UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

Public

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

MEMORANDUM OF RESPONDENT RAMBUS INC. IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO BAR PRESENTATION OF TESTIMONY AND ARGUMENTS REGARDING PURPORTED COLLUSION AMONG DRAM MANUFACTURERS

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I.
SUMMARY OF ARGUMENT

Complaint Counsel have moved *in limine* to exclude any testimony or argument regarding collusion among manufacturers of DRAM. According to Complaint Counsel, such evidence is wholly irrelevant because it could be used *only* as part of an impermissible "unclean hands" defense. In fact, evidence of collusion among DRAM manufacturers to boycott Rambus, restrict the supply and raise the price of RDRAM, and raise the prices of SDRAM and DDR SDRAM would undermine several fundamental premises of Complaint Counsel's affirmative case against Rambus. Its relevance is not at all dependent on an "unclean hands" defense.

have had (as a result of its superior technology) and that such conduct resulted in competitive harm. Once these allegations are refuted, of course, nothing remains of Complaint Counsel's case, and their expert has conceded as much. *See* McAfee Original Report ¶ 126 ("Rambus's conduct would not give rise to an antitrust problem unless the conduct increased the likelihood that Rambus could obtain market or monopoly power.").[2] Thus, it is hardly surprising that Complaint Counsel desperately want to keep Your Honor from considering the collusion evidence.

Second, evidence of collusion among DRAM manufacturers would refute Complaint Counsel's expert's opinion that the members of JEDEC would have rejected Rambus's technologies in the standard-setting process had they known of Rambus's potential patent claims. Their expert bases that conclusion largely on the fact that the industry failed to adopt Rambus's proprietary RDRAM technology, from which he infers that industry participants generally prefer to avoid proprietary technologies. But, if the industry failed to adopt RDRAM as the result of collusion among DRAM manufacturers to restrict the supply and raise the price of RDRAM, no such inference could properly be drawn. Again, this flawed inference, which would be refuted by the collusion evidence, is central to the expert's conclusion that Rambus's conduct resulted in competitive harm.

Third, evidence of collusion among DRAM manufacturers would fundamentally undermine Complaint Counsel's new-found theory of the case — that, even if (as the evidence demonstrates and as the Federal Circuit has held) Rambus did not violate any JEDEC patent disclosure duty, it nevertheless violated an amorphous duty of "good faith" toward other JEDEC

[2] The relevant portions of the McAfee Original Report are attached as Ex. A to Declaration of Sean P. Gates ("Gates Decl."). The relevant portions of the McAfee Rebuttal Report are attached as Ex. B to that declaration.

members. The evidence that Complaint Counsel seek to exclude would show that DRAM manufacturers secretly colluded to boycott Rambus's technology, which was preferred by at least one prominent JEDEC member (Intel), and to restrict supply and raise the price of products based on that technology, to the financial detriment of JEDEC members who purchased those products. That evidence is hardly consistent with an expectation among JEDEC members of "good faith" conduct toward each other. Moreover, Complaint Counsel will apparently rely upon the DRAM manufacturers for testimony about the existence and nature of this "good faith" obligation. Your Honor should certainly hear and consider evidence that these same manufacturers engaged in secret collusive activities in order fully to assess the credibility of their testimony.

In the face of the indisputable relevance of collusion evidence to their expert's opinions and to their affirmative case, Complaint Counsel disingenuously pin their hope of excluding that evidence on dictum from a narrow discovery order issued by Judge Timony. Their reliance on that order is meritless for two reasons. First, Judge Timony did not rule on the relevance or admissibility of collusion evidence, but only on whether certain limited discovery would be permitted. The order was issued in response to a motion by the Department of Justice ("DoJ") to limit Rambus's discovery in order to prevent interference with an ongoing grand jury investigation into a price-fixing conspiracy among the DRAM manufacturers. Judge Timony's order was, therefore, the result of a balancing test that weighed the potential harm to the DoJ investigation against Rambus's need for discovery. Moreover, as Complaint Counsel themselves emphasized in urging Judge Timony to issue the order, it did not bar even *discovery* of *all* evidence of collusion (the subject of Complaint Counsel's current motion), but only discovery of a very limited subset of that evidence with respect to the price-fixing being investigated by the

grand jury.

