

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

**In the Matter of**

**RAMBUS INC.,**

**a corporation.**

**Docket No. 9302**

**MEMORANDUM IN SUPPORT OF RESPONDENT RAMBUS INC.'S  
MOTION FOR SUMMARY DECISION**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

The Complaint in this matter alleges that respondent Rambus Inc. (“Rambus”) has monopolized or attempted to monopolize certain markets for technologies related to dynamic random access memory (“DRAM”). The Complaint’s allegations stem from Rambus’s involvement in an industry standard-setting body called the Joint Electron Device Engineering Council (“JEDEC”). During the 1990s, JEDEC adopted two industry standards that incorporate technologies covered by patents issued to Rambus years after it left JEDEC. The Complaint alleges that, through its silence at JEDEC meetings, Rambus “lulled” JEDEC members into believing that Rambus had no patent interests in the technologies being considered for standardization and that, but for Rambus’s silence, JEDEC would have incorporated alternative technologies into the standards at issue that avoided Rambus’s patents.

To prevail on this unprecedented theory of antitrust liability, which extends well beyond the parameters of the Commission’s negotiated consent order in *In the Matter of Dell Computer Corp.*, 121 F.T.C. 616 (1996), Complaint Counsel will be required to establish at least each of the following propositions:

(1) That, during the period in which Rambus was a JEDEC member, JEDEC’s rules required (as the Complaint now asserts) that all members disclose to the other members patent claims they might file in the future which, if issued, would read on standards then being balloted or which might be proposed for balloting in the future.

(2) That, notwithstanding the contrary holding of the Federal Circuit, *see Rambus Inc. v. Infineon Techs. AG*, \_\_\_ F.3d \_\_\_, 2003 WL 187265 (Fed. Cir. Jan. 29, 2003)



(“*Rambus v. Infineon*”), any such JEDEC rules were sufficiently clear, publicized, widely understood, and consistently applied so as to provide a basis for legal (and, in particular, antitrust) liability.

(3) That Rambus did not comply with the purported JEDEC rules asserted in the Complaint.

(4) That Rambus’s failure to comply with those purported rules constituted not just a breach of contract or other common-law duty, but also anticompetitive conduct within the meaning of Section 2 of the Sherman Act.

(5) That, because of Rambus’s failure to comply with the purported rules, JEDEC and its members did not have reason to know of Rambus’s potential patent interests, or sufficient reason to suspect such interests so that reliance on their nonexistence without a direct inquiry to Rambus about them would be unreasonable, when the relevant standards were adopted.

(6) That, if Rambus had complied with the purported rules, JEDEC would have adopted standards different from the standards at issue (and which used none of Rambus’s patented technology) in order to avoid the prospect of paying royalties to Rambus.

(7) That the failure of JEDEC to adopt such different standards constitutes injury to competition within the meaning of Section 2 of the Sherman Act, even though the fact that the standards at issue were chosen by JEDEC demonstrates that (without regard to the prospect of paying royalties to Rambus) they were superior to alternative standards because of timeliness, availability, cost, performance, or some combination thereof.

(8) That, if JEDEC had adopted such alternative standards, Rambus’s technology

would not have been widely accepted in the marketplace anyway, even though being a JEDEC standard has proved to be neither necessary nor sufficient for actual marketplace success.

(9) That, if Rambus had complied with JEDEC's purported disclosure rules, Rambus's technologies would have been rejected by the market even in the absence of an unlawful conspiracy by JEDEC members to exclude Rambus from the market.

(10) That, once it adopted the SDRAM standard in 1993, JEDEC had no practical choice but to adopt the DDR SDRAM standard in 1999, even though it was aware of Rambus's patent interests long before then and even though it knew that Rambus was not complying with the "commonly known" JEDEC rules now asserted in the Complaint.

(11) That, once the DRAM manufacturers began implementing the standards at issue, they were unable as a practical matter to switch to other DRAM designs even if those designs would have been less costly to them.

(12) And that, taking into account the timeliness, performance, and cost of alternative DRAM technologies, and assuming that the DRAM manufacturers did not themselves engage in an unlawful boycott of Rambus, the DRAM manufacturers and their customers would have been materially better off if Rambus had not failed to comply with the JEDEC rules as alleged.

The evidence in this case demonstrates that Complaint Counsel will not be able to prove any of these propositions, each of which is an essential predicate to liability under the novel theory that Complaint Counsel pursue here. This motion addresses only three of these propositions – specifically, the second, third, and fifth – because as to each of them

the undisputed facts establish precisely *the opposite* of what Complaint Counsel must prove. Each of the three grounds raised here provides an independent basis for granting summary decision in Rambus's favor.

First, this motion addresses the question whether, as a matter of law, the vague and indefinite contractual obligations purportedly imposed by the JEDEC patent disclosure policy are a legally sufficient basis on which to premise antitrust liability. They are not, for the following reasons:

- The disclosure-related language contained in the various JEDEC manuals, meeting minutes, and statements of policy has recently been characterized by the Court of Appeals for the Federal Circuit as having “a staggering lack of defining details.” *Rambus v. Infineon*, 2003 WL 187265 at \*17. For example, the descriptions of the patent policies shown to JEDEC members at meetings did not contain any language at all explaining when a disclosure obligation arises, to whom disclosures should be made, or what information should be disclosed in order to satisfy the purported disclosure policy.
- The testimony of JEDEC members about the patent policy, and the contemporaneous written evidence about the policy, reveal a cornucopia of opinions and understandings about the very basic elements of the policy, including the threshold question of whether disclosure *was required at all* or was merely voluntary.

As a matter of practical reality, the disclosure standard is effectively being defined here by the government for the first time after the fact – necessarily in reliance on the self-

interested testimony of Rambus's competitors about their "understandings" of the standard. A violation cannot properly be based on such an ill-defined set of purported contractual obligations. Summary decision should, therefore, be entered in Rambus's favor.

Second, assuming the disclosure obligation was sufficiently clear, and stated what Complaint Counsel allege, summary decision is warranted in this case because the undisputed evidence shows that both the members of the JEDEC subcommittee involved here and the chairman of that subcommittee *were* aware that Rambus might in the future assert intellectual property rights with respect to features incorporated into the contemplated standards. The evidence further shows that the members of JEDEC recognized this threat but *chose to disregard it*, choosing instead to act on their belief that any effort by Rambus to obtain valid patent rights covering the technologies in issue would fail. The evidence also shows that Rambus put JEDEC's leadership on notice (as early as 1992) that it would not comply with JEDEC's patent policies, and that Rambus's conduct continued to put JEDEC members on notice of this fact throughout the time that Rambus participated in JEDEC. As a consequence, the Complaint's core allegation – that JEDEC was lulled by Rambus's purported omissions – has no merit, and summary decision is not just appropriate, but required.

Finally, the undisputed evidence shows that whatever the JEDEC disclosure duty might have been, it was triggered *at the earliest* only when a formal proposal for standardization was made, which did not occur with respect to one of the two standards at issue in this case (the DDR SDRAM standard) until in or after December 1996. This was a

full year after Rambus had attended its last JEDEC meeting and six months after Rambus had confirmed its withdrawal from the organization by letter. As the District Court held in the *Infineon* litigation, and as a unanimous Court of Appeals affirmed, Rambus could not have breached any duty of disclosure with respect to the DDR SDRAM standard because no such duty arose during Rambus's tenure as a JEDEC member. The absence of any such breach with respect to the DDR SDRAM standard eliminates any basis for a finding of anticompetitive conduct in three of the five technology markets alleged in the Complaint. At the very least, then, partial summary decision is warranted with respect to those markets.

## **FACTUAL BACKGROUND**

### **A. Rambus's Technology and Business Model**

Rambus was founded in 1990 by two distinguished electrical engineering professors, Dr. Michael Farmwald and Dr. Mark Horowitz. They had just invented revolutionary computer-memory technologies that would enable computer-memory devices (dynamic random access memories, or DRAMs) to keep pace with faster generations of microprocessors by running at much faster speeds than earlier technologies.

