Case No. 06-4292

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BROADCOM CORPORATION, PLAINTIFF-APPELLANT

v.

QUALCOMM INCORPORATED, DEFENDANT-APPELLEE

Appeal of the Order and Judgment of
the United States District Court for
the District of New Jersey (C.A. No. 05-3350 (MJC))

BRIEF OF *AMICI CURIAE* AMERICAN ANTITRUST INSTITUTE AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF NEITHER PARTY

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Dated: December 20, 2006

/s/ Eric L. Cramer
Eric L. Cramer

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INTEREST OF THE AMICI

The American Antitrust Institute ("AAI") is an independent, not-for-profit organization dedicated to economic research, the study of the antitrust laws, and public education. The directors of the AAI authorized this filing. The Advisory Board of the AAI consists of over 90 prominent lawyers, law professors, economists and business leaders (the members of the Advisory Board and other information about the AAI may be found on its web site, www.antitrustinstitute.org). The members of the Advisory Board serve in a consultative capacity and their individual views may differ from the positions taken by the AAI. The AAI's mission is to increase the role of competition and sustain the vitality of the antitrust laws.

The Consumer Federation of America ("CFA") is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than 50 million individual members. CFA represents consumer interests before federal and state regulatory and legislative agencies and participates in court proceedings. CFA has been particularly active on antitrust issues affecting high technology industries such as the Internet and wireless communications.

The amici have two primary concerns. First, this case reaches to the heart of how antitrust law should function in connection with standard setting and licensing involving intellectual property rights. Particularly in technology industries, standard setting can produce efficiencies that lead to increased competition, lowered costs, and increased innovation and output. *See, e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) ("[S]tandards can have significant procompetitive advantages."); *In re Dell Computer Corp.*, 121 F.T.C. 616, 626 (1996) (discussing "the important role of standard-setting" in spurring "technological innovation"). Antitrust law is well-suited to redress and deter conduct that may frustrate or delay the emergence of the procompetitive benefits of standard-setting organizations. In the past few years there have been several important law enforcement actions in circumstances similar to those alleged here—that is, where misrepresentations made during the standard-setting process have enabled a patent holder to acquire market power it would not otherwise have obtained.[1] Moreover, the scope of antitrust law should not be

[1] *See In re Matter of Rambus, Inc.*, No. 9302, 2006 WL 2330117 (F.T.C. Aug. 2, 2006), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf (FTC order finding that Rambus' deception in private standard-setting organization violated the antitrust laws when it lead to monopoly power); *In re Union Oil Co. of California*, No. 9305, 2005 WL 2003365 (F.T.C. July 27, 2005), *available at* www.ftc.gov/os/adjpro/d9305/050802do.pdf (consent order resolving allegations that Unocal illegally had acquired monopoly power by misrepresenting to a state

artificially limited in a manner that inhibits it from accommodating new factual circumstances created by the interplay of standard setting and intellectual property rights.

Second, although the interests of individual firms may be well represented in this matter, the interests of consumers may not be. The purpose of the antitrust laws is to ensure a competitive system to the benefit of consumers. Ultimately, if unlawful monopolization occurs, all consumers will pay more through higher prices and less innovation.[2]

SUMMARY OF ARGUMENT

According to the District Court, because the standard-setting process leads to monopoly, the incorporation of a technology into a standard cannot result in antitrust liability—even where a party uses deception to get its technology accepted into the standard. *See* Memorandum Opinion ("Op.") filed August 31, 2006 at A21. The decision, however, ignores the unique position of standard-

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standard-setting board that certain research was non-propriety while pursuing patent claims that would have enabled Unocal to charge royalties for low-emission gasoline compliant with the standard); *In re Dell Computer Corp.*, 121 F.T.C. 616 (1996) (consent order resolving allegations that, after certifying that it had no relevant patents, Dell sought to enforce patents adopted by a standard-setting organization).

