

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RITZ CAMERA & IMAGE, LLC,
Appellee,

v.

SANDISK CORPORATION,
Appellant.

On Appeal From the United States District Court
for the Northern District of California
(The Honorable Jeremy Fogel)

**BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE
COMMISSION AS AMICI CURIAE IN SUPPORT OF APPELLEE**

WILLARD K. TOM
General Counsel

JOSEPH F. WAYLAND
Acting Assistant Attorney General

JOHN F. DALY
Deputy General Counsel
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

CATHERINE G. O'SULLIVAN
KRISTEN C. LIMARZI
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., N.W.
Room 3224
Washington, D.C. 20530-0001
202-353-8629

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
ISSUE PRESENTED	1
STATEMENT.....	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. Direct Purchasers Have Antitrust Standing to Seek Overcharge Damages Caused by an Antitrust Violation Involving Enforcement of a Patent Procured by Fraud	9
II. No Additional Standing Requirements Apply to Plaintiffs Asserting <i>Walker Process</i> Claims	17
III. Direct Purchaser Standing to Assert a <i>Walker Process</i> Claim Should Not Require the Patent Be “Tarnished”	29
CONCLUSION	35
CERTIFICATE OF COMPLIANCE	36
CERTIFICATE OF SERVICE.....	37

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, LLP</i> , 504 F.3d 1262 (Fed. Cir. 2007).....	19
<i>Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.</i> , 190 F.3d 1051 (9th Cir. 1999).....	10, 11, 12
<i>Andrx Pharm. v. Biovail Corp. Int’l</i> , 256 F.3d 799 (D.C. Cir. 2001).....	13
<i>Asahi Glass Co. v. Pentech Pharm., Inc.</i> , 289 F. Supp. 2d 986 (N.D. Ill. 2003).....	28
<i>Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters</i> , 459 U.S. 519 (1983).....	<i>passim</i>
<i>Ass’n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.</i> , 241 F.3d 696 (9th Cir. 2001).....	14, 15
<i>Atl. Richfield Co. v. USA Petroleum Co.</i> , 495 U.S. 328 (1990)	12
<i>Aurora Enters., Inc. v. NBC</i> , 688 F.2d 689 (9th Cir. 1982).....	17
<i>Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.</i> , 429 U.S. 477 (1977).....	12
<i>Carrot Components Corp. v. Thomas & Betts Corp.</i> , 1986 U.S. Dist. LEXIS 29723 (D.N.J. 1986).....	25
<i>Chattanooga Foundry & Pipe Works v. City of Atlanta</i> , 203 U.S. 390 (1906).....	10
<i>In re Ciprofloxacin Hydrochloride Antitrust Litig.</i> , 363 F. Supp. 2d 514 (E.D.N.Y. 2005)	28

<i>In re Ciprofloxacin Hydrochloride Antitrust Litig.</i> , 544 F.3d 1323 (Fed. Cir. 2008)	24
<i>In re DDAVP Direct Purchaser Antitrust Litig.</i> , 585 F.3d 677 (2d Cir. 2009)	<i>passim</i>
<i>Dippin’ Dots v. Mosey</i> , 476 F.3d 1337 (Fed. Cir. 2007)	34
<i>Glen Holly Entm’t Inc. v. Tektronix Inc.</i> , 352 F.3d 367 (9th Cir. 2003)	9
<i>Hanover Shoe v. United Shoe Mach. Corp.</i> , 392 U.S. 481 (1968)	13, 16
<i>Hydril Co. LP v. Grant Prideco LP</i> , 474 F.3d 1344 (Fed. Cir. 2007)	9, 23, 24, 26
<i>Illinois Brick Co. v. Illinois</i> , 431 U.S. 720 (1977)	14, 16
<i>Indium Corp. of Am. v. Semi-Alloys, Inc.</i> , 566 F. Supp. 1344 (N.D.N.Y. 1983)	25
<i>Indium Corp. of Am. v. Semi-Alloys, Inc.</i> , 591 F. Supp. 608 (N.D.N.Y. 1984)	26
<i>J. Truett Payne Co., Inc. v. Chrysler Motors Corp.</i> , 451 U.S. 557 (1981)	17
<i>In re K-Dur Antitrust Litig.</i> , No. 01-1652, 2007 WL 5297755 (D.N.J. Mar. 1, 2007)	28
<i>Kaiser Found. v. Abbott Labs.</i> , No. CV 02-2443-JFW, 2009 WL 3877513 (C.D. Cal. Oct. 8, 2009)	26, 27
<i>Kroger Co. v. Sanofi-Aventis</i> , 701 F. Supp. 2d 938 (S.D. Ohio 2010)	27, 31
<i>Lear, Inc. v. Adkins</i> , 395 U.S. 653 (1969)	32

<i>Loctite Corp. v. Ultraseal Ltd.</i> , 781 F.2d 861 (Fed. Cir. 1985)	32
<i>MedImmune, Inc. v. Genentech, Inc.</i> , 427 F.3d 958 (Fed. Cir. 2005)	34
<i>MedImmune, Inc. v. Genentech, Inc.</i> , 549 U.S. 118 (2007)	21, 34
<i>Microchip Tech., Inc. v. The Chamberlain Grp.</i> , 441 F.3d 936 (Fed. Cir. 2006)	23
<i>Molecular Diagnostics Labs. v. Hoffmann-La Roche Inc.</i> , 402 F. Supp. 2d 276 (D.D.C. 2005)	22, 34
<i>Nobelpharma AB v. Implant Innovations, Inc.</i> , 141 F.3d 1059 (Fed. Cir. 1998)	33
<i>Parklane Hosiery Co. v. Shore</i> , 439 U.S. 322 (1979)	30
<i>Pfizer, Inc. v. Gov't of India</i> , 434 U.S. 308 (1978)	34
<i>Pope Mfg. Co. v. Gormully</i> , 144 U.S. 224 (1892)	8
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330 (1979)	11, 15
<i>In re Remeron Antitrust Litig.</i> , 335 F. Supp. 2d 522 (D.N.J. 2004)	4, 25, 26
<i>Ritz Camera & Image, LLC v. SanDisk Corp.</i> , 772 F. Supp. 2d 1100 (N.D. Cal. 2011)	<i>passim</i>
<i>Sanner v. Bd. of Trade of Chicago</i> , 62 F.3d 918 (7th Cir. 1995)	14
<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83 (1998)	21

