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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,<br><br>Plaintiff,<br><br>v.<br><br>SANDISK CORPORATION and ELIYAHOU HARARI,<br><br>Defendants. | CASE NO.: 5:10-CV-02787 JF<br><br>**RITZ CAMERA & IMAGE, LLC'S OPPOSITION TO DEFENDANT SANDISK CORPORATION'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND REQUEST FOR JUDICIAL NOTICE**<br><br>Date: December 17, 2010<br>Time: 9:00 AM<br>Judge: Honorable Jeremy Fogel |

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## INTRODUCTION

Plaintiff Ritz Camera & Image, LLC ("RCI"), on behalf of itself and others similarly situated (collectively, "Plaintiffs"), allege a standard case of monopoly abuse leading to supra-competitive, monopoly prices. Over a period of several years, SanDisk Corp. ("SanDisk") engaged in a host of activity designed to reduce or eliminate competition in the market for raw and finished NAND flash memory—a commonly used digital storage technology used in consumer electronic devices. It intentionally withheld material prior art from the United States Patent and Trademark Office ("USPTO") in order to obtain two "crown jewel" patents covering NAND flash memory technology and then wrongfully exploited those patents by suing its competitors for infringement. The "crown jewel" patents SanDisk enforced against STMicroelectronics, Inc. ("STM") and other competitors were based on technology and knowledge SanDisk, in concert with its founder, Dr. Eliyahou Harari, intentionally stole from its competitor Wafer Scale Integration, Inc. ("WSI")—the company STM purchased in 2000 (with STM remaining as the surviving corporation). SanDisk's actions have had devastating effects on the market for NAND technology, and ultimately, STM, SanDisk's major competitor, was forced to exit the market.

In addition to bludgeoning its competitors with infringement actions to drive them from the market, SanDisk threatened its competitors' customers through harassing litigation and sales tactics; retaliated against RCI by terminating its supply of NAND flash memory in order to prevent it from vindicating its legitimate claims as to SanDisk; and entered into a global Settlement Agreement with STM that was intended to, and in fact did, drive STM from the NAND flash memory market. The obvious result of SanDisk's anticompetitive campaign was reduced competition and artificially higher prices in the market for NAND flash memory. Plaintiffs have all had to pay—and indeed are still paying—those higher prices.

SanDisk's motion to dismiss ("MTD") argues that Plaintiffs do not sufficiently allege antitrust injury. As the Supreme Court has recognized, however, the injury Plaintiffs allege—higher prices—is *precisely* the type of injury Congress intended the antitrust laws to prevent. *See Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983) ("[T]he Sherman Act was enacted to assure customers the benefits of price competition."). Plaintiffs' First Amended Complaint ("FAC") (DN 27) contains detailed allegations of SanDisk's anticompetitive behavior that led to reduced competition, *see, e.g.*, FAC ¶¶ 35-122, and repeatedly alleges that Plaintiffs were harmed by SanDisk's conduct through higher prices, *see id.* ¶¶ 5-6, 13, 21, 32, 34, 73, 109, 122-123, 129, 134. Plaintiffs' FAC furthermore contains allegations that, upon information and belief, "[i]n late 2009 SanDisk entered into a secret global agreement with STM settling federal and state litigation matters." *Id.* ¶ 112. Plaintiffs allege SanDisk "used [the Settlement Agreement] to entrench the SanDisk monopoly in [the NAND flash memory] market . . . [and] ensur[e] one if its most formidable competitors—STM—would pose no further competitive challenge, nor continue to challenge the fraudulent patents SanDisk had repeatedly used to suppress competition." *Id.* ¶ 119. Although the Settlement Agreement has not been disclosed to Plaintiffs, all the external indications suggest that discovery will confirm the Settlement Agreement was unlawfully anticompetitive.

Contrary to SanDisk's erroneous assertions, Plaintiffs' allegations easily meet the minimal "plausibility" standard for pleading set forth in Rule 8 of the Federal Rules of Civil Procedure, as well as *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1947, 1949 (2009). SanDisk's arguments ask this Court to look beyond the face of the FAC and resolve factual disputes that should not be resolved on a motion to dismiss.

## STATEMENT OF FACTS

### A. Industry Background

Flash memory is a non-volatile computer storage chip that can be electrically erased and reprogrammed. *See* FAC ¶ 1. It is primarily used in memory cards, USB flash drives, MP3 players, and solid-state drives for the general storage and transfer of data between computers and other digital products. Flash memory is a specific type of Electrically Erasable Programmable Read Only Memory ("EEPROM"). *See id.* ¶ 2. There are two types of flash memory: NOR and NAND. They differ in important ways. NAND, for example, has lower erase and write times, requires less chip area per cell, and has up to ten times the endurance of NOR.

NAND flash memory—the type at issue in this case—comes in two forms: raw and finished. *See id.* "Raw" flash memory is the basic flash memory wafer that is produced by a fabrication plan or fab. *See id.* "Finished" flash memory products are used in, or with, various electronic products, such as flash memory cards, drives, and sticks used in digital cameras, mobile phones, portable digital audio/video players, personal computers, and global positioning systems. *See id.*

Before SanDisk drove STM out of the NAND flash memory market, it was one of SanDisk's largest competitors, being the sixth largest producer of flash memory worldwide. *See id.* ¶ 7. Today, over 75% of all NAND raw and finished flash memory products sold worldwide is either (a) manufactured and sold by SanDisk or its controlled and licensed joint venture with Toshiba, or (b) manufactured by other controlled licenses of SanDisk patents. *See id.* ¶ 12.

Plaintiff RCI operates over 300 stores nationwide selling cameras and other digital electronic products. Over the last four years, RCI has directly purchased tens of millions of dollars of flash memory products from SanDisk and, before SanDisk cut off its supply after the commencement of

this litigation, RCI was a major purchaser of NAND flash memory from SanDisk. *See id.* ¶ 16.

**B. SanDisk's Anticompetitive Conduct**

**i. Dr. Harari's fraudulent conversion of NAND flash memory technology**

SanDisk was founded on or about June 1988 by Dr. Harari.[1] *See id.* ¶ 103. Prior to founding SanDisk, Dr. Harari was an employee, officer, consultant, and/or director of WSI from 1983 to March 1989. *See id.* ¶ 75. During that time period, WSI, which designed and produced various kinds of semiconductor memory for computers and other electronic devices, *see id.* ¶ 80, was involved in the research and development of new flash memory technologies, including NAND, *see id.* ¶¶ 80, 85. While at WSI, Dr. Harari had a contractual obligation to (1) "promptly disclose and describe to [WSI] . . . all inventions, improvements, discoveries and technical developments" made by him and to assign to WSI the rights to such inventions, and (2) not disclose, "either during or after [his] term of [his] employment [with WSI] . . . any proprietory or confidential information or know-how belonging to [WSI]" without WSI's prior written consent. *See id.* ¶ 79. Dr. Harari also had fiduciary obligations not to enter into any business in competition with WSI, to protect and preserve the assets of WSI, and to bring business opportunities in WSI's line of business to the attention of WSI and not appropriate the opportunity for himself. *See id.* ¶ 86.

On March 15, 1989, Dr. Harari filed a patent application with the USPTO entitled "Method of making dense flash EEprom semiconductor memory structures"; the USPTO granted the application and issued U.S. Patent No. 5,070,032 (the "'032 patent"). *See id.* ¶ 101. On April 13, 1989, several weeks before WSI accepted Dr. Harari's resignation in May 1989, Dr. Harari filed two more patent applications with the USPTO. *See id.* ¶ 94. Although he ultimately

[1] The FAC's reference to "June 1989" was an error. The correct date is June 1988.

abandoned those two patents, he took the misappropriated technology described therein and incorporated it into a new application entitled "Multi-state EEprom read and write circuits and technique," which he filed on April 11, 1990, and that was subsequently issued as U.S. Patent No. 5,172,338 (the "'338 patent"). *See id.* SanDisk and Dr. Harari used the '338 patent (along with the closely-related U.S. Patent No. 5,991,517 (the "'517 patent")) to file a successful infringement action against Samsung and multiple infringement actions against STM, imposing $20,000,000 of legal fees on STM and driving it from the NAND flash memory market in 2008, *see* FAC ¶¶ 41, 95. Dr. Harari never disclosed the two April 1989 patent applications to WSI. *See id.* ¶ 97.

