Case No. 24-2697

In the

United States Court of Appeals

for the

Ninth Circuit

PHARMACYCHECKER.COM LLC,
Plaintiff-Appellee,

v.

LEGITSCRIPT LLC,
Defendant-Appellant.

Appeal from the United States District Court for the District of Oregon (Portland), Case No. 3:22-cv-00252-SI · The Honorable Michael H. Simon, District Judge

APPELLEE'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellee states that there is no parent corporation or any publicly held corporation that owns 10% or more of its stock.

Date: September 16, 2024

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s/ Aaron Gott
Aaron Gott

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PharmacyChecker.com LLC

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STATEMENT OF ISSUES

The district court certified the following two questions for interlocutory appeal:

1. Might a plaintiff's facilitation of unlawful activity by others bar antitrust standing under some circumstances?

2. If so, is there a minimum threshold of facilitation of unlawful activity by others, measured in some appropriate fashion considering the plaintiff's entire range of business activities, for the bar to antitrust standing to be triggered?

STANDARD OF REVIEW

This Court reviews *de novo* a district court's denial of summary judgment. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1150 (9th Cir. 2016). Typically, in reviewing summary judgment, the Court determines whether the evidence, viewed in a light most favorable to the nonmoving party, presents any genuine issue of material fact and whether the district court correctly applied the law. *Id.* (citing *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995)).

But this is an interlocutory appeal under 28 U.S.C. § 1292(b) to decide controlling questions of law certified by the district court under exceptional circumstances, *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981), *cause dismissed sub nom. Arizona v. U.S. Dist. Ct. for the Dist. of Ariz.*, 459 U.S. 961 (1982), and *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983), and "[t]he antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence of a particular case." *McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004).[1]

STATEMENT OF THE CASE

PharmacyChecker operates an online pharmacy accreditation program to inform the public about online pharmacies that meet safety standards and provides drug price comparison information for website visitors worldwide, while also raising awareness about policy problems

1. The Court nevertheless has "the power to 'review an entire order, either to consider a question different from the one certified as controlling or to decide the case despite the lack of any identified controlling question.' " *Id.* at 1256–57 ("Power is one thing, the prudent exercise of it is another.") (quoting *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996)).

around prescription drug access and affordability. 1-ER-3–4. It also provides U.S. prescription drug discount cards allowing consumers to save up to 90% at U.S. pharmacies. 1-ER-4. PharmacyChecker is not a pharmacy and does not buy, sell, import, dispense, process orders for, or distribute any drugs. *Id.* PharmacyChecker does not earn any revenue from legally or illegally imported drugs. 1-ER-11.

Consumers, journalists, policymakers, and companies use the information on PharmacyChecker's website for many purposes. A Wall Street Journal op-ed recognized PharmacyChecker as one of just a handful of companies that provide patients and policymakers with a resource that gives transparency to prescription drug prices. 1-ER-8. And PharmacyChecker's online pharmacy verification and drug price comparison services are referenced in media sources, including AARP Magazine, the Wall Street Journal, NBC News, Yahoo Finance, the New York Times, Kaiser Health News, and others. *Id.*

PharmacyChecker's drug price comparisons have been cited by the FDA and academic researchers. Organizations such as Medicines Sans Frontiers (Doctors Without Borders) have sought advice from PharmacyChecker on international pharmacy safety and drug pricing,

and the World Health Organization has published reports citing PharmacyChecker's research. 1-ER-9. PharmacyChecker executives have even testified before Congress about pressing issues relating to the Internet and prescription drugs. Further, a U.S. Senate staff report expressly relied on data from PharmacyChecker. *Id.*

PharmacyChecker provides its information as a service to its website visitors for free, and the vast majority of visitors use the website as a comparative-price reference, for research, for policy advocacy, or as an educational tool without clicking through to any pharmacy's website. 1-ER-9–10.