Second, the central relevance of evidence of collusion among DRAM manufacturers has become even clearer as the result of litigation developments *after* Judge Timony's order. For example, subsequent to that ruling, Complaint Counsel's expert submitted his Rebuttal Report, in which he expressly explains that his conclusions about Rambus's alleged market power and competitive harm depend upon the prices charged for SDRAM and DDR SDRAM by DRAM manufacturers. And Complaint Counsel have just recently indicated the intention to rely upon testimony from the DRAM manufacturers about a supposed duty to disclose more intellectual

Rambus left JEDEC. *Id*., ¶¶ 82,91. Complaint Counsel contend that JEDEC members were entirely unaware of the possibility that Rambus might obtain patents on technologies being incorporated in the JEDEC standards for synchronous DRAM ("SDRAM") and double-data rate synchronous DRAM ("DDR SDRAM"). *Id*., ¶ 2. According to Complaint Counsel, if JEDEC members had been aware of this possibility, they would have incorporated alternative technologies into the relevant standards. *Id*., ¶¶ 62,65,69. Finally, Complaint Counsel allege that DRAM manufacturers are now locked into producing JEDEC-compliant DRAM products and that Rambus is thus able to demand excessive royalties from DRAM manufacturers. *Id*., ¶ 93.

As Rambus will demonstrate at trial, none of these allegations is true. To begin with, Rambus will introduce overwhelming evidence that JEDEC at most *encouraged*, and did not *require*, the disclosure of patent applications. In addition, Rambus will introduce substantial evidence that JEDEC members were aware of the possibility that Rambus might seek patent coverage for various features that were under consideration by JEDEC. There is also substantial evidence that JEDEC members believed that Rambus's efforts would fail because of prior art that would, in the opinion of those members, render Rambus's patents invalid. Rambus will also demonstrate that there were no commercially viable noninfringing alternatives to the Rambus technologies that were adopted as part of the SDRAM and DDR SDRAM standards. The manufacturers, therefore, necessarily adopted those features in order to fulfill their customers' performance requirements. Rambus will further demonstrate that, if there were commercially viable noninfringing alternatives, as Complaint Counsel contend, nothing would have prevented the DRAM manufacturers from switching to these technologies; in other words, they are not "locked-in."

In addition, Rambus intends to present substantial evidence that DRAM manufacturers have colluded on the price of SDRAM and DDR SDRAM and have engaged in a concerted boycott of Rambus's competing DRAM solution, RDRAM. What that evidence shows is that some or all of the DRAM manufacturers, in the face of the threat to their joint control of DRAM technology that was posed by RDRAM (especially after Intel selected Rambus in 1996 as its choice for "next generation memory technology"), joined together in a concerted effort to "convince" Intel and other purchasers of memory devices that: (1) Rambus DRAMs would be too difficult to build and therefore too expensive to buy; and (2) there were alternatives available that were cheaper and offered equal performance. In order to demonstrate their first point, the DRAM manufacturers deliberately *and in concert* kept their prodra TDt eocc5 Tcowd and tho

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(1) any discovery relating to any communications with the DoJ concerning the ongoing DRAM grand jury investigation; (2) discovery requests of materials produced to the grand jury; and (3) any witness depositions on communications between DRAM

that order, Complaint Counsel and their expert have made submissions that demonstrate, beyond dispute, the relevance of such evidence.

Relying on Judge Timony's order, Complaint Counsel contend that all evidence of collusion is irrelevant. But Judge Timony's order applied a standard more exacting than mere relevance. The Commission's Rules of Practice succinctly state, "Relevant, material, and reliable evidence shall be admitted." 16 C.F.R. § 3.43(b). Relevant evidence is any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. The requirement that evidence be relevant "does not raise a high standard." *Hurley v. Atlantic City Policy Dept.*, 174 F.3d 95, 109-10 (3d Cir. 1999). In contrast, Judge Timony's order was based on a balancing test, under which discovery of even *relevant* evidence may be limited to protect a grand jury proceeding. Limiting Order, p. 6 (citing *Founding Church of Scientology of Washington, D. C., Inc. v. Kelley*, 77 F.R.D. 378 (D.D.C. 1977), which held that certain interrogatories sought relevant evidence but nonetheless prohibited discovery because of impact on the grand jury proceeding, *id.* at 380-81). Judge Timony's order therefore cannot be considered dispositive with regard to the issue of relevance for admissibility purposes.

