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

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| RAMBUS, INC.<br>*Petitioner*,<br><br>v.<br><br>FEDERAL TRADE COMMISSION<br><br>*Respondent.* | Nos. 07-1086, 07-1124 |

**MOTION OF AMERICAN ANTITRUST INSTITUTE, CONSUMER FEDERATION OF AMERICA, AND PUBLIC PATENT FOUNDATION FOR LEAVE AND INVITATION TO FILE *AMICUS* BRIEF IN SUPPORT OF FEDERAL TRADE COMMISSION'S PETITION FOR REHEARING *EN BANC***

The American Antitrust Institute, Consumer Federation of America and Public Patent Foundation ("Proposed Amici") are public advocacy groups that represent the interests of millions of consumers in a free market system. Because the panel's opinion in this case raises the potential for significant consumer harm, we respectfully move the Court, pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Rule 35(f) of the Rules of the United States Court of Appeals for the District of Columbia Circuit, for leave and for the Court's invitation to file the attached *amicus curiae* brief. Proposed Amici file this motion

and brief to support the petition of the Federal Trade Commission ("Commission") for rehearing *en banc* of the panel decision in the above-captioned case.

Proposed Amici recognize that this Court does not typically accept *amicus* briefs on rehearing petitions. However, as described in more detail in the accompanying brief, this case is of such significance to the standard setting process generally and the ability of firms to acquire and exploit monopoly power through deception generally, that inviting and accepting amicus briefs is wholly appropriate. Proposed Amici recognize the limited time the Court has for the evaluation of petitions for rehearing. Acceptance of amicus briefs will facilitate the Court's full evaluation of the significance of the decision of the panel.

Perhaps more than any other Circuit, the antitrust decisions of this Court have a tremendous impact on the development of antitrust jurisprudence. Certainly, the *en banc* decision of the Court in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), has played a critical role in the development of the legal standards for monopolization, especially in high technology industries. As described in the Commission's rehearing petition, the panel's decision in this case is inconsistent with *Microsoft* in several critical respects.

We respectfully request the opportunity to participate as *amicus* to inform the Court of consumer perspectives on the critical issues raised by this case. Proposed Amici represent millions of consumers who purchase products that rely

on the standard setting process in their development. If firms are permitted to secure and/or exploit monopoly power by deceiving a standards setting body, it is the ultimate consumer who will suffer most from higher prices, less product quality, or less innovation.

The brief of Proposed Amici complements the briefs filed by the Commission and other proposed amici. Proposed Amici concur with the assessment of the Commission's petition that the panel's decision is a mistaken deviation from Section 2 jurisprudence. Proposed Amici's brief is complementary in that it focuses on the harm of deception in the standard setting process to consumers and the importance of FTC enforcement in this area.

Accordingly, we respectfully ask to be invited and permitted to file our proposed *amicus curiae* brief in support of the Commission's petition.

Respectfully submitted,

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June 11, 2008

## CERTIFICATE OF SERVICE

I hereby certify that, on June 11, 2008, I caused a true and correct copy of the Motion of American Antitrust Institute, Consumer Federation of America, and Public Patent Foundation for Leave and Invitation to File *Amicus* Brief in Support of Federal Trade Commission's Petition for Rehearing *En Banc* to be served by hand delivery and first-class mail, postage prepaid, on the following persons:

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RAMBUS INCORPORATED,

*Petitioner*,

v.

FEDERAL TRADE COMMISSION,

*Respondent*.

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ON PETITION FOR REHEARING *EN BANC*

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# *AMICUS CURIAE* BRIEF OF AMERICAN ANTITRUST INSTITUTE, CONSUMER FEDERATION OF AMERICA AND PUBLIC PATENT FOUNDATION IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING *EN BANC*

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June 11, 2008

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, amici curiae American Antitrust Institute, Consumer Federation of America, Public Patent Foundation (collectively "Amici") certify that:

### (A) Parties and Amici

All parties, intervenors, and amici appearing before the Federal Trade Commission and this Court are listed in the Respondent's Petition for Rehearing *En Banc*.

### (B) Rulings Under Review

References to the rulings at issue appear in the Respondent's Petition for Rehearing *En Banc*.

### (C) Related Cases

The case on review was before a panel of this Court for oral argument on February 14, 2008, and the panel issued its decision on April 22, 2008. Amici are not aware of any related cases in this Court or any other court.

## CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, American Antitrust Institute ("AAI") submits the following disclosure statement: AAI is a non-profit corporation and has no stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, Consumer Federation of America ("CFA") submits the following disclosure statement: CFA is a non-profit corporation and has no stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, Public Patent Foundation ("PPF") submits the following disclosure statement: PPF is a non-profit corporation and has no stock.

