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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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

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Defendants SanDisk Corporation ("SanDisk") and Dr. Eliyahou Harari ("Dr. Harari") respectfully submit this Reply in support of their Motion to Dismiss ("Motion") Plaintiff's First Amended Complaint ("FAC").

I. INTRODUCTION

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

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

II. ARGUMENT

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

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

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

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

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

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

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

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

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

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[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).

[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. 1937, 1951 (2009) ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truthfulness."). Ritz's opposition also improperly relies on allegations not actually contained in the FAC. (*See, e.g.*, Ritz 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 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.)

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

Ritz instead argues that the Court must put on blinders and consider only the allegations in the FAC, even though this case would then proceed on the basis of allegations that Ritz knows to be false. (Ritz Opp. 9 ("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.").)[4] The law does not require the Court to engage in that fantasy.

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

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

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

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

[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.

dismissal based on allegations that were contrary to an earlier complaint. 2010 WL 2898284, at *13.[5]

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

> Dreyer's requests judicial notice of filings with the Securities and Exchange Commission and with the Delaware Secretary of State. Because the facts contained in 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.

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

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

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

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[5] Ritz's truncated quote of STM's statement that SanDisk drove it out of the flash memory business in March 2008 (Ritz Opp. 13) omits STM's confirmation that "ST[M] transferred its memory division 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).

[6] Ritz again improperly attempts to skirt the facts by arguing that "SanDisk does not claim the alleged STM/Hynix joint venture was a *flash memory* joint venture" and that "SanDisk admits that STM, in leaving the market, unloaded the Hynix assets." (Ritz Opp. 13.) Defendants' Motion did not 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.

[7] Ritz's arguments regarding *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261 (7th Cir. 1984), misstate Defendants' Motion. (*See* Ritz Opp. 13-14.) Accordingly, as discussed in Defendants' 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 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

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

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

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

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plausible causal antitrust injury.

[8] In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Court held that a wholly-owned subsidiary could not form a § 1 conspiracy with its parent corporation because agreements between parents and subsidiaries "do not suddenly bring together economic power that was previously pursuing divergent goals." *Id.* at 769 The Court also recognized the established rule that a corporation and its officers cannot conspire. *Id.* at 769 n.15 ("Nothing in the language of the Sherman Act is inconsistent with the view that corporations cannot conspire with their own officers."); *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-subsidiary 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-subsidiary context. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147 (9th Cir. 2003).

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

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

The *Copperweld* doctrine bars Ritz's conspiracy claim even if, as alleged by Ritz, Dr. Harari "conceived" the inventions in the patent applications while he was "a director[] and/or consultant *at WSI*." This argument invokes the "independent personal stake" exception, which has not been adopted by the Ninth Circuit[12] and its application to antitrust claims is questionable.[13] Even if that exception were the law in the Ninth Circuit, it would still not apply here since Ritz cannot allege that Dr. Harari had an interest in a separate economic entity that stood to benefit from the alleged conspiracy,[14] or that Dr. Harari's alleged conspiracy with SanDisk "deprive[d] the marketplace of the

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[10] *See also Carpenter Tech. Corp. v. Allegheny Techs., Inc.*, 646 F. Supp. 2d 726, 734-35 (E.D. Pa. 2009) (*Copperweld*'s "analysis is equally applicable to Section 2 conspiracy to monopolize claims"); *Allen v. Washington Hosp.*, 34 F. Supp. 2d 958, 963 (W.D. Pa. 1999) (finding that officers and owners 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 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).

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

[12] *See Nat'l Flood Servs., Inc. v. Torrent Techs., Inc.*, 2006 WL 1518886, at *5 (W.D. Wash. May 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."),

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

[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

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

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

> The allegations in the instant case do not suggest that Branch *himself* ever competed with or otherwise pursued goals divergent from Boeing's. In the five months before Branch was hired by Boeing, it is true that his alleged acts cannot be said to have been in *Lockheed's* interest. His acts, however, were also not in his *own* interest as distinct from Boeing's interest . . . . Whether Branch was being paid by Boeing in those five 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-subsidiary 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.

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

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

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

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

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corporation, through which he will benefit from the restraint").

[15] Ritz's reliance on Congress' intent to protect "consumers" is misplaced. Ritz is a retailer, not consumer. (*See* FAC ¶ 16.)

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

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

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

[16] This case demonstrates another reason why direct purchasers are not the proper party to bring *Walker Process* claims. They simply are not in the position to determine at the outset whether a viable claim exists. Ritz admits that it does not have knowledge of facts needed to plead a plausible 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 . . . .").)

Ritz relies heavily on the discussion of *Walker Process* standing in *In re Netflix Antitrust Litigation*, 506 F. Supp. 2d 308 (N.D. Cal. 2007), claiming it is not dicta because the court "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 consider antitrust injury." (Ritz Opp. 16-17 n.3.) The claims in *Netflix* were dismissed because the consumer-plaintiff had not alleged a plausible antitrust injury. Accordingly, the court's discussion of whether consumers possess *Walker Process* standing was unnecessary; on the facts alleged, even competitors would lack standing.

