

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
RAMBUS INC.,) Docket No. 9302
a corporation.)

**ORDER DENYING RESPONDENT’S
MOTION FOR SUMMARY DECISION**

Respondent, Rambus Inc., moves for summary decision under Commission Rule 3.24(a)(2). It asserts three independent grounds for its motion: (1) that JEDEC patent disclosure policy lacks sufficient clarity to serve as the basis for antitrust liability; (2) that JEDEC members did not rely on any message supposedly conveyed by Respondent’s “silence” in adopting the SDRAM and DDR SDRAM standards; and (3) that Respondent did not breach any JEDEC disclosure duty with regard to DDR SDRAM because this standard was established after Respondent dropped out of JEDEC in June 1996.

Complaint Counsel opposes the motion, arguing that there is sufficient evidence to create material factual questions regarding each of these issues. It asserts that a full hearing is therefore necessary to resolve these issues and that summary decision is inappropriate.

The Court concludes that these issues present material factual questions that cannot be resolved at the summary decision phase. Accordingly, Respondent’s Motion for Summary Decision is DENIED.

I.

¹ Respondent attended its first JEDEC meeting as a guest in December 1991 before joining JEDEC in 1992. Respondent attended its last JEDEC meeting in December 1995, but did not formally withdraw from JEDEC until June 1996. Accompanying Respondent's letter of withdrawal was a partial listing of DRAM related products.

October 1981 policy known as EP-3-F²; and (2) a 1990 policy known as EP-7-A.³ Both statements contain virtually identical language. In addition, JEDEC issued a third patent policy statement in

² EP-3-F provides:

Requirements to EIA Standards which call for the use of patented items should be avoided. No program of standardization shall refer to a product on which there is a known patent unless all technical information covered by the patent is known to the formulating committee, subcommittee, or working group. The Committee Chairman must also have a written expression from the patent holder that he is willing to license applications under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

³ EP-7-A provides:

Avoid requirements in EIA standards that call for exclusive use of a patented item or process. No program standardization shall refer to a patented item or process unless all of the technical information covered by the patent is known to the formulating committee or working group, and the committee chairman has received a written expression from the patent holder that one of the following conditions prevails:

- (1) a license shall be made available without charge to applicants desiring to utilize the patent for the purpose of implementing the standard, or
- (2) a license shall be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

October 1993, known as JEP 21-I.⁴ In addition to similar language as in EP-3-F and EP-7-A, JEP 21-I directed each committee and subcommittee chair to:

...call attention to the obligation of all participants to inform the meeting of any knowledge they may have any patents, or pending patents, that might be involved in the work they are undertaking.

JEP 21-I, Appendix E, also required that a viewgraph or slide containing similar language to the chair's oral admonishment be shown at the beginning of each meeting.⁵ While not dispositive, the Court notes that the Federal Circuit found that "JEDEC members treated the language as imposing a disclosure duty" and that the Federal Circuit concluded this language imposed a disclosure duty.

Rambus Inc. v. Infineon Technologies AG, 318 F.3d 1081, 1096-98 (Fed. Cir. 2003)("Infineon II"). See

⁴ JEP 21-I provides:

While there is no restriction against drafting a proposed standard in the terms that include the use of a patented item [including items for which a patent has been applied for] if technical reasons justify the inclusion, committees should ensure that no program of standardization shall refer to a product on which there is a known patent unless all of the relevant technical information covered by the patent is known to the formulating committee, subcommittee, or working group. If the committee determines that the standard requires the use of patented items, then the committee chairperson must receive a written assurance from the organization holding rights to such patents that an license will be made available without compensation to applicants desiring to implement the standard, or written assurance that a license will be made available to all applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

While Respondent claims that it did not have a copy of JEP-21, there is some evidence to the contrary. Dep. of Richard Crip at 851-52.

⁵ The language for the viewgraph, set out in Appendix E to JEP-21-I, provides:

EIA/JEDEC PATENT POLICY STATEMENT

Standards that call for the use of a patented item or process must not be considered by a JEDEC committee unless all of the relevant technical information covered by the patent or pending patent is known to the committee, subcommittee, or working group.

also Id. at 1085 (“At least by 1993, the EIA/JEDEC patent policy required members to disclose patents and patent applications ‘related to’ the standardization work of the committees.”). As a result, a reasonable trier of fact in the instant proceeding, might find from JEDEC’s JEP21-I patent policy statement that a duty to disclose under JEDEC’s rules arose while Respondent belonged to JEDEC.

Even in the absence of the adoption of JEP 21-I in 1993, a duty of Respondent to disclose might be inferred from EP-3-F and EP-7-A alone. Both make clear that a technical standard should not be adopted if the standard includes a patent known to the formulating committee (unless the patent holder is willing to subscribe to JEDEC’s patent licensing policy). Since the formulating committee must learn about patents related to a proposed standard in some manner, a possible inference from these policy statements is that a member of a formulating committee with knowledge of any such patents (either its own patents or patents held by others) must disclose that information to the other members of the formulating committee.

