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9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN JOSE DIVISION

12 RITZ CAMERA & IMAGE, LLC, a)	CASE NO.: 5:10-CV-02787 JF
Delaware limited liability company, on)	
13 behalf of itself and others similarly situated,)	DEFENDANT’S REPLY IN SUPPORT OF
)	MOTION TO CERTIFY THE COURT’S
14 Plaintiff,)	WALKER PROCESS STANDING RULING
)	FOR INTERLOCUTORY APPEAL
15 v.)	
)	Date: May 6, 2011
16 SANDISK CORPORATION,)	Time: 9:00 AM
)	Judge: Honorable Jeremy Fogel
17 Defendant.)	
)	

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1 Defendant, SanDisk Corporation (“Defendant”), submits this Reply In Support Of Defendant’s
2 Motion To Certify The Court’s *Walker Process* Standing Ruling For Interlocutory Appeal.¹

3 **I. INTRODUCTION**

4 Defendant’s Motion demonstrates that this Court’s February 24, 2011 ruling that direct
5 purchasers have standing to pursue *Walker Process* claims where the patent(s) at issue are allegedly
6 “tarnished” by the denial of summary judgment on a competitor’s similar *Walker Process* claim is
7 particularly suited for interlocutory review under 28 U.S.C. § 1292(b).

8 *First*, whether Plaintiff, Ritz Camera & Image, LLC (“Plaintiff”), as a
9 direct purchaser, has standing to pursue a *Walker Process* claim presents a
10 “controlling question of law.” See Dkt. 60 (“Order”) at 4 (“[E]ach of Ritz’s
11 claims is dependent upon the theory that Defendants have engaged in the
12 enforcement of fraudulently-obtained patents.”).

13 *Second*, “substantial ground for difference of opinion” exists as to whether
14 direct purchasers should have standing to bring *Walker Process* claims. There is a
15 dearth of case law addressing direct purchaser *Walker Process* standing, the
16 existing cases are conflicting, and this Court’s Order stands alone in allowing a
17 direct purchaser to proceed with a *Walker Process* claim in the absence of a prior
18 judicial finding of unenforceability.

19 *Third*, resolution of the *Walker Process* standing issue “may materially
20 advance the ultimate termination” of this case because an appellate decision in
21 Defendant’s favor will effectively end this case.

22 Defendant’s Motion also demonstrates that the Court should stay or limit discovery pending
23 interlocutory review by the Federal Circuit. A stay would avoid prolonged, expensive, and potentially
24 unnecessary discovery that will inflict significant burdens and costs on numerous third parties. In
25 addition, a stay will not prejudice Plaintiff. Among other things, the challenged patents expired in
26

27 ¹ Defendant’s Motion only seeks interlocutory review of the Court’s direct purchaser *Walker*
28 *Process* standing ruling, and is not directed to general antitrust standing or the other elements of a
Sherman Act § 2 claim that Plaintiff will need to establish in this case.

1 2009.

2 Plaintiff does not dispute that: (i) the Court stands alone in allowing a direct purchaser to
3 proceed with a *Walker Process* claim in the absence of a prior judicial finding that the patent(s) at
4 issue are unenforceable due to inequitable conduct; (ii) this case will involve prolonged and expensive
5 discovery that will inflict significant burdens and costs on numerous third parties; or, (iii) it will not
6 be prejudiced if discovery is stayed pending appellate review.

7 Instead, Plaintiff argues that the Court's *Walker Process* standing ruling does not satisfy the
8 interlocutory review requirements of § 1292(b). According to Plaintiff, a "controlling question of
9 law" under § 1292(b) must be one which, if decided in favor of the appellant, would end the lawsuit
10 altogether. The Ninth Circuit specifically rejected this argument in the very case upon which Plaintiff
11 relies. Moreover, even if certification under § 1292(b) were limited to case-dispositive questions
12 (which it is not), as noted, here the *Walker Process* standing question is case-dispositive. *See* Order at
13 4 ("[E]ach of Ritz's claims is dependent upon the theory that Defendants have engaged on the
14 enforcement of fraudulently-obtained patents.").

