Docket No. 22-16527

In the

United States Court of Appeals

For the

Ninth Circuit

SAURIKIT, LLC,

Plaintiff-Appellant,

v.

APPLE, INC.,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 4:20-cv-08733-YGR · Honorable Yvonne Gonzalez Rogers

BRIEF OF *AMICUS CURIAE* THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS IN SUPPORT OF SAURIKIT, LLC'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Committee to Support the Antitrust Laws states that it is a nonprofit corporation and no entity has any ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). The Supreme Court and this Court have long recognized the key role private litigants play in enforcing federal antitrust laws. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *Memorex Corp. v. Int'l Bus. Machines Corp.*, 555 F.2d 1379, 1383 (9th Cir. 1977). This role would be jeopardized by the imposition of overly burdensome constraints and pleading standards on private attorneys general seeking remedies for anticompetitive conduct.

The Committee to Support the Antitrust Laws ("COSAL") is an independent, nonprofit corporation devoted to preventing, remediating, and deterring anticompetitive conduct through the enactment, preservation, and enforcement of a strong body of antitrust laws.[2] COSAL submits this amicus

[1] Plaintiff-Appellant SaurikIT, LLC ("SaurikIT") and Defendant-Appellee Apple, Inc. ("Apple") have consented to the filing of this amicus brief.

[2] 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 COSAL—

brief in support of SaurikIT because the goals of the antitrust laws will be undermined if this Court does not correct the Panel's erroneous construction of the continuing violations doctrine and articulation of pleading standards.

REASONS FOR GRANTING REHEARING AND REHEARING EN BANC

The Panel's order, that exclusionary conduct is immune from suit if not prosecuted in the first four years of its first occurrence, no matter how long it continues or how many market participants it harms, so long as the continuing conduct is sufficiently similar to the original conduct, does serious violence to the enforcement of the antitrust laws against cartelists and monopolists. The logical implications of the panel's order lead to incorrect results under Ninth Circuit law regarding what constitutes an overt act sufficient to restart the statute of limitations for antitrust claims. Further, the Panel's order, as noted by the dissent, alters and elevates the pleading standard for complaints subject to a statute of limitations affirmative defense. By requiring that SaurikIT go above and beyond Rule 8 pleading requirements and resolve in its pleadings a highly factual dispute that ought to be reserved for summary judgment, the Panel increased pleading requirements, in contradiction of the law of this Court.

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has contributed money that was intended to fund its preparation or submission. In addition, no COSAL member whose firm is counsel for a party had any involvement in the organization's decision to file this amicus brief.

ARGUMENT

I. The Panel's Order Modifies What Constitutes an Overt Act, and, if Allowed to Stand, Would Immunize Anticompetitive Conduct That Started More than Four Years Before the Lawsuit

As an exception to the general rule requiring suits to be brought within four years of accrual, a plaintiff may bring suit for a "continuing violation" that extends beyond those four years if the defendant completed an "overt act" during the four-year limitations period, and "restart[ed]" the clock. *Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1202 (9th Cir. 2014); *see Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 401 U.S. 321, 338 (1971) ("In the context of a continuing conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him . . . ."). The continuing violation standard is meant "to differentiate those cases where a continuing violation is ongoing . . . from those where all of the harm occurred at the time of the initial violation." *Samsung*, 747 F.3d at 1202.

Erroneously heightening this Circuit's well-established standard, the district court and the Panel imposed a novel requirement on SaurikIT to demonstrate that Apple's use of consumer warranty agreements and iOS developer agreements were overt acts: that Apple's conduct had evolved or changed over time. Specifically, in dismissing SaurikIT's federal antitrust claims, the district court concluded that to qualify as an overt act, Apple's alleged misconduct within the limitations period

had to "*differ* from what Apple [wa]s alleged to have done starting in 2008 and 2009." ER-86 (emphasis added); *see also* ER-88 (SaurikIT must have pleaded "allegations about the changes in the character" of Apple's contracts). The Panel additionally reasoned that anticompetitive contractual agreements must change during the limitations period to establish continuing violations. App. Dkt. 41 at 2.

Thus, in affirming the district court's decision, the Panel upturned established Ninth Circuit precedent to hold that new conduct does not amount to an overt act if it relates back to an agreement outside of the limitations period. In other words, the Panel supplanted the *continuing violation* doctrine with its novel *evolving violation* doctrine. Such a ruling (1) alters the establish Ninth Circuit law that imposing contracts on new products or enforcing agreements entered into prior to the limitations period constitutes new overt acts that cause new injuries; and (2) is an unworkable standard that will preclude valid antitrust claims that would otherwise be permitted in this Circuit. If left uncorrected, the Panel's decision will impede victims' ability to enforce the antitrust laws against ongoing, longstanding instances of anticompetitive conduct.