This inference (and the conclusion of the Federal Circuit in *Infineon II*) actually finds support in Respondent’s Memo at p. 41. Respondent provides an excerpt from the deposition of JEDEC committee chair, Farhad Tabrizi. Mr. Tabrizi unambiguously testified that the refusal of a JEDEC member to provide information about patents that could effect a standard is “a violation of JEDEC patent policy.” *See also, e.g.*, Dep. of Reese Brown at 80-81.(Complaint Counsel Opposition Exhibit (“CC Exh.”) 63); Dep. of Ken McGhee at 65-66 (CC Exh. 69); Dep. of Gordon Kelley at 277-78 (CC Exh. 49).

In sum, there is evidence that JEDEC’s patent disclosure policy was sufficiently clear to create a material question of fact as to a member’s obligations thereunder. While Respondent’s Memo

clearly indicates that it will attempt to undermine or refute this evidence at trial (and perhaps can successfully do so), for the purpose of summary decision the Court cannot conclude that JEDEC's patent disclosure policy was sufficiently ambiguous such that Respondent is entitled to judgment as a matter of law. Thus, Respondent's argument that lack of clarity in the JEDEC rules would preclude anti-trust liability at this phase of this proceeding is unpersuasive and in fact, raises numerous issues of disputed fact regarding whether JEDEC members were adequately informed of the disclosure policy and whether they understood such obligation.

B. There Is Sufficient Evidence That Respondent's Conduct/ "Silence" Might Have Been Relied Upon By Other JEDEC Participants Regarding The Scope Of Its Patent Claims At JEDEC Meetings Establishing Standards For SDRAM And DDR SDRAM To Create A Material Question Of Fact To Be Resolved At Trial

Respondent asserts that it gave fair notice to other JEDEC members about the scope of its patent and patent application claims with regard to SDRAM and DDR SDRAM. Moreover, it asserts that JEDEC members did not rely on any message supposedly conveyed by Respondent's "silence" in adopting the SDRAM and DDR SDRAM standards. Respondent points to following examples:

- * At a May 6, 1992 JEDEC S42.3 meeting, Respondent's representative, Richard Crisp, declined to comment when asked by the S42.3 chair if he cared to comment regarding possible patent claims by Respondent with respect to two-bank DRAM designs. (Respondent Memo at 40).
- * Also at the May 6, 1992 meeting, Mr. Crisp asked if he could propose a JEDEC standard that would incorporate a patent held by Respondent and was told he could not unless Respondents agreed to adhere to JEDEC policies on the licensing of patents. When Mr. Crisp indicated Respondent would not abide to those policies, he was told not to propose a standard until Respondents agreed to adhere to those policies. (Respondent Memo at 45).
- * At a JEDEC S42.3 meeting in 1993 or 1994 the chair informed the subcommittee members that Respondent would not agree to JEDEC's patent licensing policy. (Respondent Memo at 47).

noted however, that a member's failure to comment was tantamount to an assertion that the adoption of a standard would or was likely to result in a patent infringement.

Such other testimony also challenges Respondent's proposition that all JEDEC members were on notice about Respondent's intent with regard to its patents. For example, current JEDEC chair Desi Rhoden testified that he believes members of JEDEC operate on the principle of good faith and participated in JEDEC standard-making because they want to develop an open standard (Rhoden Dep. at 440)(CC EXH. 22), and that he understood that Respondent left JEDEC because it "did not want to continue to follow JEDEC patent policy." (Rhoden Dep. at 33)(Perry Decla. Exh. 68). Farad Tabrizi similarly indicated that he did not think that Respondent would not abide by JEDEC patent policy until it actually withdrew from JEDEC. Tabrizi Dep. at 328-29 (Perry Decla. Exh. 69). *See also* Dep. of Ramesh Gidwani at 34 (CC Exh. 96); Dep. of Gordon Kelley at 109-110 (CC Exh. 100).⁶

In addition, the list of patents attached to Respondent's June 16, 1996 withdrawal letter to JEDEC did not contain Respondent's patent number 5,513,327 ("327 patent"), issued in April 1996 (but having priority back to its application filing in 1994). This patent involves dual edge clock technology that Complaint Counsel asserts is included in JEDEC SDRAM and DDR SDRAM standards developed by JEDEC S42.3. Respondent claims that the '327 patent was inadvertently omitted from the June 1996 list of patents and that RAM manufacturers can comply with JEDEC

⁶ Complaint Counsel's Memo at pp. 110-11 cites a variety of citations for the proposition that a number of JEDEC participants apparently were unaware of Respondent's patents. These statements are sufficiently ambiguous that they could be construed as simply that these participants failed to heed Respondent's purported declarations about its patents; that the declarations about the patents by Respondent were inadequate to put other JEDEC participants on notice about the potential impact of Respondent's patents; or that Respondent effectively misled the other JEDEC participants about its patents. Since this is a motion for summary decision, the Court must construe all inferences from these statements in the light most favorable to the non-movant, Complaint Counsel.

