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**RITZ CAMERA & IMAGE, LLC**

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

17 RITZ CAMERA & IMAGE, LLC, a )  
18 Delaware limited liability company, on )  
19 behalf of itself and others similarly situated, )  
20 Plaintiff, )  
21 v. )  
22 SANDISK CORPORATION and )  
23 ELIYAHOU HARARI, )  
24 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

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

13  
14  
15 In addition to its *Walker Process* claim, Ritz brought a number of other claims against  
16 Defendants. Specifically, Ritz alleged that Defendants had tortiously converted NAND flash  
17 memory technology to obtain the “crown jewel” patents, see *id.* ¶¶ 93-109; had engaged in  
18 anticompetitive customer threats against members of the proposed class who purchased NAND  
19 flash memory from SanDisk’s competitors, see *id.* ¶ 110; had retaliated against Ritz by terminating  
20 its supply of NAND flash memory to Ritz, see *id.* ¶ 111; and had entered into an unlawfully  
21 anticompetitive settlement agreement in order to drive SanDisk’s primary competitor,  
22 STMicroelectronics, Inc., out of the NAND flash memory market, see *id.* ¶¶ 112-120.  
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24  
25 On October 1, 2010, Defendants filed a motion to dismiss Plaintiff’s FAC on all counts.  
26 As relevant to this motion, Defendants argued that Plaintiff lacks antitrust standing because only

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<sup>1</sup> See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

1 competitors, and not direct purchasers, have standing to pursue *Walker Process* claims. *See*  
2 Defendants' Mot. To Dismiss at 18 (Oct. 1, 2010) (Dkt. No. 39). Plaintiff opposed the motion to  
3 dismiss, and in an Order entered on February 24, 2011 ("Order") (Dkt. No. 60), this Court denied  
4 the motion to dismiss save only one of Plaintiff's claims—that SanDisk and Harari conspired to  
5 monopolize the NAND flash memory market.  
6

7 As to Plaintiff's other claims, the Court, engaging in a lengthy analysis of the issue,  
8 concluded that Plaintiff has standing to pursue its *Walker Process* claim. The Court also denied  
9 Defendants' motion to dismiss each of Plaintiff's monopolization claims, including Plaintiff's  
10 claims that Defendants tortiously converted NAND flash memory technology, engaged in consumer  
11 threats and sham litigation, and entered into an unlawfully anticompetitive settlement agreement to  
12 reduce competition in the market for NAND flash memory. *See id.* at 10-14.  
13

14 On the issue of Ritz's standing to bring a *Walker Process* claim for SanDisk's monopolistic  
15 actions taken under fraudulently obtained patents, the Court acknowledged that neither the  
16 Supreme Court nor the Ninth Circuit has determined whether direct purchasers, such as Ritz, have  
17 standing to assert a *Walker Process* claim. *See id.* at 4. However, the Court also found that the  
18 Supreme Court's decision in *Walker Process* "place[d] no limitation on the class of plaintiffs  
19 eligible to bring a *Walker Process* claim, and only one court has held expressly that a direct  
20 purchaser lacks standing to sue." *Id.* at 6 (citing *In re Remeron Antitrust Litig.*, 335 F. Supp. 2d  
21 522, 529 (D.N.J. 2004)). The Court expressly rejected Defendants' argument that "it is generally  
22 accepted that consumers lack standing to assert a *Walker Process* claim unless the patent at issue is  
23 'already unenforceable due to inequitable conduct,'" noting that many of the cases Defendants  
24 cited in support of their position "involve issues not presented here." *Id.* at 5 (quoting *In re*  
25 *DDAVP Direct Purchaser Antitrust Litig.* ("DAAVP"), 585 F.3d 677, 691-92 (2d Cir. 2009)).  
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1 The Court also rejected Defendants’ argument that this Court’s decision in *In re Netflix Antitrust*  
2 *Litigation*, 506 F. Supp. 2d 308 (N.D. Cal. 2007)—in which the Court held that direct purchasers  
3 *do* have standing to raise *Walker Process* claims—was *dicta* and therefore not relevant to the  
4 question of whether Ritz has *Walker Process* standing: “This Court agrees with Ritz that the  
5 question of standing was germane to the resolution of [*Netflix*]. . . . Indeed, the [*Netflix*] court  
6 could not have reached the issue of antitrust injury without finding that the plaintiffs had standing  
7 to pursue a *Walker Process* claim.” Order at 5 n.6.