On or about June 1988, while Dr. Harari continued to serve as a Director of WSI, he founded SanDisk, which, from its inception, was in direct competition with WSI in the NAND flash memory market. *See id.* ¶¶ 103-104, 107. After founding SanDisk, Dr. Harari assigned the '032 and '338 patents, which resulted from his conversion of WSI technology, to SanDisk, thus benefitting a company in direct competition with WSI.[2] *See id.* ¶ 108.

**ii. SanDisk's infringement campaign to enforce its fraudulent patents**

As this Court is aware from its order denying SanDisk's motion for summary judgment on STM's fraud claims, *see* Order Plaintiff's Mot. Summ. J., *SanDisk Corp. v. STMicroelectronics, Inc.*, No. C -4-4379 JF (N.D. Cal. Oct. 17, 2008) (DN 273) ("STM Order"), there is a strong basis to believe that SanDisk fraudulently obtained the '338 and '517 patents (the "'crown jewel" patents) by failing to disclose material prior art of which it was aware to the USPTO. The prior art went directly to the patentability of the "crown jewel" patents, *see* FAC ¶ 35, and SanDisk's failure to disclose the art was intended to deceive the USPTO. *See id.* ¶¶ 36, 54, 58, 62, 65, 68, 71.

[2] On or about July 27, 2000, STM purchased WSI, and the two companies merged, with STM remaining as the surviving corporation. *See* FAC ¶¶ 18, 76.

After fraudulently obtaining the "crown jewel" patents, SanDisk wasted no time enforcing them in a series of litigation against its competitors. *See id.* ¶¶ 41, 116. It embarked on a successful infringement campaign against Samsung in 1996, forcing it to license SanDisk technology and forcing a large competitor into the SanDisk monopoly. *See id.* ¶ 41. It then set its sights on STM. In October 2004, just as STM was preparing a manufacturing joint venture with Hynix, SanDisk began the infringement campaign that ultimately forced STM to exit the NAND flash memory market. *See id.* ¶ 116. STM filed counterclaims for fraud, sham litigation, and unfair competition, and SanDisk moved for summary judgment. In October 2008, after STM had already been forced to exit the market, this Court denied SanDisk's motion as to STM's claims for fraud and granted its motion as to STM's claims for sham litigation and unfair competition. *See id.* ¶ 115; STM Order. Then, on the eve of trial, in late 2009, STM and SanDisk entered into a secret agreement settling that litigation, as well as three other litigation matters. *See* FAC ¶ 112.

**iii. SanDisk's threats against its competitors' customers**

In addition to bombarding its competitors with infringement actions based on wrongfully obtained patents, SanDisk also threatened members of the proposed Class who purchase from SanDisk's competitors with, among other consequences, disadvantageous prices and terms if they were later required to turn to SanDisk to purchase the necessary flash memory for their products. *See id.* ¶ 110. Furthermore, SanDisk has enforced document and deposition subpoenas against numerous STM customers and, shortly after this lawsuit was filed, SanDisk retaliated against RCI by terminating its supply of NAND flash memory. *See id.* ¶¶ 100-111.

**C. The Effects of SanDisk's Anticompetitive Conduct**

SanDisk's anticompetitive conduct successfully reduced competition in the market for NAND flash memory. *See id.* ¶¶ 126, 129, 132, 134. As Plaintiffs state repeatedly in their FAC,

because of SanDisk's efforts to reduce competition, since June 2006, they have been forced to pay higher, monopolistic prices for NAND flash memory products. *See id.* ¶¶ 5-6, 13, 21, 32, 34, 73, 109, 122-123, 129, 134.

## ARGUMENT

### I. Motion To Dismiss Standard

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint and whether the allegations entitle the complainant to the relief it seeks. *See Castaneda v. Burger King Corp.*, 597 F. Supp. 2d 1035, 1040 (N.D. Cal. 2009). "[F]actual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations under Rule 12(b)(6)." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). "'The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.'" *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357, at 598 (3d ed. 2004)).

To survive a motion to dismiss, a plaintiff need articulate only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8 requires only that a complaint give a defendant fair notice of the claims and raise claims from the level of mere speculation to that of plausibility. *See Twombly*, 550 U.S. at 570; *Iqbal*, 129 S. Ct. at 1949. The *Twombly/Iqbal* standard is *not* a probability standard. *See Twombly*, 550 U.S. at 556 (stating there is no "probability requirement at the pleading stage"); *Iqbal*, 129 S. Ct. at 1949 ("The plausibility standard is not akin to a probability requirement") (internal quotation marks omitted); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1046-47 (9th Cir. 2008). A plaintiff need not establish how probable or likely it is to ultimately succeed in recovering on its claim. The allegations need only provide facts plausibly "suggesting" unlawful conduct, *Twombly*, 550 U.S. at

557, and "allow[ing] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949; *see also Twombly*, 550 U.S. at 545 (explaining factual allegations must merely be enough "to raise a right to relief above the speculative level"). Indeed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that the actual proof of those facts is improbable." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted). Antitrust cases are not subjected to any higher standards than other cases. *See Iqbal*, 129 S. Ct. at 1953 (stating the *Twombly* pleading standard applies to "'all civil actions' . . . antitrust and discrimination suits alike").

Furthermore, when evaluating a complaint on a motion to dismiss, the court must assume the truth of all the plaintiff's allegations and draw every reasonable inference in the plaintiff's favor. *See Twombly*, 550 U.S. at 556 (factual matter should be "taken as true"); *Iqbal*, 129 S. Ct. at 1949 ("take all of the factual allegations in the complaint as true"); *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 983 (9th Cir. 1999). Thus, a plaintiff "need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged." *Corrections USA v. Dawe*, 504 F. Supp. 2d 924, 929 (E.D. Cal. 2007). Any ambiguities must be resolved in favor of the pleadings. *See Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973).

## II. Plaintiffs Demonstrate Antitrust Standing by Properly Alleging Antitrust Injury

Plaintiffs have suffered the effects of SanDisk's anticompetitive conduct in the form of higher flash memory prices. *See* FAC ¶¶ 5-6, 13, 21, 32, 34, 73, 109, 122-123, 129, 134. That is all that is required for Plaintiffs to have standing to bring suit under the antitrust laws. The antitrust laws are designed to combat unlawful harm to competition. *See Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003). To have standing to bring an antitrust action, a plaintiff must show five factors: "(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." *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996). The first factor, antitrust injury, consists of the following elements: "(1) unlawful conduct, (2) causing an injury to plaintiff, (3) that flows from that which makes the conduct unlawful, . . . (4) that is of the type the antitrust laws were intended to prevent," and (5) that the plaintiff "be a participant in the same market as the alleged malefactors." *Glen Holly Ent'mt., Inc. v. Tektronix Inc.*, 352 F.3d 367, 372 (9th Cir. 2003). SanDisk's argument (at 14) that Plaintiffs' allegations of harm do not satisfy antitrust injury pleading requirements fails as a matter of law.

SanDisk grossly distorts the standards articulated in *Twombly* and *Iqbal*. Those cases in no way suggest—as SanDisk argues—that a district court can weigh and decide disputed facts contained in a complaint on a motion to dismiss. *See, e.g.*, MTD at 14, 16 (arguing that RCI's FAC is "contrary to the established facts" and that the Court should not "credit Ritz's . . . allegations"). The question at this stage is only whether Plaintiffs have *alleged* facts that could lead a reasonable fact-finder to conclude that, if the facts alleged are true, Plaintiffs' allegations rise above the level of mere speculation. *See, e.g.*, *Korea Kumho Petrochem. v. Flexsys Am. LP*, No. C07-01057 MJJ, 2008 WL 686834 (N.D. Cal. Mar. 11, 2008); *see also New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc.*, 651 F. Supp. 802, 811 (S.D.N.Y. 1986) ("[Plaintiff] should be given the opportunity to show that its members have suffered injury from higher prices."). Plaintiffs have alleged sufficient facts to demonstrate antitrust injury.

SanDisk's arguments also blatantly disregard the allegations of Plaintiffs' FAC. Plaintiffs have pleaded a long-recognized antitrust injury: the payment of higher prices by purchasers due to anti-competitive conduct—the prevention of which is a top priority of antitrust law. Indeed, in

enacting the antitrust laws, "Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices." *Associated Gen.*, 459 U.S. at 530.

