No. 98-127

In the Supreme Court of the United States

OCTOBER TERM, 1998

ALEX CAMPOS, ET AL., PETITIONERS

v.

TICKETMASTER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying the direct purchaser rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), to bar recovery of damages for alleged monopoly overcharges for ticket distribution services by claimants who, according to the court's reading of the complaint, had not purchased such services directly from the alleged monopolist.

2. Whether the court of appeals erred in holding that, in order to assert a "co-conspirator" exception to the direct purchaser rule of *Illinois Brick*, an indirect purchaser must name as defendants not only the alleged monopolist, but also the direct purchaser/co-conspirator.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. This case concerns allegations of anticompetitive activity in the market for the distribution of tickets to large-scale popular music concerts. The promoters that promote, and the venues that present, such concerts ordinarily do not themselves conduct the transactions by which tickets to the concerts are sold and delivered to members of the public. Respondent Ticketmaster Corporation and its subsidiaries (collectively, Ticketmaster) perform that function pursuant to contracts

with promoters or venues. Pet. App. A6-A7, B29, C55 (Compl. ¶ 47).[1]

In performing that function, Ticketmaster sells tickets by telephone, at retail outlets, and sometimes at the venue's own box office, collects payments from ticket buyers, and remits some, but not all, of the amounts collected to the venue. The ticket buyer pays Ticketmaster a sum that includes amounts separately designated as for the ticket itself and for "service," "convenience," "processing," or "handling." According to petitioners' complaint, "Ticketmaster sells 90% of all tickets to large-scale popular music concerts and has exclusive contracts with the largest and most popular arenas and venues controlling two-thirds of the market." Pet. App. C56 (Compl. ¶ 38).[2]

Petitioners, who bought tickets through Ticketmaster, filed class action antitrust suits, which were consolidated for pretrial proceedings in the Eastern District of Missouri. The consolidated complaint alleges that Ticketmaster attempted to monopolize and monopolized markets for the distribution of tickets to large-scale popular music concerts, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. The complaint further alleges that Ticketmaster and unnamed co-

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[1] For convenience, we use the term "venue" to refer to a venue, a promoter, or both, as the context requires.

[2] The complaint alludes to a Department of Justice investigation of Ticketmaster. Pet. App. C47 (Compl. ¶ 4). On July 5, 1995, the Department of Justice announced that it had "informed Ticketmaster Holdings Group, Inc., that it is closing its antitrust investigation into that firm's contracting practices" and that it would "continue to monitor competitive developments in the ticketing industry." U.S. Dep't of Justice, *Antitrust Division Statement Regarding Ticketmaster Inquiry*, Press Release 95-374 (July 5, 1995).

conspirators, including venues and promoters, entered into improper exclusive dealing agreements, fixed prices for ticket distribution services, and conspired to boycott certain performers of popular music, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and that Ticketmaster acquired competing firms, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Pet. App. A5, C70-C79 (Compl. ¶¶ 83-132).

Petitioners sought injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. 26, and treble damages under Section 4 of the Clayton Act, 15 U.S.C. 15. Pet. App. A5, C80. The claimed damages were based on alleged overcharges in ticket distribution service fees that reflected Ticketmaster's exercise of monopoly power. *Id.* at A5, C72 (Compl. ¶¶ 92, 94). Those "excessive fees," the complaint alleges, were paid "directly to Ticketmaster." *Id.* at C72 (Compl. ¶ 94).[3]

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[3] The complaint also alleges that petitioners sustained damages because they were "subject to lost or diminished access to large-scale popular music concerts" and were "foreclosed from the opportunity to be entertained by certain groups" that were boycotted by Ticketmaster and its co-conspirators. Pet. App. C72 (Compl. ¶ 94), C78 (Compl. ¶ 123). The complaint further alleges that "Ticketmaster has acted as the 'ringmaster' of a nationwide cartel of venues" in a conspiracy to fix "prices for service and handling fees" that has caused "plaintiffs to pay prices directly to Ticketmaster for tickets in excess of what plaintiffs would have paid had defendants not combined, agreed or conspired to fix ticket service fees." *Id.* at C75 (Compl. ¶ 110), C76 (Compl. ¶ 112). The complaint does not expressly allege, however, that petitioners paid higher prices for performances at those venues apart from any overcharges by Ticketmaster for ticket distribution services; rather, the complaint defines the relevant product market in terms of ticket distribution services. *Id.* at C52 (Compl. ¶ 28).

