

ORIGINAL

PUBLIC

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

COMPLAINT COUNSEL'S REPLY TO RESPONDING BRIEF OF *AMICIS CURIAE*
AMERICAN ANTITRUST INSTITUTE ON ISSUES OF REMEDY

Complaint Counsel submit this brief pursuant to the Commission's Order dated October 19, 2006 in response to the Responding Brief of *Amicus Curiae* American Antitrust Institute ("AAI" or "AAI Brief").

Complaint Counsel agree with AAI that "[e]vidence cited in the Commission's Opinion suggests that JEDEC's overriding mission was to create open standards to the greatest extent practicable." AAI Brief at 2; *see also* CCF 300-304, 315-319; CC Appeal Brief at 41-48. Complaint Counsel also agree with the principle set forth by AAI that the Commission's remedy in this matter must be consistent with JEDEC's expectation that its DRAM standards would be open. AAI Brief at 1-4 ("SSO participants under the impression that they were engaged in selecting an open standard free of encumbrance by proprietary rights should not be required to obtain *any* license.") (emphasis in original).

AAI's position is consistent with those of the other *amici curiae* in this matter. *See, e.g., Amicus Curiae* Brief of JEDEC Solid State Technology Association ("JEDEC Brief") at 4-7 ("JEDEC's goal is to promulgate open standards [JEDEC's] policies and practices set the foundation for addressing the remedy As a result, the 'reasonable royalty' for Rambus's patent, under the circumstances of this case, is a zero royalty on use in JEDEC-compliant memory devices."); Brief of *Amicus Curiae* Broadcom Corporation and Freescale Semiconductor, Inc. ("Broadcom Brief") at 6-7 ("Because Rambus concealed its patent rights from JEDEC, JEDEC and its members believed at the time the standards were being formulated and adopted that the standards did not implicate *any* proprietary technologies and thus would be royalty-free. . . . [T]he Commission should impose a remedy that likewise does not require anyone implementing the JEDEC SDRAM standards to license the Rambus JEDEC Patents. Any other remedy would not restore the but-for competitive situation.") (emphasis in original); Brief of *Amici Curiae* NVIDIA Corporation, Micron Technology, Inc., Samsung Electronics Corporation, Ltd., and Hynix Semiconductor, Inc. ("NVIDIA Brief") at 1-3 ("The goal of many SSOs, including JEDEC, is to set 'open' standards that are broadly available, low cost, and free from restrictive patent rights. . . . To remedy Rambus's antitrust violations, the Commission should bar Rambus from enforcing its patent rights against the [JEDEC standards].")¹

Complaint Counsel also agree with AAI that strong interest on the part of JEDEC and its members in open standards would strongly support a conclusion that they likely "would not, in any conceivable hypothetical *ex ante* negotiation, have chosen the Rambus [technologies] absent

¹ *See also* Brief of *Amici Curiae* Gesmer Updegrave LLP and Andrew Updegrave ("Updegrave Brief") at 12-13.

a concomitant and enforceable license-free, royalty-free or low-royalty commitment from the patentee.” AAI Brief at 2-3.

This position is also consistent with those of JEDEC and industry members. JEDEC Brief at 6-9 (“The Commission’s own findings in this case are the most powerful evidence that JEDEC would not have adopted the Rambus technology into a JEDEC standard even if Rambus had made timely disclosure of its patents and patent applications.”); Broadcom Brief at 8-10 (“[T]he evidence demonstrates that, but for Rambus’s deception, JEDEC would have adopted alternatives that would have been Rambus-free and, indeed, royalty-free.”); NVIDIA Brief at 5-8.²

The AAI position (AAI Brief at 3) is also consistent with JEDEC’s own description of its standard-setting process (and contrary to the theoretical world hypothesized by Rambus’s experts). As JEDEC explained, “it did not have expert economists available to attempt to compute minute differences in the costs of different alternatives.” JEDEC Brief at 10. Rather, JEDEC members sought to settle on acceptable technologies that would gain consensus support in the standard-setting process, “taking into account JEDEC’s preference for avoiding the use of patents in JEDEC standards.” *Id.*³

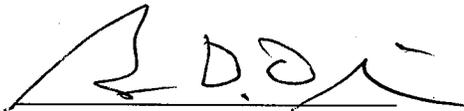
² In this context, the briefs *amici curiae* also cite to the determinative – and for Rambus, devastating – evidence that, had Rambus disclosed its patent position to JEDEC, it would have refused to provide JEDEC with a RAND assurance; absent a RAND assurance, JEDEC would have been prohibited from adopting Rambus’s technologies. Broadcom Brief at 9-10; NVIDIA Brief at 7-8; *see also* JEDEC Brief at 11.

³ Dr. McAfee used the economic term “satisficing” to describe this method of selecting technologies. *See* Complaint Counsel’s Remedy Reply Brief at 11 fn. 7.

AAI does not have an interest in the outcome of this matter or support either party, and its brief merely sets forth general principles independent of the facts of the case. It is particularly telling, therefore, that this brief is consistent with the positions set forth in the briefs of Complaint Counsel and the other four *amici curiae*, and contrary to the positions asserted by Rambus.

The brief of *Amicus Curiae* American Antitrust Institute, as well as the other four briefs *amici curiae* filed in this matter, present thoughtful positions on the issue of the appropriate remedy in this matter. Complaint Counsel respectfully urge the Commission to consider carefully the positions set forth in all five *amici* briefs.

Respectfully submitted,



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Dated: October 30, 2006

CERTIFICATE OF SERVICE

I, Lourine K. McDuffie, hereby certify that on October 30, 2006, I caused a copy of the attached, Public Version of, *Complaint Counsel's Reply to Responding Brief of Amicus Curiae American Antitrust Institute on Issues of Remedy*, to be served upon the following persons:

by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
Via Office of the Secretary, Room H-135
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