

PUBLIC

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch



In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**OPPOSITION BY RAMBUS INC. TO MOTION OF
NVIDIA CORPORATION, MICRON TECHNOLOGY, INC.,
SAMSUNG ELECTRONICS CORPORATION, LTD. AND
HYNIX SEMICONDUCTOR, INC. FOR LEAVE TO
FILE BRIEF AS AMICI CURIAE**

I. INTRODUCTION

Respondent Rambus Inc. (“Rambus”) respectfully submits this brief in opposition to the motion by NVIDIA Corporation, Micron Technology, Inc., Samsung Electronics Corporation, Ltd. and Hynix Semiconductor, Inc. (hereinafter collectively the “Certain Manufacturers”) for leave to file a brief as “amici curiae” in connection with the remedy phase of this proceeding.

The Commission should deny the motion. The Certain Manufacturers’ brief is largely devoted to an improper effort to re-argue liability issues, to a misleading and incomplete summary of the Commission’s July 31, 2006 Opinion (“Comm’n Op.”), and to arguments that mirror those in Complaint Counsel’s own brief. As Judge Posner explained in *Nat’l Organization for Women, Inc. v. Schiedler*, 223 F.3d 615, 616-17 (7th Cir. 2000), leave to file an amicus brief is not automatic, and leave should be denied when the brief presents arguments already addressed by the parties or circumvents the page limits on the parties’ briefs. *See also New England Patriots Football Club v. Univ. of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (stating that a proper amicus brief addresses “some matter of law in regard to which the court is doubtful or mistaken, rather than . . . a highly partisan account of the facts”). Under these criteria, and because the Certain Manufacturers’ brief attempts to circumvent the Commission’s order barring re-argument on liability issues, the motion for leave to file the brief should be denied.¹

¹ The Certain Manufacturers’ brief also attempts improperly to submit unauthenticated exhibits that are outside the record. *See generally In the Matter of Chester H. Roth*, 55 F.T.C. 1076, 1959 FTC LEXIS 21, *9 (1959) (“It is elementary that Commission decisions are to be founded upon the established record.”).

II. ARGUMENT

A. The Certain Manufacturers' Brief Improperly Seeks To Re-Argue Liability Issues And To Obtain New And Different Liability Findings

The Commission ordered the parties to confine their arguments in this phase to remedy issues and stated that “re-argument of issues of liability will not be permitted in these presentations.” Comm’n Op. at 119. The Certain Manufacturers did not feel constrained by this restriction, however, and their brief improperly seeks to alter or amend the Commission’s liability determinations in various ways.

1. **The Certain Manufacturers Improperly Ask The Commission To Find Liability With Respect To Additional Technologies Or Features That Are Outside The Relevant Markets Addressed By The Commission’s Opinion**

The Commission found that “Rambus engaged in exclusionary conduct that significantly contributed to its acquisition of monopoly power in four related markets.” Comm’n Op. at 118. *See also id.* at 9-10 (describing “the four relevant product markets in this case.”). The Certain Manufacturers’ brief asks the Commission to find liability with respect to at least five *additional* technologies and relevant markets that were not addressed in the Commission’s opinion. *See* Certain Manufacturers’ Brief at 12. The brief asserts that Rambus engaged in “virtually identical misconduct that was directed towards additional standardized technologies.” *Id.*

The Certain Manufacturers’ request for new and different findings with respect to technologies in new and different relevant markets is clearly a “re-argument of issues of liability” that is not permitted at this stage of the proceeding under the

Commission's Opinion.² Rambus notes in this regard that the Commission did not make the types of underlying findings with respect to the additional technologies identified by the Certain Manufacturers that it made with respect to the "four relevant product markets," such as the existence (or non-existence) of alternative technologies or the existence (or non-existence) of "lock-in." *See, e.g.,* Comm'n Op. at 82-95. Moreover, when the Commission rejected as irrelevant some of the evidence relied upon by the ALJ as demonstrating industry awareness of the potential scope of Rambus's patents, it did so because the evidence showed awareness on the part of JEDEC members "only . . . that Rambus might have a patent on a technology *outside* any of the alleged relevant product markets in this case." *Id.* at 62-63 and note 344 (emphasis added). In light of the Commission's deliberate focus on the four relevant markets and its rejection, on relevance grounds, of causation-related evidence with respect to technologies outside of the four markets, the Certain Manufacturers' request for new liability determinations regarding additional technologies is improper and should not be entertained.

2. The Certain Manufacturers Improperly Re-Argue The Commission's Conclusion That The Record Did Not Establish A Causal Link With Respect To DDR2

The Commission "conclude[d] that the record does not establish a causal link between Rambus's exclusionary conduct and JEDEC's adoption of DDR2 SDRAM."