<i>Story Parchment Co. v. Paterson Parchment Paper Co.</i> , 282 U.S. 555 (1931).....	17
<i>Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.</i> , 375 F.3d 1341 (Fed. Cir. 2004), <i>rev'd</i> 546 U.S. 394 (2006).....	9, 22, 23
<i>Vinci v. Waste Mgmt., Inc.</i> , 80 F.3d 1372 (9th Cir. 1996).....	13
<i>Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.</i> , 382 U.S. 172 (1965).....	<i>passim</i>
<i>Zenith Radio Corp. v. Hazeltine Research, Inc.</i> , 395 U.S. 100 (1969).....	17

FEDERAL STATUTES AND RULES

15 U.S.C.:	
§ 2.....	2
§ 15.....	1, 10
§ 15(a)	9
28 U.S.C. § 2201.....	20
35 U.S.C. § 321.....	19
Federal Rule of Appellate Procedure 29(a)	1

MISCELLANEOUS

2A Phillip E. Areeda et al., <i>Antitrust Law</i> (3d ed. 2007).....	10
U.S. Const. art. III, § 2, cl. 1	21
13A Charles Alan Wright et al., <i>Federal Practice and Procedure</i> (3d ed. 2008)	21

STATEMENT OF INTEREST

The United States and the Federal Trade Commission enforce the federal antitrust laws and have a strong interest in the substantive and procedural aspects of those laws. This interest includes the proper interpretation of Section 4 of the Clayton Act, 15 U.S.C. § 15, which authorizes civil damages claims by “any person who shall be injured in his business or property” by an antitrust violation. This brief addresses the circumstances in which Section 4 authorizes direct purchasers to recover overcharge damages resulting from a monopoly obtained and maintained through enforcement of a fraudulently procured patent. It is filed pursuant to Federal Rule of Appellate Procedure 29(a).

ISSUE PRESENTED

Whether direct purchasers have standing under the antitrust laws to recover damages for overcharges resulting from a monopoly obtained or maintained through the enforcement of patents procured by fraud.

STATEMENT

1. Plaintiff Ritz Camera & Image, LLC, and others in this putative antitrust class action purchased flash memory products directly from the defendant SanDisk Corporation. First Am. Compl.

¶¶ 16, 19 (FAC). Ritz claims that SanDisk monopolized the market for NAND flash memory products in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, enabling SanDisk to charge higher prices for NAND flash memory. FAC ¶¶ 131-35. Ritz alleges that SanDisk’s founder tortiously converted flash memory technology from his former employer and obtained the patents at issue by intentionally failing to disclose invalidating prior art and making affirmative misrepresentations to the PTO. *Id.* ¶¶ 35-73, 93-102, 132. Ritz also alleges that SanDisk brought infringement actions based on these invalid patents “so as to exclude competition.” *Id.* ¶ 132. Ritz relies on *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), in which the Supreme Court held that “the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present,” *id.* at 174.

The complaint alleges SanDisk’s actions harmed competition and enabled SanDisk to sell flash memory products “at above-competitive, monopoly prices to members of the proposed Class in the relevant market.” FAC ¶ 122. Ritz claims that it and the putative class

members were injured in their business and property by these overcharges, and it seeks treble damages for these injuries. *Id.* ¶¶ 134-35.¹

2. SanDisk moved to dismiss this monopolization claim for failure to state a claim, arguing not only that Ritz lacks antitrust standing and that the complaint fails to allege a relevant antitrust market, but also that *Walker Process* claims are “with few exceptions, brought as counterclaims in patent infringement actions,” and that direct purchasers like Ritz lack standing to bring such claims. Defs.’ Mot. to Dismiss 17-18. SanDisk acknowledged that the Second Circuit crafted a “narrow exception” for claims based on patents already held “unenforceable due to inequitable conduct,” *id.* at 19 (citing *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 691-92 (2d Cir. 2009)), but because the patents in this case had not been held unenforceable, SanDisk reasoned, Ritz lacked standing, *id.* at 19-20.

¹ Ritz also claimed that SanDisk and its founder, Eliyahou Harari, conspired to monopolize the market for flash memory products, but the district court dismissed that claim. *Ritz Camera & Image, LLC v. SanDisk Corp.*, 772 F. Supp. 2d 1100, 1110-11 (N.D. Cal. 2011). Ritz has not appealed the dismissal of the conspiracy count. The only claim against Harari was the now-dismissed conspiracy charge, and thus, SanDisk is the sole remaining defendant.

3. The district court denied the motion to dismiss the monopolization claim. *Ritz Camera & Image, LLC v. SanDisk Corp.*, 772 F. Supp. 2d 1100 (N.D. Cal. 2011). The court acknowledged that *Walker Process* claims typically are brought by competitors as counterclaims in patent infringement actions, *id.* at 1103, but noted “[t]he Supreme Court’s decision in *Walker Process* places no limitation on the class of plaintiffs eligible to bring a *Walker Process* claim,” *id.* at 1105 (citing *Walker Process*, 382 U.S. at 176), and only one court has held expressly that direct purchasers lack standing to sue, *id.* (citing *In re Remeron Antitrust Litig.*, 335 F. Supp. 2d 522, 529 (D.N.J. 2004)).

