IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 07-1124, 07-1086
CONSOLIDATED

RAMBUS, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Review of Final Orders of the Federal Trade Commission

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BRIEF OF OHIO AND 31 OTHER STATES AND COMMONWEALTHS AS AMICI CURIAE IN SUPPORT OF RESPONDENT FEDERAL TRADE COMMISSION

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INTRODUCTION AND INTEREST OF THE AMICI STATES

Amici Curiae, the State of Ohio and 31 other States, Territories, and Commonwealths ("Amici States") respectfully submit this brief in support of Respondent Federal Trade Commission.

The issue here is whether Rambus violated Section 2 of the Sherman Act when it sought to expand the impact of its patents by surreptitiously exploiting the procedures of a standard-setting organization ("SSO"). Here, Rambus, a company that develops and licenses high-speed chip connection technology, presented itself as a good faith participant in the SSO's efforts to adopt a standard for such technology. But while Rambus sat at the SSO table keeping up the pretense of impartiality, it intentionally deceived its SSO partners by concealing the fact that it was pursuing a patent on technology incorporated into that standard, and by secretly tweaking its patent application to cover the precise standard adopted. The Court should hold that such deceptive, anticompetitive behavior is unlawful.

The integrity of industry standard-setting is particularly important to state and local governments because of their reliance on such standards. As end-product consumers, state and local governments rely on the lower consumer prices that result from a legitimate standard-setting process. An untainted standard-setting process reduces product prices because research and development costs are spread among consumers. In addition, private SSOs play a significant role in government

rulemaking and regulation because many building, fire, and other safety and industry standards are incorporated by reference into state and local laws. If patent holders can compromise the process by concealing from SSOs the status of their patent interests in technology being considered for adoption as an industry-wide standard, the resulting tainted standard cannot be as freely adopted by government. Thus, governments, no longer able to rely on SSOs, would have to set standards themselves. Doing so would unnecessarily consume resources, as governments could save those resources for other uses if it could rely on an SSO system that is free of abuse.

The potential for abuse is particularly acute in cases where private patent rights and industrial standard-setting collide. Both SSOs and patent rights offer substantial procompetitive benefits to consumers and the marketplace. However, if subverted or misused for the purpose of seizing or expanding monopoly power, each can also cause harm to the competitive process and consumer welfare.

The Supreme Court has already established that using deception in an SSO process can constitute a Sherman Act violation. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495 (1988). When an actor, such as Rambus here, uses deception in connection with an SSO to increase the value of its patents, the violation is even more egregious because the monopolistic nature of a patented standard can "lock-in" whole industries to high prices. This in turn undermines the

integrity and the continued viability of that standard-setting process. Because of the Amici States' strong interest in both the integrity of the standard-setting process and the fair and consistent application of antitrust laws, Amici strongly urge this Court to find that Rambus's deceptive conduct violated Section 2 of the Sherman Act.

ARGUMENT

A. Any breach in the integrity of the private standard-setting process—such as Rambus's deceptive behavior here—threatens to disrupt efficient government regulation because federal, state, and local governments rely heavily on private standard-setting.

The Amici States here have a unique interest in the continued integrity of the private standard-setting process. In general, SSOs bring together the experts of a given industry to develop standards for the safety, efficiency, and interoperability of certain products and services. Standards set by SSOs accomplish two goals important to the States. First, SSO standards are efficient and therefore benefit consumers, as they tend to reduce prices and to allow consumers to use products from different companies more easily. Second, the standards set are often incorporated into state and local health, safety, and welfare laws.

Standards set by SSOs tend to reduce prices to the ultimate consumer because a larger number of consumers share research and development costs. *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, *18-20 (3d. Cir. 2007). In many cases, standard-setting makes products more compatible, which is beneficial

to consumer welfare. For example, all music CDs work the same and are the same size, and thus can fit into any CD player. Because these products are standardized, the standards increase competition among suppliers. *Id.* If each company made differently-sized CDs and CD players, consumers would be essentially "locked" into one company's technology. That is so because a consumer, having purchased one product, would have to pay a steep price to move from one standard to another. Without interoperability, a consumer buying a new CD player would have to buy a new set of CDs, too. Thus, when functioning properly, standard-setting is procompetitive and pro-consumer. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988). And the Amici States benefit from the procompetitive nature of standard-setting in two ways. Obviously, the States have an interest in the welfare of their consumer citizens. But also, the Amici States themselves are major consumers of many products that benefit from the efficiencies of standardization.

