Is a Closed iPhone Doomed to Fail*?, InformationWeek, Jan. 10, 2007, *available at* informationweek.com/is-a-closed-iphone-doomed-tofail/196802882; *A Populist Challenge to Apple's iPhone*, U.S. News & World Report, Jan. 12, 2007, *available at* http://money.usnews.com/money/blogs/daves-download/2007/01/12/a-populist-challenge-to-apples-iphone; Paul Boutin, *The iPhone Wannabes*, Slate, Apr. 4, 2007, *available at* slate.com/articles/technology/technology/2007/04/the_iphone_wannabes.html; Tim Wu, *iPhony: Why Apple's new cell phone isn't really revolutionary*, Slate, June 29, 2007, *available at* www.slate.com/articles/technology/technology/2007/06/iphony.single.html.

prominently announced the launch of the App Store, the availability of the SDK to third party App developers, and related policies in a March 6, 2008 press release:

> The App Store enables developers to reach every iPhone and iPod touch user. **Developers set the price for their applications—including free—and retain 70 percent of all sales revenues.** Users can download free applications at no charge to either the user or developer, or purchase priced applications with just one click. Enterprise customers will be able to create a secure, private page on the App Store accessible only by their employees. Apple will cover all credit card, web hosting, infrastructure and DRM costs associated with offering applications on the App Store. **Third party iPhone and iPod touch applications must be approved by Apple and will be available exclusively through the App Store.**

EOR 70 (SACC ¶ 38); RJN 2-3 & Ex. A at 1-2.[12] (emphasis added).

There are no allegations that consumers could not reasonably discover Apple's Apps policies or the terms on which Apps would be made available through Apple's App Store, let alone any allegations that Apple engaged in fraud and deceit sufficient to "rebut the economic presumption" that iPhone consumers

[12] Press Release, Apple, *Apple Announces iPhone 2.0 Software Beta*, Mar. 6, 2008, apple.com/pr/library/2008/03/06Apple-Announces-iPhone-2-0-Software-Beta.html. This was also widely reported in the media. *See, e.g.*, RJN 5 & Ex. H at 1 (Gregg Keizer, *Apple's iPhone App Store opens for business*, Computerworld, July 10, 2008, *available at* computerworld.com/s/article/9108818/Apple_s_iPhone_App_Store_opens_for_business) ("[Apple] takes 30% of the revenues for providing the marketing muscle and App Store bandwidth. A program's developer keeps the remaining 70% of any income."); RJN 5 & Ex. I at 1 (John Markoff & Laura M. Holson, *Apple's Latest Opens a Developers' Playground*, N.Y. Times, July 10, 2008, *available at* nytimes.com/2008/07/10/technology/personaltech/10apps.html) ("Apple gives developers a 70 percent cut of sales.").

made a knowing choice to purchase iPhones in the competitive initial market for smartphones. *Newcal*, 513 F.3d at 1050. And anyone who has ever tested or used an iPhone would know that Apps may only be downloaded through the App Store. It is inconceivable that consumers could not "reasonably discover" the allegedly unlawful Apps policies or "closed" system. *Id.* at 1048. Under *Newcal*, therefore, Plaintiffs' alleged aftermarket for software applications for the iPhone is not a relevant antitrust market and their claims necessarily fail. *Id.* at 1048-50.

B. Plaintiffs Have Not Alleged Any Anticompetitive Conduct

Plaintiffs' claims also fail because they have not identified any way in which Apple has engaged in anticompetitive conduct. Possession of monopoly power will only be found to be unlawful where it is acquired or maintained through anticompetitive conduct:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. … To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.

Verizon Commc'ns Inc. v. Law Office of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004). Plaintiffs fail to allege the "willful acquisition or maintenance of [monopoly] power [by Apple] as distinguished from growth or development as a

consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

When Apple launched the iPhone, the smartphone market was nascent and Apple had *zero* share of it. The iPhone and the App Store have greatly expanded consumer choice. As even Plaintiffs concede, the iPhone was "revolutionary;" it "shifted the paradigm for smartphones, and it changed the entire cell phone manufacturing industry." EOR 68 (SACC ¶¶ 27, 26). Indeed, Apple alone now offers more than 1.2 million apps, and iPhone consumers worldwide have downloaded apps more than 75 billion times since July 2008—the majority of which are *free*. *Supra* at 7 n.2; EOR 65 (SACC ¶ 9).

