UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Public Version

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

RESPONDENT RAMBUS INC.'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION IN LIMINE TO PRECLUDE OPINIONS OF RICHARD T. RAPP AND DAVID J. TEECE REGARDING "EFFICIENT BREACH" THEORY

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Complaint Counsel's motion in limine does not challenge the qualifications of Rambus's distinguished economic experts, nor does it question the relevance and admissibility of most of their intended testimony. It seeks to exclude, instead, a portion of their intended testimony. Complaint Counsel call that portion "opinions . . . regarding 'efficient breach' theory," but their Memorandum in Support of their Motion makes clear that they hope to exclude much more than the specific and literal topic of "efficient breach."

Complaint Counsel's motion rests on a disregard of fundamental principles of antitrust law and a misunderstanding, or misrepresentation, of the testimony of Rambus's economic experts. Accordingly, this Opposition Memorandum sets forth the governing legal standard to which the challenged portions of Rambus's economic testimony are directed. It then sets straight the testimony Complaint Counsel challenges and explains how that testimony relates directly to required elements of Complaint Counsel's claim. Finally, it explains why Complaint Counsel's four arguments for excluding the testimony stray wide of their mark.

I. MONOPOLIZATION CLAIMS: THE ANTITRUST LAW GOVERNING THIS CASE

This case involves alleged unlawful monopolization. Specifically, the Federal Trade Commission (the "Commission") alleges that Rambus has monopolized or attempted to monopolize certain markets through a "a pattern of anticompetitive acts and practices." In the Matter of Rambus, Inc., No. 9302, Complaint ¶ 1. Accordingly, to prevail in this case, Complaint Counsel must show, among other things, (i) that Rambus engaged in anticompetitive conduct and (ii) that that conduct caused injury to competition.

A. The Requirement of Exclusionary or Predatory Conduct

Just three and one half months ago, in a brief to the United States Supreme Court, the Federal Trade Commission again set forth the legal standard governing the anticompetitive conduct element. To prevail in a monopolization or attempted monopolization claim, the Commission said, a plaintiff "must at a minimum include some showing of 'exclusionary' or 'predatory' conduct, i.e., [that defendant's conduct] would not make economic sense unless it tended to reduce or eliminate competition." Brief for the United States and the Federal Trade Commission as Amicus Curiae on Petition for a Writ of Certiorari, Verizon Communications, Inc. v. Trinko, No. 02-6802, at 13 (December 2002) ("FTC Trinko Br.") (Ex. 1).[1] In other words, a defendant may incur antitrust liability only when its conduct does "not make economic

[1] See also, FTC Trinko Br. at 9 (Ex. 1) (criticizing a theory of antitrust liability "uncabined by any requirement that the challenged conduct be exclusionary or predatory – i.e., that the [conduct] not make economic sense *except* as an effort to diminish competition" – because such a theory "unduly expands" antitrust law) (emphasis in original); id. at 17 (no liability if antitrust theory "does not require the monopolist's conduct to be 'exclusionary' or 'predatory' within the meaning of section 2 jurisprudence"); id. at 10 ("Conduct is 'exclusionary' or 'predatory' in antitrust jurisprudence if the conduct would not make economic sense for the defendant but for the elimination or softening of competition.") (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-89 (1986)); id. at 13 ("predatory or exclusionary" means "that [it] would not make business sense unless it tended to limit or soften competition").

sense *except* as an effort to diminish competition," id. at 9 (emphasis in original); see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 609-11 (1985) (antitrust violation where defendant failed to offer "any efficiency justification whatever" for its pattern of conduct, and where it was instead "willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival").[2] This requirement is a necessary element of a monopolization claim that must be established by the plaintiff. Indeed, a complaint "does not implicate an antitrust duty" if it fails "to allege that [defendant's conduct] was predatory or exclusionary." FTC Trinko Br. at 13 (Ex. 1) (emphasis in original).

Accordingly, it is well established that "[a] monopolist may nevertheless rebut [allegations of exclusionary conduct in a monopolization claim] by establishing a valid business justification for its conduct." Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994). "If there is a valid business justification for [defendants'] conduct, there is no antitrust liability," High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993).

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[2] See also, e.g., Advanced Health Care Servs., Inc. v. Radford Comm. Hosp., 910 F.2d 139, 148 (4th Cir. 1990) ("if a plaintiff shows that a defendant has harmed consumers and competition by making a short-term sacrifice in order to further its exclusive, anticompetitive objectives, it has shown predation."); Neumann v. Reinforced Earth Co., 786 F.2d 424, 427 (D.C. Cir. 1986) ("predation involves aggression against . . . rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits."); Brief for the United States and the Federal Communications Commission as Amici Curiae, Covad Communications Co. v. BellSouth Corp., at 25 (Dec. 17, 2001) ("[C]onduct is not deemed exclusionary for purposes of Section 2 of the Sherman Act unless it lacks a valid business purpose; i.e., [i] it makes no business sense [ii] apart from its tendency to exclude and thereby create or maintain market power.").

Valid business justifications – or, in the Supreme Court's words, "normal business purpose[s]"[3] – include any reason that makes economic sense, including enhancing efficiency,[4] reducing costs,[5] protecting intellectual property,[6] and even "merely trying to make more money."[7] See also Complaint Counsel's Appeal Brief, In The Matter Of Schering-Plough Corporation, FTC Docket No. 9297 (August 9, 2002) (citing Data Gen., 36 F.3d at 1183, for the proposition that a business justification is "valid if it relates directly or indirectly to the enhancement of consumer welfare").