In addition, SSOs contribute vitally to the effective provision of essential governmental services. Federal, State, and local governments rely on SSOs not only for consumer benefits and cost-efficiency, but also for the vital role uniformity plays in public health and safety. The necessity of uniformity in government acquisitions was graphically illustrated by a devastating fire in Baltimore, Maryland in February 1904. Fire crews from five neighboring cities

responded to fight the blaze but found that their hoses would not connect to the Baltimore fire hydrants. As a result, the fire destroyed 2500 buildings in an eighty-block area of the city. National Institute of Standards and Technology, U.S. Department of Commerce, *Building & Fire Research Laboratory Annual Report 2003*. Today, thousands of federal, State, and local government entities rely on SSOs to set uniform regulatory standards—such as in the size and configuration of fire hoses. SSOs' standard-setting allows seamless implementation and enforcement across multiple jurisdictions. U.S. General Accounting Office, *Regulatory Programs: Balancing Federal and State Responsibilities for Standard Setting and Implementation,* at 23.

Because of standard-setting's inherent benefits, federal, State, and local governments often incorporate those standards into health and safety laws and regulations. For example, Congress often requires that the federal government adopt standards set by SSOs. In the Health Insurance Portability and Accountability Act of 1996, Congress mandated that "any standard adopted under this part shall be a standard that has been developed, adopted, or modified by a standard setting organization." Pub. L. 104-191, 110 Stat. 1936.

Likewise, State and local governments frequently adopt into law standards developed by SSOs, often with little or no modification. *Allied Tube,* 486 U.S. at 495; *Veeck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791, 793 (5th Cir. 2002)

(describing SSO code adopted without modification by local government). Scores of state and municipal regulatory codes—such as building or fire codes—simply incorporate by reference the standards promulgated by SSOs. *See, e.g.*, Tex. Gov't Code §495.003(b)(2) (person desiring to operate or construct a corrections facility for the State of Texas must comply with standards of the American Correctional Association); 105 Mass. Code Regs. 123.003(A)(2)(c) (operators of tanning facilities in Massachusetts must use equipment that meets the requirements of the National Fire Protection Association's National Electrical Code); Md. Code Regs. 10.15.03.06A(1)(a) (all new food service equipment in use in Maryland must meet design standards of National Sanitation Foundation and two other named SSOs); Code of the City of Akron, Ohio § 74.19B (specifications of slow-moving-vehicle emblems in City of Akron should conform to those prescribed by American Society of Agricultural Engineers); Anacortes (WA) Municipal Code § 5.44.210G (cable television franchisees' customer service standards may not fall below standards promulgated by the National Cable Television Association). In fact, nearly half of all government product standards in the United States are set by private SSOs. *See* American National Standards Institute, *Overview of the U.S. Standardization System*, July 2005, available at http://www.standardsportal.org/ usa_en/ standards_system.aspx.

Thus, the integrity of the SSO process is especially important to the States

because without it, both consumer welfare and government law-making will suffer. As described below, deceptive conduct, such as Rambus's here, harms the integrity and reliability of SSOs, and thus threatens not only private markets, but also the basic operations of government.

B. SSO members must face antitrust liability when they use patents deceptively to subvert the standard-setting process for financial gain.

1. The combination of patents and SSOs creates a special threat to competition.

Both patents and SSOs provide potential for anticompetitive behavior. Indeed, courts and commentators have long recognized that SSOs, for all of their benefits, also create the potential for collusion among competitors to undercut competition. *See, e.g., Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982) (standard-setting organizations are "rife with opportunity" for anticompetitive behavior among competitors); *see also* 13 H. Hovenkamp, Antitrust Law, P. 2231. As the Supreme Court has explained, the anticompetitive potential of SSOs arises from their very structure: SSOs are "compris[ed of] firms with horizontal and vertical business relations." *Allied Tube*, 486 U.S. at 506. Because of this risk, SSOs are "permitted at all under the antitrust laws only on the understanding that [standard setting] will be conducted in a nonpartisan manner offering procompetitive benefits." *Id.* at 506-07. When, however, a participant or a group of participants hijacks the standard-setting process for its own financial

gain, these procompetitive benefits vanish. In such a case, the SSO does not yield an optimal standard, but rather a standard that serves narrow economic interests at the expense of the greater good.

