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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RITZ CAMERA & IMAGE, LLC, a Delaware limited liability company, on behalf of itself and others similarly situated, Plaintiff, v. SANDISK CORPORATION and ELIYAHOU HARARI, Defendants.	CASE NO.: 5:10-CV-02787 JF **RITZ CAMERA & IMAGE, LLC'S OPPOSITION TO SANDISK CORPORATION'S MOTION TO CERTIFY THE COURT'S *WALKER PROCESS* STANDING RULING FOR INTERLOCUTORY APPEAL** Date: May 6, 2011 Time: 9:00 AM Judge: Honorable Jeremy Fogel

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INTRODUCTION

On August 25, 2010, Plaintiff Ritz Camera & Image, LLC ("Ritz"), on behalf of itself and others similarly situated, filed its first amended complaint (Aug. 25, 2010) (Dkt. No. 27) ("FAC") against Defendants SanDisk Corporation ("SanDisk") and Eliyahou Harari ("Harari"), alleging violations of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2 ("Sherman Act"). Ritz asserted claims for conspiracy to monopolize and monopolization of the NAND flash memory market. In particular, Ritz asserted a *Walker Process*[1] claim, alleging that SanDisk had fraudulently obtained two patents from the United States Patent and Trademark Office and had conspired with Harari to monopolize, and had monopolized, the market for NAND flash memory products by enforcing the fraudulently obtained patents. *See* FAC ¶¶ 124-135. Ritz asserted that Defendants' actions resulted in reduced market competition and a steep increase in prices for NAND flash memory products. *See id.*

In addition to its *Walker Process* claim, Ritz brought a number of other claims against Defendants. Specifically, Ritz alleged that Defendants had tortiously converted NAND flash memory technology to obtain the "crown jewel" patents, *see id.* ¶¶ 93-109; had engaged in anticompetitive customer threats against members of the proposed class who purchased NAND flash memory from SanDisk's competitors, *see id.* ¶ 110; had retaliated against Ritz by terminating its supply of NAND flash memory to Ritz, *see id.* ¶ 111; and had entered into an unlawfully anticompetitive settlement agreement in order to drive SanDisk's primary competitor, STMicroelectronics, Inc., out of the NAND flash memory market, *see id.* ¶¶ 112-120.

On October 1, 2010, Defendants filed a motion to dismiss Plaintiff's FAC on all counts. As relevant to this motion, Defendants argued that Plaintiff lacks antitrust standing because only

[1] *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

competitors, and not direct purchasers, have standing to pursue *Walker Process* claims. *See* Defendants' Mot. To Dismiss at 18 (Oct. 1, 2010) (Dkt. No. 39). Plaintiff opposed the motion to dismiss, and in an Order entered on February 24, 2011 ("Order") (Dkt. No. 60), this Court denied the motion to dismiss save only one of Plaintiff's claims—that SanDisk and Harari conspired to monopolize the NAND flash memory market.

As to Plaintiff's other claims, the Court, engaging in a lengthy analysis of the issue, concluded that Plaintiff has standing to pursue its *Walker Process* claim. The Court also denied Defendants' motion to dismiss each of Plaintiff's monopolization claims, including Plaintiff's claims that Defendants tortiously converted NAND flash memory technology, engaged in consumer threats and sham litigation, and entered into an unlawfully anticompetitive settlement agreement to reduce competition in the market for NAND flash memory. *See id.* at 10-14.

