

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

**In the Matter of**

**RAMBUS INC.,**

**a corporation.**

**Docket No. 9302**

**MEMORANDUM IN SUPPORT OF RESPONDENT RAMBUS INC.'S  
MOTION FOR SUMMARY DECISION**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

The Complaint in this matter alleges that respondent Rambus Inc. (“Rambus”) has monopolized or attempted to monopolize certain markets for technologies related to dynamic random access memory (“DRAM”). The Complaint’s allegations stem from Rambus’s involvement in an industry standard-setting body called the Joint Electron Device Engineering Council (“JEDEC”). During the 1990s, JEDEC adopted two industry standards that incorporate technologies covered by patents issued to Rambus years after it left JEDEC. The Complaint alleges that, through its silence at JEDEC meetings, Rambus “lulled” JEDEC members into believing that Rambus had no patent interests in the technologies being considered for standardization and that, but for Rambus’s silence, JEDEC would have incorporated alternative technologies into the standards at issue that avoided Rambus’s patents.

To prevail on this unprecedented theory of antitrust liability, which extends well beyond the parameters of the Commission’s negotiated consent order in *In the Matter of Dell Computer Corp.*, 121 F.T.C. 616 (1996), Complaint Counsel will be required to establish at least each of the following propositions:

(1) That, during the period in which Rambus was a JEDEC member, JEDEC’s rules required (as the Complaint now asserts) that all members disclose to the other members patent claims they might file in the future which, if issued, would read on standards then being balloted or which might be proposed for balloting in the future.

(2) That, notwithstanding the contrary holding of the Federal Circuit, *see Rambus Inc. v. Infineon Techs. AG*, \_\_\_ F.3d \_\_\_, 2003 WL 187265 (Fed. Cir. Jan. 29, 2003)



(“*Rambus v. Infineon*”), any such JEDEC rules were sufficiently clear, publicized, widely understood, and consistently applied so as to provide a basis for legal (and, in particular, antitrust) liability.

(3) That Rambus did not comply with the purported JEDEC rules asserted in the Complaint.

(4) That Rambus’s failure to comply with those purported rules constituted not just a breach of contract or other common-law duty, but also anticompetitive conduct within the meaning of Section 2 of the Sherman Act.

(5) That, because of Rambus’s failure to comply with the purported rules, JEDEC and its members did not have reason to know of Rambus’s potential patent interests, or sufficient reason to suspect such interests so that reliance on their nonexistence without a direct inquiry to Rambus about them would be unreasonable, when the relevant standards were adopted.

(6) That, if Rambus had complied with the purported rules, JEDEC would have adopted standards different from the standards at issue (and which used none of Rambus’s patented technology) in order to avoid the prospect of paying royalties to Rambus.

(7) That the failure of JEDEC to adopt such different standards constitutes injury to competition within the meaning of Section 2 of the Sherman Act, even though the fact that the standards at issue were chosen by JEDEC demonstrates that (without regard to the prospect of paying royalties to Rambus) they were superior to alternative standards because of timeliness, availability, cost, performance, or some combination thereof.

(8) That, if JEDEC had adopted such alternative standards, Rambus’s technology



the undisputed facts establish precisely *the opposite* of what Complaint Counsel must prove. Each of the three grounds raised here provides an independent basis for granting summary decision in Rambus's favor.

First, this motion addresses the question whether, as a matter of law, the vague and indefinite contractual obligations purportedly imposed by the JEDEC patent disclosure policy are a legally sufficient basis on which to premise antitrust liability. They are not, for the following reasons:

- The disclosure-related language contained in the various JEDEC manuals, meeting minutes, and statements of policy has recently been characterized by the Court of



full year after Rambus had attended its last JEDEC meeting and six months after Rambus had confirmed its withdrawal from the organization by letter. As the District Court held in the *Infineon* litigation, and as a unanimous Court of Appeals affirmed, Rambus could not have breached any duty of disclosure with respect to the DDR SDRAM standard because no such duty arose during Rambus's tenure as a JEDEC member. The absence of any such breach with respect to the DDR SDRAM standard eliminates any basis for a finding of anticompetitive conduct in three of the five technology markets alleged in the Complaint. At the very least, then, partial summary decision is warranted with respect to those markets.

## **FACTUAL BACKGROUND**

### **A. Rambus's Technology and Business Model**

Rambus was founded in 1990 by two distinguished electrical engineering professors, Dr. Michael Farmwald and Dr. Mark Horowitz. They had just invented revolutionary computer-memory technologies that would enable computer-memory devices (dynamic random access memories, or DRAMs) to keep pace with faster generations of microprocessors by running at much faster speeds than earlier technologies.

Rambus chose not to become a manufacturer of DRAMs. Rather, Rambus intended to continue to develop its technology and to make that technology available for license by manufacturers industry-wide, together with testing, design, and implementation services. This business model depended upon intellectual property to help generate royalties and licensing fees, which along with service fees would be the company's sole sources of income.

In April 1990, Farmwald and Horowitz filed a patent application describing their inventions (“the ’898 application”) and assigned it to Rambus. Like all patent applications, Rambus’s ’898 application had two parts – a “written description” (sometimes referred to as the “specification”) that described Rambus’s inventions in detail, and a set of “claims” that set forth which of the inventions described in the written description Rambus initially sought to patent. The key innovations disclosed in the ’898 written description included, among other things, forms of technologies later called programmable latency, variable burst length, dual-edge clock (producing a double data rate, or “DDR”) operation, and on-chip DLL (the use of delay lines (in particular, a delay locked loop (“DLL”) circuit) on the DRAM chip itself). Taken together, these innovations dramatically increase the speed of memory chips.<sup>1</sup>

#### **B. Rambus’s Participation in JEDEC**

One of the standard-setting organizations for semiconductor devices is JEDEC, which was (until 1998) a part of the Electronic Industries Association (“EIA”) and formally and “rigidly” governed by EIA policies. The particular JEDEC committee involved in this case is the “42.3” subcommittee, which has responsibility within JEDEC for many computer-memory devices and whose members include such computer-memory manufacturers and users as Siemens (now Infineon), Micron, NEC, Samsung, Toshiba,

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<sup>1</sup> The PTO determined that the ’898 application included numerous independent and distinct inventions and required Rambus to restrict its application to one of what the PTO identified as eleven “independent and distinct inventions.” Rambus thus submitted separate, “divisional applications” for the remaining ten. *See* 35 U.S.C. § 121; *Rambus v. Infineon*, 2003 WL 187265 at \*20-21.

IBM, Texas Instruments, Hewlett-Packard, and many others. Perry Decl., Ex. 1.<sup>2</sup>

Rambus attended its first JEDEC meeting as a guest in December 1991, when Rambus had annual revenues of less than \$2 million and just 20 employees. Rambus formally joined JEDEC in February 1992. Perry Decl., Exs. 1 & 2.