Moreover, Judge Timony's order dealt only with certain discovery regarding possible price-fixing among the DRAM manufacturers, and any statements about the relevance of other collusion evidence was necessarily *dicta.* The DoJ sought to limit discovery of "information regarding communications with the DOJ concerning the ongoing DRAM grand jury investigation or materials produced to the grand jury" and "any witness depositions concerning communications among DRAM manufacturers regarding pricing to DRAM customers."

Limiting Order, p. 1. Yet Complaint Counsel seek to use this order to exclude *all* evidence of collusion. Indeed, Complaint Counsel argue that Rambus "has been heard, and lost, on *this* issue already," Motion at 3 (emphasis added). The argument is strikingly disingenuous. In urging Judge Timony to grant the DoJ's motion, Complaint Counsel themselves emphasized that the DoJ's requested limitation *would not* affect Rambus's ability to obtain discovery regarding collusion among DRAM manufacturers. Complaint Counsel's Statement in Support of Department of Justice's Motion to Limit Discovery Relating to DRAM Grand Jury, filed Jan. 3, 2003, p. 9. The limitation, argued Complaint Counsel, would prevent Rambus only "from gaining insight as to what DOJ thought was relevant to its investigation." *Id.* Further, Complaint Counsel argued that "it would not prejudice Rambus if Your Honor were to order limitations on discovery relating not to the existence of an alleged group boycott to resist adoption of RDRAM, but to a different alleged conspiracy to inflate downstream DRAM prices. Accordingly, this portion of Rambus's argument [the portion discussing the boycott evidence] can be *ignored* for purposes of ruling on the DOJ's Motion." Complaint Counsel's Response to Memorandum by Rambus Inc. In Response to Motion by Department of Justice to Limit Discovery Relating to the DRAM Grand Jury, filed Jan. 6, 2003, p. 12 (emphasis added). Having argued to Judge Timony that the issue before him was limited to preventing Rambus "from gaining insight as to what DOJ thought was relevant to its investigation," and that he could "ignore" the group boycott issue because it was outside the scope of the DoJ's motion, it is duplicitous for Complaint Counsel now to argue that Judge Timony's order has a preclusive effect with regard to all evidence of collusion.

B. It Is Now Indisputable That Evidence of Collusion Is Relevant

Submissions by Complaint Counsel and their expert subsequent to Judge Timony's discovery order demonstrate beyond question that evidence of collusion is relevant. Moreover,

these submissions show that the relevance of this evidence has nothing to do with an "unclean hands" defense. The evidence is not being offered to "legalize" otherwise anticompetitive conduct, *see Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951); rather, the evidence is directly relevant to issues that are central to Complaint Counsel's affirmative case, including whether Rambus's allegedly illegal conduct caused any competitive harm.

1. Evidence of Collusion Is Relevant To Complaint Counsel's Expert's Conclusions

Complaint Counsel's expert, Prof. McAfee, has implicitly admitted that evidence of collusion among DRAM manufacturers would be relevant to his opinions and to Complaint

a. Evidence of Collusion Is Directly Relevant to The Questions Whether Commercially Viable Alternatives to Rambus's Technology Existed and Whether Rambus Gained Market Power Through Its Allegedly Illegal Conduct

Central to Complaint Counsel's case is the contention that Rambus's allegedly illegal conduct caused Rambus to have more market power that it would otherwise have had. *See* McAfee Original Report ¶ 27 (key issue is "extent to which [Rambus] obtain[ed] such power through the conduct challenged by this lawsuit, as opposed to other means [such as superior technology]"); *id.* ¶ 126 ("Rambus's conduct would not give rise to an antitrust problem unless the conduct increased the likelihood that Rambus could obtain market or monopoly power."). While Complaint Counsel contend that evidence of collusion is irrelevant to this determination, the methodology used by Complaint Counsel's expert to examine this question demonstrates that evidence of collusion is in fact central to the market power issue.

