2012-1183

United States Court of Appeals for the Federal Circuit

RITZ CAMERA & IMAGE, LLC,

Plaintiff-Appellee,

v.

SANDISK CORPORATION,

Defendant-Appellant

On Appeal from the United States District Court for the Northern District of California in Case No. 10-CV-2787, Hon. Jeremy Fogel

BRIEF FOR AMERICAN ANTITRUST INSTITUTE, COMMUNITY CATALYST, INC., NATIONAL LEGISLATIVE ASSOCIATION ON PRESCRIPTION DRUG PRICES, AND U.S. PUBLIC INTEREST RESEARCH GROUP, AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLEE

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May 24, 2012

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Ritz Camera & Image, LLC v. Sandisk Corporation

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CERTIFICATE OF INTEREST

Counsel for *Amici* certifies the following:

1. The full names of *amici* represented by me are:

   American Antitrust Institute, Community Catalyst, Inc., National Association for Legislative Association on Prescription Drug Prices, and U.S. Public Interest Research Group

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me is:

   There are none

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court are:

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MISCELLANEOUS

INTERESTS OF *AMICI CURIAE*

American Antitrust Institute

All parties have consented to the filing of this brief. The American Antitrust Institute ("AAI") is an independent non-profit education, research and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. AAI is managed by its Board of Directors with the guidance of an Advisory Board consisting of more than 120 prominent antitrust lawyers, law professors, economists, and business leaders.[1] AAI frequently submits amicus briefs in important antitrust cases, including those that involve the intersection of antitrust and patent policy. *See, e.g., In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677 (2d Cir. 2009); *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617 (2008). For more information about AAI's activities, see www.antitrustinstitute.org.

AAI's goals would be undermined if this Court were to accept Appellant's invitation to create an exception to basic antitrust standing rules by denying antitrust standing to overcharged purchasers for *Walker Process* monopolization claims. For antitrust law to function effectively there must be a system of remedies

[1] The Board of Directors alone has approved this filing; individual views of members of the Advisory Board may differ from AAI's positions. Pursuant to Fed. R. App. P. 29(c)(5), *amicus* states that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity – other than AAI or its counsel – has contributed money that was intended to fund preparing or submitting this brief.

that serves both of two overarching principles: compensation and deterrence. The system of antitrust litigation seeks both to enable private plaintiffs to bring suits to compensate them for injuries suffered from unlawful conduct and to ensure the violators do not profit from their wrongdoing. The rule of law advocated by Appellant would undermine both of these goals. By limiting suits attacking *Walker Process* violations to competitors, Appellant's rule would preclude compensation for purchasers, who suffer the greatest harm from the illegal conduct. Moreover, by limiting (or eliminating) the damages confronted by a wrongdoer, the deterrent effect of private antitrust actions to prevent enforcement of fraudulently procured patents would be severely dampened. AAI has a strong policy interest in preventing these adverse developments in antitrust law.

Community Catalyst, Inc.

Amicus Curiae Community Catalyst, Inc. is a national non-profit organization committed to building a consumer and community voice in health care. Through its Prescription Access Litigation LLC project ("PAL") Community Catalyst works to promote expanded access to needed medicines, while also challenging deceptive, fraudulent, or illegal promotional drug industry practices that inflate drug costs. PAL has built a nationwide coalition of over 130 organizations in 36 states and the District of Columbia, comprised of consumers, seniors, health care advocacy organizations, labor unions, and health plans, with a combined membership of over 13 million people. Community Catalyst, Inc. has a strong policy interest in maintaining the ability of private litigants to seek damages for enforcement of fraudulently obtained pharmaceutical patents.

National Legislative Association on Prescription Drug Prices

Amicus Curiae National Legislative Association on Prescription Drug Prices ("NLARx") is a national nonprofit, nonpartisan organization of state legislators who support policies to reduce prescription drug prices and expand access to affordable medicines. NLARx has a strong policy interest in maintaining the ability of private litigants to seek damages for enforcement of fraudulently obtained pharmaceutical patents.

U.S. Public Interest Research Group

Amicus Curiae U.S. PIRG (Public Interest Research Group) ("U.S. PIRG") is a federation of 28 non-profit, non-partisan state Public Interest Research Groups. The PIRGs have worked on behalf of American consumers since 1970 for a fair and competitive marketplace, a sustainable economy, and a responsive, democratic government. In association with the U.S. PIRG Education Fund, U.S. PIRG's staffs of policy experts, researchers, organizers, and advocates have authored reports, generated media coverage, organized citizens, and lobbied in the state and federal legislatures winning important victories in the areas of consumer protection, public transportation, product safety, health care, and good government. U.S. PIRG has a strong policy interest in maintaining the ability of private litigants to seek damages for enforcement of fraudulently obtained patents on pharmaceutical and other consumer goods.