Rambus chose not to become a manufacturer of DRAMs. Rather, Rambus intended to continue to develop its technology and to make that technology available for license by manufacturers industry-wide, together with testing, design, and implementation services. This business model depended upon intellectual property to help generate royalties and licensing fees, which along with service fees would be the company's sole sources of income.

In April 1990, Farmwald and Horowitz filed a patent application describing their inventions (“the ’898 application”) and assigned it to Rambus. Like all patent applications, Rambus’s ’898 application had two parts – a “written description” (sometimes referred to as the “specification”) that described Rambus’s inventions in detail, and a set of “claims” that set forth which of the inventions described in the written description Rambus initially sought to patent. The key innovations disclosed in the ’898 written description included, among other things, forms of technologies later called programmable latency, variable burst length, dual-edge clock (producing a double data rate, or “DDR”) operation, and on-chip DLL (the use of delay lines (in particular, a delay locked loop (“DLL”) circuit) on the DRAM chip itself). Taken together, these innovations dramatically increase the speed of memory chips.<sup>1</sup>

#### **B. Rambus’s Participation in JEDEC**

One of the standard-setting organizations for semiconductor devices is JEDEC, which was (until 1998) a part of the Electronic Industries Association (“EIA”) and formally and “rigidly” governed by EIA policies. The particular JEDEC committee involved in this case is the “42.3” subcommittee, which has responsibility within JEDEC for many computer-memory devices and whose members include such computer-memory manufacturers and users as Siemens (now Infineon), Micron, NEC, Samsung, Toshiba,

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<sup>1</sup> The PTO determined that the ’898 application included numerous independent and distinct inventions and required Rambus to restrict its application to one of what the PTO identified as eleven “independent and distinct inventions.” Rambus thus submitted separate, “divisional applications” for the remaining ten. *See* 35 U.S.C. § 121; *Rambus v. Infineon*, 2003 WL 187265 at \*20-21.

IBM, Texas Instruments, Hewlett-Packard, and many others. Perry Decl., Ex. 1.<sup>2</sup>

Rambus attended its first JEDEC meeting as a guest in December 1991, when Rambus had annual revenues of less than \$2 million and just 20 employees. Rambus formally joined JEDEC in February 1992. Perry Decl., Exs. 1 & 2.

Rambus attended its last JEDEC meeting in December 1995 and, having been sent a bill for 1996 dues, sent a letter confirming its withdrawal in June 1996. Perry Decl., Ex. 3. During its tenure as a JEDEC member, Rambus never proposed or advocated the adoption of any standard or technology. Perry Decl., Ex. 4. In fact, it made no presentations at all, and it voted at only one meeting, when it voted *against* four proposals. Perry Decl., Ex. 5.

### **C. The SDRAM and DDR SDRAM Standards**

The Complaint asserts that, while a member of JEDEC, Rambus representatives observed efforts at JEDEC to promulgate an industry standard for a synchronous DRAM device called “SDRAM.” Complaint, ¶ 40. According to the Complaint, Rambus was aware that the SDRAM standard under consideration incorporated features over which Rambus believed it might someday hold intellectual property rights. *Id.* at ¶¶ 47-48. These features had previously been incorporated in Rambus’s own design for a memory device, called an “RDRAM,” which Rambus had actively marketed to the DRAM industry

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<sup>2</sup> “Perry Decl.” refers to the Declaration of Steven M. Perry filed concurrently herewith, to which all exhibits submitted in support of this motion are attached. Some of the exhibits are confidential by virtue of their contents and therefore may not be filed in a public document pursuant to the Protective Order in this case, a copy of which is attached as Exhibit 1 to this memorandum.

beginning in 1989.<sup>3</sup>

The SDRAM standard was considered within JEDEC 42.3 during 1991 and 1992, adopted in early 1993, and formally announced on March 4, 1993. *Rambus v. Infineon*, 2003 WL 187265 at \*2. DRAM manufacturers did not begin manufacturing and selling SDRAM devices on a large scale until much later – in 1996 and 1997. *See, e.g.*, Perry Decl., Ex. 6 (Gross 12/19/02 Dep. at 31) [REDACTED]; Ex. 7 (Kettler 1/15/03 Dep. at 26) [REDACTED].

The Complaint alleges that JEDEC considered improvements to the SDRAM standard in the early and mid-1990s and that these discussions ripened into the formal development of a new standard, called “DDR SDRAM,” in the 1996-1999 time period. Complaint, ¶¶ 27-28. The Complaint asserts that JEDEC was lulled by Rambus’s alleged “silence” into incorporating features in the SDRAM and DDR SDRAM standards that fall within the claims of Rambus’s patents. *Id.* at ¶¶ 70-71.

Specifically, the Complaint alleges that Rambus conveyed to JEDEC “the materially false and misleading impression that [Rambus] possessed no relevant intellectual property rights.” Complaint, ¶ 2. The Complaint asserts that this impression was false because technologies discussed at JEDEC were, in fact, “encompassed” within the 62-page specification and 15 related drawings that Rambus had filed in its original

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<sup>3</sup> Rambus publicly announced the first version of RDRAM in early 1992. Perry Decl., Ex. 8. That version of RDRAM incorporated many of the key Rambus innovations described in the ’898 written description, including two features that were included in the SDRAM standard – “programmable latency” and “variable burst.”



April 1990 application. *Id.* at ¶ 48. The Complaint concedes that this specification and these drawings were disclosed by Rambus to JEDEC as part of an issued patent in September 1993. *Id.* at ¶ 76. However, the Complaint alleges that Rambus’s issued claims as disclosed were limited in scope and that Rambus failed to disclose its “belief” that the April 1990 specification and drawings might be used to support broader claims in the future that would cover JEDEC-standardized features. *Id.* at ¶¶ 48, 76, 80.

#### **D. The JEDEC Patent Policy**

The Complaint alleges that, while Rambus was a JEDEC member, JEDEC required members to disclose all patents and patent applications that “might be involved in” or “related to” the work of the relevant JEDEC committee. Complaint, ¶¶ 21, 24. The Complaint further alleges that JEDEC members were also required to disclose their intent to file or amend patent applications. *See id.* at ¶¶ 47, 55. Rambus strongly disputes these contentions but, as shown below, any factual dispute on these points does not defeat the present motion given the other dispositive issues as to which no genuine issue of material fact exists.

The Complaint does not allege that Rambus’s purported obligation as a JEDEC member to disclose its patents, patent applications, or intent to file or amend such applications arises from antitrust law or from overriding principles of public policy. Instead, the Complaint alleges that those obligations were assumed by Rambus *by contract* when it joined JEDEC. *See* Complaint, ¶ 15 (“[t]o become a JEDEC member, an eligible company need only submit an application, pay membership fees, and agree to abide by JEDEC’s rules”). Notably, however, no such agreement to “abide by JEDEC’s rules” is

made part of the application for JEDEC membership. *See* Perry Decl., Ex. 80 (Rambus’s membership application). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Perry Decl., Ex. 76 (McGhee 8/10/01 Dep. at 139-40).

The Complaint does not allege the existence of any *written* contract between Rambus and JEDEC that contains the patent disclosure obligations or “rules” that Rambus is alleged to have breached. Instead, the Complaint alleges that “the policies, procedures, and practices existing within JEDEC . . . imposed certain basic duties” on members and that “the existence and scope of [a member’s] disclosure obligations were commonly known within JEDEC,” apparently as a result of oral discussions at JEDEC meetings. Complaint, ¶¶ 21, 24.

### **ARGUMENT**

The standards governing a motion for summary decision are well settled. Rule of Practice 3.24 provides that “any party . . . may move . . . for a summary decision in the party’s favor upon all or any part of the issues being adjudicated.” 16 C.F.R. § 3.24(a)(1). Rule 3.24 further provides that summary decision should be entered when “there is no genuine issue as to any material fact and . . . the moving party is entitled to such decision as a matter of law.” 16 C.F.R. § 3.24(a)(2). Once a motion for summary decision is made and adequately supported, “a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for

trial.” 16 C.F.R. § 3.24(a)(3).

