ORIGINAL

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

[redacted]

REVISED PUBLIC VERSION

In the Matter of

RAMBUS INCORPORATED

BRIEF OF COUNSEL SUPPORTING THE COMPLAINT
ON THE ISSUE OF REMEDY

Jeffrey Schmidt
Director

Daniel P. Ducore
Assistant Director, Compliance Division

Geoffrey D. Oliver
Richard B. Dagen
Robert P. Davis

Counsel Supporting the Complaint

[redacted]

Attorney, Compliance Division

Bureau of Competition
Federal Trade Commission
Washington, DC 20580

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In the Matter of

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Docket No. 9302

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INTRODUCTION

economics, policy concerns, and principles of administrability.

[redacted]

[redacted]

(*see infra* 9-11).

Contemporaneous documents, testimony of most relevant fact witnesses, and the "natural experiment" involving the loop-back clock proposal (all cited favorably in the Commission's Decision) and other record evidence establish that the most likely competitive result would have been a series of JEDEC standards containing technologies free of Rambus patents. To replicate [redacted] patents against devices complying with JEDEC standards and products incorporating such devices.

A. The Remedy Must Fully Restore Competitive Conditions That Would Have [redacted]

violator will "relinquish the fruits of his violation."). The Commission's ultimate objective must be to protect the public from the continuing effects of Rambus's unlawful conduct. *See, e.g.,* *Hoffman-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, 170 (2004) ("[a] government plaintiff, [redacted]

further anticompetitive conduct and to redress anticompetitive harm.").

To restore competitive conditions, protect the public and deprive Rambus [redacted]

JEDEC." Decision 74; *see also* fn. 404. The Commission credited evidence that JEDEC members would select alternatives with lesser performance in order to avoid cost. Decision 75 & fn. 406. The Commission also cited to JEDEC minutes recounting, "If it is known that a [redacted] they can easily work around.") Thus, the Decision cites substantial evidence from multiple [redacted]

sources confirming that, had Rambus disclosed its patent position, JEDEC members would have [redacted]

[redacted]

alternatives cost no more than the technologies in question:

Fixed CAS Latency. The Commission found that

[redacted]

alternative would not have cost any more than programmable burst length, and was "unconvinced" by Rambus's argument that it was not viable. Decision 87, 87 fn. 473. If the Commission were to so find, this alternative would have been no more expensive than programmable burst length.

– *Doubling the Clock Speed* – The Commission stated, "the record does not support" the contention that an on-DIMM clock was required to double the clock frequency, and that [redacted]

The Commission also cited testimony that doubling clock speed "would not have any additional cost." Decision 90 fn. 492. If the Commission were to so find, this alternative would have been no more expensive than dual edge clocking.[4]

– *DLL on the Controller* – The Commission found no evidence indicating that this alternative would have been more expensive than on-chip PLL/DLLs. Decision 91. The [redacted]

[redacted] environment.[7]

3. The Commission Must Resolve Any Reasonable Doubts Against Rambus

[redacted]

(D.D.C. 2002) ("any doubts as to the extent of even this narrow remedy are to be resolved against the defendant"); *id.* at 163 ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.") (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946));[8] III Areeda &

[redacted]

Hovenkamp, Antitrust Law ¶ 653f, at 104 (2002) ("the proper relief is to eradicate all the consequences of the act and provide deterrence against repetition; and any plausible doubts should be resolved against the monopolist.").

Under the facts of this case in particular, doubts should

[redacted]

massive, wholesale destruction of documents. Decision 116-117. Complaint Counsel

[redacted]

from enforcing patents against those practicing the standard. *Dell Computer Corp.*, 121 F.T.C.

The proposed remedy is fully consistent with the remedy phase of *Microsoft*. There, the court identified "Microsoft's freedom from platform threats posed by makers of rival middleware" as the fruit of Microsoft's unlawful conduct. *Massachusetts v. Microsoft*, 373 F.3d at 1229. The court rejected, *inter alia*, Massachusetts' "open source IE proposal" to grant others a royalty-free, perpetual right to use Microsoft's Internet Explorer as inappropriate because it "'ignores the theory of liability in this case'." *Id.* at 1228. The court rejected the idea that "IE was the fruit of Microsoft's anticompetitive conduct, finding 'neither the evidentiary record from [redacted]

Policy considerations further support enjoining enforcement of a patent as a remedy for [redacted]

abuse of standard-setting. The Commission has already explained that standard-setting [redacted] conduct created the uncertainties that made inferences necessary).