Plaintiffs have explained throughout the FAC how they have been injured by reduced competition and higher prices as a direct result of SanDisk's conduct. *See, e.g.*, FAC ¶ 34 ("SanDisk's exclusionary conduct has harmed competition in the relevant market by, among other things, increasing the prices for raw and finished NAND flash memory products paid by members of the proposed Class to above-competitive, monopoly levels"); *id.* ¶ 123 ("As a consequence of this very substantial diminution of competition and suppression of competitors, members of the proposed Class have paid above-competitive, monopoly prices and suffered antitrust injury."); *id.* ¶ 129 ("As a direct and proximate result of Defendant's unlawful concerted conduct, competition in the relevant market has been severely harmed through higher prices and reduced competition, quality, innovation, and consumer choice, to the detriment of purchasers in the proposed Class."). Courts in this district and the Ninth Circuit have held that is sufficient to survive a motion to dismiss. *See, e.g.*, *Theme Promotions, Inc. v. News Am. FSI*, 35 Fed. App'x 463, 466 (9th Cir. 2002); *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1153 (N.D. Cal. 2009). Whether Plaintiffs *actually did* suffer injury as contemplated by the Sherman Act is a question of fact for trial, not a motion to dismiss. The Supreme Court has thus recognized that "in antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co. v. Trustees of the Rex Hosp.*, 425 U.S. 738, 746 (1976) (internal quotation marks omitted); *see also Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962) ("We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses

thicken the plot.”). Moreover, *Twombly* says that dismissal is inappropriate even if the factual allegations are “doubtful in fact,” “improbable,” and “very remote and unlikely.” 550 U.S. at 555-56 (internal quotation marks omitted). Accordingly, SanDisk’s argument that Plaintiffs’ alleged harm is speculative is without merit. *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1171 (9th Cir. 2002) (refusing to find damages too speculative at motion to dismiss stage because antitrust plaintiffs must be afforded opportunity to support allegation at later stage in proceedings).

In support of its misguided challenge to the sufficiency of Plaintiffs’ allegations, SanDisk relies largely on its own version of the facts. SanDisk asserts that Plaintiffs’ allegations that it drove STM from the flash memory market are false by pointing to statements STM made to the Securities and Exchange Commission (“SEC”) regarding STM’s *forecasts* about the effects of its litigation with SanDisk. Furthermore, SanDisk argues it was impossible for STM to have exited the flash market in March 2008 because it entered into a joint venture with Intel in 2007, resulting in the formation of Numonyx in March 2008. SanDisk’s arguments fail for several reasons.

***First***, as previously noted, *supra* Section II, SanDisk’s request that this Court take judicial notice of *hearsay* contained in STM’s SEC filings is improper. Courts may not “take judicial notice of a fact that is subject to ‘reasonable dispute,’” even if it is contained within a public record. *In re Petco Animal Supplies Inc. Sec. Litig.*, No. 05-CV-0823-H (RBB), 2005 WL 5957816, at *2 (S.D. Cal. Aug. 1, 2005) (quoting *Lee*, 250 F.3d at 689-90). A court may also not take judicial notice of documents “for the truth of the matter[s] asserted therein.” Fed. R. Evid. 801(c); *see also Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1152 (C.D. Cal. 2005) (“SEC filings ‘should be considered only for the purpose of determining what statements the documents contain, not to prove the truth of the documents’ contents.”) (quoting *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996)). SanDisk asks this Court to take judicial notice of hearsay statements

cherry-picked from voluminous materials outside the four corners of the FAC for the purpose of proving disputed factual propositions. It seeks to improperly introduce materials into the record as "evidence" for the truth of the matters asserted therein. As such, those materials are hearsay. *See* Fed. R. Evid. 801(c); *see also* 30B Michael H. Graham, *Federal Practice & Procedure* § 7001 (4th interim ed. 2006); *In re Cypress Semiconductor Sec. Litig.*, No. C-92-20048 RPA (PVT), 1995 WL 354855, at *4 (N.D. Cal. June 6, 1995). SanDisk's attempt must therefore be rejected. The challenged documents are outside the pleadings, improperly raise contested issues of fact on a motion to dismiss, and are not admissible evidence to prove the facts for which they are submitted.

***Second***, Plaintiffs' FAC mentions nothing about a joint venture with Intel. Indeed, SanDisk's story is taken completely from materials outside the FAC. SanDisk's attempt to litigate the original complaint is meaningless since that complaint has been superseded by the FAC. *See King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994). Although SanDisk repeatedly argues that Plaintiffs have not satisfied the *Twombly/Iqbal* standard, SanDisk ignores the fact that the standard applies only to claims *set forth in the pleadings*. *See Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) ("Generally, a court may not consider material beyond the complaint in ruling on a Fed. R. Civ. P. 12(b)(6) motion."). SanDisk asks this Court to resolve factual disputes in its favor—an improper request on a motion to dismiss. *See Twombly*, 550 U.S. at 556 (requiring that factual matter "be taken as true" at the motion to dismiss stage).

***Third***, in addition to relying almost completely on materials outside the FAC, SanDisk also relies on its own "spin" of those materials. For example, SanDisk's allegation that STM's joint venture with Intel—which resulted in the formation of a new semiconductor company called Numonyx—demonstrates STM did not exit the flash memory market in 2008 is premised on a plethora of unfounded assumptions about Numonyx. Without further investigation and discovery,

Plaintiffs cannot present key facts relevant to determining whether STM's joint venture with Intel allowed it to remain in the flash market, such as whether Numonyx paid royalties to STM, what type of products Numonyx produced, and to whom Numonyx sold those products. Moreover, even if this Court were to consider extrinsic evidence, there is *still* reason to accept Plaintiffs' position that it exited the flash memory market in 2008. Indeed, STM previously affirmed to this Court in 2008 that "SanDisk has succeeded in driving ST[M] out of the memory business—in March of this year." Opp. to SanDisk's Mot. Summ. J., *SanDisk Corp. v. STMicroelectronics, Inc.*, No. 5:04-cv-04379-JF, at 1 (N.D. Cal. filed Aug. 22, 2008) (DN 201). STM, more so than its competitors, has reason to know what it did in 2008.

SanDisk's attacks on Plaintiffs' allegations that SanDisk's barrage of infringement actions against its competitors thwarted STM's joint venture with Hynix are likewise based on unfounded assumptions. SanDisk asserts (at 16) that "STM in fact entered a joint venture with Hynix on November 16, 2004 to build a front-end memory-manufacturing facility in China." SanDisk bases its claim entirely on STM's SEC filings which, as noted above, should not be considered by the Court at this stage. More importantly, SanDisk does not claim the alleged STM/Hynix joint venture was a *flash memory* joint venture. *See* MTD at 3 (referring to the alleged "manufacturing joint venture"). Indeed, even if it was, Plaintiffs' allegations as to the opportune timing of SanDisk's "crown jewel" infringement suits against STM—just as STM was preparing to launch the joint venture with Hynix—must be accepted as true. *See Silicon Graphics*, 183 F.3d at 983. Moreover, SanDisk admits that STM, in leaving the market, unloaded the Hynix assets. *See* MTD at 3, 10, 16. Thus, even if the venture was operational for a year or two, STM's competitive role in it was prematurely eliminated in 2008 as it exited the market.

***Finally***, SanDisk relies (at 21) on *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261,

266 (7th Cir. 1984), to argue that Plaintiffs' claim that SanDisk tortiously converted NAND flash memory technology from WSI/STM fails to state a cognizable antitrust injury since "[t]he substitution of one monopoly actor for another does not implicate the antitrust laws." SanDisk's argument oversimplifies and ignores Plaintiffs' allegations. In *Riegel*, the court based its holding on its inability to "find the consumer interest in th[e] case[:] Brunswick is complaining not because Riegel is gouging the consumer by charging a monopoly price for antistatic yarn, but because Riegel took away a monopoly that rightfully belonged to Brunswick as the real inventor." *Id.* at 267. Significantly, the court noted that "there [wa]s no suggestion that any other competitors were in the picture." *Id.* Even if Riegel had not stolen the patent from Brunswick, Brunswick would have still "had the whole field to itself," and the price to consumers would have been the same as it was with Riegel as the only seller. *Id.* The court's holding confirmed the settled principle that "antitrust law . . . is concerned with the protection of *competition*, not competitors." *Id.* at 266-67 ("If no consumer interest can be discerned even remotely in a suit by a competitor—if, as here, a victory for the competitor can confer no benefit . . . on consumers—a court is entitled to question whether a violation of antitrust law is being charged."). In stark contrast to the plaintiff in *Brunswick*, Plaintiffs have consistently alleged that, but for SanDisk's enforcement of its fraudulent patents, its competitors would *not* have been driven from the market, and prices *to consumers* would be lower. *See, e.g.*, FAC ¶¶ 73, 109. Indeed, Plaintiffs' core allegation of harm is the elevated prices they were forced to pay as a result of SanDisk's anticompetitive practices. *See, e.g.*, *id.* ¶¶ 5-6, 13, 21, 32, 34, 73, 109, 122-123, 129, 134.