Rambus attended its last JEDEC meeting in December 1995 and, having been sent a bill for 1996 dues, sent a letter confirming its withdrawal in June 1996. Perry Decl., Ex. 3. During its tenure as a JEDEC member, Rambus never proposed or advocated the adoption of any standard or technology. Perry Decl., Ex. 4. In fact, it made no presentations at all, and it voted at only one meeting, when it voted *against* four proposals. Perry Decl., Ex. 5.

### **C. The SDRAM and DDR SDRAM Standards**

The Complaint asserts that, while a member of JEDEC, Rambus representatives observed efforts at JEDEC to promulgate an industry standard for a synchronous DRAM device called “SDRAM.” Complaint, ¶ 40. According to the Complaint, Rambus was aware that the SDRAM standard under consideration incorporated features over which Rambus believed it might someday hold intellectual property rights. *Id.* at ¶¶ 47-48. These features had previously been incorporated in Rambus’s own design for a memory device, called an “RDRAM,” which Rambus had actively marketed to the DRAM industry

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beginning in 1989.<sup>3</sup>

The SDRAM standard was considered within JEDEC 42.3 during 1991 and 1992, adopted in early 1993, and formally announced on March 4, 1993. *Rambus v. Infineon*, 2003 WL 187265 at \*2. DRAM manufacturers did not begin manufacturing and selling SDRAM devices on a large scale until much later – in 1996 and 1997. *See, e.g.*, Perry Decl., Ex. 6 (Gross 12/19/02 Dep. at 31) [REDACTED]; Ex. 7 (Kettler 1/15/03 Dep. at 26) [REDACTED].

The Complaint alleges that JEDEC considered improvements to the SDRAM standard in the early and mid-1990s and that these discussions ripened into the formal development of a new standard, called “DDR SDRAM,” in the 1996-1999 time period. Complaint, ¶¶ 27-28. The Complaint asserts that JEDEC was lulled by Rambus’s alleged “silence” into incorporating features in the SDRAM and DDR SDRAM standards that fall within the claims of Rambus’s patents. *Id.* at ¶¶ 70-71.

Specifically, the Complaint alleges that Rambus conveyed to JEDEC “the materially false and misleading impression that [Rambus] possessed no relevant intellectual property rights.” Complaint, ¶ 2. The Complaint asserts that this impression was false because technologies discussed at JEDEC were, in fact, “encompassed” within the 62-page specification and 15 related drawings that Rambus had filed in its original

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<sup>3</sup> Rambus publicly announced the first version of RDRAM in early 1992. Perry Decl., Ex. 8. That version of RDRAM incorporated many of the key Rambus innovations described in the ’898 written description, including two features that were included in the SDRAM standard – “programmable latency” and “variable burst.”



April 1990 application. *Id.* at ¶ 48. The Complaint concedes that this specification and these drawings were disclosed by Rambus to JEDEC as part of an issued patent in September 1993. *Id.* at ¶ 76. However, the Complaint alleges that Rambus’s issued claims as disclosed were limited in scope and that Rambus failed to disclose its “belief” that the April 1990 specification and drawings might be used to support broader claims in the future that would cover JEDEC-standardized features. *Id.* at ¶¶ 48, 76, 80.

**D. The JEDEC Patent Policy**

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made part of the application for JEDEC membership. *See* Perry Decl., Ex. 80 (Rambus's membership application). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Perry Decl., Ex. 76 (McGhee 8/10/01 Dep. at 139-40).

trial.” 16 C.F.R. § 3.24(a)(3).

While Your Honor must draw all “reasonable” inferences in favor of the non-moving party, the Commission has emphasized that “the party opposing summary judgment is required to raise more than ‘some metaphysical doubt.’” *In the Matter of College Football Ass’n*, 1994 FTC LEXIS 112 at \*35 (June 16, 1994) (citations omitted). As the Commission has explained, “[t]he mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. A material fact is a fact which might affect the outcome of a suit because of its legal import.” *In the Matter of Trans Union Corp.*, 118 F.T.C. 821, 839 (1994) (citations omitted).<sup>4</sup>

**I.**

including JEDEC committee chairmen and members of its Board of Directors.

While the applicable patent policy was murky, the applicable law is clear. The JEDEC patent policy was not sufficiently defined, as a matter of law, to form the basis of contractual *or* antitrust liability.<sup>5</sup> Indeed, the unavoidable necessity for after-the-fact definition of the disclosure duty, at the behest of the government and based on the deeply self-interested testimony of industry incumbents (Rambus's competitors and potential licensees), makes any imposition of liability here inconsistent with proper antitrust, patent, and First Amendment standards. *See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1128 (7th Cir. 1983).

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<sup>5</sup> This motion does not address numerous issues relating to the disclosure duty that the Commission contends Rambus violated, including: (1) whether any of the Rambus patents or patent applications that were issued or filed between 1992 and 1996 covered any feature or technology under consideration by JEDEC for standardization; (2) whether Rambus satisfied JEDEC's purported disclosure obligations; and (3) whether a disclosure obligation as broad as the one urged in the Complaint would serve the public interest. Rambus makes this motion without prejudice to its position on these issues.

Rambus does note that, in sharp and telling contrast to the assertions in the Complaint, the Court of Appeals for the Federal Circuit has recently held that: (1) none of JEDEC's policy manuals or other written materials expressly requires members to disclose any information about patents or patent applications; (2) to the extent that JEDEC members treated those manuals or other materials as imposing a disclosure duty, that duty extended only to patents or patent applications whose then-existing claims are reasonably read to cover the proposed JEDEC standard, and the duty did not extend to a member's intentions to file future patent applications; (3) any such duty was triggered only at formal balloting of a proposed standard and extended only to the specific standard then under consideration; (4) while Rambus was a JEDEC member, it had no undisclosed claims in any patent or application that could reasonably be read to cover any proposed JEDEC standard; and thus, for these multiple reasons (5) Rambus did not breach any duty of disclosure that it may have owed to JEDEC. *Rambus v. Infineon*, 2003 WL 187265 at \*11-20.