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## INTEREST OF AMICI CURIAE

The American Antitrust Institute ("AAI") is a non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The Consumer Federation of America ("CFA") is the nation's largest consumer-advocacy group with over 280 state and local affiliates representing consumer, senior citizen, low income, labor, farm, public power and cooperative organizations and more than 50 million individual members. The Public Patent Foundation, Inc. ("PPF") is a not-for-profit legal services organization that represents the public interest in the patent system, particularly against the harms caused by undeserved patents and unsound patent policy.

Each of these associations regularly advocates on competition issues. AAI, CFA, and PPF ("Amici") respectfully submit this brief because the 21st century economy is increasingly dependent on standard setting, and the panel's decision, if it stands, will encourage conduct that will undermine the procompetitive benefits and efficiencies intended to be achieved by properly conducted standard setting. This will cause untold harm to consumers whose interests depend on a standard setting process that protects the competitive process.

The panel's decision strays from mainstream Section 2 principles set forth in this Circuit's *en banc* decision in *United States v. Microsoft Corp.*, 253 F.3d 34

(D.C. Cir. 2001), particularly in imposing a wholly unreasonable causation burden. If the panel's decision stands, standard-setting participants will be incented to engage in conduct that will ultimately raise the price of products used by millions of consumers in industries dependent on standard setting. For these reasons, Amici support the Commission's rehearing petition.

## ARGUMENT

1. Consumers rely on standards for thousands of products in their daily life. Standards are necessary for products to interconnect effectively, for the development of new products, and for the creation of new technologies. Standard setting organizations ("SSOs") are particularly important in high technology markets such as communications and computer hardware.

2. Standard setting bodies provide the occasion for opportunistic conduct. The forms of opportunism, like other kinds of exclusionary conduct, are myriad. *See Am. Soc'y of Mech. Eng'rs, Inc v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982) ("[A] standard-setting organization . . . can be rife with opportunities for anticompetitive activity.").

3. A critical challenge for SSOs is how to deal with patent interests that may be necessary to implement the standard. Many SSOs have implemented rules to require participants to disclose patent interests and to condition their use in a standard on a commitment to reasonable license terms. These rules facilitate

competition for the standard. Consumers are the ultimate beneficiaries of these rules because they protect against the acquisition and exercise of market power. The rules at issue in this case attempted to provide that protection. Firms can secure monopoly power by failing to disclose patent interests or failing to abide by license obligations.

4. There should be no misapprehension about the magnitude of the consumer harm that may result from abuse of standard setting, particularly through deception. *In re Union Oil Co.* 138 F.T.C. 1 (2003) ("*Unocal*") is a case in point. The FTC alleged that Unocal illegally acquired monopoly power in the technology market for reformulated gasoline ("RFG") by misrepresenting before the California Air Resources Board ("CARB") and standard setting groups that its research was in the public domain. *Id.* at 92-93. The FTC alleged that Unocal was pursuing a patent that it could exploit once CARB incorporated the research into reformulated regulations. *Id.* at 93-94. This deception allegedly enabled Unocal to obtain monopoly power and thus exorbitant royalties, *id.* at 94, ultimately costing consumers over $500 million a year.[1]

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[1] According to Unocal's own expert, approximately 90% of the royalty charge was passed on to California consumers in the form of higher gas prices. 138 F.T.C. at 96. The *Unocal* case was resolved in 2005 with a consent order in which Unocal agreed to cease enforcement of its patents. The FTC estimated that, going forward, consumers would save over $500 million annually because of its enforcement action. *See Consolidation in the Energy Industry: Raising Prices at the Pump?: Before the S. Comm on the Judiciary*, 109th Cong. 12 (2006)

5. In *Unocal*, the FTC alleged that, "[b]ut for Unocal's fraud, [either] CARB would not have adopted RFG regulations that substantially overlapped with Unocal's patent claims [. . . or] the terms on which Unocal was later able to enforce its proprietary interest would have been substantially different . . . or both." 138 F.T.C. at 114. This is in substance the same "syllogism" – to use the panel's term – that set the stage for the panel's decision in this case. Presumably, then, the panel would view *Unocal* as resting on the same "unjustified" assertion of anticompetitive harm as the panel identified in this case.

6. The panel's standards for causation would simply prevent challenging deceptive manipulation of the standard setting process as in *Unocal*. The harm to consumers from this one example would be substantial absent FTC enforcement. Unocal would have continued to engage in conduct that would now be costing California consumers some $1 billion more for gasoline annually (adjusting for today's gasoline prices). Amici need not explain here why the panel's reasoning with respect to causation and deception in standard setting is incorrect, as Amici agree entirely with the FTC's petition on these points.[2] We instead elucidate real

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(statement of the Honorable William E. Kovacic, Commissioner, Federal Trade Commission), *available at* http://www.ftc.gov/speeches/kovacic/testimonyrepetroleumindustryconsolidatoin.pdf.