The court of appeals interpreted the complaint to seek damages only for alleged overcharges by Ticketmaster with respect to its

The district court dismissed the consolidated cases in their entirety for lack of antitrust standing. Pet. App. B28-B36. The court explained:

> It is the Plaintiffs['] own allegations in the Complaint which show that they are not best suited to bring this claim against Ticketmaster. If a violation has occurred, the appropriate party is a venue or class of venues and promoters who are the ones who "consume" Ticketmaster's product; they are the ones who would suffer any direct loss if there is [s]upracompetitive pricing in the fee contracts due to Ticketmaster's alleged monopoly power.

Pet. App. B34.

2. The court of appeals affirmed the dismissal of petitioners' damages claims on the ground that petitioners, as indirect purchasers, are barred from recovering damages under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). The court noted that *Illinois Brick* provides that "only the 'direct purchaser' from a monopoly supplier [can] sue for treble damages under § 4 of the Clayton Act." Pet. App. A7.[4]

The court rejected petitioners' contention that "they are direct purchasers of 'ticket distribution services' from Ticketmaster," explaining that "ticket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first." Pet.

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ticket distribution services. Pet. App. A5, A7. That reading is consistent with petitioners' own characterization of the complaint. See Pet. 8 ("Plaintiffs sued to recover their payment of monopoly overcharges and to enjoin future violations of the Sherman Act.").

[4] The court of appeals concluded, however, that petitioners were not barred by their indirect purchaser status from seeking injunctive relief. Pet. App. A16-A17. That aspect of the court's decision is not at issue here.

App. A13-A14. The court observed that the monopoly price that Ticketmaster allegedly charged the venue might not be passed on at all to the ticket buyer, or at least might not be passed on in full. *Id.* at A15.

The court concluded that this case presents none of "the limited circumstances that might warrant avoidance of the direct purchaser rule" of *Illinois Brick*. Pet. App. A12. In particular, the court held that petitioners could not avoid the direct purchaser rule on the ground that the venues allegedly were "beneficiaries of and participants in Ticketmaster's unlawful activity," because petitioners had not named the venues as defendants. *Id.* at A13 n.4.

Judge Morris Sheppard Arnold dissented from the court's affirmance of the dismissal of petitioners' damages claims, disagreeing that petitioners are indirect purchasers within the meaning of *Illinois Brick*. See Pet. App. A21-A23. In his view, "Ticketmaster supplies the product [ticket distribution services] directly to concert-goers; it does not supply it first to venue operators who in turn supply it to concert-goers." *Id.* at A23. Consequently, he argued, "the entirety of the monopoly overcharge, if any, is borne by concert-goers," and "the venues do not pay any portion of the alleged monopoly overcharge." *Ibid.*

DISCUSSION

The United States believes that the facts alleged in petitioners' complaint, as interpreted by the courts below, compel the conclusion that Ticketmaster sells its ticket distribution services directly to venues, and only indirectly to ticket buyers such as petitioners. Consequently, the court of appeals' holding that the direct purchaser rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), precludes petitioners from recovering dam-

ages under Section 4 of the Clayton Act, 15 U.S.C. 15, based on Ticketmaster's alleged overcharges is both correct and conventional. Petitioners do not ask the Court to grant the petition in order to review the court of appeals' reading of the complaint; that reading is, in any event, neither unreasonable nor an issue of general significance warranting the Court's attention. Nor does this case present any occasion to consider the existence and elements of a "co-conspirator" exception to the *Illinois Brick* rule. As the court of appeals correctly held, any such exception is inapplicable here, because petitioners failed to name as defendants the venues from which they purchased tickets. Accordingly, this case does not warrant review.

1. a. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 487-491 (1968), this Court held that a plaintiff who purchased goods or services for use in its business at an inflated price, as a result of illegal monopolization by a supplier, has suffered damage in the full amount of the overcharge for purposes of Section 4 of the Clayton Act, 15 U.S.C. 15, even if the plaintiff passed on some or all of the overcharge to its customers. It was no defense to a treble damages action, therefore, that the plaintiff shoe manufacturer had passed on to its customers, in the form of higher prices for shoes, the defendant's monopoly overcharge for shoemaking machinery. See 392 U.S. at 489 ("[a]t whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower").