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

17 Lastly, the Court expressly rejected Defendants’ policy argument that “‘giving *Walker*  
18 *Process* standing to . . . [direct purchaser] plaintiffs . . . could result in an avalanche of patent  
19 challenges, because direct purchasers otherwise unable to challenge a patent’s validity could do so  
20 simply by dressing their patent challenge with a *Walker Process* claim.’” Order at 7 (quoting  
21 Defs.’ Mot. To Dismiss at 19). The Court offered two reasons why Defendants’ position was  
22 without merit. First, the Court explained that, “because viable *Walker Process* claims are rare, it  
23 is unlikely that many direct purchasers will be in the same position as Ritz.” *Id.* Second, as the  
24 Supreme Court recognized in *Walker Process*, “‘the interest in protecting patentees from  
25 “innumerable vexatious suits” [may not] be used to frustrate the assertion of rights conferred by the  
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28



1 antitrust laws.’” *Id.* (quoting *Walker Process*, 382 U.S. at 176).

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

#### 4 ARGUMENT

5 Defendants’ motion should be denied. Defendants have failed to meet the required  
6 showing set forth under Section 1292(b) for interlocutory appeal. In particular, there is no  
7 substantial ground for a difference of opinion regarding the Court’s ruling on Ritz’s *Walker*  
8 *Process* standing. This Court, in a well-reasoned and thorough analysis, followed its prior holding  
9 in *Netflix*, as well as the Second Circuit’s sound reasoning in *DDVAP*. The only cases Defendants  
10 cite as creating a “substantial ground for difference of opinion” are cases this Court previously  
11 analyzed but held were inapposite to the question whether Ritz has *Walker Process* standing in *this*  
12 case. Moreover, because Plaintiff has claims for monopolization that do not rely on the *Walker*  
13 *Process*, certification of the *Walker Process* standing issue would not materially speed the  
14 termination of the litigation.  
15  
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#### 17 **I. Defendants Fail To Satisfy the Factors Set Forth in 28 U.S.C. § 1292(b)<sup>2</sup>**

18 Section 1292(b) “was not intended merely to provide review of difficult rulings in hard  
19

20 \_\_\_\_\_  
21 <sup>2</sup> Even if Defendants were able to satisfy the required showing under Section 1292 (and they  
22 cannot), Defendants’ claim (at 2 n.2) that proper interlocutory appeal belongs with the Federal  
23 Circuit is in error. Plaintiff’s FAC alleged causes of action under the Sherman Act and invoked  
24 this Court’s jurisdiction under 28 U.S.C. §§ 1331 and 1337 (antitrust and commerce), and 15  
25 U.S.C. §§ 2, 15(a) and 26. Plaintiff did not rely on 28 U.S.C. § 1338 (vesting district courts with  
26 jurisdiction over patents). Thus, as Defendants concede in seeking certification under Section  
27 1292 (and not 28 U.S.C. § 1295), any interlocutory appeal would be to the Ninth Circuit. *See*  
28 *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).

1 cases.” *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (vacating an order  
2 granting interlocutory appeal where the underlying litigation concerned “nothing more than an  
3 uncertain question of law relevant to only one of several causes of action”); *see Environmental Prot.*  
4 *Info. Ctr. v. Pacific Lumber Co.*, No. 01-2821, 2004 WL 838160, at \*4 (N.D. Cal. Apr. 19, 2004)  
5 (“[T]he fact that the court’s decisions were neither easy nor obvious is not sufficient reason to  
6 certify an immediate interlocutory appeal.”). Nor was it intended to be a common occurrence:  
7 “[t]he party seeking certification for interlocutory appeal has the burden of showing that  
8 ‘exceptional circumstances justify a departure from the basic policy of postponing appellate review  
9 until after the entry of a final judgment.’” *Lyon v. Grainger*, No. C 10-00884 WHA, 2010 WL  
10 485944, at \*2 (N.D. Cal. June 15, 2010) (quoting *In re Cement Antitrust Litig.*, 673 F.2d 1020,  
11 1026 (9th Cir. 1982)).