Introduction

In 1965, the Supreme Court in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), held that "the maintenance and enforcement of a patent obtained by fraud on the Patent Office may be the basis of an action under Section 2 of the Sherman Act, and therefore subject to a treble damage claims *by an injured party* under Section 4 of the Clayton Act." *Id.* at 173 (emphasis added). The *Walker Process* opinion could not be clearer in contemplating, consistently with 15 U.S.C. § 15, that antitrust standing extends to "an injured party," *i.e.*, to "*[a]ny person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." *Id.* at 174 n. 2 (quoting this latter language from 15 U.S.C. § 15; emphasis added). The "any person" language in Section 4 of the Clayton Act has consistently been construed broadly by the Supreme Court, and in *Pfizer v. Government of India*, 434 U.S. 308 (1978), was read to include foreign government *purchasers* asserting monopolization claims that rested in part on "fraud upon the United States Patent Office." *Id.* at 310.[2] Nevertheless, Appellant argues that *purchasers* who pay

[2] The antitrust claims in *Pfizer* arose from a finding by the Federal Trade Commission that a patent for tetracycline had been obtained by fraud on the Patent and Trademark Office. *See Charles Pfizer & Co. v. Federal Trade Commission*, 401 F.2d 574, 577 (6^{th} Cir. 1968) (affirming FTC decision). While the Supreme Court in *Pfizer* did not specifically address whether *Walker Process* claims could be brought by purchasers, it is noteworthy that neither the Court nor the pharmaceutical defendants apparently questioned this point.

inflated prices as a result of the type of monopolization forbidden in *Walker Process* lack "standing" to assert antitrust claims based on such wrongdoing, and that such standing is limited instead only to competitors of the patent holders. There is no basis in antitrust law or patent policy for Appellant's argument.

Argument

I. PURCHASERS HAVE ANTITRUST STANDING TO ASSERT *WALKER PROCESS* CLAIMS

A. Overcharged Purchasers Have Standing *Superior* to That of Mere Competitors

It is elementary that the purpose of antitrust law is "'the protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962)). Thus, under bedrock antitrust law, the persons who *most* clearly have standing to assert an antitrust claim are purchasers overcharged as a result of an antitrust violation – *not* competitors who may merely have lost business opportunities. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 530 (1983) ("*AGC*") ("Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices"); *id.* at 538 ("[T]he Sherman Act was enacted to assure customers the benefits of price competition"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("[A]t no time in the legislative history of the Clayton Act "was the right of a consumer to bring an action for damages questioned."); Phillip E. Areeda, Herbert Hovenkamp & Roger D. Blair, *Antitrust Law* ¶345, at 356 (2d ed. 2000) ("Areeda") ("Because protecting consumers from monopoly prices is the central concern of antitrust, buyers have usually been preferred plaintiffs in private antitrust litigation.").[3]

Purchasers' standing to obtain redress in monopolization cases under Section 2 of the Sherman Act is just as firmly embedded in the law as their standing to challenge cartel overcharges under Section 1. *See id.* at 356 ("[c]onsumer standing to recover for an overcharge paid directly to an illegal cartel *or monopoly* is seldom doubted")(emphasis added). Although antitrust violations under Section 2 generally are implemented through exclusionary conduct directed in the first instance toward competitors, purchasers who pay inflated prices as a result of such conduct nonetheless have the *foremost* antitrust standing.[4]

As a matter of antitrust standing this case is squarely controlled by *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-77, 479 (1982). In *McCready*,

[3] *Accord, e.g., Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 109 (3d Cir. 1992) ("[B]asic economic theory teaches us that the chief benefit of competition is lower prices to consumers."); *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 72 (1st Cir. 2005) (consumers are "presumptively favored as appropriate plaintiffs to assert antitrust injury").

