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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

RITZ CAMERA & IMAGE, LLC, a)	CASE NO.: 5:10-CV-02787 JF
Delaware limited liability company, on)	
behalf of itself and others similarly situated,)	DEFENDANTS' REPLY IN SUPPORT
)	OF THEIR MOTION TO DISMISS
Plaintiff,)	PLAINTIFF'S FIRST AMENDED
)	COMPLAINT
v.)	
)	Date: December 17, 2010
SANDISK CORPORATION, ELIYAHOU)	Time: 9:00 AM
HARARI)	Judge: Honorable Jeremy Fogel
)	
Defendants.)	Complaint Filed: June 25, 2010
)	

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1 Defendants SanDisk Corporation (“SanDisk”) and Dr. Eliyahou Harari (“Dr. Harari”)
2 respectfully submit this Reply in support of their Motion to Dismiss (“Motion”) Plaintiff’s First
3 Amended Complaint (“FAC”).

4 **I. INTRODUCTION**

5 Defendants’ Motion established that Ritz’s alleged causal antitrust injury is contrary to
6 judicially noticeable facts. Ritz does not deny the accuracy of any of the information included in
7 Defendants’ Motion, but instead argues that it would be improper for the Court to consider anything
8 other than the allegations in the FAC. The Court is not, however, constrained to the allegations in the
9 FAC, and it may properly consider judicially noticeable facts, including the two key facts that
10 demonstrate that Ritz’s claimed antitrust injury is not only implausible (which is all that is required to
11 grant Defendants’ Motion) but untrue: (i) STM and Hynix entered into the joint venture allegedly
12 thwarted by SanDisk in 2004, and (ii) STM did not exit the flash market in 2008 but rather joined
13 forces with Intel to create the Numonyx joint venture. Incredibly, Ritz argues that the Court may not
14 take notice of this latter fact, even though Ritz specifically alleged it in the original Complaint.

15 Ritz’s failure to allege a plausible causal antitrust injury requires dismissal of the FAC. As
16 discussed in Defendants’ Motion and below, the FAC suffers from many other fatal deficiencies.
17 Because these deficiencies cannot be cured, the FAC should be dismissed with prejudice.

18 **II. ARGUMENT**

19 **A. Ritz Has Failed To Plead Antitrust Standing (Counts I And II)**

20 Ritz fails to allege a plausible causal antitrust injury necessary to antitrust standing. (Def. Br.
21 13-16.) Ritz incorrectly argues, however, that it has adequately alleged “a long-recognized antitrust
22 injury: the payment of higher prices by purchasers due to the anti-competitive conduct.” (Ritz Opp. 9.)

23 To plead “antitrust injury” a “plaintiff must allege nonconclusory facts establishing that there
24 has been injury to the plaintiff’s business or property **and** that the injury to the plaintiff’s business or
25 property occurred ‘by reason of’ the antitrust violation.” *Solinger v. A&M Records, Inc.*, 586 F.2d
26 1304, 1308-09 (9th Cir. 1978) (emphasis added). “Implicit in this definition are **two separate**
27 **conceptual issues**. First, the claimed injury must be of a type that the antitrust laws were meant to
28 discourage.... And second, the plaintiff’s injury must have been proximately caused by the

1 defendant's antitrust violation....” *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 991
 2 (N.D. Cal. 2010) (emphasis added; quoting Holmes, Antitrust Law Handbook at 885 (West 2009)).

3 Ritz's unsupported allegations concerning “higher flash memory prices” only go to the first of
 4 these issues. Defendants' Motion is addressed, however, to Ritz's failure to allege nonconclusory
 5 facts satisfying the second issue, *namely* Ritz's failure to allege a causal antitrust injury.

6 Ritz incorrectly argues that antitrust injury “is a question of fact for trial, not a motion to
 7 dismiss.” (Ritz Opp. 10.)

8 [F]ailure to allege causal antitrust injury, which “is an element of all antitrust suits,”
 9 serves as an independent basis for dismissal. Antitrust injury is injury “of the type the
 10 antitrust laws were intended to prevent,” which means harm to the process of
 competition and consumer welfare, not harm to individual competitors.

11 *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 557 (9th Cir. 2008) (citations omitted;
 12 affirming dismissal based on failure adequately to plead a causal antitrust injury).¹ In granting the
 13 Rule 12(b)(6) motion in *LiveUniverse, Inc. v. MySpace, Inc.*, 2007 WL 6865852 (C.D. Cal. June 4,
 14 2007), the district court explained that “[h]arm to one or more competitors is not sufficient to
 15 constitute antitrust injury unless a plaintiff alleges harm to the competitive process, which in turn
 16 harms consumers.” *Id.* at *15.

17 The only “harm to the competitive process” alleged in the FAC is that SanDisk drove STM
 18 from the flash market in March 2008, and that, “upon information and belief,” SanDisk thwarted a
 19 joint venture between STM and Hynix. (Def. Br. 14; FAC ¶117.)² The FAC should be dismissed
 20 because Ritz's allegations in this regard are not only implausible,³ they are demonstrably incorrect.

21 _____
 22 ¹ See also *Solinger*, 586 F.2d at 1308-09 (“The plaintiff's claim may be dismissed for lack of
 standing as a matter of law where there is an insufficient showing of causation.”) (citation omitted).

