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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RITZ CAMERA & IMAGE, LLC, a Delaware limited liability company, on behalf of itself and others similarly situated, Plaintiff, v. SANDISK CORPORATION and ELIYAHOU HARARI, Defendants.	CASE NO.: 5:10-CV-02787 JF **(1) NOTICE OF MOTION AND DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; and** **(2) [PROPOSED] ORDER (lodged under separate cover)** Date: December 17, 2010 Time: 9:00 AM Judge: Honorable Jeremy Fogel

NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT at 9:00 a.m. on December 17, 2010, or as soon thereafter as the matter may be heard, Defendants will move this Court to dismiss Plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

This motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, and the Request for Judicial Notice filed concurrently herewith.

DATED: October 1, 2010

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

By: /s/ Raoul D. Kennedy
Raoul D. Kennedy
David W. Hansen

Attorneys for DEFENDANTS
SANDISK CORPORATION and ELIYAHOU HARARI

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants SanDisk Corporation ("SanDisk") and Dr. Eliyahou Harari ("Dr. Harari") respectfully submit this memorandum in support of their Motion to Dismiss the First Amended Complaint ("FAC") of Plaintiff, Ritz Camera & Image, LLC ("Ritz"), pursuant to Federal Rule of Civil Procedure 12(b)(6) and the parties' September 24, 2010 stipulation regarding page limits.

I. INTRODUCTION

Ritz alleges that it is a direct purchaser of NAND flash memory products sold by SanDisk and others, and it filed this putative class action on behalf of itself and other supposedly "similarly situated" direct purchasers. Ritz alleges in Count I of the FAC that SanDisk and Dr. Harari, SanDisk's founder and Chief Executive Officer, "conspired to monopolize" the market for "raw and finished" NAND flash memory products in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Ritz alleges in Count II that SanDisk "unlawfully monopolized" this "market" in violation of Section 2.

This lawsuit is an attempt by Ritz to resurrect claims made against SanDisk and Dr. Harari by STMicroelectronics, Inc. ("STM") in various lawsuits dating back to 2004, including the related cases previously before this Court. All of STM's claims in those cases were fully and finally settled in September 2009, and all of the lawsuits between STM and SanDisk/Dr. Harari were dismissed at that time with prejudice.

Specifically, Ritz seeks to revive the same *Walker Process* allegations concerning two "fraudulently obtained" patents (the '338 and '517 patents) that STM raised in defense of SanDisk's patent infringement claims in related case Nos. C 04-4379 JF and C 05-5021 JF. Ritz also seeks to revive STM's allegations in related case Nos. C 05-4691 JF and C 08-2332 JF (ultimately pursued by STM in state court) that SanDisk, in concert with Dr. Harari, "tortiously converted" technology from Wafer Scale Integration ("WSI"), a company founded by Dr. Harari prior to his founding of SanDisk that was later purchased by STM. Ritz alleges that SanDisk "wholly incorporated" the converted technology into the '338 and '517 patents, and then sued STM on those patents, which Ritz (but not STM) claims forced STM to incur $20 million in attorneys' fees and drove STM out of the NAND flash market in March 2008. Ritz also alleges that SanDisk

"threatened" unspecified "competitor customers" in connection with its patent enforcement efforts, and that SanDisk's termination of Ritz as a direct purchaser after this lawsuit was filed was unlawful. Finally, Ritz alleges that Defendants' supposedly "anticompetitive settlement agreement" with STM – the terms of which Ritz admittedly does not know – "ratified" STM's "exit from the relevant market" and "removed the threat of an STM/Hynix joint venture capable of mounting a competitive threat to SanDisk."

The allegations in the FAC are baseless and do not assert cognizable claims. More particularly, the FAC should be dismissed for at least the following reasons:

First, both Counts of the FAC should be dismissed because Ritz lacks antitrust standing to bring its claims under Section 2. Ritz has not alleged, and could not allege, a plausible "antitrust injury," *i.e.*, an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Rather, Ritz presents the completely implausible theory that STM – an international corporation and experienced patent litigant with annual revenues exceeding $5 billion that Ritz describes as "the world's sixth largest flash memory supplier" – fled the flash memory business because it spent $20 million on attorneys' fees defending against SanDisk's patent infringement claims. Ritz's theory also requires the Court to believe, without any support whatsoever, that STM repeatedly lied to its shareholders, the public and the Securities and Exchange Commission ("SEC") by stating in more than a dozen of its SEC filings that it had not identified ***any*** risk of probable loss arising from SanDisk's claims.

Ritz's theory is not only implausible, it is belied by Ritz's original Complaint in this action and STM's SEC filings, which confirm that Ritz's antitrust injury allegations in the FAC are not true. STM did not exit the flash market in March 2008. Rather, as STM reported to the SEC and Ritz alleged in its original Complaint, STM formed a joint venture at that time with Intel Corporation ("Intel"), creating a new flash memory company called Numonyx, to which STM contributed its flash memory business. STM reported in its SEC filings that it formed Numonyx with Intel in order to "benefit from critical size to be competitive in the [flash memory] market." Thus, far from fleeing the market, STM entered into the Numonyx joint venture with Intel, the

world's largest semiconductor company, intending to create an even more formidable flash memory competitor. STM reaped nearly $600 million in May of this year in connection with the sale of Numonyx to Micron Technology, Inc. ("Micron"), another major semiconductor company, for $1.2 billion.

Ritz's allegations that SanDisk prevented a STM/Hynix joint venture in late 2004 are also incorrect. STM's SEC filings show that in November 2004 STM and Hynix in fact entered the manufacturing joint venture that Ritz alleges SanDisk thwarted. STM later transferred its interest in the Hynix joint venture to Numonyx along with the rest of its flash memory business.

Finally, Ritz's allegations that Defendants' actions caused purchasers of "raw and finished NAND flash" to pay "above-competitive, monopoly prices for these products since June 25, 2006" are entirely hypothetical and speculative. Even if the Court were willing to ignore the facts, Ritz's antitrust injury theory requires the Court to accept a series of wholly-speculative leaps that, but for SanDisk's alleged anticompetitive conduct: (i) STM and Hynix would have entered some sort of manufacturing joint venture, (ii) the hypothetical STM/Hynix joint venture would have received antitrust approval from the Federal Trade Commission and its foreign counterparts, (iii) the hypothetical STM/Hynix joint venture would have been more pro-competitive than the STM/Intel Numonyx joint venture, and (iv) this series of hypothetical events would have resulted in lower prices for "raw and finished" flash products. It is settled, however, that antitrust plaintiffs like Ritz, whose claims are informed by "nothing but speculation," lack antitrust standing. *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 543 (1983).

Second, Count I is based on a supposed "conspiracy" between SanDisk and Dr. Harari. However, Ritz concedes that Dr. Harari served as SanDisk's Chief Executive Officer at all times pertinent to Ritz's claims. Count I of the FAC must therefore be dismissed with prejudice because a corporation and its officers are not separate economic entities capable of forming an antitrust conspiracy. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

Third, each of Ritz's theories of anticompetitive conduct underlying Count II is fatally flawed for at least the following reasons:

- Direct purchasers like Ritz do not have standing to pursue *Walker Process* antitrust claims. *See, e.g., Kroger Co. v. Sanofi-Aventis*, 701 F. Supp. 2d 938 (S.D. Ohio 2010); *Kaiser Foundation v. Abbott Laboratories*, 2009 WL 3877513 (C.D. Cal. Oct. 8, 2009).
- Ritz's allegations concerning Defendants' supposed "tortious conversion" of patents from WSI/STM are legally deficient because, as a matter of law, the enforcement of a valid patent, even by an alleged "usurper," does not restrain competition beyond the scope of the patents and does not cause antitrust injury. *See, e.g., Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261 (7th Cir. 1984).
- Under the *Noerr-Pennington* doctrine, SanDisk is immune from antitrust liability based on its alleged enforcement of document and deposition subpoenas and its supposed communications with "competitor customers" related to actual or potential litigation. Similarly, SanDisk's decision to cease doing business directly with Ritz is entirely lawful. Moreover, Ritz fails to allege any injury, much less an antitrust injury, caused by SanDisk's litigation related communications with unidentified "competitor customers" or SanDisk's lawful decision to cease doing business with Ritz.
- Finally, Ritz's allegations concerning Defendants' settlement with STM do not support an antitrust claim. Ritz has not alleged, and could not allege, that the settlement expanded SanDisk's (now expired) patents beyond their statutory scope and the settlement is therefore not properly subject to antitrust scrutiny. *See, e.g., In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 544 F.3d 1323, 1333 (Fed. Cir. 2008).

