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9 UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 (SAN JOSE DIVISION)

12 RITZ CAMERA & IMAGE, LLC)
13 a Delaware Limited Liability Company,)
14 On Behalf of Itself and Others)
15 Similarly Situated)
16)
17 Plaintiff,)
18)
19)
20 SANDISK CORPORATION,)
21)
22)
23 ELIYAHOU HARARI,)
24)
25)
26 Defendants.)
27)
28)

CASE: 10CV-02787-JF

**FILING AS A MATTER OF
COURSE THE FIRST
AMENDED COMPLAINT**

**CLASS ACTION
ANTITRUST**

JURY TRIAL DEMANDED

23 Pursuant to Fed. R. Civ. P. 15(a)(1), Plaintiff files this First Amended Complaint as
24 a matter of course.

1 Dated: August 25, 2010

Respectfully submitted,

2
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CERTIFICATE OF SERVICE

The foregoing has been served on August 25, 2010 on counsel of record by means of the Court's electronic filing system.

/s/ R.Stephen Berry

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CASE: 10CV-02787-JF

**FIRST AMENDED
COMPLAINT**

**CLASS ACTION
ANTITRUST**

JURY TRIAL DEMANDED

21 On behalf of itself and other similarly-situated direct purchasers of NAND raw and
22 finished flash memory products from the SanDisk Corporation (“SanDisk”) and from its
23 controlled manufacturing joint venture with the Toshiba Corporation, Ritz Camera & Image,
24 LLC (“RCI”) alleges as follows:
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SUMMARY OF CLAIMS

1. NAND flash memory is a form of non-volatile erasable memory. Its transistors are connected in series and this memory is especially attractive for the storage of large amounts of data.

2. NAND flash memory comes in raw and finished forms. “Raw” or “component” flash memory is the basic flash memory wafer that is produced by a fabrication plant or fab. “Finished” flash memory products are used in, or with, various electronic products, including cards, drives and sticks used in mobile phones, digital cameras, digital video camcorders, gaming devices, portable digital audio/video players, personal computers, and global positioning systems (“GPS”).

3. SanDisk has maintained a monopoly over raw and finished NAND flash memory worldwide by at least four practices.

4. *First*, it has obtained fraudulent patents (“fraudulent patents”) by committing willful and knowing fraud on the United States Patent and Trademark Office (“USPTO”). It has used these fraudulent patents to disadvantage and to exclude competition in the relevant market by asserting their infringement.

5. One of these patents, identified below as the ’338 patent, has been asserted by SanDisk to be a key to the manufacture of raw and finished NAND flash memory in the relevant market. SanDisk refers to it as its “crown jewel” patent, and its assertion of multiple infringements of this fraudulent patent has greatly injured competition, competitors, and purchasers (who have paid monopoly prices for SanDisk NAND flash memory).

1 6. SanDisk attempted to remove limitations on this patent grant by seeking the
2 related '517 patent, as identified below. It used this additional fraudulent patent as well to
3 allege infringement actions against competitors, thereby further injuring competition,
4 competitors, and purchasers (who have paid monopoly prices for SanDisk flash memory).
5

6 7. *Second*, SanDisk has maintained its monopoly – in concert with Eliyahou
7 Harari, a former officer of competitor Wafer Scale Integration, Inc. (“WSI”) – by
8 converting tortiously the knowledge and ownership of flash memory technology from WSI
9 (and its successor STM). This made possible the issuance of patents '338 and '517 and the
10 infringement campaign that drove STM, the sixth largest producer of flash memory
11 worldwide, from the relevant market in March of 2008. At the same time as – or shortly
12 after – this conduct Harari became the founder of SanDisk and until recently served as the
13 Chairman and Chief Executive Officer of SanDisk.
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16 8. *Third*, to enhance this suppression of competition using fraudulent patents,
17 SanDisk has also threatened purchasers of NAND flash memory from SanDisk’s competitors
18 by telling them they will be left holding large quantities of unusable flash memory. SanDisk
19 has also warned these purchasers that they will be made to acquire flash memory products
20 at disadvantageous prices and terms if they are later forced to turn to SanDisk for product.
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23 9. Further, shortly after this law suit was filed, SanDisk retaliated against Plaintiff
24 RCI, and the proposed Class it seeks to represent, by terminating its supply of NAND flash
25 memory to RCI. By so doing, SanDisk has sought to exercise and maintain its monopoly
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1 to prevent this Court from learning about, and vindicating, legitimate claims as to substantial
2 unlawful conduct by SanDisk and purchaser overcharges.

3
4 10. *Fourth*, upon information and belief, SanDisk has maintained and entrenched
5 its monopoly by entering into a secret global settlement agreement with STM, formerly the
6 sixth largest provider of NAND flash memory worldwide. This settlement ratified STM's
7 exit from the relevant market (well after it had alleged monopolization of the relevant market
8 in this Court). This settlement apparently failed to provide a means for STM to re-enter the
9 market. It also removed the threat of a STM/Hynix joint venture capable of mounting a major
10 competitive challenge to SanDisk. SanDisk subsequently and recently co-opted the Hynix
11 threat by itself forming a joint venture with Hynix.
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14 11. SanDisk manufactures the vast majority of its NAND flash memory using a
15 SanDisk controlled and licensed joint venture with Toshiba, which fabricates this NAND
16 flash memory at Toshiba's Yokkaichi factory in Japan. SanDisk terms this memory as
17 "captive supply."
18

19 12. Over 75% of all NAND raw and finished flash memory products sold
20 worldwide is either (a) manufactured and sold by SanDisk or its controlled and licensed joint
21 venture with Toshiba; or (b) manufactured by other controlled licensees of SanDisk patents.
22

23 13. By virtue of SanDisk's monopolization, competition and competitors have
24 been harmed, and worldwide purchasers of raw and finished NAND flash memory products
25 from SanDisk and its controlled and licensed Toshiba joint venture ("Class of Direct
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1 Purchasers of SanDisk NAND Raw and Finished Flash Memory Products”) have paid
2 above-competitive, monopoly prices for these products since June 25, 2006.

4 JURISDICTION AND VENUE

5 14. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1337 (commerce
6 and antitrust regulation) and 1331 (federal question), as this action arises under Section 2 of
7 the Sherman Act (15 U.S.C. § 2), and Sections 4 and 16 of the Clayton Act (15 U.S.C.
8 §§ 15(a) and 26).

10 15. Venue is proper because SanDisk resides within this judicial district as
11 provided in 28 U.S.C. § 1391(b) and (c), and as provided in Sections 4 and 12 of the Clayton
12 Act (15 U.S.C. §§ 15 and 22).