23 ² Ritz's opposition relies heavily on conclusory allegations (*see, e.g.*, Ritz Opp. 10 (citing FAC ¶¶
 34, 123, 129) that are not entitled to a presumption of truthfulness. See *Ashcroft v. Iqbal*, 129 S. Ct.
 24 1937, 1951 (2009) (“It is the conclusory nature of respondent's allegations, rather than their
 25 extravagantly fanciful nature, that disentitles them to the presumption of truthfulness.”). Ritz's
 26 opposition also improperly relies on allegations not actually contained in the FAC. (*See, e.g.*, Ritz
 27 Opp. 29 (arguing that “Samsung was driven into the monopoly camp”); *id.* 31 (arguing that SanDisk's
 lawsuit “co-opted perhaps its largest competitor, Samsung.”) Even if they had been pled, these
 28 allegations would not save the FAC. Settlements are encouraged and do not violate antitrust law
 unless they expand the scope of the patent monopoly, (Def. Br. 27-29), which Ritz nowhere alleges.

³ Ritz does not dispute that it is implausible that STM, which Ritz describes in the FAC as “the
 world's sixth largest flash memory supplier,” (FAC ¶ 116), was driven from the flash memory
 business because it incurred \$20 million in legal fees. (Def. Br. 15.)

1 Ritz does not dispute that STM and Hynix entered the joint venture the FAC incorrectly alleges
 2 SanDisk thwarted. Ritz also does not dispute that STM entered into a joint venture with Intel in
 3 March 2008 nor does Ritz dispute that STM did exit the flash market until after the patents-at-issue
 4 had expired when it sold its interest in Numonyx to Micron. (Def. Br. 9-11.)

5 Ritz instead argues that the Court must put on blinders and consider only the allegations in the
 6 FAC, even though this case would then proceed on the basis of allegations that Ritz knows to be false.
 7 (Ritz Opp. 9 (“The question at this stage is only whether Plaintiffs have *alleged* facts that could lead a
 8 reasonable fact-finder to conclude that, if the facts alleged are true, Plaintiffs’ allegations rise above
 9 the level of mere speculation.”).)⁴ The law does not require the Court to engage in that fantasy.

10 The Supreme Court held in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* that

11 courts must consider the complaint in its entirety, as well as other sources courts
 12 ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular,
 13 documents incorporated into the complaint by reference, and matters of which a court
 may take judicial notice.

14 551 U.S. 308, 322 (2007) (citation omitted). Moreover, “[t]he court need not accept as true ...
 15 allegations that contradict facts that may be judicially noticed by the court,” *Shwarz v. United States*,
 16 234 F.3d 428, 435 (9th Cir. 2000), or facts that are contrary to allegations in earlier pleadings. *See*
 17 *Stearns v. Select Comfort Retail Corp.*, 2010 WL 2898284, at *13 (N.D. Cal. July 21, 2010). In short,
 18 the Court is not required to credit demonstrably false allegations.

19 Particularly egregious is Ritz’s argument that the Court may not consider STM’s 2008 flash
 20 memory joint venture with Intel because “Plaintiff’s FAC mentions nothing about a joint venture with
 21 Intel.” (Ritz Opp. 12.) Ritz’s **original** Complaint specifically alleged that “[i]n 2008 STM transferred
 22 its flash memory business to a joint venture with Intel Corporation.” (Def. Br. 10 (quoting Dkt. 1 ¶
 23 118).) This allegation alone negates Ritz’s claim that SanDisk drove STM from the flash market in
 24 2008, which is presumably why Ritz dropped this allegation from the FAC. Precisely this sort of
 25 gamesmanship was rejected in *Stearns*, where this Court rejected the plaintiffs’ attempt to survive
 26

27 _____
 28 ⁴ Defendants are not arguing that the Court should “weigh and decide disputed facts,” (Ritz Opp. 9),
 and this motion is not based on Defendants’ “own version of the facts.” (*Id.* at 11.) Rather,
 Defendants’ motion is based on Ritz’s allegations and properly judicially noticeable facts.

1 dismissal based on allegations that were contrary to an earlier complaint. 2010 WL 2898284, at *13.⁵

2 Moreover, it is proper for the Court to take judicial notice of the fact that STM and Intel
3 entered a flash memory joint venture in 2008. As Judge Wilken recently stated in dismissing antitrust
4 and other claims in *Ice Cream Distribs. of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc.*, 2010
5 U.S. Dist. LEXIS 52985 (N.D. Cal. May 28, 2010):

6 Dreyer's requests judicial notice of filings with the Securities and Exchange
7 Commission and with the Delaware Secretary of State. Because the facts contained in
8 these filings are "capable of accurate and ready determination by resort to sources
whose accuracy cannot reasonably be questioned," the Court grants Dreyer's request.

9 *Id.* at *2-3 n.2 (citing Fed. R. Evid. 201). *See also Hanrahan v. Hewlett-Packard Co.*, 2006 U.S. Dist.
10 LEXIS 43768, at *5 (N.D. Cal. June 16, 2006) ("The Court takes judicial notice that . . . the merger
11 was consummated."). This is particularly true here since Ritz has not disputed, and reasonably could
12 not dispute, the fact that STM and Intel entered a flash memory joint venture in March 2008.

