

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

PUBLIC VERSION

In the matter of

company they had founded called Rambus. Complaint Counsel, however, has no basis to agree to the following characterization of the technology in the application as “describing *revolutionary* computer-memory technologies they had invented 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.” (Emphasis added.)

Rambus Material Fact No. 2

2. The key innovations disclosed in the written description in the ‘898 application included forms of technologies later called programmable latency, variable burst length, dual-edge clock (producing a double data rate, or “DDR”) operation, and 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. *Rambus Inc. v. Infineon Techs. AG*, ___ F.3d ___, 2003 WL 187265 at *20-21 (Fed. Cir. Jan. 29, 2003) (“*Rambus v. Infineon*”).

Complaint Counsel agrees that certain technologies disclosed in its ‘898 application were later recognized to include the referenced terms. Complaint Counsel lacks sufficient knowledge to agree with the characterization that these are “key technologies,” though Rambus has brought patent infringement actions against certain DRAM manufacturers. Complaint Counsel notes, however, that Rambus presently claims that these terms are “vague and ambiguous” and open to wide interpretation. *See, e.g.*, Rambus’s Response Complaint Counsel’s Request For Admissions (“RFAs”), filed on February 7, 2003 and supplemented on March 12, 2003: “programmable latency” (*e.g.*, RFAs No. 149), “burst length” (*e.g.*, RFAs No. 138), “delay locked loop” (*e.g.*, RFAs Nos. 118, 119, 120), “DRAM chip” (*e.g.*, RFAs No. 132). Further, during a meet and confer with Complaint Counsel on March 4, 2003, the ambiguity of these and other terms arose and Rambus’s Counsel maintained its position that these terms were open to wide interpretation.

Rambus Material Fact No. 3

3. Rambus chose not to become a manufacturer of DRAMs. Instead, Rambus continued to develop its technology and to make that technology available for license by manufacturers industry-wide, together with testing, design, and implementation services.

Complaint Counsel lacks sufficient information to agree to the characterization that Rambus “chose not to become a manufacturer of DRAMs” but “instead, that Rambus continued to develop its technology.” Complaint Counsel agrees that Rambus licenses its RDRAM technology for use by manufacturers industry-wide, together with testing, design, and implementation services.

Rambus Material Fact No. 4

4. This business model depends upon intellectual property (primarily patent protection) to help generate royalties and licensing fees, which, along with service fees, are the company’s sole sources of income.

As Rambus states in Material Fact No. 3, its business is the licensing of technology. Various internal Rambus documents support this material fact. *See, e.g.*, Rambus Inc. 1992-1997 Business Plan, dated June 1992 (R46394) [Tab 92].

B. JEDEC.

Rambus Material Fact No. 5

5. There exists a standard-setting organizations for semiconductor devices called the Joint Electron Device Engineering Council (“JEDEC”), which was (until recently) an unincorporated division of the Electronic Industries Association (“EIA”), governed by EIA policies.

Complaint Counsel has no issue with Rambus’s claim in Material Fact No. 5.

Rambus Material Fact No. 6

6. The particular JEDEC committee most 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, IBM, Texas Instruments, Hewlett-Packard, and many others. Perry Decl., Ex. 1.

Complaint Counsel agrees that the JEDEC 42.3 subcommittee is involved in this matter, along with other JEDEC committees and organizations such as EIA, TIA, and ANSI. Complaint Counsel, however, lacks sufficient information to agree to the characterization that this particular JEDEC organization is the one that is “most involved” in this matter. Complaint Counsel agrees that the members cited by Rambus are accurate – if only a selected few. Most notably omitted is Rambus itself

Rambus Material Fact No. 11

11. The Complaint also 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 at ¶ 27-28.

Complaint Counsel has no issue with Rambus’s assertion in Material Fact No. 11.

C. The EIA/JEDEC Patent Policy.

Rambus Material Fact No. 12

12. According to John Kelly, formerly General Counsel of EIA and now President of JEDEC, the patent disclosure policy with which JEDEC members were required to comply during Rambus’s membership in JEDEC was set forth in “two EIA manuals,” referred to as the *Manual for 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. See Perry Decl., Ex. 9 (Kelly 1/9/01 Dep. at 26:5-11).

Rambus mischaracterizes John Kelly’s testimony at the January 9, 2001 deposition. Indeed, Rambus is selectively carving out only a portion of Mr. Kelly’s testimony. The lines cited by Respondents include only the following:

A. As best I can recall the patent policy was reduced to writing in two EIA manuals, one was the style manual which, I'm going to look at my cribs here. The style manual was EP-7A and the other document would have been the EI manual for committee chairman,

subcommittee chairman, work group chairman et cetera, which was EP-3-F. (Kelly (1/9/01) Dep. at 26:5-11, *Rambus v. Infineon*)

The entire citation, including the question, reveals a very different reality than Rambus contrived to represent:

Q. And what writings would one look to, to find the patent policy in 1991?

A. As best I can recall the patent policy was reduced to writing in two EIA manuals, one was the style manual which, I'm going to look at my cribs here. The style manual was EP-7A and the other document would have been the EI manual for committee chairman, subcommittee chairman, work group chairman et cetera, which was EP-3-F. The patent policy is identical to the patent policy that is promulgated by the American National Standards Institute. So, and EIA is accredited by ANSI so the patent policy would be reflected there as well. (Kelly Dep. (1/9/01) at 26:3-15, *Rambus v. Infineon*) (emphasis added).

As is clear from the *entire* citation, John Kelly testified that in 1991 only (one year of six during Rambus's membership in JEDEC) the documents he could best recall were the two EIA manuals Respondent noted. *Id.* The patent policy was also reflected in ANSI documents. *Id.* Furthermore, as John Kelly testified elsewhere, from 1991 to 1996, other documents also contained the JEDEC policy. For example, Mr. Kelly's testimony at his February 26, 2003 deposition outlined the various manuals that reference and incorporate the patent disclosure policy in 1995. *See* Kelly Dep. (2/26/03) at 105:21 to 109:25, *In the Matter of Rambus Inc.* [Tab 55].

Rambus Material Fact No. 13

13. At least prior to 1998, the EIA policies governed the conduct of JEDEC meetings and the obligations of its members. JEDEC's relationship with EIA changed in 1998, when JEDEC became a more autonomous entity. *See* Perry Decl., Ex. 4 (Kelley 1/10/03 Dep. at. 62:16-24, 63:18-20).

Complaint Counsel lacks sufficient information to agree to the characterization that JEDEC was "governed" by "the EIA policies." JEDEC incorporates, by reference, the current edition of the

EP-3-F policy. JEDEC0009341 at 63. In 1981, as Rambus has previously noted, the EIA policy contained the following language, explicitly describing the disclosure obligation:

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. Rambus's Motion for Summary Decision (p. 19) (italics added).