**A. Fundamental Principles of Contract Law Require That to Be Enforceable, Promises Must Be Definite Rather Than Amorphous or Obscure.**

It is a basic principle of contract law that “an agreement, in order to be binding, must be sufficiently definite to enable the courts to give it an exact meaning.” 1 Lord, Williston on Contracts § 4:18, at 414 (4th ed. 1990). This fundamental principle applies regardless of whether Your Honor applies the law of Virginia (JEDEC’s home), California (Rambus’s home), or federal law. *Compare Smith v. Farrell*, 199 Va. 121, 127-28 (1957), with *Ladas v. California State Auto. Ass’n*, 19 Cal. App. 4th 761, 770-71 (1993), and *United States v. Orr Constr. Co.*, 560 F.2d 765, 770 (7th Cir. 1977). Under the law of any of these jurisdictions, contractual promises “must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages.” *Ladas*, 19 Cal. App. 4th at 770. *Accord TransAmerica Equip. Leasing Corp. v. Union Bank*, 426 F.2d 273, 274 (9th Cir. 1970) (holding under California law that “[w]here an agreement is not sufficiently definite to enable a court to give it an exact meaning or where an essential element is reserved for future agreement of both parties, a legal obligation cannot result”); *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 811 (1998) (holding that if “a supposed ‘contract’ does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract”); *W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 254 Va. 514, 517 (1997)

Cal. App. 4th at 770 n.2.

**B. Rules Purporting to Form the Basis for Antitrust Liability Cannot Be So Vague That Parties Cannot Be Reasonably Expected to Conform Their Conduct to the Rules' Requirements.**

Courts have also repeatedly recognized the need for clarity of rules on which antitrust liability is purportedly based. *See, e.g., Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.). Where those rules are ambiguous or indefinite, businesses are unfairly left to speculate whether their conduct will expose them to potential antitrust liability. In such situations, the ambiguity is likely to result in a chilling effect on otherwise procompetitive conduct. *See, e.g., Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986) (“if the antitrust laws applicable to vertical dealings are uncertain or inefficient, they are likely to have a chilling effect on beneficial, procompetitive market interaction”); *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 512 (7th Cir. 1982) (patent misuse claims should be tested by conventional antitrust principles given that the “law is not rich in alternative concepts of monopolistic abuse; and it is rather late in the day to try to develop one without in the process subjecting the rights of patent holders to debilitating uncertainty”). In a similar case, the Second Circuit found that there was no liability under Section 5 for conscious price parallelism given the uncertainty as to “the types of otherwise legitimate conduct that are lawful and those that are not.” *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984). The court stated that “the Commission owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete

unpredictability.” *Id.*

These requirements are even more important when the alleged contract at issue governs the conduct of industry participants in a standard-setting organization because of the anticompetitive potential for after-the-fact manipulation by industry incumbents seeking to exploit others’ innovations. As the Court of Appeals for the Federal Circuit has recently explained: “When direct competitors participate in an open standards committee, their work necessitates a written patent policy with clear guidance on the committee’s intellectual property position.” *Rambus v. Infineon*, 2003 WL 187265 at \*17. Here, as set forth more fully below, the purported JEDEC patent policy that the Complaint relies upon was not written, did not provide “clear guidance” to anyone, and cannot form the basis for antitrust (or contractual) liability.<sup>6</sup>

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<sup>6</sup> Complaint Counsel’s effort here to make antitrust liability turn on issues of disclosure must satisfy the additional standards that the First Amendment requires to be met before liability can be imposed on the basis of speech (including silence). These include: proof by clear and convincing evidence; proof of falsity, deception, and intent to deceive; sufficiently clear standards to limit enforcement discretion and manipulation; and independent appellate review of fact findings. *See generally* Brief of the United States and Federal Trade Commission as *Amici Curiae* in *Ryan v. Telemarketing Assocs., Inc.*, S. Ct. No. 01-1806 (filed Dec. 2002) at 13-14.

Basing antitrust liability on vague and inexact contractual obligations raises serious due process questions as well. It is beyond dispute that a regulation that “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). As the Supreme Court explained in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972), the Due Process Clause of the Fourteenth Amendment “insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *See also Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) (“The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative





*Committee, Subcommittee, and Working Group Chairmen and Secretaries*, Engineering Publication EP-3-F (“EP-3-F”), published in October 1981, and the *Style Manual for Standards and Publications of EIA, TIA, and JEDEC*, EIA Engineering Publication EP-7-A (“EP-7-A”), published in August 1990. Perry Decl., Ex. 9 (Kelly 1/9/01 Dep. at 26).

Despite the evidence that at least prior to 1998, the EIA policies governed the conduct of JEDEC meetings and the obligations of its members, the Complaint relies upon a manual published in 1993 not by the EIA but by JEDEC. According to the Complaint, JEDEC’s members should have looked for guidance on patent policy issues to a “Manual

Members' Manual" that was intended to "assist new (and established) members in achieving full effectiveness in the standards making process." Perry Decl., Ex. 11 (R 156887). The Members' Manual provides in part that JEDEC "adhere rigidly" to the EIA policies contained in EP-7-A and EP-3-F. *Id.* (R 156900).

As discussed below, it cannot be disputed that the disclosure obligations set out in the Complaint are *not to be found* in the EIA policy manuals, and are *not to be found* in the JC 42 Members' Manual, and are only *hinted at* in JEP 21-I. Antitrust liability cannot arise from such a muddle.

2. **Did the various manuals address mere JEDEC members and tell them they had to make *any* disclosures?**
  - a. **The EIA policy language did not tell members they had any duties, including any disclosure duties.**

The October 1981 EIA policy known as EP-3-F provides as follows:

8.3 Reference to Patented Products In EIA Standards

Requirements in EIA Standards which call for the use of patented items should be avoided. No program of standardization shall refer to a product on which there is a known patent unless all the technical information covered by the patent is known to the Formulating committee, subcommittee, or working group. The Committee Chairman must also have received a written expression from the patent holder that he is willing to license applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination. Additionally, when a known patented item is referred to in an EIA Standard, a Caution Notice, as outlined in the Style Manual, EP-7, shall appear in the EIA Standard.

Perry Decl., Ex. 12 (§ 8.3). Nowhere in this statement is any mention of an obligation or duty imposed on JEDEC members to disclose patents *or* patent applications. Rather, the statement, on its face, expresses the EIA's policy that its own actions will: (1) limit the

incorporation of patented items and processes in EIA standards; and (2) where standardization of patented items or processes occurs, ensure that the subject of such patents will be available on reasonable and non-discriminatory license terms.

Using virtually identical language, the 1990 EIA manual known as EP-7-A provides, in pertinent part:

#### 3.4 Patented Items or Processes

Avoid requirements in EIA standards that call for the exclusive use of a patented item or process. No program standardization shall refer to a patented item or process unless all of the technical information covered by the patent is known to the formulating committee or working group, and the committee chairman has received a written expression from the patent holder that one of the following conditions prevails:

- (1) a license shall be made available without charge to applicants desiring to utilize the patent for the purpose of implementing the standard, or
- (2) a license shall be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

. . . An appropriate footnote shall be included in the standard identifying the patented item and describing the conditions under which the *patent* holder will grant a license (see 6.5.2).

