A SUMMARY OF ANTITRUST COUNTERCLAIMS IN IP LITIGATION

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Intellectual property litigation by its nature invites antitrust counterclaims. In an IP suit, typically, an IP owner is trying to exclude another from its use. Exclusion leads to claims of antitrust violations. This outline explains two types of counterclaims that most often arise in the context of IP litigation including Walker Process (fraud on the PTO) and sham litigation claims. These counterclaims are more serious than defenses such as inequitable conduct or patent misuse, which may render a patent unenforceable and provide a basis for an attorneys’ fee award. Instead, these counterclaims may be used as a sword by the accused infringer, subjecting the IP owner to liability for treble damages.

Antitrust counterclaims to patent, trademark, or trade secret cases most often allege monopolization or attempted monopolization. Under the federal antitrust laws, monopoly claims are analyzed under Section 2 of the Sherman Act. 15 U.S.C. § 2. The elements of a Section 2 monopoly violation include: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). In order to prove a Section 2 violation in this context, all elements must be shown—not just the alleged conduct. See, e.g., Hydril Co. LP v. Grant Prudco LP, 474 F.3d 1344, 1349 (Fed. Cir. 2007) (instructing that fraud on the PTO may “be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present.”) (quoting Walker Process Equip., Inc. v. Food Machinery & Chem. Corp., 382 U.S. 172, 174 (1965)).

The first thing a counterclaimant must demonstrate is market power—or the ability of an alleged monopolist to charge supracompetitive prices. “To establish monopolization or attempt to monopolize... under § 2 of the Sherman Act, it is necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved.” Walker Process Equip., Inc., 382 U.S. at 177. A word of caution, however, with respect to proving market power in the IP context. Simply because an IP owner may have a “monopoly” over a patented product or technology does not mean that there is necessarily market power for the purposes of a Sherman Act claim. Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45-46 (2006) (“Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion...”). There may be ample non-protected substitutes or potential substitutes for the product or technology that prevent the IP owner from charging supracompetitive prices. As a result, a defense to any antitrust counterclaim is often the failure to sufficiently plead or prove that the IP owner has market power in some well-defined relevant market.

In addition to market power, a counterclaimant must also allege and prove exclusionary conduct in order demonstrate a violation of Section 2. Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (“To safeguard the incentive to innovate, the possession
of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”) This outline focuses specifically on the conduct element and details the types of conduct that may rise to the level of exclusionary conduct for the purposes of proving a Section 2 violation.

I. SHAM LITIGATION

One type of counterclaim that is frequently seen in IP enforcement cases, but rarely successful is a claim that the litigation itself is a sham. A bad faith attempt to enforce IP can form the basis for the counterclaimant’s right to recovery under Section 2. This can include instances where an IP owner or enforcer brings a suit with knowledge that the IP is “invalid or not infringed.” C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1368 (Fed. Cir. 1998). These suits are rarely successful, however, because a counterclaimant must overcome presumed immunity of all petitioning conduct, including petitioning of the courts through lawsuits.

A. Noerr-Pennington Immunity


B. Two-Part Test for Whether Single Suit Is a Sham

In PRE, the Supreme Court articulated a two-part test to determine whether litigation constitutes a sham. First, a suit must be “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” Id. at 60. If the claimant meets this threshold, the court inquires into whether “the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor.” Id. at 60-61 (internal quotations omitted). This second prong constitutes a subjective inquiry. See Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1072 (Fed. Cir. 1998) (“[A] sham suit must be both subjectively brought in bad faith and based on a theory of either infringement or validity that is objectively baseless.”).

litigation, and the expenses defendant must incur to defend itself, to drive defendant from the market, defendant satisfied both prongs of the test for the sham exception).