15 Plaintiff further contends that Defendant failed to establish that there is "substantial ground for
16 difference of opinion" as to whether direct purchasers possess standing to bring *Walker Process*
17 claims. To the contrary, Defendant's Motion addresses the conflicting state of the law on direct
18 purchaser *Walker Process* standing, the absence of any controlling authority, and the novel nature of
19 this Court's decision. *See* Motion at 3-6.

20 Plaintiff contends that a stay pending appellate review should be denied because Defendant
21 has not satisfied the four-part test articulated in *Hilton v. Braunskill*, 481 U.S. 770 (1987) and *Golden*
22 *Gate Restaurant Association v. City and County of San Francisco*, 512 F.3d 1112 (9th Cir. 2008).
23 This Court has expressly rejected Plaintiff's argument, holding that the *Hilton/Golden Gate*
24 *Restaurant* test does not apply in assessing the propriety of a stay pending interlocutory appeal.
25 Rather, district courts have broad discretion to stay discovery under these circumstances.

26 Finally, Plaintiff incorrectly argues that the Ninth Circuit has appellate jurisdiction over the
27 Court's *Walker Process* standing ruling. Because the *Walker Process* standing issue "turn[s] on
28 substantial questions of patent law," under 28 U.S.C. §§ 1292(c) and 1295 appellate jurisdiction lies

1 exclusively with the Federal Circuit.

2 Defendant therefore requests that the Court certify its direct purchaser *Walker Process*
3 standing ruling for interlocutory appeal to the Federal Circuit, and stay or limit discovery pending
4 appellate review.

5 **II. ARGUMENT**

6 **A. The Walker Process Standing Issue Is A “Controlling Question Of Law”**

7 Whether Plaintiff, as a direct purchaser, has standing to bring a *Walker Process* claim is a
8 controlling question of law. *See* Motion at 2. “[A]ll that must be shown in order for a question to be
9 ‘controlling’ is that resolution of the issue on appeal could materially affect the outcome of the
10 litigation in the district court.” *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982).
11 Here, as explained in Defendant’s Motion, resolution of the *Walker Process* standing issue will
12 materially affect the outcome of this case. Indeed, this Court has noted that it “must determine
13 whether Ritz has standing to bring a *Walker Process* claim, as each of Ritz’s claims is dependent upon
14 the theory that Defendants have engaged in the enforcement of fraudulently-obtained patents.” Order
15 at 4.

16 All of Plaintiff’s arguments to the contrary are unavailing.

17 Plaintiff first argues that the Defendant has not established that the *Walker Process* standing
18 issue is a controlling question of law in this case because “[t]he Ninth Circuit has defined a
19 ‘controlling question of law’ narrowly, as including *only* questions ‘which, if decided in favor of the
20 appellant, would end the lawsuit.’” Pl. Opp. at 7 (quoting *United States v. Woodbury*, 263 F.2d 784,
21 787 (9th Cir. 1959)) (emphasis added). Plaintiff’s reliance on *Woodbury* is misplaced; the court there
22 expressly rejected the proposition for which it is relied upon by Plaintiff. *See* 263 F.2d at 787 (“We
23 do not hold that a question brought here on interlocutory appeal must be dispositive of the lawsuit in
24 order to be regarded as controlling.”); *see also In re Cement Antitrust Litig.*, 673 F.2d at 1026 (“All
25 that must be shown in order for a question to be ‘controlling’ is that resolution of the issue on appeal
26 could materially affect the outcome of litigation in the district court.”).