PharmacyChecker's business model relies on pay-per click revenue to provide its services to users for free. 1-ER-9. It also supports its website and programs through other revenue, including verification and ongoing monitoring fees paid by online pharmacy websites. 1-ER-9–10. 56.7% of PharmacyChecker's total revenue is from foreign pharmacies based on U.S.-origin clicks to those pharmacies. 1-ER-10. None of that revenue depends on a drug transaction occurring. 1-ER-11. PharmacyChecker does not, and has no reason to, track visitor activity once visitors leave its website by clicking through to a pharmacy website, and it does not

have data connecting clicks to purchase transactions, or otherwise receive that information from its participating pharmacy websites. *Id.*

In August 2019, PharmacyChecker brought an antitrust lawsuit in the Southern District of New York alleging a conspiracy by two of its competitors, LegitScript and the National Association of Boards of Pharmacy, among other industry organizations, to use shadow regulation by agreements with key internet gatekeepers to manipulate and suppress the information available on the Internet to consumers about lower-cost, safe prescription medicine. 1-ER-4–5. Because of this scheme, PharmacyChecker was effectively excluded from the market, which harmed competition and seriously injured PharmacyChecker. 1-ER-11–12.

LegitScript moved to dismiss for lack of personal jurisdiction under Rule 12(b)(1). 1-ER-13. The Southern District of New York, Judge Kenneth Karas presiding, granted LegitScript's motion, and later granted a motion by PharmacyChecker to sever the claim against LegitScript and transfer it to the District of Oregon, where LegitScript resides. *Id.* Once the case was transferred, LegitScript subsequently filed

another motion to dismiss, which the district court, Judge Michael Simon presiding, denied. *Id.*

In March 2023, Judge Karas in the S.D.N.Y. granted the New York defendants' motion for summary judgment, ruling that PharmacyChecker lacks antitrust standing because, despite its many purposes and functions, PharmacyChecker's business, as a matter of law, is "completely or almost completely geared toward facilitating" consumers' alleged illegal importation of non-controlled drugs for personal use with a prescription. 1-ER-14. Judge Karas resolved the "completely or almost completely geared toward facilitating" inquiry based on calculations of the percentages of PharmacyChecker's revenue streams from foreign pharmacies. *See generally* 1-ER-43–107.

In May 2023, LegitScript moved for summary judgment based on (1) issue preclusion and (2) the merits of the S.D.N.Y. summary judgment decision. Judge Simon denied the motion on January 3, 2024, holding that PharmacyChecker does not lose its antitrust standing "merely because [its] website facilitates illegal activity by others and the plaintiff receives revenue as in indirect result of that activity." 1-ER-27. While Judge Simon did not explicitly criticize the S.D.N.Y. decision, his

reasoning roundly rejected the "completely or almost completely geared toward facilitating" standard: "It would contravene Supreme Court and Ninth Circuit precedent for this Court to fashion a new rule that deprives a plaintiff of an antitrust cause of action and immunize an antitrust defendant when the plaintiff's business is entirely ***legal***." 1-ER-41.

Judge Simon explained that "[e]ven when an antitrust plaintiff has ***directly*** engaged in an illegal activity that unequivocally constitutes a public harm, the Supreme Court has held that such harm must be addressed, if at all, by means other than depriving the plaintiff of an otherwise valid antitrust cause of action or immunizing the antitrust defendants." 1-ER-40.

Contrary to LegitScript's assertions, neither court ruled that PharmacyChecker violated any federal law or that PharmacyChecker itself engages in any illegal activity. *Compare* Appellant's Br. 24 (stating that PharmacyChecker's "business is itself illegal") *with* 1-ER-26 ("[T]he Court concludes that PharmacyChecker's business is legal. LegitScript has identified no federal or state law that PharmacyChecker has violated.") *and PharmacyChecker.com LLC v. Nat'l Ass'n of Bds of Pharmacy*, No. 19-CV-7577 (KMK), 2024 WL 1199500, at *4 (S.D.N.Y.

Mar. 20, 2024) ("[This] Court at no point decided that [PharmacyChecker], itself, violated federal law.").

Judge Simon added:

> Even if the Court agreed with LegitScript that the ***facilitation*** of illegal activity is ***itself*** illegal or otherwise equivalent to illegal activity, . . . [and e]ven accepting LegitScript's argument that facilitation of cross-border importation of drugs is itself illegal, . . . the evidence shows no more than a 'miniscule' or 'insignificant' amount of the purportedly illegal activity.

1-ER-39 n.22.

