No. 14-15000

United States Court of Appeals
For the Ninth Circuit

In re: APPLE IPHONE ANTITRUST LITIGATION,

ROBERT PEPPER; STEPHEN H. SCHWARTZ;
EDWARD W. HAYTER; ERIC TERRELL,
Plaintiffs – Appellants,
v.
APPLE INC.,
Defendant – Appellee

On Appeal From The United States District Court
For The Northern District of California
The Honorable Yvonne Gonzalez Rogers
No. C 11-06714-YGR

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

Francis M. Gregorek (SBN# 144785)
Rachele R. Rickert (SBN# 190634)
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
750 B Street, Suite 2770
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599

Mark C. Rifkin
Alexander H. Schmidt
Michael Liskow (SBN# 243899)
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
270 Madison Avenue
New York, NY 10016
Telephone: 212/545-4600
Facsimile: 212/545-4677

Counsel for Plaintiffs-Appellants Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, and Eric Terrell

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES & RULES

OTHER AUTHORITIES

I. JURISDICTIONAL STATEMENT

The District Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because the claims of Plaintiffs-Appellants Robert Pepper, Stephen H. Schwartz, Edward W. Hayter and Eric Terrell ("Plaintiffs") arise under Section 2 of the Sherman Act of 1890, 15 U.S.C. § 2 (2004) (the "Sherman Act").

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because this is an appeal from a final decision of the United States District Court for the Northern District of California. Pursuant to its December 2, 2013, Order Granting Apple's Motion to Dismiss Second Amended Complaint with Prejudice (hereafter "December 2, 2013 Order") (Excerpts of Record of Plaintiffs-Appellants ("EOR") 003-13), which dismissed Plaintiffs' Second Amended Complaint (the "SAC") (EOR 062-79) with prejudice, the District Court entered final judgment in favor of Defendant-Appellee Apple Inc. ("Apple") on January 7, 2014 (EOR 001-02).

On December 31, 2013, Plaintiffs filed their Notice of Appeal (EOR 037-54) from the December 2, 2013 Order (EOR 003-13). The Notice of Appeal was timely filed pursuant to Federal Rules of Appellate Procedure 4(a)(1)(A) and 4(a)(2). "A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry." Fed. R. App. Proc. R. 4(a)(2). *See also FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 276 (1991).

II. STATEMENT OF ISSUES PRESENTED ON APPEAL

This case was brought by the Plaintiff iPhone purchasers against Defendant Apple, which is the exclusive worldwide distributor of software applications (or "apps") for the iPhone. The claims asserted are for unlawful aftermarket monopolization, which under the law of this Circuit can only be asserted by customers of a defendant who have been unlawfully "locked in" to the defendant's aftermarket monopoly. Despite that, the court below held that Apple's customers lacked standing to bring these claims.

The issues presented for appeal are:

(1) whether Plaintiffs, who allege they bought monopoly-priced apps directly from the alleged monopolist and paid supracompetitive fees that were charged by the monopolist directly to that monopolist, have adequately pleaded that they are direct purchasers with antitrust standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

(2) whether the District Court misapplied the pleading standards in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), to Plaintiffs' SAC by accepting Defendant's version of the facts rather than Plaintiffs' well-pled factual allegations and the reasonable inferences therefrom;

(3) whether the District Court misconstrued *Illinois Brick* by requiring Plaintiffs to plead the actual percentage of the monopoly

overcharges that they paid compared to the percentage that software manufacturers (the "apps developers") may have paid, even though it is well-settled that direct purchasers may recover 100% of the overcharges regardless of the percentage they actually bore;

(4) whether Apple's motion to dismiss the SAC was improper and should have been denied under Federal Rule of Civil Procedure 12(g) because Apple intentionally chose to omit an indirect purchaser argument in two prior Rule 12(b) motions Apple filed in the case; and

(5) whether the District Court erred by dismissing Plaintiffs' SAC with prejudice for lack of standing because the court had not ruled previously that Plaintiffs are indirect purchasers and did not give Plaintiffs any opportunity to plead that they have Article III standing even if they are indirect purchasers.

The District Court ruled on the first three issues in its December 2, 2013 Order (EOR 003-13) and on the fourth issue in its August 15, 2013 Order granting Apple's earlier motion to dismiss an amended complaint (EOR 014-36). The court should have addressed the fifth issue in its December 2, 2013 Order but did not.[1]

[1] "[A]n appeal from [a] final judgment draws in question all earlier non-final orders and all rulings which produced the judgment," whether or not referenced in the notice of appeal. *Munoz v. Small Bus. Admin.*, 644 F.2d 1361, 1364 (9th Cir. 1981).

Pertinent sections of Section 2 of the Sherman Act, 15 U.S.C. § 2, and the Federal Rules of Civil Procedure are set forth verbatim in the addendum bound to this brief pursuant to Circuit Rule 28-2.7.

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

This is an antitrust class action brought pursuant to Section 2 of the Sherman Act. Plaintiffs brought this action on behalf of themselves and a class of persons similarly situated who have purchased or licensed software applications from Apple's "iTunes" site or "App Store" for use on their iPhones at any time since December 29, 2007 (the "Class Period"). EOR 063, ¶ 1.

The gravamen of the action is that Apple has engaged in an anticompetitive scheme to prevent and eliminate all competition in the multibillion dollar aftermarket for apps that can be used on Apple's iPhones. Apple uses technology built into every iPhone it sells to maintain a closed distribution system for iPhone apps that prohibits software developers from selling apps directly to consumers through their own websites, traditional retail outlets, or in any manner other than through Apple's App Store. Consequently, Apple is the sole distributor of iPhone applications worldwide, enabling itself to charge and collect a supracompetitive 30% premium from iPhone customers for every iPhone app purchased since the App Store opened six years ago. Apple has foreclosed iPhone customers from

buying apps from any source other than Apple's App Store without the customers' knowledge or consent, thereby unlawfully exploiting and locking them into an aftermarket that was and is monopolized by Apple. EOR 063-66, ¶¶ 3-9, 14; EOR 071, ¶ 44; EOR 075-78, ¶¶ 65-80.

In 2007, Apple released the iPhone following a massive advertising campaign hailing the iPhone as a "breakthrough" Internet communications device with desktop-class email, an "industry first" "visual voicemail," web browsing, maps and searching capability. The iPhone was, in effect, the first mobile computer. EOR 068, ¶ 26. Apple has earned billions of dollars in revenue from selling its revolutionary new handset. *Id*., ¶ 27. But Apple did not want to limit its revenues to what customers were willing to pay for the iPhone itself. Apple also wanted a substantial piece of every dollar that would ever be paid to buy any kind of software application for the iPhone at any time anywhere in the world. *Id*., ¶ 28. To achieve that end, Apple has embedded technology in the iPhone that maintains its closed distribution system and forces iPhone customers to obtain iPhone apps only from Apple via its App Store, thus protecting itself against any competition it might face in the distribution of iPhone apps. *Id*., ¶ 29. In contrast to the robust competition Apple faces in the software aftermarket for its desktop and laptop computers, Apple wanted the entire iPhone software aftermarket for itself. *Id*.

Apple achieved its unlawful goal as follows:

First, Apple maintained exclusive control over the design, features, and operating software for the iPhone, known as iOS, which is based on the same technologies that are used in Apple's desktop and laptop computers' operating systems, presently known as OS X. Although OS X is an "open" system that allows iMac and MacBook consumers to purchase, install, and run software manufactured or sold by any distributor, Apple "closed" its iPhone iOS by imbedding sophisticated "security measures" or "program locks" in the iPhone to prevent customers from installing or running apps that are not distributed by Apple.[2] EOR 068-69, ¶ 30. Apple locked the iOS system to foreclose competition from other potential software makers and distributers so that it could monopolize and derive monopoly profits from the iPhone apps aftermarket. EOR 069, ¶ 31.

Shortly after the iPhone's launch in June 2007, Apple developed its own apps and permitted so-called "approved" third party manufacturers to develop iPhone apps for ringtones, instant messaging, Internet access, entertainment, video, photography, and the like. *Id.*, ¶ 32. Apple conditioned its "approval" of such apps on the third parties' giving Apple a share of their sales proceeds. *Id*. But Apple quickly faced threatened competition for apps by "unapproved" third parties, such as Mobile Chat and FlickIM, which gave iPhone users access to

[2] In fact, Unix, upon which both OS X and iOS are based, is itself an open system – not one Apple developed proprietarily. EOR 069, ¶ 33.

instant messaging programs from which Apple derived no revenues. *Id.*, ¶ 34. Competing programmers, such as Ambrosia Software and Efiko software, also allowed customers to "clip" portions of songs they purchased from iTunes for use as ringtones for free, whereas Apple charged 99 cents to convert any portion of a song into a ringtone. *Id.*, ¶ 35. Apple responded to these threats of competition by updating its iOS to eliminate iPhone consumers' ability to use these "Third Party Apps" and by warning iPhone customers that using Third Party Apps would nullify Apple's iPhone warranty. *Id.*, ¶ 34. Apple also attempted to block the use of songs purchased from iTunes as ringtones by updating its iTunes software to install program locks that would interfere with such use. However, the third party programmers quickly and effectively circumvented the locks. EOR 070, ¶ 36.

Within a year, Apple completely eliminated the threat of competition from unapproved apps developers by opening the App Store to become the exclusive distributor of iPhone apps, and by rigorously enforcing and maintaining its monopoly thereafter. *Id.*, ¶ 37. Apple began approving only apps made by developers who gave Apple the exclusive worldwide right to distribute their apps through the App Store. In March of 2008, Apple released a "software development kit" ("SDK") for the stated purpose of enabling independent software developers to design apps for use on the iPhone. Afterwards, Apple began contracting with developers who, for an annual fee of $99 payable to Apple, agreed to supply apps

to Apple for distribution solely through the App Store. *Id.*, ¶ 38. Consequently, since that time there has been no other way for apps developers to distribute their software to iPhone customers except through Apple's own distribution system. Apple, thereby, has successfully thwarted all competition in the aftermarket for iPhone apps.

Apple opened its App Store in July 2008. Apple owns 100% of the App Store, staffs the App Store with Apple employees or agents, and controls all of the App Store sales, revenue collections and other business operations. *Id.*, ¶ 39. Before it agrees to sell any developer's apps, Apple informs the developers (though not the iPhone consumers) that they cannot sell iPhone apps anywhere except through the App Store, and that Apple will charge iPhone consumers a 30% commission for any non-free app sold in the App Store. *Id.*, ¶ 40. Consequently, the prices for all non-free apps, which must be purchased through Apple's App Store, include what the developers would have charged plus Apple's own 30% mark-up, which customers pay directly to Apple every time they purchase apps through the App Store. EOR 070-71, ¶ 41.

When an iPhone customer buys an app from Apple's App Store, it pays the entire purchase price, including the 30% fee, directly to Apple. *Id*. Apple takes its 30% fee off the top and then remits the balance, or 70% of the consumer's purchase price, to the developer. *Id*. Apple sells the apps (or, more recently,

licenses for the apps) directly to the customer, collects the entire purchase price (including its 30% fee) from the customer, and pays the developers after the sale. *Id*. No developers directly sell apps or licenses to iPhone customers or collect any payments from the customers. *Id*. Apps developers sell apps, they do not purchase them, and Apple distributes the apps by selling them in its App Store. The only purchasers in the entire chain of distribution are the iPhone customers, who buy apps only from Apple through its App Store. EOR 070-71, ¶¶ 38-41.

In sum, Apple's App Store functions like a virtual consignment store. Rather than following the traditional wholesale-retail merchandising model and buying apps from the developers and reselling the apps to customers at a profit, Apple places the developers' apps on the virtual shelves of its App Store, sells them directly to iPhone customers, charges and collects the full price (including its own 30% fee) from customers, keeps its 30% fee from every sale or license, and then remits the balance of the purchase price to the developer. Just as if it the App Store operated on a retail-wholesale model, Apple is the middleman – the alleged monopolist distributor – that imposes a monopoly fee directly on, and collects it directly from, the iPhone customers. *Id*.

Apple threatens to terminate any developer that makes its apps available on its own website or through a distributor other than Apple, and Apple continues to discourage iPhone customers from downloading unapproved Third Party Apps by

telling customers that Apple will void and refuse to honor the iPhone warranty of any customer who downloads a Third Party App. EOR 071, ¶ 42. By its actions, Apple has willfully acquired and maintained a monopoly in the iPhone apps aftermarket and has made itself the only distributor of iPhone apps in the entire world. Apple has no competition in the multibillion dollar iPhone Apps aftermarket, domestically or abroad, whatsoever. *Id.*, ¶ 43.