27 Plaintiff also incorrectly argues that “Section 1292(b) was not intended for litigation
28 presenting ‘nothing more than uncertain questions of law relevant to only one of several causes of

1 action.” Pl. Opp. at 7 (quoting *United States Rubber Co. v. Wright*, 359 F.2d 784, 783 (9th Cir.
2 1966)). However, *United States Rubber* is factually inapposite. See 359 F.2d at 785 (“This
3 unexceptional contract litigation presents, at most, nothing more than an uncertain question of law
4 relevant to only one of several causes of action alleged below, and no disposition we might make of
5 this appeal on its merits could materially affect the course of the litigation in the district court.”). In
6 contrast, this case involves a single cause of action and a standing question that this Court has found
7 to be the linchpin of Plaintiff’s case. See Order at 4. Accordingly, even if § 1292(b) applied only to
8 case-dispositive issues (which it does not), the question of whether Plaintiff, as a direct purchaser, has
9 standing to bring a *Walker Process* claim in this case would be a “controlling question of law” under
10 § 1292(b).

11 Plaintiff further argues that “[w]ith respect to the issue of standing, this Court has held that
12 ‘[a]lthough standing is a threshold question and, thus, one that could be considered a controlling
13 question of law in *some* circumstances,’ it is not always controlling.” Pl. Opp. at 8 (quoting *Self-*
14 *Insurers’ Sec. Fund v. Gallagher Bassett Servs., Inc.*, 2007 WL 781537, at *1 (N.D. Cal. Mar. 13,
15 2007)). Plaintiff fails, however, to explain that the threshold standing question in *Self-Insurers’ Sec.*
16 *Fund* did not qualify for interlocutory review under § 1292(b) because it was not a question of law.
17 See 2007 WL 781537, at *1 (“The Court wishes to reiterate to the parties that it resolved the standing
18 question on a motion to dismiss. Nothing in the Court’s order . . . should be construed as precluding
19 Gallagher from raising the question of standing on a motion for summary judgment.”). Plaintiff does
20 not and could not dispute that this Court’s *Walker Process* standing ruling presents a pure question of
21 law.

22 Plaintiff also takes issue with the Court’s finding that each of the anticompetitive conduct
23 theories underlying Plaintiff’s sole cause of action is “dependent upon the theory that Defendants have
24 engaged in the enforcement of fraudulently-obtained patents.” See Order at 4. Specifically, Plaintiff
25 argues that its customer threat, retaliatory termination, tortious conversion and anticompetitive
26 settlement allegations do not depend on its *Walker Process* allegations to state a claim. Pl. Opp. at 8-
27 10. This argument fails for multiple reasons.

28 As an initial matter, the only causal antitrust injury alleged in the First Amended Complaint

1 (“FAC”) – albeit an implausible one – is that Defendant’s enforcement of the ‘338 and ‘517 patents
2 thwarted a joint venture between Hynix and STM and drove STM from the flash memory market in
3 March of 2008. The FAC does not allege that Plaintiff’s customer threat, retaliatory termination,
4 tortious conversion and anticompetitive settlement theories resulted in a causal antitrust injury, *i.e.*, an
5 injury to the competitive process – as opposed to an injury to a particular competitor. Accordingly,
6 Plaintiff’s alternative theories fail to state a claim as a matter of law.

7 Moreover, as this Court correctly found, each of Plaintiff’s anticompetitive conduct theories
8 depends on Plaintiff’s *Walker Process* theory. *See* Order at 4. Plaintiff’s customer threat theory
9 depends on the *Walker Process* exception to *Noerr-Pennington* immunity because the alleged threats
10 would otherwise be protected pre-litigation communications related to Defendant’s enforcement of the
11 ‘338 and ‘517 patents.² Plaintiff’s retaliatory termination theory depends on Plaintiff’s *Walker*
12 *Process* claim because Defendant is alleged to have terminated Plaintiff to maintain an unlawful
13 monopoly obtained by *Walker Process* fraud. Plaintiff’s tortious conversion theory depends on
14 Plaintiff’s *Walker Process* claim because “the theft of a perfectly valid patent . . . creates no monopoly
15 power; it merely shifts a lawful monopoly into different hands.” *Brunswick Corp. v. Riegel Textile*
16 *Corp.*, 752 F.2d 261, 266 (7th Cir. 1984). Finally, Plaintiff’s anticompetitive settlement theory
17 depends on Plaintiff’s *Walker Process* claim because, although “the settlement of patent litigation, in
18 and of itself, does not violate the antitrust laws, . . . if the patents asserted against STM were procured
19 by fraud, there is a plausible inference that the purpose of the resulting settlement agreement was to
20 extend Defendants’ alleged monopoly.” Order at 14.