A. Apple's Ongoing Imposition and Enforcement of Tying and Exclusive Dealing Arrangements on iOS Device Users and iOS App Developers Is a Quintessential Example of a Continuing Violation of the Antitrust Laws

First, as the district court acknowledged, *see* ER-88, SaurikIT alleged that Apple has continuously imposed and enforced tying and exclusive dealing

arrangements—with each new iOS device user and with each new iOS app developer—to foreclose competition in the iOS app distribution and payment processing markets. SaurikIT alleged that Apple uses and enforces warranty agreements, which each iOS device user must enter into each time it purchases a new iOS device, including during the limitations period, to coerce consumers of iOS devices into downloading apps only through Apple's App Store. ER-177-78 (FAC ¶¶ 28-29); *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) (the seller exploits its control over the tying product (here the device) to force the buyer into the purchase of a tied product (the app store)).

SaurikIT also alleged that Apple uses agreements with developers to prohibit them from using third-party iOS app distribution platforms or payment processing platforms, like Cydia, and enforces such agreements, including during the limitations period, to stave off competition from companies like Cydia. ER-180–81 (FAC ¶¶ 32-33); *see Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010) ("Exclusive dealing involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from another vendor.").[3]

[3] In its briefing before the Panel, Apple mischaracterizes the nature of SaurikIT's allegations, suggesting that Apple's alleged misconduct flows from a single refusal to deal with SaurikIT and other third-parties dating back to 2008 and 2009, when Apple opted to use a "centralized distribution [and payment] platform" for iOS

As this Court stated in *Samsung*, "an action taken under a pre-limitations contract [i]s sufficient to restart the statute of limitations so long as the defendant had the ability *not* to take the challenged action." 747 F.3d at 1203 (emphasis added).

Further, the Ninth Circuit noted that, "[w]e have repeatedly held that acts taken to enforce a contract were overt acts that restarted the statute of limitations." *Samsung*, 747 F.3d at 1204 (internal citations deleted). As the *Samsung* Court explained, the "decision to enforce the contract caused a new anti-competitive harm, and the statute of limitations ran anew from the time that defendants began enforcement." *Samsung*, 747 F.3d at 1204. Such enforcement gives rise to "[a] continuing violation [and] is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured." *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987) (citing *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299, 1300 (9th Cir.1986)).

In *Samsung*, this Court explained that even imposition of a contract that was identical to a pre-limitations period contract, on a new buyer, was an overt act sufficient to restart the limitations period. *See* 747 F.3d at 1203.

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apps. App. Dkt. 22 at 2-3; *see id.* at 17, at 24. But, contrary to this recounting, Apple implemented this decision by affirmatively imposing consumer warranty agreements and iOS developer agreements on new iOS device users and iOS app developers, respectively, each an overt act that slowly drove SaurikIT from these markets. Thus, SaurikIT's injury "was the consequence of multiple wrongs" that accumulated over time, not "a single irrevocable and permanent injury." *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71 (9th Cir. 1979).

Further, as this Court explained in *Hennegan*, each affirmative act by the defendants to steer business away from the plaintiffs was an overt act. *See* 787 F.2d at 1300-01. Because the "alleged actions outside the limitations period did not immediately and permanently destroy the [plaintiffs'] business" and were not "irrevocable, immutable, permanent and final," the Court concluded that the defendants' acts were "continued, separate antitrust violations within the limitations period." *Id.* at 1301.

Each imposition and enforcement of a tying or exclusive dealing arrangement forced yet another customer or developer to forego dealing with the defendant's competitor, and resulted in a new injury. *See Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 24 F.4th 1262, 1272 (9th Cir. 2022) ("Ellis suffered a new injury with each monthly bill, which means that a new claim arose each month.") (citing *Flynt v. Shimazu*, 940 F.3d 457, 462 (9th Cir. 2019)). As this Court has explained "[a]n action ordinarily accrues on the date of the injury." *Pouncil v. Tilton*, 704 F.3d 568, 574 (9th Cir. 2012) (citing *Ward v. Westinghouse Canada, Inc.*, 32 F.3d 1405, 1407 (9th Cir.1994)) (holding a claim based on a policy implemented before the limitations period accrued at the time of the most recent injury, though plaintiff knew of the policy before the limitations period).

By failing to apply this Court's governing law concerning continuing violations and what constitutes an overt act, the Panel created a novel and

unworkable standard, in holding that only changed or new contracts could serve as overt acts to restart the limitations period, while actions related to pre-existing contracts could not. This is contrary to the prevailing Ninth Circuit law, which "differentiate[s] [between] those cases where a continuing violation is ongoing—and an antitrust suit can therefore be maintained—from those where all of the harm occurred at the time of the initial violation." *Samsung*, 747 at 1202. The new standard articulated by the Panel would bar many suits where "the continuing violation is ongoing."