By 1993, much of the same language, plus a few clarifying additions, was written in the JEP 21-I manual, again explicitly describing the same disclosure obligation:

While there is no restriction against drafting a proposed standard in terms that include the use of a patented item** if technical reasons justify the inclusion, committees should ensure that *no program of standardization shall refer to a product on which there is a known patent unless all the relevant technical information covered by the patent is known to the formulating committee, subcommittee, or working group.* If the committee determines that the standard requires the use of patented items, then the *committee chairperson must receive a written assurance from the organization holding rights to such patents that a license will be made available without compensation to applicants desiring to implement the standard, or written assurance that a license will be made available to all applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.* (Italics added).

** - For the purpose of this policy, the word “patented” also includes items and processes for which a patent has been applied and may be pending.

Kelly Exhibit 12 (JEDEC0009323 at 9341). [Tab 15].

Rambus Material Fact No. 15

15. Mr. Kelly has also explained that JEP 21-I did *not* contain “the JEDEC patent policy” and was in some respects “broader than is required under the patent policy.” Perry Decl., Ex. 9 (Kelly 1/9/01 Dep. at 215-217).

Complaint Counsel disagrees with Rambus’s claim and notes that Rambus continues to mischaracterize Mr. Kelly’s testimony from January 9, 2001 with regard to “the JEDEC patent policy.” *See also* Complaint Counsel’s Response to Material Fact No. 12. Mr. Kelly’s recent

testimony identifies the various locations where the patent policy is found in the JEP21-I Manual. Kelly Dep. (2/26/03)107:16 to 108:15, *In the Matter of Rambus Inc.* [Tab 55]. With regard to Mr. Kelly's previous testimony, as cited by Rambus, he distinguishes his testimony with references *either to* patent disclosure policy or patent licensing policy issues. John Kelly explained that under the EIA/JEDEC rules there is an "absolute requirement" for all JEDEC members not only to disclose, but also to give licensing assurances – *i.e.*, to commit to licensing on fair and non-discriminatory terms – any patents or patent applications relating to technologies that are "required" to be used by a JEDEC standard. Kelly Dep. (1/10/01) at 205, *Rambus v. Infineon*.

It was Mr. Kelly's unmistakable testimony that the duty to disclose within JEDEC extended broadly to patents or pending patents that "might be involved in the work" being undertaken by JEDEC. But Rambus is seeking to support the opposite contention that this is not the governing disclosure rule. Rambus has doctored up John Kelly's testimony by omitting certain key language in a manner calculated to convey – to someone who has seen only Rambus's excerpt and not the whole deposition – the false impression that Mr. Kelly said something he in fact did not say. Here is a portion of the same excerpt from Kelly's testimony:

Q. Now let me go back, is the JEDEC participant after October of 1993 in your view required to inform the meeting of any "knowledge the participant may have of any patents or pending patents that might be involved in the work they are undertaking" [quoting 9.3.1] at risk of violating the JEDEC policy?

A. Is anyone who fails to comply with 9.3 at risk of violating the patent policy?

Q. Not just at risk, violating it by not complying with sentence 1 of paragraph 9.3.1?

A. No, they're violating 9.3.1.

Q. And is that indeed the JEDEC patent policy?

A. No, that is not indeed the JEDEC patent policy. The JEDEC patent policy isn't the policy that's repeated, we've been talking

about for the last two days. The

testimony, has described the 1994 JC-42 Manual as saying “something about applications being requested;” however, “[i]t wasn’t really an official document.” Infineon Trial Tr. (5/4/01) at 53:5-12, *Rambus v. Infineon*. Complaint Counsel admits that Material Fact No. 16 accurately quotes the term “rigidly adheres” as appearing in the JC 42 Manual. However, Complaint Counsel submits that this language cannot be properly understood except by reference to the document as a whole, which speaks for itself. The full quote, found on the page is entitled “JEDEC Committees JC-42 & JC-16 Operating Procedure, Draft 5,” is distinguished from Rambus’s characterization above and is as follows: “Committees adhere rigidly to the EIA patent policy as given in EIA publication EP-7-A, August 1990”

Rambus Material Fact No. 17

17. 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).

Complaint Counsel admits that Material Fact No. 17 correctly quotes a portion of the language from the cited document. However, Complaint Counsel submits that this language cannot be properly understood except by reference to the document as a whole, which speaks for itself.

Rambus Material Fact No. 18

18. 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).

Complaint Counsel admits that Material Fact No. 18 correctly quotes a portion of the language from the cited document. However, Complaint Counsel submits that this language cannot be properly understood except by reference to the document as a whole, which speaks for itself.

with the unanimous views of the *Infineon* jury, the *Infineon* trial judge, and the Federal Circuit dissent and the Federal Circuit majority in *Infineon*. That is, Rambus seeks to protest an issue that all of these diverse fact finders in the *Infineon* suit actually agreed on. *See generally* Complaint Counsel’s Memorandum in Opposition to Respondent Rambus Inc.’s Motion for Summary Decision.

Rambus Material Fact No. 20

20. In October 1993, JEDEC issued a revised version of its *Manual of Organization and Procedure*, JEP 21-I. Perry Decl., Ex. 17. The earlier version, JEP 21-H, had 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-A and EP-3-F as the governing statement of the patent policy, but also included, for the first time, an express reference to an obligation on the part of *committee chairpersons* to “call attention to the obligation of all participants to inform the meeting of any knowledge they may have of any patents, or pending patents, that might be involved in the work they are undertaking.” Perry Decl., Ex. 17 (§ 9.3.1).

It is unclear whether Rambus read any of the EIA policy manuals, the JC 42 Members’ Manual or JEP 21-I before claiming that those documents did not contain the disclosure obligations.

Compliant Counsel notes that the October 1993 JEP 21-I manual contains nearly the identical language that Rambus cited in § 8.3 of the 1981 EIA EP-3-F policy, contradicting its assertion that an obligation to disclose for the first time (“committee chairperson” v. “committee chairman”). JEDEC0009341 at p. 19. In 1981, the EIA policy contained the following language, explicitly

willing to license applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination. Rambus's Motion for Summary Decision (p. 19) (italics added).

information in each area is available from the EIA Legal Guides.” Complaint Counsel agrees that the viewgraphs contained in Appendix E are similar to the language of the section 3.4 of EP-7-A.

