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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

RITZ CAMERA & IMAGE, LLC, ) CV-10-2787-JF  
)  
PLAINTIFF, ) SAN JOSE, CALIFORNIA  
)  
VS. )  
) DECEMBER 17, 2010  
SANDISK CORPORATION, ET )  
AL, )  
) PAGES 1-24  
DEFENDANT. )

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JEREMY FOGEL  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S :

FOR THE PLAINTIFF: LAW OFFICES OF STEPHEN BERRY  
BY: STEPHEN BERRY  
1717 PENNSYLVANIA AVENUE, NW  
SUITE 450  
WASHINGTON, DC 20006

FOR THE DEFENDANT: SKADDEN ARPS  
BY: DAVID HANSEN  
JAMES SCHAEFER  
FOUR EMBARCADERO CENTER  
SUITE 3800  
SAN FRANCISCO, CA 94111

(APPEARANCES CONTINUED ON THE NEXT PAGE)

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR  
CERTIFICATE NUMBER 13185

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FOR THE PLAINTIFF: MORGAN DUFFY-SMITH & TIDALGO  
BY: COLLEEN DUFFY-SMITH  
1960 THE ALAMEDA, STE 220  
SAN JOSE, CA 95126

1 SAN JOSE, CALIFORNIA DECEMBER 17, 2010

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENEED AND THE  
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE COURT: OKAY. RITZ VERSUS SANDISK.  
6 SANDISK.

7 MR. BERRY: GOOD MORNING, YOUR HONOR.  
8 STEPHEN BERRY OF BERRY LAW FOR RITZ CAMERA.

9 MR. HANSEN: DAVID HANSEN OF SKADDEN ARPS  
10 FOR SANDISK AND DR. HARARI.

11 MS. DUFFY-SMITH: GOOD MORNING,  
12 YOUR HONOR. COLLEEN DUFFY-SMITH ON BEHALF OF THE  
13 PLAINTIFF, RITZ CAMERA.

14 MR. SCHAEFER: JAMES SCHAEFER ON BEHALF  
15 OF SANDISK AND DR. HARARI.

16 THE COURT: WELL, WHAT WOULD HELP HERE IS  
17 THE DISCUSSION OF THE POLICY ISSUE THAT'S PRESENTED  
18 BY THE *WALKER PROCESS* CLAIM. I WILL TELL YOU  
19 EXACTLY WHAT I'M CONCERNED ABOUT.

20 IF THE LAW IS, AND THIS IS CLEARLY THE  
21 MINORITY VIEW, BUT IF THE LAW IS THAT THE  
22 PURCHASER, THE DIRECT PURCHASER CAN ASSERT A *WALKER*  
23 *PROCESS* CLAIM, HOW DO YOU SET THE BOUNDS OF THAT  
24 DOCTRINE.

25 IN OTHER WORDS, HERE RITZ IS SAYING THAT

1           THERE'S A CONSPIRACY BETWEEN DR. HARARI AND SANDISK  
2           AND STM TO STIFLE COMPETITION AND THAT THEY WERE  
3           THEN HARMED AS A RESULT.

4                         ALL RIGHT. SO THAT'S A CLASSIC  
5           ANTI-TRUST CLAIM, BUT THEY ARE RELYING ON THIS  
6           *WALKER PROCESS* PIECE WHICH IS AT ISSUE IN THE  
7           MOTION TO DISMISS.

8                         THAT'S A PATENT LAW DOCTRINE. AND IF YOU  
9           SAY THAT SOME DOWNSTREAM PURCHASER OF THE PATENTED  
10          PRODUCT HAS STANDING TO ALLEGE A *WALKER PROCESS*  
11          CLAIM, WHERE DOES IT STOP? WHY CAN'T EVERY  
12          PURCHASER DO THAT? NOT JUST IN SITUATIONS WHEREAS  
13          HERE THERE ARE SOME FAIRLY DETAILED ALLEGATIONS OF  
14          MISCONDUCT AS OPPOSED TO JUST SAYING WELL, NOT ONLY  
15          DO WE THINK THERE'S ANTI-TRUST INJURY BUT WE THINK  
16          THE PATENT THAT THE DEFENDANT HOLDS IS INVALID  
17          BECAUSE OF INEQUITABLE CONDUCT?

18                        I'M JUST REALLY WORRIED ABOUT OPENING THE  
19          DOOR TO SOMETHING THAT IS NOT AT ALL WHAT THE  
20          ANTI-TRUST STATUTE OR THE *WALKER PROCESS* CASE  
21          INTENDED.

22                        SO I NEED TO BE -- THAT'S THE CONCERN I  
23          HAVE GOING FORWARD. SO LET ME HEAR FROM  
24          PLAINTIFF'S COUNSEL.

25                        MR. BERRY: MAY IT PLEASE THE COURT.

1 ONCE AGAIN, STEVEN BERRY OF BERRY LAW.

2 THE SUPREME COURT SAID IN *WALKER PROCESS*  
3 ITSELF THAT THOSE THAT CORRUPT GOVERNMENTAL  
4 PROCESSES WITH FRAUDULENT PATENTS MUST ANSWER TO  
5 THOSE INJURED; PAGE 176.

