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The Federal Circuit Rules That a Party Can Bring a *Walker Process* Antitrust Claim Even in the Absence of a Patent Dispute

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One longstanding, open question has been whether *Walker Process* antitrust claims can be asserted even though no claim of patent infringement has been or could be brought. Some have argued that a party should not be permitted to bring an antitrust claim dependent solely on the fraudulent procurement of a patent when there is no live dispute involving that patent. Now, in *Ritz Camera & Image, LLC v. SanDisk Corp.*, No. 2012-1183 (Fed. Cir. Nov. 20, 2012), the U.S. Court of Appeals for the Federal Circuit has ruled that an injured party does have standing to bring such a *Walker Process* claim—even in the absence of a justiciable patent infringement dispute.

Ritz Camera presents significant implications for patent owners, potential accused infringers, and consumers. The case arguably expands the possibility of parties bringing *Walker Process* antitrust claims. An aggrieved consumer, *i.e.*, a direct purchaser, may bring an antitrust claim based on fraudulent procurement of a patent even though no claim for patent infringement is ripe. Additionally, *Ritz Camera* raises the possibility that the federal government, through the Department of Justice and the Federal Trade Commission, will more directly impact patent litigation and licensing through its antitrust enforcement actions. In any event, *Ritz Camera* will likely prove yet another arrow in the quiver of parties wanting to preemptively and aggressively challenge a patent owner and its licensing efforts.

Background of the Case

The dispute between Ritz and SanDisk involves the market for NAND flash memory products. NAND flash memory is a type of flash memory used in many consumer electronics products, including digital cameras, USB drives, smartphones, and computers. SanDisk manufactures NAND flash memory and sells it to numerous purchasers, including Ritz. SanDisk owns at least two patents relating to this technology: U.S. Patent Nos. 5,172,338 and 5,991,517.

In June 2010, Ritz initiated its suit against SanDisk and SanDisk founder Eliyahou Harari, alleging claims for conspiracy to monopolize and monopolization of the flash memory market under Section 2 of the Sherman Act. According to Ritz's allegations, Harari tortiously converted certain flash memory technology from his former employer to obtain

the two patents at issue. Harari and his new company, SanDisk, then asserted the "crown jewel patents" against competitors, including STMicroelectronics. In the end, SanDisk's patent enforcement scheme, in Ritz's view, destroyed competition—and thus created higher prices—in the flash memory market. Ritz contends that SanDisk's anticompetitive actions caused direct purchasers, such as Ritz and other members of the class, to pay inflated prices for NAND flash memory products.

In response to the complaint, SanDisk moved to dismiss. SanDisk argued that Ritz lacked standing to assert a *Walker Process* claim when Ritz did not face any threat of patent infringement and lacked the ability to bring a declaratory judgment action challenging the patents. Indeed, Ritz did not contend that it could have filed a declaratory judgment action. The district court rejected SanDisk's argument, but it did certify the issue for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b).

On appeal, the Federal Circuit framed SanDisk's appeal as limited to the following, single issue:

> Whether direct purchasers who cannot challenge a patent's validity or enforceability through a declaratory judgment action (and have not been sued for infringement, and so cannot assert invalidity or unenforceability as a defense in the infringement action) may nevertheless bring a *Walker Process* antitrust claim that includes as one of its elements the need to show that the patent was procured through fraud.

The court held that a direct purchaser can bring *Walker Process* claims, in an opinion written by Judge Bryson and joined by Judges Dyk and Moore.

The Federal Circuit Allows an Independent *Walker Process* Claim

The court's concise and direct opinion addressed each of SanDisk's arguments on why Ritz should not be able to bring the antitrust claims. First, the court turned to the Supreme Court's *Walker Process* decision itself to delineate the two conditions for antitrust liability based on a fraudulently procured patent: (1) the patent was obtained through knowing and willful fraud on the PTO or enforced with knowledge of the fraudulent procurement, and (2) the other elements necessary for a Sherman Act monopolization charge must be proven. The Federal Circuit further recognized that direct purchasers "are not only eligible to sue under the antitrust laws, but have been characterized as 'preferred' antitrust plaintiffs."