Before buying their iPhones, Plaintiffs neither knew nor consented to the fact that (i) Apple was monopolizing and collecting monopoly profits from the iPhone Apps aftermarket, or (ii) Plaintiffs' iPhones had been locked to prohibit them from using any app that was not approved or sold by Apple. *Id.*, ¶ 44. Because it lacked Plaintiffs' knowing consent, Apple's monopolization of the iPhone apps aftermarket constitutes an antitrust violation under Section 2. *Id.*

Plaintiffs were injured in fact and suffered antitrust injury from Apple's antitrust violation because: (i) Plaintiffs would not have had to pay the 30% fee if Apple had not monopolized the iPhone apps aftermarket and consumers were able to buy apps on the apps developers' websites or other online or off-line marketplaces; (ii) Plaintiffs' freedom to choose between the App Store and lower-cost alternatives that would be available in a competitive marketplace has been eliminated; and (iii) Apple's establishment and maintenance of monopoly pricing has reduced the output and supply of iPhone apps. EOR 071-72, ¶ 45.

Plaintiffs' allegation that Apple's 30% fee is a supracompetitive price rests on four factual predicates. *First,* Apple demonstrated its intent to reap supracompetitive profits from apps shortly after releasing the iPhone. Apple only approved apps from which it would derive revenue, nullified the warranties of consumers who used competing apps from which Apple derived no revenue, and updated its iOS operating software to disable iPhone consumers' ability to use the competing apps. EOR 069, ¶ 34. When Apple sought to charge consumers to convert songs into ringtones, Apple again voided the warranties of iPhone consumers who used competing apps that provided the same service for free and updated its iTunes software to disable the competing apps. EOR 069-70, ¶¶ 35-36.

Second, Apple eliminated the threat of competing apps altogether by creating the App Store and becoming the exclusive worldwide distributor of iPhone apps. EOR 070, ¶ 37. Under basic and fundamental economic principles, an absence of competition leads to higher prices, and increased competition leads to lower prices. An economically rational monopolist like Apple that is unconstrained by the downward pricing pressures of a competitive market will charge the highest price it can in light of the demand for its product. It is hornbook economics that profit-maximizing entities strive to achieve monopoly power in order to reap higher profits through raising prices and lowering (or controlling)

output, and higher profit is precisely why Apple sought to monopolize the iPhone apps aftermarket. EOR 063-65, ¶¶ 4, 8-9; EOR 072, ¶¶ 46-47.

Third, the supracompetitive nature of Apple's 30% fee is also apparent from Apple's cost structure. Apps developers pay Apple an annual $99 fee that covers most or all of Apple's costs of reviewing each developer's apps and the related costs of operating and maintaining the App Store. The 30% fee that Apple collects on each sale of apps constitutes virtually pure profit to Apple. In a competitive environment, where developers could sell their apps on their own websites or sell them at big box or other discount retailers without charging Apple's 30% mark-up, Apple would be under considerable pressure to lower its 30% profit margin because otherwise it would be quickly priced out of the iPhone apps market and lose substantial market share. In a truly competitive environment, Apple's 30% profit margin simply would not be sustainable. EOR 072, ¶ 48.

Fourth, events have shown that Apple's *modus operandi* consistently has been one of antitrust defiance rather than antitrust compliance. After presiding over the U.S. Justice Department's recent trial against Apple in the e-books price-fixing case, District Court Judge Denise Cote of the Southern District of New York found that one of Apple's institutional "goals was the elimination of all retail price competition" and that Apple "was happy if a result of that . . . was an increase in prices" its customers "had to pay." EOR 065, ¶10. Judge Cote found that the trial

record "demonstrated a blatant and aggressive disregard at Apple for the requirements of the law," even among "Apple lawyers and its highest executives," including Eddy Cue, the Apple executive responsible for the App Store. *Id*., ¶ 11. During the time period at issue here, Apple also engaged in an anticompetitive "no-poaching" pact with Google and other technology companies by which they agreed not to hire each other's employees.[3]

Apple's monopolization of the iPhone apps aftermarket since July 2007 is a direct reflection of Apple's goal of "eliminating all retail price competition" and its practice of disdaining antitrust compliance in order to increase the prices Apple's customers must pay. Apple has stifled competition by erecting impenetrable barriers to entry to would-be distributors of iPhone apps, reduced consumer choice in what would otherwise be a robust and competitive iPhone apps market, and artificially increased prices to supracompetitive levels for the millions of iPhone customers who were unwittingly exploited by Apple and locked into its unlawfully monopolized aftermarket. EOR 066, ¶ 12.

---

[3] *See, e.g.*, James B. Stewart, "Steve Jobs Defied Convention, and Perhaps the Law," *New York Times*, May 2, 2014, *available at* http://www.nytimes.com/2014/05/03/business/steve-jobs-a-genius-at-pushing-boundaries-too.html?_r=0. Professor Herbert Hovenkamp is quoted in the article as describing Apple's co-founder Steven Jobs as "a walking antitrust violation." *Id*.

B. PROCEDURAL HISTORY

Plaintiffs commenced this action on December 29, 2011. EOR 174. Apple moved to dismiss on March 2, 2012, solely under Rule 12(b)(7), arguing that Plaintiffs failed to join AT&T Mobility ("ATTM") as a putative necessary and indispensable party. EOR 151, 155-57. Apple did not to move to dismiss the apps aftermarket monopolization claims before then Chief Judge James Ware, who presided over this action until his retirement in mid-2012. Judge Ware consolidated this action with another case, thereby mooting the motion to dismiss and re-naming the action "*In re Apple iPhone Antitrust Litigation*." EOR 172.

Plaintiffs then filed a Consolidated Class Action Complaint on March 21, 2012, alleging claims against Apple for: (i) unlawful monopolization of the apps aftermarket (Count I); (ii) attempted monopolization of the apps aftermarket (Count II); and (iii) conspiracy to monopolize the iPhone voice and data services aftermarket (Count III). EOR 143-46.

Apple filed its second motion to dismiss on April 16, 2012. In that motion, Apple repeated its initial Rule 12(b)(7) argument and added only one new argument: that Plaintiffs failed to state a claim under Rule 12(b)(6) as to Count III of the amended complaint alleging a conspiracy between Apple and ATTM to monopolize the voice and data services aftermarket – a different aftermarket than

the one at issue in this appeal. EOR 116, 121-23. Apple again did not move to dismiss Plaintiffs' apps claims before Judge Ware.

Judge Ware granted Apple's Rule 12(b)(7) motion, finding that ATTM was a necessary party to the voice and data services aftermarket claims, and directed dismissal of those claims unless Plaintiffs filed an amended complaint joining ATTM. *In re Apple iPhone Antitrust Litig*., 874 F. Supp. 2d 889, 901-02 (N.D. Cal. 2012). Plaintiffs elected not to join ATTM, and on September 28, 2012, they filed an Amended Consolidated Complaint ("ACC") dropping the voice and data services claims. EOR 090-112. On August 31, 2012, Judge Ware retired from the bench and the case was reassigned to District Judge Yvonne Gonzalez Rogers.

Apple then filed its third motion to dismiss on November 2, 2012, raising for the first time its Rule 12(b)(1) and 12(b)(6) defenses against Plaintiffs' apps claims. EOR 081, 085-88. Plaintiffs opposed the motion in part under Rule 12(g), contending that Apple had deliberately chosen not to move against the apps claims in its previous motions because it knew that Judge Ware had, in a related case, previously sustained the apps claims and rejected Apple's indirect purchaser argument. Plaintiffs argued that Apple's conscious decision to avoid an adverse ruling from Judge Ware when making its earlier Rule 12 motions barred it under Rule 12(g) from engaging in the gamesmanship of trying its luck with a new judge. EOR 166.

On August 15, 2013, Judge Gonzalez Rogers granted Apple's motion and dismissed the ACC with leave to amend. EOR 036. Judge Gonzalez Rogers acknowledged that successive Rule 12(b) motions "are generally not permissible and create significant inefficiencies within the court system" but rejected Plaintiffs' Rule 12(g) argument on the basis that addressing Apple's belated Rule 12(b)(1) argument would expedite the case. EOR 034-35. Judge Gonzalez Rogers did not address Plaintiffs' argument that Apple had ***deliberately*** waived its Rule 12(b)(1) argument before Judge Ware.

Even though Judge Ware had rejected Apple's indirect purchaser argument when he granted class certification in the earlier related case,[4] Judge Gonzalez Rogers found that Plaintiffs had failed to plead antitrust standing under *Illinois Brick* because they did not explain "how Apple's conduct results in increased 'prices' or how said prices were paid." EOR 032. Judge Gonzalez Rogers stated that Plaintiffs did "not allege a 'supracompetitive' or 'fixed' price, but rather a mark-up." *Id.* Finding that Plaintiffs' pleading did not "allege the theory and facts upon which they were proceeding" to assert that Apple's 30% fee was paid directly

[4] Judge Ware ruled that iPhone consumers were direct purchasers of apps because, under Supreme Court and Ninth Circuit law, the consumers bought apps directly from the alleged monopolist, Apple. *In re Apple & AT&TM Antitrust Litig.*, No. C-07-05152-JW, 2010 U.S. Dist. LEXIS 98270, at *40-42 n.27 (N.D. Cal. July 8, 2010) ("*Apple I*"). *See also infra*, at 48. Judge Gonzalez Rogers noted Judge Ware's ruling but did not address or attempt to distinguish it in either of her two dismissal orders. *See* EOR 010-12, 031 n.13, 032-33.

rather than through "a pass-through," *id.*, the lower court "decline[d] to issue an advisory opinion analyzing *Illinois Brick* as relevant here," but granted Plaintiffs leave to amend. EOR 024, 032-33.

Plaintiffs filed the SAC on September 5, 2013. Apple filed its fourth motion to dismiss on September 30, 2013, again arguing that Plaintiffs lacked antitrust standing under *Illinois Brick*.[5] On December 2, 2013, the lower court issued its Order granting Apple's motion to dismiss the SAC, with prejudice. EOR 003-13.

Despite Plaintiffs' allegations that Apple was the alleged monopolist; that Apple dictated the 30% monopoly fee and collected it directly from Plaintiffs; that Apple sold the apps laden with that fee directly to Plaintiffs; and that consumers were the only apps purchasers in the entire chain of distribution, the lower court held that Plaintiffs lacked antitrust standing as a matter of law under *Illinois Brick*. Ignoring Plaintiffs' well-pled factual allegations, the lower court interpreted "the thrust" of Plaintiffs' claim as asserting "that Apple has engaged in antitrust conduct by collecting thirty percent of the price of iPhone [apps] ***from***

[5] At oral argument on November 5, 2013, the District Court expressed its belief that it was "the Court's duty … to be vigorous and make sure that [it does] not allow antitrust cases to go forward unless it meets … the [pleading] standard." EOR 056:15-18. The District Court also expressed the view that Plaintiffs should have provided expert testimony within their complaint regarding how Apple's apps aftermarket monopolization affected the market and prices for iPhone apps. EOR 058:11-059:17.

independent software developers for Apps sold in Apple's App Store." EOR 003 (emphasis added).

Although the SAC asserts only monopolization claims and no price-fixing claims, the lower court added that "[n]otably, the SAC is devoid of allegations regarding any attempt on the part of Apple to set fixed prices for Apps, [or] to have acted in concert with the independent software developers to fix said prices." *Id.*

The lower court accepted Apple's argument that "its *collection* of the entire price of the App *from consumers* is irrelevant to the standing analysis" if (as Apple argued) "the developers first bear Apple's fee." EOR 009 (emphasis in original). The lower court then found that the "SAC *is fairly read* to complain about a fee created by agreement" between Apple and the developers "and borne by the developers to pay Apple 30% from their own proceeds – an amount which is passed-on to the consumers as part of the purchase price." EOR 012 (emphasis omitted and added).