The district court observed that the Second Circuit in *DDAVP* “declined to decide ‘whether purchaser plaintiffs *per se* have standing to raise *Walker Process* claims’ . . . deciding only that it is acceptable for consumers to bring a *Walker Process* claim when the relevant patent already has been tarnished by a finding of inequitable conduct.” *Id.* In the court’s view, the patents at issue in this case had been similarly “tarnished” by a determination in a separate proceeding that there were triable issues of fact as to whether the patents were procured by fraud. *Id.* Specifically, SanDisk had filed suit against its largest competitor,

STMicroelectronics, Inc. (STM), alleging infringement of the same patents at issue here. STM brought a *Walker Process* counterclaim “identical to the claim asserted by Ritz in this case,” and on a motion for summary judgment, the district court found evidence that the patent was obtained by fraud sufficient to allow STM’s counterclaim to proceed to trial. *Id.* at 1105 n.9. The district court concluded here that, “because of the heightened evidentiary requirements necessary for a showing of fraud, few *Walker Process* claims survive summary judgment” and those that do “raise at least some question as to the validity of the subject patent.” *Id.* at 1105.

The district court also rejected SanDisk’s claim that granting Ritz standing would result in “an avalanche of patent challenges.” *Id.* To the contrary, the court observed that “viable *Walker Process* claims are rare,” and it is “unlikely that many direct purchasers will be in the same position as Ritz is here.” *Id.* Thus, the district court concluded that Ritz has standing to assert its *Walker Process* claim.

4. On September 7, 2011, the district court granted SanDisk’s motion to certify the ruling on the motion to dismiss for interlocutory

appeal. On January 13, 2012, this Court granted SanDisk's petition for permission to appeal.

SUMMARY OF ARGUMENT

For over a century, courts have held that direct purchasers have standing to recover overcharges paid to unlawful monopolists. There is no sound reason to depart from that well-settled principle when the anticompetitive conduct creating or maintaining the monopoly is the enforcement of a patent obtained through intentional fraud on the PTO. As the Supreme Court held in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), those injured by “monopolistic action” taken under fraudulently procured patents can sue for damages under the antitrust laws, *id.* at 175-76. Emphasizing that such a claim arises “under the Clayton Act, not the patent laws,” the Court expressly rejected the argument that because a private party cannot file suit to cancel or annul a patent, it may not pursue an antitrust claim requiring a court to determine the patent's validity. *Id.* at 176.

SanDisk nevertheless contends that, in addition to meeting the standards for antitrust standing, a plaintiff asserting a *Walker Process*

claim also must satisfy the requirements imposed on a plaintiff seeking a declaratory judgment of patent invalidity. App. Br. 20-21, 29. But neither *Walker Process* nor any court of appeals decision justifies such a rule, which is inconsistent with the holding of the only appellate decision to have considered the issue: *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677 (2d Cir. 2009). A plaintiff seeking a declaratory judgment of patent invalidity ordinarily must demonstrate that it has been threatened with an infringement suit in order to meet the constitutional requirement of a “case or controversy.” But a properly alleged *Walker Process* claim for damages under the antitrust laws creates a justiciable controversy whether or not there is a threat of patent enforcement against the plaintiff.

Well-settled principles of antitrust standing support granting plaintiff standing here. Ritz has alleged precisely the type of injury the antitrust laws were intended to redress. As a direct purchaser, Ritz’s injury is entirely distinct from that of an excluded competitor, and its damages—the overcharges it paid for the monopolized product—do not overlap the lost profits that an excluded competitor might seek.

The district court declined to decide whether direct purchasers generally have standing to bring *Walker Process* claims, holding only that Ritz has standing because its claim involves patents “tarnished” by a determination in a separate proceeding that there were “triable issues of fact as to whether SanDisk procured the patents by fraud.” *Ritz Camera & Image, LLC v. SanDisk Corp.*, 772 F. Supp. 2d 1100, 1105 (N.D. Cal. 2011). This Court should not adopt a rule making direct purchaser standing turn on a separate proceeding over which the direct purchaser has no control. Such a rule could encourage holders of fraudulently procured patents to settle *Walker Process* claims made by excluded competitors, allowing the excluded competitors to share in any monopoly profits and the defendant to deny direct purchasers their right to recover damages under the Clayton Act. Moreover, limiting the class of direct purchasers with standing to bring a *Walker Process* claim is not necessary to reconcile the goals of antitrust and patent law. Rather, enforcement of a patent obtained through intentional fraud contravenes the pro-competition and pro-innovation policies of both statutory schemes. *Cf. Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 234 (1892) (“It is as important to the public that competition should not be

repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly.”).

ARGUMENT

I. Direct Purchasers Have Antitrust Standing to Seek Overcharge Damages Caused by an Antitrust Violation Involving Enforcement of a Patent Procured by Fraud

1. Section 4 of the Clayton Act provides that “*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor” and recover damages. 15 U.S.C. § 15(a) (emphasis added). “Consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury.” *Glen Holly Entm’t Inc. v. Tektronix Inc.*, 352 F.3d 367, 372 (9th Cir. 2003) (internal quotation marks omitted).² Because “protecting consumers from monopoly prices is the central concern of antitrust, . . . consumer standing to recover for an overcharge

² Questions of antitrust standing, like other elements of antitrust claims that are not unique to patent law, proceed under the law of the regional circuit. *See Hydril Co. LP v. Grant Prideco LP*, 474 F.3d 1344, 1350-51 (Fed. Cir. 2007); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1349, 1355-58, 1362 (Fed. Cir. 2004), *rev’d on other grounds*, 546 U.S. 394 (2006).

paid directly to an illegal cartel or monopoly is seldom doubted.” 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 345, at 156 (3d ed. 2007).