14 In order to demonstrate that those “exceptional circumstances” are present, the moving  
15 party must establish “(1) that there be a controlling question of law, (2) that there be substantial  
16 grounds for difference of opinion, and (3) that an immediate appeal may materially advance the  
17 ultimate termination of the litigation.” *Cement Antitrust Litig.*, 673 F.2d at 1026; *see* 28 U.S.C.  
18 § 1292(b); *see also Krangel v. General Dynamics Corp.*, 968 F.2d 914, 915 (9th Cir. 1992)  
19 (denying a motion for interlocutory appeal on the ground that the district court did not find all three  
20 required elements of Section 1292(b)); *Valdovinos v. McGrath*, No. C02-1704 CW, 2007 WL  
21 2023505, at \*2 (N.D. Cal. July 12, 2007) (“The court should construe the requirements for  
22 certification strictly, and grant a motion for certification only when exceptional circumstances  
23 warrant such action.”).

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

1 *Sec. Litig.*, 584 F. Supp. 2d 1230, 1258 (N.D. Cal. 2008), and the Ninth Circuit has held that  
2 certification for interlocutory appeal should be applied “sparingly,” *United States v. Woodbury*, 263  
3 F.2d 784, 788 n.11 (9th Cir. 1959); *see also Himebaugh v. Smith*, 476 F. Supp. 502, 512 (C.D. Cal.  
4 1978) (“Certification is intended to be used in the few situations where an immediate appeal of a  
5 particular issue would more speedily terminate the litigation.”).

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

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

2 Here, the Defendants have failed to satisfy their burden to prove that the Court's February  
3 24, 2011 ruling that Ritz has *Walker Process* standing is an "exceptional circumstance" that  
4 justifies certification for interlocutory appeal. The Court's ruling is clearly supported by federal  
5 law, including the law of this Court, which specifically addresses the question Defendants now seek  
6 to appeal. Defendants simply wish to reargue the Court's prior decision; Defendants' motion to  
7 certify the Court's *Walker Process* ruling should therefore be denied.  
8

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

11 Defendants' motion fails to identify a "controlling question of law" as required by Section  
12 1292(b). In interpreting the "controlling question of law" requirement in Section 1292(b), the  
13 Ninth Circuit has held that the requirement must "be interpreted in such a way to implement [the]  
14 policy" that Section 1292(b) should be applied only "in exceptional cases." *Cement Antitrust*  
15 *Litig.*, 673 F.3d at 1027. Thus, a mere disagreement with a court's legal conclusion does not  
16 constitute a controlling question of law. *See, e.g., United States Rubber*, 359 F.2d at 785;  
17 *Notmeyer v. Stryker Corp.*, No. C 06-04096 SI, 2007 WL 2688462, at \*2 (N.D. Cal. Sept. 10,  
18 2007).  
19

20 The Ninth Circuit has defined a "controlling question of law" narrowly, as including only  
21 questions "which, if decided in favor of the appellant, would end the lawsuit." *Woodbury*, 263  
22 F.2d at 787 (explaining that "[e]xamples of such questions are those relating to jurisdiction or  
23 statute of limitations which the district court has decided in a manner which keeps the litigation  
24 alive but which, if answered differently on appeal, would terminate the case"); *see United States*  
25 *Rubber*, 359 F.2d at 783 (explaining that Section 1292(b) was not intended for litigation presenting  
26 "nothing more than uncertain questions of law relevant to only one of several causes of action").  
27  
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1 With respect to the issue of standing, this Court has held that “[a]lthough standing is a threshold  
2 question and, thus, one that could be considered a controlling question of law in *some*  
3 circumstances,” it is not always controlling. *Self-Insurers’ Sec. Fund v. Gallagher Bassett Servs.,*  
4 *Inc.*, No. 06-02828 JSW, 2007 WL 781537, at \*1 (N.D. Cal. Mar. 13, 2007) (emphasis added)  
5 (denying defendant’s motion to certify the question of whether plaintiff had standing where the  
6 “focus” of plaintiff’s claim was “on [the defendant’s] alleged business practices and whether those  
7 practices caused it injury” and where the Court had already resolved the standing question on a  
8 motion to dismiss).