B. The Panel Announced a Novel, Unworkable Standard That Will Preclude Valid Antitrust Claims Going Forward

The Panel's novel standard will lead to inconsistent results and will curtail public and private litigants from bringing meritorious claims. The incongruence of the Panel's decision is demonstrated most clearly by way of example. Imagine facts that are identical to this case but assume that the plaintiff is a consumer who purchased an iOS device from Apple (*e.g.*, an iPhone) for the very first time. As a new user of Apple's iOS devices, this consumer would be newly subjected to Apple's warranty and foreclosed from using any iOS app distribution platform other than the App Store. Under established Ninth Circuit jurisprudence—regardless of whether the warranty agreement was similar to other warranty agreements imposed by Apple more than four years prior—this consumer would have a timely tying claim against Apple because the imposition of the warranty

agreement would be an affirmative act "forc[ing]" the consumer "to do something [they] would not do in a competitive market." *Jefferson Parish*, 466 U.S. at 13-14.

Carried to its logical conclusion, the Panel's decision suggests one of two alternatives, both of which are wrong. On the one hand, assuming both coerced consumers and foreclosed competitors should be treated consistently under the antitrust laws, the Panel's reasoning suggests that the first-time consumer has no timely claim because the newly imposed warranty agreement would be a mere "reiteration or extension" of Apple's prior warranty agreements imposed more than four years earlier. App. Dkt. 41 at 2. But this is contrary to established law, which holds that "a cause of action accrues . . .when a defendant commits an act that injures a plaintiff's business." *Zenith Radio*, 401 U.S. at 338.

On the other hand, assuming consumers and excluded competitors may be treated inconsistently in their ability to bring suits for the same conduct, the Panel's decision suggests that the first-time consumer may bring a tying claim but the excluded competitor, whose ability to contract with the consumer is foreclosed by this specific warranty agreement, cannot. Such an outcome is contrary to the logic of the law, which permits both foreclosed competitors and coerced consumers to bring claims challenging tying arrangements. *See* Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 358 (5th ed. 2023).

Expanding the Panel's reasoning beyond the facts of this case demonstrates the extent to which the Panel's change to the statute-of-limitations jurisprudence would hinder the enforcement of the antitrust laws even with respect to horizontal cartels. Imagine a cartel of horizontal competitors that openly meets once a year to reaffirm their commitment to enforce—but not to modify—a market allocation conspiracy, a *per se* violation of the antitrust laws, that they continue to engage in, with an unchanged allocation. *See United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991). Under the Panel's reasoning, a plaintiff could sue during the first four years of the conduct but would be prohibited from doing so at any point afterward, simply because there was no change to the contours of the market allocation. The cartel's horizontal conspiracy would be immunized from antitrust enforcement so long as it stayed the same and they acted to enforce it without changes. Such a rule is contrary to established precedent, and if left uncorrected would create a massive end-run around the antitrust laws. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) ("[I]n the case of a continuing violation, say, a price-fixing conspiracy . . . each overt act that is part of the violation . . . , *e.g.*, each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." (internal quotation marks omitted)).

Even a recent case in this Court, *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946 (9th Cir. 2023), which concerns the same anticompetitive conduct that SaurikIT alleged in this case, would not have been permitted to go forward under the Panel's reasoning. Epic Games, an iOS app developer, sued Apple regarding its developer agreements that required iOS apps to be distributed only through the Apple App Store and forced developers to use Apple's in-app payment processor. *See id.* at 968. Although Epic Games originally agreed to Apple's developer agreement in 2010, it was permitted to bring its lawsuit a decade later, when Apple removed Epic Games's video game from the App Store pursuant to the developer agreement. *See id.* at 969. If the Panel's logic were to apply, Epic Games would not have a timely claim against Apple. Extended even further, the Panel's logic suggests that *any* nascent competitor on the cusp of entry, crowded out of the market by Apple's constant dissemination of consumer warranties and developer agreements that are substantively the same as agreements preceding the limitations period, also would be barred by the statute of limitations. But that is not the law. Indeed, Epic itself was permitted to proceed with its litigation through to trial.

II. The Ruling Would Create Major Pleading Hurdles

Statute of limitations arguments involve highly factual issues and should rarely be used as a basis for dismissal at the complaint stage, before any discovery has taken place. *See, e.g.*, *Simi Mgmt. Corp. v. Bank of Am. Corp.*, No. C-11-5573-

DMR, 2012 WL 1997232, at *8 (N.D. Cal. June 4, 2012). "The question of when a claim accrues is a fact intensive inquiry . . . ." *Pouncil*, 704 F.3d at 574. The Ninth Circuit has held that "Rule 8 does not require plaintiffs to plead around affirmative defenses." *U.S. Commodity Futures Trading Comm'n v. Monex Credit Co.*, 931 F.3d 966, 972 (9th Cir. 2019) (citing *Jones v. Bock*, 549 U.S. 199, 216 (2007)). "And '[o]rdinarily, affirmative defenses . . . may not be raised on a motion to dismiss.'" *Monex*, 931 F.3d at 972 (quoting *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1194 n.6 (9th Cir. 2018)) (alteration in original).