13 Similarly, it is proper for the Court to take judicial notice of the fact that STM and Hynix
14 entered into the joint venture that Ritz incorrectly alleges was thwarted by SanDisk. Again, Ritz has
15 not, and reasonably could not, dispute this fact.⁶

16 In short, both of Ritz's allegations of harm to the competitive process are not only implausible,
17 they are untrue.⁷

18 ⁵ Ritz's truncated quote of STM's statement that SanDisk drove it out of the flash memory business
19 in March 2008 (Ritz Opp. 13) omits STM's confirmation that "ST[M] transferred its memory division
20 to a joint venture with Intel Corporation (Numonyx B.V.)." *SanDisk Corp. v. STMicroelectronics,*
Inc., No. C 04-4379 JF (N.D. Cal.) (Dkt. 201).

21 ⁶ Ritz again improperly attempts to skirt the facts by arguing that "SanDisk does not claim the
22 alleged STM/Hynix joint venture was a *flash memory* joint venture" and that "SanDisk admits that
23 STM, in leaving the market, unloaded the Hynix assets." (Ritz Opp. 13.) Defendants' Motion did not
24 specify that the STM/Hynix joint venture was a flash memory joint venture because the FAC only
alleges that "STM was preparing a manufacturing joint venture with Hynix." (FAC ¶ 116.) Moreover,
Ritz's quibbling is a red herring because Ritz does not dispute that the joint venture STM and Hynix
entered is the joint venture the FAC incorrectly alleges that SanDisk thwarted, and STM did "leave
the market" in 2008 and the "Hynix assets" were not "unloaded": they were transferred to Numonyx
with the rest of STM's flash business.

25 ⁷ Ritz's arguments regarding *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261 (7th Cir. 1984),
26 misstate Defendants' Motion. (*See* Ritz Opp. 13-14.) Accordingly, as discussed in Defendants'
27 Motion, the patents-at-issue are presumed valid and Ritz lacks standing to challenge their validity.
(Def. Br. 17-22.) Defendants rely on *Brunswick* for the undisputed proposition that Ritz's "converted
28 patent" theory fails to state a cognizable antitrust injury because the enforcement of valid patents
cannot form the basis of an antitrust claim. (*See* Def. Br. 21-22) Also, as discussed in Defendants'
Motion (Def. Br. 17-21), Ritz lacks standing to challenge the validity of SanDisk's patents. In any
event, nothing about Ritz's discussion of *Brunswick* alters the fact that Ritz has failed to allege a

(cont'd)

1 This Court should reject Ritz's request for discovery into the details of the Numonyx joint
 2 venture. (*See* Ritz Opp. 11-12.) Ritz has not provided any reason to suspect that STM's decision to
 3 combine forces with Intel lessened competition in the flash market, and there is no reason to doubt the
 4 accuracy of the information provided by Defendants. Also, the facts concerning the STM/Hynix and
 5 STM/Intel joint ventures are not "largely in the hands" of SanDisk. (*See* Ritz Opp. 10). Ritz should
 6 not be permitted to inflict millions of dollars in discovery costs on SanDisk and multiple third-parties
 7 (e.g., STM, Intel, Hynix, Micron) based on demonstrably false allegations. The Supreme Court has
 8 flatly rejected Ritz's position. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007)
 9 ("[S]omething beyond the mere possibility of [relief] must be alleged, lest a plaintiff with a largely
 10 groundless claim be allowed to take up the time of a number of other people, with the right to do so
 11 representing an *in terrorem* increment of the settlement value.").

12 **B. Count I (Conspiracy to Monopolize) Fails Because SanDisk And Dr. Harari**
 13 **Cannot, As A Matter Of Law, Form An Antitrust Conspiracy**

14 Under the *Copperweld* doctrine, SanDisk and Dr. Harari are not separate economic entities
 15 capable of forming an antitrust conspiracy.⁸ (*See* Def. Br. 16-17.) Nevertheless, Ritz argues that
 16 *Copperweld*'s reasoning does not extend beyond the parent-subsidary relationship or to claims under
 17 § 2 of the Sherman Act. (Ritz Opp. 22-23 & n.6.) The *Copperweld* doctrine has in fact long been
 18 applied to the relationship between a corporation and its directors, officers and employees, and to § 2
 19 claims.⁹ *See, e.g., Levi Case Co., Inc. v. ATS Prods., Inc.*, 788 F. Supp. 428, 430-32 (N.D. Cal. 1992)

20
 21 (cont'd from previous page)
 plausible causal antitrust injury.

22 ⁸ In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Court held that a
 23 wholly-owned subsidiary could not form a § 1 conspiracy with its parent corporation because
 24 agreements between parents and subsidiaries "do not suddenly bring together economic power that
 25 was previously pursuing divergent goals." *Id.* at 769 The Court also recognized the established rule
 26 that a corporation and its officers cannot conspire. *Id.* at 769 n.15 ("Nothing in the language of the
 27 Sherman Act is inconsistent with the view that corporations cannot conspire with their own officers.");
 28 *Id.* (citing *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 n.9 (9th Cir. 1969) ("A
 corporation cannot conspire with its officers or agents to violate the antitrust laws.")).