[4] *See Glaberson v. Comcast Corp.*, 2006 WL 2559479, at *7 (E.D. Pa. Aug. 31, 2006) (competitor RCN was "not the more direct or 'superior' plaintiff" because "Comcast allegedly acted to restrain competition from RCN in order to gain the ability to charge consumers inflated prices. Plaintiffs were, therefore, the ultimate target of Comcast's anticomptetitive conduct towards RCN"); *New York Citizens Committee on Cable TV v. Manhattan Cable TV, Inc.*, 651 F. Supp. 802, 810 (S.D.N.Y. 1986) ("Consumers have standing when they are injured as a result of a defendant's improper exclusion of competitors from the market.").

the defendants argued that since the "goal of the conspirators was to halt encroachment by psychologists into a market that physicians and psychiatrists sought to preserve for themselves, McCready's injury [as an overcharged purchaser from the psychologists] is rendered 'remote.'" *Id.* at 478-79. The Court decisively rejected that argument, stating that "[t]he availability of the [Clayton Act] § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators. Here *the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market.*" *Id.* at 479 (emphasis added).

Purchasers who pay an unlawfully inflated price are the *primary* parties injured by practices such as those challenged here, in that unlike mere competitors, they actually *pay* the inflated prices, the collection of which is defendants' root incentive to engage in the exclusionary practices. *See In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 400-01 (3d Cir. 2000) ("[t]he class members here . . . were 'foreseeable and necessary victims' of DuPont's efforts to exclude the generic drug from the market."). Even when conduct is initially "directed" at a competitor's *customers*, this Court has held that such conduct provides antitrust standing to a competitor under *Walker Process*, to the extent that the impact on the customers causes an injury to the plaintiff competitor. *See Hydril Co. LP v. Grant Prideco LP,* 474 F.3d 1344, 1350 (Fed. Cir. 2007) ("[A] valid *Walker Process* claim [by a competitor] may be based upon enforcement activity directed against the plaintiff's customers" because "[w]ithout customers, a supplier has no business."). Thus, the issue is not at whom the behavior is superficially "directed" but rather merely whether the plaintiff suffers a non-speculative injury "by reason of" an injury to competition. 15 U.S.C. § 15; *see also McCready*, 457 U.S. at 479 (the question is "not a question of the specific intent of the conspirators"). Under longstanding antitrust standing principles, therefore, the overcharged purchasers in this case have standing to assert their antitrust claims.

That competitors often also have standing to bring antitrust claims does nothing to diminish the antitrust standing of purchasers.[5] Antitrust law embodies no such limitation, but on the contrary makes clear that one group of plaintiffs *cannot* properly be given exclusive standing when, as here, that group cannot be relied upon to represent the different antitrust interests of a different group of purchaser. "When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of

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[5] *See McCready,* 457 U.S. at 469 n.4, 474-75 (allowing purchaser of health insurance to challenge boycott by insurer and psychiatrists directed at competitor psychologists, even though the competitor psychologists had maintained their own successful suit, because the psychologists and the purchasers had suffered different injuries); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1168-70 (3d Cir. 1993) (the presence of competing trucking companies as other victims did not dilute the causal connection between the inflated charges paid by steel company purchasers of transport services and defendants' conspiracy; "other direct victims exist, but their presence does not diminish the directness of the [purchasing] steel companies' injury"); *Glaberson,* 2006 WL 2559479, at *7 ("Plaintiff's injuries, which consist of overcharges, are distinct from [the competitor's] injuries, which likely consist of lost profits.") (citation omitted). *See also U.S. Horticultural Supply, Inc. v. Scotts Co.,* Civ. A. No. 03-773, 2004 WL 1529185, at *2 (E.D. Pa. Feb. 18, 2004) (there can be more than one proper plaintiff to seek claims based on antitrust violation).

antitrust." *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986). *See also Barr Laboratories*, 978 F.2d at 109 ("'[C]ourts have carefully scrutinized enforcement efforts by competitors because their interests are not necessarily congruent with the consumer's stake in competition'") (quoting *Alberta Gas Chems. Ltd. v. E.I. DuPont de Nemours & Co.*, 826 F.2d 1235, 1239 (3d Cir. 1987)).

The injury that purchasers suffer – here, paying inflated prices – is qualitatively and quantitatively different from any injury to competitors, who do not purchase from the patent holder and thus do not pay inflated prices to begin with. A competitor case based on enforcement of a patent obtained by fraud does nothing from a compensatory standpoint to remedy the entirely different, public injury of inflated prices to purchasers. Thus, to deny standing to overcharged purchasers affords no remedy for the *primary* antitrust "wrong" of the inflated prices that the purchasers were compelled to pay.

