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

**PUBLIC**

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| **In the Matter of**<br><br>**RAMBUS INC.,**<br><br>**a corporation.** | **Docket No. 9302** |

Respondent Rambus Inc. ("Rambus") hereby moves *in limine* for an order excluding certain opinion testimony of Complaint Counsel's designated expert witness, R. Preston McAfee, from the hearing set to begin April 30, 2003. The grounds for the motion are set forth below.

## I. INTRODUCTION AND BACKGROUND

Complaint Counsel have served two reports from Dr. McAfee. A copy of his original report, served on or about December 9, 2002, is attached as Exhibit A to the Appendix of Non-Public Exhibits filed herewith ("Appendix") and a copy of his rebuttal report, served on or about January 27, 2003, is attached as Exhibit B to the Appendix. As these reports make clear, Complaint Counsel, at least originally, viewed Dr. McAfee as their omnibus expert. Among other things, his reports purport to set forth opinions regarding Rambus's state of mind, and the state of mind of various Rambus employees; the duty to disclose patents and patent applications imposed by JEDEC's rules; the expectations of JEDEC members regarding disclosure of patents and patent applications; the scope of Rambus's patent claims, that is, what technology was covered by Rambus's patent claims; and the cost and performance of various technologies, as compared to the cost and performance of various technologies covered by Rambus's patents. When Dr. McAfee was deposed on March 21, 2003, however, he admitted that he had no basis on which to opine as to the issues just identified. In some instances he conceded he had no factual basis for such opinions; in other instances he acknowledged that he had no expertise.

For the reasons set forth below, Dr. McAfee should be precluded from proffering at

the hearing in this matter any opinions as to the following issues:

- Rambus's state of mind, and the state of mind of any of its current or former employees;

- What duty to disclose patents and/or patent applications was imposed by JEDEC's rules in effect during the time that Rambus employees attended JEDEC meetings;

- What the expectations were of JEDEC's members regarding what patents and/or patent applications would be disclosed during the time that Rambus employees attended JEDEC meetings;

- Whether claims in Rambus's patents or patent applications covered any particular technology utilized in DRAMs; and

- What were the cost and performance of various "alternative" technologies as compared to the cost and performance of the technologies covered by Rambus's patents.

## II. ARGUMENT

### A. Dr. McAfee's Opinion Testimony Regarding Rambus's State of Mind Is Inadmissible Because He Is Not Qualified To Opine About Rambus's Subjective Intentions, Beliefs, Knowledge, And Motivations.

#### 1. Dr. McAfee Purports To Express Numerous Opinions About Rambus's State Of Mind.

The Complaint in this matter alleges that Rambus has monopolized or attempted to monopolize certain markets for technology related to dynamic random access memory ("DRAM") in violation of § 5 of the FTC Act. As recognized in a previous Opinion in this matter, the Complaint's "core allegation" is that "through omissions, Rambus intentionally misled the members of JEDEC with regard to the possible scope of Rambus's pending or future patent applications, in violation of the purported JEDEC patent disclosure policy. Complaint at 2, 47-55, 70-80." See Opinion Supporting Order Denying Motion of Mitsubishi Electric & Electronics USA, Inc. to Quash or Narrow

Subpoena, November 18, 2002, p. 4. Moreover, to prevail on its charge of monopolization, Complaint Counsel must demonstrate that Rambus acted willfully to acquire monopoly power. See Von Kalinowski et al., Antitrust Laws and Trade Regulation § 25.02. To prevail on its charge of attempted monopolization, Complaint Counsel must demonstrate that Rambus acted with specific intent to monopolize. See *id*. at § 26.01[1].

In an effort to meet their burden, Complaint Counsel retained Dr. McAfee "to conduct an economic analysis of certain actions allegedly undertaken by Rambus, and to develop expert opinions and conclusions relating to the nature of Rambus's alleged conduct and the effects or potential effects, if any, of such conduct on competition." Rebuttal Expert Report of R. Preston McAfee, ¶ 1 (included in Appendix as Exhibit B). Included among the proposed opinion testimony set forth in Dr. McAfee's original report (Exhibit A in Appendix) were many conclusions about Rambus' state of mind during the relevant time period. For example, Dr. McAfee opined that:

> "Rambus at times deliberately sought to convey through the actions and statements of its representatives that it would comply with JEDEC's rules regarding the disclosure of any relevant IP, when in fact Rambus had no such intention." Expert Report of R. Preston McAfee, ¶ 16.
>
> "Rambus had IP that it knew or believed related to standards being developed at JEDEC. Rambus knowingly and deliberately did not disclose its IP in accordance with JEDEC policy." *Id*. at ¶ 28.
>
> "Rambus's overall strategy appears to have been motivated in significant part both by a desire to collect royalties on SDRAM and DDR SDRAM and a desire to raise the costs of these technologies, against which Rambus's proprietary RDRAM technology competes." *Id*. at ¶ 217.

