No. 14-540

IN THE

# Supreme Court of the United States

PANASONIC CORPORATION, PANASONIC CORPORATION OF NORTH AMERICA, AND SD-3C LLC,

*Petitioners,*

v.

SAMSUNG ELECTRONICS CO., LTD.

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Whether an antitrust complaint is timely under the four-year statute of limitations for such actions, 15 U.S.C. § 15b, where the complaint alleges a continuing conspiracy in which, within four years preceding the filing of suit, a cartel met to fix prices on a second generation of products uncovered by any prior agreement, engaged in a campaign to coerce agreement to a new license on those second-generation products, and successfully demanded payment under the terms of the new license from a first-time entrant to the market for manufacture and sale of the products.

## CORPORATE DISCLOSURE STATEMENT

Respondent Samsung Electronics Co. is a publicly traded company, and no company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

## BRIEF IN OPPOSITION

Respondent Samsung Electronics Co. ("Samsung") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioners Panasonic Corporation, Panasonic Corporation of North America ("Panasonic"), and SD-3C LLC ("SD-3C"). The decision below properly found that Samsung had alleged ample overt acts to restart the limitations period under this Court's "continuing conspiracy" exception to the antitrust statute of limitations, 15 U.S.C. § 15b. The petition seeks to avoid that result by failing to mention the key allegations on which it rests: namely that, within the limitations period, 1) petitioners held a meeting in Osaka, Japan to set a new anticompetitive royalty on a new generation of products that was not compatible with or governed by an earlier license for a prior generation of products; 2) petitioners engaged in a successful campaign to force respondent to pay that anticompetitive royalty under new license terms; and 3) respondent for the first time entered the market for the relevant products. As the court of appeals correctly concluded, these well-pleaded allegations make this case a "typical" example of a "continuing conspiracy" case, and that decision presents no basis for this Court's review.

Petitioners conjure a series of purported circuit splits going back four decades, but those splits are illusory. *First*, the courts of appeals are not divided as to the application of the "continuing conspiracy" exception to anticompetitive conduct controlled by a contract; what petitioners describe as a conflict is nothing more than courts applying a single, settled rule to disparate fact patterns. *Second*, the decision below did not create any circuit split as to the concept of "antitrust injury"; petitioners omit any discussion of respondent's well-pleaded allegations of injury to respondent's business and competition in the market, which the court below properly credited. *Third*, the decision below did not break from any precedent regarding the "speculative damages" exception; the court of appeals followed settled law in holding that antitrust injury to Samsung would have been speculative prior to its entry into the relevant market within the limitations period.

Petitioners fare no better in arguing that the case has special importance because the anticompetitive conduct at issue involves a patent pool. Nothing in the decision below addresses the merits of the complaint or the effects of respondent's conduct on competition.

Finally, even if the issues presented warranted review (they do not), this case would present a poor vehicle for resolving them, for even under petitioners' preferred rule, respondent has still alleged multiple overt acts within the four-year limitations period that make respondent's complaint timely under this Court's longstanding precedents. Review thus would not change the outcome.

The petition should be denied.

## COUNTERSTATEMENT

1. Respondent's second amended complaint alleges that petitioners were central players in a cartel that conspired to restrain trade in the market for secure digital memory cards ("SD Cards"). Pet. App. 44a-45a. SD cards are a particular type of "flash" memory that consumers use to store data in portable electronic devices. Pet. App. 44a. Respondent is a manufacturer and seller of SD Cards, Pet. App. 106a-107a, has been forced to pay the cartel's anticompetitive royalty rate, Pet. App. 45a-46a, and

has been subjected to numerous other anticompetitive practices, Pet. App. 73a-75a, 89a-104a. Respondent therefore filed suit on July 15, 2010, Pet. App. 30a, making July 15, 2006 the starting point for the four-year statute of limitations governing respondent's federal antitrust claims, 15 U.S.C. § 15b.

2. Flash memory was developed in the early 1980s as a non-volatile, solid-state form of data storage, meaning that it can retain data without a continuous power source and does not have moving parts. Pet. App. 54a. After various companies established their own proprietary designs in the late 1980s, it became clear that a standardized flash-memory format would have significant advantages for both industry and consumers. Pet. App. 58a. In 1997, several companies jointly developed and introduced the MultiMediaCard ("MMC Card") specification for flash-memory storage, and in 1998 sixteen companies formed the MultiMediaCard Association ("MMCA") to promote the MMC Card as the industry standard. Pet. App. 59a-60a. All MMCA members could manufacture MMC Cards on a royalty-free basis, and all "executive" members of the MMCA—a status available to any company that paid a modest fee—could participate in the development of flash memory specifications and standards. Pet. App. 59a-60a. Respondent joined the MMCA in 2002 and manufactured MMC Cards until 2006. Pet. App. 59a-60a.

3. In 1999 Panasonic, along with two other companies, broke from that open standard-setting and began to develop a modified version of the MMC Card in a closed process that excluded other industry participants. Pet. App. 47a, 61a, 64a-66a. This cartel was called the "SD Group," and the new flash-memory format the SD Group developed was called the "SD

Card." Pet. App. 44a, 62a-63a. The SD Group created petitioner SD-3C to license this new format, Pet. App. 51a, and in March 2000 formulated the first SD Card specification, Pet. App. 66a.

The complaint alleges that petitioners conspired to suppress competition to their flash memory card products. The SD Group designed the initial SD Card specification to read on the patents of the SD Group members. Pet. App. 67a-68a. The SD Group created the SD Association for other members that wished to manufacture SD Cards, yet imposed unequal patent disclosure rules that applied to other members of the SD Association but not to the SD Group, so that it was not possible for licensees to know exactly which patents were at issue in the first SD Card specification. Pet. App. 68a-70a. Most important, the SD Group imposed a 6% royalty on all other manufacturers of SD Cards except for members of the SD Group. Pet. App. 44a-45a, 71a.