[2] *See also* David Balto & Richard Wolfram, *It's Not Over Until It's Over*, Global Competition Review, May 20, 2008.

world effects of the panel decision (if it stands) on consumer interests, and *Unocal* is instructive in this regard.

7. The conduct at issue both in this case and in *Unocal* has become increasingly common. Another example is the current litigation between Broadcom and Qualcomm, in which the Third Circuit held that Broadcom had stated an antitrust claim based on Qualcomm's alleged patent ambush in making a false commitment to license on fair, reasonable, and non-discriminatory ("FRAND") terms. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007). For the period 2003-2011, the monetary harm to cell phone purchasers based on worldwide sales is estimated at $5 billion – $8 billion.[3] Another example is reflected in Amici's recent petition to the FTC to investigate similar conduct involving digital television standards which threatens to substantially increase the costs of the conversion to digital television service.[4]

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[3] *See* Earnings Presentation, Qualcomm Inc., Q4 FY07 Earnings, 16 (Nov. 8, 2007), *available at* http://files.shareholder.com/downloads/QCOM/172781166x0x143238/6345625f-da65-49c3-b323-4a0a7c67b399/QCOM_q407_web_final.pdf (Qualcomm estimates that as of the middle of 2008, 639 million UMTS handsets will have been sold worldwide); Carter L. Horney, *Cellular Handset & Chip Markets '07: An In-Depth Analysis of Cellphones & Chips* 20-21 (Forward Concepts 2007) (estimating that for the period 2009-2011, 850 million UMTS handsets will have been sold worldwide).

[4] Petition to the Federal Trade Commission from the American Antitrust Institute, Request for Investigation of Rembrandt, Inc. for Anticompetitive Conduct that Threatens Digital Television Conversion (Mar. 26, 2008), *available at* http://www.ftc.gov/os/aai.pdf.

8. In this area, the ability of the FTC to pursue violations of Section 2 of the Sherman Act is critical to protecting consumer interests. Private litigation is an imperfect substitute for government enforcement. The interests of the firms facing abusive license demands do not always coincide entirely with the interests of consumers. Firms may be able to pass on license fees into end product prices and may be willing to do so as long as they do not pay a fee higher than their rivals. "[W]hen a standard used in a fairly competitive industry is subject to *uniform* hold-up [as here, and as distinguished from hold-up of a single firm], direct buyers may bear little of the costs, which falls primarily on final consumers."[5] Thus, "private litigation may not vindicate the same set of public interests that are addressed by the Sherman Act or Section 5 of the FTC Act."[6]

9. A related concern is that the legal remedies available to the firms facing these licensing demands may be inadequate; business tort or contract remedies, for example, are "imperfect substitutes for government antitrust enforcement" because

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[5] Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L.J. 603, 645 (2007). As the authors explain, the reason for this is that "[i]f each direct buyer knows that its rivals are paying as high a royalty as it is, pass-through can largely immunize it against economic loss from high running royalties. Thus, the direct buyers, who might otherwise be the best guardians against gratuitous insertion of patents in standards, or against excessive royalties from such patents, may bear very little of the harm . . . . Thus, consumers are not, in general well protected by the self-interest of direct technology buyers." *Id.*

[6] Alden F. Abbott & Theodore A. Gebhard, *Standard-Setting Disclosure Policies: Evaluating Antitrust Concerns in Light of Rambus*, 16 Antitrust ABA 29, 33 (2002).

of collective action and free rider problems as well as the possible unavailability of defenses such as implied license.[7]

10. By holding that the FTC must demonstrate what would have occurred "but for" Rambus' deceptive conduct, the Court creates a standard far more strict than that adopted by this Court in *United States v. Microsoft*. The panel's standard is particularly inappropriate for government actions seeking only injunctive relief. As the leading antitrust treatise observes, "[b]ecause monopoly will almost certainly be grounded in part on factors other than a particular exclusionary act, no government seriously concerned about the evil of monopoly would condition its intervention solely on a clear and genuine chain of causation from an exclusionary act to the presence of monopoly. Thus, it is sometimes said that doubts should be resolved against the person whose behavior created the problem."[8]

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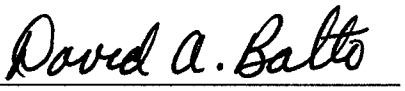
[7] Susan A. Creighton et al., *Cheap Exclusion*, 72 Antitrust L.J. 975, 993-94 (2005).

[8] III Philip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* ¶ 651(f) (3d ed. 2006).

## CONCLUSION

The Court should grant the petition for rehearing *en banc* to protect the interests of consumers in the competitive process and to ensure that firms cannot acquire monopoly power through deception in the standard setting process.

Respectfully submitted,



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June 11, 2008

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the word limit set forth under Rules 29(d) and 35(b)(1)(2) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, contains 1727 words and is no more than seven and one half pages in length, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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