14 PARTIES

15 16. Plaintiff RCI is a Delaware limited liability company headquartered in
16 Beltsville, Maryland. It is the successor in interest of Ritz Camera Centers, Inc. (“RCC”).
17 RCI and RCC are collectively referred to as “Ritz Camera.” Over the last four years Ritz
18 Camera has directly bought tens of millions of dollars of flash memory products from
19 SanDisk.
20

21 17. SanDisk Corporation is a Delaware corporation headquartered in Milpitas,
22 California. It and its licensees are the world’s largest suppliers of flash memory cards.
23

24 18. Eliyahou Harari is a former director and officer of WSI, which was purchased
25 by STM. He is a founder of SanDisk and until recently its Chairman and Chief Executive
26 officer. He resides in Los Gatos, California.
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1 **CLASS ACTION ALLEGATIONS**

2 **Class of Direct Purchasers of SanDisk**
3 **Raw and Finished NAND Flash**
4 **Memory Products**

5 19. Plaintiff Ritz Camera (“Class Representative”) is a representative of a class
6 of persons in the United States who, on or after June 25, 2006, directly purchased worldwide
7 from SanDisk, or from its controlled and licensed joint venture with Toshiba Corporation,
8 raw and finished NAND flash memory products using technology claimed to be patented by
9 SanDisk. Such products include, without limitation, those sold in SanDisk’s channels
10 dedicated to retail firms, original equipment manufacturers (“OEMs”), and distributors.
11 Purchases of flash memory that contain a microcontroller, a semiconductor that interfaces
12 with electronic equipment and operates the flash memory, are included in the Class.
13 Purchases of flash memory combined with DRAM or SRAM are excluded from the Class,
14 as well as purchases of flash memory with a system specially embedded on the chip.
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18 **Rule 23(a) Prerequisites**

19 20. Prosecution of the claims of the Class as a class action is appropriate because
20 the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are met:

21 (a) The number of persons in the Class numbers in the thousands, and the
22 members of the Class are therefore so numerous that joinder of all members of the Class is
23 impracticable. Joinder is also impracticable because of the worldwide geographic diversity
24 of the members of the Class, the need to expedite judicial relief, and the Class
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1 Representative's lack of knowledge of the identity and addresses of all members of the
2 Class.

3
4 (b) There are numerous questions of law and fact arising from the pattern
5 of Defendants' anti-competitive conduct which are common to the members of the Class.
6 These include, but are not limited to, common issues as to (1) whether SanDisk has
7 fraudulently obtained and converted two flash memory patents, and used them to exclude
8 competition; converted WSI/SMT technology and by so doing harmed competition;
9 threatened competitors' customers; and entered into a secret anticompetitive settlement
10 agreement with STM; (2) whether SanDisk has monopolized a worldwide relevant market
11 for NAND flash memory products and has monopoly power in the relevant market; and (3)
12 whether this monopolization has caused members of the proposed Class to pay unlawful,
13 above-competitive prices to SanDisk, or to its controlled and licensed Toshiba joint venture,
14 for SanDisk NAND flash memory products. In addition, there are common issues as to the
15 amount of monetary relief available to the members of the Class.
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19 21. The claims of the Class Representative are typical of the claims of the members
20 of the Class and fairly encompass the claims of the members of the Class. The Class
21 Representative and the members of the Class are similarly or identically harmed by the same
22 systematic and pervasive anticompetitive conduct in part because they have paid monopoly,
23 above-competitive prices for NAND flash memory products purchased from SanDisk and
24 its controlled and licensed Toshiba joint venture.
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1 22. The Class Representative and its counsel will fairly and adequately protect the
2 interests of the members of the Class. There are no material conflicts between the claims of
3 the Class Representative and the members of the Class making class certification
4 inappropriate. Counsel for the Class will vigorously assert the Class Representative’s claims
5 and those of the members of the Class.
6

7
8 **Rule 23(b)(2) Prerequisites**

9 23. In addition, the prosecution of the claims of the Class as a class action pursuant
10 to Rule 23(b)(2) is appropriate because Defendants have acted, or refused to act, on grounds
11 generally applicable to the Class, thereby making appropriate final injunctive relief, or
12 corresponding declaratory relief, for the Class as a whole.
13

14 **Rule 23(b)(3) Prerequisites**

15 24. In addition, the prosecution of the claims of the Class as a class action pursuant
16 to Rule 23(b)(3) is appropriate because:
17

18 (a) The questions of law or fact common to the members of the Class
19 predominate over any questions affecting only its individual members; and

20 (b) A class action is superior to other methods for the fair and efficient
21 resolution of the controversy.
22

23 **WORLDWIDE RELEVANT MARKET FOR**
24 **NAND FLASH MEMORY PRODUCTS**

25 25. SanDisk and its controlled and licensed Toshiba joint venture sell raw and
26 finished NAND flash memory products in a relevant product market (“relevant product
27 market for NAND flash memory”). These products employ technology claimed by SanDisk
28

1 to be patented, and are used as components in a wide array of consumer, camera, mobile
2 telephone, digital player, and computing products. Purchasers of raw and finished NAND
3 flash memory do not view other products as substitutes for these products. NAND flash
4 memory products have demand and pricing that is distinct from other products, and there are
5 no substitutes to which manufacturers of consumer, camera, computing and other products
6 would switch in response to a small (but substantial), non-transitory, relative increase in the
7 pricing for NAND flash memory products.
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10 26. Over 75% of all raw and finished NAND flash memory products sold
11 worldwide is either (a) manufactured and sold by SanDisk or its controlled and licensed
12 Toshiba joint venture; or (b) manufactured by other licensees of patents for NAND flash
13 memory technology claimed to be owned by SanDisk.
14

15 27. With its controlled and licensed Toshiba joint venture and its other controlled
16 licensees of NAND patented technology, SanDisk has the power to control prices in, and
17 restrict entry into, the relevant product market. It has maintained a monopoly in the relevant
18 product market for NAND flash memory products.
19

20 28. The geographic scope of the relevant product market is worldwide, or, in the
21 alternative, every country in which SanDisk contends it has patent rights over technology
22 that is an essential input to manufacturing, marketing, and selling in the relevant product
23 market for NAND flash memory products. "Relevant market" refers to the worldwide
24 relevant product market.
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1 29. The relevant market is characterized by high barriers to entry and expansion
2 as a result of, among other things, SanDisk's claimed ownership of patents covering the
3 technology necessary to manufacture NAND flash memory; its unlawful assertion of
4 fraudulently obtained or converted technology to control entry and expansion within the
5 market; and the extremely high costs necessary to enter the market. The construction of a
6 flash memory fabrication facility can cost billions of dollars, and the plant may have to be
7 retooled every five years.
8
9

10 **EXCLUSIONARY CONDUCT**

11 30. NAND flash memory is memory that can be erased electronically. Flash
12 memory allows data to be stored in a durable, compact format that retains the data after the
13 power has been turned off.
14

15 31. SanDisk competes in a worldwide relevant market to sell NAND flash memory
16 products to firms in the proposed Class.
17

18 32. Through a continuing pattern of concerted exclusionary conduct, SanDisk has
19 created and maintained a monopoly in the relevant market and – with its controlled and
20 licensed Toshiba joint venture – has sold SanDisk NAND flash memory at above-
21 competitive prices to members of the proposed Class.
22

23 33. SanDisk has done so by (a) fraudulently obtaining two patents from the
24 USPTO and using them to restrain competition by suing for infringement STM and possibly
25 other competitors; (b) converting STM technology and knowledge to file and obtain the
26 fraudulent patents (which in turn were used to exclude STM from the relevant market by
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1 multiple infringement actions); (c) threatening the customers of competitors purchasing
2 NAND flash memory, as well as terminating supply to RCI to prevent vindication of
3 purchaser overcharge claims; and (d) entering into a global settlement with STM tending to
4 entrench and expand its monopoly over the relevant market.