A business justification will rebut an allegation of anticompetitive conduct even if "one reason for [defendant's conduct] was to disadvantage the competition" Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 914 F.2d 1256, 1259 (9th Cir. 1990). Moreover, although a defendant cannot "justify his own conduct by asserting improper behavior by the injured party," actions taken by a defendant to "protect its own property from direct injury" resulting from that improper behavior are not anticompetitive under the antitrust law. Homefinders of Am., Inc. v. Providence Journal Co., 621 F.2d 441, 442 (1st Cir. 1980) (no antitrust liability because antitrust

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[3] Aspen Skiing, 472 U.S. at 608-10 (conduct that tends to exclude competitors may survive antitrust scrutiny if the exclusion is the product of a "normal business purpose").

[4] See, e.g., Bell v. Dow Chem. Co., 847 F.2d 1179, 1185 (5th Cir. 1988) ("If the justifications are supported by legitimate business concerns (such as cost savings, shortage of supplies, more efficient production), then the district court may decide as a matter of law.").

[5] See, e.g., Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield, 883 F.2d 1101, 1111 n.11 (1st Cir. 1989) (whether or not defendant "actually passed along its savings to consumers, ... achieving lower costs is a legitimate business justification under the antitrust laws").

[6] See, e.g., In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1329 (Fed. Cir. 2000) (excluding others from use of copyrighted work is a presumptively valid business justification for any immediate harm to consumers).

[7] Drinkwine v. Federated Publ'ns, Inc., 780 F.2d 735, 740 (9th Cir. 1985) ("Even that motive is consistent with competition").

defendant's selective refusal to run advertisements by plaintiff was justified by the fact that those advertisements were misleading).

In sum, to prevail here, as in any monopolization claim, Complaint Counsel must demonstrate that, "absent a tendency to reduce competition," Rambus's actions would have been "economically inexplicable." FTC Trinko Br. 18 (Ex. 1). Rambus, in turn, may rebut the evidence as to this element of the claim against it by showing that its conduct made "economic sense" for it, apart from any tendency it may have had to reduce competition.

B. Where a Claimant Relies on Rules Created Outside the Antitrust Laws

This case is unusual in that, on Complaint Counsel's theory, Rambus's conduct was predatory or exclusionary, not because it violated rules derived directly from principles of antitrust, but rather because it violated the "rules," "policies," "purposes," and "understandings" of JEDEC. While Complaint Counsel repeatedly use pejorative terms like "bad faith" and "deceptive," it is clear both from their recent Opposition to Rambus's Motion for Summary Decision and from their Memorandum in Support of the Motion in Limine, that the conduct Complaint Counsel allege was required of Rambus depended on the rules and policies of JEDEC.[8] Complaint Counsel's claim would not have been brought had Rambus's conduct occurred in the context of a different Standard Setting Organization that had no patent rules or policies of the type they attribute to JEDEC. In substance, then, the duty that Complaint Counsel allege governs Rambus's conduct arises from a private agreement, or contract, or understanding.

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[8] See, e.g., In the Matter of Rambus, Inc., No. 9302, Complaint Counsel's Opposition to Motion for Summary Decision at 3 (Rambus violated JEDEC's "patent disclosure rules" and "violated, undermined and subverted other JEDEC rules and policies"); In the Matter of Rambus, Inc., No. 9302, Memorandum in Support of Motion in Limine ("Complaint Counsel's Memorandum") at 7 & n.10 (referring to "JEDEC disclosure rules" and acknowledging that different standard-setting organizations have different rules and policies).

1. It has long been clear, however, that *antitrust* duties cannot be determined simply by reference to non-antitrust duties or standards. As Judge Posner put it, antitrust duties are not determined by liability "in tort or contract law, under theories of promissory estoppel or implied contract . . . or by analogy to the common law tort" rules. Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986). Rather, "the controlling consideration" in an antitrust case is "antitrust policy." Id.

Antitrust policy embraces a single "goal": "promot[ing] efficiency in the economic sense." Richard A. Posner, Antitrust Law (2d Ed. 2001) (discussing the current "consensus view" among economists, jurists and policymakers). See also Olympia Equipment, 797 F.2d at 375. ("the emphasis of antitrust policy [has] shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency"). Thus, as the Supreme Court has repeatedly made clear, "even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993). Rather, our system leaves it to "other laws, for example, 'unfair competition' laws, business tort laws, or regulatory laws, [to] provide remedies for various 'competitive practices thought to be offensive to proper standards of business morality," even if competitors or consumers are hurt by a monopolist's behavior. NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137 (1998).

Accordingly, antitrust law does not simply adopt non-antitrust rules or duties – whether they are derived from private agreement or from principles of tort law, or even from other, non-antitrust statutes. In order to establish an *antitrust* claim, the plaintiff must prove that the defendant violated an antitrust duty.

The cases, for example, have repeatedly made clear that violation of a non-antitrust federal statute (which presumably promotes the public interest) is not itself "anticompetitive conduct" for antitrust purposes. Rather, a plaintiff must independently demonstrate that the conduct is anticompetitive within the meaning of the antitrust laws. See, e.g., Goldwasser v. Ameritech Corp., 222 F.3d 390, 400-01 (7th Cir. 2000) (plaintiff must state "freestanding antitrust claim" and cannot base its antitrust claim simply on violations of the 1996 Telecommunications Act, even though that Act was intended to promote "the development of competitive local markets"); Trinko v. Bell Atlantic Corp., 305 F.3d 89, 109 (2d Cir. 2002) (plaintiff must state antitrust action "on its own terms"); see also Bucher v. Shumway, 452 F. Supp. 1288, 1291 (S.D.N.Y. 1978) (no antitrust liability for violation of laws preventing "deception or overreaching" in the securities markets). Even if the other laws "do not conflict with the antitrust laws," and even if the defendant's violation of those laws "helped the firm to maintain its monopoly, the link is too indirect to support an antitrust claim." Goldwasser, 222 F.3d at 400-01. As the Commission explained in its recent Supreme Court brief, "standards used in [non-antitrust] remedial and regulatory regimes" may not properly be converted "into free-standing bases for" antitrust liability. FTC Trinko Br. at 18 (Ex. 1).

