

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*

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Samsung does not deny that petitioners' licenses are representative of thousands of intellectual property agreements, or that the question presented cuts across numerous industries and agreements that call for ongoing payments—points powerfully confirmed by the Generic Pharmaceutical Association's *amicus* brief (at 9-15). Further, Samsung altogether ignores 15 U.S.C. § 22, which establishes venue wherever antitrust defendants “transact[] business.” Thus, there is no dispute that the decision below effectively sets a *nationwide rule* for challenges to national and global licenses, confirming that review is warranted even apart from the circuit splits.

Samsung's response—that the decisions applying *Zenith* are “uniform,” and would uniformly allow this suit to proceed (Opp. 18)—is untenable. Three circuits hold that “[p]erformance of ... alleged anticompetitive contracts during the limitations period is not sufficient to restart the period.” *Varner*, 371 F.3d at 1020; Pet. 15-18. The Ninth Circuit and two others hold that “an action taken under a pre-limitations contract [is] sufficient to restart the statute of limitations so long as the defendant had the ability not to take the challenged action.” Pet. 8a; Pet. 18-21. Samsung nowhere acknowledges this holding, but it is the reason why this suit proceeded, and it confirms that the circuits do not “merely reach[] different conclusions on different facts.” Opp. 19. Indeed, the Third Circuit expressly “reject[s]” other circuits' holdings that “‘reaffirmations’ of [pre-limitations] acts” do not restart the clock. *West Penn*, 627 F.3d at 106. Only this Court can resolve these splits.

Recognizing this, Samsung recasts its complaint and, upon that revisionist foundation, denies the circuit splits. But this is not a case about “price-fixing” that arose years after formation of an unchallenged SSO, or a 2006 license that Samsung never signed. The complaint challenges the very formation of SD-3C—its initial decision to charge non-SD-3C founders to use SD-3C pooled patents. According to Samsung, *this* action—not the 2003 and 2006 licenses that reaffirmed and performed the original agreement—had “permanent” anticompetitive effects. Once these allegations reemerge, nothing remains of Samsung’s opposition.

I. Samsung’s own allegations foreclose its factual and “vehicle” arguments.

Samsung insists that “the facts alleged” must be taken “as true” and viewed “collectively.” Opp. 21. We agree. But in its haste to deny the circuit splits, Samsung disavows its 2011 complaint, which alleges “anticompetitive effects” beginning “10 years ago when the SD card was first introduced.” Pet. 71a.

From the opposition, one would think Samsung challenges a good collaboration gone bad, and complains only about a 2006 license and a “cartel” meeting in Japan. The complaint, however, is a detailed structural attack on SD-3C’s formation and original licensing policies. Samsung says SD-3C’s founders permanently injured competition by offering royalty-free licenses to each other while charging others a 6% royalty. Pet. 103a-104a. The (unsigned) 2006 license merely reaffirms those practices, which Samsung could have challenged a decade ago, and certainly by 2007—four years after signing a license, and one year

after entering the market. That is why Samsung strives to present an altogether different complaint.

First, Samsung says petitioners “successfully demanded payment under the terms of the new license.” Opp. i. Not so. As the Ninth Circuit recognized (Pet. 5a), “Samsung refused to sign the 2006 license.” Pet. 89a; accord Pet. 84a. The court simply deemed it irrelevant that Samsung was paying royalties under “the annual renewal provision of its existing [2003] license” (Pet. 89a), reasoning that petitioners’ ongoing royalty collections—“whether under a new 2006 license or under the 2003 license”—“caused independent harm.” Pet. 10a.

Samsung allegedly itemized its royalties on a 2006 “reporting form,” “Schedule F.” Pet. 84a. But as Samsung then admits, petitioners accepted payment “notwithstanding the fact that Samsung did not execute the 2006 license.” *Ibid.* Moreover, “[Samsung’s] rejection of an express license with royalties negatives an agreement upon an implied license.” *Duval Sulphur & Potash Co. v. Potash Co.*, 244 F.2d 698, 701 (10th Cir. 1957); see *Winton v. Amos*, 255 U.S. 373, 394 (1921). Thus, the 2006 license, the Osaka meeting, the reporting form, and SD-3C’s emails (Opp. 5-6) do not take this case outside *Zenith*’s general rule or the circuit split warranting review.

Samsung contends that it was “*not* ‘fully aware of the terms’ of” the license (Opp. 28), but it knew the 6% royalty rate (Pet. 45a), was sufficiently interested in producing SD cards to sign a license in 2003 (Pet. 88a-89a), and by then had allegedly suffered “permanent” harm (Pet. 104a). On these allegations, several circuits would have joined the district court in finding Samsung’s suit untimely.