Demonstrating the objectively baseless prong of the PRE test is an exceedingly high hurdle. To determine whether a lawsuit is objectively baseless, the Federal Circuit has looked to whether the party seeking to enforce IP had “probable cause—e.g., where the law is unsettled, the action is arguably warranted by existing law, or there is an objectively good faith argument for extending existing law.” ERBE Elektromedizin GmbH v. Canady Tech. LLC, 629 F.3d 1278, 1292 (Fed. Cir. 2010) (concluding that ERBE presented non-frivolous arguments for its proposed construction of a disputed claim term). The Federal Circuit has directed that a successful lawsuit necessarily satisfies the first prong of the PRE test. U.S. Philips Corp. v. Sears Roebuck & Co., 55 F.3d 592, 597 (Fed. Cir. 1995) (“A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.”) (quoting PRE, 508 U.S. at 60 n.5); cf. Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH, 524 F.3d 1254, 1261-62 (Fed. Cir. 2008) (stating “when an underlying infringement suit was not unsuccessful, there is no basis to determine that the plaintiff in that suit lacked probable cause”). However, it is far from necessary to win a lawsuit to demonstrate that dismissal of a sham litigation suit is warranted. See, e.g., Honeywell Int’l Inc. v. Universal Avionics Sys. Corp., 488 F.3d 982, 1000 (Fed. Cir. 2007) (affirming dismissal of sham litigation claims on summary judgment, even though summary judgment of non-infringement and anticipation was granted); Mitek Surgical Prods., Inc. v. Arthrex, Inc., No. 99-1004, 2000 U.S. App. LEXIS 3146, at *9 (Fed. Cir. Feb. 22, 2000) (determining that party asserting sham litigation did not meet burden of proving objective baselessness where “suit hinged on claim construction” which was “quite unpredictable at the district court level”).

C. Handgards v. Ethicon

One particular factual scenario that can give rise to a sham litigation claim, is when a patent owner or enforcer attempts, in bad faith, to enforce a patent, knowing the patent is invalid even if the patent was lawfully obtained. Handgards v. Ethicon, 601 F.2d 986 (9th Cir.1979). This type of claim originated before the Supreme Court’s PRE decision, but generally is now thought of as falling under the PRE sham framework. See, e.g., C.R. Bard, Inc., 157 F.3d at 1368-69 (citing Handgards, Inc., 743 F.2d at 1288, and discussing need for clear and convincing evidence of bad faith); Bio Tech. Gen. Corp. v. Genentech, Inc., 267 F.3d 1325, 1332-33 (Fed. Cir. 2001) (declining to overturn district court’s agreement with ALJ conclusion that the ITC action was not sham litigation based on PRE objectively baseless standard). Counterclaims asserting bad faith enforcement with knowledge of invalidity have been rare, but do persist. See, e.g., Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc., 669 F. Supp. 2d 895, 899-900 (N.D. Ill. 2009) (declining to dismiss Walker Process and Handgards counterclaims on motion to dismiss); IGT v. Alliance Gaming Corp., 2:04-CV-1676-RCJ-RJJ, 2007 U.S. Dist. LEXIS 20668, at *17 (D. Nev. Mar. 22, 2007) (denying partial summary judgment and finding sufficient evidence on prior reduction to practice issue to sustain bad faith enforcement claim); Rolite, Inc. v. Wheelabrator Envtl. Sys., Inc., 958 F. Supp. 992, 1006 (E.D. Pa. 1997) (declining to dismiss Handgards claim based on invalidity due to failure to pay the maintenance fee).
D. **When Litigation Is Part of a Series of Suits**

*PRE* only addresses whether a single lawsuit is a sham. Two circuit courts have applied a different standard where there is a “whole series of legal proceedings.” *ERBE Elektromedizin GmbH*, 629 F.3d at 1291 (citing *Primetime 24 Joint Venture v. NBC, Inc.*, 219 F.3d 92 (2d Cir. 2000); *USS-POSCO Indus. v. Contra Costa County Bldg. & Const. Trades Council, AFL-CIO*, 31 F.3d 800 (9th Cir.1994)). In such a case, the test is prospective: “Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?” *Primetime*, 219 F.3d at 101. At least one Minnesota court has applied *PRE* in a multiple-lawsuit situation and inquired whether each prior lawsuit was objectively baseless. *Travelers Express Co. v. Am. Express Integrated Payment Sys.*, 80 F. Supp. 2d 1033, 1043 (D. Minn. 1999).