In suing to recover their damages, the purchasers here, like those in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 399 (7th Cir. 2000), are not asserting the entirely different rights of competitors, but instead "are asserting their own rights, and thus . . . have standing." It is logically indefensible to suggest, as Appellant does, that the rightful interest of purchasers in antitrust enforcement under *Walker Process* would be protected by the possibility of antitrust suits by competitors alone. As the Second Circuit explained in *DDAVP*,

> [T]he defendants' competitors, unlike the plaintiffs, would be seeking lost profits, not overcharges. Lost profits are the difference between the competitive price and what the competitors' costs would have been, while overcharges are the difference between the defendants' supra-competitive price and the competitive price. Denying the plaintiffs a remedy in favor of a suit by competitors would thus be "likely to leave a significant antitrust violation undetected or unremedied."

585 F.3d at 689 (quoting *AGC*, 459 U.S. at 542); *see also* discussion *infra* at 15-16.

B. Appellant's Arguments for an Exception to Basic Antitrust Standing Rules Are Flawed

1. Under Supreme Court authority and that of this Court an antitrust claim under *Walker Process* does *not* seek to "invalidate" a patent

Appellant's argument against purchaser standing rests principally on its contention that an antitrust claim of the type permitted by *Walker Process* is properly characterized as an action seeking to "set aside" or to "invalidate" a patent, or as an "annulment suit." App. Br. at 20-22, 31-32. However, to view the claims asserted here as claims "to invalidate a patent" flies squarely in the face of *Walker Process* itself. The basis on which the Supreme Court reversed the Seventh Circuit in *Walker Process* was that the rule that "only the United States may sue to cancel or annul a patent" did *not* apply because "Walker counterclaimed *under the Clayton Act, not the patent laws*," and that contrary to the Seventh Circuit's views in that case, a monopolization claim for damages based on "the maintenance and enforcement of" a wrongfully-procured patent "*does not directly seek the patent's annulment*." 382 U.S. at 175-76 (emphasis added).

This Court has previously endorsed the view that *Walker Process* claims should be evaluated based on conventional antitrust principles, which should be dispositive of this appeal. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F. 3d 1341, 1349 (Fed. Cir. 2004) (*Walker Process* claims are "*antitrust* claims premised on the bringing of a patent infringement suit") (emphasis added, citation omitted), *rev'd on other grounds*, 546 U.S. 394 (2006). The court in *Molecular Diagnostics Labs. v. Hoffman-LaRoche, Inc.*, 402 F. Supp. 2d 276, 281 (D.D.C. 2005), correctly reasoned that when a claim under *Walker Process* is "[v]iewed properly as an *antitrust* claim, there is little reason to think that standing requirements for *Walker Process* claims differ from standing requirements in more conventional antitrust actions," and that overcharged purchasers therefore have antitrust standing. As the Department of Justice and Federal Trade Commission rightly pointed out in their amicus brief to the Second Circuit in *DDAVP*, Appellant's central argument that the Appellees' claim seeks to annul a patent "has no logical connection to section 4 [of the Clayton Act] and boils down to a disagreement with *Walker Process*." Brief for the United States and Federal Trade Commission as Amici Curiae Supporting Plaintiff-Appellants, *In re DDAVP Direct Purchaser Antitrust Litig.* (No. 06-5525)(2d Cir. May 25, 2007)("DOJ/FTC *DDAVP* Br.") at 15.[6]

[6] The Department of Justice and FTC have taken the same position on standing in their brief in this case. It bears noting that the amicus brief from the United States

2. This Court's decisions in both *Hydril* and *Cipro* are inconsistent with the rule advocated by Appellant.

In addition to being flatly at odds with *Walker Process* and with this Court's reasoning in *Unitherm*, the rule advocated by Appellant also would conflict with at least two other precedents in this Court.

First, it would conflict with this Court's decision in *Hydril, supra.* In *Hydril,* the plaintiff was not sued for patent infringement, nor was it threatened with suit, and so could not have brought a declaratory judgment suit, yet this Court held the plaintiff could proceed with a claim under *Walker Process* because the defendants' enforcement of its bogus patent against the plaintiff's customers "is the kind of economic coercion that the antitrust laws are intended to prevent." 474 F.3d at 1350. Thus, this Court has already recognized that antitrust law, under *Walker Process,* properly concerns itself with the impact of fraudulently procured patents on customers, irrespective of any different rules of standing with regard to patent law claims.