"[D]ismissal based on an affirmative defense is permitted when the *complaint* establishes the defense." *Monex*, 931 F.3d at 973 (citing *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013)) (emphasis in original). "If, from the allegations of the complaint as well as any judicially noticeable materials, an asserted defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is improper." *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (citing *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir.1984) (per curiam)). For instance, *Monex* involved a dispute between the plaintiff and defendant about the characterization of the facts set forth in the complaint. This Court held that it was improper to dismiss the complaint based on a disputed characterization of the facts giving rise to an affirmative defense, stating: "Monex challenges the CFTC's characterization of its delivery scheme, but, at the 12(b)(6) stage, we ignore such

factual disputes and accept as true allegations in the complaint." *Monex*, 931 F.3d at 975.

Here, SaurikIT's complaint alleged that Apple's anticompetitive conduct drove Cydia from the market in 2020. ER-199-200 (FAC ¶¶ 75-76). The complaint also alleged modifications of Apple's contracts with developers and enforcement actions taken against developers, such as Epic, within the limitations period. ER-190-91 (FAC ¶ 57). Additionally, SaurikIT's complaint alleged that Apple introduced new products—new iPhone models—that were subject to warranties that excluded Cydia from the market during the limitations period. ER-178 (FAC ¶ 29). SaurikIT's complaint did not "establish the defense" of the statute of limitations. *Monex*, 931 F.3d at 973. Instead, it pleaded that new phones and users were subject to Apple's warranties and that developer contracts were modified and enforced, within the limitations period. App. Dkt. 41 at 2-3. Apple disagreed with this characterization, presenting the district court with a factual dispute regarding when SaurikIT's claim against Apple accrued, which dispute should have been resolved through discovery. *See ASARCO*, 765 F.3d at 1004.

The Panel's ruling, which affirmed dismissal despite the existence of factual disputes raised by the allegations, including disputes about when the injury accrued, conflicts with established Ninth Circuit law, and will leave courts and litigants in a state of confusion about the degree to which pleadings must address,

and without the benefit of a full record, dispense with, any disputes regarding statutes of limitations or other affirmative defenses. Must a litigant's complaint resolve any factual disputes regarding affirmative defenses? Should a litigant refrain from filing its complaint, if, without discovery, it cannot resolve disputes regarding acts the defendant took in furtherance of its anticompetitive scheme?

By now changing the pleading standard to require litigants to plead facts resolving disputed affirmative defenses based on information that would normally be investigated in discovery, the Panel has made it far more burdensome to plead a viable complaint and has raised the pleading burden in conflict with this Court's precedent. Instead of pleading their *prima facie* case, the Panel's order would require litigants to anticipate all affirmative defenses, from statutes of limitations, to mitigation to unclean hands, and resolve factual disputes around those defenses, without the benefit of discovery.

Indeed, if such a pleading standard became the law, and a factually-disputed affirmative defense could invalidate a complaint, litigants would either have to file early, before the facts of their *prima facie* case have sufficiently been developed and investigated, or file later and risk dismissal on statute of limitations grounds. This puts litigants in an impossible position. If they file too soon, they risk dismissal for not meeting the substantive elements of their claims or even the possibility of being held in violation of Rule 11 of the Federal Rules of Civil

Procedure. If they wait until they have fully developed their case, their suit may be dismissed as time-barred.

Having to file a complaint within the first four years of a defendant's anticompetitive conduct would likely have major impacts upon a litigant's ability to observe the conduct's full effects and plead injury and damages. Also, filing as soon as a defendant begins to engage in anticompetitive conduct without putting in the time to mitigate its effects would expose victims to defenses concerning failures to mitigate. Mitigation would certainly be discouraged if litigants were forced to rush to the courthouse within four years of the time the anticompetitive conduct started.

This cannot be the outcome the Ninth Circuit intended, and this Court should grant *en banc* review to properly analyze how the Ninth Circuit's pleading standards regarding continuing violations and accrual of claims should be applied.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner-Appellant's Petition for Rehearing and Rehearing *En Banc*.

Respectfully submitted,

Dated: January 29, 2024

By: */s/Victoria Sims*

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*Application for Admission Pending

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FOR THE NINTH CIRCUIT

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I hereby certify that on January 29, 2024, I electronically filled the foregoing with the Clerk of the Court for the United States of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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