6 AND THE -- THE PENULTIMATE SENTENCE IT  
7 SAYS "THIS MAY RESULT IN VEXATIOUS SUITS," BUT FOR  
8 THIS PURPOSE IT'S OF NO IMPORT. AND WE WILL GET TO  
9 HOW DO YOU SCREEN OUT THE VEXATIOUS SUITS IN A  
10 MOMENT.

11 THE COURT DID NOT SAY -- FIRST OF ALL,  
12 THE COURT SAID THIS IS AN ANTI-TRUST DOCTRINE, THIS  
13 IS NOT A PATENT DOCTRINE. THIS IS CREATING BY  
14 UNWITTING COOPERATION BY THE GOVERNMENT AND  
15 CORRUPTION OF PATENT PROCESSES, A GOVERNMENTAL  
16 MANDATED MONOPOLY, PARTICULARLY PERNICIOUS GIVEN  
17 THE LACK OF TRANSPARENCY IN THE APPLICATION PROCESS  
18 FOR PATENTS.

19 THE COURT SAID THEY SHALL ANSWER TO THOSE  
20 INJURED. IT DID NOT SAY JUST TO COMPETITORS, AND  
21 IT WAS SITTING ON A *WALKER PROCESS* CLAIM, OBVIOUSLY  
22 IT'S THE GENESIS DOCTRINE.

23 NOW, NETFLIX OF THIS COURT DOES NOT  
24 REQUIRE THAT THERE BE A PRIOR JUDICIAL RULING OF  
25 INEQUITABLE OR INVALIDATING CONDUCT FOR THERE TO

1 BE --

2 THE COURT: BUT NETFLIX DIDN'T HOLD WHAT  
3 YOU'RE ADVOCATING. THERE'S DICTA THAT SUPPORTS THE  
4 PROPOSITION YOU ARE INDICATING BUT THAT'S NOT THE  
5 HOLDING OF THAT CASE.

6 MR. BERRY: ALL RIGHT. I WILL CONCEDE  
7 THAT, YOUR HONOR.

8 IT RELIED ON MEDICAL DIAGNOSTICS, SO WE  
9 HAVE BI COASTAL PRECEDENT HERE.

10 LET'S TALK ABOUT HOW DO YOU -- LET'S TALK  
11 ABOUT THEIR CASE. IF YOU WILL EXCUSE ME JUST FOR A  
12 MOMENT.

13 LET'S TALK ABOUT THE SCREENING, AND I  
14 WANT TO TALK ABOUT DDAVP, THEIR LEAD CASE, SAYING  
15 THAT EFFECTIVELY YOU HAVE TO HAVE A FINAL PRIOR  
16 JUDICIAL RULING IMPLEMENTED BY A COMPETITOR,  
17 INEQUITABLE CONDUCT, FOR THE CUSTOMER TO HAVE  
18 STANDING; IN A MOMENT.

19 THIS COURT AND THE SUPREME COURT, WHEN IT  
20 SAID WE ARE NOT WORRIED ABOUT VEXATIOUS SUITS AND  
21 *WALKER PROCESS*, KNOWS HOW TO SCREEN FRIVOLOUS  
22 ANTI-TRUST SUITS. THAT'S WHAT WE ARE DOING HERE.  
23 WE ARE DOING A TWOMBLY, IQBAL PLAUSIBILITY ANALYSIS

24 THE COURT: LET'S TALK ABOUT THAT. AND I  
25 DON'T WANT TO GET OFF THE POLICY TOPIC, BUT ALL YOU

1 KNOW IS THERE IS A LAWSUIT BETWEEN SANDISK AND ST  
2 MICRO WHICH I LIVED WITH FOR MANY YEARS. AND IN  
3 THAT CASE THERE WAS A *WALKER PROCESS* CLAIM THAT  
4 SURVIVED SUMMARY JUDGEMENT. AND THAT CASE  
5 ULTIMATELY SETTLED. THERE WAS NO JUDICIAL  
6 DETERMINATION BUT THERE WAS A *WALKER PROCESS*  
7 VIOLATION.

8 MR. BERRY: THAT'S RIGHT, YOUR HONOR.  
9 AND WE DON'T THINK WE NEED THAT HERE. BUT LET'S  
10 LOOK AT THAT DDAVP CASE THAT SEEMS TO BE THE  
11 GENESIS OF THIS ARGUMENT.

12 THE SECOND CIRCUIT WAS DECIDING THE  
13 QUESTION BEFORE. THERE WAS A TARNISHED PATENT AND  
14 IT NARROWLY FOCUSED ON THAT. BUT THE LANGUAGE IT  
15 USED CERTAINLY SUPPORTS NETFLIX AND MEDICAL  
16 DIAGNOSTICS.

17 THE SECOND CIRCUIT SAYS "WE ARE WARY TO  
18 LEAVE" -- THIS IS PUBLIC POLICY IN THE ULTIMATE --  
19 "TO LEAVE A SIGNIFICANT ANTI-TRUST VIOLATION  
20 UNDETECTED AND UNREMEDIED."

