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Expanded Standing, or "Back to Basics"? Flash Memory Direct Purchasers Found to Have Standing to Assert Walker Process Claims

In *Ritz Camera & Image, LLC v. SanDisk Corporation, et al.*, United States District Court, ND Cal., Case No. 5:10-CV02787-JF/HRL, the court denied a motion to dismiss in a *Walker Process* "fraud on patent office" case, and allowed standing to a direct purchaser. Is this an extension, or is it "business as usual"? A step by step analysis is in order.

Ritz Camera & Image, LLC ("Ritz") filed an action under Section 4 of the Clayton Act alleging that SanDisk Corp., ("SanDisk") and its founder, Harari, violated Section 2 of the Sherman Act. Ritz alleged that SanDisk and Harari conspired to monopolize, and actually monopolized the market for NAND/memory products, through the assertion of and prosecution of patents which were a fraud on the United States Patent and Trademark Office ("USPTO"). NAND/memory is a form of digital storage technology used in consumer electronics devices.

In a second amended complaint, ("SAC"), Ritz alleged that Harari tortiously converted flash memory technology owned by Harari's former employer, and then prosecuted fraudulent "crown jewel" patents. Allegedly, Harari intentionally failed to disclose invalidating prior art, and made affirmative misrepresentations to the USPTO. Further, defendants allegedly threatened competitors through harassing litigation and sales tactics, and caused the elimination of a major NAND competitor, in an anti-competitive settlement of bad faith litigation. Ritz alleged that it was injured in its "business or property" as a result. The defendants' overt acts allegedly reduced market competition, thus allowing for an increase in prices. Ritz was a direct purchaser of NAND/memory from defendants.

Defendants moved to dismiss the complaint on two grounds. First, defendants alleged that plaintiffs lacked standing to pursue a *Walker Process* FOPO (fraud on patent office) claim. Second, defendants claimed that plaintiffs had failed to properly allege a viable relevant market. The court denied the motion to dismiss on standing grounds, but granted it on the ground that SanDisk and Harari were a single entity for antitrust purposes, and thus could not have "conspired to monopolize".

The gist of the defendants' arguments as to standing is that all or almost all *Walker Process* claims are brought by defendants in patent infringement actions as antitrust counterclaims. The FOPO allegations are designed to strip the patent holder of antitrust exemption under the patent laws. *Walker Process* permits plaintiffs to seek damages under Section 2 of the Sherman Act for monopoly power maintenance, where the overt acts involved fraudulent patent claims. The central issue in the motion before the court was whether to have standing, a plaintiff must be a participant in, or poised to enter the relevant market as a competitor.

While this may be the normal fact pattern in which most *Walker Process* claims are cast, the court's analysis made it clear that the "back to basics" approach of a stepped analysis under Section 4 of the Clayton Act is all that is necessary. Here, as a direct purchaser, plaintiff would have paid in excess of a market price for the direct purchases made from the defendants. As such, it has been the victim of a consumer welfare rent transfer from consumers to producers. With the elimination of viable competitor, substitutable alternatives were reduced. Ergo, there is a cognizable injury under the antitrust laws.

This analysis finds support in any number of Supreme Court antitrust decisions through several generations. For example, in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the Supreme Court held that consumers who pay more for goods are injured in their business or property under Section 4. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the Supreme Court held that Section 4 gave standing for a policyholder to sue her insurance company for allegedly conspiring with physicians to refuse to deal with a psychologist, thus causing injury to plaintiff, who was unable to obtain insurance reimbursement for psychologist services. The *McCready* Court observed, however, "that congress did not intend to allow every person tangentially affected by an antitrust violation" to maintain a treble damage action. To determine standing it is necessary to examine "the physical and economic nexus between the alleged violation and the harm to the plaintiff".

The next year, in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529-535 (1983), the Supreme Court outlined a step series of factors to be evaluated in determining whether a given plaintiff should be afforded standing. The first is the nature of the plaintiff's alleged injury, and whether it is of the type that the antitrust laws were intended to forestall. Here, basic principles of market foreclosure and the resultant allocative inefficiency warrant the conclusion that the plaintiff has been injured in its business or property within the meaning of Section 4 of the Clayton Act. A second factor is the directness of the injury. Here, plaintiff was a direct purchaser who paid a non competitive price for a product that it demanded. Accordingly, it arguably has been injured in the truest sense of classic industrial organization economics.

Thus, while the factual pattern may be a deviation from the usual *Walker Process* norm, one might say that it is nonetheless within the wellhead of traditional antitrust jurisprudence.

As to the defendants' claim of a defective relevant market allegation, stay tuned. The court held that a plausible inference is that defendants' course of conduct was *Walker Process* monopoly power maintenance. That may be good enough for a motion to dismiss, *Twombly* notwithstanding.

Authored by:

Don T. Hibner, Jr.
(213) 617-4115
DHibner@sheppardmullin.com