21 Moreover, even if Plaintiff’s alternative theories were not dependent on its *Walker Process*
22 claim, the Court’s *Walker Process* standing ruling would still present a controlling question of law
23 because its resolution “on appeal could materially affect the outcome of the litigation in the district
24 court.” *Securities & Exchange Comm. v. Mercury Interactive*, 2011 WL 1335733, at *3 (N.D. Cal.
25 April 7, 2011); *see also id.* (“The Court concludes that the appropriate construction of § 304 is a
26 controlling question of law, and that an immediate appeal would materially advance the ultimate

27 ² Contrary to Plaintiff’s argument, the FAC does not allege facts supporting a sham litigation
28 exception to *Noerr-Pennington* immunity.

1 termination of the litigation. The bulk of the damages sought against Defendants arise from the § 304
 2 claims. A final resolution as the scope of the statute would have a significant effect on the trial of this
 3 action, and perhaps upon the parties' efforts to reach settlement."'). Here, even assuming an appellate
 4 decision in Defendant's favor would not end this case, at a minimum it would (i) substantially reduce
 5 the scope and cost of discovery, (ii) significantly reduce Plaintiff's alleged damages, and (iii)
 6 significantly effect the trial of this action by eliminating the need to individually litigate which, if any,
 7 of the thousands of NAND flash memory products on the alleged market infringed the '338 and '517
 8 patents. *See, e.g., Tele Atlas N.V. v. Navteq Corp.*, 2008 WL 4809441, at *14-17 (N.D. Cal. Oct. 28,
 9 2008) (discussing requirement to establish patents at issue confer market power and explaining:
 10 "[Plaintiff] has not submitted any evidence to suggest that the personal navigation devices on the
 11 market infringe the 3D patents. Without such evidence, it is difficult to discern how [defendant] could
 12 exclude competition or control quantity."').

13 **B. There Is "Substantial Ground For Difference Of Opinion" On The Direct**
 14 **Purchaser Walker Process Standing Issue**

15 "Courts traditionally will find that a substantial ground for difference of opinion exists where
 16 the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the
 17 point, if complicated questions arise under foreign law, *or if novel and difficult questions of first*
 18 *impression are presented.*" *Mercury Interactive*, 2011 WL 1335733, at *3 (quoting *Couch v.*
 19 *Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (emphasis in original)); *see also In re California*
 20 *Title Insurance Antitrust Litig.*, 2010 WL 785798, at *1 (N.D. Cal. March 3, 2010) ("In light of the
 21 lack of precedent bearing on the issue, the Court concludes that Defendants have shown a substantial
 22 ground for a difference of opinion exists."').

23 As demonstrated in Defendant's Motion, there are substantial grounds for a difference of
 24 opinion as to whether direct purchasers have standing to bring *Walker Process* claims. *See* Motion at
 25 3-6 (discussing prior decisions and policy implications of allowing direct purchasers to pursue *Walker*
 26 *Process* claims). The Court acknowledged that "[n]either the Supreme Court nor the Ninth Circuit
 27 has determined whether direct purchasers, such as Ritz, have standing to assert a *Walker Process*
 28 claim." Order at 4. Likewise, the Federal Circuit, where appellate jurisdiction of the *Walker Process*

1 standing issue lies, has not addressed whether direct purchasers have standing to assert *Walker*
 2 *Process* claims. Further, as the caselaw stands today, (i) direct purchasers are not able to bring *Walker*
 3 *Process* claims in certain federal district courts,³ (ii) they are able to bring such claims in other
 4 districts but only after there has been a judicial determination of wrongdoing in connection with the
 5 procurement of the patents at issue,⁴ (iii) in this district (depending on whether dicta in *Netflix* or the
 6 rule announced by this Court is followed) direct purchasers either have standing generally or they
 7 have standing following a denial of summary judgment on the *Walker Process* claims in a prior
 8 lawsuit even though there has not been a judicial determination of wrongdoing,⁵ and (iv) since most
 9 districts have not yet addressed the issue, whether direct purchasers are able to bring *Walker Process*
 10 claims in those districts is completely uncertain.

