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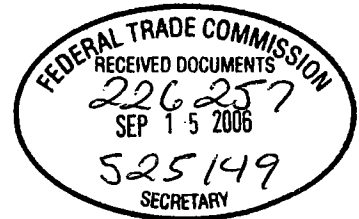
UNITED STATES FEDERAL TRADE COMMISSION

Docket No. 9302

In the Matter of

RAMBUS INC.,

A CORPORATION



**AMICUS CURIAE BRIEF OF
JEDEC SOLID STATE TECHNOLOGY ASSOCIATION
IN SUPPORT OF COMPLAINT COUNSEL**

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This *amicus curiae* brief is submitted by the JEDEC Solid State Technology Association (“JEDEC”), in support of Complaint Counsel’s brief addressing the proper remedy in this proceeding.

INTEREST OF AMICUS CURIAE

JEDEC is at the epicenter of this case. The Commission has now found that Rambus Inc. (“Rambus”) breached JEDEC’s patent-disclosure policies and practices, and engaged in conduct that violated the antitrust laws and Section 5 of the Federal Trade

Commission Act. JEDEC’s membership was a direct result of Department of Justice v. Ethicon, Inc., 486 U.S. 115 (1988).

competitive conduct. Rambus abused JEDEC’s standard setting process and thereby

to mislead JEDEC members by fostering the belief that Rambus neither had, nor was seeking, relevant patents that would be enforced against JEDEC-compliant products.” (Decision, at 67.)

SUMMARY OF ARGUMENT

JEDEC explains in this *amicus* brief why the appropriate remedy for Rambus’s “deceptive course of conduct” (Decision, at 66) is an order enjoining Rambus from collecting future royalties on JEDEC-compliant devices that require use of Rambus’s patents. Such a remedy would be equivalent to a prospective, industry-wide, royalty-free license.

JEDEC does not propose such a remedy as a “punitive” or “baseless” claim.

in equity. Instead, this remedy is the minimum necessary to restore the competitive outcome that

would have existed if Rambus had disclosed its patents and patent applications to the JEDEC

(b) the Commission expressly found that Rambus cannot prove its speculative hypothesis. As

~~As stated in Rambus' Complaint, the Commission's decision is not a finding of fact.~~

any lingering uncertainties about the hypothetical world of ex parte disclosure by Rambus

devices.

JEDEC has a strong aversion to the inclusion of royalty-bearing patents in JEDEC standards. This aversion is expressed in its publications. For example, the 1990 EIA

~~Engineering Publication that reviewed standards issued by JEDEC (that one of EIA's units)~~

stated that JEDEC should "[a]void requirements . . . that call for the exclusive use of a patented

~~item or process" (EP 7 A 1X0054 000)~~

While JEDEC had no absolute prohibition on adopting standards that required the

for in changes in standards unless all relevant information about relevant events was known to

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the one instance when JEDEC members did learn that Rambus had a patent that was likely to cover a different standard under consideration, “the members took deliberate steps to avoid standardizing the Rambus technology.” (Decision, at 74.)

The Commission also found that JEDEC members

Microsystems – “would have strongly opposed the use of royalty-bearing elements” for this type of device. (Decision, at 75.) This finding is especially important because JEDEC seeks as broad

a consensus as possible in selecting standards.

The Commission also found that JEDEC’s adoption of patent-laden standards was rare: “Payment of royalties on memory interfaces has been very much the exception, rather than

posed any risk of future royalty demands. As the Commission found: “JEDEC members – the principal buyers of the relevant technologies – gave these alternatives serious, searching consideration; in fact, the technologies as to which Rambus subsequently revealed patent claims sometimes were chosen only after prolonged debate.” (Decision, at 76.) If the Rambus technology was barely selected as a standard when JEDEC believed that it was royalty-free, there is no reason to believe that the JEDEC committee – which the Commission found was “highly sensitive to cost” (Decision, at 74) – would have selected the Rambus technology if it

had known that the Rambus technology would be encumbered by royalties.