9  
10 In support of their argument that the question of whether Plaintiff has *Walker Process*  
11 standing is a “controlling question of law” in this case, Defendants rely on a single line from the  
12 Court’s Order. *See* Def.’s Br. at 2 (Dkt. No. 64) (citing the Court’s statement that “‘each of Ritz’s  
13 claims is dependent upon the theory that [Defendant has] engaged in the enforcement of  
14 fraudulently-obtained patents’” (quoting Order at 4)). Defendants’ argument, however,  
15 misconstrues this Court’s Order. As the Ninth Circuit has recognized, “the propriety of granting  
16 an appeal under § 1292(b) will not always be apparent on the face of the findings of the district  
17 court. This is particularly true where . . . the order from which appeal is sought has broadly  
18 dismissed challenges to the legal sufficiency of each of plaintiff’s several alleged causes of action  
19 without indicating which of such challenges the court feels involves a controlling question of law.”  
20 *United States Rubber*, 359 F.2d at 785. In this case, the district court did not, as Defendants allege,  
21 conclude that the viability of all of Plaintiff’s claims is dependent on whether the Plaintiff has  
22 *Walker Process* standing.  
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26 In addition to their *Walker Process* claims, Plaintiff has alleged that SanDisk engaged in  
27 unlawful anticompetitive conduct by directly threatening its competitors’ customers solely for the  
28

1 purpose of harassing them and deterring them from doing business with the competitors. *See*  
2 FAC ¶¶ 110 (alleging that SanDisk “has threatened members of the proposed Class who purchase  
3 NAND flash memory from SanDisk’s competitors. . . . SanDisk has also threatened members of  
4 the proposed Class who purchase from SanDisk competitors that SanDisk will force them to  
5 purchase flash memory at disadvantageous prices and terms if they are later required to turn to  
6 SanDisk to purchase the necessary flash memory for their products”), 111 (alleging that SanDisk  
7 “retaliated against Plaintiff RCI, and the proposed Class it seeks to represent, by terminating its  
8 supply of NAND flash memory to RCI” and that “[b]y doing so, SanDisk has sought to exercise its  
9 monopoly to prevent this Court from . . . vindicating legitimate claims as to substantial unlawful  
10 conduct by SanDisk”). Defendants argued in their motion to dismiss that Plaintiff’s claims are  
11 barred by the *Noerr-Pennington*<sup>3</sup> doctrine. In response, this Court explained that there are two  
12 distinct exceptions to *Noerr-Pennington* immunity: “(1) where a party engages in a ‘sham’  
13 petition intended only to ‘interfere directly with the business relationship of a competitor,’ or  
14 (2) where an asserted patent was obtained through knowing and willful fraud within the meaning of  
15 *Walker Process.*” Order at 13 (citations omitted). Because the Court concluded that Plaintiff’s  
16 claims fall within the *Walker Process* exception, the Court did not address whether Plaintiff’s  
17 claims also fall within the “sham” exception to *Noerr-Pennington* immunity. Indeed, the Court  
18 specifically held that Defendants’ arguments as to the applicability of the “sham” exception  
19 “ultimately are immaterial, because Defendants’ alleged conduct clearly comes within the second  
20 exception to the *Noerr-Pennington* doctrine.” *Id.* Contrary to Defendants’ mischaracterization  
21 of the Court’s holding, the Court did *not* hold that Plaintiff’s consumer threat claims were wholly  
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23  
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26 <sup>3</sup> *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961);  
27 *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