The Federal Circuit noted that "the Supreme Court in *Walker Process* rejected an argument closely analogous to SanDisk's argument here," *i.e.*, that the rule governing standing to bring a patent validity challenge should be imported into a *Walker Process* claim. The Federal Circuit recognized that the Supreme Court did not intend to limit antitrust claims, in this context, to only those parties who could "bring an independent challenge to the patents at issue." The court also explained that nothing in the Supreme Court's decision "suggests that the standing limitations on direct actions to challenge patent validity should be imported into antitrust actions predicated on fraudulently procured patents."

The Federal Circuit also relied on earlier cases in which it, the Second Circuit, and the D.C. Circuit had "declined to apply limitations on patent validity suits to *Walker Process* antitrust actions." For instance, in 1977, the D.C. Circuit had permitted a *Walker Process* claim to proceed despite the fact that the plaintiff faced no risk for infringement because the patentee had disclaimed the patent. *Oetiker v. Jurid Werke, GmbH*, 556 F.2d 1 (D.C. Cir. 1977).

Additionally, the Federal Circuit dismissed SanDisk's concerns that "allowing direct purchasers to bring *Walker Process* claims would authorize an intolerable end-run around the patent laws." The court reiterated the point that "[a] *Walker Process* antitrust claim is a separate cause of action from a patent declaratory judgment action." Although the court recognized that prevailing on the *Walker Process* claim would likely render the patents unenforceable, the claim being asserted was strictly an antitrust claim. Therefore, the law provided for an alternative and possibly broader form of relief.

Finally, the court rejected SanDisk's argument that allowing Ritz's antitrust claim to proceed would trigger a "flood of litigation" and stifle innovation. The court noted the "demanding proof requirements of a *Walker Process* claim" and therefore found SanDisk's contention not persuasive. Indeed, during oral argument, Judge Bryson took a moment to express his skepticism of such "floodgate" arguments.

Notably, several notable *amici* supported Ritz's cause through amicus briefs. In a combined *amicus* brief, the United States and the Federal Trade Commission supported Ritz's position that it has standing to bring a *Walker Process* claim. Also supporting Ritz were a brief on behalf of thirty-three States, the District of Columbia, and Puerto Rico and a brief by the American Antitrust Institute and several non-profit organizations.

Importantly, the United States and the Federal Trade Commission argued that "monopoly overcharges," *i.e.*, higher prices tied to a fraudulently obtained patent, "are precisely the type of injury the antitrust laws were intended to redress." In other words, as the Government explained, Section 4 of the Clayton Act "authorizes direct purchasers to recover overcharge damages resulting from a monopoly obtained and maintained through enforcement of a fraudulently procured patent."

The Court Did Not Expressly Address the Question of Appellate Jurisdiction

Interestingly, the Federal Circuit did not explicitly rule on the issue of appellate jurisdiction which Ritz had raised when opposing SanDisk's petition to appeal. The Federal Circuit's jurisdiction depends on the subject matter of the case being appealed. In general, the Federal Circuit has jurisdiction over, among other things, instances where the right to relief "necessarily depend[s] on resolution of a substantial question of federal patent law." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). Ritz had argued that the Federal Circuit lacks jurisdiction because the claim is an antitrust claim, and not a patent claim. A motions panel of the court (Judges Newman, Linn, and Reyna), which granted SanDisk's petition to appeal, had passed on the jurisdictional question, writing that it is "the better course to defer the jurisdictional issue raised by the parties to the merits panel."

The merits panel, however, did not address the jurisdictional question in its opinion, perhaps thinking that its ruling on the merits was a sufficient, albeit implicit, answer to the issue of jurisdiction. Indeed, during oral argument, the judges asked several questions suggesting that the court has jurisdiction, and the answers from Ritz's counsel did not seem to convince the judges otherwise. At this point, it is a reasonable inference that the antitrust claims "necessarily depend on resolution of a substantial question of federal patent law." But this is an interlocutory appeal, and it may turn out that further litigation will lead to a different conclusion. Furthermore, the scope of the court's jurisdiction may be affected by the pending Supreme Court case *Gunn v. Minton*, which will decide the breadth of "arising under" jurisdiction, 28 U.S.C. § 1338, in legal malpractice cases.

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