Rambus Material Fact No. 22

22. There is no evidence that Rambus was provided with a copy of JEP 21-I while it was a JEDEC member. In addition, the “viewgraphs” that were displayed to JEDEC 42.3 members after JEP 21-I was adopted did not include any requirement that members disclose anything, did not include any reference to “pending patents,” and instead were comprised solely of the unaltered language of EP-7-A and EP-3-F. On one occasion, at the September 1993 meeting, the chairman showed a new viewgraph, containing proposed language from an appendix to the not-yet-published JEP 21-I manual. This viewgraph was expressly marked “DRAFT,” with a footnote stating that the “material is a proposed revision” that “has not been approved by JEDEC.” Perry Decl., Ex. 14 (at JDC 001690); Perry Decl., Ex. 15 (R65780). After September 1993, however, only the original viewgraphs were shown to members. Perry Decl., Ex. 14.

At least one copy of the JEDEC Manual of Organization and Procedure JEP21-I (hereinafter, “the JEDEC Manual”), which was published in October 1993, has been produced from Rambus’s files, although from the current record it is unclear when that copy of the manual was received by Rambus, or from whom it was received. R173458. Richard Crisp has testified that he requested and received a copy of the JEDEC Manual in 1995.

Q Did you ever get a copy of 21-I while you were at JEDEC?

A I think I did.

Q When did you get a copy of 21-I?

A It was in 1995.

Q And how did you come to get that copy in 1995?

A I had made a request to be given whatever kind of manual they must have had there for members that outlined what the patent policy was.

Q And why did you make that request?

A I was trying to respond to a request from the May 1995 meeting wherein Rambus was asked to state its intellectual property position

Counsel has referred to the JC-42 Member's Manual as an "unofficial document." *See also* Complaint Counsel's Responses to Material Fact Nos. 16 and 23.

Rambus Material Fact No. 25

25. Rambus's JEDEC representative, Richard Crisp, has testified that he reviewed the JC 42 Members' Manual in the summer of 1995 and saw that companies presenting their technologies for standardization needed to disclose their patent applications. Perry Decl., Ex. 19 (Crisp 11/8/00 Dep. at 190).

Complaint Counsel admits that this is an accurate summary of Mr. Crisp's testimony on November 8, 2000. However, Richard Crisp later testified that he asked for and received a copy of the JEDEC Manual JEP 21-I in 1995, which required disclosure from all JEDEC *participants*. *See* Complaint Counsel's Response to Material Fact No. 22 and Crisp Dep. (8/10/01) 851-852, *Rambus v. Micron* [**Tab 78**].

Rambus Material Fact No. 26

26. During its entire tenure as a JEDEC member, Rambus never proposed or advocated the adoption of any standard or technology. In fact, Rambus made no presentations at all, and it voted at only one meeting, when it voted *against* four proposals. Perry Decl., Ex. 5.

Complaint Counsel lacks sufficient knowledge to either admit or deny the characterization that Rambus never "advocated" the adoption of any standard or technology. With respect to proposals, Complaint Counsel is aware of at least one instance where a Rambus representative approached Gordon Kelley to inquire about making a presentation on RDRAM. *See* Kelley Dep. (4/25/01) at 128, *Micron v. Rambus* [**Tab 100**]; Crisp Dep. (4/23/01) at 176-180, *Micron v. Rambus* [**Tab 101**]. Complaint Counsel does admit Rambus's factual assertion that it did not make any presentations and its statement about its voting record.

D. The EIA/JEDEC Patent Policy Encouraged, But Did Not Require, Disclosure Of Intellectual Property

See, e.g., IBM511744, Kellogg Dep. (2/24/03), at 45:9-17, *In the Matter of Rambus, Inc.* [Tab 51].

Rambus Material Fact No. 29

29. 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.

Complaint Counsel notes that Material Fact No. 29 correctly quotes a portion of the language from the referenced document. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. Complaint Counsel notes that the second referenced document references a notation that “IBM will not come to the Committee with a list of applicable patents.” *But see* Complaint Counsel’s Response to Material Fact No. 28 (explaining that IBM disclosed its intellectual property position (an intention to file or amend a patent application which it believes that, by doing so, it possibly could succeed in covering some aspect or implementation of JEDEC’s standards or its standard-setting work) at JEDEC meetings; see, e.g., IBM511744, Kellogg Dep. (2/24/03), at 45:9-17, *In the Matter of Rambus, Inc.* [Tab 51]) *See also* Complaint Counsel’s Response to Material Fact No. 30.

Rambus Material Fact No. 30

30. At about the same time, both IBM and Hewlett-Packard announced at a JEDEC mee

Rambus Material Fact No. 31

31. I

Counsel's Memorandum in Opposition to Respondent Rambus Inc.'s Motion for Summary Decision. *See also* McGhee Dep. (8/10/01) at 65-66 at [Tab 69].

Rambus Material Fact No. 33

33. Motorola's JEDEC representative in the early 1990s, David Chapman, similarly testified that while he understood that "we were expected to disclose granted patents," the disclosure by JEDEC members of patent applications would have "gone beyond" the patent policy and would have involved "company confidential" information. Perry Decl., Ex. 24 (Chapman 1/23/03 Dep. at 20:8-21:13).

Complaint Counsel disagrees with Rambus' characterization of Mr. Chapman testimony. Though Motorola has certain business practices, Mr. Chapman suggests that providing the Committee with an "early warning" is the best course.

Q The -- let me deal with Mr. Swindell's objection. I'm not sure I understand what he means by "form," but I'll see if I can deal with it. What was your understanding of the JEDEC patent policy during '89 to '96 with respect to the disclosure of patent applications? Was it required in some circumstances or encouraged in some circumstances? What was your understanding of it?

A Well, I think in all fairness I would have to say that in that time frame my view on applied-for but as yet ungranted patents was informed by Motorola's legal staff, and I would not have cared what policy was. However --

Q Yeah, don't tell us what the legal staff told you because that would be privileged advice, but tell me your understanding of what the patent policy required or didn't require in that area.

A I understood that we were expected to disclose granted patents and that applications were, strictly speaking, company confidential. But the -- the committee, in my personal experience, had on any number of occasions demonstrated extreme sensitivity to getting sucker-punched, and if you wanted to have an ongoing relationship with these folks, you were well-advised to give them early warning.

See Complaint Counsel's Memorandum in Opposition to Respondent Rambus Inc.'s Motion for Summary Decision (e.g., footnote 47); see generally Chapman Dep. (1/23/03), *In the Matter of Rambus Inc.* [Tab 70].

Rambus Material Fact No. 34

34. Rambus itself declined to comment on two separate occasions, in 1992 and 1995, when asked about its intellectual property. 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.