Second, it would also conflict with this Court's decision in *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008) ("*Cipro*"). In *Cipro* this Court held, like the Second Circuit before it in *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187 (2d Cir. 2006), that an overcharged purchaser *does* have antitrust standing to challenge a payment made

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Department of Justice in *DDAVP* was submitted under an earlier, Republican administration, underscoring the bipartisan nature of the broad legal consensus that the argument offered on appeal here directly contravenes *Walker Process.*

by a patent holder to an alleged infringer in order to drop the alleged infringer's challenge to the patent, under section 1 of the Sherman Act, when the patent in question is procured by fraud. However, the same basic antitrust principles govern both sections 1 and 2 of the Sherman Act. Thus, an overcharged purchaser also should have standing to assert a *Walker Process* claim under section 2.[7] *See DDAVP*, 585 F.3d at 691 (noting that the same standing issues are presented whether direct purchasers challenge a settlement under *Tamoxifen*, or a fraudulently obtained patent under *Walker Process*).

3. Appellant's case law improperly relies largely on competitor cases

Appellant relies in part on the decision in *In re Remeron Antitrust Litig.*, 335 F. Supp. 2d 522 (D. N.J. 2004). In *Remeron,* however, the court reached a then-unprecedented conclusion denying antitrust standing *to purchasers* by erroneously relying on language taken out of context *from competitor cases*, including *Carrot Components Corp. v. Thomas & Betts Corp.,* 229 U.S.P.Q. (BNA) 61 (D. N.J. 1986).[8] However, in a competitor case like *Carrot Components*, unlike a purchaser

[7] Indeed, the *Cipro* case also included a section 2 claim under *Walker Process*, and this Court resolved that claim on the merits, without questioning plaintiffs' standing. 544 F. 3d at 1340-41.

[8] Additional non-purchaser cases cited by the Appellant and in *Remeron* include *Indium Corp. of America v. Semi-Alloys, Inc.*, 591 F. Supp. 608 (N.D.N.Y. 1984) and *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986 (N.D. Ill. 2003). However, standing of purchasers to assert *Walker Process*-type claims was neither presented as an issue, nor was it addressed, in *Indium* or *Asahi*. In *Indium*, the court held only that *when a competitor is the plaintiff,* the competitor must have been "ready, willing and able" to compete in order to have a cognizable antitrust injury. 591 F. Supp. at 614. In *Asahi*, the court held merely that since the

case, it is often doubtful whether a competitor plaintiff who is not threatened with patent enforcement has suffered any "antitrust injury," or whether the competitor's goal instead is merely to seek to use the antitrust laws as a competitive weapon when *competition* was not injured by the challenged conduct.[9] Unless a plaintiff-competitor who claims to compete with a patent holder actually would have produced an infringing product – and also had a reasonable apprehension that an infringement suit might be brought against it – a competitor as such would suffer no antitrust injury.

In contrast, *purchasers* suffer antitrust injury *by being forced to pay inflated prices.* Whether a purchaser is "ready to compete in the marketplace" has no sensible bearing on a purchaser's antitrust injury. Thus, in *Glaberson,* the requirement that a competitor be "ready, willing and able" to compete was *inapplicable* in an overcharge case brought by purchasers, because the purchaser plaintiffs were "not competitors of Comcast and *the standards that courts impose*

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inclusion of a supplier in a patent infringement case between competing manufacturers had no possible anticompetitive effect, the supplier itself had no antitrust standing.

[9] Such skepticism with regard to the standing of *competitor* plaintiffs is the basic reason for the venerable adage that the purpose of antitrust law is "to protect competition, not competitors." *See Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993)("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws. . . ."); *Unitherm*, 375 F.3d at 1362 ("It is widely recognized that an antitrust plaintiff must allege more than simply that the defendant's wrongful behavior directly damaged the plaintiff's business, but also that the accused behavior stifled competition") (citations omitted).

upon competitors to ensure that their injury is not speculative are not applicable to the determination of [purchasers'] antitrust standing." 2006 WL 2559479, at *7 n.5 (emphasis added). In other words, as differently stated in *Molecular Diagonostics*, language from competitor cases like *Carrot Components* (and other competitor cases cited in footnote 8 above) is "limited to the facts of [those cases], and [does] not purport to establish a rule of general applicability" that can properly be applied out of context in purchaser cases like this one. *Molecular Diagnostics*, 402 F. Supp. 2d at 280. The court in *Remeron* was fundamentally mistaken in applying inapposite standards, crafted in order to help identify *competitors* who are actually injured by antitrust violations, to the entirely different context of overcharged purchasers. The Department of Justice and Federal Trade Commission made this very point in their amicus brief here and to the Second Circuit in *DDAVP*.[10]