1 dependent on the viability of their *Walker Process* claims. Thus, even if, on appeal, the Court  
2 were to determine that Plaintiff lacked *Walker Process* standing, that determination would not “end  
3 the lawsuit,” *Woodbury*, 263 F.2d at 787, and therefore that issue cannot be a “controlling question  
4 of law” for purposes of this Court’s Section 1292(b) analysis.  
5

6 Similarly, Plaintiff alleged that Defendants tortiously converted NAND flash memory  
7 technology from Wafer Scale Integration, Inc. in a further effort to drive SanDisk’s competitors  
8 from the market. *See* Order at 10. Defendants responded that theft of a valid patent does not  
9 implicate monopoly power. The Court rejected this argument, however, holding that because it  
10 “assumes the validity of the patents at issue,” it was “inappropriate at the pleading stage.” *Id.* at  
11 11.  
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13 **B. Defendants Have Not Established That There Are “Substantial Grounds for  
14 Difference of Opinion Within the Ninth Circuit”**

15 Defendants have similarly failed to demonstrate “substantial grounds for difference of  
16 opinion” on the question whether direct purchasers have *Walker Process* standing. In order to  
17 demonstrate “substantial grounds for difference of opinion” within the meaning of Section 1292(b),  
18 a petitioner must generally show that there are legitimate and substantial grounds for difference of  
19 opinion regarding an issue “between and among judicial bodies.” *Leland Stanford Junior Univ. v.*  
20 *Roche Molecular Sys., Inc.*, No. C 05-04158 MHP, 2007 WL 1119193, at \*2 (N.D. Cal. Apr. 16,  
21 2007); *see also Environmental Prot. Info.*, 2004 WL 838160, at \*3-\*4 (rejecting Section 1292(b)  
22 motion for failure to show “substantial ground for difference of opinion among the courts”)  
23 (internal quotation marks and emphasis omitted). “‘A substantial ground for dispute [ ] exists  
24 where a court’s challenged decision conflicts *with decisions of several other courts.*’”  
25 *Environmental Protection Info.*, 2004 WL 838160, at \*3 (emphasis in original) (quoting *APCC*  
26 *Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003)).  
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1 Neither the mere presence of conflicting authority, nor “strong disagreement with the  
2 Court’s ruling is [] sufficient for there to be a substantial ground for difference” of opinion under  
3 Section 1292(b). *Notmeyer*, 2007 WL 2688462, at \*2 (denying defendants’ motion for  
4 certification for interlocutory appeal); *Valdovinos*, 2007 WL 2023505, at \*2 (“A substantial ground  
5 for difference of opinion is not established by a party’s strong disagreement with the court’s ruling;  
6 the party seeking an appeal must make some greater showing.”); *see also United States Rubber*,  
7 359 F.2d at 785. Indeed, federal courts throughout the country have recognized that “at least one  
8 party [is always] convinced that the court got it wrong. . . . [However,] such disagreement is not  
9 tantamount to a disagreement among the courts, and it does not itself compel section 1292(b)  
10 review. If it did, nearly every judgment would give rise to an interlocutory appeal.” *Best*  
11 *Western Int’l, Inc. v. Govan*, No. CIV 05-3247-PHX RCB, 2007 WL 1545776, at \*9 (D. Ariz. May  
12 29, 2007) (internal quotation marks and emphasis omitted); *see also Lenz v. Universal Music Corp.*,  
13 No. C 07-3783 JF (RS), 2008 WL 4790669, at \*2 (N.D. Cal. Oct. 28, 2008) (echoing that “the mere  
14 presence of a disputed issue that is a question of first impression, standing alone, is insufficient to  
15 demonstrate a substantial ground for difference of opinion under § 1292(b)”) (internal quotation  
16 marks omitted).