Indeed, even regulatory fraud that "hurt[s] consumers" by raising rates does not itself rise to the level of an antitrust violation. NYNEX, 525 U.S. at 136; see also Hunt v. Crumboch, 325 U.S. 821 (1945) (breach of duty not to discriminate in bargaining established under Supreme Court caselaw not antitrust violation). *A fortiori*, violation of laws that do not themselves enhance efficiency or competition will not be deemed to be anticompetitive conduct for antitrust purposes. See generally Olympia Equip., 797 F.2d at 379 (rejecting adoption of duty as a rule of antitrust that would help competitors, but would leave "consumers worse off in the long run.").

2. The refusal of the antitrust laws simply to adopt non-antitrust duties as antitrust rules applies with special force where, as here, the non-antitrust duties arise, not from another law, but from a private contract or understanding, such as JEDEC's rules or policies. This is so for two reasons. First, private agreements in general are intended to achieve the private goals of the parties to the agreement and do not necessarily further antitrust goals. See Teece Report ¶¶ 64-65, 77-79, 84 (Ex. 2). Accordingly, antitrust law, "framed to preserve normal competitive forces," does not "police the performance of private contracts." Madison Fund, Inc. v. Charter Co., 406 F. Supp. 749, 751 (S.D.N.Y. 1975). And "a claimed breach of contract by unreasonable conduct, standing alone, should not give rise to antitrust liability," City of Vernon v. S. Cal. Edison, 955 F.2d 1361, 1368 (9th Cir. 1992) (emphasis added). Rather, antitrust liability rests on the separate inquiry as to whether a defendant acted "anticompetitively and without a legitimate business reason." Id.

Second, some private agreements are not just unrelated to antitrust objectives, but inconsistent with them. Consider, for example, this hypothetical: Suppose that all the competitors in a particular market agree to fix prices; that one of them surreptitiously breaches the anticompetitive price fixing agreement by cutting prices; and that, as a result, the breacher captures the lion's share of the market, drives the others out of the market, and gains a monopoly position. The breach of the price fixing agreement would obviously not be deemed to be anticompetitive conduct within the meaning of the antitrust laws, even though it enabled the breacher to gain monopoly power, because the agreement was itself inconsistent with antitrust objectives. Cf., Brookside Ambulance Serv., Inc. v. Walker Ambulance Serv., Inc., No. 93-4135, 1994 WL 592941, at *3 (6th Cir. Oct. 26, 1994) (per curiam) (table) (even if it violated existing protocol, defendant ambulance company's practice of "run-jumping" was "not

anticompetitive" for antitrust purposes because the practice maximized defendant's ability to receive calls and promoted efficient use of its ambulance fleet; a firm, "regardless of its market power," may promote efficiency) (Ex. 3)[9]

* * *

In sum, in order to satisfy the anticompetitive conduct element of the offense alleged in this case, Complaint Counsel must do more than prove that Rambus violated the privately-created rules or policies of JEDEC:

(1) As in all monopolization cases, Complaint Counsel must prove that Rambus's allegedly unlawful conduct did "not make economic sense" except as a means of eliminating competition; and

(2) Complaint Counsel must demonstrate that the JEDEC rules and policies on which their case is based further, and do not undermine, the ultimate antitrust goal: "promot[ing] efficiency in the economic sense."[10]

II. THE TESTIMONY OF DR. RAPP AND PROFESSOR TEECE THAT COMPLAINT COUNSEL SEEK TO EXCLUDE GOES DIRECTLY TO THESE ISSUES

The testimony that Complaint Counsel seek to exclude goes directly to these issues and, thus, to the heart of Complaint Counsel's case. The testimony does not constitute an effort to "divert" attention or to "justify" anticompetitive conduct, but rather addresses directly the central legal requirements of Complaint Counsel's case, matters on which Complaint Counsel have the

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[9] The Sixth Circuit's Rules place no limit on citation of its unpublished opinions, of which this is one, outside that court's jurisdiction. The Rules also permit justifiable citation within its jurisdiction so long as the opinion is attached as an addendum to the brief. 6th Cir. Rule 28(g). Although that requirement is not binding here, the decision is attached at Exhibit 3.

[10] These two requirements were identified as items 4 and 7 of the elements of Complaint Counsel's case described in the Memorandum in Support of Rambus's Motion for Summary Decision at 2-3 (Feb. 26, 2003).

burden of proof: whether the conduct complained of is anticompetitive for antitrust purposes and whether it caused injury to competition.

Complaint Counsel would like your Honor to think that Dr. Rapp's and Professor Teece's testimony is a diversionary tactic focused on the price fixing conspiracy among DRAM manufacturers that is the subject of a Department of Justice grand jury investigation and was a subject of an early discovery ruling by Judge Timony. But the economists' testimony has nothing to do with that subject.[11]

A. Dr. Rapp's Testimony

The portion of Dr. Rapp's testimony that Complaint Counsel seek to exclude goes directly and explicitly to the fundamental question whether Rambus's conduct was anticompetitive for antitrust purposes, i.e., whether it made no business sense but for exclusion and recoupment. Specifically, Dr. Rapp's Report sets forth valid business reasons, unrelated to monopolization, for Rambus not to disclose information regarding patent applications that had not yet issued. Those reasons arise, in large part, from the fact that such information constitutes a trade secret.