4. Appellant's traditional antitrust standing arguments are also misplaced

As a fall-back argument to their incorrect assertion that plaintiffs seek here to "invalidate a patent," Appellant weakly attempts to argue that standing should be denied to overcharged purchasers such as those in question here because they are "too remote" and competitors supposedly would be better enforcers of the antitrust laws. App. Br. at 35-37. However, to limit standing to pursue *Walker*

[10] *See* Brief for the United States and the FTC as Amici Curiae in Support of Appellee at 25 ("DOJ/FTC Amicus Br."); DOJ/FTC *DDAVP* Br. at 13.

Process claims to competitors alone would not adequately remedy the antitrust injuries caused by fraudulently-procured patents. Often, lost profits of competitors who might challenge a patent in court will be far less than the additional profits that the owner of a fraudulently procured patent earns by exploiting his unlawful monopoly. For example, in pharmaceutical cases, a generic challenger to a patent on a brand name drug, even if it succeeds in a patent challenge, is usually able to earn only a small fraction of the profits that the brand name manufacturer is able to extract from the public by maintaining its monopoly on the drug. Thus, generic challengers generally have far less financial incentive to mount expensive and difficult patent challenges than would the purchasers or consumers who could bring a claim under *Walker Process*. *See DDAVP*, 585 F.3d at 691 (rejecting argument that overcharged purchasers should have standing only if a prior patent challenger first establishes that the patent in question was fraudulently procured, writing that "[t]his asks too much of the generic competitors and other potential patent challengers, who may not have the strategic interest or the resources to start or win such a battle").

The deficiencies of competitors as putative guardians of the interests of purchasers and consumers are further compounded by the fact that competitors often have collateral business relations with patent holders in the same industry, which can act as a strong disincentive to enforcement of the competitors' rights under antitrust laws. Moreover, as the Second Circuit noted, competitors have "strong incentives to settle their challenge by patent holders seeking not only to preserve their patent's enforceability, but also to avoid *Walker Process* liability." *Id.; see also id.* (noting that competitor can render patent unenforceable by establishing inequitable conduct, and "may not value the higher showing of fraud enough to pursue it, especially if the competitor's antitrust damages would be minor or difficult to prove").

Finally, as noted *supra,* an antitrust recovery by a competitor obviously would compensate only for the competitor's smaller lost profits, and would provide no compensation at all for often much larger and more fundamental injuries to overcharged purchasers. To leave such injuries entirely uncompensated would fail to effectuate the "primary" purpose of Section 4 of the Clayton Act, which is the compensation of injured persons. *See Brunswick,* 429 U.S. at 485-86 & n. 10.

C. Purchaser Standing Does Not Conflict with Patent Policy

Appellant attempts to justify its position primarily by reference not to *antitrust* law, but instead to professed federal *patent* policy. However, Justice Harlan's concurrence in *Walker Process* makes clear that far from having only cramped or limited application in the *Walker Process* context, "antitrust remedies *should be allowed room for full play.*" 382 U.S. at 180 (Harlan, J. concurring; emphasis added). As Justice Harlan stated, "that private suits may be instituted under § 4 of the Clayton Act 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 innovations and their disclosure*." *Id.* at 179-80 (emphasis added).

Plainly, discouraging the fraudulent procurement of patents is not inconsistent with patent policy. *Walker Process* is not the only case to make clear this clear. In *Precision Instruments Mfg. Co. v. Automotive Maint. Mach. & Co.*, 324 U.S. 806 (1945), the Court wrote that "[a] patent by its very nature is affected with a public interest. . . . The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds *free from fraud*. . . ." *Id.* at 816 (emphasis added). PTO rules recognize this anti-fraud policy by imposing a duty of candor on all patent applicants.[11]

Nevertheless, it is clear that the PTO itself can provide no effective solution to issues raised by fraudulently procured patents. In the Manual of Patenting Examining Procedure ("MPEP"), the PTO states that it will not even attempt to police compliance with this rule:

> [T]he Office does not investigate and reject original or reissue applications under 37 CFR 1.56. Likewise, the Office will not comment upon duty of disclosure issues which are brought to the attention of the Office in original or reissue applications except to note in the application, in appropriate circumstances, that such issues are no longer considered by the Office during its examination of

[11] *See* 37 C.F.R. 1.56 (every person "associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability").

patent applications.