Direct purchaser standing in antitrust damages cases was established over a century ago. In *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), the Supreme Court explained that the city of Atlanta had standing to sue for treble damages under the predecessor to the current Section 4 because it was injured when it purchased price-fixed water pipe from the defendant, *id.* at 395-96. More recently, the Supreme Court explained that the standing inquiry should focus on the nature of the plaintiff’s injury in light of the Sherman Act’s purpose of “assur[ing] customers the benefits of price competition.” *Associated Gen. Contractors of Cal., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519, 538 (1983) (*AGC*).

Courts determining standing under Section 4 generally consider five factors: (1) whether the alleged injury is the type the antitrust laws were intended to redress, (2) the directness of the injury, (3) the speculative nature of the harm, (4) the risk of duplicative recovery, and (5) the complexity of apportioning damages. *See AGC*, 459 U.S. at 535; *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1054 (9th

Cir. 1999). Although a plaintiff need not satisfy each of these factors to establish standing, all of them weigh in favor of Ritz's standing here.

Ritz has alleged that it paid higher prices because the defendant achieved a monopoly through the enforcement of a fraudulently obtained patent. FAC ¶¶ 122, 134-35. Monopoly overcharges are precisely the type of injury the antitrust laws were intended to redress. *AGC*, 459 U.S. at 530 (“Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets.”); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979) (“Here, where petitioner alleges a wrongful deprivation of her money because the price [she paid] was artificially inflated by reason of respondents’ anticompetitive conduct, she has alleged an injury in her ‘property’ under § 4.”).

2. SanDisk argues that Ritz lacks standing because the injury to SanDisk’s competitors is “more direct” than the injury to Ritz. App. Br. 36-38. But Section 4 does not limit standing to one type of plaintiff on the basis, for example, that it is the most efficient enforcer of the antitrust laws. Indeed, the Supreme Court’s admonition in *AGC* to

guard against duplicative recovery and complex apportionment of damages makes no sense if only one type of plaintiff has standing to sue for their antitrust injuries. Nor are excluded competitors favored over direct purchasers as antitrust plaintiffs. To the contrary, injury to competitors sometimes arises not from the elimination of competition but from too much competition, and in such circumstances, competitors have been denied standing. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Moreover, competitors of a monopolist that are excluded by enforcement of a fraudulently procured patent may have strong incentives to settle their claims on terms that benefit themselves but do not open the market up to competition. *See infra* pp. 31-32. Customers' interests, on the other hand, are more likely to align with the purposes of the antitrust laws, which are "to preserve competition for the benefit of consumers." *Am. Ad Mgmt.*, 190 F.3d at 1055.

3. Ritz's injury is not derived from or duplicative of the injury to SanDisk's competitors, as SanDisk contends. *See App. Br.* 36-38. A monopolist's successful exclusionary conduct has two material consequences—it deprives the excluded competitors of profits on sales

they would have made, and it facilitates monopoly overcharges to customers. These two injuries are related only in that they are both caused by the same anticompetitive conduct. The injury to customers is not derivative of—that is, it does not flow from—the injury to competitors. *See Andrx Pharm. v. Biovail Corp. Int'l*, 256 F.3d 799, 816 (D.C. Cir. 2001) (distinguishing monopoly’s injury to competitors and consumers). Indeed, because all unlawful monopolies are obtained or maintained through the exclusion of competitors, SanDisk’s argument would deny antitrust standing to all direct purchasers seeking to recover monopoly overcharges—a result that cannot be reconciled with established law. *Cf. Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) (rejecting “pass on” defense to a direct purchaser’s claim for damages reflecting a monopoly overcharge).

Although courts have denied standing to plaintiffs whose injuries are indirect or remote, the injury suffered by direct purchasers is neither. Courts deny standing to an antitrust victim’s shareholders whose holdings are diminished in value because of anticompetitive conduct. *See, e.g., Vinci v. Waste Mgmt., Inc.*, 80 F.3d 1372, 1375 (9th Cir. 1996). Similarly, indirect purchasers who seek damages for that

portion of the monopoly overcharge allegedly passed on to them by direct purchasers are generally denied standing. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The plaintiffs in these cases suffered injury only because some of the harm to another victim was passed on to them: some portion of the lost profits was passed on to the shareholder in the form of diminished share value or smaller dividends, while some portion of the overcharge was passed on to the indirect purchaser in the form of higher downstream prices.

In contrast, Ritz's alleged harm is not "the secondary consequences arising from an injury to a third party," *Sanner v. Bd. of Trade of Chicago*, 62 F.3d 918, 929 (7th Cir. 1995), but a direct injury from paying inflated prices to an allegedly unlawful monopolist. No precedent holds such an injury is too remote for recovery under the antitrust laws.³ Indeed, the Clayton Act's primary purpose was to

³ *Association of Washington Public Hospital Districts v. Philip Morris Inc.*, 241 F.3d 696 (9th Cir. 2001), on which SanDisk relies, illustrates the distinction between Ritz's alleged injury and injuries that are too remote to confer standing. In *Washington Public Hospitals*, the court denied standing to hospital districts seeking to recover damages from tobacco companies for the cost of treating patients for tobacco-related illnesses. The alleged injury was derivative of the

provide a remedy for customers “forced to pay excessive prices” because of anticompetitive conduct. *AGC*, 459 U.S. at 530; *see also Reiter*, 442 U.S. at 344.