In order to prove that Rambus's allegedly illegal conduct enhanced its market power, Complaint Counsel must prove, among other things, that there existed commercially viable alternatives to Rambus's technologies that could have been adopted by JEDEC to avoid Rambus's patents. As Judge Timony summarized Complaint Counsel's key allegation: "[H]ad Rambus made the allegedly necessary disclosures, JEDEC could have adopted alternative technologies and avoided Rambus's patented technologies. Complaint at ¶¶ 62, 65, 69." Opinion Supporting Order Denying Motion of Mitsubishi Electric & Electronics USA, Inc. to Quash or Narrow Subpoena, filed November 18, 2002, p. 4. If there were no such commercially viable alternatives, JEDEC would have had no choice but to adopt Rambus's technology, and Rambus's allegedly illegal conduct would not be the source of any market power Rambus may have. Concurring in this assessment, Prof. McAfee recognizes that the question whether there existed commercially viable noninfringing alternatives to Rambus's patented technologies is

critical to the assessment whether Rambus's allegedly illegal conduct increased its market power. Thus, he opines that, *because* there were such alternatives, Rambus's allegedly illegal conduct conferred market power upon it. *See* McAfee Original Report ¶¶ 227-234 (expressing opinion that commercially viable noninfringing alternatives existed and that Rambus therefore gained market power through its allegedly illegal conduct); McAfee Rebuttal Report ¶ 3 (expressing opinion that existence of alternatives *ex ante* demonstrates that alleged conduct increased market power).

In his recent Rebuttal Report, Prof. McAfee makes clear that his conclusion that commercially viable alternatives to Rambus's technology existed depends upon the prices that were charged for SDRAM and DDR SDRAM by DRAM manufacturers. Thus, he states: "To demonstrate that there were, *ex ante*, a number of non-infringing, commercially viable alternatives in each of the four relevant antitrust technology markets, I compare (1) the present value of the costs of the alternative, technically feasible technologies as estimated by [Rambus's expert] . . . to (2) the Rambus royalty rate multiplied by the average selling price ('ASP') for different types of SDRAM." McAfee Rebuttal Report ¶ 16 (emphasis added). If the costs of the alternative are less than the Rambus royalty rate multiplied by the ASP, Dr. McAfee concludes that the alternative was commercially viable. *See* McAfee Rebuttal Report ¶ 30

Thus, Prof. McAfee's — and Complaint Counsel's — entire theory of competitive harm depends critically on the price of SDRAM and DDR. Prof. McAfee's conclusion that Rambus's allegedly illegal conduct enabled it to exercise market power is based directly on the very prices that were the subject of the DRAM manufacturers' alleged conspiracy – the selling prices of SDRAM and DDR SDRAM. If these prices were fixed artificially high as the result of collusion, the basis for Prof. McAfee's conclusion that the cost of alternative technologies would have been

less than the cost of paying royalties to Rambus would disappear, and into the dustbin with that conclusion would go his opinion (fundamental to Complaint Counsel's entire case) that Rambus's allegedly illegal conduct caused it to have market power and allowed Rambus to raise its royalty rates above the competitive level.

To illustrate, assume that alternative technologies to the Rambus technologies embedded in SDRAM cost an additional 4¢. Assume further that the average selling price of SDRAM was $5.60. Under Prof. McAfee's analysis, alternative technologies would have been commercially viable because their additional cost (4¢) would have been less than the cost of Rambus's 0.75 royalty ($5.60*0.0075 = 4.2¢). If, however, the average selling price of SDRAM was inflated as the result of collusion among DRAM manufacturers, the alternative technologies would not have been commercially viable after all (at least not in a market free of collusion). For example, if, absent collusion, the average selling price would have been $5.20, the cost of Rambus's royalty rates ($5.20*0.0075 = 3.9¢) would have been less than the cost of the alternative technology. In that event, as Prof. McAfee recognizes, JEDEC and the DRAM manufacturers would have adopted Rambus's technology notwithstanding any potential patent claims, and Rambus's allegedly illegal conduct would not have given it market power or caused any competitive harm. Indeed, the apparently higher cost of Rambus's royalties in the first example would be revealed to be the result of collusion by the manufacturers, not the commercial viability of the alternative technologies in a competitive market. Accordingly, in order to determine whether Complaint Counsel have met the burden of proving that there were commercially viable alternatives when the SDRAM and DDR SDRAM standards were adopted, and therefore whether Rambus's allegedly illegal conduct caused any competitive harm, Your Honor and the Commission need to know whether DRAM prices have been inflated as the result of collusion among the

other patented technologies into its standards). *See* McAfee Rebuttal Report ¶ 86 (stating that the industry would have treated Rambus's intellectual property rights differently from patent rights held by other companies; "JEDEC members would have viewed Rambus IP differently").