21 THE REASON IS "IT'S NOT A GOOD IDEA TO  
22 GIVE CUSTOMER STANDING ONLY AFTER A COMPETITOR WINS  
23 A *WALKER PROCESS* OR INEQUITABLE CLAIM."

24 AND THIS IS IMPORTANT, "PATENT  
25 CHALLENGERS," THAT MEANS COMPETITORS, "MAY NOT HAVE

1 THE STRATEGIC INTEREST OR RESOURCES TO START OR WIN  
2 SUCH A BATTLE OR MAY BE PRESENTED WITH STRONG  
3 INCENTIVES TO SETTLE THEIR CHALLENGE TO PRESERVE  
4 THE PATENT."

5 THE COURT: ALL RIGHT.

6 MR. BERRY: "ENFORCEABILITY."

7 BUT TO RELY ON COMPETITORS IS ASKING TOO  
8 MUCH.

9 THE COURT: OKAY. I FOLLOW YOU.

10 IF I'M HEARING YOU CORRECTLY WHAT YOU ARE  
11 SAYING IS IF STM BRINGS THE *WALKER PROCESS*  
12 CHALLENGE, IT SURVIVES SUMMARY JUDGEMENT, THEN AT  
13 THAT POINT THERE'S A SETTLEMENT BETWEEN SANDISK AND  
14 STM. SO THE *WALKER PROCESS* CHALLENGE NEVER GOES TO  
15 TRIAL.

16 AND YOU ARE SAYING WELL, HOW DO YOU EVER  
17 GET SUNLIGHT ON THE QUESTION OF WHETHER THERE WAS A  
18 VALID *WALKER PROCESS* CLAIM OR NOT IF NOT THROUGH A  
19 LAWSUIT LIKE THIS.

20 BUT THEN TO PICK UP ON YOUR TWOMBLY  
21 ARGUMENT, WHERE IS THE PLAUSIBILITY? OTHER THAN  
22 THE FACT THAT SOMETHING SURVIVES SUMMARY JUDGEMENT?  
23 IS THAT THE SAME INQUIRY?

24 MR. BERRY: WELL, THIS COURT DEALT WITH  
25 PAGES UPON PAGES OF CONCEALMENT OR ALLEGATIONS OF



1 CONCEALMENT OR MISREPRESENTATION. IT'S A VERY --  
2 STM WAS IN A POSITION BECAUSE IT DEVELOPED THE  
3 TECHNOLOGY, IT LITIGATED FOR FOUR YEARS.

4 IF THIS IS TARNISHED -- THIS ISN'T  
5 TARNISHED BY A DEFINITIVE JUDICIAL RULING BUT IT'S  
6 CERTAINLY TARNISHED BY A VERY CAREFUL OPINION THAT  
7 THIS COURT WROTE AND ANALYZED THAT THERE ARE  
8 GENUINE ISSUES OF FACT. IN THAT SENSE, IT'S  
9 TARNISHED.

10 THE COURT: SO ONE WAY TO RESTRAIN --

11 MR. BERRY: DRAW THE LINE.

12 THE COURT: ONE WAY TO DRAW THE LINE IS  
13 TO SAY THAT IF YOU HAVE A CASE IN WHICH A  
14 COMPETITOR IS A *WALKER PROCESS* CHALLENGE AND THAT  
15 SURVIVES SUMMARY JUDGEMENT, IT NECESSARILY MEETS  
16 THE PLAUSIBILITY STANDARD FOR PURPOSES OF MOTIONS.

17 MR. BERRY: LET ME BROADEN THAT. OR  
18 THE RECORD CREATED THEREIN MAKES IT PLAUSIBLE THAT  
19 THE CUSTOMER ALLEGATIONS OF SUCH FRAUDULENT  
20 CORRUPTION OF GOVERNMENT PROPERTY IS PLAUSIBLE.

21 THE COURT: AND THE CUSTOMER HAS STANDING  
22 BECAUSE -- AND THIS IS WHERE I THINK JUDGE ALSUP'S  
23 COMMENTS ARE RELEVANT. CUSTOMERS DO HAVE STANDING  
24 IN CERTAIN ANTI-TRUST CONTEXT AND THEY CAN ASSERT  
25 ANTI-TRUST INJURY IN A CASE LIKE THIS BECAUSE THEY

1 ARE SUFFERING THE ANTI-COMPETITIVE CONDUCT.

2 MR. BERRY: AND GET BACK TO PUBLIC POLICY  
3 BECAUSE WE NEED DETERRENCE, RELYING EXPRESSLY ON  
4 MEDICAL DIAGNOSTICS.

5 I DON'T WANT TO BE TOO HYPERBOLIC HERE,  
6 BUT I DO, BUT I WON'T.

7 THE COURT: IT'S YOUR JOB, COUNSEL.

8 MR. BERRY: BUT IF YOU THROW THIS OUT,  
9 FIRST OF ALL THERE'S FIVE OTHER SOURCES OF CONDUCT  
10 HERE OTHER THAN THE *WALKER PROCESS*.