[2] *Amici Curiae* only address Broadcom Corporation's First Claim for Relief in this brief and do not take a position on the merits of Broadcom Corporation's other claims or on the veracity of the allegations in the Complaint.

setting bodies under the antitrust laws, in which cooperation among rivals is encouraged but only to the extent that "it will be conducted in a nonpartisan manner offering procompetitive benefits." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 505 (1988). Anything less than good-faith dealing among members can harm competition between rival technologies during the standard-setting process, and harm competition in the downstream market for goods incorporating the standard. This principle is consistent with federal antitrust jurisprudence and was explained at length in the Federal Trade Commission's ("FTC" or "Commission") extensive recent opinion in *In re Rambus, Inc.,* No. 9302, 2006 WL 2330117 (F.T.C. Aug. 2, 2006), a case ignored by the District Court.

The District Court's decision will significantly hamper both public and private enforcement against illegal monopolization in a standard-setting context. Consumers will pay more for products if this type of unlawful monopolization is permitted to occur. Indeed, the District Court's apparent immunizing of standard-setting related conduct from antitrust scrutiny suggests that anticompetitive collusive behavior is likewise immune, making the District Court's decision particularly dangerous precedent.

The District Court's concern regarding the rights of patent holders is misplaced. The District Court held that "Qualcomm's 'power' to control the licensing of its patents is derived from the rights it enjoys as a patent holder." *See* Op. at A20. The Complaint alleges, however, that Qualcomm gained market power as a result of its supposed deceptive conduct, not as a result of the exclusionary rights conferred by its patent portfolio.

The District Court misapprehended the rules set forth by the Supreme Court in *Trinko.* Indeed, the instant case does not implicate the law regarding refusals to deal because Qualcomm obtained its monopoly by committing to deal with all parties on fair, reasonable and non-discriminatory ("FRAND") terms.

ARGUMENT

I. THE RULE OF LAW ADOPTED BY THE DISTRICT COURT WOULD ESTABLISH A SEVERE OBSTACLE TO BOTH PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT AGAINST ANTICOMPETITIVE CONDUCT IN A STANDARD-SETTING ENVIRONMENT

Federal antitrust enforcers appreciate the potential for anticompetitive activity in standard-setting bodies and have devoted considerable resources to attempting to redress the anticompetitive effects of deceptive and anticompetitive conduct in these environments. This type of conduct may include a failure to disclose intellectual property rights before a standard is set, or the failure to abide by FRAND commitments, as alleged in this case.

The issue of deception in a standard-setting environment was addressed at length in the FTC's recent decision in *In re Rambus, Inc*. No. 9302, 2006 WL 2330117 (F.T.C. Aug. 2, 2006). On August 2, 2006, the Federal Trade Commission unanimously decided that computer technology developer Rambus, Inc. had engaged in a course of deceptive conduct that distorted a critical standard-setting process, resulting in an unlawful monopoly in the markets for four computer memory technologies relating to dynamic random access memory, or DRAM. The Commission found that Rambus had "violated Section 5 of the FTC Act by engaging in exclusionary conduct that contributed significantly to the acquisition of monopoly power." *Rambus*, at 5. The FTC's 120-page opinion describes at length the policy and economic concerns behind protecting the standard-setting process to prevent the creation or abuse of monopoly power.[3]

In *Rambus*, as in this case, members of the standard-setting body had an obligation to disclose intellectual property rights before a standard-setting body, Joint Electron Device Engineering Council ("JEDEC"). The FTC found that under both JEDEC policy and practice, members were expected, though not required, to reveal the existence of any patents or applications for patents that could later be asserted against those practicing a standard adopted by JEDEC. *Rambus*, at 4. In

[3] The case was decided after a 54-day hearing, demonstrating the importance of a full factual inquiry on the issues. The complex issues involved in a case of this type are particularly inappropriate for summary disposition.

the event that a member did hold patents or applications for patents that would cover a proposed standard, the member was obligated to commit to license the technology on reasonable and nondiscriminatory ("RAND") terms prior to a vote to adopt the standard (much like Qualcomm was obligated to do in the UMTS standard-setting process). The purpose of this requirement, as determined by the Commission, was to "prevent anticompetitive hold-up." *Id*.