⁹ Ritz argues that "[n]umerous courts have declined to extend *Copperweld* to situations outside the
 parent-subsidary relationship." (Ritz Opp. 23:1-2 & n.6.) However, none of the cases cited by Ritz
 address whether a corporation can conspire with its directors, officers or employees. Moreover, the
 Ninth Circuit has rejected Ritz's argument that *Copperweld* is limited to the parent-subsidary context.
See Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1147 (9th Cir. 2003).

1 (applying *Copperweld* to reject a § 2 claim where alleged conspirators' relationships were that of
2 patent holder/exclusive licensee and corporation/director, officer, employee).¹⁰

3 Ritz also incorrectly argues that the *Copperweld* doctrine does not apply because Dr. Harari
4 "filed the 'crown jewel' patent applications, in his own name, months before he founded SanDisk in
5 June 1989" and he therefore supposedly "committed the improper conduct underlying his conspiracy
6 with SanDisk [while] he was an employee and/or director at WSI." (Ritz. Opp. 23.) Ritz's argument is
7 belied by its own allegations. Ritz admits that SanDisk was actually founded in **June 1988**,¹¹ and the
8 FAC alleges that the applications underlying the '338 and '517 patents were filed on April 13, 1989
9 (FAC ¶ 94), nearly a year **after** SanDisk was founded and **after** Dr. Harari had severed all ties with
10 WSI. (See FAC ¶ 102.) Moreover, the applications were not filed by Dr. Harari "in his own name."
11 They were filed by SanDisk, as assignee, and they included all three SanDisk employee-inventors, not
12 just Dr. Harari. (See RJN Exs. I & J.)

13 The *Copperweld* doctrine bars Ritz's conspiracy claim even if, as alleged by Ritz, Dr. Harari
14 "conceived" the inventions in the patent applications while he was "a director[] and/or consultant at
15 WSI." This argument invokes the "independent personal stake" exception, which has not been
16 adopted by the Ninth Circuit¹² and its application to antitrust claims is questionable.¹³ Even if that
17 exception were the law in the Ninth Circuit, it would still not apply here since Ritz cannot allege that
18 Dr. Harari had an interest in a separate economic entity that stood to benefit from the alleged
19 conspiracy,¹⁴ or that Dr. Harari's alleged conspiracy with SanDisk "deprive[d] the marketplace of the

20 ¹⁰ See also *Carpenter Tech. Corp. v. Allegheny Techs., Inc.*, 646 F. Supp. 2d 726, 734-35 (E.D. Pa.
21 2009) (*Copperweld*'s "analysis is equally applicable to Section 2 conspiracy to monopolize claims");
22 *Allen v. Washington Hosp.*, 34 F. Supp. 2d 958, 963 (W.D. Pa. 1999) (finding that officers and owners
23 of the same corporation could not conspire to monopolize under Section 2); *Vollrath Co. v. Sammi*
Corp., 1989 WL 201632, at *15 (C.D. Cal. Dec. 20, 1989) ("The *Copperweld* rule should be equally
24 applicable to an allegation of conspiracy under section 2."); *Sadler v. Rexair, Inc.*, 612 F. Supp. 491,
494 (D. Mont. 1985) (applying *Copperweld* to dismiss plaintiff's § 2 conspiracy claim).

24 ¹¹ Ritz Opp. 4 n.1 ("The FAC's reference to 'June 1989' was an error. The correct date is June
1988.").

25 ¹² See *Nat'l Flood Servs., Inc. v. Torrent Techs., Inc.*, 2006 WL 1518886, at *5 (W.D. Wash. May
26 26, 2006) ("The Ninth Circuit has never expressly adopted the independent personal stake exception
to the general rule that employees cannot conspire with their employer.").

27 ¹³ See *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605, 615 (6th Cir. 1990) (declining to apply the
exception to antitrust claims).

28 ¹⁴ See *Holter v. Moore & Co.*, 702 F.2d 854, 857 n.8 (10th Cir. 1983) (explaining that the exception
"applies only when the officer has an outside economic interest, such as ownership of a competing

(cont'd)

1 independent centers of decisionmaking that competition assumes and demands.” *Lockheed Martin*
 2 *Corp. v. Boeing Co.*, 314 F. Supp. 2d 1198, 1237 (M.D. Fla. 2004).

3 In *Lockheed*, the court applied *Copperweld* to reject Lockheed’s argument that its former
 4 employee, Branch, was capable of forming an antitrust conspiracy with his new employer, Boeing,
 5 even though Lockheed alleged that the conspiracy began five months before Branch began his
 6 employment with Boeing and while Branch was still employed by Lockheed.

7 The allegations in the instant case do not suggest that Branch *himself* ever competed
 8 with or otherwise pursued goals divergent from Boeing’s. In the five months before
 9 Branch was hired by Boeing, it is true that his alleged acts cannot be said to have been
 10 in *Lockheed’s* interest. His acts, however, were also not in his *own* interest as distinct
 11 from Boeing’s interest Whether Branch was being paid by Boeing in those five
 12 months for handing over Lockheed’s documents or simply doing it to impress Boeing
 in his hopes of obtaining employment, his interests, for antitrust conspiracy purposes,
 were analogous to those of any formal employee or a wholly owned-subsiidiary of
 Boeing. . . . The collusion between Branch and Boeing represented no joining of
 economic powers; it did not deprive the marketplace of the independent centers of
 decisionmaking that competition assumes and demands.