Comm'n Op. at 114. In reaching this conclusion, the Commission found that "[t]he record

² The Certain Manufacturers' arguments about the additional technologies are also wrong on the merits and unsupported by the record, but that issue is not before the Commission in this remedy phase.

does not support a finding that lock-in conferred durable monopoly power over DDR2 SDRAM by 2000,” *id.* at 110, and it further found that “the record fails to establish that most stakeholders had invested heavily in the DDR2 standard by 2000, when Rambus’s intentions and patents were disclosed.” *Id.* at 113. The Commission also found that “the circumstances when JEDEC published the DDR2 standard in 2002 were materially different from what they were when the SDRAM and DDR SDRAM standards were adopted.” *Id.* (describing differences).³

The Certain Manufacturers argue just the opposite, and they tell the Commission that “[t]he record demonstrates clearly that JEDEC’s inclusion of the four patented technologies in the DDR2 SDRAM standard stems directly from the fact that those technologies were included in the first DDR SDRAM standard.” Certain Manufacturers’ Brief at 9. While this argument is meritless, it is also foreclosed. The Commission has already addressed the DDR2 causation issue, and it found, for example, that “[t]he record does not support a finding that lock-in conferred durable monopoly power over DDR2 SDRAM by 2000.” *Comm’n Op.* at 110. Complaint Counsel did not seek reconsideration of those findings, and the Commission has barred re-argument by the parties of its findings in that regard. The Commission should not, therefore, entertain briefing by the Certain Manufacturers with respect to DDR2 causation.

³ Rambus notes that JEDEC published the DDR2 standard in September 2003, not 2002. *See* IDF 1499; 9/12/03 JEDEC press release entitled “JEDEC Publishes DDR2 Standard,” available at http://www.jedec.org/Home/press/press_release/jedec_publishes_DD2Std.pdf.

3. The Certain Manufacturers Improperly Seek To Extend The Commission's Liability Determinations To Rambus's Foreign Patent Rights

The Certain Manufacturers ask the Commission to take the unprecedented step of barring an inventor from seeking royalties under foreign patents issued by foreign governments with respect to products that are manufactured *and* sold overseas. Even if one puts aside the substantial comity concerns presented, neither the record nor the Commission's opinion supports such a remedy. In particular, there was no evidence of the sort of expectations of disclosure with respect to foreign patents and applications that the Commission pointed to with respect to U.S. patents and applications.⁴

4. The Certain Manufacturers Improperly Seek The Commission's Assistance With Respect To Their Equitable Estoppel Defenses In Private Litigation

The Certain Manufacturers contend that the Commission should bar Rambus from receiving any royalties at all on the use of any of its patented inventions in any JEDEC-compliant devices if the patents in question claim a priority date before July 1996. They justify this unprecedented relief by arguing that “[a] patent enforcement bar of the sort discussed above is fully consistent with the relief that courts award when a patent owner is equitably estopped from enforcing its patents.” *See* Certain Manufacturers' Brief at 14, *citing A.C. Auckerman Co. v. R.I. Chaides Const. Co.*, 960 F.2d 1020, 1028 (Fed. Cir. 1992). (“*Auckerman*”).

⁴ As far as Rambus can tell, the only trial testimony about disclosure of foreign patents came from Infineon's JEDEC representative, Willibald Meyer, who testified that “[n]obody disclosed European patents” at JEDEC meetings. (Meyer, 5/7/01 Infineon Trial Tr., p. 119:3).

This “scorched earth” remedy is not supported by the liability findings entered by the Commission and is, in essence, a request for reconsideration of the Commission’s decision to limit its findings to technologies in the four relevant markets. For the reasons set out in section II(a)(1), *supra*, it is inappropriate for the Certain Manufacturers to seek new liability determinations with respect to technologies that are “outside any of the alleged relevant product markets in this case.” Comm’n Op. at 62-63 and note 344.

It is also improper for the Certain Manufacturers to try to obtain relief from the Commission on a legal theory on which they could not prevail in their private litigation with Rambus. As the Commission may be aware, three of the Certain Manufacturers, Hynix, Micron and Samsung, are asserting equitable estoppel defenses in the private cases brought in 2000 by Micron and Hynix against Rambus and in 2005 by Rambus against Samsung. The Certain Manufacturers will be required, in the private cases, to establish the reliance requirement set out in *Auckerman*. *See Auckerman*, 960 F.2d at 1042-43 (holding that reliance “is essential to equitable estoppel” and that an individual infringer “must show that, in fact, it substantially relied on the misleading conduct of the patentee . . .”). In addition, *Auckerman* would require the Certain Manufacturers, as private parties, to meet a clear and convincing burden of proof in order to obtain the kind of “free pass” remedy they ask the Commission to impose here. *See Auckerman*, 960 F.2d at 1046 (higher burden of proof required where an equitable estoppel defense is based on

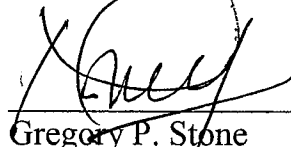
allegations of “fraud or intentional misconduct.”)⁵ The Certain Manufacturers should not be permitted to use an amicus brief as a substitute for, or an effort to evade, the burdens of proof and persuasion they have taken on in the private cases.

III. CONCLUSION

For all of the foregoing reasons, the Certain Manufacturers’ motion for leave to file an amicus brief should be denied.

DATED: September 25, 2006

Respectfully submitted,



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⁵ The Certain Manufacturers explicitly base their draconian proposal on the contention that Rambus engaged in the kind of intentional misconduct referenced in *Auckerman*. See Certain Manufacturers’ brief at 9, 16 (referring to “deceptive and exclusionary conduct”) and 15 (referring to “misrepresentations” and “misleading conduct”).

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CERTIFICATE OF SERVICE

I, Helena T. Doerr, hereby certify that on September 25, 2006, I caused a true and correct copy of the *OPPOSITION BY RAMBUS INC. TO MOTION OF NVIDIA CORPORATION, MICRON TECHNOLOGY, INC., SAMSUNG ELECTRONICS CORPORATION, LTD. AND HYNIX SEMICONDUCTOR, INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE* to be served on the following persons:

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