Complaint Counsel denies that the cited testimony supports Material Fact No. 34. See Kelley Depo. (4/25/01) at 109-110, 128, *Micron v. Rambus* [Tab 100]. Rambus cites a portion of Gordon Kelley's testimony where he states that Rambus "did not comment on those patents" at the May 1992 JEDEC meeting. However, Complaint Counsel lacks sufficient information to either admit or deny that Rambus "declined to comment" on its intellectual property in 1995 and

voluntary disclosure of patents that relate to the standards in work.”
Perry Decl., Ex. 28 (emphasis added).

Complaint Counsel admits that the statement of material fact correctly quotes a portion of the language from the referenced document, which appears to be a January 22, 1996 letter from Dan Bart of EIA to Mr. Clark of the FTC. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. *See also* Complaint Counsel’s Supplemental Response to Respondent Rambus Inc.’s Second Set of Requests For Admissions, filed on March 13, 2003; *see also* Kelly Dep. (2/26/03) at 72-73, *In the Matter of Rambus Inc.* [Tab 55].

Rambus Material Fact No. 37

37. In July 1996, the FTC responded to the EIA’s January 1996 letter in a letter signed by FTC Secretary Donald Clark. The letter stated that:

EIA and TIA, following ANSI procedures, *encourage* the early, voluntary disclosure of patents, but do not *require* a certification by participating companies regarding potentially conflicting patent interests.

Perry Decl., Ex. 29 (emphasis added). The FTC’s letter points out that the EIA policy was different from the policy of the standard-setting organization involved in the *Dell* case, where the policy *did* require the disclosure of “potentially conflicting patent interests.”

i421 the

See also

Rambus Material Fact No. 38

38. There is no evidence that any EIA official ever informed the FTC that its understanding regarding the “voluntary” nature of patent disclosure under the EIA’s policies was incorrect.

On numerous occasions John Kelly

40. There is nothing in either the written policies or the actual practices of JEDEC's members to support a duty to disclose any patent or patent application that "relates to" a proposed JEDEC standard, as the Complaint alleges.

Complaint Counsel admits that it is not aware of any JEDEC manual published between December 1991 and June 1996 that contains the terms "relate to." However, Complaint Counsel does not admit, and indeed expressly denies, that the absence of such express language in a JEDEC manual published during this time frame would eliminate any duty of a JEDEC member to disclose patents or patent applications in circumstances in which the member intends to file or amend a pending patent application. Believing that, by doing so, the member possibly could succeed in covering some aspect or implementation of JEDEC's standards or its standard-setting work, the presence of such an intention would trigger a duty to disclose under JEDEC's rules. Were such circumstances to arise, the patent application in issue would, necessarily, bear a close enough relationship to JEDEC's work to trigger a disclosure obligation, as it plainly would be the case that the application "involved" or, at a minimum, "might be involved in," the work of JEDEC. *See* Complaint Counsel's Response to Rambus Interrogatory No. 8 (November 8, 2002), at 58.

Rambus Material Fact No. 41

41. 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).

Complaint Counsel disagrees with Rambus's assertion regarding the "EIA/JEDEC policy."

Complaint Counsel admits that Material Fact No. 41 correctly quotes a portion of the language from the EP-3-F manual. However, Complaint Counsel submits that this language cannot be

properly understood except by reference to the document as a whole, which speaks for itself. A more complete reference to the quotation is 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. (emphasis added.)

Rambus Material Fact No. 42

42. 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). And as noted above, Mr. McGhee's July 10, 1996 memo to all JEDEC Council members stated that the EIA encouraged the voluntary disclosure only of "essential" patents.

Complaint Counsel disagrees with Rambus' characterization of JEP 21-I. The material fact correctly quotes a portion of the language from the referenced document. However, Complaint Counsel submits that this language cannot be properly understood except by reference to the document as a whole, which speaks for itself. A more complete quotation is as follows: "EIA and JEDEC standards and non product registrations . . . that require the use of a patented item should be considered with great care. While there is no restriction against drafting a proposed standard in terms that include the use of a patented item"

Rambus Material Fact No. 43

43. Infineon's JEDEC representative Willi Meyer 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., Ex. 31 (Meyer Infineon Trial Tr. at 117:12-14) (emphasis added).

Complaint Counsel agrees that Material Fact No. 43 correctly quotes a portion of the language from Willi Meyer’s testimony. However, Complaint Counsel submits that this language cannot be properly understood except by reference to the document as a whole, which speaks for itself.

However, Complaint Counsel disagrees with

Complaint Counsel disagrees with Rambus's characterization, as expressed in Material Fact No.

45. For example, Dan Bart, a Rambus witness, recently testified that Richard Holleman, originally listed as a Rambus expert witness, commented at an ANSI meeting that it was a

47. Complaint Counsel allege that Rambus intentionally gave the members of JEDEC 42.3 the “materially false and misleading impression . . . that JEDEC, by incorporating into its SDRAM standards technologies openly discussed and considered during Rambus’s tenure in the organization, was not at risk of adopting standards that Rambus could later claim to infringe upon its patents.” Complaint at ¶ 71. Complaint Counsel do not, however, allege that Rambus *encouraged* JEDEC to adopt any technologies that utilize Rambus’s intellectual property. Complaint Counsel also do not allege that Rambus ever made any affirmative representation

Complaint Counsel strongly disagrees with the characterization of the evidence expressed in Material Fact No. 48. *See* Complaint Counsel's Memorandum in Opposition to Respondent Rambus Inc.'s Motion for Summary Decision.

Rambus Material Fact No. 49

49. For example, *****

Perry Decl., Ex. 37. Samsung's JEDEC representative, Gil Russell, expressed the same view in a September 1992 report of that month's JEDEC meetings:

NEC revealed several interesting facts regarding their proposal for Synchronous DRAM NEC has an on-chip clock which requires 20 MA in standby mode. *This reinforces our opinion that the NEC proposal is the Rambus device with a synchronous interface. NEC is trying to preserve development costs.*

Perry Decl., Ex. 38 (emphasis added).

Complaint Counsel admits that the first referenced document appears to be a set of handwritten notes. However, the notes do not appear to include the quoted language, do not indicate by whom they were written, nor do they indicate that they relate to the referenced time period. For this reason, Complaint Counsel lacks sufficient information to either admit or deny this material fact.

Complaint Counsel agrees that the second document states in part:

NEC revealed several interesting facts regarding their proposal for Synchronous DRAM NEC has an on-chip clock which requires 20 MA in standby mode. This reinforces our opinion that the NEC proposal is the RamBus device with a Synchronous Interface. NEC is attempting to preserve development costs. [Emphasis added to correct Rambus's typographical errors.]