standards without infringing on the '327 patent. (Respondent's Answer to Complaint ¶ 87).⁷ Complaint Counsel also puts forward evidence from an expert, Bruce Jacob, that asserts that Respondent's licensing efforts appeared to focus on Respondent's proprietary narrow bus SDRAM design and, therefore, appeared have no direct application to the wide bus standards being considered (and ultimately adopted) by JEDEC S42.3. (CC Exh. 91 at 30, ¶ 67). A conclusion that might ultimately be drawn from this assertion could be that Respondent structured its patents and patent applications so that JEDEC participants could not have known what Respondent now asserts are the

⁷ Perhaps coincidentally, on the same day that Respondent claims it inadvertently failed to inform JEDEC of the '327 patent, Respondent also requested that its outside counsel render an opinion on the enforceability of this patent. (Diepenbrock 6/17/96 letter to Lester Vincent (CC Exh. 94)).

The failure of Mr. Crisp to make a proposal for a JEDEC standard after being told on May 6, 1992 that he could make proposals incorporating a patent held by the Respondent only if Respondent agreed to JEDEC's patent licensing policy (which Respondent would not), also undermines the Motion for Summary Decision. The failure of Respondent to come forward with a proposal after this admonition might be interpreted by a reasonable trier of fact as indicating that Respondent knew or should have known that it could not remain a member of JEDEC and simultaneously create (or permit to be created) a situation where JEDEC DRAM standards would provide it with pecuniary benefits.

While not alone dispositive, what patent information Respondent's JEDEC representative, Richard Crisp, chose to disclose to JEDEC involved patents that had no relationship to the proposed JEDEC SDRAM standard and Mr. Crisp admitted that he did not disclose to JEDEC Respondent's SDRAM-related work (Trial Testimony of Richard Crisp in *Rambus, Inc. v. Infineon Technologies AG*, No. 3:00CV524 (E.D. Va. May 2, 2001) at 198-99 (CC Exh. 13)). Similarly, the failure of Respondent to give notice to JEDEC of its '327 patent might lead a reasonable trier of fact to conclude that Respondent attempted to mislead its fellow JEDEC members. While Respondent claims that this omission was inadvertent (and perhaps the evidence at trial will establish this as the case), the issue of whether Respondent misled its fellow JEDEC members about the scope of its patents or whether said members relied on Respondent's conduct regarding the adoption of the SDRAM and DDR SDRAM standards is one appropriately resolved based on a full evidentiary record following trial. As material questions of fact exist as to these questions, summary decision cannot be entered.

- C. There Is Sufficient Evidence That Respondent Might Have Used Knowledge Obtained From Its Participation In JEDEC S42.3 To Engage In Anti-Competitive Conduct Concerning DDR SDRAM To Create A Material Question Of Fact To Be Resolved At Trial**

In its Motion, Respondent frames the issue to be decided at hearing narrowly: whether Respondent had any duty under JEDEC patent disclosure policies to disclose its patents or patent applications. However, Complaint Counsel's allegations are far broader than whether Respondent simply had a disclosure obligation under JEDEC patent policies. The Complaint at ¶ 2 alleges that Respondent engaged in anti-competitive practices "in violation of JEDEC's own operating rules and procedures – and through other bad-faith, deceptive conduct". As a result, the question the Court must address is far broader than that which Respondent suggests. Whether Respondent engaged in a pattern of deceptive, exclusionary conduct by subverting an open standards process; whether Respondent utilized such conduct to capture a monopoly in technology-related markets; and whether the challenged conduct violates well-established principles of antitrust law are material questions of fact to be resolved at trial.

In support of this conclusion, the Court in particular notes evidence that some JEDEC S42.3 members believe that Respondent took the ideas for some of the patents that Respondent now claims are infringed upon by the JEDEC DDR SDRAM standard from discussions it was privy to at JEDEC meetings. (Rambus Material Fact No. 87). This position is buttressed by the evidence asserted on pp. 118-22 of Complaint Counsel's Memo in Opposition to the Motion for Summary Decision that while there may not have been formal discussions of a DDR SDRAM standard prior to June 1996, there certainly appear to have been informal discussions during JEDEC S42.3 meetings of many of the design element issues that ultimately were incorporated into JEDEC's DDR SDRAM standard. The record so far appears to show that JEDEC was engaged in ongoing standard-development work for future memory technology before Respondent withdrew from the organization. There is also a dispute whether all of the relevant technologies contained in the DDR SDRAM standard were considered by

JEDEC as part of its standards work during the time Respondent was a JEDEC member. For these reasons, partial summary decision is not warranted with respect to whether Respondent breached any JEDEC disclosure duty with respect to the DDR SDRAM standard.

As a result, an evidentiary hearing is required to determine the facts as to whether Respondent's participation in JEDEC S42.3 resulted in it acquiring information through deceptive conduct and whether it used this information to obtain patents that would anti-competitively inure to its economic benefit.

IV. CONCLUSION

For the reasons set forth above, Respondent's Motion for Summary Decision is **DENIED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Dated: April 14, 2003