As Rambus's experts Mr. Fliesler and Professor Janis will testify in testimony that is uncontroverted and unchallenged by Complaint Counsel: (1) There are important reasons,

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[11] As they have throughout this case, Complaint Counsel make baseless attacks on the motives of Rambus and its counsel. Thus, Complaint Counsel repeatedly assert that the testimony of Dr. Rapp and Professor Teece at issue here is "an effort to divert this Court's attention," Complaint Counsel's Memorandum at 1; see also id. at 2 (Rambus wants to "direct the Court's attention" to other issues and "to deflect its culpability"), and they purport to know that Rambus "wants to proffer" the testimony "for one principal purpose: to divert the Court's attention." Id. at 2.

We do not presume to know what Complaint Counsel are thinking, so we will not speculate as to whether their description of the Rapp and Teece testimony at issue is a deliberate misstatement or simply a result of misunderstanding. But we do know, as will be seen, that their description is very inaccurate.

protected by patent laws, for keeping information about pending patent applications and intentions to file future applications confidential; (2) disclosing such information can be harmful to innovators and technology-licensing companies like Rambus; and (3) companies thus routinely regard such information as a trade secret and do not disclose it to outsiders.

Dr. Rapp will explain that Rambus thus had ample economically valid reasons – what the Supreme Court in Aspen Skiing called "normal business purposes" – to act the way firms ordinarily do and to guard its trade secrets, including information about its pending patent applications. Rambus's conduct therefore made good business sense without regard to exclusion and recoupment and is thus not anticompetitive for antitrust purposes. This conclusion is dispositive in the rebuttal of Complaint Counsel's claim.

The thrust and purpose of Dr. Rapp's intended testimony are straightforwardly and clearly set forth in his Expert Report. Pages 52 to 55 of his Report (Ex. 4) contain the portion of his analysis headed, "There are legitimate business reasons for Rambus's behavior, unrelated to standards 'capture.'" That discussion, in turn, constitutes the bulk of the section of the Report entitled: "RAMBUS'S CONDUCT WAS NOT ANTICOMPETITIVE."

Under this heading, Dr. Rapp summarizes his expert conclusion that "there are legitimate economic reasons" for Rambus's alleged conduct (id. at 52), that Rambus's conduct made "good business sense" (id. at 55), and that that conduct was economically "rational" and "profit-maximizing" without regard to standards capture (id. at 55). He discusses the types of costs and risks that Rambus avoided by protecting its trade secrets. Importantly, he notes that his analysis is a direct response to *Complaint Counsel's own economist*, Professor McAfee, who had asserted in his report that standards capture was "the only plausible gain to Rambus," id. at 53-54 (quoting Expert Report of Preston R. McAfee, ¶ 206) (Attached to Rambus Inc.'s Motion in

Limine to Exclude Certain Opinion Testimony of R. Preston McAfee filed March 26, 2003 as Exhibit A).

Complaint Counsel ignore this part of Dr. Rapp's Report and focus instead on the fact that the term "efficient breach" was first used at Dr. Rapp's deposition. But by ignoring the context of the deposition, they misstate the substance of Dr. Rapp's testimony. Complaint Counsel questioned Dr. Rapp at deposition about the analysis in his Report as to why Rambus's conduct was not anticompetitive. (Rapp Dep. at 222/8 to end of examination.) (Ex. 5)[12] Immediately thereafter, counsel for Rambus asked Dr. Rapp about the related economic concept of "efficient breach;" Dr. Rapp testified that the term "efficient breach" refers to the proposition that "breaking a contract could be profitable from the standpoint . . . of the firm that breaks the contract and also possibly welfare increasing or improving for society," and that Rambus's conduct as described by Complaint Counsel could be efficient in this sense, especially if it was intended to protect trade secrets. (Id. at 226/12-227/24) (Ex. 5).

The idea of efficient breach is directly relevant to the portions of Dr. Rapp's Report explaining that Rambus's conduct was not anticompetitive, and to Complaint Counsel's deposition of Dr. Rapp on that subject. Counsel for Rambus used the term at Dr. Rapp's deposition both (i) to reinforce Dr. Rapp's Report by referencing the uncontroverted economic proposition that breaches of private agreements can be beneficial, not only to the party breaching the agreement but also to the public, and (ii) to enlighten Complaint Counsel, who did not seem to understand the import of Dr. Rapp's Report.

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[12] Specifically, Complaint Counsel began questioning by pointing out that "[o]n page 52 of your report, you state that there are legitimate business reasons for Rambus' behavior unrelated to standards capture. Do you see that?" Id. at 222/8-10 (Ex. 5).

It is, of course, not necessary for Rambus to show an "efficient breach." To the contrary, as explained in Part I.A. above, it is Complaint Counsel's burden to prove that Rambus's conduct did not make "economic sense" for Rambus.

In any event, the important point for present purposes is that the brief "efficient breach" colloquy at Dr. Rapp's deposition has nothing to do with price fixing among DRAM manufacturers, unclean hands or any of the other straw men suggested by Complaint Counsel. It goes instead to rebutting a central element of Complaint Counsel's case – the necessary allegation that Rambus's conduct was "predatory" or "exclusionary."

B. Professor Teece's Testimony

The portion of Professor Teece's testimony that Complaint Counsel seek to exclude goes directly to two elements of Complaint Counsel's case: (1) whether Rambus's alleged conduct is anticompetitive within the meaning of Section 2 and (2) causation.