The SD Group codified these practices in a March 2003 License Agreement (the "2003 License"). Pet. App. 72a. The 2003 License was the exclusive means by which the SD Group members licensed SD Card technology, and SD-3C was the sole entity authorized to provide the 2003 License. Pet. App. 73a, 88a, 104a. By its terms, the 2003 License applied only to the first generation of SD Cards, *i.e.*, those SD Cards conforming to the SD Group's original specification. Pet. App. 76a, 78a-79a. Respondent signed the 2003 License on September 24, 2003. Pet. App. 88a.

4. As the market for flash memory developed after 2003, the demand grew for increased storage capacity and a smaller size, or "form factor," for flash memory. Pet. App. 78a-79a. To meet these demands, the SD Group developed new specifications for two different

types of second-generation SD Cards: a "microSD Card" specification in May 2005 for a card that was significantly smaller than the first-generation SD Card, Pet. App. 78a, and an "SDHC Card" specification in June 2006 for a card that could hold anywhere from 4 GB to 32 GB of data, Pet. App. 79a.[1] Both specifications for these second-generation SD Cards were incompatible with the first-generation SD Card specification contained in the 2003 License. Pet. App. 78a-79a.

During the week of August 28, 2006—within the four-year limitations period—petitioners met with the other members of the SD Group in Osaka, Japan to decide what royalty rate to impose on this second generation of SD Cards, and decided to impose a 6% royalty. Pet. App. 46a, 82a-83a. The SD Group embodied this new royalty, along with numerous other anticompetitive features, Pet. App. 96a-102a, in an Amended and Restated Memory Card License Agreement (the "2006 License"). Pet. App. 46a, 83a; *see also* Pet. 8 fig. As petitioners recognized, this new licensing agreement was necessary because the second-generation SD Card specifications were not covered by the 2003 License. Pet. App. 82a-83a. The SD Group also began a concerted campaign to extend and enforce this new royalty requirement. Pet. App. 82a-83a.

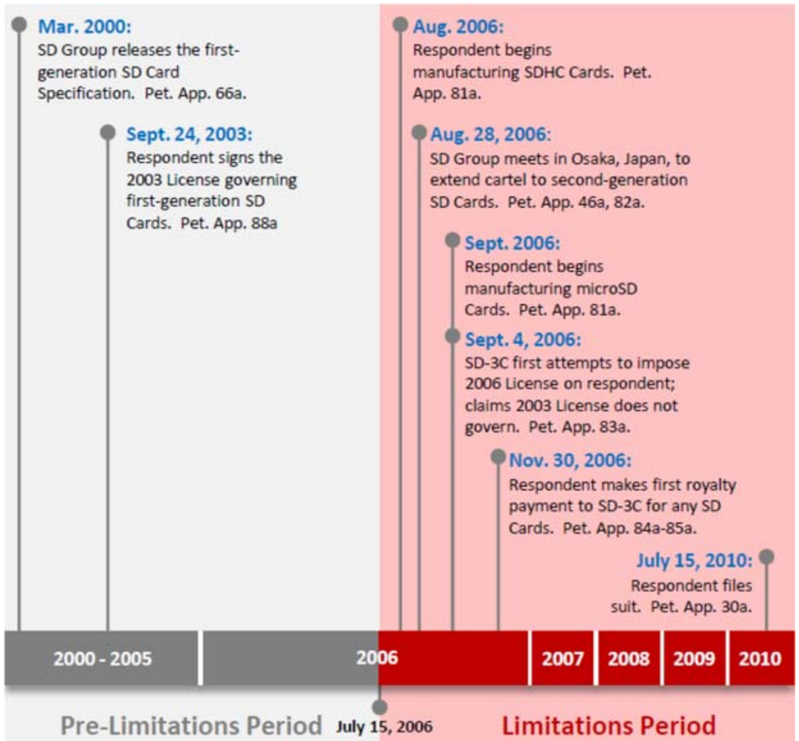
5. Respondent began to manufacture SD Cards for the first time in August 2006. Pet. App. 81a. Although respondent signed the 2003 License, it began to manufacture second-generation SD Cards only at a customer's request. Pet. App. 80a-81a.

[1] The first-generation SD Card could hold a maximum of 2 GB of data. Pet. App. 45a.

On September 4, 2006, as part of petitioners' campaign to enforce the new royalty requirement on second-generation SD Cards, petitioners' agent informed respondent "that the 2003 SD Card License" that respondent had previously signed "covered only full-sized SD Cards . . . and did not cover microSD Cards or SDHC Cards," and therefore that respondent "would have to sign the new 2006 agreement in order to manufacture the microSD Card and SDHC [C]ards." Pet. App. 83a; *see also* Pet. App. 86a (alleging other instances where petitioners informed respondent that the 2003 License did not cover second-generation SD Cards).

While respondent did not sign the 2006 License, it ultimately succumbed to petitioners' repeated demands that it pay the 6% royalty on second-generation SD Cards. Pet App. 84a, 89a. On November 17, 2006, SD-3C made its first formal demand that respondent pay royalties for any and all SD Cards respondent produced. Pet. App. 84a-85a. Respondent made its first payment to petitioners on November 30, 2006, using Schedule F to the 2006 License as petitioners insisted. Pet. App. 84a-85a. Since that time, petitioners have accepted respondent's royalty payments for all SD Cards using this Schedule F, and as of the first quarter of 2011 respondent has paid over $165 million in royalties to petitioners. Pet. App. 84a, 107a.