The Commission found that Rambus failed to disclose the existence of its patents and patent applications and took additional actions to mislead the JEDEC members into believing that Rambus was not pursuing such patents. *Id.* at 4-5. The Commission further found that Rambus had used its knowledge of the JEDEC proceedings to sculpt its patent claims to ensure that any subsequent subscriber to the SDRAM or DDR-SDRAM standards (for CPU memory technology) would directly infringe Rambus' patents. These acts, the Commission found, allowed Rambus to wait until other companies were "locked in" to the technology before revealing the existence of its patents through infringement lawsuits. *Id*. at 4.

The Commission found that Rambus' conduct constituted deception in violation of Section 5 of the FTC Act and that this deception contributed significantly to Rambus' acquisition of monopoly power in the four relevant markets in violation of Section 2 of the Sherman Act. *Id*. at 5. The case continues before the FTC with proceedings on the appropriate remedy.

The District Court below was mistaken when it suggested that "Qualcomm's alleged conduct [with respect to deception in the standard-setting context] has not been recognized as anticompetitive for purposes of the Sherman Act." Op. at A29.[4] The FTC's opinion in *Rambus* describes at length how deception in the standard-setting process violates the Sherman Act and why antitrust enforcement is necessary to maintain competition in the context of standard-setting bodies. Indeed, the FTC decision sets forward an analytical framework that would greatly assist the resolution of this case.

Rambus was not the first enforcement action involving deception and unlawful acquisition of monopoly power in the standard-setting process. In *In re Dell Computer Corp.*, 121 F.T.C. 616 (1996), the FTC challenged the effort by Dell Computer to secure royalties from computer manufacturers for technology adopted as part of the "VL-bus" computer technology standard. Dell participated in the standard-setting body, Video Electronics Standard Association ("VESA"),

[4] The District Court's observation is inconsistent with mainstream antitrust jurisprudence. As the Supreme Court observed, the "private standard setting process" is "the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves." *Allied Tube*, 486 U.S. at 505. There can be no doubt that a manipulation of the standard setting process can constitute a Sherman Act violation. Indeed, as the Court in *Allied Tube* stated, "because private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits…." *Id*. at 506.

and, after certifying that it had no relevant patents, Dell sought to enforce patents incorporated into the standard(s) adopted by VESA. The FTC challenged Dell's failure to properly disclose its patents and subsequent attempt to secure royalties. The case was resolved with a consent order in which Dell agreed not to enforce the patents.

In *In re Union Oil Co.*, No. 9305, 2005 WL 2003365 (F.T.C. July 27, 2005), the FTC brought a complaint in 2003 alleging that in the 1990s the Union Oil Company of California ("Unocal") illegally acquired monopoly power in the technology market for producing reformulated gasoline by misrepresenting before the California Air Resources Board ("CARB"), among other things, that Unocal's research was non-proprietary and in the public domain, while at the same time pursuing a patent that would enable it to charge substantial royalties once the research was incorporated by CARB into its reformulated gasoline ("RFG") regulations. The complaint further alleged that Unocal engaged in deceptive and exclusionary conduct through its participation in two private industry groups—the Auto/Oil Air Quality Improvement Program (Auto/Oil) and the Western States Petroleum Association (WSPA). As a result of this deceptive conduct, companies producing CARB reformulated gasoline were obliged to pay royalties to Unocal. According to Unocal's own expert, approximately 90 percent of the royalty charge was passed on to California consumers in the form of higher gas prices. Unocal Complaint ¶ 98 (Mar. 4, 2003).[5]

In its complaint, the FTC charged that Unocal's alleged misrepresentations harmed competition and led directly to the acquisition of monopoly power for the technology to produce and supply CARB gasoline. Unocal's "patent ambush" also allegedly permitted the company to undermine competition and harm consumers in the downstream product market for CARB reformulated gasoline. The complaint alleged that, in the absence of Unocal's deceptive conduct, CARB would not have adopted RFG regulations that substantially overlapped with Unocal's patent claims. *Id.* at ¶ 90.