On the issue of Ritz's standing to bring a *Walker Process* claim for SanDisk's monopolistic actions taken under fraudulently obtained patents, the Court acknowledged that neither the Supreme Court nor the Ninth Circuit has determined whether direct purchasers, such as Ritz, have standing to assert a *Walker Process* claim. *See id.* at 4. However, the Court also found that the Supreme Court's decision in *Walker Process* "place[d] no limitation on the class of plaintiffs eligible to bring a *Walker Process* claim, and only one court has held expressly that a direct purchaser lacks standing to sue." *Id.* at 6 (citing *In re Remeron Antitrust Litig.*, 335 F. Supp. 2d 522, 529 (D.N.J. 2004)). The Court expressly rejected Defendants' argument that "it is generally accepted that consumers lack standing to assert a *Walker Process* claim unless the patent at issue is 'already unenforceable due to inequitable conduct,'" noting that many of the cases Defendants cited in support of their position "involve issues not presented here." *Id.* at 5 (quoting *In re DDAVP Direct Purchaser Antitrust Litig. ("DAAVP")*, 585 F.3d 677, 691-92 (2d Cir. 2009)).

The Court also rejected Defendants' argument that this Court's decision in *In re Netflix Antitrust Litigation*, 506 F. Supp. 2d 308 (N.D. Cal. 2007)—in which the Court held that direct purchasers *do* have standing to raise *Walker Process* claims—was *dicta* and therefore not relevant to the question of whether Ritz has *Walker Process* standing: "This Court agrees with Ritz that the question of standing was germane to the resolution of [*Netflix*]. . . . Indeed, the [*Netflix*] court could not have reached the issue of antitrust injury without finding that the plaintiffs had standing to pursue a *Walker Process* claim." Order at 5 n.6.

The Court also rejected Defendants' argument that, under the Second Circuit's decision in *DDAVP*, *Walker Process* standing is limited to claims involving patents that "already ha[ve] been tarnished by a finding of inequitable conduct." Order at 6. Although the Court acknowledged that "a denial of a motion for summary judgment is not tantamount to a finding of inequitable conduct," *id.*, the Court explained that, "because of the heightened evidentiary requirements necessary for a showing of fraud, few *Walker Process* claims survive summary judgment. Those that do raise at least some question as to the validity of the subject patent." *Id.* at 6-7.

Lastly, the Court expressly rejected Defendants' policy argument that "'giving *Walker Process* standing to . . . [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.'" Order at 7 (quoting Defs.' Mot. To Dismiss at 19). The Court offered two reasons why Defendants' position was without merit. First, the Court explained that, "because viable *Walker Process* claims are rare, it is unlikely that many direct purchasers will be in the same position as Ritz." *Id.* Second, as the Supreme Court recognized in *Walker Process*, "'the interest in protecting patentees from "innumerable vexatious suits" [may not] be used to frustrate the assertion of rights conferred by the

antitrust laws.'" *Id.* (quoting *Walker Process*, 382 U.S. at 176).

On March 11, 2011, Defendants filed a motion seeking certification for interlocutory appeal of the Court's ruling under 28 U.S.C. § 1292(b).

ARGUMENT

Defendants' motion should be denied. Defendants have failed to meet the required showing set forth under Section 1292(b) for interlocutory appeal. In particular, there is no substantial ground for a difference of opinion regarding the Court's ruling on Ritz's *Walker Process* standing. This Court, in a well-reasoned and thorough analysis, followed its prior holding in *Netflix*, as well as the Second Circuit's sound reasoning in *DDVAP*. The only cases Defendants cite as creating a "substantial ground for difference of opinion" are cases this Court previously analyzed but held were inapposite to the question whether Ritz has *Walker Process* standing in *this* case. Moreover, because Plaintiff has claims for monopolization that do not rely on the *Walker Process*, certification of the *Walker Process* standing issue would not materially speed the termination of the litigation.

I. Defendants Fail To Satisfy the Factors Set Forth in 28 U.S.C. § 1292(b)[2]

Section 1292(b) "was not intended merely to provide review of difficult rulings in hard

