PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of **RAMBUS INC.,** **a corporation.**	**Docket No. 9302**

MOTION BY RESPONDENT RAMBUS INC. FOR PRE-HEARING DETERMINATION OF ORDER OF ISSUES TO BE TRIED; MEMORANDUM IN SUPPORT THEREOF

Respondent Rambus Inc. ("Rambus") respectfully submits this motion pursuant to Rules of Practice 3.41(b)(3) and 3.43(b)(1) for a pre-hearing determination of the order of issues to be tried. The Rules of Practice afford administrative law judges with broad discretion to expedite proceedings by determining the order in which issues will be resolved. This authority is similar to the discretion conferred upon district judges by F.R.Civ.Pro. 16(c)(4) and 42(b), which are often invoked to defer "costly and possibly unnecessary proceedings pending resolution of potentially dispositive preliminary issues." *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002).

As explained in the attached Memorandum, the nature and scope of the disclosure obligations, if any, that were imposed upon Rambus by virtue of its membership in JEDEC are fundamental, threshold issues whose resolution could dispose of the proceeding on its merits and would, at a minimum, streamline and expedite the

subsequent presentation of evidence on the complex technical issues that divide the parties.

For these reasons, as set forth more fully in the attached Memorandum, Rambus requests that Your Honor enter the [Proposed] Order Determining Order of Issues to Be Tried, filed herewith.

DATED: March ___, 2003 Respectfully submitted,

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MEMORANDUM IN SUPPORT OF RESPONDENT RAMBUS INC.'S MOTION FOR PRE-HEARING DETERMINATION OF ORDER OF ISSUES TO BE TRIED

I.

the reasons discussed in more detail below, Rambus requests that Your Honor enter the [Proposed] Order Determining Order Of Issues To Be Tried, filed herewith.

II. ARGUMENT

A. The Rules And Case Law Strongly Support The Early Resolution Of Potentially Dispositive Issues.

Under the Rules of Practice, an Administrative Law Judge may order a separate hearing of "any claim" or of "any separate issue" when such a hearing "will be conducive to expedition and economy." Rule of Practice 3.41(b)(3). *See also* Rule 3.43(b)(1) (authorizing the Administrative Law Judge to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evabl0Tce

easier, dispositive question." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 (9th Cir. 2001). In *Jinro*, for example, a case involving breach of contract, fraud and RICO claims, the trial court had ordered that "an initial determination should be made whether the parties had entered into a valid agreement and, if so, what that agreement entailed." *Jinro*, 266 F.3d at 998. The Court of Appeals held that the lower court's "approach was a reasonable way to promote clarity and judicial economy, because the validity of the contract directly informed the resolution of the other claims." *Id*. *See also Cook v. United Service Auto. Ass'n.*, 169 F.R.D. 359, 361 (D. Nev. 1996) (same).

In short, both district courts and administrative law judges have "broad discretion" to defer "costly and possibly unnecessary proceedings pending resolution of potentially dispositive preliminary issues." *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002); *Dick*, 290 F.3d at 1363. For the reasons set out below, Your Honor should enter such an order here.

B. <u>The Early Resolution Of Issues Relating To The Nature And Scope Of The JEDEC Patent Policy Would Be Highly Conducive To Expedition And Economy</u>.

Here, as in *Jinro* and the other cases described above, an early resolution of issues relating to the nature and scope of any disclosure obligations imposed by the JEDEC patent policy would "promote clarity and judicial economy" and would substantially expedite these proceedings. *Jinro*, 266 F.3d at 998. The Complaint in this matter

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"related to" the work of the relevant JEDEC committee. Complaint, ¶¶ 21, 24. The Complaint further alleges that JEDEC members were also required to disclose their intent to file or amend patent applications. *See id*. at ¶¶ 47, 55.