Thus, contrary to the illustration at Pet. 8, the key events alleged in the complaint are as follows:




6. The complaint alleges that, because "[t]he 2003 SD Card License and the 2006 License together require SD Card manufacturers to pay a royalty of 6 percent . . . [and because] the SD Group members have exempted themselves from this fee," the agreements "insulate[] SD Group members from competition in the SD Card market by giving them a permanent cost advantage over rival manufacturers." Pet. App. 111a-112a. Respondent alleges that such conduct causes it antitrust injury through lost sales and profits insofar as respondent competes with SD Group members, Pet. App. 106a; through reduced volume of sales of SD Cards that respondent can make to other manufacturers that compete with SD Group members,

Pet. App. 106a-107a; and through effectively charging respondent a double royalty on flash memory technologies that respondent must separately license, Pet. App. 107a-108a.

The district court dismissed the complaint as time-barred, construing it as alleging only "that the 2006 Amendment . . . extended the previously established 6% royalty rate to the second-generation SD Cards." Pet. App. 23a-24a. The district court misread Ninth Circuit authority as holding that "acts after the execution of a contract relating to its continued implementation do *not* constitute 'overt acts' that restart the statute of limitations." Pet. App. 24a (emphasis added) (citing *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987)). That authority in fact held the opposite: "We have held that active enforcement of an illegal contract may, under certain circumstances, constitute an overt act which will restart the statute of limitations." *Pace*, 813 F.2d at 237.[2]

7. In a unanimous decision, the Court of Appeals for the Ninth Circuit (Gould, J., joined by Paez, J. and Ezra, D.J.) reversed and remanded for further proceedings. Pet. App. 13a. The court recognized that this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), established a "continuing violation" exception to the four-year statute of limitations governing respondent's federal claims. Pet. App. 6a. The court

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[2] The district court also dismissed respondent's state law claims because, the court concluded, those claims were either untimely under the same analysis that the district court applied to respondent's federal antitrust claims or failed to state a claim as there was no predicate federal violation on which to base the state law claims. Pet. App. 25a-26a.

also observed that the test for determining whether a "continuing violation" occurs, adopted by numerous other circuits, is that a plaintiff "must allege that a defendant completed an overt act during the limitations period that meets two criteria: '1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must inflict new and accumulating injury on the plaintiff.'" Pet. App. 6a (quoting *Pace*, 813 F.2d at 238); *see also* Pet. App. 6a n.3 (collecting cases from Eighth, Sixth, and Fifth Circuits adopting the same standard). "This standard," the court explained, "is meant to differentiate 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." Pet. App. 6a-7a. The court provided illustrative examples of each type of fact pattern. Pet. App. 7a-8a

Applying this settled law to respondent's complaint, the court of appeals found that the allegations in the complaint satisfied the continuing conspiracy exception on either of two alternative bases:

*First*, the court held that

> [t]he adoption of the 2006 license was a 'new and independent act' that caused 'new and accumulating injury' . . . because the 2003 license neither covered second-generation SD cards, nor did it cover expansion to future technological developments. Rather, the 2003 license applied only to the production of first-generation SD cards, a fact that the SD Defendants recognized when they sought to have Samsung sign the new licensing agreement.

Pet. App. 9a. The court found immaterial the fact that the 2006 License imposed the same 6% royalty rate as the 2003 License, concluding that, "[a]s our sister circuits have said, '[t]he typical antitrust continuing violation occurs . . . when conspirators continue to meet to fine-tune their cartel agreement.'" Pet. App. 9a (quoting *Midwestern Mach. Co. v. New Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004)).

*Second*, the court held that, "even if the 2006 license was merely a restatement of the 2003 license, the application of the licenses to Samsung when it began to make SD cards in the fall of 2006 was also an overt act that restarted the limitations period" and "caused independent harm and accumulating injury." Pet. App. 9a-10a. The court found such allegations well within circuit precedent holding that "acts taken to enforce a contract were overt acts that restarted the statute of limitations." Pet. App. 10a.

The court of appeals further held, as a *third* ground for reversal, that respondent's complaint was independently timely under the "speculative damages" exception also enunciated in *Zenith*. Pet. App. 10a-11a. That holding responded to an argument petitioners raised, *see* C.A.9 Answering Br. 32. The court noted that, as this Court held in *Zenith*, when existence of harm is speculative at the time of an antitrust violation, the statute of limitations begins to run only on the date when plaintiff's damages first accrue. Pet. App. 10a (citing *Zenith*, 401 U.S. at 339-40). Applying that exception here, the court of appeals noted the allegations that, "[a]t the time of the adoption of the 2003 license, Samsung was not in the SD card market, and neither Samsung nor the SD Defendants could have known for certain whether Samsung would enter that market." Pet. App. 11a.

"Because the harm to Samsung challenged in this suit was speculative" at the time of the 2003 License, the court concluded, "the law of limitations in federal antitrust actions allowed Samsung to file suit once the harm crystallized in 2006." Pet. App. 11a (citing *Zenith*, 401 U.S. at 340).[3]

Petitioners sought rehearing en banc, and although the court called for a response, not a single active judge called for a vote. Pet. App. 14a-15a.

8. The same panel of the court of appeals also later reversed dismissal of a separate suit brought by a class of consumers that purchased SD Cards, applying the rule "that each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of that act." *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014) (citing *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997)). The defendants in that action separately petitioned for a writ of certiorari. *See SD-3C LLC v. Oliver*, No. 14-641. Petitioners' request to consolidate the two petitions, Pet. 5, 9, should be denied because *Oliver* involves different legal issues (such as the use of consumer sales as an overt act and numerous state-law claims not at issue here) and different factual issues (such as relevant start dates for the four-year statute of limitations).