[2] Even if Defendants were able to satisfy the required showing under Section 1292 (and they cannot), Defendants' claim (at 2 n.2) that proper interlocutory appeal belongs with the Federal Circuit is in error. Plaintiff's FAC alleged causes of action under the Sherman Act and invoked this Court's jurisdiction under 28 U.S.C. §§ 1331 and 1337 (antitrust and commerce), and 15 U.S.C. §§ 2, 15(a) and 26. Plaintiff did not rely on 28 U.S.C. § 1338 (vesting district courts with jurisdiction over patents). Thus, as Defendants concede in seeking certification under Section 1292 (and not 28 U.S.C. § 1295), any interlocutory appeal would be to the Ninth Circuit. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 813-14 (1988) ("Congress determined the relevant focus, however, when it granted jurisdiction to the Federal Circuit over 'an appeal from . . . a district court . . . if the jurisdiction of *that court* was based . . . on section 1338.'") (quoting 28 U.S.C. § 1295(a)(1)) (emphasis in original).

cases." *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (vacating an order granting interlocutory appeal where the underlying litigation concerned "nothing more than an uncertain question of law relevant to only one of several causes of action"); *see Environmental Prot. Info. Ctr. v. Pacific Lumber Co.*, No. 01-2821, 2004 WL 838160, at *4 (N.D. Cal. Apr. 19, 2004) ("[T]he fact that the court's decisions were neither easy nor obvious is not sufficient reason to certify an immediate interlocutory appeal."). Nor was it intended to be a common occurrence: "[t]he party seeking certification for interlocutory appeal has the burden of showing that 'exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" *Lyon v. Grainger*, No. C 10-00884 WHA, 2010 WL 485944, at *2 (N.D. Cal. June 15, 2010) (quoting *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982)).

In order to demonstrate that those "exceptional circumstances" are present, the moving party must establish "(1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation." *Cement Antitrust Litig.*, 673 F.2d at 1026; *see* 28 U.S.C. § 1292(b); *see also Krangel v. General Dynamics Corp.*, 968 F.2d 914, 915 (9th Cir. 1992) (denying a motion for interlocutory appeal on the ground that the district court did not find all three required elements of Section 1292(b)); *Valdovinos v. McGrath*, No. C02-1704 CW, 2007 WL 2023505, at *2 (N.D. Cal. July 12, 2007) ("The court should construe the requirements for certification strictly, and grant a motion for certification only when exceptional circumstances warrant such action.").

However, "[e]ven if these three requirements are satisfied, a district court still has the discretion in deciding whether or not to grant a party's motion for certification," *In re LDK Solar*

Sec. Litig., 584 F. Supp. 2d 1230, 1258 (N.D. Cal. 2008), and the Ninth Circuit has held that certification for interlocutory appeal should be applied "sparingly," *United States v. Woodbury*, 263 F.2d 784, 788 n.11 (9th Cir. 1959); *see also Himebaugh v. Smith*, 476 F. Supp. 502, 512 (C.D. Cal. 1978) ("Certification is intended to be used in the few situations where an immediate appeal of a particular issue would more speedily terminate the litigation.").

In setting out the required burden they must overcome to meet Section 1292(b), Defendants rely extensively on this Court's opinion in *Wilton Miwok Rancheria v. Salazar*, Nos. C-07-02681-JF-PVT *et al.*, 2010 WL 693420, at *1 (N.D. Cal. Feb. 23, 2010). But *Wilton Miwok* illustrates exactly the sort of "exceptional situation" and "rare circumstances" that justify interlocutory appeal, none of which is present here. As the Court is well-aware, in *Wilton Miwok*, the City of Sacramento and the City of Elk Grove (the "Intervenors") moved to intervene after the Court had already entered a stipulated judgment. The Intervenors argued that the Court was without jurisdiction to entertain the underlying dispute between two different groups claiming to represent the Wilton Rancheria tribe. Had the Court not granted a stay and certified the issue for interlocutory appeal, the stipulated judgment would have automatically transferred land into trust.

Wilton Miwok is nothing like the present case. Here, unlike *Wilton Miwok*, the case has not been litigated. Thus, granting the interlocutory appeal will frustrate and disrupt the normal progression of litigation. Moreover, because Plaintiff has claims outside of its *Walker Process* claims, those claims would progress in the district court while any appeal went forward, thus spawning unnecessary, piecemeal litigation. Unlike *Wilton Miwok*, this case does not involve a unique parcel of land at issue, nor are there novel jurisdictional issues that will affect third parties who might be forced to intervene. This case, rather, is a straightforward antitrust case alleging a range of *Walker Process* and other monopolization conduct where Defendants simply wish to short

circuit the process and appeal this Court's ruling denying a motion to dismiss.