However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. *See also* Complaint Counsel's Supplemental Response to Respondent Rambus Inc.'s Second Set of Requests For Admissions, filed on March 13, 2003.

Rambus Material Fact No. 50

50. 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). 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.

Complaint Counsel admits that the referenced document appears to be a Synchronous DRAM Report on specification, feasibility, and expense by N. Wirth and W. Meyer (April 30, 1992), and that the material fact correctly quotes a portion of the language from the referenced document. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. Complaint Counsel further notes that the referenced document purports to be an English-language translation of a document originally written in German. Complaint Counsel does not admit that, and has no basis to know whether, the referenced translation is accurate. *See also* Complaint Counsel’s Supplemental Response to Respondent Rambus Inc.’s Second Set of Requests For Admissions, filed on March 13, 2003.

Rambus Material Fact No. 51

51. In May 1992, when Meyer 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 admits that the referenced document appears to be a DRAM comparison chart and that the material fact correctly quotes a portion of the language from the referenced document.

However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. Complaint Counsel further notes

stated in part, ‘Siemens expressed concern over potential Rambus Patents covering 2 bank designs. Gordon Kelly [sic] of IBM asked me if we would comment which I declined.’ However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. *See also* Complaint Counsel’s Supplemental Response to Respondent Rambus Inc.’s Second Set of Requests For Admissions, filed on March 13, 2003.

Rambus Material Fact No. 54

54. According to one long-time JEDEC representative, Thomas Landgraf, *****

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

Complaint Counsel agrees that Mr. Landgraf’s answer is correctly quoted in part. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the transcript as a whole, which speaks for itself.

Rambus Material Fact No. 55

55. Another JEDEC representative, who was also a committee chair, Farhad Tabrizi, testified that Mr. Crisp's position was *itself* an open and obvious violation of JEDEC's patent policy:

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).

Complaint Counsel agrees that Mr. Tabrizi's testimony is correctly quoted in part. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the transcript as a whole, which speaks for itself.

Rambus Material Fact No. 56

56. Other JEDEC participants agree with this conclusion. *See, e.g.,* Perry Decl., Ex. 45 *****

***** Perry Decl., Ex. 48 *****

***** In short, *if* Complaint Counsel is correct about the disclosure requirements of the patent policy, then Rambus's decision not to respond to inquiries about its intellectual property in May 1992 was a violation of that policy, raised a "red flag" and did nothing to "lull" JEDEC members.

See Complaint Counsel’s Memorandum in Opposition to Respondent Rambus Inc.’s Motion for Summary Decision, V.B. and [Tab 100].

Rambus Material Fact No. 57

57. It is clear that no one was, in fact, lulled. Roughly one week after the May 1992 meeting, Siemens’ JEDEC 42.3 representative Willi Meyer reported that *****

***** Perry Decl., Ex. 46 (emphasis added). It is thus obvious that Siemens’ concerns about the “patent situation with Rambus” were not alleviated by Crisp’s refusal to comment at the May 1992 meeting.

Complaint Counsel admits that the referenced Infineon document, which appears to be

***** Complaint Counsel submits that

these statements cannot properly be understood except by reference to the pertinent document as a whole, which speak for itself. Complaint Counsel further notes that the referenced Infineon document purports to be an English-language translation of a portion of the document that was originally written in German. Complaint Counsel does not admit that, and has no basis to know whether, the referenced translation is accurate. See also Complaint Counsel’s Supplemental Response to Respondent Rambus Inc.’s Second Set of Requests For Admissions, filed on March 13, 2003.

Rambus Material Fact No. 58

58. In addition, in June 1992, IBM’s Gordon Kelley prepared a chart entitled “COMPARE ALTERNATIVES for Future High Performance, High Volume DRAM Designs.” The chart listed

“Pros” and “Cons” of Sync DRAMs and Rambus DRAMs; one of the two “cons” listed for Sync DRAMs was “Patent Problems? (Motorola/Rambus).” Perry Decl., Ex. 47.

Complaint Counsel admits that the referenced document appears to be notes from a telephone conference call and that the material fact correctly quotes a portion of the language from the referenced document. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. Complaint Counsel further notes that the referenced Infineon document purports, in part, to be an English-language translation of a document originally written in German. Complaint Counsel does not admit that, and has no basis to know whether, the referenced translation is accurate. *See also* Complaint Counsel’s Supplemental Response to Respondent Rambus Inc.’s Second Set of Requests For Admissions, filed on March 13, 2003.

Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 374, 379).

Complaint Counsel agrees that Mr. Kelley’s testimony is correctly quoted in part. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the transcript as a whole, which speaks for itself. For example, Complaint Counsel notes that omitted testimony qualifies Mr. Kelley’s reference to patent problems as a questionable one (“I say patent problem, question mark. And the difference in my mind is that I am not sure that there was patent problem.”). *Id.* at 375.

Rambus Material Fact No. 60

60. Mr. Kelley testified that *****

***** Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 375).

Complaint Counsel agrees that Mr. Kelley’s testimony is correctly quoted in part. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the transcript as a whole, which speaks for itself. For example, Complaint Counsel notes that omitted testimony prior to the cited response qualifies Mr. Kelley’s reference to patent problems as a questionable one (“I say patent problem, question mark. And the difference in my mind is that I am not sure that there was patent problem.”). *Id.* at 375. *See also* Complaint Counsel’s Response to Material Fact No. 60.

Rambus Material Fact No. 61

61. Under the Complaint's description of the JEDEC patent policy, Rambus's position would have been "commonly understood" by all JEDEC members to be an open repudiation of that policy. In any event, Rambus's position led JEDEC 42.3 Chairman Kelley to warn a large group of DRAM engineers that they ought to analyze "potential patent problems or patents that were held by Motorola and Rambus." Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 375).

Complaint Counsel is unable to agree to the characterizations of "open repudiation" and "warn."

Complaint Counsel agrees that Mr. Kelley's testimony is correctly quoted in part. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the transcript as a whole, which speaks for itself. For example, Complaint Counsel notes that omitted testimony prior to the cited response qualifies Mr. Kelley's reference to patent problems as a questionable one ("I say patent problem, question mark. And the difference in my mind is that I am not sure that there was patent problem."). That is further qualified during this exchange:

Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 380).

Complaint Counsel is unable to agree to the characterizations of *****

Complaint Counsel agrees that Mr. Kelley’s testimony is correctly quoted in part. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the transcript as a whole, which speaks for itself.

Rambus Material Fact No. 63

63. At no time between the May 1992 JEDEC meeting and its withdrawal from JEDEC 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. Chairman Kelley testified that 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:

Perry Decl., Ex. 4 (Kelley 1/10/03 Dep. at 37). *****

Id.

