ORIGINAL

Docket No. 9302

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S REPLY BRIEF ON REMEDY

INTRODUCTION

> *A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.*
>
> *International Salt Co. v. United States, 332 U.S. 392, 401 (1947)*

Starting from an incorrect position of law, and relying on false assumptions of fact, Rambus has rendered its brief irrelevant. The law provides that, to the extent possible, the Commission must restore competitive conditions that likely would have prevailed absent Rambus's conduct. The facts overwhelmingly confirm that absent Rambus's deceptive [illegible]

I. Restoring Competitive Conditions Is Central To The Commission's Remedial Powers

A. The Commission Has the Power To Enjoin Patent Enforcement or Restrict Royalties To Restore Competition

Well-settled precedent confirms the Commission's authority to "cure the ill effects of the illegal conduct." *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 88 (1950); Complaint [redacted] ordering a respondent to refrain from repeating unlawful conduct, Respondent's Brief ("RB") 4-6–flies in the face of relevant precedent. *See, e.g., Ekco Prods. Co.*, 65 F.T.C. 1163, 1216

B. Rambus Bears the Burden of Any Uncertainty Resulting from Its Unlawful Conduct

The Commission found the requisite link between Rambus's deception and its acquisition of monopoly power to establish liability. Decision 74, 118-119. Any remaining doubts regarding remedy must be resolved against Rambus. CCB 9-11. Rambus, however, asserts that this case is akin to those which require "a clearer indication of causal connection" at the remedy phase. RB 7. Areeda & Hovenkamp and *Microsoft,* upon which Rambus relies, say the opposite.

Rambus maintains that "affirmatively to reduce the defendant's market power" requires a "clearer indication of causal connection between the creation or maintenance of the market power." RB 7. Rambus misuses a principle important primarily in monopoly maintenance cases. A company that lawfully acquires a monopoly, and then engages in unlawful conduct reasonably likely to maintain that monopoly, should not be subject to divestiture or complete deprivation of

patent rights absent a showing that the remedy is linked to the anticompetitive effects of the conduct. Absent such a link, depriving a monopolist of lawfully-acquired monopoly power can restrict pro-competitive incentives. Conversely, monopoly acquisition cases are less likely to deprive a monopolist of its legitimate market position.

The Areeda & Hovenkamp section relied on by Rambus is straightforward: where a monopoly as it was before" resting on competitive merit. *Id.*

The *Microsoft* decision, applying the treatise, presents a more complex, yet similar situation. Microsoft developed the Windows operating system and the Internet Explorer browser [redacted]

competition from middleware, *Microsoft,* 373 F.3d at 1228-29, conduct that reasonably appeared capable of making a significant contribution to maintaining Microsoft's operating software monopoly. *United States v. Microsoft*, 253 F.3d 34, 79 (D.C. Cir. 2001). Massachusetts sought [redacted]

[redacted]

[redacted]

[redacted]

conduct and the monopoly increases. "When a monopolist has consummated an exclusionary act . . . [w]e must also try to undo the various effects of that act." *Antitrust Law* ¶ 653c. In the accompanying example, the monopolist actually buys its only rival. The treatise explains that a

[redacted]

[redacted]

a price-fixing or market allocation case would clearly bestow a windfall on the plaintiffs. No consumer could have expected, but for the conduct, that the intellectual property would have been free. On the other hand, under the present facts (as with cases involving equitable estoppel and laches), a zero-royalty remedy flows directly from Rambus's misconduct. CCB 12, n. 11. JEDEC members reasonably expected that JEDEC standards would be free of Rambus's patent

[redacted]

Electric, 115 F. Supp. 835 (D.N.J. 1953) (requiring public dedication of patents). In the remand in *United States v. Singer*, while rejecting royalty-free licensing in that case, the court examined the relevant authority to that point and explained that:

> The test . . . which runs through the majority opinions and dissents in the *Hartford Empire* and *National Lead* cases and the only one which must guide the

[redacted]

antitrust case").

Second, Rambus's implication that, at the time of its conduct, it could not have anticipated that it risked forfeiting the enforcement of its patents, is contradicted by the record. From the outset, Rambus consulted with its lawyers about the possible consequences of its conduct. CX1941 ("JEDEC – said need preplanning before accuse others of infringement").