Perry Decl., Ex. 13 (§ 3.4) (emphasis added). Again, this statement of the EIA patent policy makes no reference to an obligation to disclose patents or patent applications.

- b. The viewgraphs shown to JEDEC members at virtually all of the JEDEC 42.3 meetings Rambus attended were no different in this respect from the EIA policies.**

At all but one of the sixteen JEDEC 42.3 meetings attended by a Rambus

attendees. Perry Decl., Ex. 14. Minutes of the JEDEC 42.3 meetings describe these viewgraphs as containing “the” patent disclosure policy. *Id.* (JDC 001685). As described above, the language of these viewgraphs and EIA/JEDEC policy documents did not expressly require any disclosures of any kind.

contained no reference to the disclosure of patents or patent applications and had simply “incorporated” the EIA legal guides. Perry Decl., Ex. 18. JEP 21-I still cited EP-7-

**d. The JC 42 Members' Manual refers only to disclosures by presenters.**

Complicating this morass even further was the publication in 1994 of the "JC 42 Members' Manual," which was intended to "assist new (and established) members in achieving full effectiveness in the standards making process." Perry Decl., Ex. 11 (R 156887). This manual did directly address certain members and state certain duties, but the members addressed were a limited group. According to the JC 42 Members' Manual, a member that was *presenting* a technology to JEDEC for standardization "must reveal any known or expected patents, within his company, on the material presented." *Id.* (R 156900). The JC 42 Members' Manual contains no reference, however, to disclosure of patents or patent applications by *non*-presenters like Rambus.<sup>9</sup>

**3. Did JEDEC members and the JEDEC leadership act as if disclosure was required?**

Regardless of where the applicable patent policy could be found, and regardless of

- a. Two leading JEDEC members, IBM and Hewlett-Packard, announced at various times that they would not make intellectual property disclosures at JEDEC meetings.**

The evidence shows that IBM informed JEDEC on several occasions, without retribution or rebuke, that it would not disclose its intellectual property position at JEDEC meetings. The minutes of the March 1993 meeting of JEDEC 42.3 state, for example, that “IBM noted that their view has been to ignore [the] patent disclosure rule because their attorneys have advised them that if they do then a listing may be construed as complete.” Perry Decl., Ex. 20 (JDC 001540). In August 1993, IBM again informed the JEDEC leadership that it would not disclose its intellectual property rights, this time in connection with a technology referred to as “BGA.” In a memo to JEDEC entitled “BGA Patent/License Rights,” IBM’s JEDEC representative (and JEDEC 42.3 subcommittee chair) Gordon Kelley stated bluntly that:

IBM Intellectual Property Law attorneys have informed me that we will not use JEDEC as a forum for discussing this subject. It is the responsibility of the producer to evaluate the subject and to work out the proper use of rights. So, I can not confirm or deny any IPL rights.

Perry Decl., Ex. 21. The JEDEC minutes of December 1993 record yet another representation along these lines by IBM. Perry Decl., Ex. 22.

At about the same time, both IBM and Hewlett-Packard announced at a JEDEC meeting that confidentiality concerns prevented them from disclosing the existence of patent applications. Long-time Hewlett-Packard representative (and JEDEC committee chair) Hans Wiggers explained what happened:

- Q. Do you remember anything that Gordon Kelley ever said about IBM’s position with respect to the JEDEC

patent policy?

\* \* \*

- A. . . . Jim Townsend had invited a lawyer from a firm that I don't remember to give us a presentation after the regular session to talk about patents. Okay. That is – and I'm – I'm not sure whether this all happened the same meeting or not, but there – the following discussions came up there. Gordon Kelley said 'Look. I cannot disclose – my company would not let me disclose all the patents that IBM is working on because, you know, I just can't do that. The only thing we will do is we will follow the JEDEC guidelines and – or rules on whatever and we will make them



In other words, it is apparent that prominent JEDEC members believed that disclosure of patents and, in particular, patent applications, was voluntary rather than mandatory, that they acted on that belief, and that “everybody thought that that was a reasonable position to take.” *Id.* at 60.

**b. The JEDEC Secretary’s March 29, 1994, memorandum demonstrates that disclosure was voluntary, not mandatory.**

In March 1994, JEDEC Secretary Kenneth McGhee sent a memorandum to Jim Townsend, the Chairman of the JEDEC 42 Committee responsible for computer-memory devices. The memorandum stated that:

In response to your telecon message yesterday, I asked our legal counsel for his views on the matter. He responded that he didn’t think it was a good idea to require people at JEDEC standards meetings to sign a document assuring anything about their company’s patent rights for the following reasons:

- 1) It would have a chilling effect at future meetings
- 2) A general assurance wouldn’t be worth that much anyway
- 3) It needs to come from a VP or higher within the company – engineers can’t sign such documents
- 4) It would need to be done at each meeting slowing down the business at hand.

Perry Decl., Ex. 26.

The statements contained in Mr. McGhee’s March 1994 memorandum contradict the notion that the disclosure of intellectual property at JEDEC meetings was mandatory as of 1994. If JEDEC’s legal counsel recognized that a “general assurance” by a JEDEC

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Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 379-80). On neither occasion did anyone inform Rambus that disclosure was mandatory rather than voluntary.

representative about his company's patent rights could not be obtained from the engineers who attended the meeting, it cannot be the case that such assurances were *required*.

Similarly, the recognition by JEDEC's legal counsel that asking for assurances about a company's patent rights "would have a chilling effect at future meetings" is inconsistent with the proposition that such disclosures were *already* mandatory, rather than voluntary.<sup>11</sup>

**c. The EIA told the FTC in January 1996 that any intellectual property disclosures by EIA members were voluntary.**

In January 1996, shortly after Rambus had attended its final JEDEC meeting, the EIA provided comments to the FTC with respect to a proposed Consent Order between the

**d.**

In sum, there is overwhelming evidence that JEDEC members and the JEDEC leadership understood during the time that Rambus was a JEDEC member that members were encouraged, but not required, to make a “voluntary” disclosure of their intellectual property in certain circumstances.<sup>12</sup>

**4. Even assuming that disclosure was required, what had to be disclosed?**

Although the Complaint alleges that any patent or patent application that relates to a proposed JEDEC standard was subject to JEDEC’s disclosure requirements, there is nothing in either the written policies or the actual practices of JEDEC’s members to support any such requirement. First, the language of the EIA/JEDEC policy refers only to standards that “*call for the use of patented items.*” Perry Decl., Ex. 12 (§ 8.3) (emphasis added). JEDEC’s policy manual JEP 21-I similarly refers only to standards that “*require the use of patented items.*” Perry Decl., Ex. 17 (§ 9.3) (emphasis added). This language simply cannot support a requirement that patents related in some unspecified way to a proposed standard were required to be disclosed.