5
6 34. SanDisk's exclusionary conduct has harmed competition in the relevant market
7 by, among other things, increasing the prices for raw and finished NAND flash memory
8 products paid by members of the proposed Class to above-competitive, monopoly levels.
9

10 **FRAUDULENT ACQUISITION OF PATENTS FROM THE**
11 **UNITED STATES PATENT AND TRADEMARK OFFICE**
12 **(Walker Process Claim)**

13 35. Over the past decade, SanDisk has fraudulently obtained two patents – which
14 it has termed its “crown jewel” patents – from the United States Patent and Trademark Office
15 (“USPTO”): U.S. Patent Number 5,172,338 (the “338 patent”) and U.S. Patent Number
16 5,991,517 (the “517 patent”). In so doing SanDisk, the named inventors of the patents, and
17 prosecution counsel (collectively “SanDisk”) deliberately failed to disclose material
18 information – including key prior art – at times when that key prior art was known to
19 SanDisk and SanDisk had a duty to disclose that prior art to the USPTO.
20

21
22 36. Furthermore, SanDisk made representations to the USPTO that were material
23 to the patentability of its then pending patent claims and which it knew to be false. The
24 material false representations and omissions were intended to induce and did induce reliance
25 by the patent examiners charged with determining whether to grant SanDisk's patent claims.
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1 37. Indeed, as reflected in the patent examiner's "reason for allowance," the
2 USPTO unquestionably relied on San Disk's material false statements and omissions as a
3 principal reason for allowing SanDisk's patent claims to issue. But for SanDisk's material
4 false statements and omissions, the claims of the '338 patent and '517 patent could not have
5 issued as written.
6

7 38. SanDisk's fraudulent assertion of the '338 – and its extension by the '517
8 patent – have had particularly pernicious effects on competition in the relevant market
9 because it claims they are the key "crown jewel" patents for the manufacture of NAND flash
10 memory, and its multiple assertions of infringement have had wide detrimental effect on
11 competition, competitors, and purchasers in the proposed Class in the relevant market.
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14 **SanDisk's Original Prosecution of the '338 Patent**

15 39. The '338 patent was issued on December 15, 1992. According to its abstract,
16 the patent describes "[i]mprovements in the circuits and techniques for read, write and erase
17 of EEprom memory [that] enable non-volatile multi-state memory to operate with enhanced
18 performance over an extended period of time."
19

20 40. The words "permanent inhibit" appear nowhere in any portion of the
21 specification or the prosecution history of the '338 patent before December 15, 1992.
22

23 **Reexamination of the '338 Patent**

24 41. On January 11, 1996, SanDisk filed a complaint with the United States
25 International Trade Commission ("ITC") asserting that Samsung Corporation infringed claim
26 27 of the '338 patent as well as claims of another patent.
27
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1 42. In its defense, Samsung claimed (as did STM in a related matter before this
2 Court) that prior art disclosed an electrically erasable programmable read only memory
3 (“EEPROM”) function where incremental charges are added to the EEPROM until an
4 individual cell reads in the correct state, and once the correct charge is attained, the
5 application of any additional charge is inhibited so long as the cell is in its correct state. This
6 is known as an “incremental” or “temporary” inhibit.
7

8
9 43. As a result of this prior art, SanDisk and Samsung filed requests for
10 reexamination of the ’338 patent on September 15 and 17, 1996, respectively. They based
11 the request on the 1983 article, *An Improved Method for Programming a Word-Erasable*
12 *EEPROM*, authored by Dr. Guido Torelli in an Italian publication, *Alta Frequenza-Scientific*
13 *Review in Electronics*, and the product brochures and technical notes for certain SGS
14 Thompson (STM’s predecessor in interest) products, the M206, M293, and M490/491
15 integrated circuits. Samsung argued that the claim limitation described incremental
16 inhibition.
17

18
19 44. SanDisk argued claim 27 was patentable because the inhibit function was
20 “permanent” and not incremental or temporary, that this structure was latch 721 shown in
21 Figure 16, and that a person of ordinary skill in the art would know that latch 721 operates
22 as a “one-way latch” required for a permanent inhibit.
23

24 45. The USPTO relied on these and other SanDisk representations in deciding to
25 confirm the patentability of these claims. For example, in his reasons for confirming the
26 patentability of claim 27, the patent examiner stated that “the inhibiting feature recited in
27
28

1 [the] claims of the '338 patent is enabled by latch 721 in Figure 16 which is a one-way
2 resettable latch.” ('338 Re-Exam, Reexamination Reasons for Patentability/Confirmation,
3 April 16, 1997, at 3.)
4

5 46. The SanDisk representations in this regard were false. Latch 721 is a standard,
6 two-way data latch and the inventors of the '338 patent had published an article – not
7 disclosed to the examiner – that described an identically drawn latch as just that – a standard
8 two-way data latch.
9

10 **Prosecution of the '517 Patent**

11 47. The prosecution leading to the '517 patent overlapped the USPTO's
12 reexamination of the '338 patent. At least in part, the '517 patent was intended to claim a
13 permanent inhibit function without several of the claim limitations that exist in the '338
14 patent.
15

16 48. SanDisk sought claims based on the '338 patent in the '517 patent family in
17 December 1996. SanDisk stated that the “claims being substituted into this application are
18 directed to inhibiting, cell- by- cell, further application of voltages to a plurality of cells when
19 the individual cells are verified to have reached their desired states.” This was the first
20 mention of “cell by cell” inhibition anywhere in the chain of prosecutions leading to the '517
21 patent, and was done after the discovery of the Torelli article.
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23

24 **SanDisk's Multiple Failures to Disclose Prior Art** 25 **and Misrepresentations**

26 49. At all times relevant to the reexamination of the '338 patent and the
27 prosecution of the '517 patent, SanDisk and its agents had a duty to disclose to the USPTO
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1 all information known to SanDisk that was material to the question of patentability. SanDisk
2 also owed a duty of good faith and candor, which encompassed a duty to disclose prior art.
3
4 For each of these two patents, SanDisk owed these duties from the time it made its
5 application to the time the USPTO issued the patent. For the '338 reexamination, SanDisk
6 also owed these duties from the time it made its request for reexamination to the time the
7 USPTO issued its certificate of confirmation.
8

9 50. As described below, persons substantially involved with the prosecution of the
10 SanDisk patents repeatedly failed to disclose material prior art. Had SanDisk disclosed this
11 prior art, the claims of the '338 patent would not have survived reexamination and the claims
12 of the '517 patent would not have issued as written.
13

14 51. A single law firm ("the SanDisk law firm") prosecuted both the '338 patent
15 application and reexamination, as well as the '517 patent application on behalf of SanDisk.
16 Since at least February 1996, that law firm maintained a database of prior art references to
17 assist in the preparation of San Disk's patent applications. That database contained the
18 following prior art.
19