D. Principles of Administrability Favor An Order Enjoining Enforcement of Rambus's Royalties

[redacted]

the royalty rate, but also defining the parameters of the products against which it can be assessed. Administering a rate for controllers integrated into other products (such as microprocessors) will be exceedingly complex and on-going. Although a stand-alone memory controller might cost at most a few dollars, integrated products often cost tens or even hundreds of dollars, yet only a small portion of the value may be attributable to controller functions. Nonetheless, Rambus has demanded royalties based on the selling price of the entire product. The Commission could not administer an effective cap on Rambus's royalty rates unless it also set a method to determine the portion of the value of such integrated products [redacted] grant-back requirements. The Commission would have to ensure that not just the royalties, but the value of the total compensation, did not exceed the cap. The Commission might also become [redacted]

E. The Remedy Should Include DDR2 SDRAM and Future JEDEC Standards

The Commission's remedy should include products that conform to JEDEC's DDR2 [redacted] unlawful practices found to exist." *Toys "R" Us v. FTC*, 221 F.3d 928, 940 (7th Cir. 2000) (quoting *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946)); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1393 (7th Cir. 1986) (Posner, J.) ("Commission has a broad discretion, akin to that of a court of equity, in deciding what relief is necessary to cure a violation of law and to ensure against its repetition").[13]

[redacted]

standards within the scope of its order, it should, at a minimum, include the DDR2 SDRAM standard. The Commission may create a remedy aimed at "creating a breathing spell during which independent pricing might be established without the hang-over of the long existing pattern of [anticompetitive conduct]." *Association of Conference Interpreters* ("AIIC"), 123 F.T.C. 465, 659-60 (1997) (quoting *FTC v. National Lead*, 352 U.S. at 425). Including DDR2 SDRAM within the order would eliminate the "hang-over" of Rambus's deception and give the market an opportunity to consider choosing alternative technologies (assuming that is still feasible) for the DDR3 SDRAM standard [redacted]

II. Alternative Means For Determining Remedies

[redacted]

B. Specific Alternative Methodologies

1. Calculation of a Reasonable Royalty

[redacted]

Most of Rambus's SDRAM/DDR SDRAM license agreements reflect Rambus's exercise of market power, and therefore fail to provide meaningful guidance. Two such agreements, however, are somewhat closer to *ex ante* conditions (even though they also reflect Rambus's [redacted]

[redacted]

approximately 0.15%.

Separately, in March 2005, Rambus entered into an agreement with Infineon, pursuant to which Infineon will pay up to $147 million to: (a) settle world-wide claims of infringement on

[redacted]

b) Cap On Maximum Royalties Based On RDRAM License Rates

[redacted]

in. Nevertheless, extrapolating an *ex ante* SDRAM royalty rate from RDRAM license

[redacted]

c) **Cap On Maximum Royalties Based on Other Factors**

Georgia-Pacific Corp. v. United States Plywood Corp. 318 F.Supp. 1116, 1121 [redacted]

(S.D.N.Y.1970), *modified and aff'd*, 446 F.2d 295 (2d Cir.1971), describes a methodology for calculating a reasonable royalty owed to a good-faith patent-holder following a finding of infringement. That methodology is not applicable to determine a remedy for a patent holder's deceptive conduct vis-a-vis industry members that, absent the deception, likely would have [redacted]

that would have occurred had the parties chosen to negotiate *ex ante*; it has no applicability to the situation where the patent-holder's deceptive conduct prevented prior patent avoidance or technical support for [redacted]

readily available. Industry members sought to minimize cost and were highly resistant to any

cash royalties. JEDEC-compliant products are well established, but because of the standards [redacted]

[redacted]

record evidence what competitive conditions would have existed, resolving any doubts against Rambus.

2. An alternative procedure would add further delay to final resolution. Rambus has been enforcing and collecting royalties on its patents for six years now, and over four years have

[redacted]

deposition of potential fact witnesses, all likely to confirm the absence of significant additional evidence. There likely would be additional expert reports and depositions, followed by a trial on remedy issues, briefing and proposed findings of fact. After the ALJ decision, the Commission [redacted]

IV. Appropriate Injunctive and Other Provisions

Complaint Counsel have explained previously why the Commission's order should include all of Rambus's U.S. patents claiming a priority date before June 17, 1996, and [redacted]

import into or export from the United States. *See* Complaint Counsel's Post-Trial Brief at 121-134. [redacted] for purposes making appropriate patent disclosures to SSO's; and Sections VIII-XII are standard order provisions.

Respectfully submitted,

Geoffrey D. Oliver
Richard B. Dagen
Robert P. Davis

Counsel Supporting the Complaint

Jeffrey Schmidt
Director

Daniel P. Ducore
Assistant Director, Compliance Division

Rendell A. Davis, Jr.
Attorney, Compliance Division

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: September 29, 2006

CERTIFICATE OF SERVICE

I, Beverly A. Dodson, hereby certify that on September 29, 2006, I caused a copy of the attached, revised public version of the *Brief of Counsel Supporting The Complaint On The Issue Of Remedy*, to be served upon the following persons:

by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
Office of the Secretary, Room H-135
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

by electronic transmission and courier to:

A. Douglas Melamed, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Ave., N.W.
Washington, DC 20006

and by electronic transmission and overnight courier to:

Steven M. Perry, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071

Counsel for Rambus Incorporated