11 IT'S ONE, IT'S IMPORTANT, BUT THERE'S  
12 FIVE OTHER COURSES OF CONDUCT HERE. AND  
13 CONTINENTAL ORE CO. SAYS YOU DO NOT PARSE OUT, AND  
14 THAT'S ANOTHER FACTOR IN YOUR LINE DRAWING HERE.

15 BUT, IN EFFECT, THE DEFENDANTS WANT A GET  
16 OUT OF JAIL FREE CARD. THEY WANT TO EXPLOIT THE  
17 PATENT GAINED BY TRICKERY TO A \*FARE THEE WELL.  
18 SUBVERT COMPETITORS, SUE SAMSUNG THE LARGEST  
19 COMPETITOR IN THE MARKET, THAT WOULD BE NUMBER ONE  
20 NOW IF IT WAS NOT COOPTED IN 1996 BY THESE  
21 FRAUDULENT "CROWN JEWEL" PATENTS. SUBVERT  
22 COMPETITORS, COMPETITION AND PRICE COMPETITION, PUT  
23 COMPETITORS TO THE TEST OF LITIGATING ANTI-TRUST  
24 COUNTERCLAIMS FOR YEARS, AND THIS HAS BEEN GOING ON  
25 WITH SAMSUNG AND STM SINCE '96 UNTIL 2008, 2009.

1                   AND WHEN THE JIG IS UP, WHEN SUMMARY  
2                   JUDGEMENT IS DENIED AND THEY DARE NOT GO BEFORE A  
3                   JURY, USE THE MONOPOLY PROFITS OF THE INFRINGEMENT  
4                   ACTIONS AND THE ILLEGAL TRICKSTER MONOPOLY TO BUY  
5                   OFF THE COMPETITOR.

6                   AND BY THIS TIME THE PATENT IS ABOUT  
7                   READY TO EXPIRE, THE "CROWN JEWELS" ARE ABOUT READY  
8                   TO EXPIRE ANYWAY.

9                   SO YOU KNOW, YOU ARE NOT GIVING UP TOO  
10                  MUCH LICENSING FEES AND YOU ARE BUYING IMMUNITY  
11                  FROM WHAT THE ANTI-TRUST LAWS ARE PRIMARILY  
12                  DESIGNED TO PROTECT UNDER ASSOCIATED GENERAL  
13                  CONTRACTORS.

14                  NOW THESE CUSTOMERS ARE JUST OUT OF LUCK.  
15                  BECAUSE THERE HAS NOT BEEN A PRIOR. SO YOU TAKE IT  
16                  ALL THE WAY UP TO SUMMARY JUDGEMENT AND YOU GET  
17                  AWAY WITH IT.

18                  THE COURT: ALL RIGHT.

19                  BUT THE BOTTOM LINE IS THERE IS CASE LAW  
20                  THAT SAYS IF YOU HAVE A TARNISHED PATENT, CUSTOMERS  
21                  HAVE STANDING. THAT'S NOT A REVOLUTIONARY  
22                  PROPOSITION.

23                  AND HERE YOU ARE SAYING THAT THE PATENT  
24                  IS TARNISHED BY THE FACT THAT THERE WAS A  
25                  WALKER PROCESS CLAIM THAT SURVIVED SUMMARY

1 JUDGEMENT. THAT'S WHAT IT BOILS DOWN TO, RIGHT?

2 MR. BERRY: NO, IT BOILS DOWN TO THE FACT  
3 THAT CLAYTON SECTION IV DOES NOT LIMIT THE ALL  
4 PERSONS INJURED IN THE BUSINESS OR PROPERTY.

5 THE COURT: RIGHT. BUT THAT GETS BACK TO  
6 THE QUESTION OF WHERE YOU DRAW THE LINE.

7 A REASONABLE PLACE TO DRAW THE LINE IS IF  
8 YOU HAVE A WALKER PROCESS CLAIM BY A COMPETITOR  
9 THAT SURVIVES SUMMARY JUDGEMENT.

10 I MEAN, THAT'S NOT THE ONLY LINE YOU  
11 WOULD BE DRAWING.

12 MR. BERRY: YOU WOULD BE DOING LIKE THE  
13 SECOND CIRCUIT, THE DDAVP, IN THE CASE IN FRONT OF  
14 US.

15 THE COURT: IT'S NOT MY DESIRE TO INVITE  
16 8,000 LAWSUITS BY PEOPLE WHO BUY FLASH DRIVES FOR  
17 THEIR CAMERA. THAT'S NOT WHAT I'M INTERESTED IN  
18 DOING AND I DON'T THINK THAT'S WHAT I SHOULD BE  
19 DOING.

20 BUT ONE REASONABLE WAY TO DRAW THE LINE  
21 IS TO SAY, AND I'M JUST TRYING TO MAKE SURE I  
22 UNDERSTAND YOU, IS THAT YOU ARE NOT JUST GRASPING  
23 AT STRAWS HERE. YOU ACTUALLY HAVE A LITIGATED CASE  
24 IN WHICH THE CLAIM WAS AT LEAST PLAUSIBLE ENOUGH TO  
25 SURVIVE SUMMARY JUDGEMENT.