Plaintiffs are complaining that Apple might have fostered *even more and better* competitive choice if it had thrown the iPhone open to third party Apps from any source, as Google did with Android. That is highly debatable, since Apple's decision to require that Apps meet certain standards to help ensure a consistent user experience is a good bit of the iPhone's appeal. But in any event, the required anticompetitive conduct must itself harm competition—it is not enough that conduct fails to further competition or aid competitors. *See Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 1002 (9th Cir. 2010) ("*Tyco*"); *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 790 F. Supp. 804, 821 (C.D. Ill. 1992) ("[B]usinesses 'needn't acquiesce to every demand

placed upon them by competitors or customers; [their] duties are negative—to refrain from anticompetitive conduct—rather than affirmative—to promote competition.'" (citation omitted)) , *aff'd*, 998 F.2d 391 (7th Cir. 1993). As a result, the Supreme Court has made clear that "there is no duty to aid competitors." *Trinko*, 540 U.S. at 411. Even "a monopolist has no duty to help its competitors survive or expand when introducing an improved product design." *Tyco*, 592 F.3d at 1002; *see also id.* at 998-99 (establishing a rule protecting product redesign decisions from monopolization claims so long as the new design improves on the old one).

When one creates something new, like the iPhone ecosystem, competition and consumer welfare are by definition enhanced. Plaintiffs' complaint can at most be that Apple's conduct failed to "optimize" consumer welfare and competitive opportunities. That, however, does not state a claim under the antitrust laws. "There is a difference between positive and negative duties, and the antitrust laws … have generally been understood to impose only the latter." *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 513 (7th Cir. 1982). And "[a]s a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes." *United States v. Microsoft Corp.*, 253 F.3d 34, 65 (D.C. Cir. 2001); *see Tyco*, 592 F.3d at 998 (quoting *Microsoft*). Unless the challenged design serves no purpose other than protecting a monopoly,

it is not actionable. *Tyco*, 592 F.3d at 998. "In contrast, a design change that improves a product by providing a new benefit to consumers does not violate Section 2 absent some associated anticompetitive conduct." *Id.* at 998-99. Importantly, "[t]here is no room in this analysis for balancing the benefits or worth of a product improvement against its anticompetitive effects. If a monopolist's design change is an improvement, it is 'necessarily tolerated by the antitrust laws' unless the monopolist abuses or leverages its monopoly power in some other way when introducing the product." *Id.* at 1000 (citation omitted).

Here, Plaintiffs admit—as they must—that the iPhone was an improvement over previous mobile devices; in fact, it is alleged to have "shifted the paradigm for smartphones, and it changed the entire cell phone manufacturing industry." EOR 63, 68 (SACC ¶¶ 2, 26). Moreover, the Complaint admits that the iPhone's supposedly "closed" iOS system has actually led to the creation of more than 850,000 software applications (most of which are free) that have been downloaded over 50 billion times. EOR 65 (SACC ¶ 9). In other words, the allegedly "closed" iPhone platform and the App Store have dramatically increased output and produced substantial benefits for both developers and consumers.

Under *Tyco* those are fatal admissions. It simply cannot be that the design of the iPhone and Apple's App Store serve no purpose other than to create or defend a monopoly when it admittedly produced tangible consumer benefits of that

dimension. This means that Plaintiffs do not—and cannot—plead that having a "closed" system constitutes anticompetitive conduct: the design of the "system" cannot be deemed anticompetitive. *Tyco*, 592 F.3d at 998-99. Plaintiffs have thus failed to state a cause of action for unlawful monopolization.