Likewise, a patent provides a limited monopoly to encourage inventors to innovate, secure in the knowledge that they will have a period of time during which they alone can profit from their innovation. *Eldred v. Ashcroft*, 537 U.S. 186, 214 (2003) (philosophy behind patents is that encouraging individual efforts of inventors is best way to advance public welfare). Thus, patent laws exist because a carefully defined, time-limited monopoly can yield important consumer welfare benefits. At the same time, a patent left unchecked in duration or coverage may actually reduce consumer welfare, not enhance it. The federal patent scheme creates a *limited* property right in an idea, and does not allow the inventor to use secrecy to "exploit his discovery competitively." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 149 (1989) (quoting *Metallizing Eng'g Co. v. Kenyon Bearing & Auto Parts Co.*, 153 F.2d 516, 520 (2d Cir. 1946)). Expansion—especially deceptive expansion—of the impact of a patent beyond its original scope is anticompetitive. *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 670 (1944) ("conspiracy to expand a patent beyond its legitimate scope" violates antitrust laws).

Because both patents and SSOs provide such potential for competitive

injury, courts must be especially vigilant when the two cross paths. This intersection poses special dangers for competition. After all, one way to expand a patent beyond its original scope is by incorporating that patent into an industry standard. The value of the legal monopoly granted to a patentee may be relatively small when other products or processes on the market are competitive alternatives. *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 10 n. 8 (1958). But when an SSO chooses a patented process or product as a standard, it effectively removes the competition. The standard artificially expands the scope of the monopoly represented by the patent, and greatly enhances the patent's value. *Broadcom,* 501 F.3d 297 at *35-36 (when an industry standard is set, "[f]irms may become locked in to a standard requiring the use of a competitor's patented technology"). To avoid this anticompetitive result, courts must ensure that the FTC and the States are able to enforce the antitrust laws in a way that protects the public interest in maintaining robust competition.

2. Deceptive manipulation of an SSO's procedures to extend a patent for private commercial gain violates the Sherman Act.

The Supreme Court has already held that deceptively subverting an SSO's standard-setting procedures violates the Sherman Act. In *Allied Tube,* producers of steel conduit were accused of "packing" the meeting of the National Fire Protection Association, an SSO, with new members. The new members, on instruction from the steel industry, voted to exclude plastic conduit—an alternative

to a steel product—from the Association's published standard. The Supreme Court upheld the jury's verdict that the steel producers had violated the Sherman Act by subverting the standard-setting process. The *Allied Tube* Court emphasized that an SSO is procompetitive only when its standard-setting process is not biased in favor of particular members' economic interests. *Id.* at 509.

Furthermore, "[a]n association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards." *Id.* Thus, merely following the rules of the SSO is not enough to insulate anticompetitive behavior from antitrust scrutiny. The *Allied Tube* Court flatly rejected the steel producers' contention that they were immune from antitrust liability because they did not break any rules of the SSO: "The antitrust validity of these efforts is not established, without more, by petitioner's literal compliance with the rules of the Association." *Id.*

The Third Circuit's recent decision in *Broadcom* reiterated these principles when it noted, "Deception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder." 501 F.3d 297 at *37. The *Broadcom* court held that a firm that exploits an SSO's processes by falsely promising to license its intellectual property on fair, reasonable, and non-

discriminatory terms distorts the standard-setting process by obscuring the true price of a proposed standard—a deception that constitutes exclusionary conduct. *Id.* at *10-11.

Just as exploiting an SSO's internal procedures for private gain constitutes an antitrust violation, so, too, does exploiting the SSO by keeping it in the dark about a patent or patent application. When a firm steers an SSO toward adopting an industry standard covered by that firm's patents, the potential for abuse is obvious. This potential is all the greater when the SSO's other participants do not know of the relevant patents. Such a case is no different from packing an SSO's voting delegation with stooges who will vote in line with a firm's interests. In both instances, the firm deceptively exploits the SSO's standard-setting procedures to ensure that it profits from the resulting standard. This behavior is anticompetitive and thus violates Section 2 of the Sherman Act.