“The single suit/repetitive filing distinction has been followed consistently in the Ninth Circuit,” and adopted in the Second. Paul More, *Protections Against Retaliatory Employer Lawsuits After BE&K Construction v. NLRB*, 25 Berkeley J. Emp. & Lab. L. 205, 228 (2004). As recently as this past December, however, the Federal Circuit declined to adopt the Ninth-Second Circuit approach. See *ERBE Elektromedizin GmbH*, 629 F.3d at 1291 (“On these particular facts, however, we need not determine whether to adopt the test of our sister courts because there is no ‘series’ of legal proceedings.”). The Federal Circuit has, however, applied the *PRE* test in a case that involved two lawsuits and threats of analogous suits against other companies considering use of defendant’s patented technology. *Glass Equip. Dev., Inc. v. Besten, Inc.*, 174 F.3d 1337, 1343-44 (Fed. Cir. 1999).

Although it is not clear how many lawsuits constitute a series, the Ninth Circuit has determined that it must be more than two. In *Amarel v. Connell*, 102 F.3d 1494, 1519-20 (9th Cir. 1996), the Ninth Circuit clarified that two lawsuits do not constitute a “series” or “pattern” of litigation implicating the standard in *USS-POSCO* for “a whole series of legal proceedings.” Although the Ninth Circuit declined to state a numerical threshold, the court distinguished two suits from the “twenty-nine legal proceedings” in *USS-POSCO*. *Id.* at 1519.

E. **Pre-Suit Cease and Desist Letters**

Courts have also considered whether pre-suit demand letters constitute either protected petitioning activity or activity which “must be protected to afford breathing space to the right of petition guaranteed by the First Amendment.” *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 933 (9th Cir. 2006). In addressing this question, courts have held that conduct incidental to a lawsuit, including pre-suit demand letters and settlement offers, falls within the protection of the Noerr-Pennington doctrine. *Id.* (holding that pre-suit demand letters were protected by the Noerr-Pennington doctrine); see also *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367 (Fed. Cir. 2004) (recognizing that “our sister circuits, almost without exception, have applied the Noerr protections to pre-litigation communications”); *Golan v. Pingel Entm’t*, 310 F.3d 1360 (Fed. Cir. 2002) (“[A] patent owner has the right to . . . enforce its patent, and that includes threatening alleged infringers with suit.”); *Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860 (Fed. Cir. 1997) (“[A] patentee must be allowed to make its rights known to a potential infringer so that the latter can determine whether to cease its allegedly infringing activities,
negotiate a license if one is offered, or decide to run the risk of liability and/or the imposition of an injunction.”).

Pre-suit letters threatening legal action may nevertheless be restricted by law where they include representations so baseless that the threatened litigation would fall into the “sham litigation” exception. *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008) (concluding that threatened litigation was not baseless and therefore *Noerr-Pennigton* barred Theme’s intentional interference claims). Courts have denied *Noerr-Pennington* immunity where defendants mailed pre-litigation letters that did not suggest the possibility of a lawsuit or mention the enforcement of any intellectual property rights. *Luxpro Corp. v. Apple Inc.*, No. C10-03058, 2011 U.S. Dist. LEXIS 35008, at *10-11 (N.D. Cal. Mar. 24, 2011) (Apple not entitled to immunity for sending allegedly threatening letters to plaintiff’s commercial partners); *but see Carefusion Corp. v. Medtronic, Inc.*, 10-CV-01111-LHK, 2010 U.S. Dist. LEXIS 122044, at *16-17 (N.D. Cal. Nov. 1, 2010) (rejecting *Handgards* claim and upholding immunity where plaintiff relied on defendant’s public statements about “defending its intellectual property rights” and “enforcing its intellectual property portfolio” against a “growing number of competitors”).

II. WALKER PROCESS CLAIMS

Representations to the Patent and Trademark Office to obtain a patent also constitute petitioning conduct that is typically immune from antitrust scrutiny. However, when a petitioner’s conduct rises to the level of fraud, antitrust immunity is stripped. Fraud on the Patent and Trademark Office can be used to prove exclusionary conduct for the purposes of a Section 2 monopolization claim. The Supreme Court defined this now long-standing doctrine in 1965 in *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). There, the Supreme Court held that to strip a patentee of its antitrust exemption because of an attempt to enforce a patent monopoly, an antitrust plaintiff must first prove that the patentee “obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office.” *Walker Process Equip., Inc.*, 382 U.S. at 177; *see also Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033, 1048 (9th Cir. 2009) (“Inequitable conduct may render a patent invalid, but it is not enough to bring a patentee's conduct within the Walker Process exception to Noerr-Pennington immunity.”)