1 MR. BERRY: RIGHT. AFTER FOUR YEARS.

2 THE COURT: RIGHT. THANK YOU.

3 WELL, LET ME GET A RESPONSE.

4 MR. BERRY: BUT I ALSO POINT OUT IN  
5 *WALKER PROCESS* THE COURT DID DISCUSS VEXATIOUS  
6 LAWSUITS AND IT DIDN'T LIMIT ITS HOLDING AS TO  
7 THOSE WHO CAN SEEK REMEDY TO COMPETITORS ALONE.

8 THE COURT: RIGHT. OKAY. THAT WAS THE  
9 FIRST THING YOU SAID. RIGHT.

10 COUNSEL, GO AHEAD.

11 MR. HANSEN: THANK YOU, YOUR HONOR.

12 I THINK ALL OF THESE -- SO IF I  
13 UNDERSTAND THAT THE ARGUMENT IS THAT -- LET ME  
14 START WITH THE DDAVP CASE.

15 FIRST OF ALL, IT'S NOT OUR MAIN CASE AND  
16 WE ARE NOT SUGGESTING THAT WOULD BE THE LAW IN THE  
17 NINTH CIRCUIT, BUT LET'S ASSUME IT IS. DDAVP WENT  
18 THROUGH ALL OF THESE POLICY ARGUMENTS VERY  
19 CAREFULLY AND THEY CONCLUDED THAT THEY WERE ABLE TO  
20 GRANT THE DIRECT PURCHASER PLAINTIFFS ANTI-TRUST  
21 STANDING WITHOUT ALTERING THE TYPICAL LIMITS ON WHO  
22 CAN START A CHALLENGE TO A PATENT'S VALIDITY.

23 THEY ARE VERY CLEAR TO SAY, WE HOLD ONLY  
24 THAT PURCHASER PLAINTIFFS HAVE STANDING TO RAISE  
25 ONLY *WALKER PROCESS* CLAIMS FOR PATENTS THAT ARE

1 ALREADY TARNISHED THAT ARE ALREADY UNENFORCEABLE  
2 DUE TO INEQUITABLE CONDUCT.

3 SO WHAT'S HAPPENING IS YOU HAVE THE  
4 BALANCING BETWEEN ANTI-TRUST STANDING AND WE HAVE  
5 ALL THE ARGUMENTS AS TO WHY PEOPLE THAT ARE INJURED  
6 BY HIGHER PRICES HAVE ANTI-TRUST STANDING.

7 BUT WHAT THE SECOND CIRCUIT DID IS GO  
8 THROUGH METICULOUSLY AND BALANCE ALL THE ARGUMENTS  
9 AS TO WHY YOU HAVE TO BE CAREFUL NOT TO DISRUPT THE  
10 CAREFUL BALANCE OF THE PATENT SYSTEM.

11 THE COURT: WELL, THEY HAVE ANTI-TRUST  
12 STANDING TO ASSERT OTHER CLAIMS AGAINST YOUR  
13 CLIENT, DON'T THEY?

14 MR. HANSEN: ABSOLUTELY.

15 THE COURT: SO WHY IN THAT INSTANCE CAN  
16 THEY NOT SAY, OH, AND ANOTHER THING THEY DID IS  
17 THEY HAD A PATENT THAT THEY OBTAINED THROUGH  
18 INEQUITABLE CONDUCT AND THEY THEN CONSPIRED WITH  
19 THE ALLEGED INFRINGER TO ENTER INTO  
20 ANTI-COMPETITIVE SETTLEMENT OF THAT INFRINGEMENT  
21 LAWSUIT FOR THE PURPOSE OF STRENGTHENING THEIR  
22 MONOPOLY.

23 I REALIZE ALL WE ARE TALKING ABOUT IS  
24 ALLEGATIONS BUT IN A SITUATION WHERE YOU'VE HAD A  
25 WALKER PROCESS CLAIM THAT WAS LITIGATED THROUGH

1 SUMMARY JUDGEMENT, FROM A POLICY STANDPOINT DOESN'T  
2 THAT ADDRESS THE CONCERN THAT PEOPLE CAN JUST  
3 ALLEGE ANYTHING THEY WANT?

4 YOU ACTUALLY HAVE A RECORD HERE WHERE THE  
5 CLAIM WAS TAKEN SERIOUSLY ENOUGH THAT IT GOT TO  
6 THAT POINT, JUST FOR PURPOSES OF THE MOTION TO  
7 DISMISS.

8 MR. HANSEN: I DON'T AGREE.

9 AND FIRST I SHOULDN'T SAY THEY ACTUALLY  
10 HAVE ANTITRUST STANDING HERE FOR ANYTHING BECAUSE  
11 THEY HAVEN'T ACTUALLY -- WE HAVE THE OTHER ARGUMENT  
12 IN TERMS OF THEY HAVEN'T ALLEGED ANY PLAUSIBLE  
13 ANTI-TRUST INJURY BECAUSE IN ORDER TO DO SO, IN  
14 ORDER TO PROP UP THE CASE BEFORE YOU GET TO THE  
15 *WALKER PROCESS* HERE THEY HAVE TO -- THEY ARE  
16 BASICALLY SAYING, PAY NO ATTENTION TO THE FACT THAT  
17 ST DIDN'T EXIT THE MARKET. PAY NO ATTENTION TO THE  
18 FACT THAT THE HYNIX/ST JOINT VENTURE THAT WE  
19 SUPPOSEDLY DISRUPTED ACTUALLY OCCURRED.