The Court specifically rejected the argument that such a pass-on defense should be available in those cases where "the buyer suffers no loss from the overcharge." *Hanover Shoe*, 392 U.S. at 492. The Court explained that allowing even such a limited form

of a pass-on defense would lead to "complicated proceedings involving massive evidence and complicated theories" aimed at demonstrating what is ordinarily close to impossible to demonstrate. *Id.* at 493.[5]

Nine years later, in *Illinois Brick*, the Court addressed a corollary question: whether an indirect purchaser, to whom a direct purchaser had passed on some or all of a monopoly overcharge, could sue the antitrust violator for overcharge damages. The State of Illinois sought in that case to recover treble damages, under Section 4 of the Clayton Act, against concrete block manufacturers, who charged monopoly prices to masonry contractors, who, in turn, submitted bids to general contractors for the masonry portions of state construction projects.

The Court first refused to "construe § 4 to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers." *Illinois Brick*, 431 U.S. at 735. The Court explained that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants," *id.* at 730, and that nothing in the rationale of *Hanover Shoe* would justify treating plaintiffs and defendants asymmetrically with respect to the availability of pass-on theories, *id.* at 731. The Court was thus left with the question whether to overrule *Hanover Shoe* so that

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[5] The Court also expressed concern that permitting a pass-on defense could mean that no buyer, whether a direct or an indirect one, would have a sufficient incentive to sue, so that violators of the antitrust laws would retain the fruits of their illegality. *Hanover Shoe*, 392 U.S. at 494. As this Court has since explained, that factor was of less significance than the complexities of proof. *Illinois Brick*, 431 U.S. at 732 n.12.

pass-on theories could be asserted by both plaintiffs and defendants.

The Court offered two reasons, aside from *stare decisis*, for declining to restrict or abandon *Hanover Shoe*. First, the Court explained that pass-on theories would introduce undesirable complexity into antitrust litigation, particularly in view of the difficulty of allocating the monopoly overcharge among all those who might have absorbed part of it. *Illinois Brick*, 431 U.S. at 737-743. Second, the Court observed that pass-on theories would "increas[e] the costs and diffus[e] the benefits of bringing a treble-damages action," which could "reduce the incentive to sue" and thereby "seriously impair" such private antitrust enforcement. *Id.* at 745.

The Court acknowledged that "direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers." *Illinois Brick*, 431 U.S. at 746. But the Court concluded that "on balance, and until there are clear directions from Congress to the contrary," the rule allowing recovery only by direct purchasers more effectively serves "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under § 4." *Ibid.*; see *Kansas* v. *Utilicorp United, Inc.*, 497 U.S. 199, 208-219 (1990) (declining to create an exception to the direct purchaser rule of *Illinois Brick* for customers of regulated public utilities).

b. The lower courts construed the complaint in this case to state that Ticketmaster sells ticket distribution services directly to venues, and only derivatively to persons, such as petitioners, who buy tickets to attend concerts at those venues. The district court, with particular reference to the portion of the "elaborate"

and "expertly drafted" complaint "detail[ing] the contracting process between Ticketmaster and the venues," read the complaint to allege that it is the "venues and promoters who are the ones who 'consume' Ticketmaster's product" and "who would suffer any direct loss if there is [s]upracompetitive pricing in the fee contracts due to Ticketmaster's alleged monopoly power." Pet. App. B33-B34. The court of appeals likewise read the complaint as "mak[ing] clear" that "ticket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first." *Id.* at A14.

The lower courts' construction of the complaint is amply supported by petitioners' specific factual allegations. According to the complaint, Ticketmaster is "engaged in the business of distributing tickets to consumers *on behalf of venues*." Pet. App. C55 (Compl. ¶ 37) (emphasis added). In pursuit of that business, Ticketmaster enters into contracts with venues "to provide ticketing services for the * * * venues." *Id.* at C74 (Compl. ¶ 108); see also *id.* at C45-C46, C53-C54 (Compl. ¶¶ 1, 3, 29). The typical contract provides that the venue is the "Principal" who grants to Ticketmaster a right "to sell [tickets] *as Principal's agent*." *Id.* at C59 (Compl. ¶ 45) (emphasis added).[6] Ticketmaster also agrees (in at least some contracts) to install equipment (presumably to be used in distributing the venue's tickets) and to spend money on promotion. *Id.* at C58

[6] That Ticketmaster sells tickets only as agent and not as one who resells on its own account appears to be more than a formality. Nowhere in the complaint is there any suggestion that Ticketmaster ever acquires from venues the ordinary incidents of ticket ownership. Those apparently remain with the venues until the ticket is purchased by the concert-goer.