Complaint Counsel does not agree with Rambus’s characterization that “[a]t no time between the May 1992 JEDEC meeting and its withdrawal from JEDEC 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.” Complaint Counsel admits that the referenced portion of Mr. Kelley’s testimony is correctly quoted. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the transcript as a whole, which speaks for itself.

Rambus Material Fact No. 64

64. Rambus was again asked, in 1995, to respond to questions about its intellectual property. 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.

Complaint Counsel has no issue with Rambus’s claim in Material Fact No. 64.

Rambus Material Fact No. 65

65. Rambus provided its response at the very next JEDEC meeting, in September 1995, by making 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.*

Perry Decl., Ex. 52 (emphasis added). Rambus’s statement was also published in full in the official JEDEC minutes of the September 1995 meeting. Perry Decl., Ex. 53.

Complaint Counsel agrees that Material Fact No. 64 is correctly quoted in part and is a quote from the Complaint. Complaint at ¶ 72. However, Complaint Counsel submits that this language cannot properly be understood except by reference t

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governing body of JEDEC) – that SyncLink “has numerous patent issues associated with it.” Perry Decl., Ex. 54 & 55.

Complaint Counsel admits that the first referenced document appears to be an e-mail sent by Richard Crisp on June 9, 1995. Complaint Counsel admits that the second referenced document appears to be an e-mail sent by Hans Wiggers, on June 10, 1995, to various people, including Gordon Kelley of IBM and David James of Apple, stating that “[i]t is not real and has numerous patent issues associated with it.” However, Complaint Counsel submits that this language cannot properly be understood except by reference to the referenced documents as a whole, which speak for themselves. *See also* Complaint Counsel’s Supplemental Response to Respondent Rambus Inc.’s Second Set of Requests For Admissions, filed on March 13, 2003.

Rambus Material Fact No. 67

67. Mr. Wiggers forwarded Mr. Crisp’s comment to, among others, Mr. Kelley, the Chairman of JEDEC 42.3. Id. A few days later, on June 13, 1995, Crisp informed Wiggers that:

[R]egarding patents, I have stated to several persons that my personal opinion is that the Ramlink/SyncLink proposals will have a number of problems with Rambus intellectual property. We were the first out there with high bandwidth, low pincount, DRAMs, our founders were busily at work on their original concept before the first Ramlink meeting was held, and their work was documented, dated and filed properly with the US patent office. Much of what was filed has not yet issued, and I cannot comment on specifics as these filings are confidential. I was asked at the last JEDEC 42.3 meeting to report on our patent coverage relative to SyncLink as proposed at JEDEC 42.3 at the next meeting in Crystal City in September. Our attorneys are currently working on this, so I think I will be in a position to make some sort of official statement at that time and plan to do so. In the meantime, I have nothing else to say

~~to report on the status of the 06/13/95 JEDEC 42.3 meeting about SyncLink patent position.~~

companies, and at least five of the engineers present at the SyncLink meeting were JEDEC representatives who attended the next JEDEC 42.3 meeting on September 11, 1995. Perry Decl., Ex. 44 (Tabrizi 11/20/02 Dep. at 72-3; Perry Decl., Ex. 58.

Complaint Counsel does not agree to the characterization that any purported disclosure that was made to SyncLink was sufficient to put JEDEC members on notice that Rambus believed it owned intellectual property that covered SDRAM and/or DDR. In light of this fact, any overlapping membership between SyncLink and JEDEC is irrelevant. Further, SyncLink did not have the same intellectual property disclosure rules as JEDEC and the SyncLink technology was never adopted by JEDEC.

Rambus Material Fact No. 70

70. In that same time period – the fall of 1995 – Rambus CEO Geoff Tate and Rambus Vice President Allen Roberts held a series of meetings with DRAM manufacturers in Asia in an effort to convince the manufacturers to become Rambus licensees. *****

***** Perry Decl., Ex. 59; Perry Decl., Ex. 60
(Tate 1/22/03 Dep. at 304-325).

***** Tate Dep.

(1/22/03) at 327:14 to 329:14, *In the Matter of Rambus Inc.*

Rambus Material Fact No. 71

71. Leading DRAM manufacturer Micron *****

concerned to avoid the Rambus patents, though all of us share this concern.]

However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. *See also* Complaint Counsel's Supplemental Response to Respondent Rambus Inc.'s Second Set of Requests For Admissions, filed on March 13, 2003.

Rambus Material Fact No. 73

73. 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). 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.

Complaint Counsel, in absence of specific examples, does not agree with Rambus characterization that "others" took a "close look" at Rambus's intellectual property. Complaint Counsel admits that the material fact correctly quotes a portion of Mr. Gustavson's testimony. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the transcript as a whole, which speaks for itself. Specifically, the cited response is only a portion of the answer to this particular question.

Rambus Material Fact No. 74

74. 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.

Complaint Counsel disputes Rambus’s characterization that the “JEDEC” was well aware of potential patent issues involving Rambus’s intellectual property. Numerous documents and testimony support the opposite conclusion. See Complaint Counsel’s Memorandum in Opposition to Respondent Rambus Inc.’s Motion for Summary Decision, IV.B.

G. Rambus Did Nothing To Lull JEDEC Members After It Left JEDEC.

Rambus Material Fact No. 75

75. Rambus did nothing after leaving JEDEC that could have lulled JEDEC members into believing that these concerns were alleviated.

Complaint Counsel disputes Rambus’s characterization that it did nothing that “lulled” JEDEC. Though Complaint Counsel does not use the term “lull,” numerous documents and testimony support the opposite conclusion that Rambus actively misled JEDEC. See Complaint Counsel’s Memorandum in Opposition to Respondent Rambus Inc.’s Motion for Summary Decision, IV.B.

Rambus Material Fact No. 76

76. Rambus attended its last JEDEC 42.3 meeting in December 1995. In March 1996, *****

Perry Decl., Ex. 67.

Complaint Counsel agrees with Rambus’s factual assertion that it attended its last JEDEC meeting in December 1995. *****

***** *See also* Material Fact No. 77 and Complaint

Counsel’s Supplemental Response to Respondent Rambus Inc.’s Second Set of Requests For Admissions, filed on March 13, 2003.

Rambus Material Fact No. 77

77. *****

Rambus Material Fact No. 78

78. 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 42.3.

Recently at JEDEC 42.3 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).

Complaint Counsel admits that the referenced document appears to be a letter from Richard Crisp to Ken McGhee, dated June 17, 1996

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).