[3] The court of appeals also reversed the district court's dismissal of respondent's state law claims, recognizing that the district court's dismissal was "controlled by the untimeliness of the federal antitrust claims." Pet. App. 11a.

## REASONS FOR DENYING THE WRIT

### I. THE DECISION BELOW PRESENTS NO CONFLICT WITH THIS COURT'S OR OTHER CIRCUITS' PRECEDENTS

Although petitioners assert that the circuits are "intractably divided" over how to apply this Court's decision in *Zenith*, Pet. 12, citing law review articles from the 1970's and 1980's, they do not point to a single court decision ever acknowledging such a conflict. *See* Pet. 12-13 & nn.2-10. Nor can they, for there is no genuine conflict. What petitioners describe as "conflicts" are nothing more than competing dicta—much of it decades old—from decisions applying *Zenith* to a multitude of disparate factual situations in which the courts of appeals naturally have arrived at different resolutions. *See* II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶320c (4th ed. 2014) ("Areeda") ("The question . . . is whether the subsequent acts serve to keep the cause of action alive, and the answer depends heavily on the particular facts as well as the type of violation."). As explained in Part III, *infra*, none of this dicta has an impact on the decision below, and none of these factually distinguishable cases provides a reason for this Court to grant review.

#### A. The Decision Below Correctly Applies This Court's Decisions To The "Typical" Continuing-Conspiracy Fact Pattern Alleged Here

This Court recognized the continuing-conspiracy exception to the antitrust statute of limitations over 40 years ago in *Zenith*. 401 U.S. at 338-39. As this Court more recently explained, when there is

> a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, *each overt act* that is part of the violation and that injures the plaintiff . . . *starts the statutory period running again*, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.

*Klehr*, 521 U.S. at 189 (quotation marks omitted) (emphasis added). *Klehr* noted that, even though a continuing antitrust conspiracy might persist for decades, the limitations period cabins damages: "[T]he commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Id.* at 189-90 (citing, *inter alia*, *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300 (9th Cir. 1986) (holding that plaintiffs are entitled to pursue recovery of damages from overt acts that occurred within the limitations period)). Rather, a plaintiff must, as respondent has here, Pet. App. 80a-86a, "show[] how any new act could have caused them harm over and above the harm that the earlier acts caused." *Klehr*, 401 U.S. at 190.

Overt acts sufficient to restart the limitations period can encompass a variety of behaviors, but perhaps the most "typical" is a meeting of cartel members within the limitations period to "fine-tune their cartel agreement." *Midwestern Mach.*, 392 F.3d at 269; *see Areeda*, *supra*, ¶ 320c2 (noting that the "easy case" of a continuing antitrust conspiracy is one where "price-fixing conspirators . . . meet . . . to adjust the cartel price," because "each new meeting of a cartel to adjust its price or output is independently illegal").

As the court of appeals correctly held, Pet. App. 10a, the complaint here alleges, among other new overt acts, just such a "typical" or "easy case." As alleged, Pet. App. 82a-83a, petitioners met on August 28, 2006, within the limitations period, to impose for the first time an anticompetitive royalty rate upon second-generation SD Cards. The case thus falls squarely within the rule "that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period." *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring) (cited with approval in *Klehr*, 521 U.S. at 190). As explained below, the courts of appeals are not divided on how to apply this basic and long-settled rule.

### B. There Is No Circuit Split Over Whether Continued Enforcement Of A Contract Is An Independent "Overt Act"

1. Petitioners fail to establish any split regarding how to treat enforcement of an anticompetitive contract within the antitrust limitations period. For there to be a "continuing violation," a plaintiff must show an "overt act that is part of the violation and that injures the plaintiff." *Klehr*, 521 U.S. at 189 (quoting II P. Areeda & H. Hovenkamp, *Antitrust Law* ¶338b (rev. ed. 1995) and citing *Zenith*, 401 U.S. at 338). As courts on both sides of petitioners' ostensible split recognize, such an "overt act" must have two elements: "(1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff." *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004) (citing *Pace*, 813 F.2d at 238). In other words, a plaintiff must allege "some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action." *Barnosky*

*Oils, Inc. v. Union Oil Co.*, 665 F.2d 74, 81 (6th Cir. 1981) (cited in Pet. 2, 17, 20, 26) (quoting *Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1977)); *see also Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1089 (10th Cir. 2006).

The supposed "entrenched split" petitioners assert, Pet. 15, reflects nothing more than different cases with different facts falling on one side of this line or the other. For example, petitioners claim that the Eighth, Sixth, and Fifth Circuits all adhere to the "rule" that "an antitrust defendant's performance of a pre-limitations agreement . . . is not an 'overt act' under *Zenith* that restarts the limitations period." Pet. 15. That is incorrect. The cases petitioners cite, Pet. 15-18, in fact considered fact patterns where defendants simply "s[a]t back and watch[ed]," *Champagne Metals*, 458 F.3d at 1089, as their pre-limitations conduct harmed a plaintiff, without (as here) taking any new anticompetitive action to enforce their contracts within the limitations period. *See Varner*, 371 F.2d at 1019-20 (no independent overt act where plaintiffs buy supplies and facilities from conspirators under the express terms of pre-limitations-period contracts); *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 405-06 (6th Cir. 1999) (no independent overt act where sole continuing violation was periodic payments required by pre-limitations conspiracy); *Barnosky Oils*, 665 F.2d at 81 (no independent overt act where plaintiff alleged that it was forced to curtail sales to competitors prior to limitations period but "never requested permission to sell gasoline to [a competitor] during the limitations period"); *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1053 (5th Cir. 1982) (no independent overt act where pre-limitations-period contract "had fixed price, quantity, and delivery schedule terms" and established "[t]he rights and liabilities of both parties").[4] In these cases, "all of the harm occurred at the time of the initial violation." Pet. App. 7a.