(Compl. ¶ 43). The contract sets the "service fees" and "handling fees" that ticket buyers pay. *Id.* at C46 (Compl. ¶ 2).[7] Substantial portions of the amount denominated as a service fee or handling fee are "unrelated to 'service' or 'handling'" and are remitted by Ticketmaster to the venue, typically on a percentage basis. *Id.* at C46, C59 (Compl. ¶¶ 2, 46).

In short, if the well-pleaded allegations of the complaint are construed as true, as they must be on a motion to dismiss, *Albright* v. *Oliver*, 510 U.S. 266, 268 (1994), petitioners are only indirect, or "derivative" (Pet. App. A14), purchasers of Ticketmaster's services. And that is true even though ticket buyers, such as petitioners, deal with Ticketmaster, and not with the venue, when they purchase tickets. Ticketmaster enters into a contract with the venue whereby Ticketmaster agrees to act as the venue's "agent" for ticket distribution services. Ticketmaster's services are a "necessary input," as the court of appeals put it (*ibid.*), in the product that the venue sells to the public. Those services are thus analogous to the shoemaking equipment in *Hanover Shoe* and the cement blocks in *Illinois Brick*. If Ticketmaster monopolizes the market for ticket distribution services, the immediate consequence is that the venue is unable to obtain that input in a competitive market. Any subsequent increase in costs to ticket buyers is a consequence of the contracts between the venues and Ticketmaster, together with the venues' own decisions concerning the stated prices

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[7] See also Pet. App. C53 (Compl. ¶ 30) (contracts between venues and Ticketmaster relating to events other than large-scale popular music concerts provide for "lower pricing structures"); *id.* at C60 (Compl. ¶ 50) ("service fees are often pegged to the price on the face of the ticket").

of tickets, which determine both the total amount that the ticket buyer must pay for the ticket and the incidence of any service overcharge.[8]

As petitioners emphasize, the complaint alleges that "Ticketmaster charges a 'service' and 'handling' fee paid directly by consumers to Ticketmaster." Pet. App. C45 (Compl. ¶ 2); see also *id.* at C54 (Compl. ¶ 32). Thus, although petitioners do not expressly ask this Court to review the lower courts' construction of the complaint, they argue (Pet. 2) that "plaintiffs are direct purchasers of ticket distribution services from * * * Ticketmaster." But the facts that Ticketmaster collects the money from the ticket buyer, and that part of the total sum that the ticket buyer pays to Ticketmaster is denominated as a service fee, do not alone establish that the ticket buyer is purchasing any service directly from Ticketmaster. To the contrary, according to the express allegations of the complaint, Ticketmaster acts as the venue's agent when it sells tickets. Pet. App. C59 (Compl. ¶ 45). And the designated service charge

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[8] The court of appeals said that, because the amount that ticket buyers pay for tickets (including amounts denominated as service fees) is "a price that the market will bear," a venue could charge that amount even if Ticketmaster extracted no supracompetitive fees. Pet. App. A15. That statement could be interpreted as suggesting that none of Ticketmaster's overcharge may be passed on to ticket buyers. We think it is almost certain, however, that venues, faced with an overcharge, would pass on at least some portion of it, and we do not read the court to have concluded otherwise. The context, including the quotation from *Hanover Shoe*, suggests that the court was merely observing that the venues might well absorb some portion of the overcharge, although precisely how much would be difficult to determine. See also Pet. App. A7 (noting that the district court did not question the "allegation that the plaintiffs pay some increased price for concert tickets as a result of Ticketmaster's monopoly").

that Ticketmaster collects does not represent its compensation, which is fixed by contract with the venue, usually at a different amount. *Id.* at C46 (Compl. ¶ 2).

It would be contrary to the rationale of *Illinois Brick* to allow ticket buyers to recover damages attributable to Ticketmaster's alleged monopoly overcharges merely because of the particular nature of the input that Ticketmaster supplies to the venues (*i.e.*, Ticketmaster's services as the venues' agent in dealing with ticket buyers). Clearly, the venues could also assert claims for overcharge damages as direct purchasers of Ticketmaster's services. If ticket buyers could recover damages for those same overcharges, Ticketmaster would face the risk of duplicative damages liability, a risk that this Court "d[id] not find * * * acceptable" in *Illinois Brick*. 431 U.S. at 731 n.11. Or, alternatively, the courts would have to engage in "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," *id.* at 737, the very exercise that the direct purchaser rule of *Illinois Brick* was designed to avoid. The courts below were not required to create a conflict with *Illinois Brick* by accepting at face value the complaint's conclusory assertion that petitioners were direct purchasers of ticket distribution services, which was contradicted by the complaint's specific factual allegations.[9]