1. The Testimony Complaint Counsel Want To Exclude

(a) To understand the context of Professor Teece's challenged testimony, it is useful to summarize briefly portions of his testimony that Complaint Counsel do not seek to exclude.[13] Professor Teece will testify that it can be inferred, from the fact that JEDEC chose the SDRAM and DDR SDRAM standards, that JEDEC regarded them as superior to the available alternatives and that they can therefore be presumed to be superior to those alternatives. (Teece Report ¶ 250) (Ex. 2). He will further testify that, even if Rambus had made the additional disclosures that Complaint Counsel allege JEDEC rules and policies required it to make, JEDEC would still have adopted the SDRAM and DDR SDRAM standards. (Teece Report ¶ 299 (Ex. 2), see also id. at ¶¶ 143-147, 290; Teece Dep. Tr., 70/22-71/11; 96/1-8;

[13] As Professor Teece's Report and deposition make clear, he intends to testify about many other matters, not discussed here, that Complaint Counsel have also made no effort to exclude.

169/9-170/4; 172/5-173/5) (Ex. 6). The implication of this testimony, of course, is that Rambus's allegedly illegal conduct did not cause any injury to competition. (See Teece Report at ¶¶ 214-240; ¶¶ 290-94) (Ex. 2).[14]

Complaint Counsel, supported by Professor McAfee's report, allege to the contrary that, if Rambus had made the additional disclosures Complaint Counsel allege JEDEC rules required them to make, JEDEC would have boycotted the Rambus technology and would have adopted different DRAM standards because of an alleged preference to avoid proprietary standards that

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[14] Dr. Rapp – in a portion of his testimony that is not challenged by Complaint Counsel's *in limine* motion – will testify about causation from a different perspective. Dr. Rapp's report concludes that, because all of the noninfringing technologies suggested by Complaint Counsel's experts as alternatives to Rambus's technologies are inferior in cost/performance terms, in the but-for world in which Rambus made additional disclosures about its intellectual property, JEDEC would still have adopted the SDRAM and DDR standards. (Rapp Report at 13-51) (Ex. 4). Dr. Rapp explained at deposition that a "rational standard-setting body" would have preferred Rambus's technologies over the alternatives, even if use of that technology required payment of royalties. Rapp Dep. 194/7-8 (Ex. 5) Dr. Rapp elaborated upon his analysis in response to questions from Complaint Counsel:

> Q. Are there any circumstances that you can envision in which notwithstanding an unfavorable comparison between the alternatives and Rambus' technology, that is a comparison that favors the Rambus technology, JEDEC nonetheless might have chosen to use these somewhat inferior alternatives over Rambus' technology?
>
> A. Yes.
>
> Q. In what circumstance can you envision in which that might have happened?
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> A. In a circumstance whereby whatever means the normal forces that compel individual manufacturers to try to gain competitive advantage were suspended or suppressed as a result either of the standard-setting process or something else, so that individual manufacturers said to themselves, the profit maximizing solution is to buy technology rather than to create it ourselves for free, or not for free, certainly, but at higher cost, but to buy – the rational thing to do, the profit maximizing thing to do is to buy technology from Rambus, rather than to create it ourselves at higher costs; nevertheless, it's in the collective interest of the industry to keep an independent technology developer from getting a foothold. In that setting, then the expected competitive profit maximizing decision would be overturned.

Rapp Dep. at 194/11-195/11 (Ex. 5).

require payment of royalties. (McAfee Rebuttal Report ¶ 86) (Attached to Rambus Inc.'s Motion in Limine to Exclude Certain Opinion Testimony of R. Preston McAfee filed March 26, 2003 as Exhibit B). In effect, Complaint Counsel allege, JEDEC required that patent interests be disclosed in order to ensure that its members would be able to avoid paying royalties to independent technology firms like Rambus.

Disclosure of patent interests would of course not contribute to preventing the incorporation of inferior technologies in standards; those technologies would be excluded from the standards on the merits, even without disclosure of patent interests. Therefore, on Complaint Counsel's theory, disclosure of patent interests is important because it results in the avoidance or boycott of *superior* technologies, like Rambus's, that would otherwise be incorporated into standards.

(b) In this context, Professor Teece will offer two types of testimony. (1) He – and other witnesses for Rambus– will testify, contrary to Complaint Counsel's allegations, about what would likely have happened if Rambus had made the additional disclosures that Complaint Counsel allege it should have made. (2) Professor Teece will also testify as an expert about the economic implications of Complaint Counsel's view of the facts, assuming arguendo that Complaint Counsel's allegations of the facts were correct.

It is this **latter economic** testimony that Complaint Counsel seek to exclude. Complaint Counsel's description of the Professor Teece's economic analysis is, however, incomplete and inaccurate. In order to make clear what this dispute is really about, we reproduce brief excerpts from Professor Teece's Report and a portion of Professor Teece's deposition testimony: First, from Professor Teece's Report (at 17-18) (Ex. 2) (emphasis in original):

> 79. Indeed, economic theory suggests that SDOs may have a tendency to act in a socially-*inefficient* fashion when determining whether to adopt a standard on

> which a firm has a patent. The basic idea here is that royalty payments for the use of a patented technology are a *transfer payment* from the users of the patent to the owner of the patent. As such, the royalty payments *per se* represent no *net* cost to society as a whole: the patent users have less money, but the patent owner has more money. But from a *private* standpoint, SDO members treat the prospect of paying royalties as a *private* cost akin to any other cost. This in turn implies that SDO members may have an incentive to adopt inferior technologies that reduce overall economic welfare in order to avoid paying royalties. [footnotes omitted]
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> * * *
>
> 84. The above analysis suggests that SDOs may be biased toward an economically-inefficient aversion to patented technology when developing or adopting standards. Thus, if it were the case, as suggested in Para. 20 of the Complaint (which, as I discuss in more detail in Section IV.A.3 below, I believe is not correct) that JEDEC did have a "commitment to avoid, wherever possible, the incorporation of patented technologies into its published standards," from an economic standpoint, such a "commitment" is *not* "[c]onsistent with [a] commitment to promoting unfettered competition . . ." Rather, it amounts to a commitment to adopt a societally-*in*efficient policy, one that favors manufacturers at the expense of innovators.