This position finds support in both the FTC's decisions and this Court's jurisprudence. In *In re Dell Computer Corp.*, the FTC brought a complaint against Dell Computer Corporation for failing to disclose to an SSO of which it was a member of its patent covering a key piece of a proposed standard for designing a computer component. 121 F.T.C. 616 (1996). Dell attempted to enforce its intellectual property rights against the SSO participants only after the adoption of the standard. The FTC alleged that Dell's actions "created uncertainty that

hindered industry acceptance of the standard, increased the costs of implementing the standard, and chilled the willingness of industry participants to engage in the standard-setting process." *Broadcom*, 501 F.3d 297 at *8 (citing *Dell*, 121 F.T.C. at 618). To resolve the action, the parties entered into a consent decree requiring Dell to cease and desist from asserting its intellectual property rights against industry participants.

This Circuit adopted the same approach in an analogous situation in *United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir.) (per curiam), *cert. denied,* 122 S. Ct. 350 (2001). In that case, Microsoft induced software developers to write programs that would function only on Microsoft's dominant operating system, even though the developers thought the programs would function on other systems. *Id.* at 76-77. Software developers had written the programs using Microsoft's software development tools in reliance on Microsoft's public commitment to cooperate with a potential rival to its operating system. *Id.* at 76. This Court condemned Microsoft's conduct as anticompetitive, holding that Microsoft had deceived the software developers to "protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or to the acumen of its makers." *Id.*

3. Rambus's arguments to the contrary are mistaken.

Rambus cannot deny that deceiving an SSO can be an antitrust violation. Nor can it deny that deception involving a patent is also anticompetitive. That is, Rambus cannot deny that it would be an antitrust violation to affirmatively deny to SSO colleagues that a relevant patent is pending. But Rambus apparently says that it did not act deceptively because it merely maintained a strategic silence, but never lied. That distinction fails because Rambus's conduct fails to meet the standards of candor and disclosure required of participants in private standard-setting processes.

Although Rambus asserts it had no duty to disclose its patents and prospective patents to the SSO here, the cases it cites in support of this argument are inapposite. The cases apply only to an innocent patent holder seeking to exclude a competitor from its lawful patent monopoly, not a patent holder who gains market advantage through deceptive conduct. *See CSU, L.L.C. v. Xerox Corp. (In re Indep. Serv. Orgs. Antitrust Litig.),* 203 F.3d 1322, 1325-26 (Fed. Cir. 2000) (affirming summary judgment for patent holder when plaintiff had not alleged fraud or sham conduct); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.,* 797 F.2d 370, 376 (7th Cir. 1986) ("[A] monopolist might decide to entice new firms into its market only to destroy them and so deter other firms from trying to

enter. *But no such diabolical scheme* is ascribed [to Defendant-Appellant here].") (emphasis added)).

Similarly, Rambus's reliance on *Berkey Photo* is misplaced. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979); Petitioner's Br. at 32. The *Berkey Photo* court refused to hold Kodak liable for design changes because it determined that Kodak was increasing competition by releasing new designs that consumers valued. Kodak's procompetitive actions are entirely dissimilar to Rambus's anticompetitive actions, which involve misleading members of a standard-setting organization concerning its patent.

In short, Rambus, as described above, ignores a long legal tradition of holding patent holders liable under Section 2 if they engage in deceptive conduct to obtain or maintain their patent monopolies. Contrary to Rambus's suggestion, the Commission did not create a novel affirmative antitrust duty but rather reaffirmed the existing case law: a patent holder that gains market power by deceiving an SSO regarding its patent interests engages in exclusionary conduct in violation of Section 2 of the Sherman Act.

For these reasons, the Amici States urge this Court to recognize the need to safeguard the standard-setting process and affirm the opinion of the Federal Trade Commission.

CONCLUSION

For the above reasons, the Amici States respectfully request that this Court affirm the opinion of the Federal Trade Commission.

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Pursuant to Federal Rule Procedure, Rule 32(a)(7), I hereby certify, based on word count of text and footnotes generated by the word processing system used to prepare this brief, that the foregoing Brief of Ohio and 31 other States and Commonwealths as Amici Curiae in Support of Respondent Federal Trade Commission is proportionally spaced, has a typeface of 14-Point or larger and contains 3, 234 words.

DATED: November 28, 2007

By Jennifer L. Pratt

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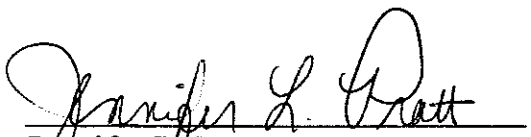

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