Testimony at the *Infineon* trial is consistent with the more narrow scope suggested by the language of the patent policy itself. For example, Infineon’s JEDEC representative Willi Meyer, explaining why he did not disclose an Infineon patent, testified that it was his understanding the disclosure duty applied only to patents “related to the work at JEDEC *in the sense* that it described features that were *necessary to meet the standard.*” Perry Decl.,

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<sup>12</sup> For purposes of this motion, Rambus need not *prove* that disclosure was voluntary rather than required. This language is consistent with the JEDEC policy’s use of the word “voluntary.”

Ex. 31 (5/7/01 *Infineon* Trial Tr. at 117) (emphasis added). That narrow sense (natural in this context) defined, at most, *what* “relation” a patent had to have to a proposed standard in order to be subject to disclosure. Similarly, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Perry Decl., Ex. 16 (Kelley

1/26/01 Dep. at 73-76, 89-92) (emphasis added); *see also id.* at 273- [REDACTED]

42.3 since the tracking list was first created over four years earlier in September 1991.

- On March 16, 1993, Toshiba filed a patent application, claiming priority to a March 19, 1992, Japanese application, a continuation of which issued as U.S. Patent No. 5,986,968, directed at semiconductor devices with programmable latency.<sup>13</sup> One of the inventors of the '968 patent, Hitoshi Kuyama, attended a JEDEC 42.3 meeting on May 7, 1992, at which presentations showing the programmable latency feature of SDRAMs were made, but did not disclose his pending application. *See Perry Decl.*, Ex. 33.

- On December 23, 1994, Micron filed a patent application, which issued on June 11, 1996, as U.S. Patent No. 5,526,320, directed at a "Burst EDO" DRAM.<sup>14</sup> (That application also spawned numerous continuation applications directed at various features of such devices.) On January 17, 1995, one of the inventors of the '320 patent, Brett Williams, made a presentation on Burst EDO DRAMs at a JEDEC DRAM Task Group meeting, but failed to disclose his pending application. *See Perry Decl.*, Ex. 34.

- On November 8, 1996, Texas Instruments filed a patent application (claiming priority to an earlier October 21, 1994, application), which issued as U.S. Patent No. 5,982,694 on November 9, 1999, directed at synchronous DRAMs that output data on both the rising and falling edges of a clock.<sup>15</sup> One of the inventors of the '694 patent,

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<sup>13</sup> Available at: <<http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=/netahtml/srchnum.htm&r=1&f=G&l=50&s1=5986968.WK U.&OS=PN/5986968&RS=PN/5986968>>.

<sup>14</sup> Available at: <<http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=/netahtml/srchnum.htm&r=1&f=G&l=50&s1=5526320.WK U.&OS=PN/5526320&RS=PN/5526320>>.

<sup>15</sup> Available at: <<http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=/netahtml/srchnum.htm&r=1&f=G&l=50&s1=5982694.WK U.&OS=PN/5982694&RS=PN/5982694>>.

Joseph Hartigan, was present at numerous JEDEC 42.3 meetings between late-1996 and mid-1998 at which such a feature of DDR SDRAMs was discussed but failed to disclose his pending patent application. *See* Perry Decl., Ex. 35.

\* \* \*

In sum, it is clear from the evidence that the JEDEC patent policy was so ambiguously defined, inconsistently explained, and inconsistently followed that it does not provide a sufficient basis for concluding that Rambus was required, as a matter of either contract or antitrust law, to make the disclosures that the Complaint alleges Rambus wrongfully did not make. Under these circumstances, no antitrust liability can result from a purported breach of JEDEC's patent disclosure policies.<sup>16</sup>

**II. JEDEC MEMBERS DID NOT RELY ON ANY MESSAGE SUPPOSEDLY CONVEYED BY RAMBUS'S "SILENCE" IN ADOPTING THE SDRAM AND DDR SDRAM STANDARDS.**

Even if Your Honor assumes that the JEDEC patent policy was as broad, and as clear, and as "commonly understood" as the Complaint paints it –



warranted. As explained below, *if* the Complaint's allegations regarding the patent policy are true, then it necessarily follows that all JEDEC members were on notice from 1992 forward that Rambus would *not* comply with the purported requirements of the JEDEC patent policy alleged in the Complaint. What is more, this section will demonstrate both that JEDEC members *were* in fact concerned about Rambus's patent rights and that Rambus's conduct did nothing to assuage those concerns; rather, Rambus's conduct only intensified the JEDEC members' fears. As a consequence, Complaint Counsel *cannot* meet their burden of proving that JEDEC relied in any way on Rambus's purported omissions, and the Complaint must be dismissed.

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about Rambus's patent position; and second, that this false understanding in turn caused JEDEC to adopt the SDRAM and DDR SDRAM standards.

Complaint Counsel must prove both of these causal steps. Like a plaintiff making similar allegations in support of a fraud claim, Complaint Counsel must prove that JEDEC and its members acted in reliance on Rambus's alleged failure to disclose – both in forming a false understanding of Rambus's patent position and in adopting the JEDEC standards that incorporated Rambus's technologies. *See Alicke v. MCI Communications Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997) (citing *Pence v. United States*, 316 U.S. 332, 338 (1941) (federal common law)); *see also Bank of Montreal v. Signet Bank*, 193 F.3d 818, 827 (4th Cir. 1999) (noting that under Virginia law fraud by omission requires a showing that the accused knew “the other party [was] acting upon the assumption that the [concealed] fact does not exist”) (internal quotation marks omitted).

An antitrust plaintiff whose claim is based on misrepresentations or omissions must similarly prove reliance on the alleged misrepresentations or omissions. Case law makes clear, for example, that to prove an antitrust claim based on fraudulent patent procurement, the claimant no

1998) (emphases added).<sup>17</sup>

Any reliance also must be justifiable under the circumstances. *See* Brief for the United States and Federal Trade Commission as *Amici Curiae* in *Ryan v. Telemarketing Assocs., Inc.*, S. Ct. No. 01-1806 (filed Dec. 2002) at 10 (noting the general rule that fraud requires not only that the representations actually be false but also that the misrepresentations be made “for the purpose and with the effect of inducing others to act in justifiable reliance on the misrepresentations,” and stressing the importance of this rule for avoidance of First Amendment problems); *id.* at 14. As explained in one treatise, “[t]he plaintiff’s conduct must not be so utterly unreasonable, in the light of the information apparent to him, that the law may properly say that his loss is his own responsibility.” *Prosser & Keeton on Torts* at 750 (5th ed. 1984). Because the undisputed evidence demonstrates that JEDEC members did not, in fact, rely on Rambus’s alleged nondisclosures, Your Honor need not reach the issue of whether any reliance was justifiable.