Fourth, both Counts should be dismissed because Ritz has not alleged a plausible antitrust market. Ritz's alleged antitrust market is fatally flawed because it encompasses products that are not reasonably interchangeable. *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

II. SUMMARY OF ALLEGATIONS[1]

A. The Parties

SanDisk was incorporated in June of 1988. (Request for Judicial Notice ("RJN") Ex. A at 3; FAC ¶ 103 (erroneously listing date as 1989).) Dr. Harari is a founder of SanDisk and has served as SanDisk's Chief Executive Officer since its incorporation. (RJN Ex. A at 12; *see also* FAC ¶ 7, 18.)[2]

SanDisk and its licensees are the world's largest suppliers of NAND flash memory. (FAC ¶¶ 7, 17, 103.) "NAND flash memory is a form of non-volatile erasable memory . . . attractive for the storage of large amounts of data." (FAC ¶ 1.) "NAND flash memory comes in raw and finished forms." (*Id.* ¶ 2.) "Raw" or "component" flash memory is "the basic flash memory wafer that is produced by a fabrication plant." (*Id.*) SanDisk's finished flash memory products are used "in, or with, various electronic products, including cards, drives and sticks used in mobile phones, digital cameras, digital video camcorders, gaming devices, portable digital audio/video players, personal computers, and global positioning systems." (*Id.* ¶ 2.)

Ritz alleges that it is a direct purchaser of flash memory products from SanDisk. (*Id.* ¶ 16.)

B. The Alleged Antitrust Market

Ritz alleges that SanDisk, and its "controlled and licensed Toshiba joint venture," "sell raw and finished NAND flash memory products in a relevant product market ('relevant product market for NAND flash memory'). These products employ technology claimed by SanDisk to be patented, and are used as components in a wide array of consumer, camera, mobile telephone, digital player, and computing products. Purchasers of raw and finished NAND flash do not view other products as substitutes for these products. NAND flash memory products have demand pricing that is

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[1] This Summary of Allegations refers to the allegations contained in Ritz's original Complaint, its FAC, and certain matters of which the Court is entitled to take judicial notice. *See In re Silicon Graphics, Inc. Sec. Litigation.*, 970 F. Supp. 746, 758 (N.D. Cal. 1997) ("[A] district court may take judicial notice of the contents of relevant public disclosure documents required to be filed with the SEC as facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). Defendants do not admit the facts alleged in Ritz's original Complaint or in the FAC.

[2] Dr. Harari recently announced that he plans to retire as SanDisk's Chairman and CEO at the end of this year.

distinct from other products, and there are no substitutes to which manufacturers of consumer, camera, computing and other products would switch in response to a small (but substantial), non-transitory, relative increase in the pricing for NAND flash memory products." (*Id.* ¶ 25.)

Ritz also alleges that "[o]ver 75% of all raw and finished NAND flash memory products sold worldwide is either (a) manufactured and sold by SanDisk or its controlled and licensed Toshiba joint venture; or (b) manufactured by other licensees of patents for NAND flash memory technology claimed to be owned by SanDisk." (*Id.* ¶ 26.)

Ritz further alleges that "[t]he geographic scope of the relevant product market is worldwide, or, in the alternative, every country in which SanDisk contends it has patent rights over technology that is an essential input to manufacturing, marketing, and selling in the relevant product market for NAND flash memory products." (*Id.* ¶ 28.)

C. The Expired Patents Underlying Ritz's Claims

Ritz alleges that SanDisk and Dr. Harari's alleged anticompetitive acts involve three patents, namely U.S. Patent Nos. 5,172,338 (the "'338 patent"), 5,991,517 (the "'517 patent") and 5,070,032 (the "'032 patent"). (*Id.* ¶¶ 35-109.) All of these patents are expired. The '338 patent expired December 15, 2009, the '517 patent expired April 13, 2009, and the '032 patent expired March 15, 2009. (*See* RJN at 2-4.)

D. The Alleged Anti-Competitive Conduct

1. SanDisk's Alleged *Walker Process* Fraud

Ritz alleges that SanDisk fraudulently obtained the '338 and '517 patents by intentionally failing to disclose invalidating prior art to the U.S. Patent and Trademark Office ("PTO") and by making affirmative misrepresentations to the PTO. (*See* FAC ¶¶ 35-73.)[3] Ritz alleges that SanDisk then sued STM on the '338 and '517 patents, and "[b]y March of 2008 SanDisk had

[3] Ritz has largely copied its *Walker Process* fraud allegations from a counterclaim made by STM in the patent infringement case brought by SanDisk against STM in this court. (*Compare* FAC ¶¶ 35-71 *with* STM's Answer to Second Amended Complaint and Counterclaims ¶¶ 53-96, *SanDisk Corp. v. STM, Inc.*, *No*. 5:04-cv-04379-JF (Dkt. No. 109, filed Sept. 6, 2007).) SanDisk and STM settled all of the claims in that case, including STM's *Walker Process* claim, in September 2009. (FAC ¶ 112; *SanDisk Corp. v. STM, Inc.*, 5:04-cv-04379-JF, Dkt. No. 332, Sept. 24, 2009.)

succeeded in imposing $20,000,000 in legal fees on STM through infringement actions based on its fraudulent patents and had driven it from the relevant market thereby injuring competition." (FAC ¶ 115.)

Ritz does not and could not allege, however, that SanDisk's lawsuits resulted in a judgment or any other relief against STM. (FAC *passim*.)

2. Defendants' Alleged "Tortious Conversion" Of Patents

Ritz alleges that "SanDisk and Harari have conspired to disadvantage SanDisk's significant competitor, STM, by converting and misappropriating STM's NAND flash memory technology, technology which was wholly incorporated by SanDisk into filings leading to the issuance of the fraudulent 'crown jewel' '338 and '517 patents. The stolen technology was central to the scope of the grants of both patents. By stealing this technology, SanDisk and Harari have competitively disadvantaged STM, eventually using its own technology to exclude it from the market entirely in March of 2008." (FAC ¶ 74; *see also id.* ¶¶ 75-109 (alleging Dr. Harari failed to fulfill contractual and fiduciary obligations to assign inventions to STM's predecessor-in-interest, WSI).)[4]

Ritz further alleges that Dr. Harari "converted STM erase-gate technology that was specified as necessary for the implementation" of the '338 and '517 patents, and that Dr. Harari filed a patent application based on this technology that resulted in the issuance of the '032 patent. (*Id.* ¶ 101.) Ritz does not and could not allege that SanDisk attempted to enforce the '032 patent against STM. (FAC *passim*.)

3. SanDisk's Alleged Threats To "Competitor Customers"

Ritz copies STM's barebones allegations that SanDisk told unnamed "competitor customers" that "they will be left holding large quantities of unusable flash memory" and that "they will be made to acquire flash memory products at disadvantageous prices and terms if they are later forced to turn to SanDisk for product." (*Id.* ¶ 8, 110.) Ritz does not allege, however, that

[4] Ritz's conversion claim is essentially a verbatim recitation of the conversion claim brought against Dr. Harari and SanDisk by STM, which was settled in September 2009. (*Compare* FAC ¶¶ 74-109, *with STM v. Harari et anno.*, No. HG 05237216 (Cal. Sup. Ct., County of Alameda filed Oct. 14, 2005), Dkt. No. 1 ¶¶ 9-45.)

these threats had any effect on any of these "competitor customers," STM or competition in the relevant market.

Ritz also alleges that in "a successful effort to drive customers from STM, SanDisk has also enforced document and deposition subpoenas against numerous STM customers." (*Id.* ¶ 110.) Ritz does not identify a single customer "successfully driven from STM," and, more significantly, it does not and could allege that the lawsuits underlying the document and deposition subpoenas SanDisk allegedly enforced were objectively baseless. In fact, this Court has already held to the contrary. *See SanDisk Corporation v. STMicroelectronics, Inc.*, 2008 WL 4615605, at * 10 (N.D. Cal. Oct. 17, 2008).

Ritz also alleges that "shortly after this lawsuit was filed, SanDisk retaliated against [Ritz] . . . by terminating its supply of NAND flash memory to [Ritz]. By doing so, SanDisk has sought to exercise its monopoly to prevent this court from learning about, and vindicating, legitimate claims as to substantial unlawful conduct by SanDisk." (*Id.* ¶ 111.) Ritz does not and could not allege, however, that it is unable to purchase SanDisk flash from other sources or that it has been unable to find an alternate source of flash memory products. Ritz also does not allege that it has otherwise been injured by SanDisk's decision to discontinue doing business with Ritz or that SanDisk's decision to discontinue doing business with Ritz has harmed competition. (FAC *passim*.)