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[9] We do not, of course, suggest that violators of the antitrust laws may avoid treble damages liability by the simple expedient of negotiating a contract that uses words describing transactions without actually creating the legal substance of those transactions. But there is no allegation here that the contracts between Ticketmaster and the venues were such a sham.

c. Petitioners suggest (Pet. 10-12) that the court of appeals adopted a sweeping new rule, extending beyond the holding of *Illinois Brick*, in stating that "[a]n indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser" (Pet. App. A9). They read the court's statement as barring even a direct purchaser from suing to recover a monopoly overcharge, if the monopoly overcharge was in any way traceable to any antecedent transaction involving the monopolist and any third party. See Pet. 10-12; see also Pet. App. A21 (Arnold, J., dissenting). We agree that such a rule would find no justification in *Illinois Brick*. As Judge Arnold explained, "*Illinois Brick* requires [that] the antecedent transaction must have been one in a direct vertical chain of transactions," such that a monopoly overcharge imposed on the direct purchaser in the antecedent transaction could be passed on to the indirect purchaser in a subsequent transaction in the chain. *Id.* at A22. But the court of appeals' statement, examined in context, does not enunciate the rule that petitioners describe.

The court of appeals did not purport to be adopting any extension or modification of *Illinois Brick*. Nor did the court have any reason to do so in this case. No extension of the direct purchaser rule of *Illinois Brick* was necessary in order to bar petitioners' claim for monopoly overcharge damages. Petitioners are precluded from recovering such damages under *Illinois Brick* itself because, according to the complaint as the lower courts reasonably construed it, petitioners are not direct purchasers, but only indirect or "derivative" purchasers, with respect to the alleged monopolist, Ticketmaster.

It appears that the court of appeals' statement was simply an attempt to rephrase the rule of *Illinois Brick* in terms that would address not only the usual case in which the monopolist sells to the direct buyer who sells to the indirect buyer, but also the unusual case, such as this one, in which the monopolist, as agent for the direct buyer, deals with the indirect buyer. Accordingly, in attempting to capture the essence of what it means to be an indirect purchaser for purposes of the *Illinois Brick* rule, the court stated:

> An indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser. Such indirect purchasers may not sue to recover damages for the portion of the overcharge they bear. The right to sue for damages rests with the direct purchasers, who participate in the antecedent transaction with the monopolist.

Pet. App. A9.

The phrasing of that passage may lack some precision. But the passage, read as a whole, indicates that the "antecedent transaction" is between the monopolist and a direct purchaser, who is neither the monopolist nor the indirect purchaser, and is an essential predicate to the imposition of any of the monopoly overcharge on the indirect purchaser. We understand the passage to refer to a series of transactions in which the monopolist sells goods or services to the direct purchaser with a monopoly overcharge and the direct purchaser, in turn, sells goods or services to the indirect purchaser at a price that includes all, or some portion, of the over-

charge.[10] In other words, the "antecedent transaction" contemplated by the court is just the sort of antecedent transaction that Judge Arnold understood the *Illinois Brick* rule to require. We therefore do not view the court's statement as suggesting any departure from or extension of *Illinois Brick*.

2. Although this Court has not addressed the question, several lower courts have considered an exception to the *Illinois Brick* rule that would permit the recovery of overcharge damages by indirect purchasers if the direct purchaser and the monopolist are co-conspirators. See, *e.g.*, *In re Brand Name Prescription Drugs*, 123 F.3d 599, 604-605 (7th Cir. 1997), cert. denied, 118 S. Ct. 1178 (1998). The complaint in this case alleged that unnamed venues had conspired with Ticketmaster. Pet. App. C73 (Compl. ¶ 101) ("unnamed co-conspirators"); *id.* at C75 (Compl. ¶ 110) (Ticketmaster acted as "'ringmaster' of a nationwide cartel of venues"). The court of appeals determined that, whether or not such an exception might be available in appropriate circumstances, petitioners could not avail themselves of it because "an antitrust plaintiff cannot avoid the *Illinois Brick* rule by characterizing a direct purchaser as a party to the antitrust violation, unless