20 **The Simko Patents**

21
22 52. On December 26, 1989, and January 29, 1991, the USPTO issued U.S. Patent
23 Number 4,890,259 (the "'259 patent") and U.S. Patent Number 4,989,179 (the "'179
24 patent"), respectively, to Richard Simko (collectively, the "Simko patents"). Both Simko
25 patents disclose a "permanent inhibit" programming system. SanDisk knew about the Simko
26 patents no later than January 5, 1993, when the SanDisk law firm disclosed those patents in
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1 a separate SanDisk patent prosecution that ultimately resulted in the issuance of U.S. Patent
2 No. 5,293,560. The SanDisk law firm also disclosed the Simko patents on July 8, 1993, in
3 a prosecution that resulted in the issuance of U.S. Patent No. 5,422,842. Accordingly,
4 SanDisk knew about the Simko patents years before the conclusion of SanDisk's '338
5 reexamination and '517 prosecution.
6

7
8 53. In arguing to the USPTO that the claims of the '338 and '517 patents were
9 directed to "permanent inhibit," SanDisk was obligated to inform the USPTO of the
10 existence of the prior art Simko patents. However, SanDisk never disclosed the Simko
11 patents to the USPTO during either the reexamination of the '338 patent or the prosecution
12 of the '517 patent, despite the fact that Dr. Simko was a litigation consultant to SanDisk.
13

14 54. SanDisk's failure to disclose the Simko patents was intended to deceive the
15 patent examiner into believing that SanDisk's claimed "inhibit" invention was novel. A
16 reasonable patent examiner would have been influenced by SanDisk's failure to disclose the
17 Simko patents, and the patent examiner was influenced, as is reflected in the examiner's
18 reasons for allowance. Had SanDisk disclosed the Simko patents, the claims of the '338
19 patent would not have survived reexamination and the claims of the '517 patent would not
20 have issued as written.
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23 **The JP-100 Patent**

24 55. On February 13, 1986, Toshiro Koyama and Tsugio Tawara published the
25 Japanese Laid Open Patent Application JP S62-188100 (the "JP-100 patent"). Like the
26 Simko patents, the JP-100 patent discloses a "permanent inhibit" programming system.
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1 Persons substantially involved in the prosecution of the '517 patent and the reexamination
2 of the '338 patent knew of the JP-100 patent no later than December 30, 1998. Accordingly,
3 SanDisk knew about the JP-100 patent well before the conclusion of SanDisk's '517
4 prosecution in November 1999.
5

6 56. The JP-100 patent was material to the patentability of the then pending '517
7 patent claims. This fact is confirmed by the decisions of two different patent examiners to
8 whom the JP-100 patent was revealed. SanDisk prosecuted a foreign counterpart to the '517
9 patent in Japan, with a claim drafted in nearly identical language to claim 1 of the '517
10 patent. On October 23, 2001, the Japanese Appeal Board rejected this claim as obvious over
11 the JP-100 patent prior art.
12

13 57. Similarly, in the prosecution of U.S. Patent Application File No. 09/129,675,
14 SanDisk initiated interference proceedings before the USPTO in which it asserted a claim
15 drafted to cover nearly identical subject matter as claim 1 of the '517 patent (the "Ohuchi
16 Interference"). On July 12, 2006, the USPTO rejected SanDisk's interference claims as
17 obvious over the JP-100 patent prior art. Thus, whenever a patent examiner considering the
18 patentability of claims like claim 1 of the '517 has become aware of the JP-100 patent, the
19 claim under consideration was rejected.
20
21

22 58. Because, *inter alia*, SanDisk was arguing to the USPTO that the claims of the
23 '517 patent were directed to "permanent inhibit," SanDisk was obligated to inform the
24 USPTO of the existence of the prior art JP-100 patent. However, SanDisk never disclosed
25 the JP-100 patent to the USPTO at any time during the '517 prosecution. SanDisk's failure
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1 to disclose the JP-100 patent was intended to deceive the patent examiner into believing that
2 SanDisk's claimed "inhibit" invention was novel.

3
4 59. SanDisk succeeded in this deception effort. A reasonable patent examiner
5 would have relied on SanDisk's failure to disclose the JP-100 patent, and the patent
6 examiner did rely as reflected by the examiner's allowance of claim 1. Had SanDisk
7 disclosed the JP-100 patent, the claims of the '517 patent would not have issued as written.
8

9 **The Sparks Patent**

10 60. On June 28, 1979, the USPTO issued U.S. Patent Number 4,752,871 (the
11 "Sparks patent") to Robert Sparks, *et al.* The Sparks patent discloses bulk erasing and
12 loading of multiple arrays simultaneously. SanDisk knew about the Sparks patent no later
13 than May 24, 1993, well before the conclusion of the '338 reexamination and the '517
14 prosecution.
15

16 61. On May 24, 1993, the SanDisk law firm filed an amendment responding to the
17 USPTO's rejection of another SanDisk patent application, the 763,851 application (the "'851
18 application"), based on the prior art of the Sparks patent. The SanDisk law firm continued
19 to argue about the relationship between the '851 application and the Sparks patent, including
20 in a USPTO filing on April 5, 1996.
21

22 62. Claim 64 of the '338 patent (which SanDisk added during reexamination) and
23 claim 11 of the '517 patent both claim bulk erasing and loading of multiple arrays
24 simultaneously. Accordingly, SanDisk was obligated to inform the USPTO about the prior
25 art of the Sparks patent for the '338 reexamination and the '517 prosecution. SanDisk's
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27
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1 failure to disclose the Sparks patent was intended to deceive the patent examiner. A
2 reasonable patent examiner would have relied, and the patent examiner did rely, on
3 SanDisk's failure to disclose the Sparks patent. The '338 patent and certificate of
4 confirmation and the '517 patent would not have been issued had SanDisk disclosed the
5 prior art.
6

7 **The GB 145 Patent**

8
9 63. On June 28, 1979, Hartmut Schrenk filed United Kingdom Patent application
10 GB 2 029 145 A ("GB 145 patent"). That patent disclosed inhibiting the individual erasing
11 of any addressed cell verified to have reached its intended erase state while enabling further
12 erasing in parallel to other addressed cells not verified. The patent was published on June
13 16, 1982. Thus persons at SanDisk substantively involved for SanDisk in the prosecution
14 of the '338 reexamination, and the application that led to the '517 patent, knew of the GB
15 145 patent no later than February 23, 1996. The SanDisk law firm filed an Information
16 Disclosure Statement citing the GB 145 patent on December 30, 1998 in SanDisk's Patent
17 Application No. 09/129/675. Accordingly, SanDisk knew about the GB 145 patent well
18 before the conclusion of the '338 reexamination and the '517 prosecution.
19
20

21
22 64. At least claim 40 of the '338 patent and claims 1, 2, 4, 6, and 10 of the '517
23 patent claim the same innovations that the GB 145 patent disclosed. SanDisk was therefore
24 obligated to disclose the GB 145 patent in the '338 reexamination and '517 prosecution, and,
25 insofar as it knew about the GB 145 patent at the time, in the '338 prosecution as well. The
26 GB 145 patent is unquestionably material to SanDisk's patent claims, because the
27
28

1 Administrative Law Judge of the United States International Trade Commission has held that
2 the GB 145 patent anticipates '517 patent claims 1, 6, and 10, rendering the patent invalid.
3
4 (See 560 ID at 115-117.)