The decisions of the D.C., Third, and Eleventh Circuits cited by petitioners, Pet. 18-20, far from setting forth a competing rule regarding contract enforcement within the limitations period, merely involved different facts. For example, petitioners' cited decisions by the Third Circuit, Pet. 19-20, involved allegations of additional, concrete steps taken beyond what was required by the terms of a contract. *See West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 94, 106 (3d Cir. 2010) (independent overt act within the limitations period beginning April 21, 2005 where "[defendant] refused to increase [plaintiff's] reimbursement rates in 2006"), *cert. denied*, 132 S. Ct. 98 (2011); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1172 (3d Cir. 1993) (independent overt act where "[c]oercion to prevent independent action continued into the limitations period"); *Harold Friedman Inc. v. Thorofare Mkts. Inc.*, 587 F.2d 127, 138-39 & n.41 (3d Cir. 1978) (independent overt act where defendant exercised an exclusivity clause within the limitations period to exclude plaintiff, a non-party to the contract, from the market).

Petitioners' assertion that those decisions somehow "split" with decisions of other circuits does not

[4] The Sixth Circuit's recent decision in *Z Technologies Corp. v. Lubrizol Corp.*, 753 F.3d 594 (6th Cir. 2014) (cited in Pet. 14, 16) is even further afield, as it is limited to mergers and acquisitions, not price-fixing conspiracies. *Id.* at 598-99. In the latter scenario, *Z Technologies* recognizes, "each price increase requires further collusion between multiple parties to maintain the monopoly," and constitutes an independent overt act. *Id.* at 599.

withstand scrutiny. For example, petitioners are incorrect to suggest, Pet. 19, that *West Penn* "rejected" other circuits' definition of an overt act as one that is more than a "reaffirmation" of prior acts, 627 F.3d at 107. The holding in that case, without mentioning "reaffirmation," relied upon a complaint's allegation of a new act within the limitations period that was more than a reaffirmation—namely the defendant's refusal to increase plaintiff's reimbursement rates. *Id.* at 106. Petitioners cannot create a circuit split by quoting *dicta* in which the Third Circuit suggested that acts within the limitations period might restart the statute of limitations even if they are "mere[] manifestations of decisions made or acts done outside the limitations period." *Id.*

Petitioners' reliance on a D.C. Circuit decision to conjure a conflict with the Fifth, Sixth, and Eighth Circuits is equally unavailing. Petitioners' cited decision adopts the *same* standard as the other circuits: "We agree with the district court that mere receipt of payments under an agreement . . . does not constitute a continuing antitrust violation." *Nat'l Souvenir Ctr., Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 512 (D.C. Cir. 1984). The same is true for the Eleventh Circuit decision cited by petitioners, Pet. 20; far from conflicting with the other side of petitioners' supposed circuit split, *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.3d 705 (11th Cir. 1984) (per curiam), in fact holds that, "[w]here rights and liabilities are finalized by a contract or by a denial of a contract, and any damages are at that time provable with certainty, the statute of limitations begins to run at that time." *Id.* at 715 (citing *City of El Paso v. Darbyshire Steel Co., Inc.*, 575 F.2d 521 (5th Cir. 1978)). Thus, rather than create a split in authority, cases like *National Souvenir* and *Midwestern Waffles* merely demonstrate that the courts of appeals have carefully applied a uniform "continuing conspiracy" exception to "particular facts as well as the type of violation," Areeda, *supra*, at ¶ 320c; *see Champagne Metals*, 458 F.3d at 1089 ("[t]he critical difference . . . is the structure of the anticompetitive conspiracy" on the particular facts).

Petitioners are thus left with passing dicta in the Fifth Circuit's nearly 40-year-old decision in *Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029 (5th Cir. 1977). *See* Pet. 17-18. Yet even petitioners are forced to acknowledge, Pet. 17-18, that the very next year the Fifth Circuit clarified *Imperial Point* in *City of El Paso*, explaining that *Imperial Point* was best understood as a speculative-damages case. *City of El Paso*, 575 F.2d at 523. Thus, while dicta from "several cases in the 1970s" may have suggested that mere passive receipt of contract payments is enough to restart the statute of limitations, "[m]ore recently . . . courts seem to have retreated from this view." ABA Section of Antitrust Law, *Proving Antitrust Damages* 71 (2d ed. 2010) (cited in Pet. 2, 14, 18, 29). Review should not be granted to correct aged Fifth Circuit dicta that the Fifth Circuit itself clarified more than thirty years ago.

2. Petitioners also err in claiming, Pet. 20, that, with the decision below, the Ninth Circuit "joined" one side or the other of petitioners' non-existent split. Petitioners do not argue, because they cannot, that the allegations in this case are factually similar to those in any of the Eighth, Sixth, or Fifth Circuit cases they cite. Petitioners also do not argue, because they cannot, that the Ninth Circuit rejected or disagreed with a decision from another circuit. And petitioners do not argue, because they cannot, that the court

below adopted any of the dicta they cite from the Third, Fifth, or D.C. Circuits.