The case was resolved in 2005 with a consent order in which Unocal agreed to cease enforcement of its patents. No. 9305, 2005 WL 2003365 (F.T.C. July 27, 2005).[6] The FTC has estimated that consumers will save over $500 million annually because of this enforcement action. *See* William E. Kovacic, Petroleum Industry Consolidation, Prepared Statement of the Federal Trade Commission before the U.S. Senate Committee on the Judiciary (Feb. 1, 2006).[7]

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5 Available at www.ftc.gov/os/2003/03/unocalcmp.htm.

6 Available at www.ftc.gov/os/adjpro/d9305/050802do.pdf.

7 Available at www.ftc.gov/speeches/kovacic/testimonyrepetroleumindustryconsolidation.pdf.

In the present case, the District Court's rule of law would severely restrict these types of enforcement actions and enable firms to engage in broad forms of manipulation of the standard-setting process with the knowledge that if they succeed, the establishment of the standard will provide protection from antitrust scrutiny. Such a standard would permit the anticompetitive conduct successfully challenged by the FTC in the cases above, costing consumers hundreds of millions of dollars each year.

II. THE DISTRICT COURT MISPERCEIVED THE IMPORTANT ROLE OF ANTITRUST ENFORCEMENT IN A STANDARD-SETTING ENVIRONMENT

The reasoning of the District Court's decision suggests that since the creation of a standard inevitably eliminates competition, fraudulent or anticompetitive activity cannot be subject to antitrust scrutiny. The District Court's decision misapprehends the important role of competition and antitrust enforcement in the establishment of standards.

Standard setting facilitates the development of markets where compatibility requirements are high. Because a standard may result in the creation of a monopoly or a dominant firm, the *competition to become the standard* is critical. Firms engaging in consensus standard-setting in network industries are not side-stepping market competition, but rather shifting the focus of market competition from the size and nature of the network to the technical merits and prices of the products and components sold by individual competitors.[8] In this type of environment, the rules of a standard-setting body, either to disclose intellectual property rights and/or to agree to fair, reasonable and nondiscriminatory licensing ("FRAND") play a vital role. Provided the process is free of distortion, bias, or manipulation by private interests, the competition for the standard that takes place in an SDO can enhance social welfare not only by refocusing competitive resources along traditional dimensions, but also by broadening the size and potential scope of the chosen network. SDO standards can provide an agreed-upon technical base on which to build new products or components and thus facilitate entry by smaller or niche competitors who may not be able to enter a market dominated by a *de facto* proprietary standard.

A standard-setting process free of distortion, bias, or manipulation by private interests is one in which the participants can make a neutral evaluation of the costs and benefits of a proposed technical solution. This will frequently require the

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8 "Agreeing on a standard may eliminate competition between technologies, but it does not eliminate competition altogether. Instead, it channels it into different and (to economists) more conventional dimensions, such as price, service, and product features." Stanley M. Besen and Joseph Farrell, *Choosing How to Compete: Strategies and Tactics in Standardization*, J. Econ. Pers., vol. 8, no. 2, (1994) 117–131. *See also* Katz, M.L. and C. Shapiro, *Systems Competition and Network Effects*, J. Econ. Pers., vol. 8, no. 2, (1994), 93–115: "For systems that are compatible, the locus of competition shifts from the overall package (including network size) to the specific cost and performance characteristics of each component individually" (citation omitted).

disclosure of intellectual property rights or the commitment to FRAND licensing so that participants can evaluate technical merits and the costs of different technological alternatives.

In this case, the District Court misjudged the important role of competition for the standard based on the conclusion that the standard itself eliminated competition. Undoubtedly a standard eliminates competition once FRAND commitments have been made by technology contributors and adoption has occurred, but that does not excuse a loss of competition due to a distortion of the pre-adoption standard-setting process. As one commentator observes: "*The harm to competition that is the focus of antitrust law in these circumstances concerns the integrity of the selection process for the standard, not the loss of competition that naturally results from the choice of a standard.* The [District Court] looked through the wrong end of the glass, and misconceived the 'harm to competition' at issue in standard setting." Richard Wolfram, *"Can you hear us now?"—Did the* Rambus *decision fall on deaf ears?,* 9 Global Competition Review 11, at 36 (Dec. 2006/Jan. 2007) (empasis added).