13 *Id.* at 1237 (citations and quotation marks omitted).

14 **C. Ritz Lacks Standing To Pursue A Walker Process Claim**

15 The majority view is that direct purchasers like Ritz do not have standing to pursue *Walker*
 16 *Process* antitrust claims. (Def. Br. 17-20).

17 Ritz urges this Court to adopt the minority view (*i.e.*, that consumers possess standing to
 18 pursue *Walker Process* claims), arguing that Congress’ intent in enacting antitrust law was to protect
 19 consumers.¹⁵ (Ritz Opp. 15.) Ritz’s argument ignores established precedent holding that a plaintiff’s
 20 status as a consumer alone does not confer antitrust standing. “Congress did not intend to provide a
 21 private remedy for all injuries that might conceivably be traced to an antitrust violation.” *Bubar v.*
 22 *Ampco Foods, Inc.*, 752 F.2d 445, 448 (9th Cir. 1985). Rather, courts “must make a further
 23 determination whether the plaintiff is a proper party to bring a private antitrust action.” *Associated*
 24 *Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983). It
 25 is this additional inquiry that has led the majority of the courts presented with the issue to conclude

26 _____
 27 (*cont’d from previous page*)
 corporation, through which he will benefit from the restraint”).

28 ¹⁵ Ritz’s reliance on Congress’ intent to protect “consumers” is misplaced. Ritz is a retailer, not
 consumer. (See FAC ¶ 16.)

1 that purchasers are not the proper party to bring *Walker Process* claims because they do not have
2 standing to challenge patent validity.¹⁶

3 Ritz's reliance on *In re DDAVP Direct Purchaser Antitrust Litigation*, 585 F.3d 677, 684 (2d
4 Cir. 2009), is misplaced. That case created—at least in the Second Circuit—a narrow exception to the
5 majority rule that purchasers do not have standing to pursue *Walker Process* claims where the patents-
6 at-issue “are **already unenforceable due to inequitable conduct.**” 585 F.3d at 691-92 (emphasis
7 added). This narrow exception avoids the potentially serious consequences of “expanding the
8 universe of patent challengers” and “disturbing the incentives for innovation,” *id.* at 691, because the
9 purchaser-plaintiff does not have to establish inequitable conduct. In the *DDAVP* setting inequitable
10 conduct has already been established by a party within the existing universe of patent challengers.
11 *DDAVP*'s narrow exception has not been adopted by the Ninth Circuit or any other court. Moreover,
12 in this case it would be inapplicable since no court has found either the '337 patent or the '517 patent
13 unenforceable. The patent challenger universe would therefore need to be expanded to include direct
14 purchasers generally and even *DDAVP* does not hold or suggest that should be done.

15 Ritz argues that “the patents in this case are considerably *more* ‘tarnished’ than in *DDAVP*”
16 because “in this case, the Court has already found that there are triable issues of fact on the *Walker*
17 *Process* claims[.]” (Ritz Opp. 19.) Ritz's attempt to equate a denial of summary judgment to a
18 finding of inequitable conduct is wrong and misses the point of the narrow *DDAVP* exception. Unlike
19 the situation in *DDAVP*, no court has found that the '338 or '517 patents are unenforceable and thus,
20 unlike the purchaser-plaintiff in *DDAVP*, Ritz will be required to mount a full challenge to the
21 patents' enforceability. Granting Ritz this right would greatly “expand the universe of patent
22 challengers” and “disturb the incentives for innovation,” and thereby “disrupt the delicate balance
23 between patent law and antitrust law that *Walker Process* delineated.” *Kroger Co. v. Sanofi-Aventis*,
24 701 F. Supp. 2d 938, 963 (S.D. Ohio 2010). (*See* Def. Br. 19-20.)

25 ¹⁶ This case demonstrates another reason why direct purchasers are not the proper party to bring
26 *Walker Process* claims. They simply are not in the position to determine at the outset whether a
27 viable claim exists. Ritz admits that it does not have knowledge of facts needed to plead a plausible
28 causal antitrust injury, *i.e.*, that STM's entry into a joint venture with Intel had an adverse effect on
competition. (Ritz Opp. 12-13 (“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 . . .”).)

1 Ritz relies heavily on the discussion of *Walker Process* standing in *In re Netflix Antitrust*
 2 *Litigation*, 506 F. Supp. 2d 308 (N.D. Cal. 2007), claiming it is not dicta because the court
 3 “necessarily addressed the issue of whether direct purchasers have *Walker Process* standing because,
 4 if it had found the plaintiff did not have *Walker Process* standing, there would have been no need for
 5 the Court to go on to consider antitrust injury.” (Ritz Opp. 16-17 n.3.) The claims in *Netflix* were
 6 dismissed because the consumer-plaintiff had not alleged a plausible antitrust injury. Accordingly, the
 7 court’s discussion of whether consumers possess *Walker Process* standing was unnecessary; on the
 8 facts alleged, even competitors would lack standing.