Moreover, because excluded competitors and customers of an unlawful monopolist suffer entirely distinct injuries, granting standing to both presents no risk of duplicative recovery. A direct purchaser’s damages are the overcharges it paid for the monopolized product. These are measured by the difference between the monopoly price actually paid and the price it would have paid for the units purchased but for the defendant’s anticompetitive conduct. An excluded competitor’s damages, on the other hand, are the profits it would have earned on each unit it would have sold but for the unlawful conduct. Those lost profits are determined by the difference between the price that would have prevailed but for the defendant’s anticompetitive conduct and the would-be competitor’s per unit production costs. *See DDAVP*, 585 F.3d at 689.

injuries suffered by smokers because it was the smoker’s injury that caused the hospital districts to incur additional expenses. *Id.* at 703.

Because these damages are not duplicative, this case does not require any apportionment. SanDisk's reliance on *Illinois Brick* and *Hanover Shoe* is thus misplaced. See App. Br. 42. In *Hanover Shoe*, the Court rejected the defense that the plaintiff had passed on some portion of the alleged overcharge to subsequent purchasers, explaining that allowing such a defense would unduly complicate antitrust damage litigation. 392 U.S. at 491. *Illinois Brick* extended this reasoning to bar indirect purchasers from recovering damages for injuries suffered when direct purchasers passed on a portion of the overcharge. 431 U.S. at 735. The Court's concerns about the difficulty of apportioning overcharge damages between direct and indirect purchasers do not apply, however, when only direct purchasers claim overcharge damages. Excluded competitors' claims for lost profits would not be based on the overcharge to purchasers, but on a wholly separate and distinct injury.

4. Finally, SanDisk suggests that Ritz lacks standing because determining the amount of damages attributable to SanDisk's anticompetitive conduct is too difficult. App. Br. 42. Assessing antitrust damage awards is often difficult and imprecise because "[t]he vagaries of the marketplace usually deny [courts] sure knowledge of

what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981); see also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). But, as the Supreme Court long ago observed: "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts" just because the damages are uncertain and difficult to measure. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); see also *Aurora Enters., Inc. v. NBC*, 688 F.2d 689, 694 (9th Cir. 1982) ("Mere uncertainty as to the extent or amount of damage will not bar recovery under the antitrust laws."). The challenge in assessing damages in this direct purchaser action—estimating the price that would have prevailed but for SanDisk's anticompetitive conduct—is not unusual in antitrust cases, nor is it a valid reason to deny direct purchasers standing to recover for overcharges.

II. No Additional Standing Requirements Apply to Plaintiffs Asserting *Walker Process* Claims

The Supreme Court held in *Walker Process* that "the enforcement of a patent procured by fraud on the Patent Office may be violative of

§ 2 of the Sherman Act provided the other elements necessary to a § 2 case are present.” 382 U.S. at 174. SanDisk nevertheless urges this Court to recognize an exception to established principles of antitrust standing in *Walker Process* cases—one that would bar direct purchasers from recovering damages for overcharges attributable to the antitrust violation. Private parties may not sue under patent law to cancel or annul a patent, SanDisk notes, and ordinarily they may bring declaratory judgment actions only if they face a threat of patent enforcement. In SanDisk’s view, it follows that only competitors facing a threat of patent enforcement have standing to bring an antitrust claim involving enforcement of a fraudulently procured patent. But this argument finds no support in the reasoning of *Walker Process* or the decisions of any appellate court, and it is inconsistent with the holding of the only appellate court to consider the issue: *DDAVP*, 585 F.3d 677.

1. In *Walker Process*, the Court expressly considered and rejected the argument that private parties should not be permitted to challenge the enforcement of a fraudulently procured patent under the antitrust laws because only the United States may sue to cancel or annul a patent. *Walker Process*, 382 U.S. at 175-77. The Court’s reasoning

applies equally to SanDisk’s argument that direct purchasers should be barred from pursuing *Walker Process* claims.

The *Walker Process* Court noted that the prohibition on private suits to cancel or annul a patent⁴ does not bar private parties from litigating the validity of the patent in other contexts, for example, in a patent infringement suit. *Id.* at 176. Allowing private plaintiffs injured by the enforcement of fraudulently procured patents to seek damages under the antitrust laws “accords with these long-recognized procedures” that allow courts to determine a patent’s validity when that is a disputed issue in a justiciable case.⁵ *Id.* at 176-77.

⁴ Although private parties may not sue to cancel or annul a patent, under a recent amendment to the patent law they may petition the PTO to cancel one or more claims of an issued patent on various grounds of invalidity. 35 U.S.C. § 321.

⁵ Patent validity may be an issue in other lawsuits as well. For example, a legal malpractice suit alleging errors in patent prosecution may raise a question of patent validity. *Cf. Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, LLP*, 504 F.3d 1262, 1270 (Fed. Cir. 2007) (making out a case of malpractice by patent lawyers required the plaintiff to show that it would have prevailed on its infringement claim, including overcoming a claim of invalidity). A ruling that the patent is invalid may have significant collateral consequences for the patent holder if it is a party to the suit, but that does not convert the suit into an action to cancel or annul the patent, nor limit the type of plaintiff that can bring such a malpractice action.

The Court emphasized that a monopolization claim arises “under the Clayton Act, not the patent laws.” *Id.* at 175-76. “While one of [the antitrust action’s] elements is the fraudulent procurement of a patent, the action does not directly seek the patent’s annulment.” *Id.* at 176. And the interest in protecting patentees from vexatious challenges to their patents is not a sufficient reason “to frustrate the assertion of rights conferred by the antitrust laws.” *Id.* Antitrust actions challenging the enforcement of fraudulently procured patents, the Court declared, promote the public interest “in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope.” *Id.* at 177 (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945)).