IV. PLAINTIFFS ARE NOT ENTITLED TO LEAVE TO REPLEAD

Finally, the district court did not abuse its discretion by denying Plaintiffs leave to file a *fifth* complaint in this action. Plaintiffs have already had multiple chances in this action to demonstrate that Plaintiffs possess antitrust standing. The court even went so far as to expressly instruct Plaintiffs regarding the allegations that might support standing. Plaintiffs could not make those allegations in good faith because they would be untrue. On such facts, Judge Gonzalez Rogers was well within her discretion to dismiss the action with prejudice.[13]

Because Plaintiffs cannot establish that any of the limited exceptions to *Illinois Brick* apply here, in light of their consistent allegations and the undisputed

[13] Plaintiffs' argument that the district court's December 2 Order was the first time that the lower court made a determination on whether Plaintiffs' allegations rendered them indirect purchasers is untenable. Plaintiffs ignore that the district court warned in its August 15 Order that its *complaint* "[did] not allege a 'supracompetitive' or 'fixed' price, but rather a mark-up." EOR 32. The district court specifically explained that the existing allegations in Plaintiffs' complaint regarding Apple's cut of developers' sales were insufficient. *See* EOR 32 n.14. The district court gave Plaintiffs leave to amend only because they had asserted "for the first time" in their opposition to Apple's motion to dismiss that they could allege that *Apple* had imposed "'a 30% fee *on top of* the cost for the apps.'" EOR 32 (emphasis added) (citation omitted).

facts of this case, it would also be futile to grant leave to amend as Plaintiffs request. First, *ATM Fee* forecloses Plaintiffs' argument that they could demonstrate that their allegations satisfy the co-conspirator exception to *Illinois Brick*. As this Court there held, "for the indirect purchaser to merit standing under this exception, the conspiracy must fix *the price paid by the plaintiffs*." *ATM Fee*, 686 F.3d at 749 (emphasis added). On appeal, Plaintiffs argue that App developers entered into a "conspiratorial agreement" to pay Apple a 30% commission. Appellants' Br. 52. But Plaintiffs have never alleged, and cannot allege, that Apple conspires with developers to set the price at which *developers* decide to sell their Apps to consumers; rather, developers set that consumer price alone. *See, e.g.*, *id.* at 35 n.10 (alleging *developers* "will mark-up the price [of their apps] to cover Apple's 30%"). *ATM Fee* makes clear that the co-conspirator exception does not apply to facts like these, where the so-called conspiracy sets an *upstream* fee (the commission), not the ultimate consumer price. This Court found dispositive that "while Plaintiffs allege a conspiracy to set interchange fees [the fee paid by a card-issuing bank to the ATM owner], they fail to show a conspiracy to set foreign ATM fees [the fee actually paid by plaintiffs]." 686 F.3d at 751, 745.

Plaintiffs' suggestion that they can qualify under an exception "when 'a conspiring seller owns or controls the direct purchaser'" is even more off base. Appellants' Br. 53 (quoting *ATM Fee*, 686 F.3d at 749). The basis for that

exception is that "[t]here is little reason for the price-fixer to fear a direct purchaser's suit when the direct purchaser is a subsidiary or division of a co-conspirator." *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980). Obviously, the suggestion that Apple "owns or controls" the hundreds of thousands of developers who choose to make their Apps available through the App Store is easily dismissed—and Plaintiffs never allege otherwise.

Finally, Plaintiffs argue that their request for injunctive relief, unlike damages, is not barred because they are indirect purchasers. While it is true that *Illinois Brick* is not generally a bar to a claim for injunctive relief under Section 16, a remand is not warranted in this case for multiple reasons. First, Plaintiffs failed to oppose the motion to dismiss on this basis below. Having failed to do so, this Court should not consider their argument on appeal. *See, e.g.*, *Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006). Second, for the reasons set out in Section III, *supra*, Plaintiffs have not made the minimum allegations necessary to establish that a separate Apps "aftermarket" exists for antitrust purposes, and have not stated any viable antitrust claim on the merits.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Defendant-Appellee Apple Inc. is aware of the following related case pending in this Court:

Ward v. Apple Inc., No. 12-17805.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing brief is proportionately spaced, has a typeface of 14 point and contains 12,623 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Daniel M. Wall
Daniel M. Wall

CERTIFICATE OF SERVICE

I, Daniel M. Wall, hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 11, 2014, which will serve all counsel registered to receive electronic notices.

s/ Daniel M. Wall
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