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

[17] Ritz attempts to distinguish *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 363 F. Supp. 2d 514, 541 (E.D.N.Y. 2005), and *In re K-Dur Antitrust Litigation*, 2007 WL 5297755 (D.N.J. Mar. 1, 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.

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Ritz's "public policy" arguments are equally unpersuasive. As an initial matter, the potential for creating a new class of purchaser "trolls" is a serious concern and, as other courts and commentators have recognized, "[t]he desirability of such a change is a complex issue which … should be made by Congress, and not by the courts." (*See* Def. Br. 19-20.) In addition, Ritz's argument that purchasers should have standing to bring *Walker Process* claims because "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," (Ritz's Opp. 19-20), overlooks: (1) the re-examination process, which permits consumers who believe they are being improperly charged monopoly prices to seek to invalidate a patent; (2) the ability of other competitors to pursue *Walker Process* claims; and (3) the policy favoring settlements. Further, Ritz's argument that customers should have *Walker Process* standing because juries need to consider an anticompetitive scheme as a whole falls flat because Ritz's anticompetitive scheme theory stands or falls with its *Walker Process* claim.

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

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

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

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Ritz's attempt to distinguish *Kaiser Foundation v. Abbott Laboratories*, 2009 WL 3877513 (C.D. Cal. Oct. 8, 2009), as involving claims under the Hatch-Waxman Act is also unavailing. (Ritz Opp. 21-22 n.5.) *Kaiser* was another direct-purchaser case and the court merely applied the majority rule, 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.

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

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

> This case does not concern "a whole series of legal proceedings," or a "'pattern of baseless, repetitive claims,'" that would require us to apply the standard set forth in *USS-POSCO Industries*. Here, plaintiffs cite only two lawsuits, not a "series" or a "pattern" of them**.** Although we do not attempt to define here the number of legal 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.

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

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

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

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

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

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

3. SanDisk's Decision To Cease Doing Business With Ritz Was Lawful

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

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

4. Ritz Does Not Allege Antitrust Injury Resulting From SanDisk's Litigation Related Communications Or From SanDisk's Lawful Decision To Stop Doing Business With Ritz

Ritz's "customer threat" and "refusal to deal" theories also fail because Ritz fails to allege an

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

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

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

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

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

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

E. Ritz Fails To Allege A Relevant Antitrust Market

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

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

Ritz also incorrectly argues that it pled a relevant market by alleging: "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 manufactures of consumer . . . products would switch in response to a small (but substantial), non-transitory, relative increase in the pricing for NAND flash memory products." (Ritz Opp. 34 (citing FAC ¶25).) Ritz gets nowhere, however, by dressing its relevant market in the language of antitrust. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987) (granting a motion to dismiss antitrust claims) ("[I]f the **facts** do not at least outline or adumbrate a violation of the Sherman Act, the [plaintiff] will get nowhere merely by dressing them up in the language of antitrust." (emphasis added)).

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

finished flash products *within* the alleged market as substitutes or the variety of finished flash products *within* the market as substitutes for each other. It is no answer that consumers do not view products *outside* the alleged market as substitutes for products *within* the market.

Ritz asserts, without citation, that it has alleged a relevant market comprising a "single, unique type of non-volatile memory." (Ritz Opp. 35.) The FAC contains no such factual allegations. To the contrary, the FAC distinguishes between raw and finished flash, (FAC ¶¶ 2, 25), distinguishes between flash products that contain a microcontroller, flash products combined with DRAM or SRAM and flash memory with a system specially embedded on the chip, (*id.* ¶ 19), and identifies a variety of finished flash products, (*id.* ¶ 2).[19] Further, the '338 and '517 patents, which are subject to mandatory judicial notice, demonstrate that there are multiple types of NAND flash memory incorporating different improvements. (RJN Exs. I, Abstract & J, Abstract.)

Ritz's claim that a broader flash memory market than the one it alleges survived summary judgment in *SanDisk Corporation v. STMicroelectronics, Inc*. is disingenuous. SanDisk's motion for summary judgment did not raise the deficiencies in STM's alleged market. *See SanDisk Corp.*, No. C 04-4379-JF (N.D. Cal.) (Dkt. 175).

III. CONCLUSION

For the foregoing reasons, Defendants' Motion should be granted and the FAC dismissed with prejudice.

DATED: November 30, 2010

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[19] The FAC also contains no factual allegations explaining why the relevant market is limited to raw and finished flash products that "employ technology claimed by SanDisk to be patented." (FAC ¶ 25.) Specifically, it contains no allegations explaining why raw and finished flash products that do not practice the inventions claimed in the '338 and '517 patents are excluded from the relevant market. The FAC is also unclear as to whether flash combined with DRAM or SRAM and flash with a system specially embedded on the chip are included in the market, and, if not, why such products are excluded. (*Id.* ¶ 19.)