9 Ritz incorrectly argues that *In re Remeron Antitrust Litigation*, 335 F. Supp. 2d 522, 529 (D.
 10 N.J. 2004) is the “sole reported case actually involving direct purchasers.” (Ritz Opp. 21.) The 2010
 11 *Kroger* decision, which has been discussed extensively by the Defendants (Def. Br. 14-20), involved a
 12 failed attempt by direct purchasers to bring a *Walker Process* claim; indeed, its alternative caption is
 13 *In re Plavix Direct Purchaser Antitrust Litigation*. See 701 F. Supp. 2d at 938. Ritz argues that
 14 *Kroger* is distinguishable because it “involved a patent that had specifically been found valid in prior
 15 litigation.” (Ritz Opp. 21 n.5.) Although the *Kroger* decision inartfully states that the patent-at-issue
 16 was “found valid” in prior litigation, the district court in the prior litigation held that “[a]fter trial on
 17 the merits, this Court finds that [defendants] have failed to prove by clear and convincing evidence
 18 that [the patent-at-issue] is invalid or unenforceable on any of the grounds asserted.” *Sanofi-*
 19 *Synthelabo v. Apotex, Inc.*, 492 F. Supp. 2d 353, 356 (S.D.N.Y. 2007), *affirmed*, 550 F.3d 1075, 1090
 20 (Fed. Cir. 2008) (affirming “the district court’s conclusion that invalidity had not been established by
 21 clear and convincing evidence.”). Further, because the direct purchaser plaintiffs in *Kroger* could not
 22 rely on the preclusive effect of a prior finding of inequitable conduct, the court dismissed their *Walker*
 23 *Process* claim “so as not to open the door to all direct purchasers otherwise unable to challenge a
 24 patent’s validity being able to do so by dressing their patent challenge with a *Walker Process* claim.”
 25 701 F. Supp. 2d at 963. Ritz’s *Walker Process* claim should be dismissed for the same reason.¹⁷

26 ¹⁷ Ritz attempts to distinguish *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 363 F. Supp.
 27 2d 514, 541 (E.D.N.Y. 2005), and *In re K-Dur Antitrust Litigation*, 2007 WL 5297755 (D.N.J. Mar. 1,
 28 2007), because they involved “indirect” purchasers, (Ritz Opp. 21-22 n.5), but direct and indirect
 purchasers both lack standing to challenge patent validity and the reasons for denying *Walker Process*
 standing apply equally to both.

(cont'd)

1 Ritz's "public policy" arguments are equally unpersuasive. As an initial matter, the potential
 2 for creating a new class of purchaser "trolls" is a serious concern and, as other courts and
 3 commentators have recognized, "[t]he desirability of such a change is a complex issue which ...
 4 should be made by Congress, and not by the courts." (See Def. Br. 19-20.) In addition, Ritz's
 5 argument that purchasers should have standing to bring *Walker Process* claims because "a monopolist
 6 that litigates up to trial and then settles with an exhausted competitor can not only exclude
 7 competition but can also keep anyone from ever challenging its fraudulently obtained patents,"
 8 (Ritz's Opp. 19-20), overlooks: (1) the re-examination process, which permits consumers who
 9 believe they are being improperly charged monopoly prices to seek to invalidate a patent; (2) the
 10 ability of other competitors to pursue *Walker Process* claims; and (3) the policy favoring settlements.
 11 Further, Ritz's argument that customers should have *Walker Process* standing because juries need to
 12 consider an anticompetitive scheme as a whole falls flat because Ritz's anticompetitive scheme theory
 13 stands or falls with its *Walker Process* claim.

14 **D. Count II (Monopolization) Must Be Dismissed Because Ritz's Remaining**
 15 **Anticompetitive Conduct Theories Are Fatally Flawed**

16 **1. SanDisk Is Immune From Antitrust Liability Based On Its**
 17 **Enforcement Of Subpoenas**

18 SanDisk is immune from liability based on its enforcement of document and deposition
 19 subpoenas. (Def. Br. 22-24.) Ritz argues, however, that SanDisk is not immune because the sham
 20 litigation exception to *Noerr-Pennington* immunity applies. (Ritz Opp. 26-28.) Recognizing that
 21 SanDisk's prior litigation success forecloses the traditional sham litigation exception, Ritz argues that
 22 it "clearly alleged SanDisk engaged in a 'pattern' of infringement actions based on fraudulently
 23 obtained patents," and, therefore, SanDisk's prior litigation success does not foreclose the sham
 24 litigation exception. (*Id.* 27 (citing *USS-POSCO Indus. v. BE&K Constr. Co.*, 31 F.3d 800, 810-11

(*cont'd from previous page*)

25 Ritz's attempt to distinguish *Kaiser Foundation v. Abbott Laboratories*, 2009 WL 3877513 (C.D.
 26 Cal. Oct. 8, 2009), as involving claims under the Hatch-Waxman Act is also unavailing. (Ritz Opp.
 27 21-22 n.5.) *Kaiser* was another direct-purchaser case and the court merely applied the majority rule,
 28 noting that "at present, non-infringing consumers of patented products who may feel they are being
 charged supra competitive prices by the patentee have no cause of action to invalidate the patent" and
 that "Congress did not intend to change the standing requirements for actions to invalidate patents
 when it passed, and still more clearly when it later amended, the Hatch-Waxman Amendments in
 2003." *Id.* at *4.

1 (9th Cir. 1994) (“When dealing with a series of lawsuits, the question is not whether any one of them
 2 has merit . . . but whether they [were] brought . . . as part of a pattern or practice of successive filings
 3 undertaken for purposes of harassment?”).)