III. THE RULE OF LAW ADOPTED BY THE DISTRICT COURT IS INCONSISTENT WITH SECTION 2 JURISPRUDENCE

Section 2 of the Sherman Act requires, *inter alia*, a showing that the defendant has engaged in "anticompetitive" or "exclusionary" conduct.

Exclusionary conduct is conduct "other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power." 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 651f (2d. ed. 2002) 83-84; *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (quoting 3 Phillip E. Areeda & Donald F. Turner, Antitrust Law 78 (1978)) ("Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."). Stated differently, if "a firm has been 'attempting to exclude rivals on some basis other than efficiency,'" it is engaging in exclusionary conduct. *See Aspen Skiing*, 472 U.S. at 605.

Especially in network in high-tech industries, federal courts have established that deception may constitute "exclusionary conduct" that will support a Section 2 claim in certain circumstances. In *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), for example, the United States Court of Appeals for the District of Columbia Circuit found that Microsoft's deception with respect to Java applications was exclusionary. In that case, Microsoft had publicly committed to cooperate with Sun Microsystems, the developer of the Java software platform, and had offered independent software developers a set of "Java implementation" tools that ostensibly would enable them to develop cross-platform applications. 253 F.3d at 76.

In fact, however, Microsoft surreptitiously included in its implementation tools certain key words or directives that could be executed solely by Microsoft's version of the Java runtime environment for Windows. As a result, software developers who used Microsoft's Java implementation tools unwittingly developed Windows-dependent applications that were incompatible with other software platforms. *Id.* Microsoft's statements were made in a context in which software developers reasonably could have believed that Microsoft would not mislead them. In light of the expectations of a cooperative relationship, Microsoft's deceptive conduct was opaque. Countermeasures therefore were hard, if not impossible, to implement, and there was a substantial risk of competitive harm. *See also Conwood Co., LP v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002) (maintaining monopoly power by, *inter alia*, providing misleading market data to retailers in order to distort their purchasing decisions violated Section 2); *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998).

Although deceptive conduct thus can be "exclusionary" for purposes of Section 2, not all deceptive conduct occurs in factual circumstances where there is a substantial threat of competitive harm. In particular, deceptive conduct in competitive environments is less likely to be actionable under Section 2, because deceptive practices in the context of competitive relationships are less likely to be material. Misleading statements in the advertising context, for example, may be transparent to rivals, who sometimes can protect themselves by engaging in their own counter-advertising. Therefore, there may be a relatively low risk that significant anticompetitive effects may occur in this competitive environment. *See Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery*, 323 F.3d 366, 370-72 (6th Cir. 2003) (applying rebuttable presumption that effect on competition of misleading advertising material was *de minimis*); *Am. Prof'l Testing Services, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997) (same).

The standard-setting process often is conducted in an environment of cooperation rather than rivalry – that is, an environment that resembles *Microsoft* rather than the competitive environment of the deceptive advertising cases. In such a collaborative environment, standard-setting participants are less likely to be wary of deception; they are less likely to be able to detect and hence counteract it; and competitive harm is therefore more likely to result. Given the potential for a standard to create market or monopoly power, the anticompetitive consequences of such deception also may be substantial, as was the case in *Microsoft*. Under such circumstances, antitrust scrutiny of possible deceptive conduct is particularly warranted.

By contrast, the District Court's decision suggests that deceptive conduct that leads to a monopoly cannot as a matter of law ground a monopolization claim. Notably, the District Court did *not* hold that the complaint failed adequately to plead that the defendant deceived other industry participants during the standard-setting process. Nor did the Court find that the complaint failed to plead that this deception materially affected the outcome of that process. Instead, the District Court held that such deception, *even where it changed the outcome of the standard-setting process*, cannot ground an antitrust claim. The Court reasoned that because the outcome of the standard-setting process is the adoption of a single technology, it did not matter that the defendant's alleged deception may have changed which technology was chosen. *See* Op. at A21 ("While Qualcomm's behavior may have influenced how the SDO would eliminate competition, it is the SDO's decision to set a standard for WCDMA technology, not Qualcomm's 'inducement,' that results in the absence of competing WCDMA technologies.").