Taken together, these findings show, by a substantial preponderance of the evidence, that JEDEC would not have adopted Rambus’s technology into a JEDEC standard if Rambus had disclosed its patent rights.

III. ANY UNCERTAINTY ABOUT JEDEC’S RESPONSE TO THE HYPOTHETICAL DISCLOSURE BY RAMBUS OF ITS PATENTS MUST BE BORNE BY RAMBUS

After reviewing Rambus’s expert witnesses’ testimony which it found “fraught

patented technology if RAND assurances were given, JEDEC and its committees did not themselves engage in *ex ante* royalty negotiations about the level of a “reasonable” royalty.⁵ (See John Kelly Trial Tr. 1882-83, 2072-74.) In those instances where a JEDEC committee learned of a patent covering a proposed standard (see Decision, at 57-59), there is no evidence that the committee secured a RAND commitment to a specific royalty rate.

Second, while the JEDEC committee was extremely sensitive to costs, it did not have expert economists available to attempt to compute minute differences in the costs of different alternatives. JEDEC committee members had to vote “up” or “down” on alternatives based on their own assessments, taking into account JEDEC’s preference for avoiding the use of patents in JEDEC standards.

Third, as noted above, some key JEDEC members (such as Sun Microsystems) would have “strongly opposed” this proposed standard had it required the use of patented

This principle applies here because the Commission has already concluded that damage to the industry and to the public has occurred as a result of Rambus' anti-competitive

conduct and deception. According to the Commission, there is "[s]ubstantial record evidence"

patents to a standard-setting group. As in this case,⁶ the Commission found that “had [the standards group] known of the [undisclosed] patent, it could have chosen an equally effective, non-proprietary standard.” 121 F.T.C. at 624 n. 2. The Commission enjoined the patentee from enforcing its patent, which equates in practice to a zero royalty rate. This choice of remedy was not an afterthought, since the Commission stated that its remedy was “*ex ante*”

121 F.T.C. at 624. The Commission felt no need to guess what the formulating committee would have done if the respondent had made a full and timely disclosure of its patents and applications to the standard-setting group. In *Dell Computer*, the Commission also noted that its remedy “is

typical case, where the Commission is concerned about competition in a product market, do not apply here.

V. **A ZERO ROYALTY RATE IS ALSO CONSISTENT WITH THE COMMISSION'S REMEDIAL PRINCIPLES**

A zero-royalty order will be consistent with the principle of proportionality. As

Commissioner (then Professor) Keravica previously wrote, "Remedies should be proportional to

the sense that they reflect the dangers of the conduct by which a firm has achieved or sustained a
position of dominance." W. Keravica, Designing Antitrust Remedies for Dominant Firms

The following words of Commissioner Kovacic are particularly apt here: “Using powerful remedies in these circumstances provides greater protection against repetition of clearly

suppressing means, and deters efforts by other firms to employ similar tactics.” 31 Conn. L. Rev. at 1313 (emphasis added).

As a standard-setting organization, JEDEC is particularly concerned with these three goals: (a) avoiding a repetition of Rambus-like conduct at JEDEC; (b) dismantling the monopoly power obtained by Rambus through its deception in JEDEC’s own meetings, which has already allowed Rambus to collect unreasonably high royalties for many years; and (c)

licensing remedies. Because such an order in this case would not seek to create structural

changes among competitors for memory device technology or products, there is no need for the

Commission to regulate matters such as the amount of "know-how" to be transferred, whether

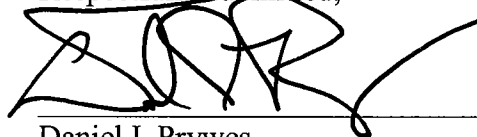
personnel should also be transferred, or other mechanics. 31 Conn. J. Reg. 1285, at 1305. The

CONCLUSION

For the foregoing reasons, the Commission should itself determine, on the

royalties on its patents for JEDEC-compliant memory devices.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2006 I caused two copies of the *Amicus*

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