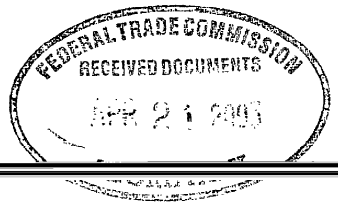
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

ORDER ON MOTIONS IN LIMINE

On March 26, 2003, pursuant to the Fourth Revised Scheduling Order, the parties filed various motions in limine. Complaint Counsel filed a total of seven motions in limine: (1) to bar evidence on issues collaterally estopped by *Infineon*; (2) to bar testimony by William Keefauver; (3) to bar testimony of Donald Soderman and Martin Fliesler; (4) to bar testimony of Michael Geilhufe; (5) to bar evidence regarding purported collusion among DRAM manufacturers; (6) to bar testimony by Richard Rapp and David Teece regarding "efficient breach" theory; and (7) to bar testimony regarding Respondent's post-June 1996 patent prosecution efforts and the scope of Respondent's pre-June 1996 patent applications. Respondent filed a single motion in limine: to exclude the testimony of Preston McafeeI.

I. Background Statement

The traditional concern addressed by a motion in limine, to prevent even the discussion at trial of evidence that could create undue prejudice in a jury, is inapplicable to the instant matter. Cf. Federal Rules of Evidence (FRE) Sec. 103(c) (directing, to the extent practicable outside the hearing of the jury to prevent inadmissible evidence from being

suggested to the jury by any means).[1] The other common purpose of a motion in limine is to exclude the introduction of either irrelevant evidence, *cf.* FRE 401, or evidence, though relevant, is either more prejudicial than probative, confusing or is a waste of time. *Cf.* FRE 403. *See also* Commission Rule 3.43(b), 16 C.F.R. § 3.43(b).

It is evident in administrative adjudications that there is no need to insulate a jury from

charged with resolving both motions in limine and the admissibility of evidence in the course of

needlessly cumulative evidence, the Court believes the more prudent course is to deny such motions and to defer judgment on the particular issues raised in the motions in limine until they actually arise at trial.

As a final prefatory comment, after reviewing the hundreds of pages of memos associated with the various motions in limine, the Court wishes to note its concern that so much of the parties' efforts seemed needlessly focused on the underlying motives of opposing counsel. The

The Court fully expects, however, that at trial and in the post-trial briefing, a higher level of advocacy will prevail.

II. The Specific Motions in Limine

A. Complaint Counsel's Motion To Bar Evidence On Issues Purportedly Collaterally Estopped By *Infineon*

[1] The Federal Rules of Evidence are persuasive authority for FTC adjudicative proceedings. *In re Herbert R. Gibson, Jr.*, 1978 FTC LEXIS 375 at *2, n.1 (May 3, 1978).

Complaint Counsel moves to prevent Respondent from presenting testimony and arguments regarding issues that it asserts were fully litigated in *Rambus Inc. v. Infineon Technologies AG*, 155 F.Supp.2d 668 (E.D. Va. 2001), *aff'd in part, rev'd in part, vacated in part, and remanded*, 318 F.3d 1081 (Fed. Cir. 2003). Put another way, by attempting to prohibit testimony from Respondent on the following issues through this motion in limine, Complaint Counsel requests that the Court establish as a matter of fact in this litigation that: (1) JEDEC's organization's rules to impose a mandatory disclosure duty; (3) the JEDEC disclosure policy all patents and applications that "relate to" JEDEC's work; and (5) JEDEC's rules applied to all members, including Respondent.

The Court has previously addressed many of the issues raised in the instant motion in its April 15, 2003 Order Denying Respondent's Motion for Summary Decision. Respondent's disclosure policy but that if JEDEC did have such a policy, Respondent did not violate it with regard to discussions relating to the development of JEDEC's SDRAM or DDRAM standards. In its Summary Decision Order, the Court held that genuine issues of material fact remained which prohibited entry of summary decision on these issues.

The Court's April 15th Order likewise addresses Complaint Counsel's instant motion. Indeed, if there were no material questions of fact concerning the issues raised in Complaint Counsel's motion, few if any factual disputes would remain for trial. For these reasons Complaint Counsel's motion in limine is **DENIED**.