The sham litigation doctrine and *Walker Process* provide two alternative avenues necessary to establish the exclusionary conduct element of an antitrust claim. “Each provides its own basis for depriving a patent owner of immunity from the antitrust laws; either or both may be applicable to a particular party's conduct in obtaining and enforcing a patent.” *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed. Cir. 1998). If all of the “elements of *Walker Process* fraud, as well as the other criteria for antitrust liability, are met, such liability can be imposed without the additional sham inquiry required under PRE. That is because *Walker Process* antitrust liability is based on the knowing assertion of a patent procured by fraud on the PTO, very specific conduct that is clearly reprehensible.” *Id.*
A. **All Elements of Common Law Fraud Must Be Present**

Basically, in order to establish *Walker Process* fraud as exclusionary conduct, each of the elements of common law fraud must be shown. The Federal Circuit articulated the following “indispensable” elements: (1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to be the equivalent of intent (scienter), (4) a justifiable reliance upon the misrepresentation by the party deceived which induces him to act thereon, and (5) injury to the party deceived as a result of his reliance on the misrepresentation. *Nobelpharma*, 141 F.3d at 1069-70 (citing *Norton v. Curtiss*, 433 F.2d 779, 792-94 (C.C.P.A. 1970)). “A finding of inequitable conduct does not by itself suffice to support a finding of Walker Process fraud, because ‘inequitable conduct is a broader, more inclusive concept than the common law fraud needed to support a *Walker Process* counterclaim.” *Dippin’ Dots, Inc. v. Mosey*, 476 F.3d 1337, 1346 (Fed. Cir. 2007) (citing *Nobelpharma*, 141 F.3d at 1069). As a general rule, these claims are not successful. A 1993 survey found “that since January 1, 1985, only two out of twenty-five cases in which *Walker Process* claims were finally adjudicated were successful.” David R. Steinman & Danielle S. Fitzpatrick, *Antitrust Counterclaims in Patent Infringement Cases*, 10 Tex. Intell. Prop. L.J. 95, 98 n.21 (2001); see also Christopher R. Leslie, *The Role of Consumers in Walker Process Litigation*, 13 Sw. J. L. & Trade Am. 281, 265 (2007) (“Commentators have asserted that, in the past two decades, only three *Walker Process* claims have been successful.”).

Key elements are described in greater detail below.

1. **Fraudulent Misrepresentation or Omission**

Like common law fraud, a representation does not have to be an affirmative one. Omissions can also form the basis for a *Walker Process* claim. In order to demonstrate *Walker Process* fraud by omission, there must be evidence of a fraudulent omission coupled with evidence “that the party asserting the patent was aware of the fraud when bringing suit.” *Nobelpharma*, 141 F.3d at 1070. Courts have emphasized that a fraudulent omission “can be just as reprehensible as a fraudulent misrepresentation.” *Id.*

Because *Walker Process* claims constitute an allegation of fraud, Rule 9(b)’s heightened pleading standards apply. A party “alleging fraud or mistake . . . must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b); see also *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 692-93 (2d Cir. 2009), cert. denied, 130 S. Ct. 3505 (2010). The patent infringement plaintiff must have been aware of the fraud when bringing suit. *Kaiser Found. Health Plan, Inc.*, 552 F.3d at 1047 (citing *Nobelpharma*, 141 F.3d at 1069). Many courts have impliedly limited standing to competitors. *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J.) (“The claim of fraud on the patent office fails for the reason just given: if patent 723 was obtained by fraud, it was a fraud aimed at competing manufacturers of drugs, not at the suppliers of those manufacturers, and so the fraud claim cannot be pressed as an antitrust claim.”) (citations omitted).