## III. *Walker Process* Standing is not Limited to Competitors

In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), the Supreme Court found that "the enforcement of a patent procured by fraud on the Patent

Office may be violative of § 2 of the Sherman Act provided that the other elements necessary to a § 2 case are present." *Id*. at 174. The Court reasoned that a patent is an exception to the general rule against monopolies and that there is a public interest in ensuring that patent monopolies are not founded on fraud. *See id*. at 177.

The *Walker Process* decision involved a competitor plaintiff. However, the Supreme Court did not provide that its holding was limited to any particular class of plaintiffs. To the contrary, it stated:

> [t]he gist of Walker's claim is that since [the defendant] obtained its patent by fraud it cannot enjoy the limited exception to the prohibitions of § 2 . . . but must answer under that section . . . *to those injured* by any monopolistic action taken under the fraudulent patent claim. *Nor can the interest in protecting patentees from "innumerable vexatious suits" be used to frustrate the assertion of rights conferred by the antitrust laws*. It must be remembered that we deal only with a special class of patents, *i.e*., those procured by intentional fraud.

*Id*. at 176 (emphases added).

There is good reason for concluding that *Walker Process* should apply to customers. Indeed, the primary goal of antitrust laws is to protect customers, not competitors. *Associated Gen.*, 459 U.S. at 538 ("[T]he Sherman Act was enacted to assure *customers* the benefit of price competition." (emphasis added)). "Congress was *primarily* interested in creating *an effective remedy for consumers* who were forced to pay excessive prices." *Id*. at 530 (emphases added). By contrast, the Supreme Court has emphasized that the antitrust laws are "'not'" for "'the protection of *competitors*.'" *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Therefore, if competitors can assert Sherman Act claims when a monopolist has fraudulently obtained a monopoly through intentional fraud on the USPTO, then it should be even clearer that customers—the "primar[y]" class protected by the antitrust laws—can do so as well. Otherwise,

the central beneficiaries of the antitrust laws would be forbidden from vindicating their rights.

Despite this, SanDisk argues that customers should be barred from bringing *Walker Process* claims. It claims that, because only a competitor can bring a direct challenge to a patent's validity under the patent laws, customers should be barred from bringing *antitrust* claims whenever the patent's validity is an issue in those claims—even though that position would completely deprive those customers of the protection of antitrust laws. In other words, SanDisk argues that a fraudulent patent owner has an absolute right to assert complete immunity from liability to customers for monopolization, even though—or rather, *solely because*—its monopoly is based on a patent procured through deliberate fraud.

### A. This Court Has Already Ruled That Customers Have Standing To Bring *Walker Process* Claims

As it happens, this issue has already been decided by this Court. In *In re Netflix Antitrust Litigation*, 506 F. Supp. 2d 308 (N.D. Cal. 2007), the Court engaged in a lengthy analysis of the cases in concluding that direct purchasers have standing to raise *Walker Process* claims against a monopolist. The Court endorsed, as "persuasive," the holding of *Molecular Diagnostics Laboratories v. Hoffmann-La Roche, Inc.*, 402 F. Supp. 2d 276, 280 (D.D.C. 2005), that direct purchasers have standing to bring *Walker Process* antitrust claims. The Court stated:

> *Walker Process* claims are properly viewed as antitrust claims, so standing under them should be viewed in the same way as well. . . . [T]he harm in a *Walker Process* claim comes not from fraudulently obtaining a patent, it comes from creating or maintaining an unlawful monopoly using that patent. . . . Even though *Walker Process* claims are predicated on enforcement of a fraudulently-obtained patent, the harm still accrues directly to consumers.

*Netflix*, 506 F. Supp. 2d at 316.[3]

[3] SanDisk dismisses *Netflix* in a brief footnote (at 19 n.6) as "dicta" because the court ended up granting dismissal for failure to allege antitrust injury. *Netflix* necessarily addressed the issue of whether direct purchasers have *Walker Process* standing because, if it had found the plaintiff did not have *Walker Process* standing, there would have been no need for the Court to go on to

The *Molecular Diagnostics* decision—endorsed by *Netflix*—provides further support for Plaintiffs. In that case, the court noted that, in *Walker Process*, the Supreme Court had not "created a new cause of action" but rather merely clarified the application of the *antitrust* laws. *Molecular Diagnostics*, 402 F. Supp. 2d at 280 n.6. Therefore, the proper analysis of which plaintiffs have standing under *Walker Process* is under the antitrust laws:

> Viewed properly as an antitrust claim, there is little reason to think that standing requirements for *Walker Process* claims differ from standing requirements in more conventional antitrust actions. . . . [D]irect purchasers are generally recognized as having standing to prosecute antitrust claims.

*Id.* at 281.

**B. The Second Circuit's *DDAVP* Decision Provides That, at a Minimum, Customers Can Sue When the Patent is "Already Tarnished"—Which is Plainly the Case Here**

Only one Court of Appeals has addressed the issue of whether customers have standing under *Walker Process*, and its decision provides further support for Plaintiffs here. In *In re DDAVP Direct Purchaser Antitrust Litigation*, 585 F.3d 677 (2d Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 5279 (June 28, 2010), the Second Circuit held that when "plaintiffs are challenging an already tarnished patent," it could not undermine any legitimate patent interest to allow customers to assert claims under *Walker Process*. *Id*. at 691. The Second Circuit did *not* decide that customers did not have standing unless the patent was already tarnished; rather, the court simply wished to limit its holding to the facts of the case so as not to decide the broader issue

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consider antitrust injury. This was not mere "dicta." *See Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) (decision is not dicta if court "confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion").

prematurely.[4]

However, the Second Circuit was alive to the risks of denying customers standing, so there is good reason to expect that it will be willing to expand standing beyond "already tarnished" patents. First, the court noted that "*Walker Process* itself does not necessarily suggest . . . a limit" to which plaintiffs have standing. *Id.* at 690. The Second Circuit went on to say:

> [W]e are reluctant to embrace the defendants' position because we are wary of creating the potential to leave a significant antitrust violation undetected or unremedied. . . . As the defendants would have it, direct purchasers would be able to recover antitrust damages from a fraudulent patentee *only* after that patentee first loses on a fraudulent procurement claim. This asks too much of the generic competitors and other potential patent challengers, who may not have the strategic interest or the resources to start or win such a battle, or who may be presented with strong incentives to settle their challenge by patent holders seeking not only to preserve their patent's enforceability, but also to avoid potential *Walker Process* liability. . . . [R]elying on generic competitors to lead the antitrust charge may ask too much of them.

*Id*. at 691 (internal quotation marks omitted).

In *DDAVP*, the patent had already been found unenforceable because of inequitable conduct; it had not been found to have been procured by fraud. As the Second Circuit noted, "[i]nequitable conduct is a lesser showing than fraud." *Id.* Indeed, there is no *Walker Process* liability whatsoever for patents rendered unenforceable for inequitable conduct. A defendant whose patent is unenforceable because of inequitable conduct retains full immunity from antitrust liability. *See Walker Process*, 382 U.S. at 179-80 (Harlan, J., concurring); *Nobelpharma AB v.*

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[4] SanDisk claims that the Second Circuit stated that "'giving *Walker Process* standing to the [direct purchaser] plaintiffs . . . 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.'" MTD at 19 (quoting *DDAVP*, 585 F.3d at 691). In fact, this was merely the Second Circuit's summary of the *defendants*' position in that case—in the original decision, the language quoted by SanDisk was preceded by "[the defendants] *argue that* . . . ." *See DDAVP*, 585 F.3d at 691 (emphasis added).