4 In fact, Ritz has failed to allege that SanDisk has a “policy of starting legal proceedings
 5 without regard to the merits.” *See Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d
 6 1033, 1046 (9th Cir. 2009). Ritz also fails to allege the requisite “pattern.” The FAC refers only to
 7 three infringement actions: (1) a 1996 ITC proceeding against Samsung, (FAC ¶ 41); (2) a 2004
 8 infringement action against STM, (FAC ¶ 112); and (3) a 2005 infringement action against STM,
 9 (FAC ¶ 112).¹⁸ *USS-POSCO* does not apply in such circumstances:

10 This case does not concern “a whole series of legal proceedings,” or a “pattern of
 11 baseless, repetitive claims,” that would require us to apply the standard set forth in
 12 *USS-POSCO Industries*. Here, plaintiffs cite only two lawsuits, not a “series” or a
 13 “pattern” of them. Although we do not attempt to define here the number of legal
 14 proceedings needed to allege a “series” or “pattern” of litigation as required in *USS-
 POSCO Industries*, **we distinguish this case from *USS-POSCO Industries*, which
 involved twenty-nine legal proceedings.** We do not consider the third “sham”
 litigation alleged, since that was simply a counterclaim in this litigation, and contained
 essentially the same allegation as one of the two alleged “sham” lawsuits.

15 *Amarel v. Connell*, 102 F.3d 1494, 1519 (9th Cir. 1997) (internal citations omitted) (emphasis added).

16 Ritz’s attempt to invoke the *Walker Process* fraud exception also fails because, as discussed
 17 above, Ritz does not have standing to pursue a *Walker Process* fraud claim.

18 2. SanDisk Is Immune From Liability Based On Litigation-Related 19 Communications To Competitor Customers

20 SanDisk is immune from liability based on communications reasonably related to potential
 21 litigation. (Def. Br. 22-25.) Ritz does not attempt to distinguish the body of case law Defendants cite
 22 for the majority view that litigation-related communications to customers must be based on
 23 objectively baseless claims to fall outside *Noerr-Pennington*. *See, e.g., GP Indus., Inc. v. Eran Indus.*
 24 *Inc.*, 500 F.3d 1369 (Fed. Cir. 2007). Rather, Ritz relies on readily distinguishable cases to argue that
 25 SanDisk’s litigation-related communications to competitor customers do not enjoy *Noerr-Pennington*
 26 immunity. (Ritz Opp. 25-26.) The sole Ninth Circuit case relied upon by Ritz, *Coalition for ICANN*

27
 28 ¹⁸ The actions against STM were consolidated into a single proceeding in August 2007. (*See* C 04-4379-JF, Dkt. No. 273 at 6.)

1 *Transparency, Inc. v. VeriSign, Inc.*, 567 F.3d 1084 (9th Cir. 2009), involved the application of *Noerr-*
2 *Pennington* to defamatory communications to customers that were *unrelated* to litigation. *Id.* at 1092-
3 93. Ritz also cites *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982),
4 which involved threats to bring sham litigation against customers. Ritz does not allege that SanDisk
5 threatened to bring suit against STM’s customers. Finally, *Meridian Project Sys., Inc. v. Hardin*
6 *Constr. Co.*, 404 F. Supp. 2d 1214 (E.D. Cal. 2005), *180s, Inc. v. Gordini U.S.A., Inc.*, 602 F. Supp.
7 2d 635 (D. Md. 2009), and *Caldon, Inc. v. Advanced Measurement & Analysis Grp., Inc.*, 515 F. Supp.
8 2d 565 (W.D. Pa. 2007) involved false and disparaging statements; Ritz does not allege that
9 SanDisk’s statements were false or disparaging.

10 **3. SanDisk’s Decision To Cease Doing Business With Ritz Was Lawful**

11 SanDisk’s decision to stop doing business with Ritz was entirely lawful. (Def. Br. 25-27.)
12 “[A]s a general matter, the Sherman Act does not restrict the long recognized right of a trader or
13 manufacturer engaged in an entirely private business, freely to exercise his own independent
14 discretion as to parties with whom he will deal.” *LiveUniverse*, 304 F. App’x at 556 (affirming the
15 district court’s dismissal of the plaintiff’s “failure to deal” claim). The law is clear that “a party may
16 refuse to deal with another ‘provided there is no effect that contravenes the antitrust laws.’” *Zoslaw v.*
17 *MCA Distrib. Corp.*, 693 F.2d 870, 889 (9th Cir. 1982).

18 Ritz does not cite any authority holding that a defendant must continue to do business with a
19 plaintiff. Ritz argues that the holding in *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d
20 867 (2d Cir. 1962), is limited to Sherman Act § 1 claims and to cases where there is no suggestion that
21 the manufacturer’s actions constituted a § 2 violation. (Ritz Opp. 30.) In *Zoslaw*, the Ninth Circuit
22 applied the same rationale that the Second Circuit applied in *House of Materials* to hold in a § 2 case
23 that a defendant may refuse to deal with the plaintiffs that brought suit. *Zoslaw*, 693 F.2d at 890
24 (explaining that “avoiding future litigation whose costs exceeded the benefits from doing business
25 with appellants” was a legitimate business reason for the accused monopolist to refuse to deal).