Later, Professor Teece testified as follows at his deposition:

> PROFESSOR TEECE: Let me make a couple of comments. My reading of the evidence is that[,] contrary to Professor McAfee's interpretation[,] that JEDEC was willing to adopt standards that implicated intellectual property so long as the owner of the intellectual property provided a RAND letter. I believe that's a sensible strategy for JEDEC and is not on its face anti-competitive and could well be pro-competitive. On the other hand, if JEDEC behaved as Professor McAfee believed it did and if it's policies were as Professor McAfee believes they were, namely, that JEDEC doesn't like to pay royalties, JEDEC favors zero royalties or minimal royalties and JEDEC will abandon efficient standards in favor of inefficient standards because they don't involve paying a royalty, *if in fact JEDEC is as Professor McAfee has represented it to be, then I believe that its policies,* if in fact they are as he says they are, could be – well, they *would be inefficient from a social welfare perspective,* and they could be anti-consumer, because if an agency or if an SDO had such a policy, it could end up, as I said before, adopting standards that are higher cost than ones that implicate intellectual property, both higher cost to them as well as to society. Now, I should add, I think, that is Professor McAfee's caricature on JEDEC, and hence on I'm more comfortable with the earlier representation that I provided you with.

Deposition of Professor David Teece (2/13/03) at 29/1-31/1 (Ex. 6) (emphasis added).

2. Professor Teece's Testimony Rebuts Complaint Counsel's Allegations of Anticompetitive Conduct

Professor Teece's challenged testimony directly addresses whether the private JEDEC agreement or policy, as alleged by Complaint Counsel, is the kind of procompetitive agreement that can properly be the basis of antitrust liability.

Professor Teece, as an economic expert, cannot enter a final conclusion about what JEDEC's policy was or about what JEDEC would have done in the counterfactual or but-for world in which Rambus acted differently from the way it actually acted; that is a matter for the finder of fact. As an economist, however, he is eminently qualified to develop an expert opinion about the competitive implications of the alternative versions of the facts alleged by Rambus and by Complaint Counsel. That is precisely what Professor Teece intends to testify about: If JEDEC's rules and policies are what he and Rambus understand them to be, those rules and policies would be "not on [their] face anti-competitive and could well be pro-competitive" (Teece Dep. 29/8-9) (Ex. 6); if, on the other hand, the situation at JEDEC were as "Professor McAfee has represented it to be," then its policies "would be inefficient from a social welfare perspective, and they could be anti-consumer" because they would entail the boycotting by JEDEC of superior technologies solely in order to enable the manufacturers to avoid paying royalties. (Id. 29/18-22.)

Accordingly, as explained above, JEDEC's rules, if construed as Complaint Counsel allege, cannot provide a proper basis for antitrust liability. See Part I.B., above (setting forth legal standard). Indeed, Professor Teece's testimony on this subject comports squarely with the Commission's long-standing recognition that a standard setting organization acts in an anticompetitive manner, and indeed can violate the antitrust laws, when it knowingly boycotts superior technologies on the ground that they are proprietary. See American Society of Sanitary

Engineering, 106 F.T.C. 324 (1985) (consent order prohibiting standards organization "from directly or indirectly failing to issue a new standard" because it covers product that "is patented").

3. Professor Teece's Testimony Rebuts Complaint Counsel's Allegations of Causation

In addition, Professor Teece's challenged testimony goes to the issue of causation, which Complaint Counsel must also prove as part of their case. His testimony bears on causation in two ways.

First, as described above, Professor Teece will testify, contrary to the testimony of Complaint Counsel's economist Professor McAfee, that, in the hypothetical "but for" world in which Rambus had made the additional disclosures that Complaint Counsel allege it should have made, JEDEC would have adopted the SDRAM and DDR standards incorporating Rambus's patent inventions, just as it did in the real world. This testimony will go directly to the question whether Rambus's conduct caused JEDEC to adopt standards that incorporated Rambus technology.

Second, Professor Teece's testimony bears on the causation issue in another way as well. Professor Teece draws upon his expertise as an economist to explain both the likely behavior of the various parties in Complaint Counsel's story and the economic motives they would have to have had in order for events to unfold as Complaint Counsel allege. This testimony is relevant both to determining the likelihood of the chain of causation alleged by Complaint Counsel and to understanding the competitive implications of the kinds of policies and practices by JEDEC that are a necessary part of Complaint Counsel's causation story.

In sum, the testimony of Professor Teece that Complaint Counsel seek to exclude bears directly on two key elements of Complaint Counsel's case: (i) whether the JEDEC rules and

policies alleged by Complaint Counsel can, as a matter of law, be the basis of antitrust liability and (ii) whether Rambus's allegedly illegal conduct caused any injury to competition. That testimony has nothing to do with price fixing by DRAM manufacturers, unclean hands or any of the other straw men suggested by Complaint Counsel.