*Implant Innovations, Inc.*, 141 F.3d 1059, 1069-70 (Fed. Cir. 1998); *Netflix*, 506 F. Supp. 2d at 314; *Molecular Diagnostics*, 402 F. Supp. 2d at 280 n.5. Thus, the court in *DDAVP* allowed customers to bring *Walker Process* claims even where no prior *Walker Process* liability had been established.

When one compares the facts in *DDAVP* to the facts in this case, it is clear that *DDAVP* supports allowing the *Walker Process* claims here. SanDisk and STM litigated *Walker Process* claims for five years, and this Court specifically denied summary judgment on STM's *Walker Process* claims, finding that the claims presented triable issues of fact. *See* STM Order at 7-13. This Court specifically found that "a reasonable jury could infer an intent to deceive," and concluded that "a jury should be allowed to make the ultimate determination" on the *Walker Process* claims. *Id.* at 10, 12. After this decision, SanDisk settled its case against STM, using the settlement to avoid trial on the *Walker Process* claims and ensure STM's exit from the market.

Thus, the patents in this case are considerably *more* "tarnished" than in *DDAVP*. In *DDAVP*, there had merely been a finding of a lesser showing—inequitable conduct—that did not trigger liability under *Walker Process* or indicate that the patent had been procured by fraud. By contrast, in this case, the Court has already found that there are triable issues of fact on the *Walker Process* claims—that is, that SanDisk procured its patents by fraud. *See id.* at 7-13. Therefore, all of the arguments cited by the Second Circuit in *DDAVP* in favor of its holding apply even more strongly here. Meanwhile, all of the countervailing arguments apply more weakly: if granting standing in *DDAVP* did not "alter[] the typical limits on who can start a challenge to a patent's validity," then neither would allowing standing here. 585 F.3d at 691.

**C. Public Policy Strongly Supports Allowing Standing Here**

SanDisk concedes (at 19) that, had it gone to trial on STM's *Walker Process* claims and lost, Plaintiffs would have standing. Yet, it argues, the mere fact that it settled the case on the

courthouse steps has the effect of stripping Plaintiffs of any ability to challenge SanDisk's conduct. As the *DDAVP* court suggested, this approach would grant monopolists altogether too much power to manipulate the legal system to block any litigation of legitimate *Walker Process* claims. SanDisk litigated right up until the eve of trial, imposing $20,000,000 in legal fees on a major competitor; then, after the Court found that the *Walker Process* claims presented triable issues of fact, it settled with STM in such a way as to ensure STM's permanent exit from the market. *See* FAC ¶¶ 112-120. Yet if SanDisk has its way, a monopolist that litigates up to trial and then settles with an exhausted competitor can not only exclude competition but can also keep anyone from ever challenging its fraudulently obtained patents. Moreover, if any competitor arises in the future, SanDisk will be able to evade liability in exactly the same way. Meanwhile, the *primary* victims of this fraudulently obtained monopoly—the customers—will be left powerless.

There is an even further reason to allow standing here: the fact that SanDisk has engaged in *additional* anticompetitive conduct, including the misappropriation of patents and technology from WSI, threats against customers themselves, and an anticompetitive settlement removing a competitor. *See id.* ¶¶ 8, 74-110, 112-113. Thus, SanDisk's *Walker Process* conduct constitutes one part of an overall anticompetitive scheme. Courts have warned about the importance of allowing juries to consider the entire anticompetitive scheme as a whole, and against "compartmentalizing" a single anticompetitive conspiracy. *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962); *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980). Thus, even if a court were reluctant to allow all customers to bring *Walker Process* claims, it would still make sense to allow such claims (1) where a competitor has already successfully litigated such claims through summary judgment, and (2) where the *Walker Process* fraud is part of a larger, overall pattern of anticompetitive

conduct.

Allowing standing to customers is also consistent with common sense, because the entire purpose of SanDisk's conduct was to enable SanDisk to victimize customers and to extract higher prices from them. The exclusion of competitors was merely the means to the end of victimizing customers. Indeed, SanDisk's conduct even extended to direct threats against customers. *See* FAC ¶¶ 110-111. It would be perverse to deny standing to the main targets of SanDisk's conduct.

**D. The Other Cases Cited By SanDisk are Inapposite**

SanDisk claims (at 18) that "[c]ases involving *Walker Process* challenges . . . by direct purchasers . . . have almost uniformly been dismissed." But SanDisk is only able to cite a single reported decision denying a *Walker Process* challenge by direct purchasers. Instead, SanDisk relies on cases that did *not* involve direct purchasers but instead involved more remote plaintiffs, where concerns about expanding standing are much more powerful. Insofar as those cases contain language that seems to include direct purchasers, such language is dicta and is less persuasive than the careful analyses contained in the cases discussed above.

The sole reported case actually involving direct purchasers was *In re Remeron Antitrust Litigation*, 335 F. Supp. 2d 522 (D.N.J. 2004). However, the court in *Molecular Diagnostics* found that the *Remeron* court "offered little justification for its holding" and had "confused the harm addressed through a *Walker Process* claim," failing to recognize that "[t]he harm is not the invalid patent, but the use of the invalid patent to establish a monopoly." *Molecular Diagnostics*, 402 F. Supp. 2d at 280.[5]

[5] The other cases cited by SanDisk are even less relevant. *Kroger Co. v. Sanofi-Aventis*, 701 F. Supp. 2d 938 (S.D. Ohio 2010), involved a patent that had specifically been found *valid* in prior litigation. Indeed, there had not even been inequitable conduct. *See id*. at 962-63. *Kaiser Foundation v. Abbott Laboratories*, No. CV 02-2443-JFW, 2009 WL 33877513 (C.D. Cal. Oct. 8, 2009), an unreported decision, did not involve a typical *Walker Process* claim but rather a claim

## IV. Plaintiffs Have Stated Claims That SanDisk and Dr. Harari Conspired to Monopolize the Relevant NAND Flash Memory Market

SanDisk argues (at 16-17) that, under *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752 (1984), Dr. Harari and SanDisk could not, as a matter of law, have conspired to monopolize the NAND flash memory market because a corporation and its officers and employees constitute a single entity legally incapable of forming an antitrust conspiracy. SanDisk's reliance on *Copperweld* is inapposite. In *Copperweld*, the Supreme Court held that a parent corporation and its wholly-owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act." *Id.* at 777. The Court reasoned that coordinated activity by parties who lack independent sources of economic power and separate interests does not warrant scrutiny under antitrust laws. *See id.* at 771. Since a parent and its wholly-owned subsidiary have "a complete unity of interest," the Court concluded that their "coordinated activity . . . must be viewed as that of a single enterprise for purposes of § 1." *Id.*

*Copperweld* did *not* hold, and SanDisk has cited no other authority for the proposition, that a corporation and its CEO cannot legally conspire. The Court explicitly stated, "[w]e limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary

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under the Hatch-Waxman Act, which involves a peculiar statutory regime allowing patent challenges to prescription drugs even when there is no infringing product. The court repeatedly emphasized that its decision was limited to Hatch-Waxman claims. *See id.* at *3-*4. *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 363 F. Supp. 2d 514 (E.D.N.Y. 2005), also did not involve *Walker Process* claims by direct purchasers. Rather, the only *Walker Process* claims had been brought by *indirect* purchasers. *See id.* at 547. *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc*., 289 F. Supp. 2d 986 (N.D. Ill. 2003), involved the issue of whether a supplier could challenge a patent settlement. As the court noted, the general rule is that suppliers—unlike direct purchasers—do not have antitrust standing. *See id*. at 990. In addition, the court found that there had been no material deception of the patent office in any event. *See id*. at 995. Finally, *In re K-DUR Antitrust Litigation*, No. 01-1652 (JAG), MDL No. 1419, 2007 WL 5297755 (D.N.J. Mar. 1, 2007), was not even a court decision, but merely an unreported decision by a special master. Moreover, it too only involved indirect purchasers. *See id.* at *18.

are capable of conspiring in violation of § 1." *Id.* at 767. Numerous courts have declined to extend *Copperweld* to situations outside the parent-subsidiary relationship.[6]