2. Nor is there merit to SanDisk’s argument that plaintiffs lack standing to bring *Walker Process* antitrust claims unless they have standing to seek a declaration of patent invalidity under the Declaratory Judgment Act, 28 U.S.C. § 2201. *See* App. Br. 20-21, 29. The requirement that a party seeking a declaratory judgment of patent invalidity be affected by the allegedly invalid patent—ordinarily

through a threat of enforcement or the payment of fees under protest—is grounded in the constitutional requirement of a “case or controversy,” U.S. Const. art. III, § 2, cl. 1; see *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126, 130-31 (2007). But the plaintiff in this case has alleged a concrete, particularized, actual injury caused by the defendant’s conduct and redressable by an award of damages. FAC ¶¶ 13, 16, 134-35. Thus, there is no doubt of its Article III standing and no reason to invoke the requirements for relief under the Declaratory Judgment Act. Cf. 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.6, at 474 (3d ed. 2008) (“Ordinarily there is no question as to the [constitutional] standing of a plaintiff who claims a personal right to a damages remedy” because the “[r]emedial benefit is apparent, and we are accustomed to thinking of injury and causation as part of the substantive and remedial calculus.”).

If there is an issue of plaintiff’s standing, it is of antitrust standing, which is “*statutory* standing” and “has nothing to do with whether there is case or controversy under Article III.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 97 (1998); see also *AGC*, 459 U.S. at 535 n.31. The harm alleged in a *Walker Process* case is not the

potential for enforcement of the fraudulently procured patent against the plaintiff itself, but the use of that patent to establish a monopoly. *Walker Process*, 382 U.S. at 176; *Molecular Diagnostics Labs. v. Hoffmann-La Roche Inc.*, 402 F. Supp. 2d 276, 280 (D.D.C. 2005). And purchasers who pay monopoly prices for a patented product suffer an injury that does not depend upon the anticipation of an infringement suit. Thus, there is no reason to apply antitrust standing rules differently when the monopoly is obtained by enforcing a fraudulently procured patent than when the monopoly is obtained by any other exclusionary conduct. *Id.* at 281.

Walker Process plaintiffs must prove, as elements of the monopolization claim, that the patent holder has enforced or threatened to enforce fraudulently obtained patents and that these actions enabled it to obtain or maintain a monopoly. And, as SanDisk notes, App. Br. 29, this Court has found that the level of enforcement that provides the necessary controversy for an action seeking a declaratory judgment of patent invalidity is the same “minimum level of ‘enforcement’ necessary to expose the patentee to a *Walker Process* claim for attempted monopolization.” *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375

F.3d 1341, 1358 (Fed. Cir. 2004), *rev'd on other grounds*, 546 U.S. 394 (2006). But nothing in *Walker Process* or this Court's precedents indicates that the plaintiff's antitrust standing turns on whether it is the object of that enforcement action.

Indeed, this Court has previously recognized that “a valid *Walker Process* claim may be based upon enforcement activity directed against the plaintiff's customers.” *Hydril Co. LP v. Grant Prideco LP*, 474 F.3d 1344, 1350 (Fed. Cir. 2007). The plaintiff in *Hydril* was not itself threatened with enforcement, but the Court concluded that the defendant's enforcement of the fraudulently obtained patent against plaintiff's customers was a sufficient basis for the *Walker Process* claim. *Id.* Although the Court had previously held in *Microchip Technology, Inc. v. The Chamberlain Group*, 441 F.3d 936 (Fed. Cir. 2006), that a district court lacked jurisdiction under the Declaratory Judgment Act because “the threats of enforcement litigation directed against the patentee's customers failed to satisfy [this Court's] test for declaratory judgment jurisdiction,” the Court in *Hydril* “decline[d] to extend that ruling to invalidate a *Walker Process* claim alleging threats of infringement litigation directed against a supplier's customers by the

holder of a patent allegedly procured by fraud on the Patent Office.”

Hydril, 474 F.3d at 1350.⁶ Noting that the plaintiff in *Hydril* had alleged “the kind of economic coercion that the antitrust laws are intended to prevent,” *id.*, the Court apparently found no need to impose the requirements of a declaratory judgment action as well.

3. Decisions from other circuits provide no basis to accept SanDisk’s argument that only plaintiffs with standing to challenge a patent’s validity under the patent laws have standing to bring a *Walker Process* claim. In the only appellate decision on the issue, the Second Circuit held that direct purchasers had antitrust standing to bring a *Walker Process* claim even though they could not challenge the patent’s validity under the patent laws, although the court’s holding was limited to circumstances in which the patent had already been held

⁶ Similarly, in *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 544 F.3d 1323 (Fed. Cir. 2008), indirect purchasers of the drug Cipro asserted a *Walker Process* type claim under state antitrust law. The district court had dismissed the claim as preempted by federal patent law, *id.* at 1340, but on appeal, this Court determined that it need not decide whether the claim was preempted because the plaintiffs had failed to prove the defendant obtained the patent through fraud, *id.* at 1341. Notably, the Court did not affirm the dismissal based on lack of standing, even though, as indirect purchasers of the drug, plaintiffs were not threatened with an infringement action and thus, likely could not have sought a declaratory judgment of the patent’s invalidity.

unenforceable due to inequitable conduct. *DDAVP*, 585 F.3d at 690-92. SanDisk relies on several district court cases as authority for imposing special standing requirements on plaintiffs asserting *Walker Process* claims (App. Br. 23-24 & n.3), but only one of those decisions is on point, and none offers persuasive support for SanDisk's argument.