Second, Samsung depicts a foreign “cartel” meeting “to fix prices” of “products.” Opp. i. Samsung refers to a regular SD-3C meeting, which—for obvious reasons—occurred in Japan in broad daylight. And as Samsung ultimately acknowledges, the “collective price setting” it alleges is simply “apply[ing] [the 6% royalty] to multiple generations” of *intellectual property*, not *finished products*. Opp. 26. As the district court observed, petitioners’ alleged price-fixing “is a widely accepted method for calculating patent royalties where the final product includes, but is not limited to, parts or components that are covered by other patents or are unpatented.” Pet. 39a. Moreover, Samsung’s only allegation that petitioners “fix[ed]” prices appears in a *state-law* count. Pet. 121a.

Third, Samsung dismisses its allegation that the original cross-licensing scheme caused it “permanent” harm, saying it “appears only twice” in the complaint and was addressing the combined effect of petitioners’ cross-licenses and the 2006 license. Opp. 29. Not so. As the district court recognized, Samsung “alleg[es] that the *original* cross-licensing agreement ... gave [petitioners] a permanent cost advantage.” Pet. 24a-25a (emphasis added). Indeed, before amending its last complaint, Samsung alleged a “permanent cost advantage” tied to the “original” cross-licenses several more times. Pet. 35a; N.D. Cal. Dkt. 10-cv-03098, No. 74 (FAC ¶¶ 109-110, 1, 14, 113-114, 124).¹

¹ Samsung “cannot amend pleadings to ‘directly contradict an earlier [factual] assertion.’” *Airs Aromatics, LLC v. Opinion Victoria’s Secret Stores Brand Mgmt.*, 744 F.3d 595, 600 (9th Cir. 2014).

Samsung’s leading allegation of permanent harm nowhere mentions the 2006 license. Pet. 104a. The allegation comes after Samsung quotes SanDisk’s 1999 “annual report” and identifies the challenged features of the original licenses (Pet. 103a-104a)—the very “practices” that Samsung concedes (and the Ninth Circuit did not dispute) were simply “codified” in “the ‘2003 License’” (Opp. 4).

II. Each conflict asserted in the petition is real and warrants review.

Once “*all* of the facts” emerge, the circuit splits are anything but “illusory.” Opp. 21, 1.

A. Continuing violation conflict

Six circuits are divided over whether ongoing contractual performance under a pre-limitations agreement qualifies as an “overt act” under *Zenith*. Pet. 14-21; accord *Amicus* Br. 4-9. Samsung’s attempt to dismiss this conflict distorts both the decision below and the other circuits’ decisions.

1. Samsung never acknowledges the Ninth Circuit’s core holding that “an action taken under a pre-limitations contract [is] sufficient to restart the statute of limitations so long as the defendant had the ability not to take the challenged action, even if that would have required breaching.” Pet. 8a. Nor does Samsung mention the court’s reliance on the fact that the 2003 license “did [not] foreclose future agreements on different terms” or “permanently and finally control [petitioners’] acts.” Pet. 9a, 10a. Only by ignoring these points can Samsung say the decisions reflect merely “different facts.” Opp. 15.

2. According to Samsung, the circuits “appl[y] a uniform ‘continuing conspiracy’ exception.” Opp. 18.

Yet the very treatise it cites explains that “[t]he cases are inconsistent and often hypertechnical.” Areeda & Hovenkamp ¶ 320a. Numerous commentators writing since 2010—not just in “the 1970’s and 1980’s” (Opp. 12)—agree. Pet. 13-14. As the ABA explains: “Although the lower courts have uniformly recognized that a continuing violation may renew the running of the statute,” they “have not followed consistent principles” or identified a “satisfactory test.” *Proving Antitrust Damages* 71-72.

3. Samsung says no court “acknowledg[es] such a conflict.” Opp. 12. When the Third Circuit in “*West Penn* ‘rejected’ other circuits’ definition of an overt act,” Samsung maintains, that was “dict[um].” Opp. 17. Not so.

The defendant in *West Penn* maintained that the suit would be time-barred under Sixth Circuit precedent (*Lakian*) holding that “‘reaffirmations’ of acts done or decisions made outside the limitations period” do not restart the period. 627 F.3d at 106. The court did not dispute the outcome under this “proposed rule.” *Id.* at 107. It simply “reject[ed]” that rule, reasoning that Third Circuit precedent “le[ft] no room for [it].” *Ibid.* Thus, “[the] suit was timely even though the acts that occurred within the limitations period were reaffirmations of decisions originally made outside the limitations period.” *Ibid.* Nothing in *West Penn*’s “holding” “relied upon” an act “that was more than a reaffirmation.” Opp. 17.