Here, the Defendants have failed to satisfy their burden to prove that the Court's February 24, 2011 ruling that Ritz has *Walker Process* standing is an "exceptional circumstance" that justifies certification for interlocutory appeal. The Court's ruling is clearly supported by federal law, including the law of this Court, which specifically addresses the question Defendants now seek to appeal. Defendants simply wish to reargue the Court's prior decision; Defendants' motion to certify the Court's *Walker Process* ruling should therefore be denied.

A. Defendants Have Not Established the Existence of a Controlling Question of Law

Defendants' motion fails to identify a "controlling question of law" as required by Section 1292(b). In interpreting the "controlling question of law" requirement in Section 1292(b), the Ninth Circuit has held that the requirement must "be interpreted in such a way to implement [the] policy" that Section 1292(b) should be applied only "in exceptional cases." *Cement Antitrust Litig.*, 673 F.3d at 1027. Thus, a mere disagreement with a court's legal conclusion does not constitute a controlling question of law. *See, e.g., United States Rubber*, 359 F.2d at 785; *Notmeyer v. Stryker Corp.*, No. C 06-04096 SI, 2007 WL 2688462, at *2 (N.D. Cal. Sept. 10, 2007).

The Ninth Circuit has defined a "controlling question of law" narrowly, as including only questions "which, if decided in favor of the appellant, would end the lawsuit." *Woodbury*, 263 F.2d at 787 (explaining that "[e]xamples of such questions are those relating to jurisdiction or statute of limitations which the district court has decided in a manner which keeps the litigation alive but which, if answered differently on appeal, would terminate the case"); *see United States Rubber*, 359 F.2d at 783 (explaining that Section 1292(b) was not intended for litigation presenting "nothing more than uncertain questions of law relevant to only one of several causes of action").

With respect to the issue of standing, this Court has held that "[a]lthough standing is a threshold question and, thus, one that could be considered a controlling question of law in *some* circumstances," it is not always controlling. *Self-Insurers' Sec. Fund v. Gallagher Bassett Servs., Inc.*, No. 06-02828 JSW, 2007 WL 781537, at *1 (N.D. Cal. Mar. 13, 2007) (emphasis added) (denying defendant's motion to certify the question of whether plaintiff had standing where the "focus" of plaintiff's claim was "on [the defendant's] alleged business practices and whether those practices caused it injury" and where the Court had already resolved the standing question on a motion to dismiss).

In support of their argument that the question of whether Plaintiff has *Walker Process* standing is a "controlling question of law" in this case, Defendants rely on a single line from the Court's Order. *See* Def.'s Br. at 2 (Dkt. No. 64) (citing the Court's statement that "'each of Ritz's claims is dependent upon the theory that [Defendant has] engaged in the enforcement of fraudulently-obtained patents'" (quoting Order at 4)). Defendants' argument, however, misconstrues this Court's Order. As the Ninth Circuit has recognized, "the propriety of granting an appeal under § 1292(b) will not always be apparent on the face of the findings of the district court. This is particularly true where . . . the order from which appeal is sought has broadly dismissed challenges to the legal sufficiency of each of plaintiff's several alleged causes of action without indicating which of such challenges the court feels involves a controlling question of law." *United States Rubber*, 359 F.2d at 785. In this case, the district court did not, as Defendants allege, conclude that the viability of all of Plaintiff's claims is dependent on whether the Plaintiff has *Walker Process* standing.