4. Defendants' Allegedly "Anticompetitive Settlement" With STM

Ritz alleges that "[i]n late 2009 SanDisk entered into a secret global agreement with STM settling federal and state litigation matters[.]" (*Id.* ¶ 112.) Notwithstanding the fact that Ritz admittedly has no knowledge of the terms of the settlement agreement, (*id.* ¶ 119), Ritz alleges that the settlement agreement "ratified STM's exit from the market," "failed to provide a means for STM to re-enter the market," and "removed the threat of a STM/Hynix joint venture capable of mounting a major competitive challenge to SanDisk." (*Id.* ¶ 10; *see also id.* ¶¶ 113-19.)

E. <u>The Alleged Injury To Competition</u>

Ritz alleges that SanDisk's anticompetitive conduct "drove STM, the sixth largest producer of flash memory worldwide, from the relevant market in March of 2008." (*Id.* ¶ 7.) Specifically, Ritz alleges that "[b]y March of 2008 SanDisk had succeeded in imposing $20,000,000 in legal

fees on STM through infringement actions based on its fraudulent patents and had driven it from the relevant market thereby injuring competition," (*id.* ¶ 115), and that had SanDisk not converted technology rightfully owned by STM, "STM would continue to be a viable competitor in the relevant market for NAND flash memory products, with the result that there would be more competition and lower prices." (*Id.* at 109.) Further, Ritz alleges that by driving STM from the market, SanDisk avoided a major competitive challenge from a manufacturing joint venture between STM and Hynix. (*Id.* ¶¶ 116-17, 121.)

F. Judicially Noticeable Facts

STM's SEC filings and Ritz's original Complaint in this case both establish that SanDisk's efforts to enforce the '338 and '517 patents did not drive STM from the flash memory business.

As an initial matter, public records show that STM is an experienced and sophisticated patent litigant, having been involved in over 30 patent suits since 1998 in addition to its patent suits with SanDisk. (*See* RJN Ex. L (Results of Pacer search of patent litigation involving STM).)

Moreover, Ritz does not and could allege that SanDisk's lawsuits resulted in a judgment or other relief against STM, or that STM felt threatened by SanDisk's suits. In fact, STM was not threatened by SanDisk's suits. STM represented in more than a dozen SEC filings it made during the course of STM's litigation with SanDisk that, in consultation with counsel, STM had not identified ***any*** risk of probable loss associated with SanDisk's lawsuits. For example, in its May 4, 2005 Form 6-K – the first filing to discuss the SanDisk litigation – STM stated:

> The Company is currently a party to legal proceedings with SanDisk Corporation ("SanDisk"). Based on management's current assumptions made with the support of the company's outside attorneys, the Company does not believe that the SanDisk litigation will result in a probable loss.

(*See* RJN Ex. G at F-19.) STM made similar statements in the Form 20-F it filed on March 3, 2008, the very time that Ritz alleges SanDisk's lawsuits drove STM from the flash market, (*see* RJN Ex. B at 121 ("With respect to the lawsuits with SanDisk ... and following two prior decisions in our favor taken by the ITC, we have not identified any risk of probable loss that is likely to arise out of the outstanding proceedings."), and again in the 6-K it filed on May 19, 2009. (*See* RJN Ex. H at 25 (same).)

Further, contrary to Ritz's allegations in the FAC, STM did not exit the flash memory market in 2008. Rather, as Ritz alleged in its original Complaint, "[i]n 2008 STM transferred its flash memory business to a joint venture with Intel Corporation." (*See* Dkt. 1 ¶ 115.) STM explained in its SEC filings that its decision in 2007 to enter into the Intel joint venture was based on a "strategic review" of its product portfolio. (RJN Ex. B at 8.) The STM/Intel transaction closed in March 2008, resulting in the formation of a new semiconductor company called Numonyx. (*See* RJN Ex. C at 10.) STM's SEC filings report that its intent in entering the joint venture with Intel was that Numonyx would "benefit from critical size to be competitive in [the flash memory] market." (RJN Ex. B at 8.)

Similarly, contrary to Ritz's allegations in the FAC, SanDisk's lawsuits did not prevent STM from entering a "manufacturing joint venture with Hynix" in 2004. (*See* FAC ¶¶ 116-17, 121.) Rather, as STM reported to the SEC, STM entered into a manufacturing joint venture with Hynix on November 16, 2004 "to build a front-end memory manufacturing facility" in China. (RJN Ex. B at 30.) STM subsequently transferred its interest in this joint venture with Hynix to its Numonyx joint venture with Intel. (RJN Ex. D at 62.)

Micron recently purchased Numonyx from STM and Intel. (RJN Ex. E at 11.) For the second quarter of 2010, STM reported "an exceptional gain of $265 million on the Numonyx equity divestiture, for which [STM] received shares of Micron common stock, evaluated at $583 million at closing, as compensation." (RJN Ex. E at 9.) On May 7, 2010, Micron announced the Numonyx acquisition and stated that the acquisition would strengthen competition in the flash market, including the NAND flash market at issue in this case:

> BOISE, Idaho and GENEVA, May 7, 2010 -- Micron Technology, Inc., (NASDAQ:MU) announced today that the company has completed its acquisition of Numonyx B.V. in an all stock transaction valued at approximately $1.2 billion USD. Under the agreement, Micron issued approximately 138 million shares of Micron common stock to Numonyx shareholders, Intel, STMicroelectronics, N.V. and Francisco Partners, and assumed outstanding restricted stock units held by Numonyx employees.
>
> "With this acquisition, Micron builds on its position as one of the world's leading memory companies with increased scale, a broader product portfolio and industry-leading technology," said Steve Appleton, Chairman and CEO of Micron.
>
> The transaction further strengthens Micron's broad portfolio of DRAM, NAND and NOR memory products and strong expertise in developing and supporting memory

> system solutions. Micron also gains increased manufacturing and revenue scale along with access to Numonyx's customer base, providing significant opportunities to increase multi-chip offerings in the embedded and mobile markets.
>
> As of Dec. 31, 2009, Numonyx reported net assets of $1.3 billion and cash and cash equivalents, net of debt to unrelated parties of $70 million. In the fourth calendar quarter, Numonyx generated $42 million in free cash flow based on quarterly revenues of approximately $550 million.

(RJN Ex. F at Ex. 99.1.)

III. ARGUMENT

A. The Standard Applicable On A Motion To Dismiss

As the Supreme Court explained in its landmark decision in *Bell Atlantic Corp. v. Twombly*, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." 550 U.S. 544, 558 (2007) (citations and internal quotation marks omitted); *see also id.* at 558 ("'[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.'" (quoting *Asahi Glass Co. v. Pentech Pharms, Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation))). The Supreme Court expressly laid to rest the oft-cited "'rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 558 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Rather, the Court held that Federal Rule of Civil Procedure 8 requires that the plaintiff plead facts sufficient to show "plausible entitlement to relief." *Twombly*, 550 U.S. at 559.

More recently, the Court explained in *Ashcroft v. Iqbal* that "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual development." 129 S. Ct. 1937, 1949 (2009) (internal citations omitted). Assessing a claim's plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950. The court "cannot assume any facts necessary to the [plaintiff's] claim that they have not alleged." *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club*, 407 F.3d

1027, 1035 (9th Cir. 2004). Further, the court need not "accept as true allegations which are contradicted by documents which are properly considered on a motion to dismiss." *In re Visx, Inc. Sec. Litigation.*, 2001 WL 210481, *7 n.1 (N.D. Cal. Feb. 27, 2001) (disregarding allegation in plaintiff's complaint that was contradicted by judicially noticed document) (citing *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998)).

Although the *Twombly* plausibility standard applies to all claims brought in federal court, it is particularly important in antitrust cases "because discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case." *Kendall v. Visa U.S.A., Inc.*, 518 F. 3d 1042, 1047 (9th Cir. 2008); *see also Twombly*, 550 U.S. at 558 (justifying the plausibility standard in part by reference to the "potentially enormous" cost of discovery in antitrust cases); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (*en banc*) ("[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law-lest the antitrust laws become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be.").[5] Under the prevailing standard, "something beyond the mere possibility of [relief] must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Twombly*, 550 U.S. at 546 (citation and internal quotation marks omitted). The Ninth Circuit made clear in *Kendall* that antitrust plaintiffs "must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove" the elements of the underlying antitrust claim. 518 F. 3d at 1047.

[5] *See also id.* (stressing the importance of "weeding out meritless antitrust claims" at the pleading stage because "'[i]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive'" (quoting *Twombly*, 550 U.S. at 558) (internal citation omitted)); *id.* (recognizing "the limited 'success of judicial supervision in checking discovery abuse' and 'the threat [that] discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.'" (quoting *Twombly*, 550 U.S. at 559)).