And neither court ruled that any percentage of PharmacyChecker's revenue can be linked to an actual foreign prescription drug purchase, let alone an ***illegal*** import. PharmacyChecker does not track visitor activity after clicking through to a pharmacy website, and it has no data connecting clicks to transactions. 1-ER-9. PharmacyChecker does not receive such information from pharmacies that participate in its programs in the ordinary course because it has no business need for that information; its revenue is not based on drug transactions. *Id.* But, according to one pharmacy's testimony in the New York action, a mere 3.47% of its clicks led to a transaction. *Id.*

Finally, personal importation of prescription drugs is not necessarily illegal. Judge Karas in the S.D.N.Y., for example, agreed that PharmacyChecker "is correct that there are various exceptions to and exemptions from [the personal importation] laws," such as labelling exemptions. 1-ER-85. In other words, not every importation of a prescription drug for personal use is unlawful. And Judge Simon in the district court ruled that even assuming LegitScript's legal conclusions, the evidence showed a "miniscule" amount of "purportedly illegal activity" may have resulted from the actions of visitors to PharmacyChecker's website. 1-ER-39 n.22.

ARGUMENT

An antitrust plaintiff whose business conduct includes facilitating the unlawful activity of third parties does not lose its antitrust standing under any circumstances, and there is no threshold at which a plaintiff's facilitation of such third-party unlawful activity would bar its antitrust standing. There is no decision directly addressing this question, but, as the district court recognized, there is binding authority that says even a plaintiff's ***own*** illegal activity does not bar its antitrust standing. Thus, it would contravene Supreme Court and Ninth Circuit precedent to

fashion a new rule that strips antitrust standing from plaintiffs whose businesses are entirely legal while immunizing antitrust violations.

I. A PLAINTIFF'S FACILITATION OF UNLAWFUL ACTIVITY BY OTHERS DOES NOT BAR ANTITRUST STANDING

As this Court has held time and again, a plaintiff's unlawful conduct does not bar its antitrust claim. The district court recognized that it would contravene more than a half century of precedent to fashion a new rule that deprives a plaintiff of antitrust standing where its business is completely legal, "even if the plaintiff's website is used for purposes of facilitating unlawful activity by others and the plaintiff indirectly derives revenue (even a large portion of its revenue) from that activity." 1-ER-41.

A. A Plaintiff's Illegal Conduct Does Not Bar Antitrust Standing

The Supreme Court long ago rejected an "unclean hands" or *in pari delicto* defense to the federal antitrust laws, even when the plaintiff's own conduct is a felony antitrust violation. That includes when the plaintiff participates in a different antitrust conspiracy, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) ("The alleged illegal conduct of petitioner, however, could not

legalize the unlawful combination by respondents nor immunize them against liability to those they injured."), or even in the same conspiracy as the defendant. *Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968) (If a plaintiff did something unlawful, she remains "fully subject to civil and criminal penalties for [her] own illegal conduct."); *see also* I Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 361. (4th ed. 2018). The Supreme Court's rationale for these decisions was the overriding public interest in antitrust enforcement through private antitrust actions, even if it means a windfall gain for a wrongdoing plaintiff. After all, that plaintiff would "remain fully subject to civil and criminal penalties for their own illegal conduct." *Perma Life*, 392 U.S. at 139.

As the district court noted, courts since have understood *Kiefer-Stewart* and *Perma Life* to have "abolished the defense of illegality even when the plaintiff's wrongdoing is unrelated to antitrust policy." 1-ER-30 (quoting *Consol. Exp., Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494, 526 (3d Cir. 1979) (collecting cases), *vacated on other grounds sub nom. Int'l Longshoremen's Ass'n v. Consol. Exp., Inc.*, 448 U.S. 90 (1980)). 1-ER-30.

The Ninth Circuit's decisions have similarly understood *Kiefer-Stewart* and *Perma Life* as rejecting any exception to antitrust liability based on "illegality on the part of the plaintiff." *Memorex Corp. v. IBM Corp.*, 555 F.2d 1379, 1381 (9th Cir. 1977). In *Calnetics Corp. v. Volkswagen of America, Inc.*, the Court declined to exclude damages incurred when the plaintiff's business was illegal because the argument is "in effect" an "unclean hands" defense, "which is not a defense in an action for treble damages." 532 F.2d 674, 688 (9th Cir. 1976) (citations omitted).