4. Samsung’s effort to reconcile the decision below with Sixth, Eighth, and Fifth Circuit precedent fares no better. Although Samsung says these precedents did not involve defendants “taking any new anticompetitive action to enforce their contracts within the

limitations period” (Opp. 15), that is incorrect. As detailed below, each defendant took steps to enforce a pre-limitations agreement. But regardless, the decision below makes defendants’ *inaction* “sufficient to restart the statute.” Pet. 8a. If an agreement does “not permanently and finally control” the defendant’s actions—or the defendant can “breach[]”—then “overt act[s]” performing pre-limitations contracts “restart[] the statute.” Pet. 8a, 10a.

Had the Sixth, Eighth, and Fifth Circuits applied this standard, they would have ruled differently. By Samsung’s own description, the defendants in these cases collected ongoing “payments” (*Lakian* and *Kaiser*) and made ongoing sales (*Varner*) under “pre-limitations-period contracts.” Opp. 15. Under the decision below, each lawsuit would have been timely because each defendant “had the ability not to take the challenged action”—including by “breaching”—and its ongoing performance constituted “an overt act that restarted the statute.” Pet. 8a. Thus, Sixth, Eighth, and Fifth Circuit precedent conflicts with the Ninth Circuit’s rule.

5. Nor does Samsung fairly portray the other side of the split. Samsung uses ellipses (Opp. 17) to conceal that the D.C. Circuit, like the court below, holds that “the ‘overt act’ requirement may be satisfied merely by the parties continuing to maintain contractual relationships that directly affect competition.” *National Souvenir*, 728 F.2d at 510. The D.C. Circuit thus deemed a claim timely because “the challenged [pre-limitations] contract” required ongoing “rent.” *Id.* at 513-514. This is *not* “the *same* standard as the other circuits.” Opp. 17.

Samsung says the lone disagreement among the circuits comes from “aged Fifth Circuit dicta.” Opp. 18. But this misses the point. The Fifth Circuit’s *later* decisions conflict with the decision below. Pet. 17. Nor is the conflict “aged.” The Third, Sixth, Eighth, and Ninth Circuits have issued conflicting decisions in the past decade, and the earlier decisions remain binding. Thus, the conflict is now entrenched, warranting the attention that this Court has not given the subject in 43 years.

6. Samsung points to “*other* [Ninth Circuit] decisions” that supposedly “adopted” the Sixth, Eighth, and Fifth Circuits’ rule. Opp. 19. Yet the court below analyzed those decisions and distilled them into its core holding: “action taken under a pre-limitations contract ... restart[s] the statute of limitations so long as the defendant had the ability not to take the challenged action.” Pet. 8a. That holding is binding Ninth Circuit law, and it directly conflicts with the other circuits’ rule: “Performance of the alleged anti-competitive contracts during the limitations period is not sufficient to restart the period.” *Varner*, 371 F.3d at 1020. Notably, Samsung ignores the Ninth Circuit’s explanation that “cases where a continuing violation is ongoing” are now “the rule,” not “the exception.” Pet. 6a-7a. That turns *Zenith* on its head.

Samsung says other circuits follow the reaffirmation standard articulated in *Pace*, another Ninth Circuit decision. Opp. 20. But the Third Circuit *has* “rejected” *Pace*. *Ibid.*; see *West Penn*, 627 F.3d at 106 (“reject[ing]” the Sixth Circuit’s reaffirmation standard, which came from *Pace*, see *DXS*, 100 F.3d at 467). Further, the circuits that follow *Pace* remain divided over whether acts performing pre-limitations

agreements are “overt acts” under *Zenith*. Pet. 14-21. Both splits can be resolved here.

7. Samsung cannot escape the conflict by asserting that the Ninth Circuit “found that Samsung had alleged ample overt acts.” Opp. 1. Samsung’s timeline (Opp. 7) lists six acts within the limitations period, but four are *Samsung’s*—and are therefore irrelevant under *Zenith*, which requires a new overt act by “the defendants.” 401 U.S. at 338. Further, the court below found just *two* overt acts—petitioners’ efforts “to enforce” the 2003 license and their “adoption of the 2006 license.” Pet. 8a-10a, 5a. And since Samsung cannot rely on the 2006 license (*supra* at 2-3)—which Samsung never signed, and in any event merely “implement[ed] ... the contract terms originally agreed to” (Pet. 24a)—this case fits squarely into the split over the effect of ongoing performance under pre-limitations agreements.

B. Antitrust injury conflict

1. Samsung does not dispute that, if it was *not* injured by the 2006 license, the court below broke with seven circuits’ decisions requiring new and independent “injury to *the plaintiff’s* business.” *World of Sleep*, 756 F.2d at 1478 (emphasis added). According to Samsung, this split is “illusory” because Samsung *was* injured when petitioners “sought to have [it] sign” the 2006 license. Opp. 21. But even if that license did more than reaffirm the initial agreement (it did not), Samsung “refused to sign” (Pet. 89a), and its “rejection of an express license” precludes “an implied license” (*Duval*, 244 F.2d at 701).