Even assuming *Copperweld*'s reasoning should be extended to this case, the alleged conspiracy between Dr. Harari and SanDisk does not violate the *Copperweld* rule. When Dr. Harari committed the improper conduct underlying his conspiracy with SanDisk, he was an employee and/or director *at WSI*. *See* FAC ¶ 99 ("On information and belief, the ideas disclosed in these converted patent applications were known to or conceived by Harari while he was a director[] and/or consultant of WSI."); *id.* ¶¶ 94-96 (alleging Dr. Harari filed the "crown jewel" patent applications, in his own name, months before he founded SanDisk in June 1989). In fact, the very reason it was improper for Dr. Harari to develop and acquire flash memory technology and patents in his own personal capacity and withhold them from WSI was that he had a contractual and fiduciary duty to disclose and assign them *to WSI*. It is impossible to understand SanDisk's argument that there was a "complete unity of interest" between Dr. Harari and SanDisk when Dr. Harari misappropriated WSI's technology since (1) SanDisk had not yet been founded, and (2) Dr. Harari was barred by a clear contractual and fiduciary duty from serving the interests of

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[6] *See, e.g.*, *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56-58 (1st Cir. 2002) (declining to extend to relationship between organization and its operators/investors); *Townshend v. Rockwell Int'l Corp.*, No. C99-0400SBA, 2000 WL 433505 (N.D. Cal. Mar. 28, 2000) (declining to extend to licensor/licensee relationship); *Wilcox Dev. Co. v. First Interstate Bank of Or.*, 605 F. Supp. 592 (D. Or. 1985) (declining to extend to sister corporations and other non-affiliated organizations). In addition, *Copperweld* involved a parent corporation's liability under § 1 of the Sherman Antitrust Act, a cause of action Plaintiffs have not pled. *Copperweld* did not address a parent corporation's liability under § 2, which, as the Court explained, covers a distinctly different range of anticompetitive conduct. *See* 467 U.S. at 767-69 & n.13 ("Section 1 of the Sherman Act, in contrast to § 2, reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities.") (quoting 15 U.S.C. § 1); *see also In re Tableware Antitrust Litig.*, 485 F. Supp. 2d 1121, 1123 (N.D. Cal. 2007) (noting *Copperweld*'s "sweeping distinction between § 1 and § 2").

anyone but WSI, including the not-yet-founded SanDisk. This Court should reject SanDisk's attempts to use *Copperweld* to cloak itself in immunity for conduct that clearly falls outside the bounds of that case's narrow holding.[7] In this case, the Court should not view Dr. Harari as a servant of SanDisk whose interest is inseparable from SanDisk, but rather as an "unfaithful servant" of WSI who conspired with a monopolist to victimize WSI and Plaintiffs. It would be absurd to say that *Copperweld* grants immunity to a conspirator merely because the monopolist calls the conspirator an officer when that conspirator's primary duty was to a *victim* of the conspiracy.

**V. SanDisk is not Immune From Plaintiffs' Customer Threat and Subpoena Claims**

Under the *Noerr-Pennington* doctrine, private citizens may exercise their First Amendment rights to petition the government without fear of antitrust liability. *See Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033, 1044 (9th Cir. 2009). The protection extends to petitioning of administrative agencies and courts and covers not only actual proceedings, but also conduct that is "incidental" to the petition. *See id.*; *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934 (9th Cir. 2006). There are two recognized exceptions to *Noerr-Pennington* immunity: (1) where a party engages in a "sham" petition intended only to "interfere directly with the business relationships of a competitor," or (2) where the asserted patent was obtained through knowing and willful fraud within the meaning of *Walker Process*. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972); *see, e.g., In re Independent Serv. Orgs. Antitrust Litig.*, 203

[7] *See Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1296 (11th Cir. 1998) (declining to extend *Copperweld* where individual defendant also represented other interests); *St. Joseph's Hosp. Inc. v. Hospital Corp. of Am.*, 795 F.2d 948, 956 (11th Cir. 1986) (when officers of a corporation "act for their own interests, and outside the interests of the corporation," they are legally capable of conspiring with their employers for purposes of the Sherman Act).

F.3d 1322, 1326 (Fed. Cir. 2000).

SanDisk offers two reasons—both of which fail—for why it is immune from Plaintiffs' allegations that it enforced document and deposition subpoenas against Plaintiffs and made anticompetitive threats against them. *See* FAC ¶¶ 8, 110; MTD at 22-25. First, SanDisk argues the alleged conduct "relate[s] to potential litigation and actual litigation with SanDisk competitors," and second, SanDisk argues its enforcement of the "crown jewel" patents against STM was not "sham litigation" and thus the exception to *Noerr-Pennington* immunity does not apply.

**A. *Noerr-Pennington* Immunity Does Not Apply to Customer Threats**

Threats made directly to a competitor's customers for the purpose of harassment are outside *Noerr-Pennington* immunity since such threats are not intended to influence government action but are rather directed at and intended to influence the parties threatened. The Ninth Circuit has confirmed that "*Noerr-Pennington* immunizes only litigation activity, not other forms of threats or harassment." *Coalition for ICANN Transparency, Inc. v. Verisign, Inc.*, 567 F.3d 1084, 1093 (9th Cir. 2009) (trial court erroneously applied *Noerr-Pennington* doctrine to dismiss plaintiff's claims because it overlooked plaintiff's allegations of non-litigation conduct aimed at damaging plaintiff's reputation). A host of federal courts have refused to apply *Noerr-Pennington* to litigation-related statements, including threats, made to a competitor's customers.[8]

[8] *See, e.g.*, *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1200 (8th Cir. 1982) (plaintiffs' "broad pattern" of harassing and threatening competitor's customers intended to make defendant's products "too hot to handle" and deter customers from dealing with defendant not entitled to *Noerr-Pennington* immunity); *see also Meridian Project Sys., Inc. v. Hardin Constr. Co.*, 404 F. Supp. 2d 1214, 1223 (E.D. Cal. 2005) (allegations that defendant's misstatements to plaintiff's customers were not a good-faith effort to obtain the objects of litigation but merely an effort to discourage customers from purchasing plaintiff's product sufficient to survive a motion to dismiss because such contacts were not entitled to *Noerr-Pennington* immunity); *180S, Inc. v. Gordini*

Consistent with the authorities referenced above, Plaintiffs allege that SanDisk's threats and subpoenas were not good-faith efforts to communicate or procure information about its infringement litigation with STM or other competitors. Instead, Plaintiffs have alleged that SanDisk's efforts were part of a direct, all-out effort to intimidate and instill fear in its competitors' customers so they could not and would not exercise their own freedom of choice to purchase NAND flash memory products from the supplier of their choosing. *See* FAC ¶¶ 8, 110 (alleging SanDisk "threatened members of the proposed Class who purchase from SanDisk competitors that SanDisk will force them to purchase flash memory at disadvantageous prices and terms" and that "they will be left holding large quantities of unusable NAND flash memory products . . . if SanDisk's infringement actions are successful"). In any event, determining whether allegedly threatening communications with customers fall within the scope of *Noerr-Pennington* immunity is an issue that should be resolved at trial. *See Korea Kumho*, 2008 WL 686834, at *8 n.7 ("To the extent it is necessary, any determination as to which communications with customers fall within the scope of [*Noerr-Pennington*] immunity will await the merits stage of litigation.").

**B. The "Sham" Exception to *Noerr-Pennington* Applies to SanDisk's Conduct**

In its previous order granting summary judgment in favor of SanDisk on STM's sham litigation claim, this Court applied the familiar two-prong test for determining sham litigation

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*U.S.A., Inc.*, 602 F. Supp. 2d 635, 641 (D. Md. 2009) ("false statements made by [defendant] about [plaintiff's] products to retailers separate and apart from bringing the lawsuit against [plaintiff] are not the type of petitioning activity protected by the *Noerr-Pennington* doctrine") (internal quotation marks omitted); *Caldon, Inc. v. Advanced Measurement & Analysis Group, Inc.*, 515 F. Supp. 2d 565, 574 (W.D. Pa. 2007) (allegations that defendant disseminated false and disparaging claims to plaintiff competitor's customers not entitled to *Noerr-Pennington* immunity, even though the claims were also made in connection with regulatory agency submissions); *Oahu Gas Serv., Inc. v. Pacific Res., Inc.*, 460 F. Supp. 1359, 1386 (D. Haw. 1978) (alleged threats of lawsuits against potential customers for the purpose of foreclosing competition not entitled to *Noerr-Pennington* immunity).

liability set forth in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993). *See* STM Order at 13-15 (applying the objectively baseless-subjective motivation test). In *USS-POSCO Indus. v. BE&K*, 31 F.3d 800, 810-11 (9th Cir. 1994), however, the Ninth Circuit held that test is inapplicable where a plaintiff alleges the defendant engaged in a "whole series of lawsuits" intended to quash competition by imposing undue costs and burdens on competitors. Endorsing the sham litigation standard adopted by the Supreme Court in *California Motor Transport*, 404 U.S. at 510, the Ninth Circuit explained:

> *California Motor Transport* deals with the case where the defendant is accused of bringing a whole series of legal proceedings. Litigation is invariably costly, distracting and time-consuming; having to defend a whole series of such proceedings can inflict a crushing burden on a business. *California Motor Transport* thus recognized that the filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action, and can serve as a very effective restraint on trade. When dealing with a series of lawsuits, the question is not whether any one of them has merit . . . but whether they [were] brought . . . not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?