Dr. McAfee's rebuttal report contained similar – perhaps even bolder –

testimony, such testimony is inadmissible if it does not meet two related requirements: (1) it must be based on the special knowledge of the expert; and (2) it must be helpful to the finder of fact. See Daubert v. Merre

held by an expert are "expert opinions." See United States v. Benson

Like a neurologist opining about the cause of an injury, or an economist or textile expert opining about the ethics or legality of a particular business practice, or a law enforcement officer opining about the state of mind of a suspect, Dr. McAfee does not speak from his expertise when he opines about Rambus' subjective state of mind. Watkins, 52 F.3d at 771; Benson, 941 F.2d at 604; Mid-State Fertilizer, 877 F.2d at 1339-40; Lithuanian Commerce Corp., 177 F.R.D. at 260. His testimony on this subject accordingly is inadmissible.

### 3. Dr. McAfee's Opinions About Rambus's State Of Mind Are Also Inadmissible Because They Would Do Nothing That Your Honor Cannot Do For Himself.

Where, as here, an expert's opinion is informed not by his special expertise but rather by the expert's common sense or human intuition, the opinion is inadmissible not only for lack of qualification, but also because it does nothing for the finder of fact that he could not do for himself. See Fed. R. Evid. 702 advisory committee's note (urging as a measure of admissibility "the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute") (quotations omitted); see also Salem v. United States Lines Co., 370 U.S. 31, 35 (1962); United States v. Cruz, 981 F.2d 659, 664 (2d Cir. 1992) (holding expert testimony is inadmissible unless subject matter has "esoteric aspects reasonably

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one of a short list of "subject matters that the courts have held to be committed exclusively to the finder of fact and thus not amenable to expert testimony." See Weinstein's Federal Evidence § 702.03[3]

defendant medical product manufacturer's conduct was "willful and wanton" for the same reason).

Because Dr. McAfee's testimony regarding Rambus's state of mind would be nothing but an attempt to substitute his inferences and intuitions for Your Honor's own inferences and intuitions, it should be excluded.

### B. Dr. McAfee's Opinion Testimony Regarding What Patents Or Patent Applications Were Required By JEDEC's Rules To Be Disclosed Is Inadmissible Because, By His Own Admission, He Is Not Qualified To Opine Regarding This Issue.

As noted above, many of the opinions set forth in Dr. McAfee's two reports are premised on his opinion as to whether Rambus complied with a duty to disclose patents or patent applications that was imposed by JEDEC's rules. See *supra* at 3-4. However, at

discussion going on at that time." Tr. at 73. As it turns out, Dr. McAfee's conclusions as to what the expectations were of JEDEC members are critical to his opinions, because he was quite firm that if Rambus had acted in "accordance with the expectations of JEDEC members," his "conclusions [would] be overturned." Tr. at 78.

But Dr. McAfee has no expertise or training that enables him to testify to what expectations were held by JEDEC members. Just as he cannot testify to the state of mind of Rambus, so can he not testify to the state of mind or expectations of JEDEC members. See *supra* at 4-9. The grounds previously discussed at length compel the conclusion that Dr. McAfee should not be permitted to testify to the expectations of JEDEC members, whether individually or collective.

But there is more. Dr. McAfee has no factual basis whatsoever for any "opinion" regarding the expectations of JEDEC members. For example, he conceded at his deposition that he did not know if what he assumed were the members' expectations had ever been set forth in writing.

> "I think there's an understanding among the JEDEC members, and we've looked at the – at the – at this document. But is it in writing specifically? I don't know.
>
> * * * *
>
> Let me say first that what's in writing changes over time. I think I should see if I can look up precisely what is in – I don't specifically recall what's in writing and I'm not finding it when I look through this section."

Tr. at 168.

He also acknowledged that he had seen no evidence of conduct consistent with what he was prepared to opine were JEDEC members' expectations regarding disclosure

cover the subject matter, we expected you to disclose it"?

Mr. Royall: Can I hear that back?

to opine on this issue, although he purports to do so.[6]

Obviously, nothing in Dr. McAfee's training or experience as an economist qualifies him express opinions about the scope of patent claims. Moreover, he concedes that he is not qualified to render such opinions.

> "I did at one time look at one of Rambus's patents but not with the purpose of establishing, does this cover the – the technologies at issue, and in particular, I don't think I'm personally equipped to be able to look at a patent and say, this covers a technology such as programmable CAS latency.
>
> * * * *
>
> I don't know that I could look at Rambus's patents and come to a conclusion about whether they have – they cover any specific technologies. That's not my role as an economist."