Instead, petitioners offer misleading and selective quotations from the decision below in an effort to support their claim that it "eviscerates" the statute of limitations. Pet. 20. Petitioners ignore, however, that in several other decisions, the Ninth Circuit has adopted their preferred rule concerning contract performance during the limitations period—and that the decision below is entirely consistent with that circuit precedent. *See Eichman v. Fotomat Corp.*, 880 F.2d 149, 160 (9th Cir. 1989) ("[T]he passive receipt of profits from an illegal contract by an antitrust defendant is not an overt act of enforcement which will restart the statute of limitations"); *Aurora Enters., Inc. v. Nat'l Broad. Co., Inc.*, 688 F.2d 689, 694 (9th Cir. 1982) (distinguishing *Imperial Point* and reasoning that "the mere fact that defendants receive a benefit today as a result of a contract executed [outside the limitations period] . . . is not enough to restart the statute of limitations").[5] Notwithstanding petitioners' rhetoric, cases such as *Eichman* and *Aurora* make clear that the Ninth Circuit has not created any conflict requiring this Court's review, but rather merely reaches different conclusions on different facts under the single, settled rule set forth in *Zenith* and *Klehr*. *See* Pet. App. 7a-8a (collecting additional cases on both sides of the ostensible divide).

Nor is there any merit to petitioners' suggestion, Pet. 20, that the Ninth Circuit's decision here "directly

[5] Although petitioners relied heavily on these decisions in their brief below, *see* C.A.9 Answering Br. 10, 17, 21, 25, 27, 34, 38, 40, petitioners do not reference these opinions in their petition to this Court.

conflicts with . . . the Eighth, Sixth, and Fifth Circuits." To the contrary, as the court below recognized, Pet. App. 6a n.3, the Ninth Circuit's 1987 articulation of the "continuing conspiracy" doctrine, *Pace*, 813 F.2d at 238, has been adopted by five other circuits, including the very three petitioners identify. *See, e.g.*, *Varner*, 371 F.3d at 1019 (8th Cir.) (adopting definition of "overt act" from *Pace*); *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467 (6th Cir. 1996) (same); *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1275 (5th Cir. 1991) (citing *Pace* and concluding "[w]e agree with the Ninth Circuit's reasoning"); *see also Lehman v. Lucom*, 727 F.3d 1326, 1331 (11th Cir. 2013) (citing *Pace* and noting that prior Eleventh Circuit decisions have "quoted with approval the Ninth Circuit's articulation of the appropriate circumstances for the [separate accrual] rule"); *Champagne Metals*, 458 F.3d at 1088 (10th Cir.) (adopting definition of "overt act" from *Pace*). Nor has any circuit rejected the *Pace* standard. Far from creating a split, the Ninth Circuit's interpretation of this Court's "continuing conspiracy" jurisprudence has been adopted by every circuit to consider it and rejected by none.

### C. There Is No Circuit Split Over The Definition Of "Antitrust Injury"

Petitioners' claim that, in applying the concept of "antitrust injury" for determining when the statute of limitations starts, the court below split with "at least seven circuits' decisions," Pet. 21, is meritless and ignores the actual facts of the case. Petitioners erroneously claim that the court of appeals found anticompetitive injury where "the only personalized harm that [respondent] can allege traces back to the 1999 and 2003 agreements." Pet. 22-23. To the contrary, the well-pleaded allegations of the complaint make clear that the only harm that occurred happened in the third quarter of 2006, within the limitations period. Pet. App. 81a, 84a. The court of appeals correctly recognized as much: "the 2003 [L]icense applied only to the production of first-generation SD cards, a fact that [petitioners] recognized when they sought to have [respondent] sign the new licensing agreement," Pet. App. 9a, a conclusion also supported by the complaint's direct quotation of emails from SD-3C to the same effect, Pet. App. 86a; *see also* Pet. App. 83a (collecting other examples). "[A]s with any motion to dismiss for failure to plead a claim on which relief can be granted, [a court must] accept all factual allegations in the complaint as true," an analysis that requires inquiring into "whether *all* of the facts alleged, taken collectively," state a claim, "not whether any individual allegation" does so. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007). That is what the court below did here.

Accepting the complaint's actual allegations, any purported circuit split is illusory. Petitioners claim that the Ninth Circuit broke from the rule that "[i]f the plaintiff would have suffered the same injury without regard to the allegedly anticompetitive acts of Defendants, it has not suffered an antitrust injury." Pet. 22 (brackets and quotation marks omitted); *see also* Pet. 24. That rule, however does not apply on the facts of this case: respondent would not have suffered the same injury if petitioners did nothing, because the 2003 License did not cover second-generation SD Cards. Pet. App. 46a, 82a-86a. Indeed, it was only at the August 28, 2006 meeting in Osaka, Japan—an alleged anticompetitive act occurring within the limitations period—that petitioners conspired to impose a royalty on this second generation of products, and only on November 30, 2006—also within the limitations period—that respondent, for the first time, made any royalty payments at all. *Id.* However one characterizes petitioners' decision to accept respondent's royalty payments on Schedule F of the 2006 License without respondent actually signing the 2006 License, Pet. App. 84a, there is no doubt that without these actions, respondent would not have paid the over $165 million in royalty payments that it has paid through the first quarter of 2011, all solely within the limitations period, Pet. App. 107a.

Equally without merit is petitioners' assertion that respondent somehow "benefitted" from petitioners' anticompetitive conduct. Pet. 2, 23-24. Petitioners cannot explain how respondent stood to benefit from having to pay at least $165 million in anticompetitive royalties. Pet. App. 107a. Petitioners do not so much as mention those royalty payments, or the three other means by which the complaint alleges that the royalty rate harms both competition and respondent's business. Pet. App. 106a-108a. Petitioners' mischaracterization of the complaint cannot substitute for an actual circuit split warranting this Court's review.