The district court in *In re Remeron Antitrust Litigation*, 335 F. Supp. 2d 522 (D.N.J. 2004), concluded that only potential or actual competitors threatened with patent infringement suits have standing to bring *Walker Process* claim, *id.* at 529. That conclusion, however, is based on a misreading of two cases involving actual and potential competitors that failed to allege they were excluded from the market by the defendant's unlawful conduct. *Id.* (citing *Carrot Components Corp. v. Thomas & Betts Corp.*, 1986 U.S. Dist. LEXIS 29723 (D.N.J. 1986); *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 566 F. Supp. 1344, 1352-53 (N.D.N.Y. 1983)). *Carrot Components* and *Indium* merely stand for the proposition that plaintiffs asserting *Walker Process* damage claims, like all other antitrust damages plaintiffs, must demonstrate that they

suffered injury caused by the defendant's conduct.⁷ They provide no support for the *Remeron* court's conclusion that only plaintiffs against whom the fraudulently obtained patent has been enforced have standing to bring a *Walker Process* claim. *Cf. Hydril*, 474 F.3d at 1350.

Two other district court decisions, cited by SanDisk, denied direct purchasers standing, but for reasons that do not apply here. In *Kaiser Foundation v. Abbott Laboratories*, No. CV 02-2443-JFW, 2009 WL 3877513 (C.D. Cal. Oct. 8, 2009), direct purchasers of a branded drug alleged they would be forced to pay higher prices because of the enforcement of fraudulently obtained patents against would-be competitors seeking approval to market a generic version of the drug. The court denied standing, explaining that “[b]ecause there is no infringing product yet on the market and the act of infringement and the specified consequences are artificial, it would be impossible for Plaintiff to suffer the sort of ‘direct’ injury necessary for antitrust standing.” *Id.* at *4. The *Kaiser* court acknowledged that its reasoning did not apply in cases, as here, where the allegedly infringing product

⁷ In *Indium Corp. of America v. Semi-Alloys, Inc.*, 591 F. Supp. 608 (N.D.N.Y. 1984), the court found plaintiff's amended complaint alleged a sufficient causal link.

already exists. *Id.* In any event, the court was wrong to suggest that such plaintiffs could never suffer the requisite direct injury: the threat of an infringement action could prevent generic entry, thereby enabling the branded manufacturer to maintain a monopoly and charge its customers monopoly prices. *See DDAVP*, 585 F.3d 677 (granting direct purchaser standing where patent holder’s infringement suit prevented generic entry).

In *Kroger Co. v. Sanofi-Aventis*, 701 F. Supp. 2d 938 (S.D. Ohio 2010), a district court denied a direct purchaser standing to assert a *Walker Process* claim, stressing that, unlike here, the patent at issue in *Kroger* had been declared “valid and enforceable” in a separate proceeding presenting “almost identical” claims. *Id.* at 962-63. Not only is *Kroger* distinguishable on that basis, but the court’s conclusion that standing in *Walker Process* cases should be limited to plaintiffs that can “directly challenge a patent’s validity” (*id.* at 960) runs contrary to the Supreme Court’s reminder that *Walker Process* claims are brought “under the Clayton Act, not the patent laws,” *Walker Process*, 382 U.S. at 176.

Other cases on which SanDisk relies are simply irrelevant. In *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986 (N.D. Ill. 2003), the court found that a drug ingredient supplier lacked standing, following the “general rule [] that suppliers do not have ‘standing’ . . . to complain about a violation of the antitrust laws at the customer level,” *id.* at 990, but said nothing about whether direct purchasers—who traditionally have antitrust standing—can assert a *Walker Process* claim. See also *In re K-Dur Antitrust Litig.*, No. 01-1652, 2007 WL 5297755, *19 (D.N.J. Mar. 1, 2007) (emphasizing the difficulty indirect purchasers asserting *Walker Process* claims would have in satisfying the ordinary requirements of antitrust standing and contrasting them with more direct victims like competitors and direct purchasers).⁸

⁸ SanDisk quotes *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 363 F. Supp. 2d 514 (E.D.N.Y. 2005), for the proposition that “non-infringing consumers of patented products who may feel that they are being charged supracompetitive prices by the patentee have no cause of action to invalidate the patent,” App. Br. at 24 n.3 (quoting *Cipro*, 363 F. Supp. 2d at 541). But the court, at that point, was not addressing *Walker Process* claims, but the desirability of granting consumers a cause of action to seek patent invalidation.

SanDisk suggests that Ritz is seeking to evade established standing rules by “donning the cloak of a Clayton Act monopolization claim.” App. Br. 23 (quoting *Remeron*, 335 F. Supp. 2d at 529). But, as the Supreme Court emphasized, a suit under *Walker Process* is a monopolization claim authorized by the Clayton Act. Ordinary antitrust standing rules should govern.

III. Direct Purchaser Standing to Assert a *Walker Process* Claim Should Not Require the Patent Be “Tarnished”

Neither the district court in this case, nor the Second Circuit in *DDAVP*, decided whether direct purchasers generally have standing to bring *Walker Process* damages claims. Rather, each court decided only the case before it and did not rule on other fact patterns. In *DDAVP*, the court found that the direct purchaser plaintiffs had standing to pursue a *Walker Process* claim involving patents previously held unenforceable in a separate proceeding. *DDAVP*, 585 F.3d at 691-92. And in this case, the district court found that Ritz has standing to pursue a *Walker Process* claim involving patents that were “tarnished” by a determination in a separate proceeding that there were “triable issues of fact as to whether SanDisk procured the patents by fraud.” *Ritz*, 772 F. Supp. 2d at 1105.

Although the district court’s and Second Circuit’s limited holdings sufficed to grant standing to the direct purchasers in the cases before them, a continued focus on whether a patent has been tarnished in other proceedings could significantly distort the development of the law and undermine the goal of both antitrust and patent law to encourage free competition in the use of ideas in the public domain. Accordingly, we urge this Court to hold that direct purchasers have standing to bring *Walker Process* antitrust damage claims without regard to whether the patent has been tarnished in another proceeding.