B. Complaint Counsel's Motion To Bar Testimony By William Keefauver

Complaint Counsel moves to preclude the report and testimony of William Keefauver. Respondent proposes to call Mr. Keefauver, a former General Counsel and Vice President of Bell Labs and AT&T, as an expert to testify "how a reasonable JEDEC member would have understood the terms of JEDEC's patent policy." (Keefauver Opp. Memo at 9).

Complaint Counsel attacks the proposed testimony on the grounds of both reliability and relevance. Complaint Counsel claims that Mr. Keefauver's testimony is unreliable because it lacks a proper foundation. In particular, according to Complaint Counsel, Mr. Keefauver's testimony is faulty because: it is founded on the improper assumption that JEDEC members based their interpretations of JEDEC's patent policies on the policies of other standard developing organizations ("SDOs"); he looked at too few SDO patent policies to have any significance; and his opinion is based on incomplete facts provided by Respondent's counsel. As to relevance, Complaint Counsel asserts that interpretation of JEDEC's patent policy is a matter of common sense interpretation of JEDEC's written patent policy statements and that the various JEDEC participants on the final witness lists can provide sufficient evidence of JEDEC's members' course of conduct.

Respondent argues that JEDEC's policies are confusing and contradictory and that the only possible way to understand them is to bring in extrinsic expert testimony by Mr. Keefauver explaining the philosophy behind their adoption. Mr. Keefauver purportedly will do this by providing information on the patent policies of several other high-tech SDOs. Respondent suggests that Mr. Keefauver's testimony will provide keen insight into the true meaning and intent of JEDEC's patent policies. Respondent's argument on this point is unpersuasive.

the most valuable extrinsic evidence for the Court to consider, or as Respondent puts it, "how a reasonable JEDEC member would have understood the terms of JEDEC's patent policy," is testimony from actual JEDEC participants (of which there are several on the parties' final witness lists). Such interpretations are best left to the discretion of JEDEC and its members. This is especially true given the particular circumstances and specialized knowledge required of JEDEC members in the instant case. Moreover, Respondent's position in the present motion is undercut by its fully contradictory position in its own motion in limine to preclude certain testimony by Preston McAfee (an expert for Complaint Counsel). In the McAfee motion Respondent asserts that Respondent's disclosure duties (if any) are a question of law to be resolved by the Court. determined by the Court and are not to be the subject of expert testimony. *E.g., Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996); *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994).

Complaint Counsel's motion is, therefore, GRANTED and Mr. Kaufman's report will not be received into evidence and he will not be permitted to testify at trial.

C. Complaint Counsel's Motion To Bar Testimony By Donald Soderman And Martin Fliesler

Complaint Counsel moves to preclude the report and testimony of Donald Soderman and Martin Fliesler. Respondent intends to use testimony from Mr. Soderman and Mr. Fliesler to argue that key features in the underlying technology of JEDEC's SDRAM and DDRAM standards would have made it difficult, if not impossible, for JEDEC to specify DRAM standards that could

the "technical aspects" patents held by Respondent. In particular, Mr. Soderman would testify that alternative SDRAM technologies proposed by Complaint Counsel's expert, Bruce Jacob, were either unfeasible or subject to one of four patents held by Respondent. Mr. Fliesler would testify that the JEDEC DDRAM standards are covered by a patent which Complaint Counsel does not claim Respondent was obligated to disclose to JEDEC.

Complaint Counsel argues that the proposed testimony of both Mr. Soderman and Mr. Fliesler is incomplete and, therefore, unreliable. Complaint Counsel contends that they did not conduct a full analysis of whether possible alternative technologies that JEDEC could have considered in preparing its SDRAM and DDRAM standards would infringe on patents held by Respondent and did not determine if these patents are valid. Complaint Counsel then claims that the proposed testimony is unreliable, as it is speculative and permitting speculation is a waste of the Court's time.