The lower court ruled further that under this Court's decision in *In re ATM Fee Antitrust Litigation*, 686 F.3d 741 (9th Cir. 2012), "the alleged conduct does not equate to price fixing." EOR 012. The Court held that "the 30% figure for which Plaintiffs complain is not a fixed fee, but a cost passed-on to consumers by independent software developers. As such, any injury to Plaintiffs is an indirect effect resulting from the software developers' own costs." *Id.*

Last, the lower court held that Plaintiffs' SAC did not adequately allege indirect purchaser standing under the exceptions to *Illinois Brick*, even though the Plaintiffs had not pleaded indirect purchaser standing as an alternative to direct purchaser standing. In that regard, the court noted that the SAC lacked conspiracy allegations to support a co-conspirator exception to *Illinois Brick*, and it repeated that Plaintiffs had not alleged "any price 'fixed' by Apple." *Id*. The court also stated that "[t]o the extent that Plaintiffs intimate that developers would necessarily charge only 70% of the purchase price if not for Apple, such a conclusion requires the Court to speculate into developers' pricing structure, their costs, ability to find a distribution chain, and/or desired profits or rates of return." *Id*.

The lower court dismissed Plaintiffs' claims with prejudice, without giving Plaintiffs an opportunity to re-plead to demonstrate either direct or indirect purchaser standing. EOR 012-13.

IV. SUMMARY OF ARGUMENT

The District Court's judgment of dismissal should be reversed to correct numerous fundamental errors of both substance and procedure.

First, as a threshold matter, under Rule 12(g), the court below should not have granted Apple's indirect purchaser argument given that Apple failed to make that argument in two earlier Rule 12 motions it filed while the case was still pending before Judge Ware, and made the argument for the first time in its third

motion to dismiss simply because Judge Ware had retired and Apple wanted to try its luck before a newly assigned judge.

Second, the lower court ignored the basic standards of review on motions to dismiss by rejecting Plaintiffs' well-pled factual allegations and adopting Apple's version of the facts. Instead of accepting as true Plaintiffs' allegations that apps developers pay a $99 annual fee for the right to distribute their apps on the App Store and that Plaintiffs paid the challenged 30% fee as pure monopoly profit directly to Apple, the lower court, at Apple's urging, drew every conceivable inference ***against*** Plaintiffs and in favor of Apple. As a result, the lower court found irrelevant the well-pled (and undisputed) fact that Plaintiffs paid the 30% fee directly to Apple, and instead "fairly read" the SAC as alleging that the apps developers bore that fee as part of their distribution costs. Even if that reading of the SAC was "fair" (which it was not remotely), at most that different reading gives rise to a factual question that cannot be resolved on a motion to dismiss.

Third, this Court has held repeatedly that the *Illinois Brick* direct purchaser rule is a "bright line" test whereby the first party in the distribution chain to buy the alleged monopoly-priced product from the alleged monopolist is the party with standing to sue. Here, the SAC plainly and plausibly alleges that Plaintiffs bought the monopoly-priced apps directly from the monopolist Apple, making Plaintiffs the first (and only) purchaser of apps in the distribution chain. Plaintiffs therefore

have standing. That should have been the end of the analysis. This Court's precedents require district courts to look only to the chain of distribution of the price-tainted product and precludes them from conducting case-by-case economic analyses to forge exceptions to the bright line direct purchaser rule. But that is precisely what the lower court did here to find (somehow) that the apps developers paid the challenged 30% fee, even though Plaintiffs and all other iPhone consumers in fact paid that fee directly to Apple.

Fourth, the lower court's conclusion that the apps developers are the direct purchasers ignores the distribution chain and the economic realities of the iPhone apps transactions at issue. The court's finding that the apps developers "passed on" Apple's 30% fee to iPhone consumers necessarily assumes that the developers sold the apps directly to the consumers, which utterly ignores both Apple's role as the middleman in every transaction between the developers and apps customers as well as Plaintiffs' central allegation that Apple, in order to create its worldwide apps distribution monopoly in the first place, expressly *forbade* apps developers from selling directly to consumers. Without saying so, the lower court in essence adopted the highly criticized "antecedent transaction" concept of a direct purchaser that was formulated in an Eighth Circuit split-decision sixteen years ago (*Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998)), on which Apple relied heavily below, but no court outside the Eighth Circuit has adopted since.

Former Chief Judge Ware correctly rejected Apple's reliance on that case when he granted class certification in the related case. *See infra*, at 48. The lower court should have followed Judge Ware's lead. By not doing so, the lower court denied standing to the only parties that could possibly assert an apps aftermarket monopolization claim against Apple, since the apps developers consented to Apple's monopoly and, therefore, have no sustainable aftermarket claim against Apple under the clear law of this Circuit.

Fifth, this is a monopolization case, not a price-fixing case. Therefore, Plaintiffs need not plead that Apple's 30% fee was a "fixed" price, only that it was a supracompetitive price, which Plaintiffs have done. Indeed, none of Apple's four motions to dismiss asserted that Plaintiffs have failed to allege either causation or damages (*i.e.*, that they paid a supracompetitive price to Apple for the apps).

Sixth¸ the lower court completely missed the point of *Illinois Brick* when it held that Plaintiffs should have pleaded the specific prices that developers would have charged for apps but for Apple's conduct. Under *Illinois Brick*, courts do not have "to speculate into" the developers' pricing structures and desired profit margins. The direct purchaser rule precludes precisely that type of analysis apportioning losses among various levels of the distribution chain. Because Plaintiffs are the direct purchasers from Apple, under the bright line *Illinois Brick* rule, they are entitled to recover 100% of the resulting damages.

Finally, the lower court failed to give Plaintiffs leave to replead. This Court routinely requires such leave even if it is not requested. The December 2, 2013 Order dismissing the SAC was the first time the lower court held that Plaintiffs were indirect purchasers, which was unexpected since Judge Ware previously held to the contrary. The lower court, moreover, improperly ruled that Plaintiffs cannot satisfy any of the *Illinois Brick* exceptions, which would give them indirect purchaser standing, without once giving Plaintiffs an opportunity to plead that an exception applied. The court also overlooked that Plaintiffs' SAC seeks injunctive relief, which indirect purchasers always have standing to pursue.

V. ARGUMENT

A. Standard of Review

Challenges to a dismissal for failure to state a claim under Rule 12(b)(6) are reviewed *de novo*. *Carlin v. Dairy Am., Inc.*, 705 F.3d 856, 866 (9th Cir. 2013); *N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011). Issues regarding antitrust standing and dismissal without leave to amend are likewise reviewed *de novo*. *See Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004) (dismissal without leave to amend is reviewed de novo); *Glen Holly Entm't Inc. v. Tektronix Inc.*, 352 F.3d 367, 368 (9th Cir. 2003) (antitrust standing is a question of law reviewed de novo).

B. Apple Is Barred By Federal Rule of Civil Procedure 12(g) From Asserting Lack of Antitrust Standing Because It Failed to Raise the Argument in Either of Its First Two Motions to Dismiss

Because Judge Ware had previously sustained identical apps aftermarket monopolization claims and rejected Apple's indirect purchaser argument in the earlier related case,[6] Apple deliberately omitted those arguments from its first two motions to dismiss in this case, and did not make the argument again until it filed its third motion to dismiss on November 2, 2012, after Judge Ware retired. The lower court should have barred Apple under Rule 12(g) from making both arguments and instead ordered Apple to answer the AAC.

Successive motions to dismiss are inefficient and improper. Rule 12(g) is unequivocal: a party that makes a Rule 12 motion "*must not* make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2) (emphasis added).

This Court has held that Rules 12(g) and (h) "promote the early and simultaneous presentation and determination of preliminary defenses." *Chilicky v. Schweiker*, 796 F.2d 1131, 1136 (9th Cir. 1986), *rev'd on other grounds*, 487 U.S. 412 (1988). Therefore, Rule 12(g) "requires that a party who raises a defense by motion prior to an answer raise all such possible defenses in a single motion; omitted defenses cannot be raised in a second, pre-answer motion." *Id*. at 1136

[6] *See Apple I*, 596 F. Supp. 2d at 1304, 1306. *See also infra*, at 48.

(emphasis added); *see also, e.g.*, *Myers v. Am. Dental Ass'n*, 695 F.2d 716, 720 (3d Cir. 1982) (same). The Advisory Committee notes to the 1946 amendments state that Rule 12(g) was designed to eliminate a practice permitted under "the original rule," which had divided defenses "into two groups which could be the subjects of two successive motions." The Advisory Committee notes are clear:

> [I]f the defendant moves before answer to dismiss the complaint for failure to state a claim, he is barred from making a further motion presenting [for example] the defense of improper venue, if that defense was available to him when he made his original motion. Amended subdivision (g) is to the same effect. This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case.

Fed. R. Civ. P. 12 (Adv. Comm. notes to 1966 amendments).[7]

Numerous district courts in this Circuit and elsewhere have applied Rule 12(g) as written. *See, e.g.*, *Sunnergren v. Ahern*, No. 10-2690, 2010 U.S. Dist. LEXIS 114874, at *2 n.1 (N.D. Cal. Oct. 27, 2010) ("Rule 12(g) requires that a

[7] The exceptions in Rule 12(h)(2) and (3) are not exceptions to the rule that only one Rule 12(b) motion is permitted. Rather, those rules preserve certain non-waivable defenses, including the Rule 12(b)(1) and 12(b)(6) defenses Apple seeks to assert here. But those non-waivable defenses cannot be the subject of a second Rule 12(b) motion:

> If omitted from the initial motion, those matters may not be raised in a successive Rule 12(b) motion, but may be raised in any Rule 7(a) responsive pleading, in a Rule 12(c) motion for judgment on the pleadings, or at trial.

2 James Wm. Moore et al., Moore's Federal Practice ¶ 12.23 at 12-31 (3d ed. 2012).

party who raises a defense through a pre-answer motion raise all such possible defenses in a single motion; omitted defenses cannot be raised in a second, pre-answer motion."); *Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp.*, 247 F. Supp. 2d 987, 999 (N.D. Ill. 2002) (defendants precluded from asserting 12(b)(6) defense by second pre-answer motion when they failed to do so in initial motion); *EP Operating Ltd. P'ship v. Placid Oil Co.*, No. 93-0257, 1994 U.S. Dist. LEXIS 13065, at *6 (E.D. La. Sept. 13, 1994) (defendants' attempt to move to dismiss under 12(b)(7) despite having earlier brought a Rule 12(b) motion "is clearly precluded by the Federal Rules of Civil Procedure"); *United States Fidelity & Guaranty Co. v. Jepsen*, No. 90-6931, 1991 U.S. Dist. LEXIS 16818, at *5 (N.D. Ill. Nov. 1, 1991) (second pre-answer 12(b)(6) motion denied in part because "[o]mitted defenses cannot be raised in a second pre-answer motion" and "the few novel Rule 12(b)(6) arguments raised in the second motion to dismiss were all available to [the defendant] at the time of his first motion to dismiss").

It makes no difference that the operative complaint was amended after Apple's initial 12(b) motions, because the same apps claims were in Plaintiffs' original complaint and Apple was capable of raising its defenses to them in its initial 12(b) motion. Moreover, Plaintiffs amended both their original and consolidated complaint because they were directed to do so by Judge Ware, not voluntarily by their own election. *See, e.g.*, *Church of Scientology v. Linberg*, 529

F. Supp. 945, 967 (C.D. Cal. 1981) (rejecting argument that Rule 12(b) defense not raised in initial motion was not waived where complaint had been subsequently amended, noting that "Rule 12(g) specifically rejects this possibility where, as here, the grounds for the objections were 'available' at the time the previous motion was filed."); *Sears Petroleum & Transp. Corp. v. Ice Ban Am. Inc*., 217 F.R.D. 305, 307 (N.D.N.Y 2003) (if complaint is amended, defendant may bring second Rule 12 motion to object only to any new allegations that were added); *766347 Ontario, Ltd. v. Zurich Capital Mkts., Inc.*, 274 F. Supp. 2d 926, 930 (N.D. Ill. 2003) (same); *United States Fidelity & Guaranty*, 1991 U.S. Dist. LEXIS 16818, at *7 (an amended complaint "does not automatically revive all the defenses" waived by failure to raise them in a first motion to dismiss).

Accordingly, the mere fact that Chief Judge Ware ordered Plaintiffs to file a amended complaints did not entitle Apple to make a new Rule 12(b) motion to raise defenses to the apps claims that Apple could have raised in its prior two Rule 12 motions but did not.

The lower court decided it had discretion to ignore the plain terms of Rule 12(g)(2). EOR 034-35. However, the plain language of Rule 12(g)(2) is unequivocal that there is no such discretion, and this Court never has held otherwise. This Court should apply the plain language of Rule 12(g)(2) as written and confirm that the lower court had no discretion to ignore the Rule – particularly

in this case, where Apple deliberately omitted the argument from multiple motions to dismiss and only chose to reassert it after the case was assigned to a new judge. This Court should not condone Apple's blatant judge-shopping.