### D. There Is No Circuit Split Over The "Speculative Damages" Exception

Petitioners also fail to conjure any circuit split concerning the separate "speculative damages" exception to antitrust limitations rules. Petitioners point to other cases holding that "mere 'uncertainty as to the extent of the damage,' but not 'as to the fact of damage,' will not render an antitrust plaintiff's damages too speculative." Pet. 28 (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931)); *see also* Pet. 24-27 (collecting additional cases where courts concluded that plaintiffs "could have established their injury, if not the precise scope and extent of their future damages" (brackets and quotation marks omitted)). But the decision below is not to the contrary: it too recognized that "the key question in determining whether damages were overly speculative . . . is whether the existence of the harm is determinable, not the specific dollar value of that harm." Pet. App. 10a-11a (citing *Pace*, 813 F.2d at 240 (citing *Story Parchment Co.*, 282 U.S. at 562)).[6]

Thus petitioners dispute not the existence of a settled rule on speculative damages, but only its application to the particular facts before the court of appeals below. And their argument again mischaracterizes the actual allegations in the complaint. In asserting that respondent "knew that it was injured before 2006," Pet. 27, petitioners omit that respondent did not even begin manufacturing SD Cards until August 2006 and that petitioners did not demand payment until November 2006, Pet. App. 81a, 84a-85a. And in asserting that respondent knew of its losses when it "executed a 6% royalty agreement in 2003," Pet. 27, petitioners disregard that second-generation SD Cards were not invented until 2005 and 2006, Pet. App. 78a-79a, and that petitioners would accept royalty payments for such SD Cards only using a schedule to the 2006 License, Pet. App. 83a-86a.

Nor did the court of appeals' straightforward application of *Zenith*'s speculative-damages exception create a conflict with such decisions as *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261 (7th Cir. 1984) (cited at Pet. 3, 25). *Brunswick* held that a

[6] Even if the court below had somehow created a circuit split on this issue (which it has not), that still would not justify a grant of the petition given that the decision below found respondent's claims independently timely based on the continuing-conspiracy exception. Pet. App. 9a-10a.

plaintiff's damages were not speculative because it knew what patent was infringed and "could and did ask for [defendant's] profits from the sale . . . up to the date of trial and for an assignment of [defendant's] patent rights" to the plaintiff. *Id.* at 271. Here, by contrast, the complaint alleges that one of the ways petitioners maintain their cartel is by refusing to disclose all of the patents at issue in the SD Card specification, Pet. App. 69a-70a, and in any event, it would not be possible for respondent to know exactly what damages it would have suffered before it ever sold a single SD Card, Pet. 11a. *Cf. Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 573 (4th Cir. 1976) (cited in Pet. 26-27) (holding plaintiff's damages to be non-speculative where defendant's public filings "included its projections of subscribers and gross receipts for the first five years of operation").[7]

Petitioners' argument in the end rests on the implausible theory that, immediately after signing the 2003 License, respondent should have come into court speculating that, at some undefined point, 1) petitioners would invent a new type of SD Card, 2) petitioners would insist that the 2003 License did not cover those new SD Cards, 3) petitioners would apply a new anticompetitive royalty rate on those hypothetical new SD Cards, and 4) respondent would start manufacturing SD Cards covered by that hypothetical future license. As this Court recognized in *Zenith*, respondent's "[c]laims of future damage would have probably gotten short shrift in the lower

[7] There is likewise no merit to petitioners' accusations that respondent took a "wait and see" approach, Pet. 3, because respondent did not even enter the market until within the limitations period.

courts if they had been pressed." 401 U.S. at 342; *see Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 540-41 (1983) (affirming dismissal of antitrust complaint for failure to allege antitrust injuries when complaint alleged the plaintiff "suffered unspecified injuries in its 'business activities'").

Last, petitioners attempt to sweep away these concerns by quoting *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981), to the effect that "'[t]he vagaries of the marketplace [that] usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation'" do not undermine a jury's verdict. Pet. 28 (brackets omitted). Petitioners omit, however, *Truett*'s very next sentence, which cautions that "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *Truett*, 451 U.S. at 566-67. Petitioners' similar arguments fail to create a circuit split.

## II. THE DECISION BELOW PRESENTS NO ISSUE OF NATIONAL IMPORTANCE CONCERNING PATENT POOLS OR STANDARD-SETTING

Petitioners' lengthy discussion of patent pools and standard-setting organizations (Pet. 29-36) likewise fails to justify granting review of this case, because the decision below will have no effect on patent pools or standard-setting organizations. The court below was explicit: although petitioners "argue that their behavior was a pro-competitive patent pool," because "[t]he district court did not reach the merits of [respondent's] claims," the court "also express[es] no position on the substance of the complaint." Pet. App. 5a n.2.

Moreover, there is no reason to treat this case differently from any other antitrust case simply because it involves patent pools. As the very DOJ Antitrust Guidelines petitioners cite make clear, "[c]ross-licensing and pooling arrangements can have anticompetitive effects in certain circumstances," including where there are "collective price . . . restraints in pooling arrangements, such as the joint marketing of pooled intellectual property rights with collective price setting." U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.5 (1995) (cited in Pet. 33);[8] *see also* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 34-35 (2007) (cited in Pet. 33) (observing that "collaboratively set standards can reduce competition and consumer choice" and discussing cases where courts have found antitrust liability "involving the manipulation of the standard-setting process or the improper use of the resulting standard to gain competitive advantage over rivals").[9] That is what the complaint alleges here: petitioners have, for example, established and fine-tuned an anticompetitive royalty rate of 6% so that it applies to multiple generations of SD Cards. Pet. App. 81a-89a, *see also* Pet. App. 96a-98a (alleging other ways in which the 2006 License establishes a "floor price"). But the fact that the complaint concerns patent pools does not elevate the statute-of-limitations issue presented here to one of national importance

[8] http://www.justice.gov/atr/public/guidelines/0558.htm#t55.