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[10] As *Hanover Shoe* and *Illinois Brick* make clear, the goods or services sold by the monopolist to the direct purchaser are often an input (*e.g.*, manufacturing equipment, component materials) that goes into the production of the goods or services sold by the direct purchaser to the indirect purchaser. Thus, contrary to certain intimations of Judge Arnold's dissenting opinion (Pet. App. A22-A23), the same "product" need not be involved in both transactions.

the direct purchaser is joined as a defendant." *Id.* at A13 n.4.[11]

The requirement that an indirect purchaser who seeks to invoke a co-conspirator exception to *Illinois Brick* name as a defendant the direct purchaser through whom he purchased serves the purpose of avoiding duplicative liability, which is one of the primary concerns expressed by the Court in *Illinois Brick*. See 431 U.S. at 730-731 & n.11, 737. If the direct purchaser is not a party to the indirect purchaser's suit against a monopolist, any finding that the direct purchaser conspired with the monopolist would have no preclusive effect in a subsequent action by the direct purchaser. An inconsistent finding regarding conspiracy (or an unwillingness of the monopolist to raise the defense that a conspiracy existed between itself and the plaintiff) could result in the direct purchaser's recovery of three times the full amount of the same overcharge for which the indirect purchaser had previously been awarded treble damages. See *In re Midwest Milk Monopolization Litig.*, 730 F.2d 528, 530-532 (8th Cir.), cert. denied, 469 U.S. 924 (1984).

Petitioners observe (Pet. 21-22) that antitrust conspirators are jointly and severally liable and, consequently, cannot complain of the risk of liability for overcharges attributable to co-conspirators' conduct.

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[11] Ticketmaster contends (Br. in Opp. 7) that the court of appeals' statement that the complaint contained "no proper allegation that the direct purchasers have conspired with or otherwise been party with Ticketmaster to any antitrust violation" (Pet. App. A12-A13) sets forth an additional ground for rejecting the co-conspirator exception in this case. In our view, that statement is more plausibly read to indicate that the allegations of conspiracy were not "proper" because petitioners failed to name the allegedly co-conspiring direct purchasers as defendants.

But that observation is beside the point. The risk here is not that one conspirator will be held liable for the damages caused by all conspirators; rather, it is that one conspirator will be held liable more than once for the same overcharge damages as a result of inconsistent verdicts in suits by direct and indirect purchasers. That is precisely the multiple liability that the *Illinois Brick* rule is designed to prevent. See *In re Coordinated Pretrial Proceedings*, 691 F.2d 1335, 1342 (9th Cir. 1982), cert. denied, 464 U.S. 1068 (1984); *In re Beef Industry Antitrust Litig.*, 600 F.2d 1148, 1163 (5th Cir. 1979), cert. denied, 449 U.S. 905 (1980).[12]

Petitioners also attribute to the court of appeals the proposition that an antitrust plaintiff must name every alleged co-conspirator as a defendant. See Pet. i, 20-21.

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[12] Although petitioners suggest (Pet. 21 & n.17) that the court of appeals' decision conflicts, on this issue, with decisions of the Seventh and Ninth Circuits, we discern no conflict. The Seventh Circuit's most recent discussion of the co-conspirator exception did not reach the issue because the alleged co-conspirators had been named as defendants. *In re Brand Name Prescription Drugs*, 123 F.3d at 604-605. The earlier *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980), on which petitioners rely, contains suggestive dicta but no holding on point because the plaintiff there did not seek overcharge damages. Petitioners apparently recognize that the Ninth Circuit's decision in *In re Coordinated Pretrial Proceedings*, 691 F.2d at 1342, is consistent with the court of appeals' position in this case. They therefore rely on two other Ninth Circuit decisions, neither of which shows a conflict. No passed-on overcharge was involved in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982). In *State of Arizona* v. *Shamrock Foods Co.*, 729 F.2d 1208, 1214 (9th Cir. 1984), cert. denied, 469 U.S. 1197 (1985), the plaintiffs did not seek overcharge damages as indirect purchasers; they sought damages only for overcharges resulting from a conspiracy among the retailers from whom they bought directly.

Such a rule could indeed tend to "frustrate private enforcement of the antitrust laws" (Pet. 24). We find no such holding, however, in the decision below. We understand the court to have held only that an indirect purchaser may not invoke the co-conspirator exception unless it has joined as a defendant the entity from which the plaintiff purchased. See Pet. App. A13 n.4 ("an antitrust plaintiff cannot avoid the *Illinois Brick* rule by characterizing a direct purchaser as a party to the antitrust violation, unless the direct purchaser is joined as a defendant"). That proposition is correct and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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