The lower court's reasoning that ignoring Rule 12(g) is warranted when a successive motion raises a subject matter jurisdiction challenge, or if the party could simply file a post-answer Rule 12(c) motion asserting the same grounds, ignores the plain language and intent of the Rule. It also creates an exception that swallows the Rule because virtually any defendant in every case can make a Rule 12(c) motion or a Rule 12(b)(1) argument. The Rule's drafters created the Rule to advance litigation beyond the Rule 12(b) stage after the first motion to dismiss is made, and to disable defendants from forestalling having to file an answer by making repeated Rule 12(b) motions. Admissions contained in an answer, moreover, could potentially doom the defendant's Rule 12(c) motion, so efficiency is not necessarily promoted by ignoring Rule 12(g), as the lower court presumed.

The District Court erred as a matter of law by permitting Apple to violate Rule 12(g) by moving to dismiss based upon defenses that Apple could have raised, but did not, in its earlier Rule 12(b) motions. To the extent the District Court had discretion to ignore Rule 12(g), this Court should find that it abused its discretion under the unique circumstances of this case.

C. The Lower Court Misapplied *Twombly*

A court considering a Rule 12(b)(6) motion to dismiss "must accept as true all of the allegations contained in a complaint." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This rule of construction must be followed even if the court disbelieves the facts alleged. *Twombly*, 550 at 556 (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)). The court is also required to construe the pleadings in the light most favorable to the plaintiff, *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1048 (9th Cir. 2012), and to draw all reasonable inferences in the plaintiff's favor, *Usher v. Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The lower court did precisely the opposite in this case, construing the facts and drawing inferences in Apple's favor. Consequently, the lower court's opinion should be reversed.

Rule 12(b)(6) "dismissal [is] inappropriate unless the complaint fails to 'state a claim to relief that is plausible on its face.'" *Twombly*, 550 U.S. at 570. A claim is facially plausible when the facts alleged, accepted as true, generate "more than a sheer possibility that [the] defendant has acted unlawfully." *Ashcroft*, 556 U.S. at 678. Even plaintiffs claiming a violation of the antitrust laws must merely set forth enough "factual matter" to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 556 U.S. at 570.

As set forth more fully below, Plaintiffs allege they are direct purchasers because, under the facts alleged in the SAC, they are the first – and *only* –

purchasers of iPhone apps in the entire distribution chain. Plaintiffs purchased the apps directly from the alleged monopolist Apple and paid the alleged monopoly price directly to Apple. Plaintiffs allege that apps developers sold rather than purchased apps. Apple did not technically purchase apps because it operated the App Store like a consignment store, but Apple was the middleman distributor in each apps transaction and sold each app directly to the iPhone customer. EOR 070-74, ¶¶ 41, 45, 48-49, 54; EOR 077-78, ¶¶ 74, 79.

The lower court was required to accept these allegations as true and draw all inferences in favor of Plaintiffs. However, the lower court rejected Plaintiffs' factual allegations and accepted the contrary version of the facts that Apple presented in its briefs. Most critical to the outcome below was the lower court's disregard of Plaintiffs' unambiguous allegation that while Apple *told the developers* in advance that Apple would charge *consumers* a 30% fee, the consumers paid that fee *directly to Apple*, which kept the fee for itself. EOR 070-71, ¶¶ 40-41. The court instead accepted Apple's view that the 30% fee *Apple received from* the consumers was not actually *paid to Apple* by those consumers but, instead, was paid *by apps developers* and merely "passed on" by Apple to the consumers. *See* EOR 012 ("[T]he SAC is fairly read to complain about a fee created by agreement and borne *by the developers* to pay Apple 30% from their own proceeds – an amount which is passed-on to the consumers as part of the

purchase price.") (emphasis in original). The lower court's finding makes no sense because it necessarily assumes that apps developers sold apps directly to the iPhone customers, which ignores the alleged (and indisputable) fact that Apple's App Store was the middleman in every apps transaction. It also completely ignores Plaintiffs' central allegation that Apple, in order to maintain its worldwide apps distribution monopoly, expressly *forbids* apps developers from selling directly to iPhone consumers.[8]

The lower court should not have deferred to Apple's preferred view of the facts, and it should not have ruled that Plaintiffs were indirect purchasers as a matter of law based on Apple's interpretation of how the SAC should be "fairly read." The lower court was obligated to accept Plaintiffs' well-pled facts – *i.e.*, that Plaintiffs purchased the apps directly from Apple and paid the 30% fee to Apple, and that the developers did not pay that fee to Apple but simply knew in advance that Apple would charge and collect the fee from the Plaintiffs.

The court was not permitted to weigh conflicting interpretations of the SAC's allegations or "fairly read" the SAC by discounting the words Plaintiffs

[8] The District Court also appears to have accepted Apple's argument that the 30% fee was a "distribution cost" that Apple charged to the apps developers for placing their apps in the App Store. *See* EOR 010. But that allegation contradicts Plaintiffs' allegation that Apple's distribution costs were covered by the apps developers' $99 annual fee, not by the 30% Apple charged consumers for every apps sale. EOR 070, ¶ 38; EOR 072, ¶ 48. The District Court was not permitted to ignore Plaintiffs' allegations or resolve that factual dispute in Apple's favor.

actually used and reaching inferences adverse to Plaintiffs' claims. Especially in light of Judge Ware's earlier ruling, on virtually identical facts, that iPhone consumers are direct purchasers under *Illinois Brick*, *Apple I*, 2010 U.S. Dist. LEXIS 98270, at *40-42 n.27, the District Court's conclusions that Plaintiffs' assertion of direct purchaser status is not even *plausible*, and that Plaintiffs are indirect purchasers as a matter of law, should be reversed.[9]

D. Plaintiffs Plainly Are Direct Purchasers With Antitrust Standing

In this Circuit, the *Illinois Brick* direct purchaser rule is simple, straightforward, and easy to apply: an "indirect purchaser" is anyone who did not "'purchase[] directly from the alleged antitrust violator'" and a "direct purchaser" is someone who did so. *In re Cathode Ray Tube (CRT) Antitrust Litig*, 911 F. Supp. 2d 857, 864 (N.D. Cal. 2012) (quoting *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1211-12 (9th Cir. 1984)). *See also In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 749-50 (9th Cir. 2012) (plaintiffs who "did not directly pay the alleged

[9] As discussed below, the District Court relied almost entirely on an erroneous reading of *In re ATM Fee* to find that Plaintiffs were indirect purchasers. But even in that case the district court held that the plaintiffs' direct purchaser allegations *were sufficient* to withstand a motion to dismiss under *Twombly*. *In re ATM Fee Antitrust Litig.*, 768 F. Supp. 2d 984, 1004 (N.D. Cal. 2009) (motion denied "insofar as it alleges [p]laintiffs lack standing to assert a claim for damages under the Sherman Act"; motion granted on other grounds). That court later dismissed for lack of antitrust standing on summary judgment, which this Court affirmed. *See In re ATM Fee Antitrust Litig.*, No. C-04-02676, 2010 U.S. Dist. LEXIS 97009 (N.D. Cal. Sept. 16, 2010), *aff'd* 686 F.3d 741 (9th Cir. 2012).

fixed interchange fees" to the alleged wrongdoer are indirect purchasers). "Under *Illinois Brick*, 'only the first party in the chain of distribution to purchase a price-fixed [or monopoly-priced] product has standing to sue.'" *In re (CRT)* 911 F. Supp. 2d at 864.

Under this Circuit's straightforward direct purchaser analysis, Plaintiffs undoubtedly are direct purchasers and have standing to sue. *Id.* Apple is the alleged antitrust violator, and iPhone apps are the alleged monopoly-priced products. *Id*. Apple imposes the challenged 30% fee, and Plaintiffs paid the illegal 30% directly to Apple, which keeps the entire 30% fee for itself, when they purchased the apps directly from Apple's App Store. EOR 070-71, ¶¶ 40-41. It is beyond dispute that Plaintiffs paid the allegedly unlawful 30% fee directly to Apple, the alleged monopolist. There is no basis to misapply this Court's straightforward direct purchaser analysis under these simple facts.

Moreover, Plaintiffs are the only purchasers of iPhone apps, and Apple's sale to them is the first and only sale in the entire distribution chain. Apple does ***not*** purchase apps – it sells them in its capacity as middleman in the transaction. The apps developers also sell, rather than buy, apps. Thus, Plaintiffs are not merely "the first party in the chain of distribution to purchase" the monopoly-priced product, Plaintiffs are the *only* party in the chain that purchases the monopoly-priced product.

Even the District Court and Apple would agree that Plaintiffs would be direct purchasers if the App Store operated under a traditional wholesale-retail model. That is, if Apple bought apps from the developers for a wholesale price and then, due to its monopoly power, marked up the apps by the challenged 30% fee and sold the apps to iPhone consumers in the App Store, then Plaintiffs would undeniably be the direct purchasers of the monopoly-priced product from the alleged monopolist.

The District Court apparently got confounded, however, because Apple uses a consignment model in the App Store rather than the traditional model. Instead of focusing properly on who directly bought and sold the price-tainted *products, i.e.*, the apps, the District Court focused solely on the 30% fee and concluded that because Apple "agreed" with apps developers in advance that Apple would charge the 30% fee to apps consumers, the developers somehow paid that fee rather than the consumers. But that is ***not*** what happened. No developer ever physically paid the 30% fee to Apple. Only consumers paid that fee, and they paid it when they purchased the apps.[10]

[10] While the lower court assumed that the 30% fee became part of the developers' internal costs, as an economic matter, the developers' costs are the same under a consignment model as they are under a traditional retail model – the costs of the goods sold are the developers' input costs, and if the developer does not physically pay the 30% fee, it does not become part of its costs. That is certainly a plausible allegation at the motion to dismiss stage.

As shown below, moreover, the lower court's concern over whether the developers may have absorbed some of the 30% fee by lowering their app prices is not

Even more importantly, there is no basis in the law for concluding that the Plaintiffs' direct purchaser status depends (or should depend) on whether Apple uses a consignment model or a wholesale-retail model. In either case, Apple is still the alleged monopolist and the direct seller of the monopoly-priced apps, and Plaintiffs are still the direct (and only) purchasers of the apps. Nothing in *Illinois Brick* or its progeny in the Supreme Court or this Court warrants making a legal distinction based on an alleged monopolist's particular sales model. Indeed, as we show below, individual case-by-case economic analyses of the sort the lower court performed here cannot be used to depart from the simple bright line direct purchaser requirement of *Illinois Brick*. The rule would be disserved, and antitrust enforcement would be undermined, if a distributor like Apple that unlawfully obtains monopoly power could avoid liability to its direct customers simply by utilizing a consignment sales model.

---

relevant because direct purchasers can collect 100% of the overcharge damages even if they did not suffer any genuine loss. The court's concern is also unwarranted as an economic matter. Apps developers, who compete with other apps developers for App Store sales, will price their products at cost plus a marginal rate of return whether they sell under a retail-wholesale or consignment model – they will not charge below cost or suffer a loss simply because the App Store operates on a consignment basis. Rather, they will mark-up the price to cover Apple's 30%, especially since they know that Apple is charging iPhone consumers the same 30% for every other developers' apps. Accordingly, Plaintiffs have appropriately alleged that the App Store's prices "include the developers' price plus Apple's 30% mark-up." EOR 070, ¶ 41.

1. The Direct Purchaser Rule and Its Policies

Almost fifty years ago, the Supreme Court issued the first of a series of seminal decisions on antitrust standing. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the plaintiff alleged that the defendant's practice of leasing rather than selling its "more complicated and important shoe machinery" forced Hanover (a shoe manufacturer) to lease the machinery at an inflated price and constituted unlawful monopolization. *Id*. at 484. Hanover sought "the difference between what it paid United in shoe machine rentals and what it would have paid" absent the allegedly inflated prices. *Id*. at 484.

United argued that Hanover's customers, rather than Hanover itself, were the proper plaintiffs because the entire inflation was passed on in the price Hanover charged its customers. The Supreme Court rejected United's argument, holding that "when a buyer shows that the price paid by him . . . is illegally high and also shows the amount of the overcharge, he has made out a *prima facie* case of injury and damage within the meaning of [section 4 of the Clayton Act]." *Id*. at 489.

The Supreme Court explained that the injury to Hanover occurred at the moment it leased the machinery at an illegally high price, and that Hanover was entitled to damages even "if [it] raised the price for [its] own product." *Id*. The Court was unwilling to complicate antitrust actions with attempts to trace overcharges and was concerned that indirect purchasers with small stakes in

potential recoveries had small incentives to sue. In short, "*Hanover Shoe* . . . rest[s] on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Ill. Brick*, 431 U.S. at 734-35.