[9] http://www.justice.gov/atr/public/hearings/ip/222655.pdf.

requiring this Court's review, especially given the pre-trial procedural posture of the case.

Finally, petitioners' emphasis on the value of "repose," Pet. 35, is misplaced. Their repose is adequately protected by the limitation of damages to the four-year limitations period. As this Court recognized, making antitrust damages "*forever* incapable of recovery[ is] contrary to the congressional purpose that private actions serve as a bulwark of antitrust enforcement," which are designed to "fully protect the victims of forbidden practices as well as the public." *Zenith*, 401 U.S. at 340 (quotation marks omitted) (emphasis added). Moreover, adopting petitioners' argument

> would . . . improperly transform the limitations statute from one of repose to one of continued immunity. . . . Employing the limitations statute additionally to immunize recent repetition or continuation of violations and damages occasioned thereby not only extends the statute beyond its purpose, but also conflicts with the policies of vigorous enforcement of private rights through private actions.

*Poster Exch.*, 517 F.2d at 127-28 (citing, *inter alia*, *Zenith*, 401 U.S. at 340).

## III. THIS CASE IS IN ANY EVENT A POOR VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED BECAUSE PETITIONERS' PROPOSED RULES WILL HAVE NO EFFECT ON THE OUTCOME

Even if there were any conflict between the decision below and existing authorities (which there is not), review still should be denied because adoption of petitioners' preferred rules would have no practical significance here. The complaint here alleges new and independent overt acts and new injury within the limitations period even under petitioners' various suggested rules.

For example, petitioners urge the Court to embrace the Eighth Circuit's suggestion that, "[w]hen a complaining party was fully aware of the terms of an agreement when it entered into the agreement, an injury occurs only when the agreement is initially imposed" and there is thus no continuing violation, *Varner*, 371 F.3d at 1020 (quoted in Pet. 16); *see also* Pet. 2. But recognition of that rule would not change the outcome, because taking the allegations of the complaint here as true, respondent was *not* "fully aware of the terms" of the agreements at issue. For instance, respondent could not and did not know when it signed the 2003 License concerning first-generation SD Cards that second-generation SD Cards would be invented and that petitioners would impose a 6% royalty rate on their use, Pet. App. 45a; that petitioners themselves would insist that the terms of the 2003 License did not apply to second-generation SD Cards, Pet. App. 83a, 86a; or that respondent would then begin manufacturing second-generation SD Cards itself, Pet. App. 81a.

Petitioners similarly ask this Court to adopt the rule that "the clock does not restart simply because the defendant 'could have ceased causing the injury' by not performing." Pet. 2 (quoting *Barnosky Oils*, 665 F.2d at 81). But again, adoption of that rule would have no effect on the outcome here, because the complaint here alleges that petitioners did far more. Petitioners almost entirely ignore—except for a passing and incomplete reference in their timeline, *see* Pet. 8 fig.

(citing Pet. App. 46a)—that the SD Group, including petitioners, met in Osaka, Japan on August 28, 2006, within the limitations period, to determine what royalty rate to apply to second-generation SD Cards. That was only one of several affirmative steps the alleged cartel members took to conspire within the limitations period to extend their anticompetitive conduct to a segment of the market that did not exist in 2003. Pet. App. 46a, 82a-83a.

Petitioners cannot show that the outcome would be different under its proposed rules by taking isolated allegations in the complaint out of context. *See Tellabs*, 551 U.S. at 322 ("courts must consider the complaint in its entirety" and "accept all factual allegations in the complaint as true"). For example, there is no merit to petitioners' repeated emphasis (Pet. 1, 3, 6, 8, 10, 20, 21, 22, 27, 29) on respondent's isolated use of the word "permanent" to describe the advantages gained from the 2003 License, Pet. App. 104a, 111a-112a. This word appears only twice in respondent's 60-page complaint. And even the cited paragraphs make clear that petitioners' anticompetitive cost advantage results from "[t]he 2003 SD Card License and *the 2006 License together*," Pet. App. 111a-112a (emphasis added), through petitioners' web of "cross licensing arrangements" "*[i]n conjunction with* the other elements of their licensing arrangements," Pet. App. 104a (emphasis added). In any event, petitioners fail to explain how respondent could have suffered "'permanent' injury in 1999," Pet. 1, when respondent did not even sign the first of two agreements until 2003.

Similarly, it is unavailing for petitioners to insist that the court below "disregarded [respondent's] allegations that it paid royalties under the 'renewal provision of its existing SD Card license.'" Pet. 9 (quoting Pet. App. 89a). As the very next paragraph in the complaint explains, that was a consequence of petitioners' own decisions: petitioners "continued to insist that the renewed 2003 License did not cover microSD and SDHC Cards," Pet. App. 89a, but petitioners "determined in 2007 that they would invoice [respondent] and accept payment of royalties for these new types of SD Cards notwithstanding [respondent']s failure to execute the 2006 License," Pet. App. 86a.

Petitioners' factual disputes with the complaint's allegations will be resolved during discovery and trial, and there is no reason for this Court to review a "battle[] over mere form of statement." *Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (per curiam) (quotation mark omitted).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,


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December 15, 2014