In dismissing Broadcom's antitrust claim on that basis, the District Court created a dangerous precedent that could be used to excuse, among other things, collusive behavior in standard setting. Such behavior might include, for example, members of a standard-setting organization colluding to exclude superior alternative technology from a standard or coordinating to elevate the rates individual members will charge to license their intellectual property. Antitrust needs to provide some measure of protection against such anticompetitive abuses.

IV. THE DISTRICT COURT'S REASONING MISAPPREHENDS THE EFFICIENCY BENEFITS THAT RESULT FROM COLLABORATIVE STANDARD SETTING, AND HENCE THE SUBSTANTIAL COMPETITIVE HARM THAT CAN RESULT FROM DECEPTION IN THE STANDARD-SETTING PROCESS

When industry participants collaborate in the development of a standard, consumers benefit from procompetitive efficiencies both in the downstream goods market, and in the technology market that is the subject of the standards-setting process. In the downstream goods market, interoperability standards enable consumers to share information with each other and to interconnect products from different producers. As the Department of Justice recently explained, the collaborative standard-setting process, especially in industries with network effects (such as the wireless industry at issue here), "can enlarge markets by overcoming coordination failures among those interested in developing and using the standard so that the products are available to, and used, by more consumers." Letter from Thomas O. Barnett, Assistant Attorney General, Antitrust Division, Department of Justice, Business Review Letter to Robert A. Skitol, Esq. (Oct. 30, 2006) at 7 (hereinafter "VITA Standards Letter").[9]

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[9] Available at www.usdoj.gov/atr/public/busreview/219380.htm.

Collaborative standard setting also can generate procompetitive benefits in the upstream technology market. Early in the standard-setting process, SDO members often can choose among many competing technologies, some of which may be patented. An SDO may choose to require disclosure of patent positions or licensing terms before standardization decisions are made, because this enables SDO participants to make more informed decisions when setting a standard. SDO members might decide, for example, that a less expensive, albeit less technologically sophisticated solution would work best, or they might decide that the superior technology is preferable despite more restrictive licensing terms. If SDO participants prefer a particular technology despite its higher royalty rates, they can vote to incorporate the technology into the standard. Alternatively, if they determine that the incremental benefits of the technology do not justify the higher royalty rates, they can vote to keep the technology outside of the standard.

To function effectively, the standard-setting process must be free from deception. Otherwise, the distortion that results from the deception can lead to inefficient and anticompetitive outcomes. Disclosure of patent positions and licensing terms is particularly important in view of what economists refer to as the problem of "lock in." *See, e.g.*, Federal Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, Ch. 2 at 29 (2003). Prior to adoption of a standard, SDO participants typically can switch relatively easily among competing technologies. Once a particular standard has been chosen, however, and products have begun to be developed based on that standard, it can be extremely expensive–or, as a practical matter, impossible–to substitute one technology for another. Industry participants therefore become "locked in" to the standard: they may be willing to pay substantially more onerous terms to license a particular patent after it has been incorporated into the standard than they would have been willing to pay prior to its adoption, to avoid the substantial cost and delay of repeating the entire standard-setting process. *Id*.

Deception as to proposed licensing terms during the standard-setting process may directly undercut the procompetitive efficiencies that can flow from the process. In the upstream technology market, collaborative standard setting can function as an efficient substitute for the selection of interoperable technologies through direct competition. By depriving SDO participants of information needed to select the optimal technology, based on an evaluation of costs as well as benefits, deceptive conduct can directly impair the efficient operation of the standard-setting process. Under the case law of Section 2 of the Sherman Act, deceptive behavior that hides the price of a patented technology is not competition on the merits, and deception that thwarts informed choice is not competition on the basis of efficiency.

Deceptive conduct in the standard-setting process also can harm competition in the downstream goods market. Unexpected licensing terms that contradict representations made during the SDO process might lead to licensing disputes that delay adoption and implementation of the standard in the downstream market; competition might be hampered as fewer market participants might choose to compete given higher-than-expected costs; and higher licensing costs might cause goods incorporating the standard to compete less effectively against goods that utilize rival technologies.