While Your Honor must draw all “reasonable” inferences in favor of the non-moving party, the Commission has emphasized that “the party opposing summary judgment is required to raise more than ‘some metaphysical doubt.’” *In the Matter of College Football Ass’n*, 1994 FTC LEXIS 112 at \*35 (June 16, 1994) (citations omitted). As the Commission has explained, “[t]he mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. A material fact is a fact which might affect the outcome of a suit because of its legal import.” *In the Matter of Trans Union Corp.*, 118 F.T.C. 821, 839 (1994) (citations omitted).<sup>4</sup>

**I. THE JEDEC PATENT DISCLOSURE POLICY LACKS SUFFICIENT CLARITY TO SERVE AS THE BASIS FOR ANTITRUST LIABILITY.**

As set forth below, the undisputed evidence that has been gathered in this case demonstrates three things: (1) no document anywhere states or purports to impose on JEDEC members the broad disclosure requirements alleged in the Complaint; (2) there is inexact, amorphous, and varying language in different JEDEC materials, some shown to JEDEC members and some not; and (3) as a result of (1) and (2), there was and is a wide array of dramatically different views on the JEDEC patent policy among JEDEC members,

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<sup>4</sup> The parties disagree as to whether Complaint Counsel must meet their burden under a “clear and convincing” standard or merely by a preponderance of the evidence. Rambus submits that under *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1070-71 (Fed. Cir. 1998), and related cases, Complaint Counsel must satisfy the heightened standard. *See generally In the Matter of VISX, Inc.*, Docket No. 9286 (May 27, 1999) (available at <<http://www.ftc.gov/os/1999/9906/visxid.pdf>>) (applying clear and convincing standard to antitrust claims based on alleged failure to disclose prior art to Patent Office examiners). Your Honor need not address this issue at this time, however, because summary decision is required here *regardless* of which standard is applied.

including JEDEC committee chairmen and members of its Board of Directors.

While the applicable patent policy was murky, the applicable law is clear. The JEDEC patent policy was not sufficiently defined, as a matter of law, to form the basis of contractual *or* antitrust liability.<sup>5</sup> Indeed, the unavoidable necessity for after-the-fact definition of the disclosure duty, at the behest of the government and based on the deeply self-interested testimony of industry incumbents (Rambus's competitors and potential licensees), makes any imposition of liability here inconsistent with proper antitrust, patent, and First Amendment standards. *See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1128 (7th Cir. 1983).

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<sup>5</sup> This motion does not address numerous issues relating to the disclosure duty that the Commission contends Rambus violated, including: (1) whether any of the Rambus patents or patent applications that were issued or filed between 1992 and 1996 covered any feature or technology under consideration by JEDEC for standardization; (2) whether Rambus satisfied JEDEC's purported disclosure obligations; and (3) whether a disclosure obligation as broad as the one urged in the Complaint would serve the public interest. Rambus makes this motion without prejudice to its position on these issues.

Rambus does note that, in sharp and telling contrast to the assertions in the Complaint, the Court of Appeals for the Federal Circuit has recently held that: (1) none of JEDEC's policy manuals or other written materials expressly requires members to disclose any information about patents or patent applications; (2) to the extent that JEDEC members treated those manuals or other materials as imposing a disclosure duty, that duty extended only to patents or patent applications whose then-existing claims are reasonably read to cover the proposed JEDEC standard, and the duty did not extend to a member's intentions to file future patent applications; (3) any such duty was triggered only at formal balloting of a proposed standard and extended only to the specific standard then under consideration; (4) while Rambus was a JEDEC member, it had no undisclosed claims in any patent or application that could reasonably be read to cover any proposed JEDEC standard; and thus, for these multiple reasons (5) Rambus did not breach any duty of disclosure that it may have owed to JEDEC. *Rambus v. Infineon*, 2003 WL 187265 at \*11-20.

**A. Fundamental Principles of Contract Law Require That to Be Enforceable, Promises Must Be Definite Rather Than Amorphous or Obscure.**

It is a basic principle of contract law that “an agreement, in order to be binding, must be sufficiently definite to enable the courts to give it an exact meaning.” 1 Lord, Williston on Contracts § 4:18, at 414 (4th ed. 1990). This fundamental principle applies regardless of whether Your Honor applies the law of Virginia (JEDEC’s home), California (Rambus’s home), or federal law. *Compare Smith v. Farrell*, 199 Va. 121, 127-28 (1957), with *Ladas v. California State Auto. Ass’n*, 19 Cal. App. 4th 761, 770-71 (1993), and *United States v. Orr Constr. Co.*, 560 F.2d 765, 770 (7th Cir. 1977). Under the law of any of these jurisdictions, contractual promises “must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages.” *Ladas*, 19 Cal. App. 4th at 770. *Accord TransAmerica Equip. Leasing Corp. v. Union Bank*, 426 F.2d 273, 274 (9th Cir. 1970) (holding under California law that “[w]here an agreement is not sufficiently definite to enable a court to give it an exact meaning or where an essential element is reserved for future agreement of both parties, a legal obligation cannot result”); *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 811 (1998) (holding that if “a supposed ‘contract’ does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract”); *W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 254 Va. 514, 517 (1997) (same). It is also settled, moreover, that the question “[w]hether a contract term is sufficiently definite to be enforceable is a question of law for the court.” *Ladas*, 19

Cal. App. 4th at 770 n.2.

**B. Rules Purporting to Form the Basis for Antitrust Liability Cannot Be So Vague That Parties Cannot Be Reasonably Expected to Conform Their Conduct to the Rules' Requirements.**

Courts have also repeatedly recognized the need for clarity of rules on which antitrust liability is purportedly based. *See, e.g., Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.). Where those rules are ambiguous or indefinite, businesses are unfairly left to speculate whether their conduct will expose them to potential antitrust liability. In such situations, the ambiguity is likely to result in a chilling effect on otherwise procompetitive conduct. *See, e.g., Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986) (“if the antitrust laws applicable to vertical dealings are uncertain or inefficient, they are likely to have a chilling effect on beneficial, procompetitive market interaction”); *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 512 (7th Cir. 1982) (patent misuse claims should be tested by conventional antitrust principles given that the “law is not rich in alternative concepts of monopolistic abuse; and it is rather late in the day to try to develop one without in the process subjecting the rights of patent holders to debilitating uncertainty”). In a similar case, the Second Circuit found that there was no liability under Section 5 for conscious price parallelism given the uncertainty as to “the types of otherwise legitimate conduct that are lawful and those that are not.” *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984). The court stated that “the Commission owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete

unpredictability.” *Id.*

These requirements are even more important when the alleged contract at issue governs the conduct of industry participants in a standard-setting organization because of the anticompetitive potential for after-the-fact manipulation by industry incumbents seeking to exploit others’ innovations. As the Court of Appeals for the Federal Circuit has recently explained: “When direct competitors participate in an open standards committee, their work necessitates a written patent policy with clear guidance on the committee’s intellectual property position.” *Rambus v. Infineon*, 2003 WL 187265 at \*17. Here, as set forth more fully below, the purported JEDEC patent policy that the Complaint relies upon was not written, did not provide “clear guidance” to anyone, and cannot form the basis for antitrust (or contractual) liability.<sup>6</sup>

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<sup>6</sup> Complaint Counsel’s effort here to make antitrust liability turn on issues of disclosure must satisfy the additional standards that the First Amendment requires to be met before liability can be imposed on the basis of speech (including silence). These include: proof by clear and convincing evidence; proof of falsity, deception, and intent to deceive; sufficiently clear standards to limit enforcement discretion and manipulation; and independent appellate review of fact findings. *See generally* Brief of the United States and Federal Trade Commission as *Amici Curiae* in *Ryan v. Telemarketing Assocs., Inc.*, S. Ct. No. 01-1806 (filed Dec. 2002) at 13-14.