III. COMPLAINT COUNSEL'S ARGUMENTS FOR EXCLUDING THE TESTIMONY ARE WITHOUT MERIT

Complaint Counsel have made four arguments for excluding the testimony of Dr. Rapp and Professor Teece that they seek to avoid. None is sound.

A. Judge Timony's Order on the Department of Justice's Motion to Limit Discovery

Complaint Counsel argue that Judge Timony has already "found that evidence of any and all actions on the part of DRAM-makers is irrelevant." Complaint Counsel's Memorandum at 19. This assertion is untenable on its face, in a case that alleges broad-based antitrust liability arising from the proceedings of an organization in which the DRAM-makers comprise the principal members.[15] It is, moreover, based on a serious misreading of Judge Timony's Order.

Judge Timony's Order granted a motion to bar discovery of information regarding communications with the Department of Justice concerning, or materials produced in, an ongoing criminal grand jury investigation into possible price-fixing by DRAM manufacturers in the late 1990s, long after Rambus left JEDEC. Judge Timony explained his ruling as follows:

> But Rambus has not shown that any of these issues are directly relevant and material in this proceeding. While proof of price fixing by DRAM manufacturers could show that higher prices downstream would not be entirely due to Rambus' conduct, it is immaterial to the issues in this case, including whether Rambus'

[15] As Complaint Counsel's own economic expert put it, "JEDEC's behavior matters only insofar as its members would, or would not, have behaved differently had Rambus disclosed its IP." (McAfee Rebuttal Report ¶ 78, Attached to Rambus Inc.'s Motion in Limine to Exclude Certain Testimony of R. Preston McAfee filed March 26, 2003 as Exhibit B).

conduct alleged in the Complaint could tend to injure competition. FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966).

> DOJ has demonstrated that discovery should be limited to protect the interests of the grand jury proceeding. Rambus has not demonstrated that the discovery it seeks concerning possible collusion among those DRAM manufacturers is sufficiently relevant and material to the issues in this litigation to offset the burden on the targets of that discovery, who may have already been, or may yet be, subject to the grand jury investigation, or to overcome the DOJ's reasons for seeking protection. Accordingly, the parties to this proceeding are prohibited from conducting witness depositions on communications among DRAM manufacturers regarding pricing to DRAM customers.[16]

Judge Timony did not rule, as Complaint Counsel assert, "that evidence of any and all actions on the part of DRAM-makers is irrelevant." His Order has nothing to do with the expert testimony that Complaint Counsel seek to exclude (i) because none of that testimony concerns price fixing by DRAM manufacturers and (ii) because none of that testimony has anything to do with the discovery into grand jury proceedings that was the subject of Judge Timony's Order.

B. Unclean Hands

Complaint Counsel argue that the testimony at issue amounts to an impermissible affirmative "unclean hands" defense. "Unclean hands" is an equitable doctrine that, when applicable, means that "plaintiff's fault, like defendant's, may be relevant to [the] question of what, if any, remedy plaintiff may be entitled to." Black's Law Dictionary 1524 (6th ed., 1999). It derives from the "[p]rinciple that one who has unclean hands is not entitled to relief in equity" and "means no more than that one who has defrauded his adversary in the subject matter of the action will not be heard to assert right in equity." Id. If, for example, this were a case brought by the DRAM manufacturers against Rambus and Rambus were arguing that the manufacturers

[16] Opinion Supporting Order Granting Motion of the United States Department of Justice To Limit Discovery Relating to the DRAM Grand Jury at 7 (Jan. 15, 2003).

could not recover, even if Rambus had violated the antitrust laws, because of the manufacturers' price fixing conspiracy, Rambus could be said to be trying to raise an unclean hands defense.[17]

But neither Rambus's contentions in this case, nor the testimony of Dr. Rapp and Professor Teece that Complaint Counsel seek to exclude, has anything to do with such a defense. Rambus's economic experts do not contend that Rambus should avoid otherwise proper antitrust liability because of others' unclean hands. To the contrary, their testimony goes instead to rebut basic elements of Complaint Counsel's case. As explained above, Complaint Counsel must prove that Rambus engaged in anticompetitive conduct when it violated what Complaint Counsel allege to be duties created by JEDEC, and it must prove causation. To do the former, Complaint Counsel must prove that Rambus's conduct made no business sense apart from exclusion of competitors and that the JEDEC rules and policies on which Complaint Counsel's case rests are procompetitive. To do the latter, Complaint Counsel must prove that Rambus's allegedly unlawful conduct caused an injury to competition. The challenged economic testimony directly addresses these elements of Complaint Counsel's case. It has nothing to do with an unclean hands defense.

C. Speculation

Complaint Counsel further argue that "both Dr. Rapp and Professor Teece are indulging in rank conjecture, engaging in mental gymnastics, and positing theoretical possibilities pulled

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[17] The only antitrust case cited by Complaint Counsel in support of its unclean hands argument makes clear that the testimony by Dr. Rapp and Professor Teece that Complaint Counsel seek to exclude has nothing to do with an unclean hands defense. As in all the cases cited by Complaint Counsel, the defendant in that case contended that the *plaintiff* (in that case, the Government) had unclean hands that prohibited it from recovering despite defendant's anticompetitive conduct. United States v. S. Motor Carriers Rate Conference, 439 F. Supp. 29, 52 (N.D. Ga. 1977) (plaintiff seeks to assert defense that the Government "permitted and even encouraged the conduct which it now seeks to hold violative of the antitrust laws"). The testimony by Dr. Rapp and Professor Teece, by contrast, has nothing to do with whether the Government has unclean hands.

out of the proverbial barrel." Complaint Counsel's Memorandum at 13. More specifically, they assert that the challenged testimony is "pure speculation." Id. at 4.