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20 Defendants’ argument regarding the required “substantial grounds for difference of  
21 opinion” relies again on the same few cases that they cited in their motion to dismiss. This Court,  
22 however, correctly held (at 5-6) that all but one of those cases is inapposite in this case. Thus,  
23 contrary to Defendants’ assertions, there is no “substantial” dispute on the *Walker Process* standing  
24 issue that must be resolved by “[i]mmediate appellate review.” Indeed, the only Court of Appeals  
25 decision that has addressed the issue *supports* allowing *Walker Process* standing in this case, *see*  
26 *DDAVP*, 585 F.3d at 689-92, and the two district court cases that have addressed the issue outside  
27



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

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

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21 This Court recognized as much in concluding that the cases relied on by Defendants  
22 “involve issues not presented here.” Order at 5 (distinguishing *Kroger* as involving a challenge to  
23 a patent that had been upheld as valid; distinguishing *Kaiser* as involving particular issues  
24 associated with the Hatch-Waxman Act; distinguishing *In re K-Dur Antitrust Litigation*,  
25 No. 01-1652 (JAG), MDL No. 1419, 2007 WL 5297755 (D.N.J. Mar. 1, 2007); *In re Ciprofloxacin*  
26 *Hydrochloride Antitrust Litigation*, 363 F. Supp. 2d 514 (E.D.N.Y. 2005); and *Asahi Glass Co. v.*  
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1 *Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986 (N.D. Ill. 2003), as involving indirect  
2 purchasers). Indeed, the Court noted that only one case had “held expressly that a direct purchaser  
3 lacks standing to sue.” Order at 6 (citing *Remeron*, 335 F. Supp. 2d at 529). But the “fact that  
4 other district courts have interpreted [*Walker Process*] in the manner advocated by Defendants . . .  
5 does not provide a substantial ground for difference of opinion on controlling questions of law.”  
6 *Getz v. Boeing Co.*, No. C 07-06396 CW, 2009 WL 3765506, at \*3 (N.D. Cal. June 16, 2009).  
7 This is all the more so when the only applicable district court opinion Defendants point  
8 to—*Remeron*—predates the Second Circuit’s decision in *DDAVP*. See *Spears v. Washington Mut.*  
9 *Bank FA*, No. C-08-00868 RMW, 2010 WL 54755, at \*2 (N.D. Cal. Jan. 8, 2010) (no substantial  
10 ground for difference of opinion where “disagreement on th[e] issue among district courts” all  
11 predated relevant appellate opinions). As such, Defendants cannot show any “grounds for  
12 difference of opinion,” much less a “substantial” one.

15 **C. Defendants Have Not Established That An Interlocutory Appeal Would**  
16 **“Materially Advance the Ultimate Termination of the Litigation”**

17 Defendants have similarly failed to show that interlocutory appeal would “materially  
18 advance” this litigation. See 28 U.S.C. § 1292(b); *Shurance v. Planning Control Int’l, Inc.*, 839  
19 F.2d 1347, 1348 (9th Cir. 1988) (denying an interlocutory appeal because an appeal would not  
20 advance litigation but “might well have the effect of delaying the resolution of this litigation, for an  
21 appeal probably could not be completed before [the trial date]”). As Plaintiff made clear in its  
22 arguments before the Court, Plaintiff’s claims under Section 2 of the Sherman Act do not rest  
23 entirely on a *Walker Process* claim. Thus, even if this Court were to certify the issue for  
24 interlocutory appeal (and it should not)—and even were the Ninth Circuit to conclude that Plaintiff  
25 lacked standing to bring a *Walker Process* claim—Plaintiff would still have claims under Section 2  
26 for Defendants’ conduct in suppressing competition through sham litigation, threatening customers  
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1 and competitors, terminating Plaintiff's purchasing agreement, and engaging in a global settlement  
2 agreement with the intent of reducing competition and furthering a monopoly. *See* FAC  
3 ¶¶ 110-120, 132.

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

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

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

21 Moreover, Defendants have failed to show any irreparable injury. Defendants contend (at  
22 8) only that they will suffer irreparable injury because "[d]iscovery, class certification proceedings  
23 and trial of this matter will consume a considerable amount of the Court's time and the parties'  
24

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

7 For the foregoing reasons, Defendants’ motion to certify the Court’s February 24, 2011  
8 *Walker Process* standing ruling for interlocutory appeal and their request for a stay of discovery  
9 pending interlocutory appeal should be denied.  
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1 DATED: April 15, 2011

KELLOGG, HUBER, HANSEN, TODD,  
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By : /s/ Kfir B. Levy  
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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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