20 THE COURT: SO YOU BELIEVE EVEN IF THEY  
21 HAVE STANDING, THEY DON'T HAVE INJURY. YOU ARE NOT  
22 CONCEDING THEY HAVE STANDING.

23 MR. HANSEN: THEY DON'T HAVE STANDING ON  
24 THE ANTI-TRUST SIDE AND THE *WALKER PROCESS* SIDE  
25 BECAUSE THE *WALKER PROCESS* IS A MIXED ANTI-TRUST

1 PATENT POINT.

2 AND THAT'S WHAT THE SECOND CIRCUIT COMES  
3 DOWN TO. AND THE COURT'S ORDER, AS YOU KNOW  
4 BECAUSE YOU ISSUED IT, IS IN ORDER TO PLEAD  
5 INEQUITABLE CONDUCT CLAIM UNDER FEDERAL CIRCUIT LAW  
6 YOU HAVE TO HAVE THE SPECIFICITY THAT'S REQUIRED.  
7 SO YOU HAVE TO HAVE THE SORT OF ALLEGATION.

8 SO THESE ARE THINGS THAT WOULDN'T  
9 NECESSARILY JUST ANY COMPETITOR COULD COME UP WITH  
10 THE SAME ALLEGATIONS THAT ST DID IF THEY WANTED TO  
11 DO THEIR HOMEWORK AND DIG UP ALL THE STUFF THAT  
12 SUPPOSEDLY CREATES INEQUITABLE CONDUCT. WHICH YOU  
13 ALSO KNOW IS A BLIGHT ON THE PATENT SYSTEM.

14 THE COURT: SO YOU ARE SAYING THERE'S A  
15 POLICY REASON NOT TO SIMPLY ALLOW A CUSTOMER TO  
16 BOOTSTRAP THE COMPETITOR'S ALLEGATIONS IN THEIR  
17 *WALKER PROCESS* SUIT.

18 MR. HANSEN: THAT'S ALL THIS IS. THEY  
19 BASICALLY COPIED IN WHOLE.

20 BUT EVEN MORE SO, THE FACT THAT AN  
21 INEQUITABLE CONDUCT CLAIM SURVIVES SUMMARY  
22 JUDGEMENT, THEY ARGUE IN THE BRIEF THAT ESSENTIALLY  
23 MEANT THAT YOUR HONOR HAD DECIDED EFFECTIVELY THAT  
24 WE WERE GOING TO LOSE.

25 BUT IF YOU LOOK AT THE EARLIER ORDERS,



1 AND I BELIEVE THERE WAS A PLAN IN JANUARY OF IN  
2 THIS YEAR TO HAVE THE BENCH TRIAL ON INEQUITABLE  
3 CONDUCT BECAUSE ST WANTED TO WIN.

4 THE COURT: I KNOW WHAT I THOUGHT OF THE  
5 *WALKER PROCESS* CLAIM.

6 MR. HANSEN: WE WILL LEAVE THAT OUT.

7 THE COURT: BUT THAT'S A SUBJECTIVE  
8 OPINION THAT HAS NOTHING TO DO WITH MAKING POLICY.

9 THE QUESTION IS, DO YOU BAR THESE  
10 CUSTOMER *WALKER PROCESS* CASES ALL TOGETHER UNLESS  
11 THERE'S BEEN AN ADJUDICATION OR IS THERE SOME OTHER  
12 LINE YOU CAN DRAW? AND THAT'S WHAT I'M TRYING TO  
13 FIGURE OUT.

14 MR. HANSEN: AND OUR POSITION IS, NOT  
15 EVEN SAYING THE DDAVP IS CORRECT, BUT THEY DO NOT  
16 CHANGE THE STANDING AS TO WHO CAN CHALLENGE A  
17 PATENT.

18 IT HAS NOTHING TO DO WITH WHETHER OR  
19 NOT -- YOU WOULD HAVE TO, IN ORDER TO RULE IN  
20 RITZ'S FAVOR YOU WOULD HAVE TO SAY THAT A --  
21 SOMEONE WHO DOESN'T HAVE STANDING TO DIRECTLY  
22 CHALLENGE THE PATENT, WHICH I DON'T THINK IS  
23 DISPUTED HERE, HAS STANDING TO DO SO INDIRECTLY BY  
24 A *WALKER PROCESS* CLAIM.

25 THE COURT: THEY ARE MAKING A *WALKER*

1        *PROCESS* CLAIM AND COUNSEL IS CITING LINES FROM THE  
2        CASES, THEY ARE NOT MAKING IT UP, BUT *WALKER*  
3        *PROCESS* IS BOTH A PATENT DOCTRINE AND AN ANTI-TRUST  
4        DOCTRINE.