In response, Respondent argues that Mr. Soderman conducted sufficient examinations of the relevant technologies and the patents and that, when combined with his experience in the area he can render expert opinions. Additionally, Respondent places the blame for any shortcomings in Mr. Soderman's analysis on inadequate descriptions of the proposed alternative technologies by Complaint Counsel's expert, Mr. Jacob. As to Mr. Fliesler, Respondent claims that Mr. Fliesler has sufficient experience to make the determination and present an expert opinion concerning whether a DDRAM device built to conform with JEDEC standards infringes on a patent held by Respondent.

Complaint Counsel's reliability argument is not sufficient to foreclose testimony by either Mr. Soderman or Mr. Fliesler. If their shortcomings are as asserted by Complaint Counsel, the

better remedy is rigorous cross-examination by Complaint Counsel, not exclusion. *Sphere Drake Ins. PLC v. Trisko*, 226 F.3d 951, 955 (8th Cir. 2000). It appears that Mr. Soderman's testimony, in effect, is to rebut testimony that Respondent anticipates will come from an expert for Complaint Counsel, Mr. Jacob. As a result, it appears that Mr. Soderman's testimony should be relevant.

Similarly, it appears that Mr. Fliesler's testimony is relevant to a defense theory of Respondent that a patent which Complaint Counsel does not contend Respondent had to disclose to JEDEC covers the JEDEC DDRAM standard and, therefore, no injury resulted from Respondent failing to meet what Complaint Counsel alleges was Respondent's disclosure obligations concerning JEDEC's DDRAM standard.[2]

The Court believes that the proposed testimony and reports of Mr. Soderman and Mr. Fliesler are admissible and therefore Complaint Counsel's motion is DENIED.

D. Complaint Counsel's Motion To Preclude Testimony By Michael Geilhufe Concerning Cost Estimates

Complaint Counsel moves to preclude the report and testimony of Michael Geilhufe concerning his price estimates for alternative DRAM technologies proposed by an expert witness for Complaint Counsel, Bruce Jacob. Complaint Counsel argues that Mr. Geilhufe's 30 years of integrated circuit manufacturing experience do not qualify him to estimate the costs of production for DRAM. In particular, Complaint Counsel asserts that Mr. Geilhufe's cost estimates are based

[2] The Court wishes to note that although it will extend some latitude to Respondent on the presentation of testimony by Mr. Soderman and Mr. Fliesler, it will not allow the parties to conduct a "trial within a trial" on the validity and scope of the five patents covered by their collective testimony. Evidence on this issue will be limited in scope based upon the degree of relevance the Court considers helpful in addressing the central issues before it.

on subjective and anecdotal information and could not be duplicated or verified by Complaint Counsel.

In opposition, Respondent argues that Mr. Geilhufe's experience in the integrated circuit manufacturing business is itself a sufficient basis for his cost estimates and that his testimony need not be testable empirically in order to be sufficiently reliable to be admissible. As in its opposition to Complaint Counsel's motion in limine concerning Messrs. Soderman and Fliesler, Respondent again places the blame for any inadequacies in Mr. Geilhufe's cost estimates on the purported inadequacies in the alternative technologies described by Mr. Jacob.

Complaint Counsel's reliability argument is not sufficient to foreclose testimony by Mr. Geilhufe. If his shortcomings are as asserted by Complaint Counsel, the better remedy is rigorous cross-examination by Complaint Counsel, not exclusion. The Court believes that the proposed testimony and expert report of Mr. Geilhufe are admissible and, therefore, the motion is **DENIED**.

E. Complaint Counsel's Motion To Bar Evidence Regarding Purported Collusion Among DRAM Manufacturers

Complaint counsel moves to bar any evidence regarding purported collusion among DRAM manufacturers. Respondent claims that collusion among DRAM manufacturers artificially raised market prices and eliminated the possibility of commercially viable alternatives to the JEDEC DRAM standards that purportedly infringe on patents held by Respondent. As a result, according to Respondent, any actions by Respondent did not cause harm to the DRAM market(s).