2. Pointing to the royalties it paid under the 2003 license, Samsung scoffs at the idea that it might have “benefitted” from the 2006 amendment. Opp. 22. Yet

our point is simple. If the amended terms merely “implement[ed] ... the contract terms originally agreed to” (Pet. 24a), then there could be no new and independent antitrust injury to Samsung even if it had signed. Conversely, if the amended terms were more onerous than the 2003 terms, Samsung had an advantage over competitors that *did* sign. Pet. 23. And the circuits “routinely reject[] [antitrust] claims” where “the claimants st[and] to gain from the [challenged] conduct.” *Lexmark*, 697 F.3d at 407.

C. Speculative damages conflict

Samsung never attempts to reconcile the decision below with other circuits’ decisions that “projections” can “provide a reasonable basis for calculating damages”—or that even if the plaintiff lacks “sufficiently exact evidence of damages,” it must “file[] suit and request[] a stay” (*Lakian*, 188 F.3d at 406-407) or seek “injunctive relief” (*Midwestern*, 392 F.3d at 276). These facts would render the speculative damages exception inapplicable in other circuits. Pet. 24-27.²

Samsung says it was impossible “to know exactly what damages it would have suffered before it ever sold” SD cards. Opp. 24. But the availability of the speculative damages exception turns not on the “extent” of Samsung’s damages—it turns on knowledge of their “exist[ence].” *Midwestern*, 392 F.3d at 276. And insofar as Samsung’s alleged injury stems from

² What Samsung labels a “separate ‘speculative damages’ exception” (Opp. 22) is closely related to the “continuing violation” exception. Both focus on “accrual of the action,” and courts typically consider them together. *E.g.*, *Zenith*, 401 U.S. at 338-339.

the 6% royalty, that injury was known and became “permanent” by 2003. Pet. 104a. Whatever additional information Samsung obtained when it started selling SD cards was a matter of mathematics.

Samsung, like the Ninth Circuit, pays lip-service to the principle that “uncertainty as to the extent of the damage” does not render damages too speculative (Opp. 22), but its focus on calculating “exact[]” damages (Opp. 24) would eviscerate the four-year limitations period. Even when an alleged overcharge percentage is known (as here), no seller knows *how much* it will sell—its “losses lie mostly in the future.” *Brunswick*, 752 F.2d at 271.

Samsung need not have sued “immediately after signing the 2003 License.” Opp. 24. Samsung could have sued anytime within four years of the alleged “act that injure[d] [its] business.” *Zenith*, 401 U.S. at 338. Samsung could have waited until 2007, *one year after it entered the market*. Yet Samsung, wanting to “see just how well [petitioners] d[id] in the market” (*Brunswick*, 752 F.2d at 271), waited *seven* years.

It is routine, not speculative, for standard-setting and patent-pooling agreements to be extended to future generations of technology. Pet. 31-32. But if the decision below stands, such agreements will *never* experience repose.

III. The national importance of the question presented independently warrants review, particularly in light of 15 U.S.C. § 22.

Hoping to diminish the national importance of the issue, Samsung says the decision below “will have no effect on” similar agreements because the court “did not reach the merits.” Opp. 25. But this wrongly assumes that only adverse merits rulings can deter pre-

sumptively procompetitive standard-setting and patent-pooling activity. Samsung ignores that “certainty” as to “potential liabilities” (*Rotella*, 528 U.S. at 555) is critical to investment in high-tech industries. Moreover, “repose is especially valuable in antitrust,” where “practices can be simultaneously efficient” and “also challengeable.” *Areeda & Hovenkamp* ¶ 320a.

Samsung says “repose is adequately protected by the limitation of damages to the four-year limitations period.” Opp. 27. But a never-ending threat of four years of treble damages is not repose, and Samsung also seeks “injunctive relief.” Pet. 122a. Further, the four-year period is meaningless if *Zenith*’s exceptions swallow its rule. According to the Ninth Circuit, “a continuing violation is ongoing” unless “all of the harm occurred” at “the initial violation,” and such cases are “the exception, not the rule.” Pet. 6a-7a.

For agreements involving ongoing performance, that rule does not protect repose. It creates a perpetual risk of costly litigation. Petitioners are not seeking “immunity” (Opp. 27)—only a sensible interpretation of *Zenith*’s exceptions, which this Court has not revisited in 43 years. And since Congress has authorized venue wherever antitrust defendants “transact[] business” (15 U.S.C. § 22), the Ninth Circuit’s decision effectively sets a nationwide rule for every national or global license. Pet. 34.

CONCLUSION

Certiorari should be granted.

Respectfully submitted.

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