Complaint Counsel's critique plainly does not apply to the testimony of Dr. Rapp that they seek to exclude. Dr. Rapp will testify, based on real-world facts and other testimony about industry custom, that Rambus's failure to disclose more than it did about its intellectual property interests served its legitimate interest in protecting its trade secrets and made good economic sense apart from exclusion of competition. His testimony constitutes a straightforward economic assessment of Rambus's actual conduct. It is not conjecture or speculation.

As to Professor Teece, Complaint Counsel confuse "speculation" with assuming "hypothetical" facts. Professor Teece will testify that Complaint Counsel are wrong on the facts about what would have happened if Rambus had made the additional disclosures Complaint Counsel allege it should have made. He will also testify – as economic experts customarily do – about the economic significance of the hypothetical facts alleged by Complaint Counsel. Specifically, as explained above, Professor Teece will testify that, if Complaint Counsel were right about those facts (i.e., about what JEDEC would have done had Rambus made the additional disclosures Complaint Counsel allege it should have made), then the JEDEC rules and policies on which Complaint Counsel's case is based are anticompetitive. This testimony is admissible both as proper hypothetical testimony and as relevant testimony in the alternative.

We agree with Complaint Counsel that the facts they have alleged are "speculative" and unlikely. But we are nevertheless entitled to adduce expert economic testimony to assess the economic significance of those facts on the hypothetical assumption that Complaint Counsel succeed in proving them.

Complaint Counsel's argument on this point is not only wrong, but also based on selective and misleading quotation from Professor Teece's deposition. In a passage quoted by Complaint Counsel, Professor Teece was asked if he believes JEDEC's rules "favor users of technology over owners of technology." Teece Dep. (2/13/03) at 96/11-13 (Ex. 6), quoted in Complaint Counsel's Memorandum at 6. Complaint Counsel quote Professor Teece as saying only that his "study . . . of JEDEC's actual behavior . . . would probably not support that view. . . ." Teece Dep. (2/13/03) at 96/19-21 (Ex. 6), quoted in Complaint Counsel's Memorandum at 7. Had Complaint Counsel quoted Professor Teece's answer to the question completely and accurately, the hypothetical nature of his testimony would have been clear. We quote the entire exchange below, noting in bold the part of Professor Teece's testimony that Complaint Counsel omitted without ellipses or other explanation:

> Q. Do you believe that JEDEC has adopted procedures and substantive rules that favor users of technology over owners of technology?
>
> [objection omitted]
>
> * * *
>
> **A. Well, perhaps I can answer this in the following way: If the policies are as Professor McAfee believes they are, then I think possibly yes.**
>
> My study, however, of JEDEC – of JEDEC's actual behavior, I think, would probably not support that view, because I do note that JEDEC has been willing to embrace standards so long as there is a – a RAND licensing agreement, or put differently, so long as the owner of the intellectual property has been willing to enter into a RAND commitment of some kind.[18]

D. New Affirmative Defense

Finally, Complaint Counsel contend, in light of what they characterize as Judge Timony's ruling that "charges of conspiratorial conduct by DRAM-manufacturers are outside the scope of

[18] Teece Dep. (2/13/03) 96/11-97/2 (Ex. 6).

the Commission's Complaint" (Complaint Counsel's Memorandum at 14), that Dr. Rapp's and Professor Teece's testimony constitutes an "affirmative defense." But, even apart from Complaint Counsel's misreading of Judge Timony's order, Dr. Rapp and Professor Teece are not testifying to affirmative defenses, for the reasons set forth throughout this Opposition.[19]

Complaint Counsel concede, as they must, that "Rambus is entitled to defend itself against the charges alleged in the Commission's Complaint. And in so doing, it is entitled to present qualified and reliable expert opinion evidence" that is "relevant to the issues raised by those charges." Complaint Counsel's Memorandum at 9. The testimony of Dr. Rapp and Professor Teece that Complaint Counsel seek to exclude is precisely such "expert opinion evidence." It rebuts fundamental elements of Complaint Counsel's case – their allegation that Rambus's conduct was anticompetitive within the meaning of the antitrust laws and their required proof of causation. It is plainly relevant and admissible.

[19] We note that – although it was not legally required in order to preserve these arguments – Rambus in fact pleaded, as an Affirmative Defense, that "The Complaint fails to state a claim under Section 5 of the FTC Act." Answer, p. 48 (July 29, 2002).

CONCLUSION

For the reasons discussed above, Complaint Counsel's Motion In Limine To Preclude Opinions Of Richard T. Rapp And David J. Teece Regarding "Efficient Breach" Theory 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 INC.,	)	
a corporation,	)	
	)	

CERTIFICATION

I, Jacqueline M. Haberer, hereby certify that the electronic copy of *Respondent Rambus Inc.'s Opposition to Complaint Counsel's Motion In Limine to Preclude Opinions of Richard T. Rapp and David J. Teece Regarding "Efficient Breach" Theory* accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on April 11, 2003 by other means:

Jacqueline M. Haberer
April 11, 2003

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, IJay Palansky, hereby certify that on April 11, 2003, I caused a true and correct copy of the public versions of *Respondent Rambus Inc.'s Opposition to Complaint Counsel's Motion in Limine to Preclude Report and Testimony of William L. Keefauver* and *Respondent Rambus Inc.'s Opposition to Complaint Counsel's Memorandum in Support of Motion in Limine to Preclude Opinions of Richard T. Rapp and David J. Teece Regarding "Efficient Breach" Theory* to be served on the following persons by hand delivery:

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