Basing antitrust liability on vague and inexact contractual obligations raises serious due process questions as well. It is beyond dispute that a regulation that “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). As the Supreme Court explained in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972), the Due Process Clause of the Fourteenth Amendment “insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *See also Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) (“The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative

**C. The Evidence Demonstrates That the JEDEC Patent Policy Was So Poorly Defined and Inconsistently Explained That JEDEC Members Could Not Reasonably Have Understood It as Containing the Broad Disclosure Obligations Described in the Complaint.**

According to the Complaint, Rambus agreed upon joining JEDEC to follow the “basic disclosure duty applicable to all JEDEC members – the duty to disclose the existence of any patents or pending patent applications it knew or believed ‘might be involved in’ the standard-setting work that JEDEC was undertaking, and to identify the aspect of JEDEC’s work to which they related.” Complaint, ¶ 79. The principal questions addressed in this section are: (1) where, if anywhere, could a JEDEC member find the purportedly “basic disclosure duty” alleged in the Complaint; and (2) whether JEDEC members and the JEDEC leadership understood that they had such a duty, and acted in conformity with it, while Rambus was a member. The answers to these questions are “nowhere” and “no.”

**1. What policy manuals governed JEDEC members while Rambus was a member?**

JEDEC was until 1998 an unincorporated division of the EIA.<sup>7</sup> According to John Kelly, formerly General Counsel of EIA and now President of JEDEC, the patent disclosure policy with which JEDEC members were required to comply during Rambus’s membership in JEDEC was set forth in “two EIA manuals,” referred to as the *Manual for*

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choice among competing social values.”). In this case, where the government seeks to base antitrust liability on the violation of a supposed disclosure rule, such a rule must be sufficiently definite so that those of whom compliance is expected can conform their conduct to its requirements.

<sup>7</sup> JEDEC’s relationship with the EIA changed in 1998, when JEDEC became a more autonomous entity. Perry Decl., Ex. 4 (Kelley 1/10/03 Dep. at 62-63).



*Committee, Subcommittee, and Working Group Chairmen and Secretaries*, Engineering Publication EP-3-F (“EP-3-F”), published in October 1981, and the *Style Manual for Standards and Publications of EIA, TIA, and JEDEC*, EIA Engineering Publication EP-7-A (“EP-7-A”), published in August 1990. Perry Decl., Ex. 9 (Kelly 1/9/01 Dep. at 26).

Despite the evidence that at least prior to 1998, the EIA policies governed the conduct of JEDEC meetings and the obligations of its members, the Complaint relies upon a manual published in 1993 not by the EIA but by JEDEC. According to the Complaint, JEDEC’s members should have looked for guidance on patent policy issues to a “Manual of Organization and Procedure” that was revised in 1993 and referred to as “JEP 21-I.” This manual was apparently drafted to instruct JEDEC committee chairman on how to conduct their committees and was not routinely provided to mere members. In any event, as discussed below, JEP 21-I cited EP-7-A and EP-3-F as the governing policy guides, and JEDEC President John Kelly has confirmed that “[t]he JEDEC manual is subordinate to the EIA manual, . . . because in the hierarchy of EIA, JEDEC was subordinate to EIA.” Perry Decl., Ex. 10 (4/30/01 *Infineon* Trial Tr. at 317). Mr. Kelly has also explained that JEP 21-I did *not* contain “the JEDEC patent policy” and was in some respects “broader than is required under the patent policy” – although, on alternate pressing from counsel for Infineon and Rambus, his hedging and attempted fine-tuning of this testimony simply confirmed the lack of clarity as to which specific manual governed or could be relied upon. Perry Decl., Ex. 9 (Kelly 1/9/01 Dep. at 205-10, 215-17, 227-38, 243-51).

There was one other manual issued while Rambus was a JEDEC member that contains references to patent-related disclosures. In 1994, JEDEC issued a “JC 42

Members' Manual" that was intended to "assist new (and established) members in achieving full effectiveness in the standards making process." Perry Decl., Ex. 11 (R 156887). The Members' Manual provides in part that JEDEC "adhere rigidly" to the EIA policies contained in EP-7-A and EP-3-F. *Id.* (R 156900).

As discussed below, it cannot be disputed that the disclosure obligations set out in the Complaint are *not to be found* in the EIA policy manuals, and are *not to be found* in the JC 42 Members' Manual, and are only *hinted at* in JEP 21-I. Antitrust liability cannot arise from such a muddle.

2. **Did the various manuals address mere JEDEC members and tell them they had to make *any* disclosures?**
  - a. **The EIA policy language did not tell members they had any duties, including any disclosure duties.**

The October 1981 EIA policy known as EP-3-F provides as follows:

### 8.3 Reference to Patented Products In EIA Standards

Requirements in EIA Standards which call for the use of patented items should be avoided. No program of standardization shall refer to a product on which there is a known patent unless all the technical information covered by the patent is known to the Formulating committee, subcommittee, or working group. The Committee Chairman must also have received a written expression from the patent holder that he is willing to license applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination. Additionally, when a known patented item is referred to in an EIA Standard, a Caution Notice, as outlined in the Style Manual, EP-7, shall appear in the EIA Standard.

Perry Decl., Ex. 12 (§ 8.3). Nowhere in this statement is any mention of an obligation or duty imposed on JEDEC members to disclose patents *or* patent applications. Rather, the statement, on its face, expresses the EIA's policy that its own actions will: (1) limit the

incorporation of patented items and processes in EIA standards; and (2) where standardization of patented items or processes occurs, ensure that the subject of such patents will be available on reasonable and non-discriminatory license terms.

Using virtually identical language, the 1990 EIA manual known as EP-7-A provides, in pertinent part:

#### 3.4 Patented Items or Processes

Avoid requirements in EIA standards that call for the exclusive use of a patented item or process. No program standardization shall refer to a patented item or process unless all of the technical information covered by the patent is known to the formulating committee or working group, and the committee chairman has received a written expression from the patent holder that one of the following conditions prevails:

- (1) a license shall be made available without charge to applicants desiring to utilize the patent for the purpose of implementing the standard, or
- (2) a license shall be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

. . . An appropriate footnote shall be included in the standard identifying the patented item and describing the conditions under which the *patent* holder will grant a license (see 6.5.2).

Perry Decl., Ex. 13 (§ 3.4) (emphasis added). Again, this statement of the EIA patent policy makes no reference to an obligation to disclose patents or patent applications.

- b. The viewgraphs shown to JEDEC members at virtually all of the JEDEC 42.3 meetings Rambus attended were no different in this respect from the EIA policies.**

At all but one of the sixteen JEDEC 42.3 meetings attended by a Rambus representative between February 1992 and December 1995, a slide or “viewgraph” setting forth the patent policies contained in EP-7-A and EP-3-F was shown to the meeting

attendees. Perry Decl., Ex. 14. Minutes of the JEDEC 42.3 meetings describe these viewgraphs as containing “the” patent disclosure policy. *Id.* (JDC 001685). As described above, the language of these viewgraphs and EIA/JEDEC policy documents did not expressly require any disclosures of any kind.

On one occasion, at the September 1993 meeting, the chairman showed a different viewgraph, containing proposed language from an appendix to the not-yet-published JEP 21-I manual. This viewgraph was expressly marked “DRAFT,” with a footnote stating that the “material is a proposed revision” that “has not been approved by JEDEC.” Perry Decl., Ex. 14 (JDC 001690); Perry Decl., Ex. 15 (R65780). Moreover, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* In any event,

after September 1993, only the original viewgraphs, not this one, were shown to members.

Perry Decl., Ex. 14.