5 65. SanDisk's failure to disclose the GB 145 patent was intended to deceive the
6 USPTO. A reasonable patent examiner would have relied, and the patent examiner did rely,
7 on San Disk's failure to disclose the GB 145 patent, in the '338 patent and certificate of
8 confirmation. The '517 patent would not have been issued had SanDisk disclosed the prior
9 art.
10

11 **The Inventor's VLSI Paper**

12
13 66. As described above, throughout the '338 reexamination, SanDisk repeatedly
14 and knowingly misrepresented Figure 16 of the '338 patent as disclosing a "one-way latch"
15 when, in fact, it discloses only a standard two-way data latch.
16

17 67. In 1992, a named inventor of the '338 and '517 patents, presented a paper co-
18 authored by another named inventor of the '338 and '517 patents to the VLSI (Very Large
19 Scale Integration) Symposium in Seattle, Washington. The Latch circuitry and its input
20 interface shown in Figure 5 of the VLSI Symposium paper is identical to Figure 16 of the
21 '338 patent, but describes the latch (including its reset) as a standard data latch, not a "one-
22 way latch."
23

24 68. Despite its obligation to do so, SanDisk never disclosed as prior art the VLSI
25 paper during the reexamination of the '338 patent. Instead, SanDisk repeatedly and falsely
26 represented to the examiner and others that Figure 16 was a "one-way latch." SanDisk knew
27
28

1 those representations were false when it made them, and made the representations and failed
2 to disclose the prior art of the VLSI paper with an intent to deceive. A reasonable patent
3 examiner would have relied, and the patent examiner did rely, on SanDisk's
4 misrepresentations and failure to disclose the VLSI paper in granting a certificate of
5 confirmation for the '338 patent. The certificate of confirmation would not have been issued
6 had SanDisk not made misrepresentations and failed to disclose the prior art.
7

8
9 69. In 2006, SanDisk filed the application that led to the '517 patent for the
10 specific purpose of broadening SanDisk's rights and jettisoning the means-plus-function
11 limitations of the '338 patent:

12
13 The principal purpose of the present application is to define the cell-by-cell
14 inhibition programming feature without all the other limitations included in
15 claim 27 of the '338 patent that are not necessary to its patentability. The
16 feature of inhibiting programming on a cell-by-cell basis until all cells in a
17 group are programmed (also referenced as 'termination') is patentable by
18 itself.

19 ('517 File History, Second Preliminary Amendment filed December 23, 1997 at 9-10,
20 emphasis added.) SanDisk could not have made this statement if the Simko patents had been
21 disclosed to the USPTO.

22 70. SanDisk also never cited two additional permanent-inhibit references – the GB
23 145 patent and the JP 100 patent – about which it was aware. Disclosure of those references
24 would have prevented SanDisk from representing that permanent inhibit is patentable by
25 itself.

26 71. SanDisk and its prosecuting attorney unquestionably knew of the JP 100 and
27 the GB 145 patent at the time they were prosecuting the '517 application. In a filing in the
28

1 Ohuchi Interference on December 3, 1998, for example, SanDisk's prosecuting attorney told
2 the USPTO that he had reviewed the Ohuchi patent file history. That file history is replete
3 with substantive discussions of the JP 100 patent and GB 145 patent prior art – and the fact
4 that they disclose permanent inhibit. Thus, by arguing to the USPTO in the '517 prosecution
5 that permanent inhibit was patentable by itself, SanDisk intentionally misled the USPTO as
6 to the patentability of the '517 patent's claims.
7

8
9 72. Further, the fraud on the Patent Office was compounded and deepened by
10 Harari's failure to disclose that he had stolen WSI/STM knowledge to prosecute these
11 patents. *Infra* ¶¶ 74-109.
12

13 73. If SanDisk had not fraudulently obtained the patents described above and
14 wrongfully enforced those patents against competitors, the technology embodied in those
15 patents would be freely available to competing providers of flash memory products, with the
16 result that there would be more competition and lower prices in the relevant market.
17

18 **CONCERTED CONDUCT TO CONVERT**
19 **WSI/STM TECHNOLOGY THAT WAS**
20 **THEN USED TO EXCLUDE COMPETITION**

21 74. In support of its monopolization, SanDisk and Harari have conspired to
22 disadvantage SanDisk's significant competitor, STM, by converting and misappropriating
23 STM's NAND flash memory technology, technology which was wholly incorporated by
24 SanDisk into the filings leading to the issuance of the fraudulent "crown jewel" '338 and
25 '517 patents. The stolen technology and knowledge was central to the scope of the grants of
26 both patents. By stealing this technology, SanDisk and Harari have competitively
27
28

1 disadvantaged STM, eventually using its own technology to exclude it from the market
2 entirely in March of 2008.

3
4 75. Harari had served as an employee, officer, consultant and/or director of WSI.
5 WSI was co-founded in 1983 by Harari. It designed and sold programmable system devices,
6 including memory systems and nonvolatile memories. While Harari was an officer and/or
7 director of WSI, it was designing and developing flash memory products.
8

9 76. On July 27, 2000, STM and WSI merged, with STM remaining as the
10 surviving corporation. Pursuant to the Agreement and Plan of Merger between STM and
11 WSI, STM succeeded to “all rights and property” of WSI.
12

13 77. Harari served numerous roles at WSI between its founding on August 1, 1983,
14 and his resignation in March of 1989, including:

- 15 • Chief Executive Officer (CEO): August 1, 1983 until June 11, 1986;
- 16 • Chief Technology Officer (CTO): June 11, 1986 until February 28,
17 1988;
- 18 • Director: August 1, 1983 until March 15, 1989; and
- 19 • Chairman of the Board: November 30, 1983 until June 15, 1985, and
20 again from June 11, 1986 until February 28, 1988.
21

22 **Harari’s Patent Assignment Obligation**

23 78. Early in the period that Harari was an employee, officer and director of WSI,
24 he signed two agreements with the company: (1) an Employee Agreement Regarding
25 Confidentiality and Inventions dated February 22, 1984 (the “Inventions Agreement”), and
26 (2) a Key Employee Agreement dated February 27, 1984 (the “Key Employee Agreement”).
27
28

1 79. Through the Inventions Agreement, Harari agreed to the following:

2 2. I will maintain in confidence and *will not disclose or use, either*
3 *during or after the term of my employment without the prior written consent of*
4 *[WSI], any proprietary or confidential information or know-how belonging to*
5 *[WSI] Upon termination of my employment or at the request of my*
6 *supervisor before termination, I will deliver to [WSI] all written and tangible*
7 *material in my possession incorporating the Proprietary Information or*
8 *otherwise relating to [WSI's] business. . . .*

9 3. I will promptly disclose and describe to [WSI] (i) all inventions,
10 improvements, discoveries and technical developments (“Inventions”), whether
11 or not patentable, made or conceived by me, either alone or with others, during
12 the term of my employment, provided that [WSI] shall receive such information
13 in confidence. *I hereby assign and agree to assign to [WSI] my entire right,*
14 *title and interest in and to such Inventions which relate in any way to or are*
15 *useful in [WSI's] business as presently conducted or as conducted at any future*
16 *time during my employment, and agree to cooperate with WSI and its*
17 *designee(s) both during and after my employment in the procurement and*
18 *maintenance, at [WSI's] expense and at its discretion, of patents, copyrights,*
19 *and/or other protection of [WSI's] rights in such inventions. I will keep and*
20 *maintain adequate and current written records of all such Inventions, which*
21 *shall be and remain the property of the [WSI].*

22 4.