Hanover Shoe conclusively established that "a pass-on theory may not be used defensively by an antitrust violator against a direct purchaser plaintiff." *Id*. at 726. However, it left unanswered whether "passing-on" could be used offensively by indirect purchasers to prove injury and damages in antitrust cases. The Supreme Court answered that question in *Illinois Brick*, where the State of Illinois sued Illinois Brick and other concrete block manufacturers for conspiring to raise the cost of concrete blocks in violation of Section 1 of the Sherman Act. The Supreme Court held that the State suffered no compensable injury because it did not purchase any concrete blocks directly from Illinois Brick, which instead sold the blocks to masonry subcontractors that in turn sold them to the State.

The Supreme Court declined to overrule *Hanover Shoe* or to create exceptions for particular industries because "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants," and the Court could not "justify unequal treatment of plaintiffs and defendants with respect to the permissibility of pass-on arguments." *Id*. at 731. In *Illinois Brick*,

the Supreme Court focused on the "chain of manufacture or distribution" and explained that "the effectiveness of the antitrust treble-damages action would be substantially reduced by adopting a rule that any party in the chain may sue to recover the fraction of the overcharge allegedly absorbed by it." *Id*. at 729.

In *Kansas v. UtiliCorp United, Inc*., 497 U.S. 199, 204 (1990), natural gas wholesalers were sued by several public utilities as well as Kansas and Missouri, acting as *parens patriae* for their citizens. Following its *Illinois Brick* analysis, the Supreme Court held that only the utilities, as direct purchasers, were proper plaintiffs and again declined to create an exception to the indirect purchaser rule for situations where regulated public utilities pass on 100% of their costs to consumers. *Id*. at 208-17. Again focusing on the chain of distribution, the Supreme Court reiterated that only the immediate buyer from the alleged monopolist has standing to assert antitrust claims:

> Like the State of Illinois in *Illinois Brick*, the consumers in this case have the status of indirect purchasers. In the distribution chain, they are not the immediate buyers from the alleged antitrust violators. They bought their gas from the utilities, not from the suppliers said to have conspired to fix the price of the gas. Unless we create an exception to the direct purchaser rule established in *Hanover Shoe* and *Illinois Brick*, any antitrust claim against the defendants is not for them, but for the utilities to assert.

Id. at 207.

This Court has held that the simple rule set forth in the trio of Supreme Court cases: (1) "eliminate[s] the complications of apportioning overcharges

between direct and indirect purchasers; (2) eliminate[s] multiple recoveries; and (3) promote[s] the vigorous enforcement of the antitrust laws." *In re ATM Fee*, 686 F.3d at 748 (quoting *UtiliCorp*, 497 U.S. at 208).

In a particularly instructive case for present purposes, this Court applied the Supreme Court's antitrust standing analysis in *Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1122 (9th Cir. 2008). The manufacturer, Johnson & Johnson ("J&J"), sold medical supplies to a distributor under a traditional retail-wholesale model. The distributor sold the products to a hospital and nursing center ("Bamberg"). Bamberg paid the distributor. This Court held that Bamberg lacked standing to sue J&J for antitrust violations because the distributor, not Bamberg, was the immediate purchaser of the medical supplies from J&J. This Court explained:

> Following the clear rule set forth in *Illinois Brick*, Bamberg lacks standing because the hospital is not a direct purchaser of products from J&J. Although the price that Bamberg pays [the distributor] is set, in part, by an agreement negotiated by a GPO on behalf of Bamberg, the hospital contracted separately with [the distributor] for the actual sale and delivery of products. The final price paid by Bamberg included the list price negotiated by Premier, plus a markup fee charged by [the distributor].

Id.

This Court declined to look to the "substance" of the antitrust theory in the case, explaining that the Supreme Court's "firm rule [in *Illinois Brick*] does not provide us the leeway to make a policy determination on a case-by-case basis as to

whether standing should be recognized when there are special business arrangements." *Id.* at 1124. This Court looked to the "contract that ultimately effectuated the transfer of" the relevant product and concluded, quite simply, that "a bright line rule emerged from *Illinois Brick*: only direct purchasers have standing . . . to seek damages for antitrust violations." *Id.* at 1120-21.

Under that analysis, Bamberg would have had direct purchaser standing if the distributor rather than the manufacturer had been the alleged antitrust violator. Apple is the distributor and alleged antitrust violator here, and the "contract that ultimately effectuated the transfer" of the monopoly-priced product was the transaction that each Plaintiff entered into directly with Apple when they bought the apps. The lower court should not have considered whether there are "special business arrangements" between Apple and the apps developers that permit Apple to charge a 30% commission when it sells apps to iPhone customers. Instead, the lower court should have applied the "bright line" direct purchaser test based on the only relevant transaction: the one between the Plaintiffs and Apple.

2. The District Court Misapplied *In re ATM Fee*

The lower court erroneously relied on this Court's decision in *In re ATM Fee*, 686 F.3d 741. There the holders of various banks' automated teller machine ("ATM") cards alleged that their banks colluded to fix the price of an "ATM interchange" fee that their banks paid to the owners of other ATMs (called

"foreign ATMs") when the plaintiffs used an ATM not owned by their bank. The plaintiffs alleged that the defendant banks schemed to increase the ATM interchange fees that the banks paid each other when their cardholders used foreign ATMs, which the banks then collected from their own cardholders in the form of higher foreign ATM fees.

This Court found that Plaintiffs were indirect purchasers because "their banks pay an unlawfully inflated interchange fee and then pass the cost of the artificially high interchange fee along to them through foreign ATM fees." *Id.* at 746-47, 749-50 (quoting *In re ATM Fee Antitrust Litig.*, U.S. Dist. LEXIS 97009). Strictly applying the simple standing test, this Court again refused to engage in any case-specific economic analysis and refused to create any exceptions to the *Illinois Brick* rule: "[E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id.* at 748-49 (quoting *Del. Valley Surgical Supply Inc.* 523 F.3d at 1124; *UtiliCorp*, 497 U.S. at 208).

Importantly, this Court observed that the plaintiffs there had not even *alleged* that they directly paid the challenged fee:

> Plaintiffs do not allege that the Defendants or any other banks have conspired to fix the foreign ATM fee that Plaintiffs must pay.… Instead, Plaintiffs assert that their banks pay an unlawfully inflated interchange fee and then pass the cost of the artificially high

> interchange fee along to them through foreign ATM fees.… Plaintiffs … do not pay this allegedly unlawful fee directly (their banks do) and therefore are not directly harmed by it.… Plaintiffs do not dispute that they pay the purportedly unlawful interchange fee only indirectly.… Plaintiffs therefore acknowledge that they are only indirect payers of the interchange fee and that the banks are the direct payers.…

Id. at 746-47.

The difference between this case and *In re ATM Fee* could not be any clearer. *In re ATM Fee* involved classic indirect purchaser allegations. The plaintiffs alleged that the defendants fixed one fee, which the plaintiffs did *not* pay, and that the enhanced price was "passed on" by others in the form of *another* fee, which the plaintiffs *did* pay. Here, in stark contrast, Plaintiffs paid the monopoly-priced fee directly to the alleged monopolist and purchased the affected product directly from the alleged monopolist.

3. The District Court's "No Allegation of Price-Fixing" and Apportionment of Damages Rationales are Misplaced

The District Court's misreading of *In re ATM Fee* also appears to have led it to conclude erroneously that Plaintiffs must allege that Apple's 30% fee was the product of price-fixing to state a monopolization claim. EOR 011-12. While *In re ATM Fee* conducted a direct purchaser analysis in a price-fixing case, the same analysis applies in the same manner in a monopolization case, where Plaintiffs need only allege that the challenged fee is supracompetitive, as Plaintiffs have done. *See Universal Grading Serv. v. eBay, Inc.*, No. 12-15294, 2014 U.S. App.

LEXIS 4962 (9th Cir. Mar. 17, 2014) (elements of monopolization claim are "(1) [p]ossession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury"); *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013) (causation element requires pleading supracompetitive price).

The lower court's finding that Plaintiffs had not alleged that they bore the entirety of Apple's supracompetitive profit (EOR 012) misses the entire point of the *Illinois Brick* rule. The simple, bright line standing rule avoids complicating antitrust actions with attempts to trace overcharges among various levels of potentially injured parties along the distribution chain. *See Illinois Brick*, 431 U.S. at 734-35; *In re ATM Fee*, 686 F.3d at 748. Consequently, only direct purchasers are permitted to sue for damages, and they are entitled to recover 100% of the damages even if they suffered none of the actual loss. *See UtiliCorp*, 497 U.S. at 208-17 (direct purchasers are the proper plaintiffs even if they pass on 100% of their losses to their customers). *See also Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1212 (9th Cir. 1984) (*Illinois Brick* "sought to avoid increasing the cost and burden of antitrust actions with complicated damage theories necessitating massive evidence to determine how the overcharge was apportioned throughout the distribution chain") (citing *Illinois Brick*, 431 U.S. at 731-32).

Plaintiffs were the only purchasers in the distribution chain, and they are entitled to recover 100% of the alleged overcharges from Apple, to whom they paid the entire purchase price (including the alleged 30% surpacompetitive fee) for all the iPhone apps they bought. The court below erred by requiring Plaintiffs to plead that the apps developers "would . . . charge only 70% of the purchase price if not for Apple," The lower court's concern that it would have to delve into "the developers' pricing structures, their costs, ability to find a distribution chain, and/or desired profits or rates of return" was misplaced, EOR 012. Under *Illinois Brick* and its progeny, that inquiry is neither required nor even permitted: it is simply irrelevant.[11]

4. The District Court Improperly Applied the Eighth Circuit's Aberrant and Discredited *Campos v. Ticketmaster* Approach

In the lower court, Apple relied extensively on the Eighth Circuit's opinion in *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998). *See* EOR

[11] Apple did not argue in *any* of its four motions to dismiss that Plaintiffs had not adequately alleged causation or damages under *Twombly*. That is because Plaintiffs have amply pleaded that they paid a supracompetitve price. The SAC cites specific examples of Apple charging for apps that its would-be-competitors were giving away for free, and it alleges: (i) that Apple monopolized the apps aftermarket to reap the supracompetitive profits that monopolies typically provide; (ii) that Apple's 30% fee was pure profit and not a function of its cost structure; and (iii) that Apple is an unrepentant recidivist antitrust violator that, according to Judge Cote's review of admitted trial evidence, seeks at all times to eliminate retail price competition in order to raise the prices its customers must pay. *See supra*, at 11-13.

030 n.10; EOR 031 n.13. In *Campos*, the plaintiffs were concertgoers who sued Ticketmaster for monopolizing the market for concert ticket distribution services, which Ticketmaster was able to achieve by entering into exclusive contracts with most of the popular concert promoters and venues. *Id.* at 1168. The plaintiffs argued they were direct purchasers because they paid supracompetitive service and other fees directly to Ticketmaster. *Id.* at 1171.

In a split decision, the Eighth Circuit held that plaintiffs lacked standing under *Illinois Brick*. The court reasoned that because Ticketmaster had entered into exclusive contracts with the concert promoters and venues to use Ticketmaster for ticket distribution to those events, plaintiffs' inability to obtain ticket delivery services in a competitive market was the consequence of the "antecedent inability of venues to do so." *Id.* ("[T]icket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first.") This "derivative dealing" purportedly barred the plaintiffs' antitrust claims. *Id.*

The dissenting judge properly maligned the majority for creating a concept of an "antecedent transaction" that "appears nowhere" in *Illinois Brick* or any other direct purchaser case, and which upends the traditional rule that an "indirect purchaser" is "someone in a vertical supply chain who purchases a monopolized product *from someone other than a monopolist*." *Campos*, 140 F.3d at 1174 (Arnold, J., dissenting) (emphasis added). That traditional definition of an

"indirect purchaser," not the *Campos* majority's aberrant view, is the controlling law in this Circuit. *See In re ATM Fee*, 686 F.3d at 749-50.

In the sixteen years since *Campos* was decided, neither this Court nor any other federal court of appeals has adopted the majority's "antecedent transaction" analysis. This Court's decision in *Del. Valley Surgical Supply Inc.* faithfully following the bright line rule of *Illinois Brick*, and this Court's failure to cite *Campos* in *In re ATM Fee*, were strong indicators that this Court would not do so in this case, and the District Court should have rejected the flawed *Campos* majority's "antecedent transaction" concept of an indirect purchaser.