The undisputed evidence summarized below demonstrates that there was no reliance in this case. This evidence shows that JEDEC and its members did not act on any mistaken belief that Rambus had no patent interests in the technologies incorporated into

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<sup>17</sup> In *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), the Supreme Court held that one who obtains a patent by fraud on the patent office and thereafter uses the patent to exclude competitors from the market might be found to violate Section 2 of the Sherman Act, 15 U.S.C. § 2. To be clear, Complaint Counsel have not alleged that Rambus obtained its patents through fraud by failing to disclose information *to the patent office*; rather, Complaint Counsel allege that Rambus failed to disclose *to JEDEC*, pursuant to a purported duty to do so, the fact that Rambus had applied for certain patent rights.



Rambus's "silence" lulled JEDEC into adopting standards that utilize Rambus's intellectual property. The uncontroverted evidence demonstrates, however, that JEDEC 42.3 recognized very early that Rambus had sought and might one day assert intellectual property claims over important features contained in the SDRAM and DDR SDRAM standards. The undisputed evidence also shows that JEDEC 42.3 members chose to

In a similar vein, the JEDEC 42.3 representative of Siemens (now Infineon), Willi Meyer, wrote in April 1992 that “[t]he original idea of SDRAM is based on the fundamental ideas of a simple clock input (IBM toggle pin) *and the complex Rambus structure.*” Perry Decl., Ex. 39 (I 252168) (emphasis added). Meyer apparently recognized that the genesis of the SDRAM device raised issues relating to Rambus intellectual property rights. In April 1992, Meyer wrote that Rambus was demanding royalties from Samsung “because of similarity of SDRAMs with the architecture of Rambus memories. IBM is therefore seriously considering purchasing a license . . . as a precaution.” Perry Decl., Ex. 40. In May 1992, when he prepared a chart comparing the “pros” and “cons” of SDRAMs and Rambus DRAMs, one of the two “cons” he listed with respect to SDRAMs was that “2-bank sync may fall under Rambus patents.” Perry Decl., Ex. 41.

Complaint Counsel apparently contend that these early concerns were allayed by Rambus’s alleged efforts to mislead JEDEC members. According to the Complaint, “Rambus’s very participation in JEDEC, coupled with its failure to make required patent-technologies adopted by JEDEC were free of Rambus intellectual property. Complaint, ¶ 71. The undisputed evidence, however, demonstrates that a company’s “very participation” at JEDEC did not convey the message that that company lacked intellectual property interests – certainly not with respect to IBM, Motorola, Rambus, or any other company that expressly declined to comment on its intellectual property. And, in any

event, and critically for this motion, the undisputed evidence demonstrates that Rambus's conduct did *not* lull JEDEC.

On May 6, 1992, JEDEC 42.3 met in New Orleans, Louisiana. Perry Decl., Ex. 14 (JDC 001196). This was Rambus's second meeting as a JEDEC member. During the meeting, IBM representative Gordon Kelley, who also served as the 42.3 subcommittee chairman, asked Rambus representative Richard Crisp if he would care to comment regarding possible Rambus patent claims with respect to two-bank synchronous DRAM designs. Mr. Crisp declined to comment. Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 380); Ex. 42 (Meyer 4/5/01 Dep. at 947-52); Ex. 31 (*Infineon* trial testimony of Mr. Meyer: "The way . . . Mr. Kelley formulated the question was: Do you want to give a comment on this?"); Perry Decl., Ex. 8.

Mr. Crisp's refusal to comment about Rambus's intellectual property rights could not, of course, have lulled JEDEC into believing that Rambus had no intentions to seek or assert such rights. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Perry Decl., Ex. 43 (Landgraf 12/17/02 Dep. at 149-50) (emphases added).

Another JEDEC representative, who was also a committee chair, Farhad Tabrizi, testified that a representative's refusal to comment on his company's patent position would in and of itself raise a red flag:

Q. And if you asked a representative to comment about his company's patents or patent applications, you expected the representative to give you the information; correct?

A. That's right.

\* \* \*

Q. [I]f the company refused to provide their position or any information about the patent position, that would be a violation of JEDEC patent policy, as you understood it?

A. That's correct.

Perry Decl., Ex. 44 (Tabrizi 11/20/02 Dep. at 27-28). Other JEDEC participants agree with this conclusion.<sup>19</sup>

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<sup>19</sup> See, e.g., [REDACTED]



It is also undisputed that Mr. Crisp's refusal to comment did in fact "raise a flag," rather than lull JEDEC into confidence that Rambus lacked potential patent interests in the proposals being considered. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Id.* at 374, 379-80.

Mr. Kelley testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 375.<sup>20</sup>

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<sup>20</sup> Kelley’s references to Motorola patents apparently relate to comments at the May 1992 JEDEC meeting by NEC representative Howard Sussman. Sussman stated that he had reviewed the publicly available copy of Rambus’s International Patent Application and





Rambus's position thus could not have been clearer. In May 1992, at only its second meeting as a member, and nearly a year before the SDRAM standard was adopted, Rambus had openly declined to provide information about its intellectual property. It had also explicitly informed the relevant subcommittee chairman that it would not agree in advance to restrictions on its licensing practices with its intellectual property. Rambus was not, as Complaint Counsel has alleged, a "snake in the grass." Instead, it delivered a message that was clear and unambiguous and that could not have lulled, and did not lull, anyone.<sup>21</sup>

**2. Rambus did nothing to lull JEDEC after the May 1992 meeting and prior to its departure from JEDEC in 1996.**

At no time after the May 1992 JEDEC meeting did Rambus do or say anything to suggest that it had changed the position it had taken at that meeting with respect to patent disclosures and licensing. Instead, as Chairman Kelley has testified, Rambus took the very same position in 1993 or 1994, when Rambus representative Crisp again approached Kelley about making a presentation to JEDEC regarding Rambus's technology:

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<sup>21</sup> Rambus's business model, which emphasized the licensing of intellectual property instead of the manufacture or sale of products, was well known to JEDEC members at the time. For example, H-P's JEDEC representative, Hans Wiggers, testified that, even before Rambus began attending JEDEC meetings, H-P had met with some Rambus representatives and understood its business model:

Q. You understood Rambus was not a manufacturer of memory?

A. Right, they were basically taking ideas wherever they could find them and gathering them as intellectual property.

Perry Decl., Ex. 23 (Wiggers 12/18/02 Dep. at 17).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In the summer and fall of 1995, Rambus again made it clear to JEDEC and its members that it had not changed its position about intellectual property disclosure and licensing. At the May 24, 1995, JEDEC meeting, presentations were made by several JEDEC members regarding a “next generation” memory technology called “SyncLink.” Perry Decl., Ex. 51. Rambus was asked at the meeting to state whether it had patents that related to the SyncLink technology. Perry Decl., Ex. 52. Rambus gave its response at the very next JEDEC meeting, in September 1995, by providing the following written statement:

At this time, Rambus elects to not make a specific comment on our intellectual property position relative to the Synclink proposal. *Our presence or silence at committee meetings does not constitute an endorsement of any proposal under the committee’s consideration nor does it make any statement regarding potential infringement of Rambus intellectual property.*

*Id.* (emphasis added). Rambus’s statement was also published in full in the official JEDEC

Rambus thus *again* put all JEDEC 42.3 members on notice that its “presence or silence” at JEDEC meetings did not “make any statement regarding potential infringement of Rambus intellectual property.” *Id.* In addition, Rambus was in this same time period delivering the same message to the group of JEDEC member companies that were working (under the auspices of a separate standard-setting body called the IEEE) to develop the SyncLink technology. In June 1995, Mr. Crisp sent an e-mail to Hans Wiggers, a longtime JEDEC representative for Hewlett-Packard who had been working on the SyncLink technology. Mr.

*is currently pending and we will not make any comment at all*



Rambus's widely broadcast warnings in the summer and fall of 1995 were more than enough to put JEDEC members on notice regarding any threat Rambus posed.<sup>22</sup> Although many of the members' documents from that period have apparently been destroyed or lost,<sup>23</sup> it is clear that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In January 1996, Micron's concerns about Rambus's intellectual property were reflected in the minutes of the SyncLink Consortium, which Micron had by then joined:

Rambus has 16 patents already, with more pending. Rambus says their patents may cover our SyncLink approach even

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<sup>22</sup> In addition to warnings that Rambus delivered directly at JEDEC and SyncLink meetings, Rambus conveyed a similar message in individual meetings with many of the key players in the DRAM manufacturing industry. Rambus CEO Geoff Tate and Rambus Vice President Allen Roberts held a series of meetings with DRAM manufacturers in Asia in October 1995 who were also Rambus licensees. [REDACTED]

[REDACTED] Perry Decl., Exs. 59 & 60 (Tate 1/22/03 Dep. at 304-25).

<sup>23</sup> See, e.g., [REDACTED]

though our method came out of early RamLink work. Micron is particularly concerned to avoid the Rambus patents, though all of us share this concern.

Perry Decl., Ex. 65.

Others who took a close look at Rambus's intellectual property in this time period included Dave Gustavson, a SyncLink founder, who reviewed several European patent applications that Rambus had filed. Perry Decl., Ex. 66 (Gustavson 1/17/03 Dep. at 32, 40).<sup>24</sup> Mr. Gustavson has testified that he recognized *immediately* upon reviewing the Rambus patent applications that they had a broad scope that would apply to virtually any memory device, but that he believed the applications would never be allowed in light of their breadth:

Well, at that time, as I recall, there were only patent applications available and those were just available for the European applications, and so someone got those, and we looked at them and concluded that it wouldn't be possible to build any kind of device that used electricity and wires that would – you know – there's just no way to work around those if you're going to use electricity and wires. Now, obviously those claims aren't going to be granted, but that was what was in the application . . . .

*Id.* at 32.

In sum, during the entire time that Rambus was a JEDEC member, JEDEC was well aware of potential patent issues involving Rambus's intellectual property. Rambus did nothing that could have lulled JEDEC members into believing that these concerns were alleviated. To the contrary, during that entire time, Rambus consistently and loudly

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<sup>24</sup> Rambus's European patent application, which became public in 1991, had the same written description as the U.S. '898 application. *Rambus v. Infineon*, 2003 WL 187265 at \*1.

delivered a message to its fellow JEDEC members that, given its business model, Rambus was not going to disclose its patent applications, that its “presence or silence” at JEDEC meetings did not say anything about “potential infringement of Rambus intellectual property,” and that it would not agree to any restrictions on the licensing of that intellectual property. As a result, *if* the Complaint correctly sets out the scope and extent of Rambus’s disclosure obligations under the JEDEC patent policy, and *if* the existence of those obligations was – as the Complaint alleges – “commonly understood” at JEDEC, then it necessarily follows that *every* JEDEC member was on notice that Rambus would not comply with those obligations.

**3. Rambus did nothing to lull JEDEC after its departure from JEDEC.**

Rambus attended its last JEDEC 42.3 meeting in December 1995. In March 1996, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*<sup>25</sup>

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<sup>25</sup> The statement attributed to the IBM representative is also evidence that JEDEC members believed that there would be ways – whether because of prior art or cross-licensing of patents – to avoid Rambus’s intellectual property claims.

Regardless of whether Rambus was “ousted” from JEDEC or merely resigned, Rambus’s separation from JEDEC was formalized on June 17, 1996, when Rambus sent a letter to the JEDEC office that stated:

I am writing to inform you that Rambus Inc. is not renewing its membership in JEDEC.

Recently at JEDEC meetings the subject of Rambus patents has been raised. *Rambus plans to continue to license its proprietary technology on terms that are consistent with the business plan of Rambus, and those terms may not be consistent with the terms set by standards bodies, including JEDEC 42.3.* A number of major companies are already licensees of Rambus technology. *We trust that you will understand that Rambus reserves all rights regarding its intellectual property.* Rambus does, however, encourage companies to contact Dave Mooring of Rambus to discuss licensing terms and to sign up as licensees.

To the extent that anyone is interested in the patents of Rambus, I have enclosed a list of Rambus U.S. and foreign patents. *Rambus has also applied for a number of additional patents in order to protect Rambus technology.*

Perry Decl., Ex. 3 (emphases added).

Several JEDEC 42.3 representatives have testified that they understood from Rambus’s June 1996 letter, and its reservation of “all rights,” that Rambus did not intend to comply with JEDEC’s patent policies. For example, the current Chairman of the JEDEC Board of Directors, Desi Rhoden, testified that he recalls the letter said “that [Rambus] did not agree with, nor intend to follow, JEDEC patent policy . . . .” Perry Decl., Ex. 68 (Rhoden 1/24/03 Dep. at 33). Similarly, Mr. Tabrizi, a long-time JEDEC representative and committee chair, testified that he understood from Rambus’s withdrawal letter that Rambus refused to “follow the rules” and that “from that point on

[he] understood that Rambus was not agreeing to abide by JEDEC’s patent policies.”

Perry Decl., Ex. 69 (Tabrizi 3/12/01 Dep. at 328-29).