V. THE DISTRICT COURT DECISION MISINTERPRETS THE EXCLUSIONARY POWER OF PATENTS

Patents do not necessarily create market power. *See Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1293 (2006); *see also* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 2.2 (1995). Moreover, and more fundamentally, patents are not inherently in tension with antitrust law. Competition and patent policy both seek to promote innovation that enhances consumer welfare, and generally they work well together in furthering that goal. *See Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) ("[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition"); Federal Trade Commission, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, Ch. 1 at 7-9 (2003). Nonetheless, the District Court expressed concern that recognizing an antitrust claim based on deception in the standard-setting process would create such conflict, because it would mean that Qualcomm could be held liable under the antitrust laws for "merely holding patents essential to the UMTS standard." Op. at A17.

That concern is misplaced. Plaintiff's standard-setting claim is not directed at the legality of defendant's licensing practices (although some of plaintiff's other claims are so directed) or at the exclusionary rights imbued by patent grant, but rather at defendant's agreement to license on FRAND terms and subsequent refusal to do so. As described by the Court, plaintiff alleged that SDO participants had other technology options that would not have involved the incorporation of Qualcomm's patents into the standard. *See* Op. at A21 (discussing allegations that Qualcomm's "false promise biased the SDO in Qualcomm's favor, to the detriment of those patent-holders competing to have their patents incorporated into the standard"). Qualcomm's *ex post* monopoly power consequently may have derived from its deceptive conduct in the standard-setting process, not from the value its patents would command absent such opportunistic conduct. On a motion to dismiss—where the Court only should determine whether if true, the facts present a justiciable claim—it was improper for the District Court to ignore that possibility.

As a factual matter, there are several ways in which Qualcomm might defeat such a claim. For example, if Qualcomm did not participate in the SDO, but the resulting standard incorporated technology that Qualcomm had patented, it would be free (subject to antitrust restrictions including, inter alia, the prohibition on unlawful exclusive dealing, bundling, and tying) to charge such licensing terms as it chose. Under those circumstances, Qualcomm's possible monopoly would be the result of accident rather than its own anticompetitive conduct, and hence not actionable under the antitrust laws. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (holding that monopoly power acquired "as a consequence of a superior product, business acumen, or historic accident" does not violate Section 2 of the Sherman Act).

It is thus not the case, as the District Court feared, that recognition of an actionable claim based on deceptive conduct in the standard-setting process "would subject every firm with patents incorporated into an industry standard to antitrust liability." Op. at A20. Only if the patent holder participates in the SDO process, makes deceptive commitments that induce the SDO to choose its technology, and then reneges on those commitments after adoption of the standard in a way that creates or threatens to create monopoly power, would an actionable claim potentially arise under Section 2 of the Sherman Act.

VI. THE REASONING BEHIND THE SUPREME COURT'S DECISION IN *TRINKO* DOES NOT APPLY IN THIS CASE

The District Court's decision to dismiss petitioner's Amended Complaint relied in part on *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Regrettably, however, the District Court misapplied the holding in that case. The *Trinko* court held that district courts at the motion to dismiss stage may sometimes abstain from taking legal cognizance of a private antitrust claim when the commercial conduct of the parties is already sufficiently highly regulated.The *Trinko* decision results from a case-by-case analysis of "the particular structure and circumstances of the industry at issue," 540 U.S. at 411, in that case the telecommunications industry, the circumstances of which are determined by the Telecommunications Act of 1996, a comprehensive statutory and regulatory framework focused on the duties of monopolists toward its rivals. Thus, a private action against an incumbent monopolist for a "refusal to deal" is not cognizable where dealing in the first place only occurs because it is compelled by a federal statute (implemented by administrative regulations that also proscribe remedies for non-compliance). Moreover, where a one-off remedy is likely to suffice, comprehensive regulatory schemes are ordinarily superfluous. Thus, the burden of ongoing remedial supervision ("continuing supervision of a highly detailed decree," 540 U.S. at 415) counted heavily against recognizing an antitrust action, particularly when a regulatory framework designed to deal with precisely such regulation already exists.