But Apple strenuously urged the lower court to adopt *Campos*, and the court appears to have done so without citing *Campos*. Because Apple "agreed" with the apps developers that Apple would charge a 30% fee on all App Store purchases before Apple actually charged and collected that fee from iPhone consumers, the lower court in essence concluded that Apple's antecedent transactions with apps developers insulates Apple from liability to Plaintiffs – even if Plaintiffs bought the apps directly from Apple, Plaintiffs directly bore "the entirety of the monopoly overcharge," *Campos*, 140 F.3d at 1174 (Arnold, J., dissenting), and Plaintiffs were the only ones damaged by Apple's imposition of its illegal 30% fee. However, "*Illinois Brick* requires more than a mere antecedent transaction for an antitrust defendant to avoid suit." *Id*.

Campos has "been widely criticized for a variety of reasons." Duffy, M.M., *Note: Chipping Away at the Illinois Brick Wall: Expanding Exceptions to the Indirect Purchaser Rule*, 87 Notre Dame L. Rev. 1709, 1737 n.154 (2012).[12] The

[12] Other scholars have also criticized *Campos*. The criticism is compelling:

> [T]he *Illinois Brick* rule bars claims by parties further down the vertical distribution chain from the original purchaser. Under that principle, it should be clear that these plaintiffs should not have been barred from asserting a claim, as they were dealing directly with Ticketmaster, buying both the tickets and the distribution services directly from them. Instead, the Eighth Circuit created a new, and bizarre, definition of "indirect purchaser": a person "who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser." Although it is true that there was some prior relationship between the concert venues and Ticketmaster, this was clearly not a situation where Ticketmaster had created a product and then sold it at an elevated price to its "direct purchaser," which in turn sold it to the indirect buying plaintiffs. Here, the plaintiffs *dealt directly with the defendant, and paid the overcharge directly to it*. If anything, *Ticketmaster* was acting as an agent for the venues, in their sales of tickets to the concert-goers. Furthermore, permitting this suit to proceed would not have implicated the goal at the heart of *Illinois Brick*, preventing duplicative suits by both direct and indirect purchasers. Here, as the venues did not purchase these services from Ticketmaster, they would have had no basis for asserting a claim for any overcharge. The consequence of the Eighth Circuit's holding was that the only private parties who had any incentive to bring a lawsuit, and any basis for asserting that they were harmed, were barred from bringing a treble damage action.

J.P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. Pitt. L. Rev. 437, 446-47 (Spring 2001) (emphasis added).

Campos case was correctly rejected by Judge Ware in the related action alleging virtually identical claims as this action:

> [T]he Court rejects Apple's contention that certification of a class as to the applications aftermarket is barred by *Illinois Brick* …. [Plaintiffs' claims do] not rest on an indirect purchaser model. … [T]he class members *deal directly with the accused monopolist, Apple*. Although *Campos* found that *Illinois Brick* applied in a context where class members dealt directly with the monopolist (Ticketmaster) – "ticket buyers only buy Ticketmaster's services [at marked up prices] because concert venues have been required to buy those services first" – the Court is not aware of any Ninth Circuit case that applied *Illinois Brick* in this manner, and the Court declines to do so here.

Apple I, 2010 U.S. Dist. LEXIS 98270, at *40-42, n.27 (emphasis omitted and added).

This Court rightly has never adopted the outlier *Campos* decision, and it should continue to adhere to the "bright line" direct purchaser test, which unlike the *Campos* test, comports fully with *Hanover Shoe*, *Illinois Brick* and *UtiliCorp*.

5. The Apps Developers Cannot Sue Apple

The District Court's factually unsupportable finding that the apps developers rather than Plaintiffs paid the challenged 30% fee disserves one of the fundamental policies underlying both *Illinois Brick* and the Sherman Act generally – the need to "promote the vigorous enforcement of the antitrust laws." *In re ATM Fee*, 686 F.3d at 748. If the District Court's opinion is affirmed, Apple will be immunized from suit because Plaintiffs and other iPhone consumers are the only parties who

have an aftermarket monopolization cause of action against Apple and were the only parties actually injured by Apple's unlawful conduct. The apps developers, whom the lower court found to be the direct purchasers, have no viable cause of action against Apple for two reasons.

First, unlike Plaintiffs, the developers contractually *agreed* to permit Apple to charge the 30% fee and, therefore, knowingly consented to Apple's monopolization of the iPhone apps aftermarket. Plaintiffs' aftermarket monopolization claims are based on the Supreme Court's decision in *Eastman Kodak Co. v. Image Technical Servs., Inc*., 504 U.S. 451 (1992), and this Court's application of *Kodak* in *Newcal Industries, Inc. v. IKON Office Solution*, 513 F.3d 1038 (9th Cir. 2008). Under *Newcal*, a Section 2 aftermarket violation occurs only when the plaintiff does not knowingly consent to the monopolization. *See* 513 F.3d at 1049 (relevant inquiry is (i) "whether a consumer's selection of a particular brand in the competitive market is the functional equivalent of a contractual commitment, giving that brand an agreed-upon right to monopolize its consumers in an aftermarket," and (ii) "whether consumers entered into such 'contracts' knowing that they were agreeing to such a commitment"). Here, all of the apps developers consented to Apple charging Plaintiffs 30% for every paid app in the App Store. Consequently, apps developers have no Section 2 aftermarket monopolization claim against Apple under the law of this Circuit.

Second, the antitrust concern in *Kodak* was that suppliers of a primary product (here, Apple's iPhone) might exploit their unique position with their *customers* "to gain monopoly power in the derivative . . . market" when such power "was neither naturally nor contractually created." *Newcal*, 513 F.3d at 1049. Plaintiffs and other iPhone consumers were the only customers whom Apple exploited. Thus, they are the only ones who could allege that when they bought their iPhones they did not knowingly commit to purchase only Apple-approved apps or to pay Apple a supracompetitive 30% fee for every app they bought. Therefore, under *Newcal*, only the Plaintiff consumers, and not the apps developers, have a sustainable claim against Apple for monopolization or attempted monopolization of the iPhone apps aftermarket.

For the same reason, Apple is not subject to potential multiple recoveries, which is another objective of the direct purchaser rule. *See In re ATM Fee*, 686 F.3d at 748. If the apps developers have no sustainable claim, Apple has exposure only to Plaintiffs, the only parties who do have a viable claim.

Because apps developers, whom the District Court erroneously found to be the direct purchasers, cannot sue Apple for monopolizing or attempting to monopolize the applications aftermarket, affirming the District Court's ruling will enable Apple to "retain the fruits of [its] illegality because no one [will be] available who would bring suit against them." *Hanover Shoe*, 392 U.S. at 494.

This result would contravene the goal of promoting the "vigorous enforcement of the antitrust laws." *UtiliCorp*, 497 U.S. at 214.

E. The Court Should Have Granted Leave to Replead to Permit Plaintiffs to Assert Indirect Purchaser Claims

This Court requires district courts to generously grant leave to amend from a dismissal for failure to state a claim, even if no request to amend the pleading was made, "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Christoferson v. Thomas*, No. 11-35721, 2013 U.S. App. LEXIS 24528 (9th Cir. Dec. 10, 2013) (citing *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*)); *see also OSU Student Alliance v. Ray*, 699 F.3d 1053, 1079 (9th Cir. 2012) (even though "Plaintiffs did not request leave to amend until after the judgment issued, . . . district court's with-prejudice dismissal was still an abuse of discretion" because "plaintiffs might well be able to remedy the deficiencies in the claims" and "should be afforded that opportunity") (citing *Lopez*, 203 F.3d at 1130).

The court below failed to heed that directive. The court's December 2, 2013 Order was the first time the court had ruled that Plaintiffs were indirect purchasers. The court did not rule on the issue in its August 15, 2013 Order because it deemed the issue to call for an advisory opinion and asked for additional factual detail. EOR 033. Plaintiffs provided additional detail and, since Judge Ware had found Plaintiffs to be direct purchasers, reasserted their direct purchaser claims. When

the District Court issued its December 2, 2013 Order finding Plaintiffs to be indirect purchasers it should have, under this Court's precedents, given Plaintiffs leave to amend, at the very least to try to plead that they had indirect purchaser standing.

If this Court affirms the lower court's holding that the apps developers are the direct purchasers (which for the above reasons it should not), Plaintiffs will have a good faith basis for arguing they have standing to sue as indirect purchasers.

Under the "co-conspirator" exception to *Illinois Brick*, indirect purchasers can sue if there is a "conspiracy between the manufacturer and the middleman." *Del. Valley*, 523 F.3d at 1123 n.1 (citing *Shamrock Foods*, 729 F.2d at 1211); *see In re ATM Fee*, 686 F.3d at 749; 2A Phillip E. Areeda et al., Antitrust Law ¶ 346h (3d ed. 2007). Although the court below opined (without the benefit of any briefing on the subject) that "none of the exceptions to the *Illinois Brick* doctrine apply" and that "the SAC lacks allegations of a conspiracy of any kind," EOR 012, the court incongruently also found that the 30% fee arose "by agreement" between Apple and the apps developers, *id.* That agreement can be characterized, under the facts alleged in the SAC, as a conspiratorial agreement between Apple and the apps developers enabling Apple to monopolize the iPhone apps aftermarket. The allegation is certainly colorable, and Plaintiffs should have been given an opportunity to plead and brief the issue.

Indirect purchasers also have standing to sue for antitrust violations "if there is no realistic possibility that the direct purchaser will sue . . . over the antitrust violation." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003) (citing *Royal Printing Co. v. Kimberly-Clark Corp*., 621 F.2d 323, 326 (9th Cir. 1980)). This is particularly the case when "a conspiring seller owns or controls the direct purchaser." *In re ATM Fee*, 686 F.3d at 749. While Apple does not own the apps developers, it arguably controls them within the meaning of this exception through its exclusive contracts, which the developers have no choice but to sign if they want to participate in the multibillion dollar iPhone apps market.

Finally, the District Court overlooked the fact that the SAC contains a request for injunctive relief. EOR 077-78, ¶¶ 74, 80 and (a). *Illinois Brick* does not bar an indirect purchaser's suit for an injunction. *See In re Cathode Ray Tube Antitrust Litig.*, No. 07-5944-SC, 2010 U.S. Dist. LEXIS 145617, at *95 (N.D. Cal. Feb. 5, 2010), *adopted by In re Cathode Ray Tube (CRT) Antitrust Litig*., 738 F. Supp. 2d 1011, 1024 (N.D. Cal. 2010) (citing *In re Warfarin Sodium Antitrust Litig*., 214 F.3d 395, 402 (3d Cir. 2000)); *Pecover v. Elec. Arts Inc*., 633 F. Supp. 2d 976, 980 (N.D. Cal. 2009) ("Apportionment challenges and duplicative recovery simply do not come into play in suits seeking injunctive relief and thus *Illinois Brick* does not apply.")

To obtain equitable relief, plaintiffs need only demonstrate: "(1) threatened loss or injury cognizable in equity; [and] (2) proximately resulting from the alleged antitrust injury." *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 400 (3d Cir. 2000). Plaintiffs' SAC adequately alleges these two elements, and the District Court did not find otherwise. Therefore, even if Plaintiffs are indirect purchasers, they have standing to pursue injunctive relief, and it was plain error for the District Court to dismiss the action in its entirety.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs request this Court to reverse the District Court's August 15, 2013 and December 2, 2013 Orders and remand for further proceedings.

Dated: May 12, 2014

Respectfully Submitted,

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
MARK C. RIFKIN
ALEXANDER H. SCHMIDT
MICHAEL LISKOW
270 Madison Avenue
New York, New York 10016
Telephone: 212/545-4600
Facsimile: 212/545-4677
rifkin@whafh.com
schmidt@whafh.com
liskow@whafh.com

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLC
FRANCIS M. GREGOREK
RACHELE R. RICKERT

By: /s/ Rachele R. Rickert
RACHELE R. RICKERT

750 B Street, Suite 2770
San Diego, California 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599
gregorek@whafh.com
rickert@whafh.com

Attorneys for Plaintiffs-Appellants
Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, and Eric Terrell

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,411 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman type style, 14-point font.