- c. **JEDEC Manual 21-I, directing committee chairs to make certain statements to members, left members still having to infer any duties from the EIA-based viewgraphs.**

In October 1993, JEDEC issued a revised version of its *Manual of Organization and Procedure*, JEP 21-I. Perry Decl., Ex. 17. The earlier version, JEP 21-H, had

contained no reference to the disclosure of patents or patent applications and had simply “incorporated” the EIA legal guides. Perry Decl., Ex. 18. JEP 21-I still cited EP-7-A and EP-3-F as the governing statement of the patent policy, but also included, for the first time, an express reference to an obligation on the part of *committee chairpersons* to “call attention to the obligation of all participants to inform the meeting of any knowledge they may have of any patents, or pending patents, that might be involved in the work they are undertaking.” Perry Decl., Ex. 17 (§ 9.3.1). But the manual further instructed that committee chairpersons should satisfy this requirement by showing members the very “viewgraphs” discussed above, contained in Appendix E of the manual. *Id.* The viewgraphs in Appendix E contained language that was substantially similar to the language of section 3.4 of EP-7-A, except for the addition of a reference to “pending patent.” Perry Decl., Ex. 17 (Appendix E at JDC 013325).

Although the Complaint relies heavily on the reference to “pending patents” in JEP 21-I, there is no evidence that Rambus was provided with a copy of JEP 21-I while it was a JEDEC member. Moreover, it is undisputed that the “viewgraphs” that were displayed to JEDEC 42.3 members after JEP 21-I was adopted did not include any requirement that members disclose anything, did not include any reference to “pending patents,” and instead consisted simply of the unaltered language of EP-7-A and EP-3-F. Perry Decl., Exs. 14 & 17.<sup>8</sup>

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<sup>8</sup> Notwithstanding this evidence, the Complaint consistently refers to JEP 21-I as “the” JEDEC manual (*see, e.g.*, Complaint ¶¶ 14, 15, 18, 21-23), ignoring its limited distribution and focus on chairmen’s duties and, as explained in the next section, the existence of the JEDEC “Members’ Manual.”

**d. The JC 42 Members' Manual refers only to disclosures by presenters.**

Complicating this morass even further was the publication in 1994 of the "JC 42 Members' Manual," which was intended to "assist new (and established) members in achieving full effectiveness in the standards making process." Perry Decl., Ex. 11 (R 156887). This manual did directly address certain members and state certain duties, but the members addressed were a limited group. According to the JC 42 Members' Manual, a member that was *presenting* a technology to JEDEC for standardization "must reveal any known or expected patents, within his company, on the material presented." *Id.* (R 156900). The JC 42 Members' Manual contains no reference, however, to disclosure of patents or patent applications by *non*-presenters like Rambus.<sup>9</sup>

**3. Did JEDEC members and the JEDEC leadership act as if disclosure was required?**

Regardless of where the applicable patent policy could be found, and regardless of what it said while Rambus was a JEDEC member, there is substantial contemporaneous evidence demonstrating that while JEDEC members and the JEDEC leadership may have understood the JEDEC patent policy as *encouraging* member companies to disclose their intellectual property, they did not understand that policy to *require* disclosure of intellectual property. Some of that evidence is set out below.

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<sup>9</sup> Rambus's JEDEC representative, Richard Crisp, has testified that he reviewed the JC 42 Members' Manual in the summer of 1995 and saw that companies *presenting* their technologies for standardization needed to disclose their patent applications. Perry Decl., Ex. 19 (Crisp 11/8/00 Dep. at 190). It is undisputed that Rambus never presented its technology for standardization. Perry Decl., Ex. 4 (Kelley 1/10/03 Dep. at 137-38).

- a. **Two leading JEDEC members, IBM and Hewlett-Packard, announced at various times that they would not make intellectual property disclosures at JEDEC meetings.**

The evidence shows that IBM informed JEDEC on several occasions, without retribution or rebuke, that it would not disclose its intellectual property position at JEDEC meetings. The minutes of the March 1993 meeting of JEDEC 42.3 state, for example, that “IBM noted that their view has been to ignore [the] patent disclosure rule because their attorneys have advised them that if they do then a listing may be construed as complete.” Perry Decl., Ex. 20 (JDC 001540). In August 1993, IBM again informed the JEDEC leadership that it would not disclose its intellectual property rights, this time in connection with a technology referred to as “BGA.” In a memo to JEDEC entitled “BGA Patent/License Rights,” IBM’s JEDEC representative (and JEDEC 42.3 subcommittee chair) Gordon Kelley stated bluntly that:

IBM Intellectual Property Law attorneys have informed me that we will not use JEDEC as a forum for discussing this subject. It is the responsibility of the producer to evaluate the subject and to work out the proper use of rights. So, I can not confirm or deny any IPL rights.

Perry Decl., Ex. 21. The JEDEC minutes of December 1993 record yet another representation along these lines by IBM. Perry Decl., Ex. 22.

At about the same time, both IBM and Hewlett-Packard announced at a JEDEC meeting that confidentiality concerns prevented them from disclosing the existence of patent applications. Long-time Hewlett-Packard representative (and JEDEC committee chair) Hans Wiggers explained what happened:

- Q. Do you remember anything that Gordon Kelley ever said about IBM’s position with respect to the JEDEC

patent policy?

\* \* \*

A. . . . Jim Townsend had invited a lawyer from a firm that I don't remember to give us a presentation after the regular session to talk about patents. Okay. That is – and I'm – I'm not sure whether this all happened the same meeting or not, but there – the following discussions came up there. Gordon Kelley said 'Look. I cannot disclose – my company would not let me disclose all the patents that IBM is working on because, you know, I just can't do that. The only thing we will do is we will follow the JEDEC guidelines and – or rules on whatever and we will make them available.'

And I piped up at that point and said 'The same is true for HP.'

\* \* \*

Q. Okay. Did Mr. Townsend [the JC 42 committee chairman] have any response when you and Mr. Kelley talked about what your company's positions were?

A. I think he just took it as – I don't know that he had a particular response to that. I think everybody – my impression was that everybody thought that that was a reasonable position to take. We could not even know all the patents that people in our companies were working on. And if we did know it, we certainly were not in a position to divulge that to anybody.

Perry Decl., Ex. 23 (Wiggers 12/18/02 Dep. at 57-58, 60).<sup>10</sup>

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<sup>10</sup> Motorola's JEDEC representative in the early 1990s, David Chapman, similarly testified that while he understood that "we were expected to disclose granted patents," the disclosure by JEDEC members of patent *applications* would have "gone one step beyond" the patent policy and would have involved "company confidential" information. Perry Decl., Ex. 24 (Chapman 1/23/03 Dep. at 20-21). Rambus itself declined to comment on two separate occasions, in 1992 and 1995, when asked about its intellectual property.



In other words, it is apparent that prominent JEDEC members believed that disclosure of patents and, in particular, patent applications, was voluntary rather than mandatory, that they acted on that belief, and that “everybody thought that that was a reasonable position to take.” *Id.* at 60.

**b. The JEDEC Secretary’s March 29, 1994, memorandum demonstrates that disclosure was voluntary, not mandatory.**

In March 1994, JEDEC Secretary Kenneth McGhee sent a memorandum to Jim Townsend, the Chairman of the JEDEC 42 Committee responsible for computer-memory devices. The memorandum stated that:

In response to your telecon message yesterday, I asked our legal counsel for his views on the matter. He responded that he didn’t think it was a good idea to require people at JEDEC standards meetings to sign a document assuring anything about their company’s patent rights for the following reasons:

- 1) It would have a chilling effect at future meetings
- 2) A general assurance wouldn’t be worth that much anyway
- 3) It needs to come from a VP or higher within the company – engineers can’t sign such documents
- 4) It would need to be done at each meeting slowing down the business at hand.

Perry Decl., Ex. 26.