In addition to their *Walker Process* claims, Plaintiff has alleged that SanDisk engaged in unlawful anticompetitive conduct by directly threatening its competitors' customers solely for the

purpose of harassing them and deterring them from doing business with the competitors. *See* FAC ¶¶ 110 (alleging that SanDisk "has threatened members of the proposed Class who purchase NAND flash memory from SanDisk's competitors. . . . SanDisk has also 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 if they are later required to turn to SanDisk to purchase the necessary flash memory for their products"), 111 (alleging that SanDisk "retaliated against Plaintiff RCI, and the proposed Class it seeks to represent, by terminating its supply of NAND flash memory to RCI" and that "[b]y doing so, SanDisk has sought to exercise its monopoly to prevent this Court from . . . vindicating legitimate claims as to substantial unlawful conduct by SanDisk"). Defendants argued in their motion to dismiss that Plaintiff's claims are barred by the *Noerr-Pennington*[3] doctrine. In response, this Court explained that there are two distinct exceptions to *Noerr-Pennington* immunity: "(1) where a party engages in a 'sham' petition intended only to 'interfere directly with the business relationship of a competitor,' or (2) where an asserted patent was obtained through knowing and willful fraud within the meaning of *Walker Process*.'" Order at 13 (citations omitted). Because the Court concluded that Plaintiff's claims fall within the *Walker Process* exception, the Court did not address whether Plaintiff's claims also fall within the "sham" exception to *Noerr-Pennington* immunity. Indeed, the Court specifically held that Defendants' arguments as to the applicability of the "sham" exception "ultimately are immaterial, because Defendants' alleged conduct clearly comes within the second exception to the *Noerr-Pennington* doctrine." *Id.* Contrary to Defendants' mischaracterization of the Court's holding, the Court did *not* hold that Plaintiff's consumer threat claims were wholly

[3] *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

dependent on the viability of their *Walker Process* claims. Thus, even if, on appeal, the Court were to determine that Plaintiff lacked *Walker Process* standing, that determination would not "end the lawsuit," *Woodbury*, 263 F.2d at 787, and therefore that issue cannot be a "controlling question of law" for purposes of this Court's Section 1292(b) analysis.

Similarly, Plaintiff alleged that Defendants tortiously converted NAND flash memory technology from Wafer Scale Integration, Inc. in a further effort to drive SanDisk's competitors from the market. *See* Order at 10. Defendants responded that theft of a valid patent does not implicate monopoly power. The Court rejected this argument, however, holding that because it "assumes the validity of the patents at issue," it was "inappropriate at the pleading stage." *Id.* at 11.

B. Defendants Have Not Established That There Are "Substantial Grounds for Difference of Opinion Within the Ninth Circuit"

Defendants have similarly failed to demonstrate "substantial grounds for difference of opinion" on the question whether direct purchasers have *Walker Process* standing. In order to demonstrate "substantial grounds for difference of opinion" within the meaning of Section 1292(b), a petitioner must generally show that there are legitimate and substantial grounds for difference of opinion regarding an issue "between and among judicial bodies." *Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, No. C 05-04158 MHP, 2007 WL 1119193, at *2 (N.D. Cal. Apr. 16, 2007); *see also Environmental Prot. Info.*, 2004 WL 838160, at *3-*4 (rejecting Section 1292(b) motion for failure to show "substantial ground for difference of opinion among the courts") (internal quotation marks and emphasis omitted). "'A substantial ground for dispute [ ] exists where a court's challenged decision conflicts *with decisions of several other courts*.'" *Environmental Protection Info.*, 2004 WL 838160, at *3 (emphasis in original) (quoting *APCC Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003)).