23 (c) *During my employment by [WSI] I will not engage in any*
24 *employment, consulting or other activity in any business without [WSI's]*
25 *express written agreement.*

26 (Emphasis added).

27 **WSI's Development of NAND Flash Memory**

28 80. WSI, a company which designed and produced various kinds of semiconductor
memory (memory on a chip) for computers and electronic devices, dedicated substantial
resources and effort to research and development of new memory technologies.

1 81. Semiconductor memory can be either volatile or nonvolatile. Volatile memory
2 requires a power source to maintain data in memory, while nonvolatile memory requires no
3 power to retain data.
4

5 82. The main memory in computers has traditionally been dynamic random access
6 memory (“DRAM”) or static random access memory (“SRAM”) both of which are volatile
7 memories. Thus, if the computer is turned off, any data stored in DRAM or SRAM will be
8 lost.
9

10 83. Computers have also used nonvolatile memories such as read only memory
11 (“ROM”) and programmable read only memory (“PROM”) and electrically programmable
12 read-only memory (“EPROM”).
13

14 84. In the late 1980s, when Harari was still an employee, officer and director of
15 WSI, a new nonvolatile memory technology called electrically erasable programmable read
16 only memory (“EEPROM” or “E²PROM”) was developed which offered a substantial
17 advantage over ROM, PROM or EPROM because it was electrically erasable, as well as
18 reprogrammable. When an EEPROM is capable of simultaneous quick erasure of blocks of
19 its memory cells, as well as being reprogrammable, it is referred to as “flash EEPROM,” or
20 “flash memory.” If the computer is turned off, data in these memories are not lost.
21

22 85. While Harari was its chief technical officer, WSI began development work on
23 NAND flash memory. By at least 1987, WSI was involved in research and development
24 efforts regarding flash memory technology. By 1989, WSI had a prototype NAND flash
25 memory product, and was anticipating revenues from this line of business. As an employee,
26
27
28

1 CTO and/or director of WSI, Harari was aware of WSI's research and development efforts
2 with regard to this flash memory.

3
4 86. As a director and officer of WSI, Harari was in a position of trust and
5 confidence and had fiduciary obligations, including at least the following: (a) to act in good
6 faith and in the best interests of WSI and its shareholders; (b) to put the interests of WSI and
7 its shareholders ahead of his private interests; (c) not to enter into any business in competition
8 with WSI; (d) to bring business opportunities in the line of business of WSI to the attention
9 of WSI and not to appropriate the opportunity for himself; (e) to protect and preserve the
10 assets of WSI; and (f) to disclose material facts to WSI concerning his business dealings in
11 the same field as WSI's business endeavors.
12

13
14 87. In concert with SanDisk, and in aid of its monopolization, Harari violated these
15 obligations to convert one patent and two applications which eventually were used to assist
16 SanDisk in obtaining the '338 and '517 "crown jewel" patents used to bring infringement
17 actions against STM and other competitors.
18

19 88. WSI, in order to protect its intellectual property, routinely applied for United
20 States patents to cover inventions developed in the course of its business. As an employee,
21 officer, and director of WSI, Harari had fiduciary and contractual obligations to assist WSI
22 with the protection of its intellectual property, and to assign inventions which related to WSI's
23 business to WSI.
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1 89. Harari and WSI entered into an agreement dated February 29, 1988 (the
2 “Consulting and Directorship Agreement”). In this agreement Harari resigned his duties as
3 an employee and officer of WSI effective February 28, 1988.
4

5 90. In the Consulting and Directorship Agreement, WSI and Harari also agreed that:
6 (a) WSI would continue to nominate Harari as a director until an IPO took place; (b) Harari
7 would be a paid consultant to WSI for 11 months at his then current salary; (c) WSI had the
8 right to extend the consulting agreement for a period of six months; and (d) Harari would
9 “continue to be bound by and comply with the terms of his Employee Agreement Regarding
10 Confidentiality and Inventions dated February 22, 1984” (“Inventions Agreement”).
11

12 91. The obligations in the Inventions Agreement as extended by the Consulting and
13 Directorship Agreement included, among other things, three important obligations: (a) to
14 maintain in confidence and not to use or disclose any proprietary or confidential information
15 or knowhow of WSI without the company’s prior written consent; (b) to assign “all
16 inventions, improvements, discoveries and technical developments (“Inventions”), whether
17 or not patentable”; and (c) “not [to] engage in any employment, consulting or other activity
18 in any business without the Company’s express written agreement.”
19
20

21 92. Furthermore, as a director of WSI, Harari continued in a position of trust and
22 confidence and had all of the same fiduciary obligations he previously had when he was an
23 officer and director.
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1 **Harari Converted STM Technology Which Led Eventually**
2 **to the Issuance of the Fraudulent “Crown Jewel” Patents**
3 **Used to Force STM Out of the Market**

4 93. Harari filed two patent applications three weeks after tendering his resignation
5 as a director of WSI, but before the Board of Directors accepted his resignation. The
6 inventions disclosed in these applications were invented and developed while Harari was an
7 officer, director and/or consultant of WSI.

8
9 94. Specifically, on April 13, 1989, Harari filed two patent applications with the
10 USPTO numbered 07/337,566 and 07/337,579. While these two applications were abandoned,
11 Harari took the misappropriated technology described therein and wholly incorporated it into
12 the application for the “crown jewel” fraudulent patent ’338, which was filed on April 11,
13 1990. This was little over a year after Harari’s resignation from the WSI Board of Directors.

14
15 95. SanDisk and Harari later used this ’338 patent (with the closely-related ’517
16 patent) to file multiple infringement actions against STM, to impose \$20,000,000 of
17 attorney’s fees upon it, and to precipitate its exit from the relevant market in March of 2008.