The Complaint does not allege that Rambus's purported obligation as a JEDEC member to disclose its patents, patent applications or intent to file or amend such applications arises from antitrust law or from overriding principles of public policy. Instead, the Complaint alleges that those obligations were assumed by Rambus by contract when it joined JEDEC. *See* Complaint, ¶ 15. The Complaint does not, however, allege the existence of any *written* contract between Rambus and JEDEC that contains the patent disclosure obligations that Rambus is alleged to have breached. Instead, the Complaint alleges that "the policies, procedures, and practices existing within JEDEC . . . imposed certain basic duties" on members and that "the existence and scope of [a member's] disclosure obligations were commonly known within JEDEC," apparently as a result of oral discussions at JEDEC meetings. *Id*., ¶¶ 21, 24.

Rambus has filed a Motion for Summary Decision that contends that the JEDEC patent policy was so poorly defined and inconsistently applied that any breach of the obligations it purportedly imposed could not give rise to antitrust (or even contractual) liability.[1] If Your Honor were to deny Rambus's pending motion, the matter would

[1] Rambus's motion also seeks summary decision or partial summary decision on the ground that: (1) JEDEC's leadership and its members were well aware that Rambus might assert intellectual property rights with respect to features incorporated in JEDEC standards; and (2) Rambus could not have breached any duty of disclosure with respect to the DDR SDRAM standard because the DDR standardization process did not begin until after Rambus had left JEDEC.

proceed to a hearing. At that hearing, Complaint Counsel would bear the burden of proving that the JEDEC patent policy was as broad, as clear and as commonly understood as the Complaint alleges. *In addition*, Complaint Counsel would also bear the burden of proving, for each of the purported "technology markets" at issue, *at least* the following elements:

(1) that Rambus had issued patents, pending patent applications, or an intent to file or amend such applications (depending on how the patent policy is defined) that covered or related to the particular technology or feature in question;

(2) that Rambus deliberately failed to disclose information called for by the JEDEC patent policy, with the intent to monopolize a relevant market;

(3) that because of Rambus's purported failure to comply with JEDEC's policy, JEDEC and its members did not have reason to know of or suspect Rambus's potential patent interests when the relevant standards were adopted;

(4) that at the point in time when Rambus supposedly should have disclosed its intellectual property claims or intentions to JEDEC, there were feasible, non-infringing alternatives with respect to *each* feature or technology, and that JEDEC would have adopted each of these alternative features or technologies;

(5) that the purported alternative features or technologies would, when used in combination, be both compatible with one another and less expensive than features or technologies that required royalty payments to Rambus;

(6) that DRAM manufacturers were "locked in" to producing JEDEC-compliant SDRAM devices to such a degree that they could not switch to a noninfringing

alternative technology to avoid Rambus's patent claims;

(7) that, once it adopted the SDRAM standard in 1993, JEDEC was "laho:3uzh"

resolution of these issues will require a substantial amount of highly technical and detailed expert testimony. As just one example, Rambus has filed herewith the portions of the parties' expert reports that relate to the hotly disputed question of whether there were at the relevant times commercially feasible, non-infringing alternatives to just one of the features or technologies at issue, programmable burst length. *See* Declaration of Steven M. Perry ("Perry Decl."), exs. A-B.

Rambus does not suggest that Your Honor would be unable, in time, to resolve the many disputes between the parties' experts regarding the existence and feasibility of alternative technologies or the other technical issues addressed in the experts' reports. The point of this motion is that *if* there are threshold issues whose resolution would eliminate the need to address these complex issues, or whose resolution would expedite the examination of these complex issues, the threshold issues should be resolved first. For example, if Your Honor were to decide in the initial phase of the hearing that disclosure of patent applications was voluntary rather than mandatory -- as much of the evidence (including JEDEC's own Board minutes) suggests and as many of the witnesses (including JEDEC committee chairs) have stated -- then the matter could be concluded at this point. If, on the other hand, Your Honor were to decide that Rambus was obligated to disclose pending patent applications that related in some way to the JEDEC standardization process, but that it did not have to disclose an *intent* to file or amend an application in the future, the experts and other witnesses would be able to focus closely in the second phase of the hearing on the particular claims that were contained in Rambus's pending patent applications at the relevant times. Or, as a third alternative, if Your Honor

were to decide that the JEDEC disclosure obligations changed over time, as some witnesses have testified, the experts and other witnesses would similarly be able to focus

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