B. Ritz Lacks Antitrust Standing (Counts I And II)

1. The Requirements Of Antitrust Standing

In addition to Article III standing, private antitrust plaintiffs must establish "antitrust standing":

> [T]he focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.

Assoc. Gen. Contractors, 459 U.S. at 535 & n. 31. Antitrust standing is a fundamental requirement of any antitrust claim. A complaint that fails to establish antitrust standing must be dismissed. This is a black letter principle of antitrust law. As the *en banc* Sixth Circuit held in *NicSand*, "antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [the court] must dismiss it as a matter of law." *NicSand*, 507 F.3d at 450 (6th Cir. 2007); *see also HyPoint Tech., Inc. v. Hewlett-Packard Co.*, 949 F.2d 874, 877 (6th Cir. 1991) ("Antitrust standing to sue is at the center of all antitrust law and policy. It is not a mere technicality. It is the glue that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws.").

The Ninth Circuit has summarized the factors relevant to antitrust standing as follows: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1054 (9th Cir. 1999). The first of these factors, *i.e.*, "antitrust injury," is a "necessary, but not always sufficient," component of antitrust standing. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986); *see also Am. Ad Mgmt., Inc.*, 190 F.3d at 1055.

"Antitrust injury is defined not merely as injury caused by an antitrust violation, but more restrictively as 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1007-08 (9th Cir. 2003) (quoting *Brunswick.*, 429 U.S. at 489). Essential to "antitrust

injury" is a showing that the defendants' challenged conduct has harmed competition, because "[t]he antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" *Brunswick*, 429 U.S. at 488 (quoting *Brown Shoe v. United States*, 370 U.S. 294, 320 (1962)). "If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal *per se*." *Glen Holly Entm't, Inc.*, 343 F.3d at 1008 (quoting *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001) (citation and internal quotation marks omitted).

"Naked assertions" of antitrust injury are not enough to survive a motion to dismiss. *NicSand*, 507 F.3d at 451. "[A]n antitrust claimant must put forth factual 'allegations plausibly suggesting (not merely consistent with)' antitrust injury." *Id.* (quoting *Twombly*, 550 U.S. at 553-54); *see also CBC Cos. v. Equifax*, 561 F.3d 569, 572 (6th Cir. 2009) (dismissing antitrust claim for failure to allege facts supporting alleged reduction in competition). Further, neither implausible antitrust injury allegations, *see, e.g., In re NetFlix Antitrust Litigation*, 506 F. Supp. 2d 308 (N.D. Cal. 2007), nor allegations of speculative injury are enough to survive a motion to dismiss. *See, e.g., City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 267-68 (3rd Cir. 1998) (finding speculative injury inadequate to state an antitrust claim); *Kroger Co. v. Sanofi-Aventis*, 701 F. Supp. 2d 938, 956-57 (S.D. Ohio 2010) (granting motion to dismiss because alleged "injury deriving from the failure to reach a hypothetical procompetitive agreement is nothing but speculation" (citations and quotation marks omitted)).

2. Ritz Fails To Allege A Plausible Antitrust Injury

Ritz alleges that SanDisk's enforcement of the supposedly fraudulently-procured '338 and '517 patents caused a "substantial diminution of competition" and "above competitive, monopoly prices" by forcing STM to incur $20 million in fees, driving STM from the flash memory product market in March 2008, and preventing a "major competitive challenge" to SanDisk from a joint venture that STM was preparing to enter with Hynix in October 2004. (FAC ¶¶ 115-116, 121-122.) Ritz's "antitrust injury" allegations are implausible, contrary to Ritz's original Complaint, contrary to the established facts, and they fail to satisfy the strict antitrust injury pleading requirements.

STM is a large international corporation that Ritz describes as "the world's sixth largest flash memory supplier." (FAC ¶ 116.) At the time SanDisk allegedly drove STM from the market, STM had annual revenues exceeding $5 billion. (RJN Ex. B at 4.) Moreover, the '338 and '517 patents underlying SanDisk's alleged *Walker Process* fraud were due to expire on December 15, 2009 and April 13, 2009, respectively. (RJN at 2-4.) Under these circumstances, it is simply implausible that SanDisk's infringement claims drove Ritz, an experienced and sophisticated patent litigant, from the flash business.

The Court need not guess as to the implausibility of Ritz's allegations because STM itself repeatedly told its shareholders and the SEC throughout the litigation with SanDisk that it did not view the litigation as a serious threat. As noted, STM stated in its May 2005 Form 6-K that "[b]ased on management's current assumptions made with support of the company's outside attorneys, the Company does not believe that the SanDisk litigation will result in a probable loss." (RJN Ex. G at F-19.) This was right after the litigation commenced. STM made similar statements in the SEC filing it made in March 2008 (when Ritz claims SanDisk's patent suits drove STM from the market), and again in May 2009, STM's last filing mentioning the SanDisk litigation prior to the settlement. (*See* RJN Ex. B at 121 & Ex. H at 25.) Further undermining Ritz's allegations is its failure to allege that SanDisk ever obtained any relief against STM as a result of its lawsuits.

Moreover, Ritz is well aware that its allegations in the FAC that STM left the flash memory products market in March 2008 are false. As Ritz alleged in its original Complaint and as STM reported to the SEC, STM made a strategic business decision in 2007 to enter into a joint venture with Intel, which resulted in the formation of Numonyx effective in March 2008. (*See* Ritz's Complaint (Dkt. 1) ¶ 115; RJN Ex. C at 10.) STM reported to the SEC that it entered the Numonyx joint venture with Intel in order to "benefit from critical size to be competitive in this market."

> As a result of a strategic review of our product portfolio, in 2008 we divested our Flash Memory activities by combining our business with that of Intel and creating Numonyx, a new independent semiconductor company in the area of Flash memories. The intent is that Numonyx will benefit from critical size to be competitive in this market. The transaction concerning the creation of Numonyx closed on March 30, 2008.

(RJN Ex. C at 10.) STM's formation of Numonyx with Intel did not injure competition, but rather created a potentially **more formidable** flash competitor.

There is absolutely no reason for this Court to credit Ritz's implausible and inaccurate allegations over the public statements made by STM to the SEC and its shareholders.

Ritz's allegation that SanDisk's patent suits prevented an STM/Hynix joint venture is similarly implausible and contrary to the facts. STM in fact entered a joint venture with Hynix on November 16, 2004 to build a front-end memory-manufacturing facility in China. (RJN Ex. B at 29.) STM subsequently transferred its interest in this joint venture with Hynix to the Numonyx joint venture with Intel. (RJN Ex. D at 62.)

Finally, Ritz's allegations that Defendants' actions caused purchasers of NAND "raw and finished flash" to pay "above-competitive, monopoly prices for these products since June 25, 2006" are entirely hypothetical and speculative. Even if the Court were willing to ignore the facts, Ritz's antitrust injury theory requires the Court to accept a series of wholly-speculative leaps that, but for SanDisk's alleged anticompetitive conduct: (i) STM and Hynix would have entered some sort of manufacturing joint venture, (ii) the hypothetical STM/Hynix joint venture would have received antitrust approval from the Federal Trade Commission and its foreign counterparts, (iii) the hypothetical STM/Hynix joint venture would have been more pro-competitive than the STM/Intel Numonyx joint venture, and (iv) this series of hypothetical events would have resulted in lower prices for "raw and finished" flash products. It is settled, however, that antitrust plaintiffs like Ritz, whose claims are informed by "nothing but speculation," lack antitrust standing. *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 543 (1983). *See also City of Pittsburgh*, 147 F.3d at 267-68; *Kroger*, 701 F. Supp. 2d at 956-57; *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1126 (E.D. Cal. 2004).

C. SanDisk And Dr. Harari Could Not, As A Matter Of Law, Form An Antitrust Conspiracy (Count I)

As the Supreme Court held in *Copperweld Corp. v. Independence Tube Corp*, a corporation and its officers and employees constitute a single economic entity legally incapable of forming an antitrust conspiracy:

> The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent economic goals. . . . For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.

467 U.S. 752, 769 (1984). Although *Copperweld* involved a claim under Section 1 of the Sherman Act, this blackletter rule is equally applicable to claims under Section 2. *See, e.g., Levi Case Co., Inc. v. ATS Prods., Inc.*, 788 F. Supp. 428, 430-32 (N.D. Cal. 1992) (applying *Copperweld* and dismissing a Section 2 claim).