This same sentiment appears in the official JEDEC minutes of the March 1997 meeting, which state that Rambus had “told JEDEC 42.3 that they do not intend to comply with JEDEC 42.3 patent policies.” Perry Decl., Ex. 70 (JDC 002568). As Mr. Wiggers explained, by March 1997, the members of JEDEC 42.3 “all knew that Rambus was trying to license their intellectual property for a fee, and for royalties, and they had no intention of complying with the JEDEC patent policy.” Perry Decl., Ex. 23 (Wiggers 12/18/02 Dep. at 159).

Further evidence that the JEDEC leadership did not rely on Rambus’s “silence” comes from a March 1998 e-mail by IBM representative Gordon Kelley. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Perry Decl., Ex. 71.

Mr. Kelley explained these views at his deposition:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Perry Decl., Ex. 4 (Kelley 1/10/03 Dep. at 137-38).

In a similar vein, and in language showing no lack of attention to the perceived threat posed by Rambus, [REDACTED]

JEDEC about whether the use of technologies incorporated into the proposed DDR SDRAM standard might infringe Rambus's intellectual property. The minutes of the March 1997 JEDEC meeting reflect that during a presentation regarding an NEC proposal involving DDR SDRAM, a representative stated that "[s]ome on the committee felt that Rambus had a patent on that type of clock design." Perry Decl., Ex. 35 (JDC 002568). The minutes also state that "[o]thers felt that the concept predated Rambus by decades." *Id.*

Hewlett-Packard's JEDEC representative, Hans Wiggers, explained that at the March 1997 meeting, after someone stated that the idea of using double data rate in a memory device had been around for decades, the discussion of Rambus's intellectual property at the meeting essentially ended. Perry Decl., Ex. 23 (Wiggers 12/18/02 Dep. at 159). Mr. Wiggers himself felt strongly that Rambus's use of both clock edges in a memory device was nothing new:

Q. When did you first learn that Rambus was using both the rising edge and the falling edge of the clock in a memory module?

A. I don't know. I think . . . it was probably one of the first things I learned about Rambus.

Q. And at the time you learned that, did you think that was something new?

A. Absolutely not . . . [T]he idea of sending data on both platforms was something already used in SDRAM, it was something we used in scalable coherent interface, SCI . . . . So it was my feeling that Rambus had got the idea from that standards committee, and was taking it as their property.

*Id.* at 26.

This same debate went on internally at JEDEC member companies, [REDACTED]

[REDACTED]





As noted above, the Complaint's allegations of anticompetitive conduct are predicated on Rambus's alleged breach of a disclosure duty, imposed by JEDEC's rules, requiring members to declare whether they held patent interests in technologies being considered for standardization. Complaint, ¶¶ 79-80.<sup>26</sup> The indisputable facts demonstrate

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item number 815. Perry Decl., Ex. 77. Rambus had long since left JEDEC by then. In fact, Rambus had attended its last JEDEC meeting a full year before, in December 1995, and confirmed its withdrawal from the organization by letter in June 1996. Perry Decl., Ex. 3.

Both the district court and the Federal Circuit in *Infineon* concluded on these facts that Rambus had not breached any duty to disclose with respect to the DDR SDRAM standard. In granting Rambus judgment as a matter of law on Infineon's fraud claim with respect to the DDR SDRAM standard, the district court stated that "JEDEC Committee JC-42.3 did not begin working on the standard for DDR SDRAM until December 1996," well after Rambus left JEDEC, and that Infineon had thus failed to prove that Rambus had any duty to disclose as to DDR SDRAM. *Rambus, Inc. v. Infineon Techs. AG*, 164 F. Supp. 2d 743, 765 (E.D. Va. 2001). The Federal Circuit unanimously agreed that the JEDEC disclosure duty regarding the DDR SDRAM standard "did not arise before legitimate proposals were directed to and formal consideration began on the DDR-SDRAM standard," and that this first occurred in December 1996, long after Rambus had withdrawn from JEDEC. *Rambus v. Infineon*, 2003 WL 187265 at \*20. The court affirmed judgment as a matter of law in Rambus's favor on Infineon's fraud claim "[b]ecause Infineon did not show that Rambus had a duty to disclose before the DDR-SDRAM standard-setting process formally began." *Id.* at \*21.<sup>27</sup>

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<sup>27</sup> Although Complaint Counsel have repeatedly referred to the Federal Circuit's ruling as a "split decision," the panel was unanimous in concluding on Infineon's cross-appeal that no duty to disclose ever arose with respect to the DDR SDRAM standard while Rambus was a member of JEDEC. *See id.* at \*33 (Prost, J., dissenting in part) (dissenting only

The additional relevant evidence produced in these proceedings simply confirms that the DDR SDRAM standardization process did not begin at JEDEC until December 1996. For example, in a March 9, 1998, e-mail addressed to the members of JEDEC 42.3,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

not have breached any JEDEC disclosure duty with respect to the DDR SDRAM standard. Because precisely such a breach is an essential predicate for the Complaint's allegations of anticompetitive conduct in the markets for on-chip DLL and dual-edge clock technology, as well as the market for those two technologies combined with programmable CAS latency and programmable burst length, partial summary decision is warranted.

### **CONCLUSION**

The undisputed evidence demonstrates unequivocally that the governing EIA and JEDEC patent policies did not set forth a disclosure duty with sufficient clarity to form the basis of antitrust liability. Moreover, even if that were not the case, in adopting both the SDRAM and DDR SDRAM standards, JEDEC 42.3 members recognized the threat Rambus's portfolio of inventions posed to the standards and, in the face of that knowledge, chose to rely on their belief that Rambus would be unable to obtain valid patent rights to the technologies in issue. As a result, Complaint Counsel cannot prove causation and reliance here. For each of these reasons, Your Honor should enter a summary decision dismissing the action.

At the very least, there is no genuine issue as to any of the facts establishing that formal standardization work on the DDR SDRAM standard began long after Rambus left JEDEC. Rambus could not have breached any JEDEC disclosure duty with respect to the DDR SDRAM standard, and as a result Rambus cannot be found to have engaged in anticompetitive conduct with respect to three of the five technology markets alleged in the Complaint. Partial summary decision is therefore warranted with respect to those technology markets.

DATED: February \_\_\_\_, 2003      Respectfully submitted,

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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In the Matter of )  
 )  
 ) Docket No. 9302  
RAMBUS INCORPORATED, )  
 )  
 a corporation. )  
 )  

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**CERTIFICATE OF SERVICE**

I, Jacqueline M. Haberer, hereby certify that on February 28, 2003, I caused a true and correct copy of the public version of the *Memorandum in Support of Respondent Rambus Inc.'s Motion for Summary Decision* to be served on the following persons by hand delivery:

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