2. **Material Fact**
To demonstrate Walker Process fraud, a claimant must make higher threshold showings of both materiality and intent than are required to show inequitable conduct. Nobelpharma, 141 F.3d at 1070-71; see also Dippin’ Dots, Inc., 476 F.3d at 1346. Walker Process fraud must concern a material issue of patentability; otherwise, a patent would have issued regardless of any fraud, and potential plaintiffs would have suffered the same monopoly effects (but legitimately). In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d at 693. The Code of Federal Regulations requires a patent applicant “to disclose to the [PTO] all information known to that individual to be material to patentability . . . .” 37 C.F.R. § 1.56(a). The regulation defines materiality broadly: “[I]nformation is material to patentability when it . . . establishes, by itself or in combination with other information, a prima facie case of unpatentability of a claim; or it refutes, or is inconsistent with, a position the applicant takes in . . . [a]sserting an argument of patentability.” Id. § 1.56(b).

3. Intent

Courts require “independent and clear evidence of deceptive intent [on the part of the patentee].” Kaiser Found. Health Plan, Inc., 552 F.3d at 1047 (citing Nobelpharma, 141 F.3d at 1071). Because direct evidence of intent to deceive is rarely available, courts may infer intent from “clear and convincing evidence of the surrounding circumstances.” Kaiser Found. Health Plan, Inc., 552 F.3d at 1047 (citing Purdue Pharma L.P. v. Endo Pharms. Inc., 438 F.3d 1123, 1133-34 (Fed. Cir. 2006)). Where the alleged fraud is based on an affirmative misrepresentation, an inference may be drawn that “the statement was made with deceptive intent.” Dippin’ Dots, 476 F.3d at 1347 (providing the example that evidence may establish that a patent applicant knew one fact and presented another, thus allowing the factfinder to conclude that the applicant intended by the misrepresentation to deceive the examiner).

Under Federal Circuit precedent, the same is not the case for omissions. In its 2007 Dippin’ Dots decision, the Federal Circuit limited Walker Process fraud to situations where independent evidence of fraudulent conduct existed beyond a patentee’s mere decision to omit a reference from the prosecution record. Dippin’ Dots, 476 F.3d at 1347 (“While Walker Process intent may be inferred from the facts and circumstances of a case, ‘[a] mere failure to cite a reference to the PTO will not suffice.’”).

Where intent is a required element, a patentee’s good faith before the PTO furnishes a complete defense. Walker Process, 382 U.S. at 177. Good faith includes “an honest mistake as to the effect of prior [art] upon patentability.” Id.

4. Injury

Because a patent “by its very nature is affected with a public interest,” injury is a “matter of course whenever the other four elements are met.” Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 375 F.3d 1341, 1361 (Fed. Cir. 2004), rev’d on other grounds, 546 U.S. 394 (2006).

B. Third-Party Applicability

Recently the Federal Circuit has determined that threats to sue a plaintiff’s customers can give rise to a valid Walker Process claim. While this issue would not arise in the context of a
counterclaim based on asserted IP, it is relevant to Walker Process claims asserted in the first instance by a plaintiff. In Hydril Co. LP v. Grant Prideco LP, the Federal Circuit considered whether Hydril could state a Walker Process fraud claim based on Grant Prideco’s threats to sue Hydril’s customers for infringement. 474 F.3d at 1344 (Fed. Cir. 2007). The court held that “a valid Walker Process claim may be based upon enforcement activity directed against the plaintiff’s customers” because threatening patent infringement suits against customers to cause them to stop dealing with their suppliers “is the kind of economic coercion that the antitrust laws are intended to prevent.” Hydril Co. LP, 474 F.3d at 1344; see also Dean L. Fanelli et al., A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit, 57 Am. U.L. Rev. 821, 871-872 (2008) (citing Hydril Co. LP, 474 F.3d at 350). At least one district court has relied on Hydril in finding that a Walker Process claim could be sustained based on “communications [] made to competitors, distributors, architects and end-users that may not sell or purchase . . . from anyone but [Defendant].” U.S. Rubber Recycling, Inc. v. Encore Int'l, Inc., CV 09-09516 SJO OPX, 2011 U.S. Dist. LEXIS 11678 (C.D. Cal. Jan. 7, 2011).