Count I of the FAC is based on a supposed "conspiracy to monopolize" between SanDisk and Dr. Harari. (*See* FAC ¶ 125.) Ritz concedes, however, that Dr. Harari has served as SanDisk's CEO at all times pertinent to Ritz's claims. (*See* FAC ¶¶ 7; *see also* RJN Ex. A at 12 ("Dr. Eli Harari, the founder of SanDisk, has served as Chief Executive Officer and as a director of SanDisk since June 1988.").) Because SanDisk and Dr. Harari are therefore legally incapable of forming an antitrust "conspiracy," Count I should be dismissed as a matter of law with prejudice.

D. The Anticompetitive Conduct Underlying Count II Is Fatally Flawed

1. Ritz Lacks Standing To Pursue A *Walker Process* Claim

Although litigation to enforce a patent is ordinarily immune from antitrust liability unless the litigation is objectively baseless, the Supreme Court's holding in *Walker Process Equipment, Inc. v. Food Machinery Chemical Corp.*, 382 U.S. 172 (1965), provides an exception to that immunity: "the enforcement of a patent procured by fraud on the Patent Office may be violative of [Section] 2 of the Sherman Act provided the other elements necessary to a [Section] 2 case are present." *Id.* at 174. "If a patent is valid, a *Walker Process* claim cannot stand." *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 684 (2d Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 5279 (June 28, 2010)) (citing *Walker Process Equip., Inc.*, 382 U.S. at 173). Proving a *Walker Process* claim, therefore, necessarily requires challenging the validity of the patent-at-issue and *Walker Process* claims are, with few exceptions, brought as counterclaims in patent infringement actions. *See, e.g., In re DDAVP*, 585 F.3d at 689 ("*Walker Process* claims are based on a fraudulently obtained patent, and are typically brought as counterclaims in patent infringement suits: the plaintiff claims the defendant infringed his patent, and the defendant responds that the

patent was invalid as fraudulently obtained, and that the plaintiff's enforcement efforts violate *Walker Process*."); *Kroger*, 701 F. Supp. 3d at 960 (same); *In re Remeron Antitrust Litigation*, 335 F. Supp. 2d 522, 529 (D.N.J. 2004) ("*Walker Process* and its progeny involve antitrust counterclaimants who were potential or actual competitors in patent infringement suits.").

Cases involving *Walker Process* challenges to patent validity/enforceability by direct purchasers (like Ritz), rather than competitors (like STM), have almost uniformly been dismissed on the grounds that direct purchasers lack standing to pursue such claims. For example, the court dismissed the *Walker Process* claim brought by direct purchasers of a drug in *In re Remeron*, reasoning that "*Walker Process* and its progeny involve antitrust counterclaimants who were potential or actual competitors in patent infringement suits." 335 F. Supp. 2d at 529. Because the direct purchasers "neither produced [the drug] nor would have done so . . . [and they] were not party to the initial patent infringement suits," the court concluded they lacked standing to pursue a *Walker Process* claim. *See also Kroger*, 701 F. Supp. 3d at 962 (granting motion to dismiss direct purchaser claim, noting that "the balance of the courts interpreting standing of consumers in *Walker Process* claims deny such parties standing"); *Kaiser Foundation Health Plan, Inc. v. Abbott Laboratories, Inc.*, 2009 WL 3877513, at * 4 (C.D. Cal. Oct. 8, 2009) (holding direct purchaser lacked standing to bring a *Walker Process* claim); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 363 F. Supp. 2d 514 (E.D.N.Y. 2005) ("[N]on-infringing consumers of patented products who may feel that they are being charged supracompetitive prices by the patentee have no cause of action to invalidate the patent."); *cf. Asahi Glass Co.*, 289 F. Supp. at 995 (Posner, J., sitting by designation) (holding the fraud at issue in a *Walker Process* claim is directed at a patentee's competitors and therefore suppliers of inactive pharmaceutical ingredients for those competitors lacked standing). As Judge Walter recognized in *Kaiser Foundation*¸ denying direct purchasers standing:

> preserves the appropriate balance between antitrust and patent law. It avoids the risk of overdeterrence by allowing both competitors the right to sue resulting in damage recoveries that exceed the social costs of such violations and preserves the full strength of patent incentives to engage in research and development.

2009 WL 3877513, at * 4 (citation omitted).

The Second Circuit recently crafted a narrow exception to this rule in *In re DDAVP* for direct purchasers bringing a *Walker Process* claim involving a patent that has already been held unenforceable in litigation between the patent owner and a competitor. Based on the fact that the direct purchaser plaintiffs in that case were challenging an "already tarnished patent," the Second Circuit stated "[w]e therefore hold only that purchaser plaintiffs have standing to raise *Walker Process* claims for patents that are **already unenforceable due to inequitable conduct**." 585 F.3d at 690-91 (emphasis added). The Second Circuit noted that "giving *Walker Process* standing to the [direct purchaser] plaintiffs, who cannot directly challenge the '398 patent's validity, could result in an avalanche of patent challenges, because direct purchasers otherwise unable to challenge a patent's validity could do so simply by dressing their patent challenge with a *Walker Process* claim." *Id.* at 691. Based on the potentially serious consequences of "expanding the universe of patent challengers" and "disturbing the incentives for innovation," the Second Circuit specifically declined to decide "whether purchaser plaintiffs *per se* have standing to raise *Walker Process* claims." *Id.* at 691-92.

Most recently, the district court in *Kroger* analyzed the various decisions on this issue, including *In Re DDAVP* and the two decisions declining to dismiss direct purchaser claims on standing grounds,[6] and granted the defendants' motion to dismiss for lack of standing, finding "the reasoning of *In re Remeron* and *In re Ciprofloxacin* more persuasive[.]" 701 F. Supp. 3d at 962; *see also In re K-Dur Antitrust Litigation*, 2007 WL 5297755, at *11-*16 (D.N.J. Mar. 1, 2007) (comprehensive discussion of authority against direct purchaser *Walker Process* standing).

As cogently stated in *In re Ciprofloxacin*:

> Given that consumers are often subjected to monopoly prices for invalid patents, it is tempting to suggest that, as a policy matter, a rule should be fashioned giving consumers of drugs--and perhaps patented goods generally--the right to challenge the validity of patents. . . . Under the proposed rule, the consumers would have to show by clear and convincing evidence--as accused infringers must--that the subject

[6] One of those decisions, *In re Netflix Antitrust Litigation*, 506 F. Supp. 2d 308, 316 (N.D. Cal. 2007), was authored by Judge Alsup, who agreed with the other decision, *Molecular Diagnostics Labs v. Hoffmann-La Roche Inc.*, 402 F. Supp. 2d 276 (D.D.C. 2005). Judge Alsup's decision on this issue is *dicta* since he granted the dismissal motion based on the direct purchaser's failure to plead an "antitrust injury," and, in any event, Defendants believe, like the court in *Kroger*, that the decisions denying direct purchaser plaintiffs *Walker Process* standing reach the correct result.

> patent was invalid. This proposal would have the effect of allowing non-infringing consumers of a patented product to seek to invalidate the patent in order to allow price-reducing competitors to enter the market. **The desirability of such a change is a complex issue which . . . should be made by Congress, and not by the courts.**

363 F. Supp. 2d at 542 (emphasis added).

The district court in *Kroger* saw no "reason to disrupt the delicate balance between patent law and antitrust law that *Walker Process* delineated," and was influenced by the Second Circuit's restraint in this regard in *In re DDAVP*:

> The Second Circuit's decision specifically crafted a narrow holding so to not disturb this balance, and such narrowing is telling of the Second Circuit's hesitation to expand standing in *Walker Process* cases to all direct purchasers. [*In re DDAVP*, 585 F.3d] at 691-92 (Second Circuit specifically declined to decide "whether purchaser plaintiffs per se have standing to raise *Walker Process* claims."). This Court too will tread carefully so as not to open the door to all direct purchasers otherwise unable to challenge a patent's validity being able to do so by dressing their patent challenge with a *Walker Process* claim. Accordingly, the Court finds Plaintiffs lack standing to pursue their *Walker Process* claims.

701 F. Supp. 3d at 963.

Defendants believe that the correct result was reached in *In re Ciprofloxacin*, *Kroger* and the other decisions denying direct purchasers like Ritz standing to pursue *Walker Process* antitrust claims where, as here, the challenged patents have not previously been held unenforceable. The potential for creating a new class of direct purchaser antitrust "trolls" is a serious concern and, as recognized by the district judges in *In re Ciprofloxacin* and *Kroger*, "[t]he desirability of such a change is a complex issue which . . . should be made by Congress, and not by the courts." *See generally* Christopher R. Leslie, *The Role Of Consumers In Walker Process Litigation*, 13 Sw. J.L. & Trade Am. 281, 300 (2008) ("[F]rivolous litigation is more likely to be brought in the form of a consumer class action than by excluded competitors. While increasing the pool of potential plaintiffs from 5 competitors to 5 million consumers should increase deterrence, it also magnifies the risk of nuisance suits.").