MPEP § 2010. The PTO explains that it does not enforce the duty of candor because courts, rather than the PTO, are better equipped to deal with such issues in private litigation. *Id.*

Even if PTO examination rules could be revised to embrace questions of fraud and inequitable conduct, such a change would be ineffectual in light of structural limitations of the PTO. Forty years ago, the courts recognized "the practical inadequacy of existing remedies for improperly procured patents." *Chas. Pfizer & Co. v. Davis-Edwards Pharmacal Corp.*, 385 F.2d 533, 538 (2d Cir. 1967). More recently, the Federal Trade Commission issued an exhaustive study of competition and patent law in which it concluded, after holding extensive hearings on the subject for nearly a year, that "questionable patents" are a very serious problem and that "existing means for challenging questionable patents are inadequate." Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy,* Executive Summary at 5, 8 (October 2003) ("2003 FTC Report"), *available at* www.ft.gov/os/2003/10/innovationrpt.pdf. Initial patent examination in the PTO is conducted in an *ex parte* process by examiners who have no laboratory facilities, and thus no ability independently to confirm the truth of representations made by patent applicants to the PTO. *Id.* at 9, ch. 1 at 27, ch. 5 at 6-10. This is one of the primary reasons offered by the PTO in the MPEP itself as to why it does not consider issues of fraud or inequitable conduct. *See* MPEP § 2010. Moreover, estimates of the time permitted for an examiner to reach a decision on each patent application range from 8 to 25 hours, but all commentators seem to agree that it is "very short." 2003 FTC Report, Exec. Summ. at 10; ch. 5 at 5.

Testimony given by PTO directors reports that "these inadequate time frames create a stressful work environment and are cited in the agency's exit surveys as a primary reason that examiners leave the agency." GAO Testimony, Intellectual Property, Improvements Needed to Better Manage Patent Office Automation and Address Workforce Challenges at 18, GAO-05-1008T (Sept. 8, 2005), *available at* www.gao.gov/new.items/d051008t.pdf. As a result, the PTO has "difficulty competing with the private sector to attract and retain staff with the high degree of scientific, technical, and legal knowledge required to be patent examiners." *Id.* at 1. Furthermore, "examiners told us they have to contend with a highly stressful work environment and work voluntary overtime to meet their assigned quotas," examiners "do not have enough time to conduct high-quality reviews of patent applications," and "[e]xaminers told us that voluntarily working overtime to meet quotas is common at USPTO, and they find it demoralizing not to have enough time to do a good quality job." GAO Report to Congressional Committees, Intellectual Property: USPTO Has Made Progress in Hiring Examiners, but Challenges to Retention Remain at i, 5, 29, GAO-05-720 (June 2005), *available at*: www.gao.gov/new.items/d05720.pdf; *see also* Fed. Trade

Comm'n, *The Evolving IP Marketplace* 117 (2011) (noting "flood of applications" faced by PTO, which had a backlog of more than 726,000 applications awaiting action by examiners at the end of fiscal year 2010).

Even forty years ago, it was recognized that such circumstances make it "nearly impossible to filter out invalid patents prior to their issuance." Note, *Improperly Procured Patents: FTC Jurisdictional and Remedies Power*, 77 Harv. L. Rev. 1505, 1507 (1964). That reality has become even more pronounced in recent decades as "[p]atent applications have doubled in the last twelve years and are increasing at about 10% per year." 2003 FTC Report, Executive Summary p. 9. This has been fittingly described as an "unprecedented explosion." *Id.*, ch. 5 at 4.

Appellant argues that the ability of third party private citizens to seek post-grant or inter partes review of patent issuances makes problems with fraudulent patents unlikely. App. Br. at 22. However, post-grant review is available only for nine months after patent issuance, and inter partes review can be sought only on the basis of prior art that is either a patent or a printed publication. *See* 35 U.S.C. § 311(b), § 321(c). In addition, both proceedings contain broad estoppel provisions that prevent challengers from later raising claims in litigation on any ground they "raised or reasonably could have raised" during the proceedings. *See* 35 U.S.C. § 315(e), § 325(e). Moreover, third parties generally have little incentive to seek to invalidate a patent at the PTO and patent holders have much to gain from obtaining a patent through fraud. In view of these realities, in order to protect the public from very substantial antitrust injuries caused by fraudulently procured patents and resulting monopolies, the only recourse under existing legal machinery is private litigation.[12] As shown above, to limit such private litigation to competitors alone would both leave the distinct antitrust interests of purchasers unrepresented and unprotected, and fail adequately to deter fraudulent patent procurement. Effective antitrust and patent policy, in addition to established law, requires that fraudulent procurement of patents be subject to challenge by overcharged purchasers under *Walker Process.*