Neither the mere presence of conflicting authority, nor "strong disagreement with the Court's ruling is [] sufficient for there to be a substantial ground for difference" of opinion under Section 1292(b). *Notmeyer*, 2007 WL 2688462, at *2 (denying defendants' motion for certification for interlocutory appeal); *Valdovinos*, 2007 WL 2023505, at *2 ("A substantial ground for difference of opinion is not established by a party's strong disagreement with the court's ruling; the party seeking an appeal must make some greater showing."); *see also United States Rubber*, 359 F.2d at 785. Indeed, federal courts throughout the country have recognized that "at least one party [is always] convinced that the court got it wrong. . . . [However,] such disagreement is not tantamount to a disagreement among the courts, and it does not itself compel section 1292(b) review. If it did, nearly every judgment would give rise to an interlocutory appeal." *Best Western Int'l, Inc. v. Govan*, No. CIV 05-3247-PHX RCB, 2007 WL 1545776, at *9 (D. Ariz. May 29, 2007) (internal quotation marks and emphasis omitted); *see also Lenz v. Universal Music Corp.*, No. C 07-3783 JF (RS), 2008 WL 4790669, at *2 (N.D. Cal. Oct. 28, 2008) (echoing that "the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion under § 1292(b)") (internal quotation marks omitted).

Defendants' argument regarding the required "substantial grounds for difference of opinion" relies again on the same few cases that they cited in their motion to dismiss. This Court, however, correctly held (at 5-6) that all but one of those cases is inapposite in this case. Thus, contrary to Defendants' assertions, there is no "substantial" dispute on the *Walker Process* standing issue that must be resolved by "[i]mmediate appellate review." Indeed, the only Court of Appeals decision that has addressed the issue *supports* allowing *Walker Process* standing in this case, *see DDAVP*, 585 F.3d at 689-92, and the two district court cases that have addressed the issue outside

the unique context of the Hatch-Waxman Act—which is not applicable here—have held that direct purchasers *do* have standing to bring *Walker Process* claims, *see Netflix*, 506 F. Supp. 2d at 314-16; *Molecular Diagnostics Labs. v. Hoffmann-La Roche, Inc.*, 402 F. Supp. 2d 276, 280 (D.D.C. 2005).

Moreover, the cases Defendants rely on to show "substantial grounds for difference of opinion" all involve patents for pharmaceutical products and the Hatch-Waxman Act. As Judge Alsup recognized in *Netflix*, the sole authority denying *Walker Process* standing to purchasers "involve[s] allegedly anti-competitive practices, such as collusive patent-infringement settlements or attempts to game the FDA's generic drug approval process, in connection with pharmaceutical patents." *Netflix*, 506 F. Supp. 2d at 316. That distinction is critical: courts have recognized that with regard to pharmaceuticals, the fact that "the Hatch-Waxman Act creates a patent infringement claim where there is no infringing product" means that it would be "impossible for Plaintiff to suffer the sort of 'direct' injury necessary for antitrust standing." *Kaiser Found. v. Abbott Labs.*, No. CV 02-2443-JFW, 2009 WL 3877513, at *4 (C.D. Cal. Oct. 8, 2009). "This situation is dramatically different than those cases outside the 'highly artificial' Hatch-Waxman patent content where patent suits are generally brought against existing products, and the issues are, thus, more straightforward." *Id*. Defendants have failed to point to a single case outside of the specialized pharmaceutical context that supports their position.

This Court recognized as much in concluding that the cases relied on by Defendants "involve issues not presented here." Order at 5 (distinguishing *Kroger* as involving a challenge to a patent that had been upheld as valid; distinguishing *Kaiser* as involving particular issues associated with the Hatch-Waxman Act; distinguishing *In re K-Dur Antitrust Litigation*, No. 01-1652 (JAG), MDL No. 1419, 2007 WL 5297755 (D.N.J. Mar. 1, 2007); *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 363 F. Supp. 2d 514 (E.D.N.Y. 2005); and *Asahi Glass Co. v.*