Complaint Counsel argues that such evidence is not relevant and that the Court's January 15, 2003 Order Granting the U.S. Department of Justice's Motion to Limit Discovery dispositively establishes this point. Complaint Counsel cites to a long line of cases for the proposition that the anti-competitive actions of others do not constitute a defense to one's own

In Opposition, Respondent claims that such evidence would rebut Complaint Counsel's proposition that the JEDEC DRAM standards would have been different had Respondent disclosed its patents and patent applications. Respondent claims that the purported collusion of DRAM manufacturers so affected DRAM market prices that Respondent's conduct (even if it was attempting to monopolize DRAM markets) resulted in no harm to the market place. Additionally, Respondent claims that evidence on this issue would assist it in rebutting the testimony of one of Complaint Counsel's experts, Preston McAfee.

While the Court has doubts about the relevance of evidence regarding purported collusion among DRAM manufacturers, it appears that it will be in better position to make a dispositive ruling on this issue with the benefit of the greater context available from trial, particularly (based on the representations of Respondent) the testimony of Mr. McAfee. The Court also notes that the authority cited by Complaint Counsel does not fully support its position. The Court's January 15, 2003 Order Granting the U.S. Department of Justice's Motion to Limit Discovery was decided in the context of determining a balancing test on whether Respondent could obtain discovery of documents conditionally protected by the law enforcement privilege asserted by the USDOJ as part of a criminal investigation of possible collusion among DRAM manufacturers. As a result while it might be persuasive on this issue, the Court does not view it as dispositive. The cases

cited by Complaint Counsel directly stand only for the proposition that a plaintiffs's own unclean hands do not serve as an estoppel which prevents a plaintiff from pursuing the illegal anti-competitive activities of a defendant. *E.g. Southern Motor Carriers Rate Conf.*, 439 F. Supp. 29, 52 (N.D. Ga. 1977) (defendants accused the government itself of having unclean hands by having stood by for thirty years while the defendants engaged in the conduct that the government was then prosecuting).

[redacted] DENIED. The Court will defer ruling on this motion in limine

ruling on this issue until it can be decided in context at trial. Even if the Court decides to admit limited evidence of the purported anti-competitive conduct of DRAM manufacturers, Respondent is again advised that the Court does not intend to entertain extensive examination on this question since the focus of this matter is on the conduct and actions of Respondent, not non-parties.

F. Complaint Counsel's Motion To Bar Testimony By Richard Rapp And David Teece Regarding "Efficient Breach" Theory

Complaint Counsel moves to bar the portion of proposed testimony by two economists, Richard Rapp and David Teece, regarding "efficient breach" theory. Under this theory, Respondent claims that JEDEC's patent disclosure rules (if any) were themselves anti-competitive. Following on this premise, Respondent contends that if it breached JEDEC's patent disclosure rules its violation is fully excused because: (1) the violation was made with the intent to counter JEDEC's illegal anti-competitive rules; and (2) Respondent's breach created more "efficient" DRAM markets, thus increasing social welfare over what would have been had Respondent complied with JEDEC's patent disclosure rules.

Complaint Counsel advances several arguments against the admission of testimony concerning this theory. First, it is inconsistent with the Court's January 15, 2003 Order granting [redacted] manufacturers engaged in an illegal conspiracy, this would not amount to a defense in the instant [redacted] case. Fourth, even if there were any validity to the theory it is barred since it was never pled as an affirmative defense.

[redacted] undermined the theoretical goal of the antitrust laws: to promote economic efficiency. Assuming *arguendo* that JEDEC did not promote economic efficiency, Respondent argues that had it failed to disclose its patents and patent applications to JEDEC , such conduct would have actually promoted economic efficiency in the DRAM market(s).

The Court believes that Respondent's arguments miss the mark. The issue here is not whether JEDEC's standards are anti-competitive. Rather, the issue is whether Respondent used its participation in JEDEC to benefit itself economically by creating or attempting to create a monopoly in one or more DRAM markets. Moreover, while the concept of an "efficient breach" has had some acceptance in breach of contract cases, *e.g.*, *Stop-N-Go of Madison Inc. v. Uno-Ven Co.*, 184 F.3d 672, 689 (7th Cir. 1999), the Court cannot locate any antitrust case ever discussing, much less adopting, an "efficient breach" defense theory. Moreover, even if such theory were [redacted] theory to the instant case he had to make some assumptions that he believed are counter-factual (Rapp. Dep. at 230-231 *quoted in* Complaint Counsel's Rapp and Teece Motion in Limine Memo

at 5), causes the Court to conclude that such proposed testimony is plainly irrelevant to the issues in the instant case. The Court's January 15, 2003 Order Granting the U.S. Department of Justice's Motion to Limit Discovery, though decided in the significantly different context of whether Respondent made a sufficient showing to overcome the USDOJ's qualified law enforcement privilege over grand jury materials, strongly suggests that a purported illegal conspiracy by DRAM manufacturers has no relevance to the instant action. Finally, again assuming that there exists an "efficient breach" defense available in antitrust law, the timing of the delayed initial presentation of the defense by Respondent to Complaint Counsel is troubling.