D. A Patent Need Not Be "Tarnished" For an Overcharged Purchaser to Have Standing

Under traditional antitrust standing criteria, as explained above, no "tarnish" of a patent should be required in order for an overcharged purchaser to have standing to bring a claim under *Walker Process*. That is the consistent position of the Justice Department and the Federal Trade Commission. *See* DOJ/FTC Amicus Br. at 29; DOJ/FTC *DDAVP* Br. at 2 n.1, 10 (standing analysis on 12(b)(6) motion assumes the underlying merits of plaintiff's claims). It is also the position of 40

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[12] When private litigation directly challenges a patent under the patent laws, it has long been observed that large proportions of the challenged patents are found to be invalid. As early as 1964, it was observed that the "majority of litigated patents are found invalid." Note, *supra*, 77 Harv. L. Rev. at 1508. More recently, studies have found that "45-46% of all patents litigated to final results are held invalid." 2003 FTC Report, Ch. 5 p 6.

States, DC and Puerto Rico as expressed in *DDAVP*.[13] The Second Circuit, while cogently explaining why no prior determination of patent fraud should be required for purchaser standing, declined to reach the question of whether "purchaser plaintiff's *per se* have standing to raise *Walker Process* claims," as it was sufficient that the patent in that case had already been held to be unenforceable because of inequitable conduct. *DDAVP*, 585 F.3d at 691. But a principal reason that led the Second Circuit to reject a requirement of a prior determination of fraud also militates against any requirement of a prior determination of invalidity, namely that a patentee's settlement of the underlying patent litigation would immunize it from liability for using a fraudulently obtained patent to monopolize a market.

Appellant raises the spectre of nuisance *Walker Process* lawsuits, but the Supreme Court in *Walker Process* itself rejected this argument as a basis "to frustrate the assertion of rights conferred under the antitrust laws." 382 U.S. at 176. Just as important, there is simply no evidence or reason to believe that purchasers are likely to bring nuisance *Walker Process* claims.[14] As the Department of Justice and Federal Trade Commission have pointed out, the "factual reliability" of hyperbolic rhetoric about a flood of purchaser *Walker Process* cases is "open to

[13] Brief for the 40 States, DC and Puerto Rico as Amici Curiae supporting Plaintiff-Appellants, *In re DDAVP Direct Purchaser Antitrust Litig.* (No. 06-5525)(2nd Cir. May 25, 2007).

[14] Appellant states, "*The Second Circuit cautioned* that 'giving *Walker Process* standing to the [direct purchaser] plaintiffs . . . could result in an avalanche of patent challenges,'" App. Br. at 25 (quoting *DDAVP*, 585 F.3d at 690) (emphasis added), but in fact, the Second Circuit was merely reciting the defendants' argument, which it largely rejected.

serious question," given the "need to plead with particularity and prove a knowing and intentional fraud on the PTO." DOJ/FTC *DDAVP* Br. at 16; *see* DOJ/FTC Amicus Br. at 34. Moreover, the antitrust requirements of proving defendant's monopoly power in a relevant market and that purchasers were injured as a result of the exclusion of rivals are considerable additional hurdles, as are the requirements for class certification. This may explain why *Walker Process* type claims by direct purchasers "are hardly commonplace." *Id.*

The proper remedy for vexatious *Walker Process* claims, should they occur, is not to engraft some special merits or "tarnish" requirement onto antitrust standing jurisprudence, but rather for courts to use the considerable tools they already possess to dismiss dubious *Walker Process* claims. Rule 9(b) establishes a heightened pleading requirement for pleading fraud, and *Bell Atl. Co. v. Twombly*, 550 U.S. 544 (2007), requires a plaintiff to demonstrate that its claim is plausible on its face. Prior proceedings related to the validity of the patent may well be relevant to whether purchasers (or rivals) allege a plausible *Walker Process* claim, as are numerous other factors, but the absence of some "tarnish" does not necessarily mean that a *Walker Process* claim is implausible.

Conclusion

For the foregoing reasons, the decision of the District Court should be affirmed.

May 24, 2012

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Dated: May 24, 2012

Michael B. Eisenkraft

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