26 **4. Ritz Does Not Allege Antitrust Injury Resulting From SanDisk’s** 27 **Litigation Related Communications Or From SanDisk’s Lawful** 28 **Decision To Stop Doing Business With Ritz**

Ritz’s “customer threat” and “refusal to deal” theories also fail because Ritz fails to allege an

1 associated injury to competition. (Def. Br. 22-26.) Ritz does not allege that any customer reacted to
2 SanDisk's alleged threats by altering its purchasing behavior, much less allege that a sufficient
3 number of competitor customers altered their purchasing behavior to result in harm to competition, as
4 opposed to harm to a specific competitor.

5 Ritz argues instead that SanDisk's termination of Ritz harmed competition by sending "a clear
6 message to the entire flash memory market: if you challenge the enforceability of our patents, we will
7 cut you off." (Ritz Opp. 31.) As an initial matter, the FAC does not allege that SanDisk sent "a clear
8 message to the entire flash memory market." Indeed, the FAC does not allege that anyone other than
9 Ritz and SanDisk even knew of SanDisk's decision to stop doing business with Ritz. Further, "[a]
10 refusal to deal becomes illegal under the Sherman Act only when it produces . . . elimination of
11 competition, or creation of monopoly." *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1248 (5th
12 Cir. 1975). Here, even if true, the only alleged harm to competition (STM's alleged exit from the
13 market in March 2008 and the allegedly thwarted 2004 Hynix/STM joint venture) occurred long
14 before SanDisk decided to stop doing business with Ritz.

15 **5. Ritz's Anticompetitive Settlement Theory Fails To State A Claim**

16 Ritz's anticompetitive settlement theory fails because it does not state a plausible,
17 nonspeculative antitrust injury. (Def. Br. 27-29.) Indeed, Ritz's allegation that SanDisk drove STM
18 from the market in March 2008 is inconsistent with its allegation that the September 2009
19 SanDisk/STM settlement harmed competition.

20 Ritz argues that settlement agreements involving reverse payments can be anticompetitive.
21 (Ritz Opp. 31-33.) Ritz does not allege, however, that the SanDisk/STM settlement involved a
22 reverse payment. Moreover, reverse payment settlements only violate antitrust law where they
23 expand a patent beyond its statutory scope. *See In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187,
24 212 (2d Cir. 2006) ("[S]imply because a . . . company holding a patent paid its generic competitor
25 money cannot be the sole basis for a violation of antitrust law,' unless the 'exclusionary effects of the
26 agreement' exceed the 'scope of the patent's protection.'") (quoting *Schering-Plough Corp. v. FTC*,
27 402 F.3d 1056, 1076 (11th Cir. 2005)). Ritz does not and could not plausibly allege that the
28 SanDisk/STM settlement expanded the '338 or '517 patents beyond their statutory scope, and the '517

1 patent expired *before* the settlement was entered, and the '338 patent expired *shortly thereafter*. (See
2 RJN 4-5.)

3 **E. Ritz Fails To Allege A Relevant Antitrust Market**

4 Ritz's failure to define a relevant product market with reference to the rule of reasonable
5 interchangeability of use and cross-elasticity of demand mandates dismissal of the FAC. (Def. Br. 29-
6 32.) Specifically, Ritz fails to allege facts suggesting that consumers view raw flash components as
7 reasonably interchangeable with finished flash products or that they view the variety of finished flash
8 products identified in the FAC as reasonably interchangeable with each other. *See, e.g., Golden Gate*
9 *Pharmacy Servs., Inc. v. Pfizer, Inc.*, 2010 WL 1541257, at *2-4 (N.D. Cal. Apr. 16, 2010);
10 *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 536 F. Supp. 2d 1191, 1196 (N.D. Cal. 2008).

11 Ritz does not address this fatal flaw in its market allegations. Instead, Ritz incorrectly argues
12 that "[t]he Ninth Circuit has rejected identical arguments, holding that they are factual critiques that
13 do not show 'the alleged market suffers a fatal legal defect'." (Ritz Opp. 34 (citing *Newcal Indus., Inc.*
14 *v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008).) *Newcal* actually rejected an argument
15 that Defendants have neither made nor suggested, *i.e.*, that a contractually-created group cannot
16 constitute a 'relevant market' for antitrust purposes. *Id.* at 1050 ("This case is not a case in which the
17 alleged market power flows from contractual exclusivity.").

18 Ritz also incorrectly argues that it pled a relevant market by alleging: "Purchasers of raw and
19 finished NAND flash memory do not view other products as substitutes NAND flash memory
20 products have demand and pricing that is distinct from other products, and there are no substitutes to
21 which manufactures of consumer . . . products would switch in response to a small (but substantial),
22 non-transitory, relative increase in the pricing for NAND flash memory products." (Ritz Opp. 34
23 (citing FAC ¶25).) Ritz gets nowhere, however, by dressing its relevant market in the language of
24 antitrust. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987)
25 (granting a motion to dismiss antitrust claims) ("[I]f the **facts** do not at least outline or adumbrate a
26 violation of the Sherman Act, the [plaintiff] will get nowhere merely by dressing them up in the
27 language of antitrust." (emphasis added)).

28 The FAC also fails because Ritz alleges no facts demonstrating consumers view the raw and