[redacted]

Complaint Counsel nevertheless urge the Commission to adopt a traditional, limited antitrust remedy clearly within its well-defined powers. Despite Rambus's windfall gains during the past six years and the possibility of perverse incentives in SSOs, the Commission's primary objective (as explained above) should be to restore competitive conditions and protect consumers going forward.

II. Enjoining Enforcement Of Rambus's Relevant Patents Against JEDEC-Compliant

[redacted]

Products Is Appropriate

[redacted]

(Diepenbrock). This was not mere oversight or misunderstanding; it was a calculated position. Rambus representatives regarded RAND as contrary to Rambus's entire business model. CX0873 ("Rambus Inc. cannot agree to the terms of the JEDEC patent [licensing] policy"); CX0874 ("the patent [licensing] policy of JEDEC does not comport with our business model"); [redacted]

practices"); CX2112 at 213 (Mooring); CX3129 at 488-89 (Vincent); CX2083 at 98 (Davidow). And absent a RAND commitment, JEDEC could not have adopted Rambus's technologies. CX0203A at 11; JX0054 at 9; CX0208 at 19; Tr. 1868-69, 1884-86, 1895-96, 1907-08 (Kelly). Absent Rambus's deception, JEDEC standards would have been free of Rambus's patent claims.

(A) Cost projections were extremely difficult and subject only to very rough estimates. Cost projections were often rounded plus-or-minus 10%.

(B) Costs typically dropped dramatically over time. *See* CX2747 at 68 (RDRAM cost disadvantage dropping from 80% to 30-40% from 1H99 to 2H00).[6] As a result, cost projections rarely extended over more than 1-2 years.

(C) Cost projections varied widely from company to company—a single company often

[redacted]

[redacted]

[redacted]

– DRAM manufacturers (his only potential source of verification) contradicted his

[redacted]

[redacted]

reflect the factual record) demonstrate that the marginal value of the Rambus technologies over [redacted] practice in the precise form in which it is found to have existed in the past," but extends to such

[redacted]

other provisions as may be necessary to "close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *accord, International Salt,* 332 U.S. at 400 ("it is not necessary that all the untraveled roads to that end be left open and that only the worn one be closed."); *see also United States v. National Lead*, 332 U.S. [redacted]

defendant in the future received an exclusive license.).

III. Rambus's Proposed Royalty Rates Are Palpably Unreasonable

Complaint Counsel agree with Rambus on one critical principle: the Commission normally avoids direct price regulation. RB 15. The Commission protects the integrity of markets and allows markets to determine prices. The Commission has neither the role nor the ability to regulate prices. This is precisely why the Commission should avoid trying to set a

royalty rate for Rambus's technologies.

Rambus nevertheless argues that the Commission should regulate Rambus royalties at a

[redacted]

level of at least 2.5%. RB 14-25.[12] Rambus relies primarily on a single agreement – the Rambus-Hyundai RDRAM agreement – to justify its proposal. *Id.* 17-18. Rambus grossly mischaracterizes this agreement. Hyundai did not initiate negotiations in response to a RamLink/SyncLink-related warning from Rambus. *Id.* 17. In fact, Rambus and Hyundai commenced negotiations for an RDRAM license in early 1995. *See* CX0782; CX0711 at 61-62. The "Other DRAM" provision was included in the resulting RDRAM license. CX1599 at 2, 3, 24.

The Rambus-Hyundai RDRAM agreement does not represent the likely outcome absent Rambus's deception. Indeed, this agreement was also a product of Rambus's deception.

[redacted]

patents, it refused to "alert them to a potential problem they can easily work around." CX0711 at

72. Instead, Rambus merely stated vaguely that unspecified patents might [illegible]

wide royalty rates, IBM's policy potentially applies only to the fraction of the price attributable to the patented portions of the product.).

For the forgoing reasons, Complaint Counsel respectfully requests that the Commission enter its proposed order.

Respectfully submitted,

[redacted]

CERTIFICATE OF SERVICE

I, Beverly A. Dodson, hereby certify that on September 29, 2006, I caused a copy of the attached, *Complaint Counsel's Reply Brief On Remedy*, to be served upon the following persons:

by hand delivery to:

The Commissioners
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