1. Limiting standing in *Walker Process* cases to direct purchasers whose claims rest on so-called tarnished patents would create an odd regime in which a plaintiff’s standing depends upon claims, counterclaims, or defenses raised by separate parties in a separate proceeding. *Cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (“It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an

opportunity to be heard.”).⁹ Direct purchasers who pay monopoly overcharges suffer an injury separate and distinct from that of excluded competitors. Such direct purchasers do not lose the right to redress that injury simply because an excluded competitor fails to press its own claim.

Moreover, such a restriction on direct purchaser standing may prompt a patentee to settle competitors’ *Walker Process* claims in order to bar similar claims by direct purchasers. In certain circumstances, it may be mutually profitable for the holder of a fraudulently obtained patent to settle *Walker Process* claims brought by competitors on terms that permit the patent holder and the competitor to share in any monopoly profits that the settlement may preserve. Limiting standing to direct purchasers that challenge previously tarnished patents may increase the patent holder’s incentive to enter into such a settlement because, by doing so early in the litigation—that is, before the patent is “tarnished” by a finding that it was procured through fraud or even a finding that there are triable issues of fact on that score—the patent

⁹ For the same reason, *Kroger, supra* p. 27, erred in stating that a decision holding a patent valid and enforceable in a separate litigation robs non-parties to that litigation of standing. 701 F. Supp. 2d at 963.

holder can also foreclose any *Walker Process* claims by direct purchasers.

In this case, SanDisk's competitor, STM, settled its *Walker Process* counterclaim against SanDisk on undisclosed terms. If such a settlement can be used to prevent direct purchasers from bringing an antitrust claim, the injury suffered by direct purchasers may never be redressed.

2. SanDisk argues that allowing antitrust suits by direct purchasers will lead to increased litigation against patent holders and thereby diminish the patent system's incentive for innovation. App. Br. 30-31. But litigation of *Walker Process* claims does not threaten "the honest patentee who brings an enforcement action." *Id.* at 31 (quoting *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 876 (Fed. Cir. 1985)). And litigation to enforce patents obtained by fraud undermines the "important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain." *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969). Indeed, allowing antitrust suits "to recover damages for Sherman Act monopolization knowingly practiced under the guise of a patent procured by deliberate fraud, cannot well be

thought to impinge upon the policy of the patent laws to encourage inventions and their disclosure.” *Walker Process*, 382 U.S. at 179-80 (Harlan, J., concurring).

The district court suggested that limiting direct purchaser standing to claims involving previously tarnished patents would help to avoid frivolous lawsuits. *Ritz*, 772 F. Supp. 2d at 1105 (finding that the summary judgment decision ensured there was “at least some question as to the validity of the subject patent”). But other limitations on *Walker Process* claims already protect patent holders from vexatious challenges.

As the Supreme Court emphasized, *Walker Process* authorizes antitrust suits only in the limited circumstances of a patent that has been procured by intentional fraud. *Walker Process*, 382 U.S. at 176-77; *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068-69 (Fed. Cir. 1998). That is, the plaintiff must prove the patentee “obtained the patent by knowingly and willfully misrepresenting facts to the [PTO].” *Walker Process*, 382 U.S. at 177. Moreover, a *Walker Process* claim requires proof that “the patent would not have issued but for the patent examiner’s justifiable reliance on the patentee’s

misrepresentation or omission.” *Dippin’ Dots v. Mosey*, 476 F.3d 1337, 1347 (Fed. Cir. 2007).

Courts also require a plaintiff asserting a *Walker Process* claim to plead the alleged fraud with particularity. *MedImmune, Inc. v. Genentech, Inc.*, 427 F.3d 958, 967 (Fed. Cir. 2005) (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003)), *rev’d on other grounds*, 549 U.S. 118 (2007). Even if a plaintiff can satisfy the heightened pleading requirements, the burden of proving knowing and intentional fraud on the PTO likely discourages many direct purchasers from bringing such a claim and defeats most that do. Moreover, a plaintiff asserting a *Walker Process* claim must plead and prove the other elements of a monopolization claim, including the patent holder’s monopoly power in a relevant market. *Walker Process*, 382 U.S. at 174. Not surprisingly, while *Walker Process*-type claims by purchasers are not unheard of, *see, e.g., Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308, 310 (1978); *Molecular Diagnostics*, 402 F. Supp. 2d 276, they are hardly commonplace.

Accordingly, there is no basis in precedent or sound policy for limiting antitrust standing to only those direct purchasers whose

Walker Process claims concern so-called tarnished patents. As the Supreme Court cautioned, concerns about vexatious lawsuits cannot “be used to frustrate the assertion of rights conferred by the antitrust laws.” *Walker Process*, 382 U.S. at 176.

CONCLUSION

The district court’s decision denying the motion to dismiss should be affirmed. The Court should further hold that plaintiff’s standing does not depend upon the patents at issue being tarnished in a prior proceeding.

Respectfully submitted.

WILLARD K. TOM
General Counsel

JOSEPH F. WAYLAND
Acting Assistant Attorney General

JOHN F. DALY
Deputy General Counsel
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

CATHERINE G. O’SULLIVAN
KRISTEN C. LIMARZI
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., N.W.
Room 3224
Washington, D.C. 20530-0001
202-353-8629

May 22, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,988 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

May 22, 2012

Attorney

CERTIFICATE OF SERVICE

I, Kristen C. Limarzi, hereby certify that on May 22, 2012, I served two copies of the foregoing Brief for the United States and Federal Trade Commission as Amici Curiae in Support of Appellee, by first-class mail upon the following counsel of record:

Steven F. Benz
Joseph H. Hall
Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

Raoul D. Kennedy
David W. Hansen
Skadden, Arps, Slate, Meagher
& Flom LLP
525 University Ave., Suite 1100
Palo Alto, CA 94301

May 22, 2012

Attorney