The motion in limine is, therefore, **GRANTED**. Neither Mr. Teece nor Mr. Rapp will be permitted to present any testimony regarding or concerning "efficient breach" theory and any discussion in their expert reports regarding or concerning "efficient breach" theory must be excised or redacted in order to be considered for admission at trial.

G. Complaint Counsel's Motion To Bar Testimony Regarding Respondent's Post-June 1996 Patent Prosecution Efforts And The Scope of Respondent's Pre-June 1996 Patent Applications

Complaint Counsel moves to bar testimony by any other representatives of Rambus regarding Respondent's post-June 1996 patent prosecution efforts and the scope of Respondent's pre-June 1996 patent applications. Of particular interest to Complaint Counsel is Neil Steinberg who, at various times, served as outside and in-house patent counsel for Respondent and appears to have been involved in discussions on both of the issues raised in the instant motion. Also who Complaint Counsel asserts also has knowledge of these issues.

In support of the motion, Complaint Counsel claims that Respondent prohibited Complaint Counsel from taking complete discovery from Mr. Steinberg, Mr. Karp or other representatives of Respondent on these issues, asserting attorney-client privilege. Having according to Complaint Counsel, used the attorney-client privilege to block discovery, during discovery. Complaint Counsel contends that to do so not only would permit Respondent to selectively release only favorable privileged material, it also would make the released information difficult to challenge since Complaint Counsel was limited in its discovery efforts.

In its opposition, Respondent states that it did not assert privilege for the information that it intends to introduce at trial. Rather, Respondent indicates that any evidence it may introduce at trial concerning post-June 1996 patent prosecution efforts and the scope of Respondent's pre-June 1996 patent applications is purely factual information and that Complaint Counsel had the opportunity to test its veracity through discovery. In addition, to the extent that it did assert privilege during discovery, Respondent contends that its assertion was both proper and limited in in scope and should not affect the admissibility of the purely factual evidence that Respondent intends to introduce at trial.

The Court agrees with the general proposition asserted by Complaint Counsel that no party should be permitted to use the attorney-client privilege as both a shield to block discovery and a sword to introduce at trial selected and difficult to challenge evidence on which discovery was not permitted. However, the Court cannot make a dispositive ruling on this issue on the existing record. In particular, the pending reconsideration of Complaint Counsel's Motion to Compel Discovery based on the Crime-Fraud Exception may significantly effect the permitted scope of

Respondent's attorney-client privilege. The motion in limine therefore, is **DENIED**. The Court, if necessary, on the objection of Complaint Counsel, will revisit this issue at trial following its ruling on the Crime-Fraud Exception Motion and with the fuller context on this issue available at trial.

H. Respondent's Motion To Exclude Testimony By Preston McAfee Regarding Respondent's State Of Mind, JEDEC's Patent Disclosure Policy, The Scope Of Respondent's Patents, And The Cost And Performance Of Alternative Technologies

Respondent moves to exclude testimony by Preston McAfee regarding Respondent's state of mind, JEDEC's patent disclosure policy, the scope of Respondent's patents, and the cost and performance of alternative technologies. Respondent indicates that Complaint Counsel improperly intends to use Mr. McAfee, an economist, as its "omnibus expert" and have him testify on issues beyond the training, experience or expertise of any economist.