Pentech Pharmaceuticals, Inc., 289 F. Supp. 2d 986 (N.D. Ill. 2003), as involving indirect purchasers). Indeed, the Court noted that only one case had "held expressly that a direct purchaser lacks standing to sue." Order at 6 (citing *Remeron*, 335 F. Supp. 2d at 529). But the "fact that other district courts have interpreted [*Walker Process*] in the manner advocated by Defendants . . . does not provide a substantial ground for difference of opinion on controlling questions of law." *Getz v. Boeing Co.*, No. C 07-06396 CW, 2009 WL 3765506, at *3 (N.D. Cal. June 16, 2009). This is all the more so when the only applicable district court opinion Defendants point to—*Remeron*—predates the Second Circuit's decision in *DDAVP*. *See Spears v. Washington Mut. Bank FA*, No. C-08-00868 RMW, 2010 WL 54755, at *2 (N.D. Cal. Jan. 8, 2010) (no substantial ground for difference of opinion where "disagreement on th[e] issue among district courts" all predated relevant appellate opinions). As such, Defendants cannot show any "grounds for difference of opinion," much less a "substantial" one.

C. Defendants Have Not Established That An Interlocutory Appeal Would "Materially Advance the Ultimate Termination of the Litigation"

Defendants have similarly failed to show that interlocutory appeal would "materially advance" this litigation. *See* 28 U.S.C. § 1292(b); *Shurance v. Planning Control Int'l, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988) (denying an interlocutory appeal because an appeal would not advance litigation but "might well have the effect of delaying the resolution of this litigation, for an appeal probably could not be completed before [the trial date]"). As Plaintiff made clear in its arguments before the Court, Plaintiff's claims under Section 2 of the Sherman Act do not rest entirely on a *Walker Process* claim. Thus, even if this Court were to certify the issue for interlocutory appeal (and it should not)—and even were the Ninth Circuit to conclude that Plaintiff lacked standing to bring a *Walker Process* claim—Plaintiff would still have claims under Section 2 for Defendants' conduct in suppressing competition through sham litigation, threatening customers

and competitors, terminating Plaintiff's purchasing agreement, and engaging in a global settlement agreement with the intent of reducing competition and furthering a monopoly. *See* FAC ¶¶ 110-120, 132.

II. There Is No Basis To Stay or Limit Discovery in This Case

Defendants, already assuming that the Court will certify this case for interlocutory appeal, put the proverbial cart before the horse and seek a stay of the proceedings. As Defendants correctly acknowledge, district court proceedings are not automatically stayed during an interlocutory appeal. *See* Def.'s Br. at 7-8; 28 U.S.C. § 1292(b); *Phelan v. Taitano*, 233 F.2d 117, 119 (9th Cir. 1956). In determining whether to issue a stay, the Court must balance the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see Golden Gate Rest. Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008); *Lopez v. Heckler*, 713 F.2d 1432, 1435-36 (9th Cir. 1983).

As discussed above, *supra* at 10-13, Defendants have failed to show a substantial likelihood of success on the merits. The only court of appeals to have considered the issue—the Second Circuit in *DAAVP*—lends support to Plaintiff, not Defendants. And the only other authority relied on by Defendants: 1) involves the particular intersection of the Hatch-Waxman Act and patent law, and 2) pre-dates *DAAVP*.

Moreover, Defendants have failed to show any irreparable injury. Defendants contend (at 8) only that they will suffer irreparable injury because "[d]iscovery, class certification proceedings and trial of this matter will consume a considerable amount of the Court's time and the parties'

resources." But as this Court has stated, "[t]he cost of some pretrial litigation does not constitute an irreparable harm." *Bradberry v. T-Mobile USA, Inc.*, No. 06-6567, 2007 WL 2221076, at *4 (N.D. Cal. Aug. 2, 2007). Defendants have failed to demonstrate any exceptional circumstances that would warrant staying discovery.

CONCLUSION

For the foregoing reasons, Defendants' motion to certify the Court's February 24, 2011 *Walker Process* standing ruling for interlocutory appeal and their request for a stay of discovery pending interlocutory appeal should be denied.

DATED: April 15, 2011

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2011, the foregoing Plaintiff Ritz's Opposition to Sandisk's Motion to Certify the Court's *Walker Process* Standing Ruling For Interlocutory Appeal was filed electronically. Notification of this filing will be sent to all parties by operation of the Court's CM/ECF system.

By : */s/ Kfir B. Levy*
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