Tr. at 31, 33.[7]

Going even further, Dr. McAfee concedes that he has no basis on which to disagree

> "I cannot think of a single instance where I'm relying on someone's opinion about Rambus's – the scope of Rambus's patent claims that is in – that is contrary to the majority opinion of the federal circuit …."

Tr. at 103.[8]

Thus, Dr. McAfee should not be permitted to testify to any opinion regarding the scope of Rambus's patent claims, nor should he be permitted to rely on the opinion of any other expert that would be contrary to the majority opinion of the Federal Circuit. His opinions must rise or fall, quite reasonably in fact, on the Federal Circuit's views as to the scope of Rambus's patent claims.

### E. Dr. McAfee Should Not Be Permitted To Testify To The Cost And Performance Of Various "Alternative" Technologies As Compared To The Cost And Performance Of Technologies Covered By Rambus's Patents.

In his original report, Dr. McAfee describes four distinct product markets, and a cluster product market. Expert Report of R. Preston McAfee, ¶¶ 147-197. In so doing, he describes certain technologies as commercially viable alternatives to the technologies invented by Rambus. See, e.g., *id*. at ¶¶ 150. 152-53, 159, 163-64. Not surprisingly, he recognizes that the commercial viability of these "alternative" technologies depends on the level of performance they provide, and their cost. In his rebuttal report, Dr. McAfee goes even further, taking cost data provided by Mr. Geilhufe, one of Rambus's experts, and using that data (after manipulation) to suggest what the cost differentials are between technologies invented by Rambus and the "alternative" technologies postulated by Dr.

[8] In fact, Dr. McAfee acknowledges that he does not rely on the work of any expert to establish the scope of Rambus's patents. Tr. at 32 ("I'm not relying – well – I'm not relying on the work of any expert to establish that Rambus's patents cover programmable CAS latency.")

McAfee. Rebuttal Report of R. Preston McAfee, ¶¶ 16-34. However, Dr. McAfee provides no cost estimates of his own. Although it *may* (or may not) be appropriate for Dr. McAfee to rely upon the cost estimates of Mr. Geilhufe, he should not be permitted to testify at trial to any other cost estimates because he has no factual basis for doing so. See Tr. at 224-25.

Dr. McAfee also testified at his deposition that he has not made any effort to quantify the technical differences or performance differences between the technologies invented by Rambus and the alternative technologies postulated by Dr. McAfee. Tr. at 231-38. After much back and forth, Dr. McAfee admitted that he had not quantified the performance differences, although he did contend that he had performed a market-definition analysis.

> "I do not give a dollar value for any of the technologies, which I believe actually is an answer you've already gotten from me earlier. I don't give a specific dollar value for any of the technologies. However, I have performed a market-definition analysis."

Tr. at 235-36. Dr. McAfee then went on to testify that

> "JEDEC is an organization composed of a large variety of different members with different company – from different companies. They have differing applications in mind. They have differing sets of customers that they're serving. They have different technologies at their manufacturers. Those companies are going to have different evaluations of the performance differences, and to suggest that there's some method of saying 'the performance difference,' which I believe was a phrase in your question, it strikes me as being misguided."

Tr. at 236-37. When then asked if he had performed any analysis in an effort to model how any particular JEDEC member had analyzed various technologies from a performance

point of view, Dr. McAfee conceded that he had not. Tr. at 237-38.

Having not quantified costs or performance differences between the technologies invented by Rambus and the alternative technologies he postulates, and having no factual basis on which to do so, Dr. McAfee should not be permitted to testify to the relative cost or performance of "alternative" technologies as compared to the cost and performance of the technologies invented by Rambus.

## III. CONCLUSION

For the foregoing reasons, Rambus respectfully requests that Your Honor grant its motion *in limine* and enters an order precluding Dr. McAfee from testifying at the hearing in this matter on any of the following issues:

- Rambus's state of mind, and the state of mind of any of its current or former employees;
- What duty to disclose patents and/or patent applications was imposed by JEDEC's rules in effect during the time that Rambus employees attended JEDEC meetings;
- What the expectations were of JEDEC's members regarding what patents and/or patent applications would be disclosed during the time that Rambus employees attended JEDEC meetings;
- Whether claims in Rambus's patents or patent applications covered any particular technology utilized in DRAMs; and
- What were the cost and performance of various "alternative" technologies as compared to the cost and performance of the technologies covered by Rambus's patents.

DATED: March ___, 2003 Respectfully submitted,

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