DATED: May 12, 2014

Respectfully Submitted,

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
MARK C. RIFKIN
ALEXANDER H. SCHMIDT
MICHAEL LISKOW
270 Madison Avenue
New York, New York 10016
Telephone: 212/545-4600
Facsimile: 212/545-4677
rifkin@whafh.com
schmidt@whafh.com
liskow@whafh.com

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLC
FRANCIS M. GREGOREK
RACHELE R. RICKERT

By: /s/ Rachele R. Rickert
RACHELE R. RICKERT

750 B Street, Suite 2770
San Diego, California 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599
gregorek@whafh.com
rickert@whafh.com

Attorneys for Plaintiffs-Appellants
Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, and Eric Terrell

STATEMENT OF RELATED CASES

Plaintiffs are aware of the following related case pending in this Court: *Ward v. Apple Inc*, No. 12-17805.

ADDENDUM

*** Current through PL 113-100, approved 4/18/14 ***

TITLE 15. COMMERCE AND TRADE
CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

Go to the United States Code Service Archive Directory

15 USCS § 2

§ 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

HISTORY:

(July 2, 1890, ch 647, § 2, 26 Stat. 209; July 7, 1955, ch 281, 69 Stat. 282; Dec. 21, 1974, P.L. 93-528, § 3, 88 Stat. 1708; Nov. 16, 1990, P.L. 101-588, § 4(b), 104 Stat. 2880.)

(As amended June 22, 2004, P.L. 108-237, Title II, Subtitle A, § 215(b), 118 Stat. 668.)

*** Current through changes received May 6, 2014 ***

FEDERAL RULES OF CIVIL PROCEDURE
TITLE III. PLEADINGS AND MOTIONS

Go to the United States Code Service Archive Directory

USCS Fed Rules Civ Proc R 12

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as

follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or
(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

HISTORY:

(Amended March 19, 1948; July 1, 1963; July 1, 1966; Aug. 1, 1987; Dec. 1, 1993; Dec. 1, 2000.)

(As amended Dec. 1, 2007; Dec. 1, 2009.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. *Note to Subdivision (a).* 1. Compare former Equity Rules 12 (Issue of Subpoena--Time for Answer) and 31 (Reply--When Required--When Cause at Issue); 4 Mont. Rev. Codes Ann. (1935) §§ 9107, 9158; N.Y.C.P.A. (1937) § 263; N.Y.R.C.P. (1937) Rules 109-111.

2. U.S.C., Title 28, former § 763 (now § 507) (Petition in action against United States; service; appearance by district attorney) provides that the United States as a defendant shall have 60 days within which to answer or otherwise defend. This and other statutes which provide 60 days for the United States or an officer or agency thereof to answer or otherwise defend are continued by this rule. Insofar as any statutes not excepted in Rule 81 provide a different time for a defendant to defend, such statutes are modified. See U.S.C., Title 28, former § 45 (District courts; practice and procedure in certain cases under the interstate commerce laws) (30 days).

3. Compare the last sentence of former Equity Rule 29 (Defenses--How Presented) and N.Y.C.P.A. (1937) § 283. See Rule 15(a) for time within which to plead to an amended pleading.

Note to Subdivisions (b) and (d). 1. See generally former Equity Rules 29 (Defenses--How Presented), 33 (Testing Sufficiency of Defense), 43 (Defect of Parties--Resisting Objection), and 44 (Defect of Parties--Tardy Objection); N.Y.C.P.A. (1937) §§ 277-280; N.Y.R.C.P. (1937) Rules 106-112; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 25, rr 1-4; Clark, Code Pleading (1928) pp 371-381.

2. For provisions authorizing defenses to be made in the answer or reply see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 25, rr 1-4; 1 Miss. Code Ann. (1930) §§ 378, 379. Compare former Equity Rule 29 (Defenses--How Presented); U.S.C., Title 28, former § 45 (District Courts; practice and procedure in certain cases under the interstate commerce laws). U.S.C., Title 28, former § 45, substantially continued by this rule, provides: "No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed." Compare Calif. Code Civ. Proc. (Deering, 1937) § 433; 4 Nev. Comp. Laws (Hillyer, 1929) § 8600. For provisions that the defendant may demur and answer at the same time, see Calif. Code Civ. Proc. (Deering, 1937) § 431; 4 Nev. Comp. Laws (Hillyer, 1929) § 8598.

3. Former Equity Rule 29 (Defenses--How Presented) abolished demurrers and provided that defenses in point of law arising on the face of the bill should be made by motion to dismiss or in the answer, with further provision that every

such point of law going to the whole or material part of the cause or causes stated might be called up and disposed of before final hearing "at the discretion of the court." Likewise many state practices have abolished the demurrer, or retain it only to attack substantial and not formal defects. See 6 Tenn. Code Ann. (Williams, 1934) § 8784; Ala. Code Ann. (Michie, 1928) § 9479; 2 Mass. Gen. Laws (Ter. Ed., 1932) ch 231, §§ 15-18; Kansas Gen. Stat. Ann. (1935) §§ 60-705, 60-706.

Note to Subdivision (c). Compare former Equity Rule 33 (Testing Sufficiency of Defense); N.Y.R.C.P. (1937) Rules 111 and 112.

Note to Subdivisions (e) and (f). Compare former Equity Rules 20 (Further and Particular Statement in Pleading May Be Required) and 21 (Scandal and Impertinence); English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, rr 7, 7a, 7b, 8; 4 Mont. Rev. Codes Ann. (1935) §§ 9166, 9167; N.Y.C.P.A. (1937) § 247; N.Y.R.C.P. (1937) Rules 103, 115, 116, 117; Wyo. Rev. Stat. Ann. (Courtright, 1931) §§ 89-1033, 89-1034.

Note to Subdivision (g). Compare Rules of the District Court of the United States for the District of Columbia (1937), Equity Rule 11; N.M. Rules of Pleading Practice and Procedure, 38 N.M. Rep. vii [105-408] (1934); Wash. Gen. Rules of the Superior Courts, 1 Wash. Rev. Stat. Ann. (Remington, 1932) p 160, Rule VI (e) and (f).

Note to Subdivision (h). Compare Calif. Code Civ. Proc. (Deering, 1937) § 434; 2 Minn. Stat. (Mason, 1927) § 9252; N.Y.C.P.A. (1937) §§ 278 and 279; Wash. Gen. Rules of the Superior Courts, 1 Wash. Rev. Stat. Ann. (Remington, 1932) p. 160, Rule VI (e). This rule continues USC, Title 28, former § 80 (Dismissal or remand) (of action over which district court lacks jurisdiction), while U.S.C., Title 28, former § 399 (Amendments to show diverse citizenship) is continued by Rule 15.

Notes of Advisory Committee on 1946 amendments. *Note to Subdivision (a).* Various minor alterations in language have been made to improve the statement of the rule. All references to bills of particulars have been stricken in accordance with changes made in subdivision (e).

Note to Subdivision (b). The addition of defense (7), "failure to join an indispensable party," cures an omission in the rules, which are silent as to the mode of raising such failure. See *Commentary, Manner of Raising Objection of Non-Joinder of Indispensable Party, 1940, 2 Fed. Rules Serv. 658* and, 1942, *5 Fed. Rules Serv. 820.* In one case, *United States v. Metropolitan Life Ins. Co., 36 F. Supp. 399 (E.D. Pa. 1941),* the failure to join an indispensable party was raised under Rule 12(c).

Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action. Some courts have held that as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it. On the other hand, in many cases the district courts have permitted the introduction of such material. When these cases have reached circuit courts of appeals in situations where the extraneous material so received shows that there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it. In dealing with such situations the Second Circuit has made the sound suggestion that whatever its label or original basis, the motion may be treated as a motion for summary judgment and disposed of as such. *Samara v. United States, 129 F.2d 594 (2d Cir. 1942),* cert. denied, *317 U.S. 686, [87 L. Ed. 549] 63 S. Ct. 258 (1942); Boro Hall Corp. v. General Motors Corp., 124 F.2d 822 (2d Cir. 1942),* cert. denied, *317 U.S. 695, [87 L. Ed. 556] 63 S. Ct. 436 (1943).* See also *Kithcart v. Metropolitan Life Ins. Co., 150 F.2d 997 (8th Cir. 1945),* affg *62 F. Supp. 93.*

It has also been suggested that this practice could be justified on the ground that the federal rules permit "speaking" motions. The Committee entertains the view that on motion under Rule 12(b)(6) to dismiss for failure of the complaint to state a good claim, the trial court should have authority to permit the introduction of extraneous matter, such as may be offered on a motion for summary judgment, and if it does not exclude such matter the motion should then be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in Rule 56 relating to summary judgments, and, of course, in such a situation, when the case reaches the circuit court of appeals, that court should treat the motion in the same way. The Committee believes that such practice, however, should be tied to the summary judgment rule. The term "speaking motion" is not mentioned in the rules, and if there is such a thing its limitations are undefined. Where extraneous matter is received, by tying further proceedings to the summary judgment

rule the courts have a definite basis in the rules for disposing of the motion.

The Committee emphasizes particularly the fact that the summary judgment rule does not permit a case to be disposed of by judgment on the merits on affidavits, which disclose a conflict on a material issue of fact, and unless this practice is tied to the summary judgment rule, the extent to which a court, on the introduction of such extraneous matter, may resolve questions of fact, on conflicting proof would be left uncertain.

The decisions dealing with this general situation may be generally grouped as follows: (1) cases dealing with the use of affidavits and other extraneous material on motions; (2) cases reversing judgments to prevent final determination on mere pleading allegations alone.

Under group (1) are: *Boro Hall Corp. v. General Motors Corp. 124 F.2d 822 (2d Cir 1942),* cert. denied, *317 U.S. 695, [87 L. Ed. 556] 63 S. Ct. 436 (1943); Gallup v. Caldwell, 120 F.2d 90 (3d Cir. 1941); Central Mexico Light & Power Co. v. Munch, 116 F.2d 85 (2d Cir. 1940); National Labor Relations Board v. Montgomery Ward & Co., 79 U.S. App. D.C. 200, 144 F.2d 528 (D.C. Cir. 1944),* cert. denied *[323 U.S. 774, 89 L. Ed. 619,] 65 S. Ct. 134 (1944); Urquhart v. American-La France Foamite Corp., 79 U.S. App. D.C. 219, 144 F.2d 542 (D.C. Cir. 1944); Samara v. United States, 129 F.2d 594 (2d Cir. 1942),* cert. denied, *317 U.S. 686, [87 L. Ed. 549] 63 S. Ct. 258 (1942); Cohen v. American Window Glass Co., 126 F.2d 111 (2d Cir. 1942); Sperry Products Inc. v. Association of American Railroads, 132 F.2d 408 (2d Cir. 1942); Joint Council Dining Car Employees Local 370 v. Delaware, Lackawanna and Western R. Co., 157 F.2d 417 (2d Cir. 1946); Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941); Carroll v. Morrison Hotel Corp., 149 F2d 404 (7th Cir. 1945); Victory v. Manning, 128 F.2d 415 (3d Cir. 1942); Locals No. 1470, No. 1469, and No. 1512 of International Longshoremen's Association v. Southern Pacific Co., 131 F.2d 605 (5th Cir. 1942); Lucking v. Delano, 129 F.2d 283 (6th Cir. 1942); San Francisco Lodge No. 68 of International Association of Machinists v. Forrestal, 58 F. Supp. 466 (N.D. Cal. 1944); Benson v. Export Equipment Corp., 164 P.2d 380 (N. Mex. 1945),* construing New Mexico rule identical with Rule 12(b)(6); *F. E. Myers & Bros. Co. v. Gould Pumps, Inc., 9 Fed. Rules Serv. 12b, 33* Case 2, *5 F.R.D. 132 (W.D.N.Y. 1946).* Cf. *Kohler v. Jacobs, 138 F.2d 440 (5th Cir. 1943); Cohen v. United States, 129 F.2d 733 (8th Cir. 1942).*

Under group (2) are: *Sparks v. England, 113 F.2d 579 (8th Cir. 1940); Continental Collieries, Inc. v. Shober, 130 F.2d 631 (3d Cir. 1942); Downey v. Palmer, 114 F.2d 116 (2d Cir. 1940); DeLoach v. Crowley's Inc., 128 F.2d 378 (5th Cir. 1942); Leimer v. State Mutual Life Assurance Co. of Worcester, Mass., 108 F.2d 302 (8th Cir. 1940); Rossiter v. Vogel, 134 F.2d 908 (2d Cir. 1943),* compare s. c., *148 F.2d 292 (2d Cir. 1945); Karl Kiefer Machine Co. v. United States Bottlers Machinery Co., 113 F.2d 356 (7th Cir. 1940); Chicago Metallic Mfg. Co. v. Edward Katzinger Co., 123 F.2d 518 (7th Cir. 1941); Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc., 131 F.2d 419 (8th Cir. 1942); Publicity Bldg. Realty Corp. v. Hannegan, 139 F.2d 583 (8th Cir. 1943); Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944); Package Closure Corp. v. Sealright Co., Inc., 141 F.2d 972 (2d Cir. 1944); Tahir Erk v. Glenn L. Martin Co., 116 F.2d 865 (4th Cir. 1941); Bell v. Preferred Life Assurance Society of Montgomery, Ala, 320 U.S. 238, [88 L. Ed. 15] 64 S. Ct. 5 (1943).*

The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment. In this manner and to this extent the amendment regularizes the practice above described. As the courts are already dealing with cases in this way, the effect of this amendment is really only to define the practice carefully and apply the requirements of the summary judgment rule in the disposition of the motion.