11 Plaintiff does not dispute that this Court stands alone in allowing a direct purchaser to proceed
 12 with a *Walker Process* claim in the absence of a prior judicial finding that the patent(s) at issue are
 13 unenforceable due to inequitable conduct. *See* Pl. Opp. at 10-13. Instead, Plaintiff argues that
 14 Defendant has not established that there are substantial grounds for a difference of opinion because “a
 15 petitioner must generally show that there are legitimate and substantial grounds for differences of
 16 opinion regarding an issue ‘between and among judicial bodies.’” Pl. Opp. at 10 (citing *Leland*
 17 *Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 2007 WL 1119193, at *2 (N.D. Cal. Apr. 16,
 18 2007)).⁶ However, the *Leland Stanford* decision relied on the decision in *APCC Servs., Inc. v. AT & T*

19 ³ *See Kroger Co. v. Sanofi-Aventis*, 701 F. Supp. 2d 938, 957 (S.D. Ohio 2010); *Kaiser Foundation*
 20 *v. Abbott Lab.*, 2009 WL 3877513 (C.D. Cal. Oct. 8, 2009); *In re Remeron Antitrust Litig.*, 335 F.
 21 Supp. 2d 522, 529 (D.N.J. 2004).

22 ⁴ *See In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677 (2d Cir. 2009); *Molecular*
 23 *Diagnostics Laboratories v. Hoffman-La Roche Inc.*, 402 F. Supp. 2d 276 (D.D.C. 2005).

24 ⁵ Compare the Court’s Order with *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308 (N.D. Cal.
 25 2007).

26 ⁶ Plaintiff makes no attempt to reconcile this argument with its argument that the “presence of
 27 conflicting authority” is not sufficient to establish a substantial ground for difference of opinion, *see*
 28 Pl. Opp. at 11 (citing *Notmeyer v. Stryker Corp.*, 2007 WL 2688462, at *2 (N.D. Cal. Sept. 10, 2007),
 or its argument that “the ‘fact that other district courts have interpreted [*Walker Process*] in a manner
 advocated by Defendants . . . does not provide a substantial ground for difference of opinion on
 controlling questions of law.” *Id.* at 13 (citing *Getz v. Boeing Co.*, 2009 WL 3765506 (N.D. Cal. June
 16, 2009)). Taken together, the serial limitations Plaintiff seeks to impose on what constitutes a
 “substantial ground for difference of opinion” would arguably preclude all interlocutory review.

1 *Corp.*, 297 F. Supp. 2d 101 (D.D.C. 2003), which explained that “substantial ground for difference of
2 opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting
3 decisions in other circuits” and that “[t]he mere fact that a substantially greater number of judges have
4 resolved the issue one way rather than another does not, of itself, tend to show that there is no ground
5 for difference of opinion.” *Id.* at 107. Accordingly, *Leland Stanford* and *APCC Services* actually
6 support Defendant’s position that there are substantial grounds for a difference of opinion regarding
7 the instant *Walker Process* standing issue. As discussed above and in Defendant’s Motion, there is a
8 dearth of case law, there is no controlling decision, and the cases that do exist demonstrate a
9 difference of opinion between and among judicial bodies.