In the present case, however, no such regulatory framework exists, and no such detailed decree would be required. By applying the reasoning of *Trinko* to an inappropriate context, the District Court anomalously brings regulatory antitrust abstention to bear on a case involving standard setting, activity from which regulation is notably absent and for which antitrust law itself determines the very legitimacy of the activity. *See Allied Tube*,486 U.S. at 500 ("standard-setting associations have traditionally been objects of antitrust scrutiny . . ."), *Id.*, 486 U.S. at 507 (Standard setting is "the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves . . . . Indeed, . . . private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits . . . .").

For example, the District Court expressed concern that a claim based on deception in the standard-setting process would infringe the right of a competitor to refuse to deal with a rival. *See* Op. at A14, *citing Trinko*. Such a concern is unwarranted. The Court in *Trinko* had to balance the disincentive for investment in private infrastructure against the slight benefits of a regime of forced dealing in a regulated industry. On the other hand, the proponent of a proprietary standard must make a commitment to deal if it expects its proposal to be adopted as the standard. The only incentive created by a regime of forced dealing for antitrust violators in those circumstances is for participants to live up to their commitments.

Moreover, the claim alleged in this case is not that Qualcomm refused to deal with its competitors (because Qualcomm Inc. could not refuse to license under its FRAND obligation) but that it ostensibly and deceptively promised to deal with all parties on particular terms. As the Department of Justice recently observed, "when it agrees to license on nondiscriminatory terms as is usually required by SDOs, a patent owner relinquishes its right to restrict the number of licenses it will grant, and its right to require more restrictive terms in exchange for an exclusive license." VITA Standards Letter at n. 28. The gravamen of the claim alleged here is the deceptive commitment to license, rather than a unilateral refusal to deal.[10]

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[10] The distinction between conditional refusals to deal, such as those alleged in this case and unilateral refusals to deal, is a fundamental one under the Sherman Act. Indeed, the District Court's rationale—that the right to refuse to deal enables a firm to condition its licensing on such terms as it chooses—largely would eviscerate the antitrust laws in the licensing context. Tying, exclusive dealing, and price fixing, for example, all would be *per se* legal for the patent holder.

The District Court fears that "reviewing and supervising the terms upon which Qualcomm licenses its patents ... may be beyond the effective control of the Court under the antitrust laws." Op. at A16. But this statement appears without support, and the District Court does not explain why a final decree upon a finding of liability in this case cannot consist of a one-off remedy ordering respondent to abide by its licensing pre-commitments.

Despite giving lip service to the need to "always be attuned to the particular structure and circumstances of the industry at issue," *Trinko*, 540 U.S. at 411, the District Court appears to have failed to do just that, by enlisting a doctrine of regulatory antitrust abstention to undermine the application of antitrust law to an area—consensus standard setting—in which it has traditionally supplied the dispositive legal rule.

CONCLUSION

For the reasons set forth above, this Court should reverse the District Court's holding that the First Claim for Relief in Broadcom's Complaint fails to state an actionable claim as a matter of law, and remand for further hearing.

Respectfully submitted,

December 20, 2006 By: Berger & Montague, P.C.

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CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

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CERTIFICATION OF WORD COUNT

I certify that to the best of my knowledge, information and belief the foregoing Brief of Amici Curiae contains 6,070 words.

Dated: December 20, 2006

/s/ Eric L. Cramer
Eric L. Cramer

CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS

I certify that to the best of my knowledge, information and belief that all copies of the foregoing Brief of Amici Curiae that are being served today on the Court and the Parties are identical copies of same.

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I certify that to the best of my knowledge, information and belief the electronic version of foregoing Brief of Amici Curiae served has been successfully scanned for the absence of a computer virus using Symantec AntiVirus Version 10.1.4000.4.

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CERTIFICATE OF SERVICE

I certify that I caused today a copy of the foregoing Brief of Amici Curiae to be electronically filed with the United States Court of Appeals for the Third Circuit, <<electronic_briefs@ca3.uscourts.gov. I have also caused today ten paper copies of the Brief of Amici Curiae to be sent to the Court via First-Class United States Mail, and two copies to be served on the following counsel via both electronic and First-Class United States Mail:

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