5                        SO AS A PATENT DOCTRINE HIS CLIENT  
6        CLEARLY DOESN'T HAVE STANDING BECAUSE THIS IS NOT  
7        AN INFRINGEMENT CASE. BUT FROM AN ANTI-TRUST  
8        STANDPOINT THEY CAN SAY WE SUFFERED ANTI-TRUST  
9        INJURIES BECAUSE OF THE FRAUD ON THE PATENT  
10        DOCUMENTS.

11                      MR. HANSEN: YES.

12                      AND THESE ARE ALL THE ARGUMENTS THAT WERE  
13        RAISED IN DDAVP THAT SAYS YOU HAVE TO HAVE BOTH.  
14        WE ARE NOT GOING TO -- WHERE ARE YOU GOING TO DRAW  
15        THE LINE THEN? IF YOU TAKE IT WITH THE DENIAL OF  
16        SUMMARY JUDGEMENT, INEQUITABLE CONDUCT, RIGHT, AND  
17        *WALKER PROCESS* BOTH HAVE ISSUES OF INTENT.

18                      SO THESE ARE CLAIMS THAT AS A BASIC  
19        MATTER ARE NOT REALLY SUBJECTED TO SUMMARY  
20        JUDGEMENT IN THE FIRST PLACE, UNLESS THERE'S UN  
21        DISPUTED EVIDENCE --

22                      THE COURT: WELL, ALL I'M SAYING IS IF  
23        YOU HAVE, IF THERE IS A WINDOW FOR PEOPLE WHO ARE  
24        NOT COMPETITORS -- IN OTHER WORDS, IF YOU READ THE  
25        *WALKER PROCESS* CASE AS COVERING A LARGER UNIVERSE

1 OF POTENTIAL PLAINTIFFS THAN IN A TYPICAL PATENT  
2 CASE WHICH OBVIOUSLY IS A PROPOSITION THE PARTIES  
3 DON'T AGREE ABOUT, IF YOU MAKE THAT LEAP, THEN THE  
4 FACT THAT SOMETHING SURVIVES SUMMARY JUDGEMENT I  
5 THINK IT'S NOT UNREASONABLE TO THINK IT WOULD  
6 SURVIVE A 12(B)(6) MOTION.

7 IT MIGHT NOT SURVIVE SUMMARY JUDGEMENT IN  
8 THE CASE BROUGHT BY THE CONSUMER, BUT IN ORDER TO  
9 BE PLAUSIBLE ENOUGH TO SURVIVE SUMMARY JUDGEMENT I  
10 ASSUME IT'S PLAUSIBLE ENOUGH TO SURVIVE A 12(B)(6)  
11 MOTION.

12 BUT I THINK WHERE THE PARTIES DISAGREE,  
13 IF I'M HEARING THIS CORRECTLY, IS THE BASIC  
14 PROPOSITION: CAN A CUSTOMER ASSERT A  
15 *WALKER PROCESS* CLAIM EVER? YOU KNOW, AS LONG AS  
16 THE PATENT IS STILL VALID?

17 RIGHT?

18 MR. HANSEN: YES.

19 THE COURT: THAT'S WHAT YOU DISAGREE  
20 WITH?

21 MR. HANSEN: YES. AND WE ARE NOT ARGUING  
22 -- WE DIDN'T ARGUE THAT THE *WALKER PROCESS*  
23 ALLEGATIONS WERE DEFICIENT OF THE 12(B)(6).

24 THE COURT: RIGHT.

25 MR. HANSEN: I DON'T THINK THAT WAS

1 OUR --

2 THE COURT: THAT THEY DON'T HAVE  
3 STANDING.

4 MR. HANSEN: BECAUSE THEY ARE NOT A  
5 PROPER PARTY TO CHALLENGE THE PATENTS AND ALL THE  
6 DECISIONS IN THE BRIEFS TALK ABOUT OPENING THE  
7 FLOODGATES AND WHERE DO YOU STOP IT.

8 THE COURT: STRAIGHT UP POLICY --

9 MR. HANSEN: IT'S A CREEPING EXPANSION OF  
10 STANDING ARGUMENT WHERE YOU SAY IT SHOULDN'T BE  
11 EXPANDED AT ALL. ULTIMATELY --

12 THE COURT: OKAY. I GOT IT. THANK YOU.

13 THIS IS AN INTERESTING QUESTION.  
14 NORMALLY TRIAL COURTS DON'T QUITE DEAL WITH POLICY  
15 ISSUES AT THIS LEVEL.

16 YES, COUNSEL, VERY BRIEF RESPONSE.

17 MR. BERRY: I DRAW THE LINE WHERE IF THE  
18 *WALKER PROCESS* -- THE COMPETITOR CASE SURVIVES  
19 SUMMARY JUDGEMENT SO IT'S "PLAUSIBLE" UNDER TWOMBLY  
20 AND IQBAL AND THERE'S OTHER EXCLUSIONARY CONDUCT SO  
21 THAT YOU HAVE TO BE PARSING UNDER CONTINENTAL ORE,  
22 OUT A PATTERN OF SIX, THAT THAT PASSES THE  
23 12(B)(6).