In support of the motion, Respondent states that at his March 21, 2003 deposition, Mr. McAfee admitted he had no basis for any of the opinions which Respondent seeks to exclude. Respondent asserts that, as an economist, Mr. McAfee lacks the expertise to provide any specialized insight into Respondent's subjective state of mind and his opinions interpreting facts are not better than the trier of facts. As an economist, Respondent also contends that Mr. McAfee lacks the expertise to determine the disclosure duties (if any) imposed by JEDEC's rules and that these are legal questions to be resolved by the Court. Respondent also asserts that Mr. McAfee is not qualified to testify to the state of mind or expectations of JEDEC members concerning patent disclosures and, even if he were, he has no factual basis for forming the opinions he would offer in testimony. Mr. McAfee's background as an economist does not, according to Respondent,

provide him with the expertise to express opinions about the scope of Respondent's highly technical patents. Finally, Respondent asserts that Mr. McAfee has no factual basis for testifying on the cost and performance attributes of alternative DRAM technologies that would not infringe on Respondent's patents because he has not quantified any of these attributes and, therefore, his opinions are without any factual basis.

In its opposition, Complaint Counsel attempts to counter Respondent's position by asserting that the bulk of the issues raised by Respondents motion are moot: Mr. McAfee will not testify concerning four of the five issues raised in Respondent's motion. The sole issue presented by the motion where Mr. McAfee will provide testimony is on the cost and performance attributes of alternative DRAM technologies that would not infringe on Respondent's patents. As to this issue, Complaint Counsel responds that the methodology used by Mr. McAfee is consistent with the FTC/DOJ Horizontal Merger Guidelines and Respondent's own experts' efforts. Complaint Counsel further asserts that the statistical analysis that Respondent claims Mr. McAfee's work lacks is not required under these guidelines.

Respondent's motion in limine is **GRANTED, IN PART** to the extent applicable to the issues that are allegedly mooted. Mr. McAfee will not be allowed to testify as to any aspect of these issues and his expert report must have any discussions regarding or concerning these issues excised or redacted to be considered for admission into evidence at trial. As to the remaining issue, Respondent's motion in limine is **DENIED, IN PART**. It appears that if the shortcomings in Mr. McAfee's methodology and data are as asserted by Respondent, the better remedy is rigorous cross-examination by Respondent, not exclusion.

III. Conclusion

For the reasons set forth above:

A. Complaint Counsel's Motion to bar evidence on issues purportedly collaterally estopped by Infineon is **DENIED**;

B. Complaint Counsel's Motion to bar testimony by and the expert report of William Keefauver is **GRANTED**;

C. Complaint Counsel's Motion to bar testimony by Donald Soderman and Martin Fliesler is **DENIED**;

D. Complaint Counsel's motion to bar testimony by Michael Geilhufe concerning cost estimates is **DENIED**;

E. Complaint Counsel's Motion to bar evidence regarding purported collusion among DRAM manufacturers is **DENIED**;

F. Complaint Counsel's motion to bar the portions of the proposed testimony and expert reports by Richard Rapp and David Teece regarding "efficient breach" theory is **GRANTED**;

G. Complaint Counsel's Motion to bar testimony regarding Respondent's post-June 1996 patent prosecution efforts and the scope of Respondent's pre-June 1996 patent applications is **DENIED**;

H. Respondent's motion to exclude testimony by Preston McAfee regarding Respondent's state of mind, JEDEC's patent disclosure policy, and the scope of Respondent's patents, is **GRANTED IN PART.** Any discussion regarding or concerning these issues in his expert report must be excised or redacted in order for the report to be considered for admission into evidence at trial. Respondent's motion is **DENIED IN PART** as to Mr. McAfee's testimony on the cost and performance attributes of alternative DRAM technologies that would not infringe [illegible] the subject of Respondent's motion in limine.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Dated: April 21, 2003

Matter: D09302 Rambus Incorporated

Document: 499895 ADMINISTRATIVE LAW JUDGE ORDER ON MOTIONS IN LIMINE

Filed: 04/23/2003 Records Staff: Jones, Patricia G

Malcolm L. Catt
Room: 6264

Richard B. Dagen
Room: 6264

Scanner

Stephen J McGuire
Room: 110

Web Representative

TO BE COMPLETED BY MAILROOM STAFF

The documents were mailed and the documents were distributed.

Please sign -> **Please date ->**

RETURN THIS CERTIFICATE TO: PUBLIC RECORDS, H-159