The statements contained in Mr. McGhee’s March 1994 memorandum contradict the notion that the disclosure of intellectual property at JEDEC meetings was mandatory as of 1994. If JEDEC’s legal counsel recognized that a “general assurance” by a JEDEC

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Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 379-80). On neither occasion did anyone inform Rambus that disclosure was mandatory rather than voluntary.

representative about his company's patent rights could not be obtained from the engineers who attended the meeting, it cannot be the case that such assurances were *required*.

Similarly, the recognition by JEDEC's legal counsel that asking for assurances about a company's patent rights "would have a chilling effect at future meetings" is inconsistent with the proposition that such disclosures were *already* mandatory, rather than voluntary.<sup>11</sup>

**c. The EIA told the FTC in January 1996 that any intellectual property disclosures by EIA members were voluntary.**

In January 1996, shortly after Rambus had attended its final JEDEC meeting, the EIA provided comments to the FTC with respect to a proposed Consent Order between the FTC and Dell Computer Corporation ("*Dell*"). In that letter, submitted by an EIA Vice President and by its General Counsel, the EIA stated that "allowing patented technology in standards is pro competitive." Perry Decl., Ex. 28. The EIA also stated that it "*encourage[s]* the early, voluntary disclosure of patents that relate to the standards in work." *Id.* (emphasis added). Nothing in the letter suggests that disclosure was required rather than "voluntary." *Id.*

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<sup>11</sup> A February 2000 memo by Mr. McGhee demonstrates his understanding that disclosure continued to be voluntary, even as of that late date. Mr. McGhee, who by that time had been attending JEDEC meetings for almost 20 years, wrote:

The JEDEC patent policy concerns items that are known to be patented that are included in JEDEC standards. Disclosure of patents is a very big issue for Committee members and *cannot be required* of members at meetings.

Perry Decl., Ex. 27 (emphasis added). Mr. McGhee also stated that a member that had disclosed a patent application had "gone one step beyond the patent policy," and that JEDEC "*encourages* this type of activity from any member." *Id.* (emphasis added).

**d. The FTC acknowledged in July 1996 that disclosure under the EIA patent policy was voluntary, not mandatory.**

In July 1996, the FTC responded to the EIA's January 1996 letter commenting on the *Dell* Consent Order. In a letter signed by FTC Secretary Donald Clark, the FTC acknowledged that:

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

Perry Decl., Ex. 29 (emphasis added).

The FTC's letter points out that the EIA policy was thus different from the policy of the standard-setting organization involved in the *Dell* case, which *did* require the disclosure of "potentially conflicting patent interests." *Id.* There is no evidence that any EIA official ever informed the FTC that its understanding regarding the "voluntary" nature of patent disclosure under the EIA's policies was incorrect.

**e. The JEDEC Secretary's July 10, 1996, memorandum confirms that patent disclosures were voluntary rather than mandatory.**

On July 10, 1996, JEDEC Secretary Kenneth McGhee sent a memorandum to all "JEDEC Council Members and Attendees" regarding the FTC's Final Consent Order in the *Dell* case. The memo, which was apparently prepared by the EIA's Vice President of Engineering, stated in part that:

[REDACTED]

Perry Decl., Ex. 30 (emphasis added).

In sum, there is overwhelming evidence that JEDEC members and the JEDEC leadership understood during the time that Rambus was a JEDEC member that members were encouraged, but not required, to make a “voluntary” disclosure of their intellectual property in certain circumstances.<sup>12</sup>

**4. Even assuming that disclosure was required, what had to be disclosed?**

Although the Complaint alleges that any patent or patent application that relates to a proposed JEDEC standard was subject to JEDEC’s disclosure requirements, there is nothing in either the written policies or the actual practices of JEDEC’s members to support any such requirement. First, the language of the EIA/JEDEC policy refers only to standards that “*call for the use of patented items.*” Perry Decl., Ex. 12 (§ 8.3) (emphasis added). JEDEC’s policy manual JEP 21-I similarly refers only to standards that “*require the use of patented items.*” Perry Decl., Ex. 17 (§ 9.3) (emphasis added). This language simply cannot support a requirement that patents related in some unspecified way to a proposed standard were required to be disclosed.

Testimony at the *Infineon* trial is consistent with the more narrow scope suggested by the language of the patent policy itself. For example, Infineon’s JEDEC representative Willi Meyer, explaining why he did not disclose an Infineon patent, testified that it was his understanding the disclosure duty applied only to patents “related to the work at JEDEC *in the sense that it described features that were necessary to meet the standard.*” Perry Decl.,

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<sup>12</sup> For purposes of this motion, Rambus need not *prove* that disclosure was voluntary rather than mandatory. It is sufficient instead for Rambus to show that the applicable policy (if it can be identified) did not clearly and explicitly require the type of disclosures set out in the Complaint, and that members did not act as if such disclosures were mandatory.

Ex. 31 (5/7/01 *Infineon* Trial Tr. at 117) (emphasis added). That narrow sense (natural in this context) defined, at most, *what* “relation” a patent had to have to a proposed standard in order to be subject to disclosure. Similarly, [REDACTED]

[REDACTED] Perry Decl., Ex. 16 (Kelley 1/26/01 Dep. at 73-76, 89-92) (emphasis added); *see also id.* at 273-76 [REDACTED]

[REDACTED]; Ex. 30 (July 1996 McGhee memorandum [REDACTED] (emphasis added).

Indeed, this narrower understanding of the scope of the disclosure duty is consistent with the JEDEC goal of ensuring that standards incorporating patented items or processes can be practiced under reasonable and non-discriminatory license terms. Given that EIA/JEDEC goal, there would be no basis for requiring disclosure of patents or applications that did not support a demand for a license.

That JEDEC members could not have understood the scope of the disclosure requirement to be as broad as the Complaint suggests is made clear by the evidence of what was actually disclosed during the relevant time period. Jim Townsend of Toshiba, Chairman of JC 42, maintained a “patent tracking list” that purported to list patents which were disclosed as having potential relevance to the work of JEDEC committees. The JEDEC patent tracking list published in December 1995 at the last JEDEC meeting Rambus attended lists only 65 patents or patent applications that were disclosed to JEDEC

42.3 since the tracking list was first created over four years earlier in September 1991. Perry Decl., Ex. 32. Once added, entries on the list ordinarily were not removed. Perry Decl., Ex. 4 (Kelley 1/10/03 Dep. at 113). Of the 65 entries, only five state “pending,” apparently in reference to a patent application. Perry Decl., Ex. 32.

Although it is impossible to know the total number of patents issued or pending that belonged to JEDEC members during Rambus’s tenure at JEDEC, it is certainly *not* possible that the 60 patents and five patent applications listed on the December tracking list were the *only* patents that “related to” the proposed SDRAM standard in some sense beyond the normal one of supporting a claim of infringement and hence a demand for a license. *Rambus v. Infineon*, 2003 WL 187265 at \*16. The committee’s membership included more than 50 companies, representing the semiconductor industry’s leading patent holders and the memory-technology industry’s leading manufacturers. According to Gordon Kelley, “hundreds, if not thousands,” of patents related to DRAMs. Perry Decl., Ex. 16 (Kelley 1/26/01 Dep. at 158). That only 65 patents and patent applications were disclosed and found their way to Mr. Townsend’s records demonstrates that it clearly was *not* the practice – or implied policy – to disclose patents and applications that were related in some unspecified way to a standard under consideration.

Indeed, dozens of patents and pending patent applications that were related to JEDEC standard-setting work and that named as inventors JEDEC attendees were not disclosed by those attendees. Apparently, numerous JEDEC attendees from some of the most prominent JEDEC member companies did not understand there to be any such disclosure obligation. To list just a few examples:

- On March 16, 1993, Toshiba filed a patent application, claiming priority to a March 19, 1992, Japanese application, a continuation of which issued as U.S. Patent No. 5,986,968, directed at semiconductor devices with programmable latency.<sup>13</sup> One of the inventors of the '968 patent, Hitoshi Kuyama, attended a JEDEC 42.3 meeting on May 7, 1992, at which presentations showing the programmable latency feature of SDRAMs were made, but did not disclose his pending application. *See Perry Decl.*, Ex. 33.