III. ANTITRUST STANDING

In addition to showing all elements for an underlying antitrust violation, an antitrust plaintiff or a counterclaimant must demonstrate that it has antitrust standing. Antitrust standing is distinct from Article III standing. In order to establish antitrust standing a plaintiff must show (1) antitrust injury, which is “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful,” Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977), and (2) “that he is a proper plaintiff in light of four ‘efficient enforcer’ factors.” See, e.g., In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 690 (2d Cir. 2009) cert. denied, 130 S. Ct. 3505 (2010). The need for strict antitrust standing flows from the fact that the antitrust laws provide treble damages.

Generally counterclaimant competitors who have been sued for infringement of intellectual property have been found to have antitrust standing. See, e.g., Amgen, Inc. v. F. Hoffmann-La Roche Ltd., 480 F. Supp. 2d 462, 469 (D. Mass. 2007) (“This Court reads these cases as conferring antitrust standing upon those who sufficiently plead an antitrust injury based upon the prosecution of a fraudulently obtained patent.”). In addition, counterclaimants who have been sued by a patent holder that does not compete in the market, but only licenses its intellectual property also has been found to have standing. Anchor Wall Sys., Inc. v. Rockwood Retaining Walls, Inc., 06-CV-0466 PJS/RLE, 2007 WL 4465195, at *10 (D. Minn. Dec. 18, 2007) (denying motion to dismiss where counterclaimant alleged Walker Process fraud by a licensor).

An interesting issue has arisen however with respect to whether purchasers, as opposed to a party that has been sued, have standing to bring Walker Process or sham litigation claims. Typically, “[o]utside of an infringement suit counterclaim, a patent’s validity can be challenged only by a party (1) producing or preparing to produce the patented product, and (2) being threatened or reasonably likely to be threatened with an infringement suit.” In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d at 690 (citing Cordis Corp. v. Medtronic, Inc., 835 F.2d 859, 862 (Fed. Cir. 1987)). The issue arises because purchasers are not producing a patented product or likely being threatened with an infringement suit.
The court in *DDAVP*, analyzed the issue and issued a narrow holding that lets some purchasers assert these claims. 585 F.3d at 691-92 (holding “only that purchaser plaintiffs have standing to raise *Walker Process* claims for patents that are already unenforceable due to inequitable conduct”); see also *Molecular Diagnostics Labs. v. Hoffmann-La Roche Inc.*, 402 F. Supp. 2d 276, 281 (D.D.C. 2005) (“Examining these factors, the court sees no reason to limit standing to competitors,” and, “[w]hile entities facing enforcement actions are more likely to rely on Walker Process, this reflects more that they are in a stronger position to detect wrongdoing than a Congressional preference”); *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 316 (N.D. Cal. 2007) (following *Molecular Diagnostics* and finding consumer standing to allege *Walker Process*, but ultimately dismissing complaint); *Ritz Camera & Image, LLC v. SanDisk Corp.*, 5:10-CV-02787-JF HRL, 2011 WL 741227, at *3 (N.D. Cal. Feb. 24, 2011) (allowing direct purchaser standing to assert *Walker Process* claim relying on the fact that “[T]he Supreme Court’s decision in *Walker Process* places no limitation on the class of plaintiffs eligible to bring a *Walker Process* claim.”).

Many other courts have reached a contrary conclusion. *See Kroger Co. v. Sanofi-Aventis*, 701 F. Supp. 2d 938, 963 (S.D. Ohio 2010) (denying direct purchaser standing where patent already found valid); *In re K-Dur Antitrust Litig.*, CIV.A. 01-1652 (JAG), 2007 WL 5297755, at *18 (D.N.J. Mar. 1, 2007) (“I conclude that *Molecular Diagnostics* is an isolated anomaly” and denying standing to indirect purchasers); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 363 F. Supp. 2d 514, 542 (E.D.N.Y. 2005) (denying indirect purchaser standing); *In re Remeron Antitrust Litig.*, 335 F. Supp. 2d 522, 529 (D.N.J. 2004) (denying purchaser standing based on principle that a “plaintiff does not have standing to assert a *Walker Process* claim unless ‘[t]he defendant had sought to enforce the patent against the plaintiff, or that plaintiff had some reasonable basis for fearing such attempted enforcement.’”).

The issue of purchaser standing is an open one with different courts coming down with different conclusions. Allowing purchaser standing could interject more life into *Walker Process* and sham litigation doctrines that have been traditionally seen in the realm of counterclaims, but have rarely been successful.