Yet LegitScript insists that "*Calnetics* does not apply here because, again, the defense at issue not [sic] unclean hands or *in pari delicto*." Appellant's Opening Br. at 30. But the defendant in *Calnetics* made the same argument about *Perma Life*—it wasn't asserting unclean hands or *in pari delicto*, but rather that sales resulting from an illegal agreement "were inadmissible for the purpose of proving damages." *Calnetics*, 532 F.2d at 688. This Court was unpersuaded. It held that "[l]abels . . . are not controlling, and we find no legitimate reason for distinguishing defendants' 'illegal sales' argument from the *in pari delicto* type of defense struck down in *Perma Life*." *Calnetics*, 532 F.2d at 689. Not only

that, but if the plaintiff proved that the defendants illegally excluded it from the market, "it is entitled to recover damages actually suffered even though" its market position "had been attained ***only through*** illegal conduct." *Id.*

Likewise, in *Memorex*, where the plaintiff allegedly stole trade secrets, the Court rejected an "unlawful market presence" defense as indistinguishable from the equitable defense rejected in *Perma Life*. 555 F.2d at 1381. The Court confirmed that "illegality on the part of the plaintiff is the common nucleus of all of these defenses," and each was rejected under the same rationale: vigorous antitrust enforcement. *Id.* at 1383. ("We continue to side with the goal of vigorous enforcement of our antitrust laws."). A plaintiff's wrongful conduct must not "become a shield in the violator's hands against [the] operation of the antitrust laws," and there were other remedies to the plaintiff's illegal activity. *Id.* at 1382 and n.3.

LegitScript tries to minimize *Memorex* in its immunity bid by distinguishing the type of "public wrong." According to LegitScript, the supposed "wrongs" at issue in this case are not "directed at LegitScript; rather, they are directed at the public." Appellant's Br. at 30 ("*Memorex*,

therefore, does not apply."). But LegitScript ignores that *Kiefer-Stewart*, *Perma Life*, and *Calnetics* all involved so-called "public wrongs"—antitrust violations affecting competition in the marketplace—and *Memorex* was an extension of those decisions.

Against all this binding authority, LegitScript asks this Court to consider three non-binding cases instead. One, *Maltz v. Sax*, is an 80-year-old out-of-circuit decision that the district court recognized has been at least partially, if not completely, overruled, and that has not been cited favorably in 45 years. 134 F.2d 2 (7th Cir. 1943); 1-ER-39 n.23 ("[A]nd the Seventh Circuit has not cited it in nearly 70 years.").

The next case, *Pearl Music Co. v. Recording Industry Association of America, Inc.*, is a Central District of California court case that expressly contradicts the binding *Calnetics* and *Memorex* decisions issued in the two years before it. 460 F. Supp. 1060, 1068 (C.D. Cal. 1978). That case removed standing from an antitrust plaintiff whose business conduct was "totally illegal" despite *Calnetics*. *Id.* And the last case, *PharmacyChecker.com, LLC. v. National Association of Boards of Pharmacy*, the S.D.N.Y decision that has yet to be reviewed by the Second

Circuit, relied on *Maltz* and *Pearl Music*. 1-ER-43–107. It also improperly applied the summary judgment standard, as discussed below. *Id.*

B. The Court Should Not Bar Antitrust Standing Based on Plaintiff's Entirely Legal Conduct

To reverse the district court's denial of summary judgment would mean not only to reject more than half a century of precedent that says a plaintiff's unlawful conduct does not bar antitrust standing; it would tread entirely new ground in the other direction: a plaintiff could lose antitrust standing by acting legally, but by indirectly benefiting from the potentially illegal conduct of others. This rule would know no bounds.

The district court noted that:

> It would contravene Supreme Court and Ninth Circuit precedent for this Court to fashion a new rule that deprives a plaintiff of an antitrust cause of action and immunize an antitrust defendant when the plaintiff's business is entirely *legal*. That is so even if the plaintiff's website is used for purposes of facilitating unlawful activity by others and the plaintiff indirectly derives revenue (even a large portion of its revenue) from that activity.

1-ER-41.

The Supreme Court has admonished that courts should "not add requirements to burden the private [antitrust] litigant beyond what is specifically set forth by Congress in those laws," and it has forcefully rejected various pleas for exceptions to the policy underlying those laws—

even for dangerous goods and services—because to do so "would be tantamount to repeal of the [Sherman Act]." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 547 n.1 (1983) (quoting *Radovich v. NFL*, 352 U.S. 445, 453–54 (1957)); *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978). If creating an exception for a plaintiff's illegal conduct would "only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement," *Perma Life*, 392 U.S. at 139, contriving an exception for a plaintiff's entirely legal conduct because the plaintiff indirectly benefits from the potentially unlawful conduct of others could destroy its usefulness altogether.