10 Plaintiff further argues that the Second Circuit’s decision in *In re DDAVP* precludes a finding
11 that there are substantial grounds for a difference of opinion as to the instant *Walker Process* standing
12 issue. Pl. Opp. at 13 (citing *Spears v. Washington Mut. Bank FA*, 2010 WL 54755, at *2 (N.D. Cal.
13 Jan. 8, 2010)). In *Spears*, however, the court denied an untimely motion to certify an issue for
14 interlocutory appeal because two federal appeals courts had “thoroughly considered” and rejected the
15 defendant’s position. 2010 WL 54755, at *2. In contrast, the Second Circuit’s holding in *In re*
16 *DDAVP* is expressly limited to circumstances not present here, *i.e.*, where a prior judicial finding
17 exists that the patent at issue is unenforceable due to inequitable conduct. Further, after *In re DDAVP*,
18 district courts have continued to take divergent positions as to whether and, if so, under what
19 circumstances, direct purchasers have standing to bring *Walker Process* claims. *See, e.g., Kroger Co.*,
20 701 F. Supp. 2d at 957 (dismissing direct purchaser’s *Walker Process* claim “so as not to open the
21 door to all direct purchasers otherwise unable to challenge a patent’s validity being able to do so by
22 dressing their patent challenge with a *Walker Process* claim”).

23 C. **Resolution Of The Direct Purchaser Walker Process Standing Issue “May**
24 **Materially Advance The Ultimate Termination” Of This Case**

25 As discussed in Defendant’s Motion, resolution of the *Walker Process* standing issue is
26 particularly suited for interlocutory review because an appellate decision in Defendant’s favor would
27 eliminate the need for prolonged and costly discovery. *See* Motion at 6-7. Indeed, an appellate
28 decision in Defendant’s favor would effectively end this case. *Id.*

1 Plaintiff argues, however, that resolving the *Walker Process* standing issue will not materially
2 advance the ultimate resolution of this case. Plaintiff contends it “made clear in its arguments before
3 the Court [that its] claims under Section 2 of the Sherman Act do not rest entirely on a *Walker Process*
4 claim.” Pl. Opp. at 13. This argument is in direct conflict with the Court’s finding that “[t]he Court
5 must determine whether Ritz has standing to bring a *Walker Process* claim, as each of Ritz’s claims is
6 dependent upon the theory that Defendants have engaged in the enforcement of fraudulently-obtained
7 patents.” Order at 4. Moreover, even if Plaintiff’s alternate theories independently state a viable
8 claim, an appellate decision in Defendant’s favor would still materially advance the ultimate
9 termination of this case by substantially reducing the scope of discovery, increasing the likelihood of a
10 settlement by reducing Plaintiff’s alleged damages, and eliminating the need to individually litigate
11 which, if any, of the thousands of NAND flash memory products on the alleged market infringed the
12 ‘338 and ‘517 patents.

13 **D. Discovery Should Be Stayed Or Limited Pending Appeal**

14 As explained in SanDisk’s Motion, discovery in this case should be stayed or limited pending
15 interlocutory appeal because doing so would “promote economy of time and effort for [the Court], for
16 counsel, and for litigants.” Motion at 7-8 (citing *Asis Internet Servs. v. Active Response Group*, 2008
17 WL 4279695, at *4 (N.D. Cal. Sept. 16, 2008)).

18 Plaintiff does not dispute that staying discovery pending interlocutory review could avoid
19 potentially unnecessary and expensive discovery, including discovery that will inflict significant
20 burdens and costs on numerous third parties. Plaintiff also does not dispute that it will not be
21 prejudiced by a stay. Instead, Plaintiff argues that discovery should not be stayed because
22 Defendant’s request does not satisfy the four-part test articulated in *Hilton* and *Golden Gate*
23 *Restaurant Association*. Pl. Opp. at 14-15. However, in *Asis Internet Services* this Court specifically
24 rejected Plaintiff’s argument:

25 Plaintiffs argue that the Court should weigh the factors set out in *Hilton v. Braunskill*
26 and *Golden Gate Restaurant Assoc. v. City and County of San Francisco* to determine
27 whether to grant a stay, but those [factors] govern a district court’s judgment or other
28 order pending appeal, not a stay of ongoing proceedings.

1 2008 WL 4279695, at *4 n.1 (citations omitted).⁷ Rather, “[w]hen considering a stay pending appeal
2 pursuant to § 1292(b), the Court has broad discretion to decide whether a stay is appropriate to
3 promote economy of time and effort for itself, for counsel, and for litigants.” *Id.* at *3-4 (quotations
4 and citations omitted).