Ritz's *Walker Process* claims should be dismissed for lack of standing.

2. Ritz's "Tortiously Converted" Patent Theory Fails To State A Cognizable Antitrust Injury

As noted, to state a Section 2 claim a plaintiff must plead "antitrust injury." *See McGlinchy v. Shell Chemical Co. v. Shell Chemical Co.*, 845 F.2d 802, 811-13 (9th Cir. 1988). Anticompetitive behavior does not necessarily cause antitrust injury:

> Conduct in violation of the antitrust law may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.

Atlantic Richfield Co. v. USA Petroleum, Co., 495 U.S. 328, 343-44 (1990) . Where "the injury flows from aspects of the defendant's conduct that are beneficial or *neutral to competition*, there is no antitrust injury, even if the defendant's conduct is illegal *per se*." *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) (emphasis added); *see also Pool Water Prods.*, 258 F.3d at 1034.

The substitution of one monopoly actor for another does not implicate the antitrust laws. *See, e.g., Columbia River People's Util. Dist. v. Portland Gen. Elec. Co.*, 217 F.3d 1187, 1190-91 (9th Cir. 2000) (holding no antitrust injury occurs where the issue is who is the rightful monopolist); *Reiffin v. Microsoft Corp.*, 158 F. Supp. 2d 1016, 1033-34 (N.D. Cal. 2001) (dismissing Sherman Act claim where "consumers would simply be subjected to the monopoly patent rights of a different party"). Consequently, the enforcement of a valid patent, even by an alleged "usurper," does not cause antitrust injury. *See Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266 (7th Cir. 1984) (affirming dismissal on the pleadings), *cert. denied*, 472 U.S. 1018 (1985).

In *Riegel Textile*, Brunswick invented a process for manufacturing antistatic yarn. *Id.* at 264. Brunswick disclosed the process to Riegel, who promised to keep the invention a secret. *Id.* Instead, Riegel sought and obtained a patent on Brunswick's invention. *Id.* Brunswick subsequently brought an antitrust suit against Riegel, alleging Riegel violated Section 2 by fraudulently obtaining a patent on Brunswick's invention and using the patent to monopolize the

production of antistatic yarn. *Id.* The district court dismissed on the pleadings. The Seventh Circuit affirmed, explaining "[i]f the invention is patentable, it does not matter from an antitrust standpoint what skullduggery the defendant may have used to get the patent issued or transferred to him." *Id.* at 265. The question of who rightfully owns the patent "has no antitrust significance" because "[t]he theft of a perfectly valid patent . . . creates no monopoly power; it merely shifts a lawful monopoly into different hands." *Id.* at 266 ("[T]o say that a patent should have been issued because the invention covered by it is patentable, but should have been issued to a different person and would have but for fraud . . . is to say in effect that the patentee stole the patent from its rightful owner; and stealing a valid patent is not at all the same thing, from an antitrust standpoint, as obtaining an invalid patent.").

Here, Ritz alleges that Dr. Harari and SanDisk violated Section 2 by tortiously converting patents rightfully owned by STM and enforcing those patents to exclude STM from the relevant market. (FAC ¶¶ 101, 109.) As in *Riegel Textile*, Ritz's converted patent theory fails because the alleged conversion of a valid patent did not create monopoly power; at most, it shifted ownership of that power from STM to SanDisk.[7]

Accordingly, Ritz's converted patent theory should be dismissed with prejudice because it fails, as a matter of law, to allege a cognizable antitrust injury.

3. Ritz's "Customer Threats" Theory Is Fatally Flawed Because The Alleged Misconduct Is Protected By The *Noerr-Pennington* Doctrine And Because Ritz Fails To Allege An Associated Antitrust Injury

(a) SanDisk is immune from antitrust liability based on its enforcement of document and deposition subpoenas.

Ritz alleges that "[i]n a successful effort to drive customers from STM, SanDisk has also enforced document and deposition subpoenas against numerous STM customers." (FAC ¶¶ 110.) Under the *Noerr-Pennington* doctrine,[8] however, citizens who petition the government for redress

[7] As discussed, Ritz does not have standing to challenge the validity or enforceability of the '338 and '517 patents, which are therefore presumed to be valid. *See* 35 U.S.C. § 282. Moreover, even if Ritz did have standing, this would at best support a *Walker Process* claim, not a conversion claim since there would be no "property" to convert if the patents were proven to be invalid.

[8] In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Supreme Court established the *(cont'd)*

of grievances are immune from antitrust liability, including when they seek relief in the courts. *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993) (citing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). "[I]n the litigation context, not only petitions sent directly to the court in the course of litigation but also 'conduct incidental to the prosecution of the suit' is protected by the *Noerr-Pennington* doctrine." *Sosa v. DirecTV*, 437 F.3d 923, 934 (9th Cir. 2006) (quoting *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525, 1528-29 (9th Cir. 1991) *aff'd* 508 U.S. 49 (1993)).

Noerr-Pennington immunity does not extend, however, to conduct which is in fact "a mere sham to cover what is nothing more than an attempt to interfere directly with business relationships of a competitor . . ." *Noerr Motor Freight, Inc.*, 365 U.S. at 144. A lawsuit is a "sham" if it is (1) objectively baseless such that no reasonable litigant could realistically expect success on the merits, and (2) subjectively motivated by bad faith. *Id.*

Noerr-Pennington immunity extends to SanDisk's alleged enforcement of document and deposition subpoenas. *See Freeman v. Lasky, Hass & Cohler*, 410 F.3d 1180 (9th Cir. 2005). In *Freeman*, the plaintiff brought suit alleging that discovery misconduct in related litigation constituted an antitrust violation. *Id.* at 1183. The Ninth Circuit held that discovery communications, while not themselves petitions, constituted "conduct incidental to a petition." *Id.* at 1184 (internal quotation marks omitted). Therefore, unless the underlying lawsuit was a sham, the defendants' discovery communications were within the *Noerr-Pennington* doctrine. *Id.*; *see also Sosa*, 437 F.3d at 935 n.7 ("In *Freeman*, we answered the question left open in [*Theofel v. Farey-Jones*, 359 F.3d 1066, 1078-79 (9th Cir. 2004)], concluding that private litigation communications in commercial litigation sufficiently implicate the exercise of petitioning rights to trigger *Noerr-Pennington* protection.").

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basic principle of antitrust petitioning immunity, that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670. In *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court extended petitioning immunity to joint efforts to influence adjudicative bodies.

Here, Ritz does not allege that the lawsuits underlying the document and deposition subpoenas SanDisk allegedly enforced against STM's customers were shams. (FAC *passim*.) Moreover, Ritz could not plausibly allege that SanDisk's enforcement of the '338 and '517 patents was a sham because this Court has already found that SanDisk's prior litigation success related to these patents bars a sham litigation claim "as a matter of law." *See SanDisk Corporation v. STMicroelectronics, Inc.*, 2008 WL 4615605, at * 10 (N.D. Cal. Oct. 17, 2008). Accordingly, Ritz's allegation that SanDisk violated Section 2 by enforcing document and deposition subpoenas fails as a matter of law.

(b) SanDisk is immune from liability based on litigation-related communications and Ritz fails to allege any associated antitrust injury.

Ritz also alleges that SanDisk "threatened members of the proposed Class who purchase NAND flash memory from SanDisk's competitors." (FAC ¶ 110.) The majority of federal courts have concluded, however, that pre-litigation communications reasonably related to potential litigation are entitled to *Noerr-Pennington* immunity.[9] Indeed, unless the communication is objectively baseless, federal courts have extended *Noerr-Pennington* immunity to a party's communications with a competitor's customers. *GP Ind., Inc. v. Eran Indus.*, 500 F.3d 1369 (Fed. Cir. 2007) (holding that letters to customers must be based on objectively baseless claims to fall outside *Noerr-Pennington*).[10]

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[9] *See e.g., Sosa*, 437 F.3d at 938; *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367, 1377 (Fed. Cir. 2004) (holding pre-litigation communications alleging patent infringement must be objectively baseless to support liability); *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 252-253 (3d Cir. 2001) (settlement agreements); *Primetime 24 Joint Venture v. Nat'l Broad. Co.*, 219 F.3d 92, 100 (2d Cir. 2000) (pre-suit challenges to signal strength determinations by satellite broadcasters); *Glass Equip. Dev., Inc. v. Besten, Inc.*, 174 F.3d 1337, 1343-1344 (Fed. Cir. 1999) (threat of patent enforcement litigation); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1558-60 (11th Cir. 1992) (concerted threats of litigation); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) (generalized threats of litigation to protect claim to oil assets).