*USS-POSCO*, 31 F.3d at 811.[9]

Plaintiffs have clearly alleged SanDisk engaged in a "pattern" of infringement actions based on fraudulently obtained patents. *See* FAC ¶¶ 41-46 (alleging SanDisk brought infringement actions against Samsung as far back as 1996); *id* ¶¶ 116-118 (alleging SanDisk commenced its infringement actions against STM in October 2004); *id.* ¶ 112 (alleging SanDisk and STM settled four litigation matters in 2009). Indeed, in this Court alone, SanDisk has brought four different actions against STM. *See* Case Nos. 5:04-cv-043479-JF; 5:05-cv-01248-JF; 5:05-cv-05021-JF; 5:06-cv-00194-JF. Moreover, it is clear from the facts Plaintiffs allege—facts

[9] *See also, e.g.*, *Primetime 24 Joint Venture v. National Broad., Co.*, 219 F.3d 92, 101 (2d Cir. 2000); *Total Renal Care, Inc. v. Western Nephrology & Metabolic Bone Disease, P.C.*, No. 08-cv-00513, 2009 WL 2596493, at *10-*11 (D. Colo. Aug. 21, 2009).

this Court has previously accepted as true—that SanDisk's motive was improper. *See* STM Order. As evidenced by the timing of its suits, SanDisk's sole intention was to inundate competitors with the burdens of litigation and drive them from the market, forcing them to license with SanDisk for higher prices. SanDisk's infringement claims were not directed only at STM. Indeed, as Plaintiffs allege, SanDisk also filed an infringement claim based on the '338 patent against Samsung, one of its largest competitors, forcing Samsung to license with SanDisk for its NAND flash memory products and join the SanDisk monopoly camp. *See* FAC ¶¶ 41-45.

It is uncertain at this stage whether SanDisk's infringement campaign against its competitors was a "sham" since this Court has not yet analyzed the claims under the proper standard. SanDisk's claim that *Noerr-Pennington* protects it from antitrust liability is thus premature. *See Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253 (9th Cir. 1982) ("Whether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact.").

**C. The Fraud Exception to *Noerr-Pennington* Applies to SanDisk's Conduct**

In addition to the "sham" exception to *Noerr-Pennington* immunity, there exists a separate and distinct exception—which SanDisk's motion to dismiss completely ignores—for *Walker Process* fraud. *See, e.g., Clipper Exxpress*, 690 F.2d at 1261-62 ("There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body."); *see also Independent Serv.*, 203 F.3d at 1326 (a patent owner is immune from antitrust liability unless the infringement defendant proves one of two conditions: (1) "that the asserted patent was obtained through knowing and willful fraud within the meaning of Walker Process," or (2) "that the infringement suit was a mere sham"); *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363, 368-69 (S.D.N.Y. 2002) (explaining the "'*Walker Process* exception co-exists

with the sham litigation exception'" and that "'either exception will strip a patent holder of *Noerr-Pennington* immunity'" (quoting *Independent Serv.*, 203 F.3d at 1326)). We need not say much about the application of this exception, since this Court has already held there are genuine issues of material fact as to whether SanDisk committed *Walker Process* fraud. *See* STM Order at 7-13. That holding is sufficient for Plaintiffs' allegations to withstand a motion to dismiss. *See, e.g.*, *Branch v. Tunnell*, 937 F.2d 1382, 1384 (9th Cir. 1991) ("Because there exist genuine issues of material fact . . . the court is constrained to deny the motion to dismiss.").

## VI. Plaintiffs Have Sufficiently Alleged Injury Stemming From SanDisk's Threats, Subpoenas, and Refusal To Deal with Ritz

In addition to arguing it is immune from antitrust liability for its alleged threats to its competitors' customers, SanDisk also argues (at 8) that Plaintiffs' allegations must fail because Plaintiffs "do[] not identify a single customer 'successfully driven from STM.'" SanDisk's argument completely ignores the nature of the antitrust injury Plaintiffs allege: SanDisk used the bludgeon of its infringement claims to threaten, harass, and intimidate its competitors' customers, seeking to prevent them from exercising their own freedom of choice and to place SanDisk's competitors under a cloud with their own purchasers. *See* FAC ¶¶ 8, 110. SanDisk having successfully done so, Samsung was driven into the monopoly camp, and STM was driven from the market, reducing competition and allowing SanDisk to charge higher prices to Plaintiffs. Plaintiffs are not required to show they were harmed or changed course because of a particular anticompetitive act, and SanDisk has cited no authority to the contrary. The threat of being cut off from supply is an inherent injury to competition. *See, e.g.*, *Alexander*, 687 F.2d at 1198 & n.27. It is well-established that threats and intimidation can work to restrain competition—even if the threats are never carried out. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 181 (1944); *New York v.*

*Microsoft Corp.*, 224 F. Supp. 2d 76, 163 (D.D.C. 2002). SanDisk's argument, once again, is simply an attempt to impose upon Plaintiffs a higher pleading standard that is required at this stage. *See Twombly*, 550 U.S. at 570; *Iqbal*, 129 S. Ct. at 1949. In any event, even if this Court wished to do an individualized analysis of how each affected customer reacted to SanDisk's threats, the proper time for that analysis is not on a motion to dismiss.

In a similar vein, SanDisk argues (at 26) that Plaintiffs' allegation that it retaliated against RCI for its attempt to vindicate its claims in this litigation by terminating its supply of NAND flash memory must also fail because Plaintiffs have not alleged RCI "has been unable to obtain flash memory products from an alternate source." *See* FAC ¶¶ 9, 111. In support of its argument, SanDisk cites *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867, 889-90 (2d Cir. 1962), but that case is inapposite. In *House of Materials*, the Second Circuit held that a manufacturer's refusal to deal with a number of its customers was not an unreasonable restraint of trade under § 1 of the Sherman Act. *Id.* In so doing, the court emphasized: "There is no suggestion here that [the manufacturer's] action constituted a violation of the anti-monopoly provision of the Sherman Act. It is not alleged that [the manufacturer] monopolized the market or by its refusal to deal attempted to achieve a monopoly." *Id.* at 871. Unlike the plaintiffs in that case, Plaintiffs here have alleged that SanDisk's refusal to deal with Ritz was part and parcel of its overall scheme to monopolize the NAND flash memory market. *See* FAC ¶ 111 (alleging SanDisk's termination of supply to RCI was "a further act to maintain unlawfully its monopoly"). Contrary to SanDisk's assertions, there is no bright-line safe harbor for terminating a customer's supply to maintain an unlawful monopoly. Indeed, it is well-settled that conduct which may be lawful when carried out by a competitive company may become unlawful when carried out by a

monopolist.[10]

SanDisk successfully forced one of its largest competitors out of the market and co-opted perhaps its largest competitor, Samsung, by misappropriating technology and enforcing fraudulent patents, and then retaliated against RCI for its efforts to challenge that fraudulently obtained monopoly. By terminating RCI's supply of NAND flash memory products, SanDisk intended to, and did, send a clear message to the entire flash memory market: if you challenge the enforceability of our patents, we will cut you off. Taking Plaintiffs' allegations as true, they have alleged that SanDisk's termination was in furtherance of an antitrust violation. *See Silicon Graphics*, 183 F.3d at 983. Indeed, SanDisk's assumption that RCI could obtain flash memory products from an "alternate source" wholly ignores the entirety of Plaintiffs' allegations that SanDisk violated § 2 by *eliminating* the "alternate source[s]."