Complaint Counsel admits that the referenced portion of Mr. Rhoden’s testimony is correctly quoted. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the transcript as a whole, which speaks for itself. For example, further in his testimony, Mr. Rhoden states that “basically they said that they did not want to remain a member because they did not want to continue to follow the JEDEC patent policy, something along that line.” Rhoden Dep. (1/24/03) at 33:11-14, *In the Matter of Rambus Inc.* [Tab 22]. (Emphasis added.) Rather than the likelihood that it was commented on by many members – as characterized by Rambus – Mr. Rhoden “doesn’t recall it [the letter] being circulated within the council” but it “probably went out to a few people.” *Id.*, at 33:18 to 34:3. See Complaint Counsel’s Memorandum in Opposition to Respondent Rambus Inc.’s Motion for Summary Decision, IV.B.

Rambus Material Fact No. 80

80. 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).

Complaint Counsel admits that Material Fact No. 80 correctly quotes a portion of Mr. Tabrizi’s testimony. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the entire transcript as a whole, which speaks for itself.

Rambus Material Fact No. 81

81. This same sentiment appears in the official JEDEC minutes

Complaint Counsel admits that Material Fact No. 83 correctly quotes a portion of Mr. Kelley's testimony. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the entire transcript as a whole, which speaks for itself.

Rambus Material Fact No. 84

84. In a similar vein, *****

***** Perry Decl., Ex. 72. Mr. Wiggers explained his reference in his deposition:

Q. Why would you refer to Rambus as the dark side?

A. Well, because Rambus was trying to stifle the whole open standardization process and trying to do a grab for controlling the whole memory business.

Perry Decl., Ex. 23 (Wiggers 12/18/02 Dep. at 174).

Complaint Counsel admits that the referenced document purports to *****

***** However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself.

Rambus Material Fact No. 85

85. The minutes of the March 1997 JEDEC meeting also 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. 70. The minutes then state that "[o]thers felt that the concept predated Rambus by decades."

Complaint Counsel admits that the referenced document appears to be minutes from a March 13-14, 1997 JEDEC 42.3 subcommittee meeting and that the material statement correctly quotes a portion of the language from the document. However, Complaint Counsel submits that this

87. 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.

Complaint Counsel admits that Material Fact No. 87 correctly quotes a portion of Mr. Wiggers's testimony. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the entire transcript as a whole, which speaks for itself.

Rambus Material Fact No. 88

88. *****

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Rambus Material Fact No. 89

89. In sum, Rambus did nothing that would have conveyed that it believed it had no intellectual property rights reading on the contemplated standards, nor that it intended to acquiesce to the unlicensed use of its proprietary technologies.

acquiesced it had its ipri

Complaint Counsel has no issue with Rambus's claim in Material Fact No. 90.

Rambus Material Fact No. 91

91. The SDRAM incorporates the first two technologies alleged in the Complaint (programmable CAS latency and programmable burst length), but does not require the use of either on-chip DLL or dual-edge clock technology. The DDR SDRAM standard also incorporates programmable CAS latency and programmable burst length. The DDR SDRAM standard differs from its predecessor, however, in that it also requires the use of on-chip DLL and dual-edge clock technology as well.

Complaint Counsel has no issue with Rambus's claim in Material Fact No. 91.

Rambus Material Fact No. 92

92. The DDR SDRAM standard was adopted by JEDEC 42.3 in August 1999 and published in June 2000. Perry Decl., Ex. 74.

Complaint Counsel admits that the referenced document appears to be the June 2000 DDR SDRAM standard but notes that the document does not appear to establish that the standard was adopted at the August 1999 meeting.

Rambus Material Fact No. 93

93. The duty to disclose imposed by JEDEC was triggered only when a standard was formally proposed for committee consideration. Gordon Kelley, the Chairman of JEDEC 42.3, testified *****

Perry Decl., Ex. 16 (Kelley 1/26/01 Dep. at 90-91).

Complaint Counsel disagrees with Rambus's characterization of Gordon Kelley's testimony on January 26, 2001. Mr. Kelley distinguished between a "formal" disclosure requirement (i.e.,

balloting) and one occurring during “presentations” or discussions (meetings). The testimony quoted by Rambus is specific to a “formal” duty to disclose.

Q So, other than when a ballot was circulated and the opportunity was presented to check or not check the box, was there any other time in the standardization process when a member was required to [sic] identify a patent?

A Well, that was the formal time, as I mentioned. Usually what happened -- and I'm thinking of my own instances that happened when I recognized that a new proposal was going to be impacted by a patent that IBM held that I was aware of, and I would then make the committee aware of that as soon as I knew that.

Q. And then again, as your personal participation in this process, when and how would you do that?

A At the time of discussion, and discussion occurred many months before you actually get to balloting.

Rambus Material Fact No. 94

94. JEDEC’s secretary, Kenneth McGhee, *****

***** Perry
Decl., Ex. 76 (McGhee 8/10/01 Dep. at 165, 174). Rambus attended its last JEDEC meeting in December 1995, and confirmed its withdrawal from the organization by letter in June 1996. Perry Decl., Ex. 3.

Complaint Counsel disagrees with Rambus’s characterization of Ken McGhee’s testimony on August 10, 2001. Within the referenced citations, Mr. McGhee testified on the narrow issue that the SyncLink presentation in May 1995 was not part of JEDEC’s work and therefore did not receive an item number. *Id.* at 166:5 to 167:4; and that item numbers would not be assigned “if the company asked not to.” *Id.* at 175:3-4.

Rambus Material Fact No. 95

95. 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 thus Infineon had failed to prove that any duty to disclose arose as to DDR SDRAM. *Rambus, Inc. v. Infineon Technologies AG*, 164 F. Supp. 2d 743, 765 (E.D. Va. 2001).

Complaint Counsel admits that the material fact correctly quotes a portion of the language from District Court’s holding in the *Rambus Inc. v. Infineon Technologies AG* matter. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the entire holding as a whole, which speaks for itself. Complaint Counsel notes that the standard of proof required by the District Court is not applicable to the present matter. *See* Complaint Counsel’s Memorandum in Opposition to Respondent Rambus Inc.’s

97. The Federal Circuit 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.

Complaint Counsel admits that the material fact correctly quotes a portion of the language from the holding in the *Rambus Inc. v. Infineon Technologies AG* matter. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the entire holding as a whole, which speaks for itself. Complaint Counsel notes that the standard of proof required by the Federal Circuit is not applicable to the present matter. *See* Complaint Counsel's Memorandum in Opposition to Respondent Rambus Inc.'s Motion for Summary Decision.

Rambus Material Fact No. 98

98. The undisputed contemporaneous evidence confirms that the DDR SDRAM standard-setting practices did not formally begin until December 1996.