Note to Subdivision (c). The sentence appended to subdivision (c) performs the same function and is grounded on the same reasons as the corresponding sentence added in subdivision (b).

Note to Subdivision (d). The change here was made necessary because of the addition of defense (7) in subdivision (b).

Note to Subdivision (e). References in this subdivision to a bill of particulars have been deleted, and the motion provided for is confined to one for a more definite statement, to be obtained only in cases where the movant cannot reasonably be required to frame an answer or other responsive pleading to the pleading in question. With respect to

preparations for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose. *Slusher v. Jones, 7 Fed. Rules Serv. 12e.*231, Case 5, *3 F.R.D. 168 (E.D. Ky. 1943)* ; *Best Foods, Inc. v. General Mills, Inc., 7 Fed. Rules Serv. 12e.*231, Case 7, *3 F.R.D. 275 (D. Del. 1943); Braden v. Callaway, 8 Fed. Rules Serv. 12e.*231, Case 1 (E.D. Tenn. 1943) (" . . . most courts . . . conclude that the definiteness required is only such as will be sufficient for the party to prepare responsive pleadings"). Accordingly, the reference to the 20-day time limit has also been eliminated, since the purpose of this present provision is to state a time period where the motion for a bill is made for the purpose of preparing for trial.

Rule 12 (e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized by commentators, judges and members of the bar. See general discussion and cases cited in 1 Moore's Federal Practice, 1938, Cum. Supplement, § 12.07, under "Page 657"; also, Holtzoff, New Federal Procedure and the Courts, 1940, 35-41. And compare vote of Second Circuit Conference of Circuit and District Judges, June 1940, recommending the abolition of the bill of particulars; *Sun Valley Mfg. Co. v. Mylish, 8 Fed. Rules Serv. 12e.*231, Case 6 (E.D. Pa. 1944) ("Our experience . . . has demonstrated not only that 'the office of the bill of particulars is fast becoming obsolete' . . . but that in view of the adequate discovery procedure available under the Rules, motions for bills of particulars should be abolished altogether."); *Walling v. American Steamship Co., 4 F.R.D. 355, 8 Fed. Rules Serv. 12e.*244, Case 8 (W.D.N.Y. 1945) (" . . . the adoption of the rule was ill advised. It has led to confusion, duplication and delay."). The tendency of some courts freely to grant extended bills of particulars has served to neutralize any helpful benefits derived from Rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words "or to prepare for trial"--eliminated by the proposed amendment--have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, many courts have in effect read these words out of the rule. See *Walling v. Alabama Pipe Co., 3 F.R.D. 159, 6 Fed. Rules Serv. 12e.*244, Case 7 (W.D. Mo. 1942); *Fleming v. Mason & Dixon Lines, Inc., 42 F. Supp. 230 (E.D. Tenn. 1941); Kellogg Co. v. National Biscuit Co., 38 F. Supp. 643 (D.N.J. 1941); Brown v. H. L. Green Co., 7 Fed. Rules Serv. 12e.*231, Case 6 (S.D.N.Y. 1943); *Pedersen v. Standard Accident Ins. Co., 8 Fed. Rules Serv. 12e.*231, Case 8 (W.D. Mo. 1945); *Bowles v. Ohse, 4 F.R.D. 403, 9 Fed. Rules Serv. 12e.*231, Case 1 (D. Neb. 1945); *Klages v. Cohen, 9 Fed. Rules Serv. 8a.*25, Case 4 (E.D.N.Y. 1945); *Bowles v. Lawrence, 8 Fed. Rules Serv. 12e.*231, Case 19 (D. Mass. 1945); *McKinney Tool & Mfg. Co. v. Hoyt, 9 Fed. Rules Serv. 12e.*235, Case 1 (N.D. Ohio 1945); *Bowles v. Jack, 5 F.R.D. 1, 9 Fed. Rules Serv. 12e.*244, Case 9 (D. Minn. 1945). And it has been urged from the bench that the phrase be stricken. *Poole v. White, 5 Fed. Rules Serv. 12e.*231, Case 4, *2 F.R.D. 40 (N.D. W. Va. 1941).* See also *Bowles v. Gabel, 9 Fed. Rules Serv. 12e.*244, Case 10 (W.D. Mo. 1946) ("The courts have never favored that portion of the rules which undertook to justify a motion of this kind for the purpose of aiding counsel in preparing his case for trial.").

Note to Subdivision (f). This amendment affords a specific method of raising the insufficiency of a defense, a matter which has troubled some courts, although attack has been permitted in one way or another. See *Dysart v. Remington-Rand, Inc., 31 F. Supp. 296 (D. Conn. 1939); Eastman Kodak Co. v. McAuley, 4 Fed. Rules Serv. 12f.*21, Case 8, *2 F.R.D. 21 (S.D.N.Y. 1941); Schenley Distillers Corp. v. Renken, 34 F. Supp. 678 (E.D.S.C. 1940); Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co., 3 F.R.D. 440 (S.D.N.Y. 1944); United States v. Turner Milk Co., 4 Fed. Rules Serv. 12b.*51, Case 3, *1 F.R.D. 643 (N.D. Ill. 1941); Teiger v. Stephan Oderwald, Inc., 31 F. Supp. 626 (S.D.N.Y. 1940); Teplitsky v. Pennsylvania R. Co., 38 F. Supp. 535 (N.D. Ill. 1941); Gallagher v. Carroll, 27 F. Supp. 568 (E.D.N.Y. 1939); United States v. Palmer, 28 F. Supp. 936 (S.D.N.Y. 1939).* And see *Indemnity Ins. Co. of North America v. Pan American Airways, Inc., 58 F. Supp. 338 (S.D.N.Y. 1944);* Commentary, Modes of Attacking Insufficient Defenses in the *Answer, 1 Fed. Rules Serv. 669, 1940, 2 Fed. Rules Serv. 640 (1939).*

Note to Subdivision (g). The change in title conforms with the companion provision in subdivision (h).

The alteration of the "except" clause requires that other than provided in subdivision (h) a party who resorts to a motion to raise defenses specified in the rule, must include in one motion all that are then available to him. Under the original rule defenses which could be raised by motion were divided into two groups which could be the subjects of two successive motions.

Note to Subdivision (h). The addition of the phrase relating to indispensable parties is one of necessity.

Notes of Advisory Committee on 1963 amendments. This amendment conforms to the amendment of Rule 4(e). See also the Advisory Committee's Note to amended Rule 4(b).

Notes of Advisory Committee on 1966 amendments. *Note to Subdivision (b)(7).* The terminology of this

subdivision is changed to accord with the amendment of Rule 19. See the Advisory Committee's Note to Rule 19, as amended, especially the third paragraph therein before the caption "Subdivision (c)."

Note to Subdivision (g). Subdivision (g) has forbidden a defendant who makes a preanswer motion under this rule from making a further motion presenting any defense or objection which was available to him at the time he made the first motion and which he could have included, but did not in fact include therein. Thus if the defendant moves before answer to dismiss the complaint for failure to state a claim, he is barred from making a further motion presenting the defense of improper venue, if that defense was available to him when he made his original motion. Amended subdivision (g) is to the same effect. This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case. For exceptions to the requirement of consolidation, see the last clause of subdivision (g), referring to new subdivision (h)(2).

Note to Subdivision (h). The question has arisen whether an omitted defense which cannot be made the basis of a second motion may nevertheless be pleaded in the answer. Subdivision (h) called for waiver of " . . . defenses and objections which he [defendant] does not present . . . by motion . . . or, if he has made no motion, in his answer . . . ." If the clause "if he has made no motion," was read literally, it seemed that the omitted defense was waived and could not be pleaded in the answer. On the other hand, the clause might be read as adding nothing of substance to the preceding words; in that event it appeared that a defense was not waived by reason of being omitted from the motion and might be set up in the answer. The decisions were divided. Favoring waiver, see *Keefe v. Derounian, 6 F.R.D. 11 (N.D. Ill. 1946); Elbinger v. Precision Metal Workers Corp., 18 F.R.D. 467 (E.D. Wis. 1956);* see also *Rensing v. Turner Aviation Corp., 166 F. Supp. 790 (N.D. Ill. 1958); P. Beiersdorf & Co. v. Duke Laboratories, Inc., 10 F.R.D. 282 (S.D.N.Y. 1950); Neset v. Christensen, 92 F. Supp. 78 (E.D.N.Y. 1950).* Opposing waiver, see *Phillips v. Baker, 121 F.2d 752* (9th Cir. 194*1*); *Crum v. Graham, 32 F.R.D. 173 (D. Mont. 1963)* (regretfully following the Phillips case); see also *Birnbaum v. Birrell, 9 F.R.D. 72 (S.D.N.Y. 1948); Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 176 (E.D. Tenn. 1940);* cf. *Carter v. American Bus Lines, Inc., 22 F.R.D. 323 (D. Neb. 1958).*

Amended subdivision (h)(1)(A) eliminates the ambiguity and states that certain specified defenses which were available to a party when he made a preanswer motion, but which he omitted from the motion, are waived. The specified defenses are lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process (see Rule 12(b)(2)-(5)). A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions.

By amended subdivision (h)(1)(B), the specified defenses, even if not waived by the operation of (A), are waived by the failure to raise them by a motion under Rule 12 or in the responsive pleading or any amendment thereof to which the party is entitled as a matter of course. The specified defenses are of such a character that they should not be delayed and brought up for the first time by means of an application to the court to amend the responsive pleading.

Since the language of the subdivisions is made clear, the party is put on fair notice of the effect of his actions and omissions and can guard himself against unintended waiver. It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver as there provided, the more substantial defenses of failure to state a claim upon which relief can be granted, failure to join a party indispensable under Rule 19, and failure to state a legal defense to a claim (see Rule 12(b)(6), (7), (f)), as well as the defense of lack of jurisdiction over the subject matter (see Rule 12(b)(1)), are expressly preserved against waiver by amended subdivisions (h)(2) and (3).

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments. *Note to Subdivision (a).* Subdivision (a) is divided into paragraphs for greater clarity, and paragraph (1)(B) is added to reflect amendments to Rule 4. Consistent with Rule 4(d)(3), a defendant that timely waives service is allowed 60 days from the date the request was mailed in which to respond to the complaint, with an additional 30 days afforded if the request was sent out of the country. Service is timely waived if the waiver is returned within the time specified in the request (30 days after the request was mailed, or 60 days if mailed out of the country) and before being formally served with process. Sometimes a plaintiff may attempt to serve a defendant with process while also sending the defendant a request for waiver of service; if the defendant executes the waiver of service within the time specified and before being served with process, it should have the longer time to respond afforded by waiving service.

The date of sending the request is to be inserted by the plaintiff on the face of the request for waiver and on the waiver itself. This date is used to measure the return day for the waiver form, so that the plaintiff can know on a day certain whether formal service of process will be necessary; it is also a useful date to measure the time for answer when service is waived. The defendant who returns the waiver is given additional time for answer in order to assure that it loses nothing by waiving service of process.

Notes of Advisory Committee on 2000 amendments. Rule 12(a)(3)(B) is added to complement the addition of Rule 4(i)(2)(B). The purposes that underlie the requirement that service be made on the United States in an action that asserts individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States also require that the time to answer be extended to 60 days. Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.

An action against a former officer or employee of the United States is covered by subparagraph (3)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer.

Notes of Advisory Committee on 2007 amendments. The language of Rule 12 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 12(a)(4) referred to an order that postpones disposition of a motion "until the trial on the merits." Rule 12(a)(4) now refers to postponing disposition "until trial." The new expression avoids the ambiguity that inheres in "trial on the merits," which may become confusing when there is a separate trial of a single issue or another event different from a single all-encompassing trial.

Notes of Advisory Committee on 2009 amendments. The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

,