- On December 23, 1994, Micron filed a patent application, which issued on June 11, 1996, as U.S. Patent No. 5,526,320, directed at a "Burst EDO" DRAM.<sup>14</sup> (That application also spawned numerous continuation applications directed at various features of such devices.) On January 17, 1995, one of the inventors of the '320 patent, Brett Williams, made a presentation on Burst EDO DRAMs at a JEDEC DRAM Task Group meeting, but failed to disclose his pending application. *See Perry Decl.*, Ex. 34.

- On November 8, 1996, Texas Instruments filed a patent application (claiming priority to an earlier October 21, 1994, application), which issued as U.S. Patent No. 5,982,694 on November 9, 1999, directed at synchronous DRAMs that output data on both the rising and falling edges of a clock.<sup>15</sup> One of the inventors of the '694 patent,

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<sup>13</sup> Available at: <<http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=/netahtml/srchnum.htm&r=1&f=G&l=50&s1=5986968.WK U.&OS=PN/5986968&RS=PN/5986968>>.

<sup>14</sup> Available at: <<http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=/netahtml/srchnum.htm&r=1&f=G&l=50&s1=5526320.WK U.&OS=PN/5526320&RS=PN/5526320>>.

<sup>15</sup> Available at: <<http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=/netahtml/srchnum.htm&r=1&f=G&l=50&s1=5982694.WK U.&OS=PN/5982694&RS=PN/5982694>>.

Joseph Hartigan, was present at numerous JEDEC 42.3 meetings between late-1996 and mid-1998 at which such a feature of DDR SDRAMs was discussed but failed to disclose his pending patent application. *See* Perry Decl., Ex. 35.

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In sum, it is clear from the evidence that the JEDEC patent policy was so ambiguously defined, inconsistently explained, and inconsistently followed that it does not provide a sufficient basis for concluding that Rambus was required, as a matter of either contract or antitrust law, to make the disclosures that the Complaint alleges Rambus wrongfully did not make. Under these circumstances, no antitrust liability can result from a purported breach of JEDEC's patent disclosure policies.<sup>16</sup>

**II. JEDEC MEMBERS DID NOT RELY ON ANY MESSAGE SUPPOSEDLY CONVEYED BY RAMBUS'S "SILENCE" IN ADOPTING THE SDRAM AND DDR SDRAM STANDARDS.**

Even if Your Honor assumes that the JEDEC patent policy was as broad, and as clear, and as "commonly understood" as the Complaint paints it – which this section of the motion hereafter assumes *arguendo* – summary decision in Rambus's favor is still

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<sup>16</sup> There is, of course, the underlying question whether the type of conduct alleged here can ever form the basis for imposition of the kind of remedy sought – compulsory, royalty-free licensing of valid patents. *See United States v. National Lead Co.*, 332 U.S. 319, 349 (1947) (rejecting such a remedy for antitrust violation by patent holder); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 414-15 (1945) (same); *see also Intel Corp. v. Via Techs., Inc.*, 2001 WL 777085 at \*6 (N.D. Cal. 2001) (raising but not deciding issue of "whether a *Dell*-type theory is reconcilable with the statement of the Federal Circuit that 'in the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory rights to exclude others [under the patent] free from liability under the antitrust laws'" (quoting *In re Independent Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327 (Fed. Cir. 2000)). These issues need not be addressed here.



warranted. As explained below, *if* the Complaint’s allegations regarding the patent policy are true, then it necessarily follows that all JEDEC members were on notice from 1992 forward that Rambus would *not* comply with the purported requirements of the JEDEC patent policy alleged in the Complaint. What is more, this section will demonstrate both that JEDEC members *were* in fact concerned about Rambus’s patent rights and that Rambus’s conduct did nothing to assuage those concerns; rather, Rambus’s conduct only intensified the JEDEC members’ fears. As a consequence, Complaint Counsel *cannot* meet their burden of proving that JEDEC relied in any way on Rambus’s purported omissions, and the Complaint must be dismissed.

**A. Complaint Counsel Must Prove That JEDEC and Its Members Relied on Rambus’s Alleged Omissions; That Is, Complaint Counsel Must Prove Causation.**

Complaint Counsel’s action against Rambus is premised on the allegation that Rambus intentionally gave the members of JEDEC 42.3 the “materially false and misleading impression . . . that JEDEC, by incorporating into its SDRAM standards technologies openly discussed and considered during Rambus’s tenure in the organization, was not at risk of adopting standards that Rambus could later claim to infringe upon its patents.” Complaint, ¶ 71. As a result, Complaint Counsel allege, JEDEC adopted the SDRAM and DDR SDRAM standards incorporating features that were later covered by Rambus’s patents, which JEDEC would not have done had it known of Rambus’s patent interests. *Id.* at ¶ 22. In other words, according to Complaint Counsel’s theory of the case (and for Complaint Counsel to prevail here), two things must be true: first, that Rambus’s alleged failures to disclose caused JEDEC and its members to have a false understanding

about Rambus's patent position; and second, that this false understanding in turn caused JEDEC to adopt the SDRAM and DDR SDRAM standards.

Complaint Counsel must prove both of these causal steps. Like a plaintiff making similar allegations in support of a fraud claim, Complaint Counsel must prove that JEDEC and its members acted in reliance on Rambus's alleged failure to disclose – both in forming a false understanding of Rambus's patent position and in adopting the JEDEC standards that incorporated Rambus's technologies. *See Aliche v. MCI Communications Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997) (citing *Pence v. United States*, 316 U.S. 332, 338 (1941) (federal common law)); *see also Bank of Montreal v. Signet Bank*, 193 F.3d 818, 827 (4th Cir. 1999) (noting that under Virginia law fraud by omission requires a showing that the accused knew “the other party [was] acting upon the assumption that the [concealed] fact does not exist”) (internal quotation marks omitted).

An antitrust plaintiff whose claim is based on misrepresentations or omissions must similarly prove reliance on the alleged misrepresentations or omissions. Case law makes clear, for example, that to prove an antitrust claim based on fraudulent patent procurement, the claimant not only must demonstrate that the patentee knowingly and willfully made a fraudulent omission or misrepresentation with clear intent to deceive the patent examiner, but also must make a “*clear showing of reliance*, i.e., that the patent would not have issued but for the misrepresentation or omission” that “*cause[d]* [the] PTO to grant [an] invalid patent.” *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1070-71 (Fed. Cir.

1998) (emphases added).<sup>17</sup>

Any reliance also must be justifiable under the circumstances. *See* Brief for the United States and Federal Trade Commission as *Amici Curiae* in *Ryan v. Telemarketing Assocs., Inc.*, S. Ct. No. 01-1806 (filed Dec. 2002) at 10 (noting the general rule that fraud requires not only that the representations actually be false but also that the misrepresentations be made “for the purpose and with the effect of inducing others to act in justifiable reliance on the misrepresentations,” and stressing the importance of this rule for avoidance of First Amendment problems); *id.* at 14. As explained in one treatise, “[t]he plaintiff’s conduct must not be so utterly unreasonable, in the light of the information apparent to him, that the law may properly say that his loss is his own responsibility.” *Prosser & Keeton on Torts* at 750 (5th ed. 1984). Because the undisputed evidence demonstrates that JEDEC members did not, in fact, rely on Rambus’s alleged nondisclosures, Your Honor need not reach the issue of whether any reliance was justifiable.