Evidence of possible collusion among the DRAM manufacturers to boycott RDRAM is directly relevant to Prof. McAfee's opinion. According to him, one may infer from the failure of the industry to adopt RDRAM that industry participants *in general* prefer to avoid proprietary technologies. This might be true *if* one assumes that the industry failed to adopt RDRAM in a purely competitive market, based entirely on performance and competitive cost considerations. If, however, the failure of the industry to adopt RDRAM was instead the result of collusion among the DRAM manufacturers to invent or exaggerate performance difficulties with RDRAM and to inflate the price of RDRAM, no such inference would be proper, and Prof. McAfee's opinion would be without foundation.

2. Evidence of Collusion Is Directly Relevant to Complaint Counsel's New Theory of A Duty of "Good Faith"

Complaint Counsel have recently purported to introduce into the case a new theory that further demonstrates the relevance of collusion evidence. Judge Timony previously described Complaint Counsel's core theory in this case as being whether Rambus had violated JEDEC's purported patent disclosure policy:

> 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.

Opinion Supporting Order Denying Motion of Mitsubishi Electric & Electronics USA, Inc. to Quash or Narrow Subpoena, filed November 18, 2002, p. 4 (emphasis added). It was with this understanding of the case that Judge Timony made his statement that evidence of collusion was

not relevant.

In response to the Federal Circuit holding that Rambus did not violate any JEDEC patent disclosure duty, *Rambus Inc. v. Infineon Technologies AG*, 318 F.3d 1081, 1105 (Fed. Cir. 2003), Complaint Counsel have turned to a new theory. Complaint Counsel now contend that R

witnesses' credibility, to the extent they testify adverse to positions advanced by Rambus, would be called into question.

For example, one component of the DRAM manufacturers' boycott efforts was the "SyncLink Consortium," which was a membership-restricted manufacturer consortium formed to

evidence of collusion, even if relevant, because such evidence would confuse the issues and result in an undue delay. Memorandum in Support of Motion *In Limine* to Bar Presentation of Testimony and Arguments Regarding Purported Collusion Among DRAM Manufacturers, p. 7 n.4. Complaint Counsel base this argument on the faulty assumption that evidence of collusion is relevant only to an "unclean hands" defense. *Id.* As demonstrated above, however, evidence of collusion is relevant to central issues in this case, not to some "unclean hands" defense. It therefore cannot be said that the probative value of this evidence is "*substantially outweighed* by the danger of . . . confusion of the issues . . . or by considerations of undue delay." 16 C.F.R. § 3.43(b) (emphasis added); *see also United States v. Terzado-Madruga*, 897 F.2d 1099, 1117 (11th Cir.1990) (stating that exclusion under Federal Rule of Evidence 403 (which has the same language as § 3.43(b)) "is an extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly probative evidence"); *see also Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996, 1004 (5th Cir. 1998) (same); *United States v. Morris*, 79 F.3d 409, 411 (5th Cir. 1996) (same).

Allowing Rambus to introduce evidence of collusion would not result in any extraordinary delay. The documents and testimony related to the issue of collusion are intertwined with other important issues in this case. For instance, the DRAM manufacturers' efforts to boycott Rambus through the SyncLink Consortium are intimately tied to the issue whether JEDEC would have attempted to avoid potential Rambus patents had Rambus made the disclosures that Complaint Counsel claim it should have. The evidence will show that Rambus warned SyncLink that its efforts were running headlong into Rambus's IP. Undaunted, the SyncLink members, the same DRAM manufacturers who are in JEDEC and were supposedly unaware of Rambus's potential IP, dumped millions of dollars and thousands of engineer hours

into the SyncLink efforts, apparently believing that Rambus would be unable to obtain relevant patents because of prior art. There is no reason to believe that these same manufacturers would have acted any differently had Rambus made the disclosures that Complaint Counsel allege were necessary. Thus, the evidence related to collusion among DRAM manufacturers is part and parcel of evidence that goes to other key issues in this case.

IV.
CONCLUSION

For all the foregoing reasons, Complaint Counsel's motion *in limine* should be denied.

DATED: April 11, 2003

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on April 11, 2003, I caused a true and correct copy of the *Memorandum of Respondent Rambus Inc. in Opposition to Complaint Counsel's Motion In Limine to Bar Presentation of Testimony and Arguments Regarding Purported Collusion Among DRAM Manufacturers* to be served on the following persons by hand delivery:

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