18
19 96. On May 17, 1989, the Board of Directors of WSI met and accepted Harari’s
20 resignation effective after the Board meeting of March 15, 1989. The Board agreed to
21 Harari’s request to back-date his resignation without knowing that Harari had filed the above
22 patent applications on April 13, 1989 and stolen central and key WSI flash memory
23 knowledge and technology to do so.
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1 97. On information and belief, Harari did not disclose applications 07/337,566 or
2 07/337,579 to WSI at any time. WSI had no way of knowing of Harari's improper conduct,
3 as patent applications filed with the USPTO are confidential.
4

5 98. If WSI had known that Harari had misappropriated its technology, and
6 eventually used it to file on April 11, 1990 a confidential patent application leading to the
7 issuance of fraudulent patent '338 (and eventually to the issuance of the closely-related '517
8 patent), it could have hastened its own competing patent application (if not aware of prior art
9 invalidating this application); asked that the resulting '338 and '517 patents be conveyed to
10 it under conversion and contract law; and/or immediately contested the validity of '338 after
11 its issuance on December 15, 1992. None of these options would have precluded STM and
12 SanDisk from continuing to compete in the market. Thus STM would have had the
13 opportunity to prevent the use of these NAND flash memory patents – claimed by SanDisk
14 to be central to the fabrication of flash memory – in infringement actions well over a decade
15 before SanDisk began its infringement campaign against STM using STM's own technology.
16
17

18 99. On information and belief, the ideas disclosed in these converted patent
19 applications were known to or conceived by Harari while he was a director and/or consultant
20 of WSI, and the evidence at trial may prove that he had known of or conceived of these ideas
21 during his tenure as an employee and officer as well. Moreover, on information and belief,
22 STM has contended that Harari actively worked on the preparation of all these patent
23 applications during his tenure as a director and/or consultant to WSI, and that Harari
24 concealed this activity from WSI.
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1 100. These two patent applications (and resulting '338 and '517 patents) contain
2 ideas and designs that would have benefitted from the design and development work being
3 done at WSI on NAND flash memory.
4

5 101. Further, Harari filed on March 15, 1989 Patent Application 07/323,779, which
6 became patent 5,070,032 ("032 patent"), with the USPTO. It was entitled "method of making
7 dense flash EEPROM semiconductor memory structures." This teaches a good, but not the
8 only, way to manufacture EEPROM which incorporates erase structures for application in
9 all sorts of memory including NAND flash memory. To do so Harari further converted STM
10 erase-gate technology that was specified as necessary for the implementation of the
11 fraudulent patents used to exclude STM from the market, and STM was excluded from using
12 technology stolen from it.
13
14

15 102. Further, as noted above, on March 21, 1989, Harari tendered his resignation
16 from the Board of Directors of WSI, requesting that his resignation be back-dated to March
17 15, 1989 – the same day he had filed the '032 application. Harari made this request without
18 disclosing to the Board that he had filed the '032 application. This is clear evidence of his
19 intent to conceal his patent filing conduct from WSI, and to obtain for himself patent rights
20 that he knew should have been assigned to WSI.
21
22

23 **Harari Founded SanDisk, a Competitor of WSI,**
24 **While Serving as a Director of WSI**

25 103. On or about June 1989, Harari founded SanDisk.
26
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1 104. Harari founded SanDisk while serving as a Director of WSI, and therefore was
2 under a fiduciary obligation not to enter into any business in competition with WSI.
3 Moreover, Harari had a fiduciary obligation to present corporate opportunities in WSI's line
4 of business to WSI, and not to appropriate such opportunities to himself or another company.
5

6 105. On information and belief, WSI/STM, since at least 1987 and until 2008, has
7 focused its research and development efforts in part on developing NAND flash memory
8 technology since at least 1987, and was continuing to develop such technology at the time
9 SanDisk was formed by Harari.
10

11 106. Moreover, at the time Harari founded SanDisk, he was well aware of WSI's
12 research into flash memory technology. Harari served as CTO of WSI, and thus headed WSI's
13 research efforts on flash memory until February of 1988. As a Director of WSI, Harari
14 received reports regarding WSI's flash memory work until at least January of 1990, several
15 months after he founded SanDisk and improperly filed three patent applications employing
16 STM technology.
17

18 107. From its inception and founding by Harari, SanDisk was in direct competition
19 with WSI in the relevant market. As an officer and/or director of WSI, Harari had an
20 obligation to present WSI with any corporate opportunity appropriate for WSI. Harari's
21 involvement with concerted action on behalf of SanDisk has seriously impeded STM's
22 capacity to compete in the manufacture and sale of NAND flash memory products.
23

24 108. Furthermore, in aid of SanDisk's monopolization, Harari assigned the '338 and
25 '032 patents which resulted from his conversion of WSI technology to SanDisk, thereby
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1 benefitting a company in direct competition with WSI to which he owed fiduciary duties of
2 loyalty and good faith. This conversion has resulted in competitive injury to competition;
3
4 STM, the successor-in-interest to WSI, and eventually has led to the exclusion of STM from
5 the relevant market.

6 109. If SanDisk and Harari had not wrongfully converted the technology described
7
8 above, STM would continue to be a viable competitor in the relevant market for NAND flash
9 memory products, with the result that there would be more competition and lower prices.
10 SanDisk has used fraudulent and converted technology to exclude or suppress other flash
11 memory competitors as well.

12
13 **THREATS TO COMPETITORS' PURCHASERS**
14 **AND TERMINATION OF PLAINTIFF TO**
15 **PREVENT PURCHASER RELIEF**

16 110. In addition to the use of infringement actions directed at its competitors for the
17 alleged use of fraudulent patents to exclude them from the relevant market, SanDisk has
18 threatened members of the proposed Class who purchase NAND flash memory from
19 SanDisk's competitors. SanDisk has threatened such class members with the prospect that
20 they will be left holding large quantities of unusable NAND flash memory products
21 manufactured by STM and others that refuse to license SanDisk's fraudulent technology (if
22 SanDisk's infringement actions are successful). SanDisk has also threatened members of the
23 proposed Class who purchase from SanDisk competitors that SanDisk will force them to
24 purchase flash memory at disadvantageous prices and terms if they are later required to turn
25 to SanDisk to purchase the necessary flash memory for their products. In a successful effort
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1 to drive customers from STM, SanDisk has also enforced document and deposition subpoenas
2 against numerous STM customers.

3
4 111. Further, shortly after this law suit was filed, SanDisk retaliated against Plaintiff
5 RCI, and the proposed Class it seeks to represent, by terminating its supply of NAND flash
6 memory to RCI. By so doing, SanDisk has sought to exercise its monopoly to prevent this
7 Court from learning about, and vindicating, legitimate claims as to substantial unlawful
8 conduct by SanDisk. This is a further act to maintain unlawfully its monopoly. By so doing
9 SanDisk seeks to suppress RCI's attempt to show that SanDisk has systematically used
10 fraudulent patents and stolen technology to exclude competition, dominate the relevant
11 market, and continue to injure members of the proposed Class.
12
13

14 **ANTICOMPETITIVE STM**
15 **GLOBAL SETTLEMENT**

16 112. In late 2009 SanDisk entered into a secret global agreement with STM settling
17 federal and state litigation matters, which were captioned in this Court:

18 *SanDisk Corp. v. STMicroelectronics, Inc.*, Case No. C 04-4379 JF, filed October 15, 2004;

19 *SanDisk Corp. v. STMicroelectronics, Inc.*, Case No. C 05-5021 JF, filed December 6, 2005;

20 *STMicroelectronics, Inc. v. Harari et al.*, Case No. C 05-4691 JF, filed November 16, 2005;

21 *STMicroelectronics, Inc. v. Harari et al.*, Case No. C 08-2332 JF, filed May 6, 2008.
22