Complaint Counsel does not agree with Rambus's characterization the "undisputed contemporaneous evidence" confirms that the DDR standard-setting practices did not formally begin until December 1996. Specifically, Complaint Counsel is uncertain what "undisputed contemporaneous evidence" is being referenced. *See* Complaint Counsel's Memorandum in Opposition to Respondent Rambus Inc.'s Motion for Summary Decision.

Rambus Material Fact No. 99

99. The first formal proposal for standardization of DDR SDRAM did not occur until December 1996, when Fujitsu made a "first showing" on DDR SDRAM that was assigned item number 815. Perry Decl., Ex. 77 (JDC 00252-29)

Complaint Counsel does not agree with Rambus's characterization that the first "formal" proposal for DDR SDRAM did not occur until December 1996. Complaint Counsel notes that the

referenced document has a heading “Fujitsu DDR SDRAM, 1st showing (2nd Draft),” which does

Rambus Material Fact No. 102

102. Because Rambus was no longer a JEDEC member when JEDEC was undertaking its DDR SDRAM standardization efforts, it had no duty of disclosure with respect to the technologies or features incorporated into those standards.

Complaint Counsel disputes Rambus’s characterization that “[b]ecause Rambus was no longer a JEDEC member when JEDEC was undertaking its DDR SDRAM standardization efforts, it had no duty of disclosure with respect to the technologies or features incorporated into those standards.” While Rambus was not a member of JEDEC when the DDR SDRAM standards were

106. As set out below, the MELCO documents show that by June 1993, MELCO had recognized the possibility that Rambus could assert intellectual property claims relating to features included in SDRAM and other DRAM devices.

Complaint Counsel disagrees with Rambus that four documents, from a production of 16,000 pages, can be characterized as stated by Rambus above. Complaint Counsel admits that the documents referenced in Material Facts Nos. 107 to 111 are quoted in part. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. Complaint Counsel further notes that the referenced Mitsubishi documents purport to be an English-language translation of a document originally written in Japanese. Complaint Counsel does not admit that, and has no basis to know whether, the referenced translations are accurate.

Rambus Supplemental Material Fact No. 107

107. In March 1993, a MELCO “Patent Committee Member” wrote that “[a] need has arisen to evaluate all of the claims in a patent being applied for by Rambus (1 patent, a total number of claims is 150). . . .” Supp. Perry Decl., ex. B.

Complaint Counsel admits that the referenced document appears to be a memo drafted by Nishimura and that the material statement correctly quotes a portion of the language from the referenced document. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. Complaint Counsel f

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108. A few months later, in June 1993, a MELCO employee named Sakao wrote a memo that asked in part: “What are the threats to the establishment of a RAMBUS patent?” *Id.*, ex. C. One answer was:

“The individual technologies that appear in the RAMBUS patent will be used independently in the future.”

Id. The June 10, 1993 memo by Sakao thus acknowledged that Rambus could, based on its original patent application, assert claims over the “individual” use of the various technologies described in that application.

Complaint Counsel admits that the referenced document appears to be a “summary of responses” drafted by “Sakao” and that the material statement correctly quotes a portion of the language from the referenced document. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. Complaint Counsel further notes that the referenced Mitsubishi document purports to be an English-language translation of a document originally written in Japanese. Complaint Counsel does not admit that, and has no basis to know whether, the referenced translation is accurate. Complaint Counsel disputes Rambus’s characterization that “the June 10, 1993 memo by Sakao thus acknowledged that Rambus could, based on its original patent application, assert claims over the ‘individual’ use of the various technologies described in that application.” *See also* Complaint Counsel’s Response to Material Fact No. 109.

Rambus Supplemental Material Fact No. 109

109. In recognition of this possibility, the Sakao memo goes on to say that “[t]here is a need to examine the specifications of the patent claims to determine whether individual technologies used independently will infringe on the RAMBUS patent, and for that we will have to obtain the views and interpretations of experts.” *Id.* (emphasis added).

Complaint Counsel admits that the referenced document appears to be a “summary of responses” drafted by “Sakao” and that the material statement correctly quotes a portion of the language from

the referenced document. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. Complaint Counsel further notes that the referenced Mitsubishi document purports to be an English-language translation of a document originally written in Japanese. Complaint Counsel does not admit that, and has no basis to know whether, the referenced translation is accurate. *See also* Complaint Counsel’s Response to Material Fact No. 108.

Rambus Supplemental Material Fact No. 110

110. A MELCO memorandum prepared the following month described MELCO’s analysis of Rambus’s 150-claim “WIPO” patent application and stated in part that it was “quite predictable” that Rambus would attempt to obtain patents that were not tied to, and were “separate from,” the particular type of “bus” described in the application. Suppl. Perry Decl., ex. D. The July 13, 1993 memo recommended that because of this possibility, MELCO should “carry out [a] prior art investigation in detail.” *Id.* The memo also stated that MELCO “must thoroughly investigate the DRAM-related claims” and “pay special attention to SDRAM, which is a similar idea.” *Id.*

Complaint Counsel admits that the referenced document appears to have an attachment, entitled “Opinions of Kodan/Jodenken” and that the material statement correctly quotes certain portions of the attachment in the referenced document. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. Complaint Counsel further notes that the referenced Mitsubishi document purports to be an English-language translation of a document originally written in Japanese. Complaint Counsel does not admit that, and has no basis to know whether, the referenced translation is accurate.

Rambus Supplemental Material Fact No. 111

111. In a subsequent analysis of portions of Rambus's WIPO application, dated September 16, 1993, MELCO again recognized that Rambus's intellectual property claims related to features used or proposed in SDRAM devices. With respect to the use of two banks in a DRAM, for example, the MELCO memorandum stated that "[t]his is also being done by SDRAM. Need a prior art." Supp. Perry Decl., ex. E. The memo also acknowledged that "auto precharge" was a feature described in the Rambus WIPO application and that it was "being implemented in SDRAM, etc." *Id.*

Complaint Counsel admits that the referenced document appears to be a chart entitled "Evaluation of the DRAM portion of the Rambus DRAM and that the material statement correctly quotes certain portions of the referenced document. However, Complaint Counsel submits that this language cannot properly be understood except by reference to the document as a whole, which speaks for itself. For example, the entire reference relating to "auto precharge" is that "I think this is just a simple protocol and is being implemented in SDRAM." (Emphasis added.) Complaint Counsel further notes that the referenced Mitsubishi document purports to be an English-language translation of a document originally written in Japanese. Complaint Counsel does not admit that, and has no basis to know whether, the referenced translation is accurate. Complaint Counsel disputes Rambus's characterization that "MELCO again recognized that Rambus's intellectual property claims related to features used or proposed in SDRAM devices."

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