Congress empowered victims of antitrust violations to enforce the Sherman Act through the Clayton Act. This Court should decline LegitScript's invitation to repudiate longstanding congressional policy and high court precedent. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (federal antitrust laws are the "Magna Carta of free enterprise," as important to interstate commerce and economic liberty "as the Bill of Rights is to the protection of our fundamental personal freedoms"); *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381

U.S. 311, 318–19 (1965) (Congress relies on antitrust victims to act as private attorneys general through trebled damages and attorneys' fees under the Clayton Act.). But if the Court were to consider such an invitation, this is not the case to do so because PharmacyChecker is a victim who has "broken no law." 1-ER-35.

II. THE DISTRICT COURT CORRECTLY APPLIED THE SUMMARY JUDGMENT STANDARD

As explained above, § 1292(b) appeals are intended for the Court to decide "controlling questions of law" under "exceptional circumstances" and not for piecemeal review of run-of-the-mill summary judgment denials that turn on fact questions. But now that it has jurisdiction, the Court has the power to decide any issue it would like. To the extent the Court wades into fact issues, it should affirm the district court's factual findings.

The district court found that PharmacyChecker has "broken no law" and that its "business is legal." 1-ER-26, 35, 41. But the district court also said that, even assuming LegitScript were correct that facilitation of illegal importation was itself illegal and that all cross-border importation is illegal, LegitScript's "evidence shows no more than a 'miniscule' or 'insignificant' amount of the purportedly illegal activity." 1-ER-39 n.22.

Thus, if it had adopted and applied the S.D.N.Y. court's *almost completely geared toward facilitating* standard, the district court still would have held that LegitScript was not entitled to summary judgment.

LegitScript's evidence—at best—showed that at one foreign pharmacy, about 3.47% of clicks from PharmacyChecker's website resulted in drug purchases. 1-ER-11, 39 n.22. Thus, accepting LegitScript's novel standard and extrapolating that figure, it would still only mean a fraction of a fraction of PharmacyChecker's revenue is from clicks that might have led to drug importations. 1-ER-10–11, 39 n.22.

The district court did not "ignore[] the evidence." Appellant's Br. 23. It recognized that, on summary judgment, it "must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor." 1-ER-6 (citing *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001)). And under that standard, the amount of facilitated potentially illegal activity was "miniscule." 1-ER-39 n.22.

The S.D.N.Y. court, in contrast, did not view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. Instead, it resolved numerous

convoluted and complex factual disputes to find that the "largest share" of PharmacyChecker's revenue was "click fees from U.S. consumers to foreign pharmacies" and that because this was a "majority," it was enough to meet its ***almost completely*** *geared toward facilitating* standard. 1-ER-97–98.[2] Thus, where the decisions really differ as a practical matter is in applying the standard for summary judgment, and the decision subject to review in this Court correctly applied that standard to find that PharmacyChecker's business is legal.

As explained above, it would contravene this Court's and the U.S. Supreme Court's precedent to fashion a new rule like the *almost completely geared toward facilitating* standard for this circuit. But even if the Court thought such a sweeping change of precedent appropriate, this is the wrong case in which to adopt it.

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2. In a later opinion, the S.D.N.Y. court specifically stated that it "did not conclude that [PharmacyChecker's] business violated federal law." *PharmacyChecker.com LLC v. Nat'l Ass'n of Boards of Pharmacy*, 19-CV-7577 (KMK), 2024 WL 1199500, at *4 (S.D.N.Y. Mar. 20, 2024). "Semantic similarity aside, the Court at no point decided that [PharmacyChecker], itself, violated federal law or that [PharmacyChecker] engaged in something akin to criminal facilitation." *Id.* Further, while it had found PharmacyChecker "received nearly all its revenue from sending consumers to foreign pharmacies, [the defendant] did not tie those funds to illegal imports." *Id.*

The Court should affirm the district court's denial of summary judgment and hold, consistent with binding precedent, that a plaintiff's facilitation of unlawful activity by others does not bar antitrust standing.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's denial of summary judgment.

Respectfully submitted,

Date: September 16, 2024

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