## VII. Plaintiffs Have Stated a Claim That SanDisk's Settlement Agreement with STM was Unlawfully Anticompetitive

Contrary to SanDisk's assertions, settlement agreements relating to patent infringement suits can be unlawfully anticompetitive in violation of the Sherman Act. One type of settlement agreement courts have held may be unlawfully anticompetitive are those involving reverse royalty payments from a patent holder to a competitor challenging the patent.

In *In re Cardizen CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003), a brand-name drug manufacturer paid a generic manufacturer who sought to enter the market and who had filed a patent infringement action against it to stay out of the market. The Sixth Circuit held the

[10] *See, e.g.*, *Schine Chain Theatres v. United States*, 334 U.S. 110, 119 (1948) ("Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce."); *California Computer Prods., Inc. v. International Bus. Mach. Corp.*, 613 F.2d 727, 735 (9th Cir. 1979) ("The plaintiff need not show that the conceded monopolist's acts were of a kind that would be unlawful for an ordinary enterprise.").

agreement was a *per se* violation of the Sherman Act. Even where courts have applied a rule-of-reason test rather than a *per se* analysis to anticompetitive settlement agreements, they have held that agreements involving reverse payments to prevent infringement suits may be unlawful where a patent is procured by fraud. *See, e.g.*, *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 212-13 (2d Cir. 2006) (where a patent is procured by fraud, a settlement agreement may unlawfully harm competition); *In re Ciproflaxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1336 (6th Cir. 2008) (where there is evidence of fraud, a court should consider the validity of the patent in the antitrust analysis of a settlement agreement involving a reverse payment).[11]

Plaintiffs alleging an unlawfully anticompetitive settlement agreement need only plead facts suggesting there is a "reasonable expectation" of wrongful conduct. *Twombly*, 550 U.S. at 557, 559. The complaint "does not need detailed factual allegations," *id.* at 550, but only needs to "raise a reasonable expectation that discovery will reveal evidence of illegal agreement," *id.* at 557. Plaintiffs' allegations easily satisfy that low standard. Plaintiffs have alleged the "crown jewel" patents SanDisk sought to enforce against competitors were fraudulent, *see* FAC ¶¶ 4, 33, 35-73, and this Court has already held STM presented evidence establishing a genuine issue of material fact as to whether the patents were fraudulently obtained, *see* STM Order at 7-13. Moreover, Plaintiffs allege that, after this Court's denial of SanDisk's summary judgment motion on STM's fraud claims, STM entered into the Settlement Agreement with SanDisk, which ensured STM's exit from the NAND flash memory market, thereby entrenching SanDisk's monopoly. *See* FAC ¶¶ 112-120. As SanDisk concedes (at 27) without reading the terms of the Settlement Agreement,

[11] In fact, courts have held plaintiffs can sustain a claim of anticompetitive conduct simply by alleging facts showing the outcome of a settlement agreement would have been more pro-competitive absent cash payments to a competitor. *See, e.g.*, *K-Dur*, 338 F. Supp. 2d at 532.

Plaintiffs cannot determine with certainty whether the agreement was unlawfully anticompetitive. Without discovery, for example, Plaintiffs cannot determine whether SanDisk paid STM to exit the market and forego any infringement claims. But the conjunction of the settlement and STM's exit from the market, especially against the backdrop of SanDisk's other anticompetitive conduct, certainly "suggest[s]" unlawful conduct, *Twombly*, 550 U.S. at 557, 559, and raises a reasonable expectation that discovery will reveal evidence of illegal agreement. It would therefore be improper for this Court to dismiss Plaintiffs' claim at this early stage.

**VIII. Plaintiffs Have Alleged a Plausible Relevant Market**

SanDisk argues (at 29-32) that Plaintiffs have failed to allege a relevant antitrust market. Both the Supreme Court and the Ninth Circuit have confirmed that SanDisk's arguments are without merit.

The Supreme Court has recognized that market definition requires a factual inquiry into the commercial realities faced by consumers, *see Eastman Kodak Co. v. Image Tech Servs., Inc.*, 504 U.S. 451, 481-82 (1992), and the Ninth Circuit is in accord, *see Newcal Indus., Inc. v. IKON Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008) ("[T]he validity of the 'relevant market' is typically a factual element rather than a legal element."). Accordingly:

> [t]here is no requirement that these elements of [an] antitrust claim be pled with specificity. An antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect. And since the validity of the "relevant market" is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial.

*Newcal*, 513 F.3d at 1045; *see also Mendoza*, 301 F.3d at 1171 (describing questions regarding relevant market as "exceedingly complex and best addressed by economic experts and other evidence at a later stage in the proceedings"). Because defining the relevant market is so highly factual, on a motion to dismiss, an antitrust plaintiff need only allege a "plausible relevant market."

*See, e.g.*, *In re ATM Fee Antitrust Litig.*, No. C 04-2676 CRB, 2010 WL 2557519, at *5 (N.D. Cal. June 21, 2010).

Plaintiffs' allegations are certainly plausible. They have alleged a relevant product market of "raw and finished NAND flash memory products." FAC ¶ 25. SanDisk nonetheless argues (at 31) that Plaintiffs' definition is "fatally flawed" because they have "alleged no facts suggesting that consumers view all the products encompassed within the alleged market as 'reasonably interchangeable.'" SanDisk claims the alleged market is "overly broad" because "[t]here are numerous and very different flash memory products designed for various uses." *Id.* The Ninth Circuit has rejected identical arguments, holding that they are factual critiques that do not show "'the alleged market suffers a fatal legal defect.'" *Newcal*, 513 F.3d at 1045. At any rate, Plaintiffs have specifically alleged that "Purchasers of raw and finished NAND flash memory do not view other products as substitutes. . . . NAND flash memory products have demand and pricing that is distinct from other products, and there are no substitutes to which manufacturers of consumer . . . products would switch in response to a small (but substantial), non-transitory, relative increase in the pricing for NAND flash memory products." FAC ¶ 25. SanDisk essentially argues that unless a complaint includes the magic words of "interchangeability" or "cross-elasticity of demand," it must be dismissed. But SanDisk's argument confuses the rules of pleading with the evidence that will be required to address the merits.

Neither of the cases SanDisk relies on to support its position are helpful. In *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 536 F. Supp. 2d 1191, 1195-96 (C.D. Cal. 2008), the court dismissed the plaintiff's claim because it alleged no "clearly defined" relevant market and was "hopelessly muddled," inconsistently referring to both the "retail ticket sales market" or the "ticket resale market"—two terms that could both encompass distinct products belonging to different markets.

Unlike the plaintiff in *Ticketmaster*, Plaintiffs have consistently alleged a clear, straightforward, and defined product market: "raw and finished NAND flash memory." FAC ¶¶ 3, 5, 12-13, 19, 25-26, 34. Similarly, in *Golden Gate Pharmacy Services, Inc. v. Pfizer, Inc.*, No. C-09-3854 MMC, 2010 WL 1541257, at *2-*3 (N.D. Cal. Apr. 16, 2010), the Court unsurprisingly held that the plaintiffs' alleged market of "the pharmaceutical industry which includes, but is not necessarily limited to . . . all pharmaceutical products" must be dismissed because they had failed to allege all commodities in the "pharmaceutical industry" were reasonably interchangeable. *Id*. at *3. The product market Plaintiffs allege is far less sweeping. Plaintiffs do not allege the relevant market is "all computer memory" or "all flash memory." They allege only that the market includes a single, unique type of non-volatile memory.

Finally, SanDisk's claim (at 31) that the relevant market Plaintiffs allege is "overly broad," ignores the fact that an alleged relevant market *even broader* than the market Plaintiffs allege has already survived summary judgment in this Court. Indeed, in the previous litigation between SanDisk and STM, STM alleged a relevant market of "flash memory chips which are used as components for consumer products." Ans. 2d Am. Compl. & Countercls., *SanDisk Corp. v. STMicroelectronics, Inc.*, No. 5:04-cv-04379-JF, ¶ 41 (filed Sept. 6, 2007) (DN 109). The relevant market STM alleged, and which survived SanDisk's motion for summary judgment, encompassed NAND *and* NOR flash memory chips. *See id.* SanDisk's assertion that the alleged relevant market is "overly broad" is therefore misplaced.

## CONCLUSION

For the foregoing reasons, SanDisk's motion to dismiss should be denied.

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