[10] *See also Eazypower Corp. v. Alden Corp*, 2003 WL 22859492 (N.D. Ill. Dec. 2, 2003); *Beau Rivage Resorts, Inc. v. Bel Aire Prods.*, 2008 WL 1868437 (S.D. Miss. Apr. 24, 2008); *Matsushita Elecs. Corp. v. Loral Corp.*, 974 F. Supp. 345, 359 (S.D.N.Y. 1997) (extending immunity to infringement warning letters sent to customers of defendants); *Thermos Co. v. Igloo Prods. Corp.*, 1995 WL 842002, at *4-5 (N.D. Ill. Sept. 27, 1995) (extending immunity to cease and desist letters sent to alleged trademark infringers); *Barq's Inc. v. Barq's Beverages, Inc.*, 677 F. Supp. 449, 453 (E.D. La. 1987) ("Here the litigation was initiated in good faith. Therefore plaintiff's actions (including letters to suppliers and demand letters) which preceded the filing of this lawsuit are also

(cont'd)

Here, SanDisk's alleged communications with competitor customers relate to potential litigation and actual litigation with SanDisk competitors. Further, as noted above, Ritz does not and could not allege that SanDisk's enforcement related communications regarding the patents-at-issue in this action were objectively baseless. Accordingly, SanDisk's alleged communications enjoy *Noerr-Pennington* immunity. *See, e.g.*, *Contech Stormwater Solutions, Inc. v. Baysaver Techs., Inc.*, 534 F. Supp. 2d 616 (D. Md. 2008) (affirming summary judgment where notice of lawsuit letter sent to a competitor's customers alleging patent infringement and threatening retaliation was not objectively baseless).

Further, Ritz's customer threat theory is facially inadequate because Ritz fails to allege facts plausibly suggesting an injury stemming from SanDisk's alleged threats. Ritz does not allege that any competitor customer responded to SanDisk's alleged threats by altering its purchasing behavior, much less that a sufficient number of competitor customers altered their purchasing behavior to result in harm to competition, as opposed to harm to a specific competitor. (FAC *passim*.) *See McGlinchy*, 845 F.2d at 811-12 ("The antitrust laws were enacted for 'the protection of competition, not competitors.'"). Accordingly, Ritz's customer threat theory fails to state a claim. *Id.* at 811-13 (holding plaintiffs must allege antitrust injury to state a Section 2 claim).

(c) SanDisk's decision to cease doing business with Ritz was lawful and Ritz fails to allege any resulting antitrust injury.

Ritz also alleges that SanDisk violated Section 2 by terminating Ritz as a customer in retaliation for the filing of this action. (FAC ¶¶ 9, 111.) The law is clear, however, that "a party may refuse to deal with another 'provided there is no effect that contravenes the antitrust laws.'"

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protected under the *Noerr-Pennington* petitioning immunity."); *Aircapital Cablevision, Inc. v. Starlink Commc'ns Group, Inc.*, 634 F. Supp. 316, 323-26 (D. Kan. 1986) (observing that publicity about non-sham litigation and its indirect threats of litigation against Starlink's customers were incidental to non-sham litigation and thus protected under the *Noerr-Pennington* immunity doctrine); *accord Fisher Tool Co. v. Gilet Outillage*, 530 F.3d 1063 (9th Cir. 2008) (holding that threats to customers did not violate the Lanham Act absent a showing of bad faith); *cf. Meridian Project Sys., Inc. v. Hardin Constr. Co., LLC*, 404 F. Supp. 2d 1214, 1222 (E.D. Cal. 2005) (finding fraudulent statements to competitor customers not immune under *Noerr-Pennington*).

Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 889 (9th Cir. 1982) (citing *Mut. Fund Investors, Inc. v. Putnam Mgmt. Co.*, 553 F.2d 620, 626 (9th Cir. 1977)).

In *House of Materials, Inc. v. Simplicity Pattern Co., Inc.*, 298 F.2d 867 (2d Cir. 1962), the court held that a manufacturer's refusal to deal with a retailer after the retailer filed an antitrust suit against the manufacturer did not violate the Sherman Act, explaining:

> Appellee does not cite, and we have not found any case in which a "refusal to deal" based on a customer's prosecution of a suit against a manufacturer has been held to constitute an unreasonable restraint of trade. This when considered is not astonishing, for the relationship between a manufacturer and his customer should be reasonably harmonious; and the bringing of a lawsuit by the customer may provide a sound business reason for the manufacturer to terminate their relation.

Id. at 889-90 (internal citations omitted). *See also Zoslaw*, 693 F.2d at 890 (explaining that "avoiding future litigation whose costs exceeded the benefits from doing business with appellants" was a legitimate business reason for the accused monopolist to refuse to deal).

Here, Ritz fails to allege facts plausibly suggesting that SanDisk's decision to cease doing business with Ritz had an effect that contravenes antitrust law. (FAC *passim*.) Instead, Ritz alleges SanDisk's decision was an attempt to deter Ritz and members of the putative class from pursuing antitrust claims against SanDisk. (FAC ¶ 111.) Ritz does not, however, allege that it or any putative class member was actually deterred. (FAC *passim*.) Ritz does not allege that it has been unable to obtain flash memory products from an alternate source, or that it has otherwise been injured by SanDisk's decision to stop doing business with Ritz. (*Id.*)

Further, even if Ritz had alleged that it was injured by SanDisk's decision, a "manufacturer's refusal to deal does not violate the antitrust laws merely because it adversely affects the entity refused." *Marquis v. Chrysler Corp.*, 577 F.2d 624, 640 (9th Cir. 1978); *Sadler v. Rexair, Inc.*, 612 F. Supp. 491, 494 (D. Mont. 1985) ("It is not an antitrust violation for a manufacturer to change distributors even if the effect is to seriously damage the former distributor's business."). The anticompetitive impact must rise to the level of an antitrust injury, and, therefore, any harm to the entity refused is "immaterial when the refusal is 'for business reasons which are sufficient to the manufacturer . . . in the absence of any arrangement restraining

trade.'" *Marquis*, 577 F.2d at 640 (quoting *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119 (9th Cir. 1972)). Ritz does not allege an arrangement in restraint of trade.

Finally, Ritz's conclusory allegation that SanDisk's decision was "a further act to maintain unlawfully its monopoly" is implausible on it face. SanDisk allegedly monopolized the flash memory market by enforcing the '338 and '517 patents. These patents expired prior to SanDisk's decision to cease doing business with Ritz. The FAC is devoid of any explanation, conclusory or otherwise, as to how SanDisk's decision to cease doing business with Ritz would permit SanDisk to maintain a monopoly based on expired patents. (FAC *passim*.)

4. Ritz's "Anticompetitive Settlement" Theory Fails To State A Claim

Ritz admits that it does not know the terms of the settlement agreement between SanDisk and STM. (FAC ¶ 119.) Nevertheless, Ritz speculates that the agreement "appears to have been used to entrench" SanDisk's monopoly by "ratifying" STM's exit from the flash product market, failing "to provide a means for STM to re-enter the market" and removing the "threat of a STM/Hynix joint venture capable of mounting a major competitive challenge to SanDisk." (*Id.* ¶¶ 10 & 119.)

This pure speculation is implausible and, as STM's SEC filings disclose, wrong. As discussed, STM did not exit the market in March 2008. Rather, in May 2007, more than two years before SanDisk and STM settled, STM elected to enter the Numonyx flash memory joint venture with Intel. The SanDisk/STM settlement agreement could not have "ratified" STM's exit from the market because STM continued to compete in the flash market through Numonyx until February of this year, when STM and Intel sold Numonyx to Micron. This sale provided STM with "an exceptional gain of $265 million on the Numonyx equity divestiture, for which [STM] received shares of Micron common stock, evaluated at $583 million at closing, as compensation." (RJN Ex. E at 9.)

Further, since STM had not left the market, Ritz's claim that the SanDisk/STM settlement agreement failed to provide a means for STM to re-enter the market is baseless. Further, even if STM's decision to enter a joint venture with Intel constituted an "exit" from the market – which it did not – SanDisk was under no duty to assist STM in "re-entering" the market. In truth, STM

only "exited" the market in May of this year, well after the settlement with Defendants, in connection with Micron's acquisition of Numonyx, and STM was well rewarded for its exit.

Similarly, STM's settlement with SanDisk did not "remove the threat" of an STM/Hynix joint venture. As explained, STM entered a joint venture with Hynix in November 2004 and subsequently transferred its interest in that joint venture to Numonyx.