23 113. This was after this Court and a California Superior Court had denied SanDisk's
24 summary judgment motions, and readied the federal and state claims for trial.
25

26 114. The global settlement was not submitted to, nor approved by, this Court and a
27 comprehensive search of relevant public sources has not disclosed its terms. Neither party
28

1 sponsored a press release announcing its terms, as is customary. In its 10-Q filing with the
2 Securities and Exchange Commission on September 27, 2009, SanDisk only revealed it had
3 settled all litigation on “amicable and confidential” terms.
4

5 115. By March of 2008 SanDisk had succeeded in imposing \$20,000,000 in legal
6 fees on STM through infringement actions based on its fraudulent patents and had driven it
7 from the relevant market thereby injuring competition.
8

9 116. Further, in October 2004, when SanDisk first began its assertion of infringement
10 of fraudulent “crown jewel” patents against STM, STM was preparing a manufacturing joint
11 venture with Hynix, a leading semiconductor manufacturer, to expand STM’s presence in the
12 relevant market. At the time STM itself was the world’s sixth largest flash memory supplier.
13

14 117. By March 2008 STM had been forced from the market by SanDisk and, upon
15 information and belief, was not able to enter into the Hynix joint venture and mount a major
16 competitive challenge to SanDisk. As a consequence competition was injured.
17

18 118. Having eliminated STM as a partner with Hynix, SanDisk has entered into a
19 joint venture with Hynix, thus further suppressing the possibility of any major competitive
20 entry and further injuring competition.
21

22 119. Thus, although the STM global settlement has not been disclosed, it appears to
23 have been used to entrench the SanDisk monopoly in a relevant product market (“relevant
24 product market for NAND flash memory”). The settlement removed a legal and competitive
25 threat to SanDisk’s monopoly, while ensuring one of its most formidable competitors – STM
26 – would pose no further competitive challenge, nor continue to challenge the fraudulent
27
28

1 patents SanDisk has repeatedly used to suppress competition. It did nothing to cure SanDisk's
2 anticompetitive conduct, or facilitate STM's re-entry into the relevant market as a significant
3 competitor. It appeared to put an end to the STM/Hynix joint venture. Far from promoting
4 competition, the settlement cleared the way for SanDisk to further suppress competition and
5 entrench its monopoly by replacing STM as the Hynix venture partner.
6

7
8 120. Plaintiff is seeking discovery relating to the global settlement agreement from
9 both STM and SanDisk and will amend in due course as appropriate.

10 INJURY TO COMPETITION

11 121. Aided by Defendant Harari and SanDisk's controlled and licensed Toshiba joint
12 venture, SanDisk has monopolized the relevant market for NAND flash memory products
13 with exclusionary patent fraud, technology conversion, threats to competitor customers and
14 termination of RCI, and an anticompetitive settlement. SanDisk has succeeded in driving STM
15 out of the relevant market and prevented a major competitive challenge from a STM/Hynix
16 joint venture.
17
18

19 122. As a consequence of the monopolization, SanDisk has injured competition and
20 competitors, and SanDisk and the controlled and licensed Toshiba joint venture have sold
21 flash memory products at above-competitive, monopoly prices to members of the proposed
22 Class in the relevant market.
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CLASS PURCHASER STANDING

123. As a consequence of this very substantial diminution of competition and suppression of competitors, members of the proposed Class have paid above-competitive, monopoly prices and suffered antitrust injury.

COUNT ONE

(Conspiracy to Monopolize)

124. Plaintiff incorporates the allegations of paragraphs 1 through 123 as though set forth here in their entirety.

125. SanDisk and Harari have conspired to monopolize, and have monopolized and maintained a monopoly in, the relevant market for NAND flash memory products.

126. They have done so with specific intent to monopolize and have accomplished this through numerous overt acts, including fraudulent omissions and misrepresentations in connection with the filing and prosecution of the '338 and '517 "crown jewel" patents, by concerted conduct to exploit those invalid patents with infringement actions so as to exclude competition, by the concerted conversion of WSI/STM technology so as to reduce competition in the relevant market, by threats to competitor customers and the termination of RCI, and by an anticompetitive settlement agreement, all in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

127. SanDisk's monopolization strategy has been implemented in concert with Defendant Harari, who has profited from and aided the conspiracy, and who had the specific

1 intent to assist SanDisk in its monopolization even though he was an employee and officer of,
2 and owed fiduciary duties to, WSI.

3
4 128. SanDisk is engaged in interstate and foreign commerce, and the vast majority
5 of its past, present, and future sales in the relevant market has and will occur in such
6 commerce.

7
8 129. As a direct and proximate result of Defendants' unlawful concerted conduct,
9 competition in the relevant market has been severely harmed through higher prices and
10 reduced competition, quality, innovation, and consumer choice, to the detriment of purchasers
11 in the proposed Class.

12
13 130. As a direct and proximate result of Defendants' unlawful conduct, the members
14 of the proposed Class have been injured in their business or property by the payment of
15 above-competitive, monopoly pricing.

16
17 **COUNT TWO**

18 **(Monopolization)**

19 131. Plaintiff incorporates the allegations of paragraphs 1 through 130 as though set
20 forth here in their entirety.

21
22 132. SanDisk has monopolized the relevant market for NAND flash memory
23 products, and maintained that monopoly, by fraudulent omissions and misrepresentations in
24 connection with the filing and prosecution of the '338 and '517 "crown jewel" patents, by
25 conduct to exploit those invalid patents with infringement actions so as to exclude
26 competition, by the conversion of WSI/STM technology so as to reduce competition in the
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1 relevant market, by threats to competitor customers and the termination of RCI, and by an
2 anticompetitive settlement agreement, all in violation of Section 2 of the Sherman Act, 15
3 U.S.C. § 2.
4

5 133. SanDisk is engaged in interstate and foreign commerce, and the vast majority
6 of its past, present, and future sales in the relevant market has and will occur in such
7 commerce.
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9 134. As a direct and proximate result of SanDisk's unlawful conduct, competition
10 in the relevant market has been severely harmed through higher prices and reduced
11 competition, quality, innovation, and consumer choice, to the detriment of consumers.
12

13 135. As a direct and proximate result of SanDisk's unlawful conduct, the members
14 of the proposed Class have been injured in their business or property by the payment of
15 above-competitive pricing.
16

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff individually, and as a representative of members of the
19 defined proposed Class, prays that:

20 A. This Court declare that Defendants' conduct constitutes a violation of
21 Section 2 of the Sherman Act, 15 U.S.C. § 2;

22 B. This Court permanently enjoin Defendants and their agents and employees
23 from continuing their unlawful actions set forth herein;
24

25 C. Plaintiff recover treble damages;

26 D. Plaintiff recover its reasonable attorneys' fees and costs as allowed by law;
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1 E. Plaintiff recover pre-judgment and post-judgment interest at the highest rate
2 allowed by law; and

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4 F. Plaintiff be granted such other and further relief as the Court deems just and
5 equitable.

6 **JURY DEMAND**
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1 Dated: August 25, 2010

Respectfully submitted,

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/s/ Colleen Duffy-Smith

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