24 THE COURT: WELL, BUT YOU ARE, I THINK  
25 THE THING THAT IS GOING TO GIVE ME A LOT OF

1 MATERIAL TO CHEW ON IS THAT YOU'RE IMPORTING SOME  
2 PATENT DOCTRINES INTO AN ANTI-TRUST CASE.

3 NOW MAYBE THAT'S FINE, MAYBE THAT'S  
4 EXACTLY WHAT *WALKER PROCESS* ALLOWS YOU TO DO, BUT  
5 YOU ARE TAKING SOMETHING WHICH WOULD ORDINARILY BE  
6 LITIGATED IN A PATENT CASE AND YOUR NOTIONS OF  
7 STANDING AND EVERYTHING ELSE ARE WITHIN THE PATENT  
8 FRAMEWORK, AND YOU ARE BRINGING IT INTO THE  
9 ANTI-TRUST WORLD.

10 MR. BERRY: I DISAGREE.

11 THE COURT: HOW IS THAT NOT THE CASE?  
12 *WALKER PROCESS* IS A DOCTRINE WHICH HAS TO DO WITH  
13 INEQUITABLE CONDUCT IN OBTAINING A PATENT. YOU ARE  
14 NECESSARILY BRINGING PATENT CONDUCT INTO THE CASE.

15 MR. BERRY: WITH RESPECT, IT'S CREATING  
16 -- IT'S SAYING THIS IS ILLEGAL MONOPOLIZATION BY  
17 CORRUPTION OF GOVERNMENTAL PROCESSES. IT'S *CLAYTON*  
18 *IV*, *SHERMAN ACT* SAYS THOSE INJURED CAN RECOVER,  
19 FULL STOP, ANTI-TRUST DOCTRINE. YOU DON'T GET THE  
20 PATENT DOCTRINE. *WALKER PROCESS* IS AN ANTI-TRUST  
21 CASE.

22 THE COURT: OKAY.

23 MR. BERRY: NOW LASTLY, EBAY. THE COURT  
24 IS VERY FAMILIAR WITH THAT. 597 U.S. THIS IS  
25 STRICTLY ANALOGOUS.

1 THE FEDERAL CIRCUIT WANTED TO PUT IN A  
2 LOT OF BELLS AND WHISTLES ON THE PERMANENT  
3 INJUNCTION AS APPLIED TO PATENTS. THE  
4 UNITED STATES SUPREME COURT SAID NO, JUSTICE  
5 THOMAS, NO, THERE'S ONLY ONE LAW OF PERMANENT  
6 INJUNCTION ACROSS ALL CAUSES OF ACTION IN THE  
7 UNITED STATES.

8 THERE'S ONLY ONE LAW OF ANTI-TRUST  
9 MONOPOLIZATION ENFORCEMENT ACROSS ALL CAUSES OF  
10 ACTION.

11 THE COURT: ALL RIGHT. THANK YOU.

12 THIS IS -- IT'S GOING TAKE A WHILE.  
13 PLEASE BEAR WITH ME, IT WILL BE ABOUT A MONTH OR  
14 TWO. I WANT TO REALLY DO A GOOD JOB ON THIS.

15 SO ANYTHING ELSE THAT WE NEED TO DO  
16 TODAY? I KNOW WE HAD A CASE MANAGEMENT CONFERENCE  
17 SCHEDULED AND I'M GOING TO SUGGEST THAT WE PUT IT  
18 OFF A LITTLE BIT UNLESS THERE'S SOME REASON TO DO  
19 IT TODAY.

20 MR. BERRY: NO, I THINK WE SHOULD COME  
21 BACK WHEN YOU ARE READY.

22 THE COURT: OKAY. ALL RIGHT.

23 MR. BERRY: HOPEFULLY.

24 THE COURT: NO, IT'S NOT GOING TO -- I'M  
25 GIVING MYSELF AN ADEQUATE AMOUNT OF TIME TO DO A

1 GOOD JOB ON THE RULING.

2 BUT LET'S SAY THE 11TH OF FEBRUARY, DOES  
3 THAT WORK FOR A CMC?

4 MR. BERRY: YES.

5 THE COURT: ALL RIGHT. THE 11TH OF  
6 FEBRUARY AT 10:30 FOR A CASE MANAGEMENT CONFERENCE.

7 MR. BERRY: THANK YOU, YOUR HONOR.

8 THE COURT: THANKS VERY MUCH.

9 MATTER SUBMITTED.

10 MS. DUFFY-SMITH: THANK YOU, YOUR HONOR.

11 (WHEREUPON, THE PROCEEDINGS IN THIS  
12 MATTER WERE CONCLUDED.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT  
REPORTER OF THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH  
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY  
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,  
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND  
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS  
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS  
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED  
TRANSCRIPTION TO THE BEST OF MY ABILITY.

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SUMMER A. FISHER, CSR, CRR  
CERTIFICATE NUMBER 13185