Moreover, Ritz's "anticompetitive" settlement theory fails as a matter of law. "It is well settled that '[w]here there are legitimately conflicting [patent] claims . . ., a settlement by agreement, rather than litigation, is not precluded by the [Sherman] Act,' although such a settlement may ultimately have an adverse effect on competition." *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 202 (2d Cir. 2006) (quoting *Standard Oil Co. v. United States*, 283 U.S. 163, 171 (1931)) (additional citations omitted); *see also In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d at 1333 ("Because the court found no anticompetitive effects outside the exclusionary zone of the patent, it concluded that the Agreements were not violative of Section 1 of the Sherman Act. We find no error in the court's analysis." (internal citations omitted)); *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1220 (4th Cir. 1976) ("[T]he settlement of patent litigation, in and of itself, does not violate the antitrust laws."). To the contrary, "[t]he general policy of the law is to favor the settlement of litigation, and the policy extends to the settlement of patent infringement suits." *Asahi*, 289 F. Supp. 2d at 991. "[A]bsent an extension of the monopoly beyond the patent's scope . . . the question is whether the underlying infringement lawsuit was objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 213 (citations and quotation marks omitted). *See also Valley Drug Co.*, 344 F.3d at 1311 (holding where settlement agreement is within the scope of the patent, settlement is not subject to antitrust scrutiny).

Ritz does not and could not allege that SanDisk's patent infringement suits against STM were objectively baseless because this Court has already held that they were not. *SanDisk Corporation v. STMicroelectronics, Inc.*, 2008 WL 4615605, at * 10 (N.D. Cal. Oct. 17, 2008) (holding that STM's "sham litigation" claims fail as a matter of law due to SanDisk's prior litigation success). Ritz also does not and cannot allege that the settlement agreement between

SanDisk and STM extended the scope of either the '338 patent or the '517 patent. The '517 patent expired on April 13, 2009 **before** the settlement. Although the '338 patent did not expire until December 15, 2009, three month after the settlement, Ritz does not and could not plausible allege that SanDisk used the global settlement with STM to extend the scope of a patent that expired shortly after the agreement was signed.

E. Ritz Fails To Allege A Relevant Antitrust Market (Counts I And II)

"In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market.'" *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044 (9th Cir. 2008).[11] "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). "'Interchangeability implies that one product is roughly equivalent to another for the use to which its put,' . . . while '[c]ross-elasticity of demand is a measure of the substitutability of products from the point of view of buyers.'" *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, 2010 WL 1541257, at * 2 (N.D. Cal. Apr. 16, 2010) (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437 & 438 n.6 (3d Cir. 1997)). Thus, "a cognizable product market consists of 'commodities reasonably interchangeable by consumers for the same purposes.'" *Id.* (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)). "Whether products are part of the *same or different markets* under antitrust law depends on whether consumers view those products as reasonable substitutes for each other and would switch among them in response to changes in relative prices." *Apple, Inc. v. Pystar Corp.*, 586 F. Supp. 2d 1190, 1196 (N.D. Cal. 2008) (emphasis added).

[11] *See also Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F. 3d 430, 437 (6th Cir. 2008) (upholding dismissal of complaint for failing to plead a plausible relevant market); *Tanaka v. University of Southern California*, 252 F.3d 1059, 1063 (9th Cir. 2001) ("Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim."); *McCabe Hamilton & Renny, Co. v. Matson Terminals, Inc.*, 2008 WL 2437739, at *7 (D. Haw. June 17, 2008) ("For example, where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient, and dismissal is warranted." (internal quotation marks and citations omitted)).

Dismissal is warranted "if the complaint's 'relevant market' definition is facially unsustainable," *Newcal*, 513 F.3d at 1045, including where the alleged market encompasses products that are not reasonably interchangeable. *See, e.g.*, *Golden Gate Pharmacy*, 2010 WL 1541257, at *4. For example, in *Golden Gate Pharmacy*, the plaintiffs' Second Amended Complaint alleged the relevant market encompassed the "manufacture, sale and innovation of *all* pharmaceutical products, prescription pharmaceutical products, non-prescription pharmaceutical products, brand name pharmaceutical products and particular pharmaceutical products and therapies specifically noted and identified by Pfizer and Wyeth in their annual reports." *Id.* at *3. The district court dismissed for failure to allege adequately a relevant product market, explaining:

> Plaintiffs fail to allege that all commodities sold by entities who compete in the "pharmaceutical industry" are reasonably interchangeable with one another, or that "all pharmaceutical products," all "prescription pharmaceutical products," all "non-prescription pharmaceutical products," or all "brand-name pharmaceuticals products" are reasonably interchangeable with one another. As the Court noted in its order dismissing the First Amended Complaint, with reference to plaintiffs' allegation included therein that all prescription drugs constituted a product market, *the Court cannot 'simply assume that all prescription drugs are reasonably interchangeable for the same purposes, such that, for example, if the price of a prescription drug used to treat osteoporosis rises, consumers may react by switching to a prescription drug used to treat Alzheimer's disease.'"*

Id. (emphasis added).

Similarly, in *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 536 F. Supp. 2d 1191, 1196 (N.D. Cal. 2008), the court dismissed an antitrust claim for failure to allege a relevant market because the alleged markets (the "retail ticket sales market" or the "ticket resale market") could encompass both tickets and ticket distribution services.

> [T]he Court has no difficulty whatsoever in finding, as a matter of law, that ticket distribution services and tickets do not belong in the same market. What happens in one market may be relevant to what happens in the other market, but in no sense whatsoever are "ticket distribution services" a viable substitute for tickets themselves. There is no "interchangeability of use" or "cross-elasticity of demand" between tickets and ticket distribution services. *Someone who wants to attend a Lakers game is not going to find that the opportunity to sell tickets on TeamExchange is a reasonable substitute for a ticket to the game.*

Id. at 1196 (emphasis added); *see also Analogix Semiconductor, Inc. v. Silicon Image, Inc.*, 2008 WL 8096149, *5-6 (N.D. Cal. Oct. 28, 2008) (finding relevant market allegations

inadequate where the plaintiff failed to describe the interchangeability of discrete and indiscrete HDMI solutions).

Ritz alleges that the "relevant product market for NAND flash memory" consists of "raw and finished NAND flash memory products . . . used as components in a wide array of consumer, camera, mobile telephone, digital player, and computing products." (FAC ¶ 25.) As in *Golden Gate Pharmacy* and *Ticketmaster*, Ritz's market allegations fail because Ritz alleges no facts suggesting that consumers view all the products encompassed within the alleged market as "reasonably interchangeable." In fact, common sense and judicial experience provide the Court with a sufficient basis to reject Plaintiffs' overly broad market definition. *See E&E Co. v. Kam Hing Enters., Inc.*, 2008 WL 3916256, at *3 (N.D. Cal. Aug. 25, 2008). There are numerous and very different flash memory products designed for various uses. (FAC ¶¶ 2, 25.) A consumer who wants a flash memory card for his or her digital camera is not going to find an SSD computer hard drive to be a reasonable substitute. Likewise, a consumer who wants a finished flash memory product is not going to be happy receiving raw flash memory components. In short, common sense confirms that the relevant market alleged in the FAC is fatally flawed.

Accordingly, Ritz's allegation that SanDisk possesses a 75% share of some market is meaningless: "Without a proper definition of the relevant market, it is impossible to determine a party's influence over that market." *Cargill, Inc. v. Budine*, 2007 WL 2506451, *8 (E.D. Cal. Aug. 30, 2007) (citing *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F. 2d 1369, 1374 (9th Cir. 1989)); *accord Analogix Semiconductor*, 2008 WL 8096149, at *6-7.

Ritz's failure to define a plausible relevant market mandates dismissal. *See, e.g., Tanaka*, 252 F. 3d at 1059 (failure to allege a plausible relevant market is "a proper ground for dismissing a Sherman Act complaint"); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F. 2d 139, 143 (9th Cir. 1989) (plaintiff bears the burden of demonstrating a relevant market for antitrust purposes); *Apple, Inc.*, 586 F. Supp. 2d, at 1190 (dismissing tying claims because relevant market allegations were implausible); *McCabe Hamilton & Remy*, 2008 WL 2437739, at *7

("The [complaint] includes no facts indicating that the identified market bears any relation to the methodology necessary in defining the relevant market.").

IV. CONCLUSION

For the foregoing reasons, Defendants' motion should be granted and the FAC should be dismissed. Because Ritz cannot amend to overcome the multiple flaws in the FAC, Defendants urge that the dismissal be with prejudice.

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