5 If the Court grants Defendant’s Motion the most efficient course here would be to stay
6 discovery pending appellate review.

7 **E. Plaintiff Incorrectly Argues That An Interlocutory Appeal Of This Court’s Order**
8 **Would Be To The Ninth Circuit**

9 Whether direct purchasers possess *Walker Process* standing “turn[s] on substantial questions
10 of patent law,” and, therefore, appellate jurisdiction over this issue “would lie exclusively with the
11 Federal Circuit.” *In re DDAVP*, 585 F.3d at 685; *accord Christianson v. Colt Indus. Operating Corp.*,
12 486 U.S. 800, 813-14 (1998) (holding 28 U.S.C. § 1295 vests the Federal Circuit with exclusive
13 jurisdiction where the plaintiff’s right to relief necessarily depends on resolution of a substantial
14 question of federal patent law). Accordingly, Defendant’s Motion specifically requests that the Court
15 certify its direct purchaser *Walker Process* standing ruling for interlocutory appeal to the Federal
16 Circuit. *See* Motion at 4 n.7.

17 Plaintiff contends that “Defendants concede in seeking certification under Section 1292 (and
18 not 28 U.S.C. § 1295), any interlocutory appeal would be to the Ninth Circuit.” Pl. Opp. at 4 n.2.
19 Plaintiff’s argument confuses the procedural mechanism for seeking an interlocutory appeal, *i.e.*, 28
20 U.S.C. § 1292(b), with the statute establishing the Federal Circuit’s subject matter jurisdiction, *i.e.*, 28
21 U.S.C. § 1295. Plaintiff’s argument also overlooks 28 U.S.C. § 1292(c), which expressly provides
22 that the Federal Circuit “shall have exclusive jurisdiction . . . of an appeal from an interlocutory order
23 or decree described in [§ 1292(b)] in any case over which the court would have jurisdiction of an
24 appeal under [§ 1295].” 28 U.S.C. § 1292(c). Finally, contrary to Plaintiff’s argument, Pl. Opp. at 4

25 ⁷ Applying the wrong standard, Plaintiff argues “[t]he cost of *some* pretrial discovery does not
26 constitute irreparable harm.” Pl. Opp. at 15 (quoting *Bradberry v. T-Mobile USA, Inc.*, 2007 WL
27 2221076, at *4 (N.D. Cal. Aug. 2, 2007)). Plaintiff fails to mention that the *Bradberry* court denied a
28 stay pending appeal “without prejudice to refile if discovery becomes burdensome” *Id.* Here,
Plaintiff does not contest that prolonged and expensive discovery in this case will inflict significant
burdens and costs on numerous third parties.

1 n.2, Plaintiff's failure to plead 28 U.S.C. § 1338 as a basis for this Court's jurisdiction does not
2 determine where appellate review of the *Walker Process* standing issue properly lies. *See Weinberger*
3 *v. Bentex Pharm., Inc.*, 412 U.S. 645, 652 (1973) ("Parties, of course, cannot confer jurisdiction; only
4 Congress can do so.").

5 **III. CONCLUSION**

6 Defendant respectfully requests that the Court certify its direct purchaser *Walker Process*
7 standing ruling for interlocutory appeal and stay discovery pending that appeal.

8 DATED: April 22, 2011

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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By: /s/ David W. Hansen
 David W. Hansen

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Attorneys for DEFENDANT
SANDISK CORPORATION

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CERTIFICATE OF SERVICE

I hereby certify on April 22, 2011 a copy of the foregoing was filed electronically through the Court’s CM/ECF system, with notice of case activity automatically generated and sent electronically to all counsel of record who have registered for electronic filing at their electronic addresses of record, constituting service per General Order 45, section IX.B. Per General Order 45, section IX.C.2, all others were served by U.S. Mail at their street addresses of record.

DATE: April 22, 2011

By: /s/ David W. Hansen
David W. Hansen