**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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| IN RE APPLE IPHONE ANTITRUST LITIGATION, | No. 14-15000 |
| | D.C. No. 4:11-cv-06714-YGR |
| ROBERT PEPPER; STEPHEN H. SCHWARTZ; EDWARD W. HAYTER; ERIC TERRELL, *Plaintiffs-Appellants*, | OPINION |
| v. | |
| APPLE INC., *Defendant-Appellee.* | |

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted February 10, 2016
San Francisco, California

Filed January 12, 2017

Before: A. Wallace Tashima and William A. Fletcher, Circuit Judges, and Robert W. Gettleman,* District Judge.

Opinion by Judge W. Fletcher

* The Honorable Robert W. Gettleman, United States District Judge for the Northern District of Illinois, sitting by designation.

## SUMMARY**

### Antitrust

The panel reversed the dismissal for lack of statutory standing of an antitrust complaint alleging that Apple, Inc., monopolized and attempted to monopolize the market for iPhone apps.

Plaintiffs argued that Fed. R. Civ. P. 12(g)(2) barred Apple from raising in its fourth Rule 12 motion to dismiss a statutory standing defense omitted from prior motions to dismiss. Agreeing with the Third and Tenth Circuits, the panel held that as a reviewing court, the court of appeals should generally be forgiving of a district court's ruling on the merits of a late-filed Rule 12(b)(6) motion. The panel concluded that any error in the district court's consideration on the merits of Apple's Rule 12(b)(6) motion to dismiss was harmless.

Disagreeing with the Eight Circuit's analysis in a similar case, the panel held that the plaintiffs were direct purchasers of iPhone apps from Apple, rather than the app developers, and therefore had standing to sue under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The panel concluded that Apple was a distributor of iPhone apps, selling them directly to purchasers through its App Store. The panel remanded the case for further proceedings.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

## COUNSEL

Mark C. Rifkin (argued), Alexander H. Schmidt, and Michael Liskow, Wolf Haldenstein Adler Freeman & Herz LLP, New York, New York; Francis M. Gregorek and Rachele R. Rickert, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, California; for Plaintiffs-Appellants.

Daniel M. Wall (argued), Christopher S. Yates, and Sadik Huseny, Latham & Watkins LLP, San Francisco, California; J. Scott Ballenger, Latham & Watkins LLP, Washington, D.C.; for Defendant-Appellee.

## OPINION

W. FLETCHER, Circuit Judge:

In their current complaint, Plaintiffs allege that they purchased iPhones and iPhone applications ("apps") between 2007 and 2013, and that Apple has monopolized and attempted to monopolize the market for iPhone apps. In ruling on Apple's fourth motion to dismiss, the district court held that Plaintiffs lacked antitrust standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

We must decide two questions. First, we must decide whether Rule 12(g)(2) barred the district court from considering on the merits Apple's fourth motion to dismiss, brought under Rule 12(b)(6), in which Apple contended that Plaintiffs lack statutory standing under *Illinois Brick*. We conclude that the district court may have erred in considering this motion on the merits, but that its error, if any, was harmless. Second, we must decide whether Plaintiffs lack

statutory standing under *Illinois Brick*. We hold that Plaintiffs are direct purchasers from Apple within the meaning of *Illinois Brick* and therefore have standing.

## I. Factual Allegations

The following factual narrative is drawn from Plaintiffs' current complaint. Because the district court dismissed Plaintiffs' suit under Rule 12(b)(6) for failure to state a claim, we take as true all plausible allegations.

Apple released the iPhone in 2007. The iPhone is a "closed system," meaning that Apple controls which apps—such as ringtones, instant messaging, Internet, video, and the like—can run on an iPhone's software. In 2008, Apple launched the "App Store," an internet site where iPhone users can find, purchase, and download iPhone apps. Apple has developed some of the apps sold in the App Store, but many of the apps sold in the store have been developed by third-party developers. Apple earns a commission on each third-party app purchased for use on an iPhone. When a customer purchases a third-party iPhone app, the payment is submitted to the App Store. Of that payment, 30% goes to Apple and 70% goes to the developer.

Apple prohibits app developers from selling iPhone apps through channels other than the App Store, threatening to cut off sales by any developer who violates this prohibition. Apple discourages iPhone owners from downloading unapproved apps, threatening to void iPhone warranties if they do so.

## II. Procedural History

The procedural history of this case is complex. We describe as much of the history as is necessary to resolve the procedural question before us. Four named plaintiffs filed a putative antitrust class action complaint ("Complaint 1") against Apple on December 29, 2011. Counts I and II of Complaint 1 alleged monopolization and attempted monopolization of the iPhone app market by Apple. Count III alleged a conspiracy between Apple and AT&T Mobility, LLC ("ATTM") to monopolize the voice and data services market for iPhones. Plaintiffs alleged that they had purchased iPhones, but did not allege that they had ever purchased, or attempted to purchase, iPhone apps. On March 2, 2012, Apple moved to dismiss the entire complaint under Rule 12(b)(7) for failure to join ATTM as a defendant. This motion to dismiss was mooted when the district court consolidated the action with another action.

Seven named plaintiffs, including the original four plaintiffs, then filed a consolidated putative class action complaint ("Complaint 2") against Apple on March 21, 2012. The allegations in Complaint 2 were essentially the same as those in Complaint 1, and the same three Counts were alleged. None of the named plaintiffs alleged that they had bought, or attempted to buy, an iPhone app. ATTM was not added as a defendant. On April 16, 2012, Apple moved again to dismiss the entire complaint under Rule 12(b)(7) for failure to join ATTM as a defendant. In the alternative, it moved to dismiss Count III under Rule 12(b)(6) for failure to state a claim for conspiracy between Apple and ATTM. The district court granted without prejudice the motion to dismiss the entire complaint, even though Counts I and II alleged no wrongdoing by ATTM. The court specifically ordered

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