The undisputed evidence summarized below demonstrates that there was no reliance in this case. This evidence shows that JEDEC and its members did not act on any mistaken belief that Rambus had no patent interests in the technologies incorporated into

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<sup>17</sup> In *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), the Supreme Court held that one who obtains a patent by fraud on the patent office and thereafter uses the patent to exclude competitors from the market might be found to violate Section 2 of the Sherman Act, 15 U.S.C. § 2. To be clear, Complaint Counsel have not alleged that Rambus obtained its patents through fraud by failing to disclose information *to the patent office*; rather, Complaint Counsel allege that Rambus failed to disclose *to JEDEC*, pursuant to a purported duty to do so, the fact that Rambus had applied for certain patent rights.

the SDRAM and DDR SDRAM standards. To the contrary, based on their own statements, the undisputed evidence shows that JEDEC and its members knew that Rambus had the ability to obtain broad patent claims covering the technologies at issue here, and that Rambus had openly said that it would not discuss its patent position at JEDEC. JEDEC and its members nevertheless incorporated those technologies into the standards because they repeatedly assured themselves and one another that Rambus would be unable to obtain valid patents in light of prior art.<sup>18</sup> In other words, JEDEC and its members already knew what Complaint Counsel now allege Rambus failed to disclose.

**B. Summary Adjudication Is Warranted Because JEDEC 42.3 Members Recognized the Risk That Rambus Would Assert Patent Rights to the Technologies in Issue but Chose to Disregard That Risk.**

Complaint Counsel do not allege that Rambus *encouraged* JEDEC to adopt any technologies that utilize Rambus’s intellectual property. Complaint Counsel also do not allege that Rambus ever made any affirmative representation that it had no relevant intellectual property. Instead, as noted above, Complaint Counsel’s central claim is that

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<sup>18</sup> For a patent to be valid, the claimed invention must be novel (*i.e.*, not previously known or used by others and not described in certain publicly available types of documents), *see* 35 U.S.C. § 102, and nonobvious (*i.e.*, not obvious to a person of ordinary skill in the art), *see* 35 U.S.C. § 103. Both novelty and nonobviousness are measured against the “prior art,” which includes prior patents, publications, and anything publicly known or used prior to the date of the invention. Whether a patent is valid, therefore, depends on “the scope and content of the prior art” as well as “differences between the prior art and the claims at issue.” *Graham v. John Deere*, 383 U.S. 1, 17 (1966).

The evidence discussed below demonstrates that JEDEC members believed Rambus could not obtain valid patents broad enough to encompass the technologies adopted in the SDRAM and DDR SDRAM standards because of their assumptions about the prior art. The question whether Rambus’s patent claims are in fact valid is not relevant to this motion.

Rambus's "silence" lulled JEDEC into adopting standards that utilize Rambus's intellectual property. The uncontroverted evidence demonstrates, however, that JEDEC 42.3 recognized very early that Rambus had sought and might one day assert intellectual property claims over important features contained in the SDRAM and DDR SDRAM standards. The undisputed evidence also shows that JEDEC 42.3 members chose to disregard that risk, in the apparent belief that Rambus would not be able to obtain valid patent rights to the technologies in issue.

**1. Before JEDEC adopted its SDRAM standard, JEDEC members were aware of – and chose to ignore – Rambus's possible intellectual property claims.**

JEDEC adopted its SDRAM standard in early 1993. *Rambus v. Infineon*, 2003 WL 187265 at \*2. There is uncontroverted evidence demonstrating that JEDEC 42.3 members recognized, long before the SDRAM standard was adopted, that the contemplated standard bore strong similarities to Rambus's proprietary technologies. For example, [REDACTED]

[REDACTED] Perry Decl., Ex. 37. Samsung's JEDEC representatives had the same view. In a September 1992 report of that month's JEDEC meetings, Samsung's Gil Russell noted that:

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

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

In a similar vein, the JEDEC 42.3 representative of Siemens (now Infineon), Willi Meyer, wrote in April 1992 that “[t]he original idea of SDRAM is based on the fundamental ideas of a simple clock input (IBM toggle pin) *and the complex Rambus structure.*” Perry Decl., Ex. 39 (I 252168) (emphasis added). Meyer apparently recognized that the genesis of the SDRAM device raised issues relating to Rambus intellectual property rights. In April 1992, Meyer wrote that Rambus was demanding royalties from Samsung “because of similarity of SDRAMs with the architecture of Rambus memories. IBM is therefore seriously considering purchasing a license . . . as a precaution.” Perry Decl., Ex. 40. In May 1992, when he prepared a chart comparing the “pros” and “cons” of SDRAMs and Rambus DRAMs, one of the two “cons” he listed with respect to SDRAMs was that “2-bank sync may fall under Rambus patents.” Perry Decl., Ex. 41.

Complaint Counsel apparently contend that these early concerns were allayed by Rambus’s alleged efforts to mislead JEDEC members. According to the Complaint, “Rambus’s very participation in JEDEC, coupled with its failure to make required patent-related disclosures, conveyed a materially false and misleading impression” that the technologies adopted by JEDEC were free of Rambus intellectual property. Complaint, ¶ 71. The undisputed evidence, however, demonstrates that a company’s “very participation” at JEDEC did not convey the message that that company lacked intellectual property interests – certainly not with respect to IBM, Motorola, Rambus, or any other company that expressly declined to comment on its intellectual property. And, in any

event, and critically for this motion, the undisputed evidence demonstrates that Rambus's conduct did *not* lull JEDEC.

On May 6, 1992, JEDEC 42.3 met in New Orleans, Louisiana. Perry Decl., Ex. 14 (JDC 001196). This was Rambus's second meeting as a JEDEC member. During the meeting, IBM representative Gordon Kelley, who also served as the 42.3 subcommittee chairman, asked Rambus representative Richard Crisp if he would care to comment regarding possible Rambus patent claims with respect to two-bank synchronous DRAM designs. Mr. Crisp declined to comment. Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 380); Ex. 42 (Meyer 4/5/01 Dep. at 947-52); Ex. 31 (*Infineon* trial testimony of Mr. Meyer: "The way . . . Mr. Kelley formulated the question was: Do you want to give a comment on this?"); Perry Decl., Ex. 8.

Mr. Crisp's refusal to comment about Rambus's intellectual property rights could not, of course, have lulled JEDEC into believing that Rambus had no intentions to seek or assert such rights. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

Another JEDEC representative, who was also a committee chair, Farhad Tabrizi, testified that a representative's refusal to comment on his company's patent position would in and of itself raise a red flag:

Q. And if you asked a representative to comment about his company's patents or patent applications, you expected the representative to give you the information; correct?

A. That's right.

\* \* \*

Q. [I]f the company refused to provide their position or any information about the patent position, that would be a violation of JEDEC patent policy, as you understood it?

A. That's correct.

Perry Decl., Ex. 44 (Tabrizi 11/20/02 Dep. at 27-28). Other JEDEC participants agree with this conclusion.<sup>19</sup>

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<sup>19</sup> See, e.g., [REDACTED]



It is also undisputed that Mr. Crisp's refusal to comment did in fact "raise a flag," rather than lull JEDEC into confidence that Rambus lacked potential patent interests in the proposals being considered. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

It is thus obvious that Siemens'

concerns about the "patent situation with Rambus" were only heightened by Crisp's refusal to comment at the May 1992 meeting.

Similarly, in June 1992, IBM's Gordon Kelley prepared a chart entitled "COMPARE ALTERNATIVES for Future High Performance, High Volume DRAM Designs." The chart listed "Pros" and "Cons" of Sync DRAMs and Rambus DRAMs; one of the two "cons" listed for Sync DRAMs was "Patent Problems? (Motorola/Rambus)."

Perry Decl., Ex. 47. Mr. Kelley has testified that [REDACTED]

[REDACTED]

[REDACTED]. Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 374-75). He

has also testified that [REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Id.* at 374, 379-80.

Mr. Kelley testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 375.<sup>20</sup>

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<sup>20</sup> Kelley’s references to Motorola patents apparently relate to comments at the May 1992 JEDEC meeting by NEC representative Howard Sussman. Sussman stated that he had reviewed the publicly available copy of Rambus’s International Patent Application and

It is clear that Rambus's participation at JEDEC did not lull JEDEC in any way. Instead, Rambus made it apparent to all that it would not disclose information relating to its intellectual property. Under the Complaint's description of the JEDEC patent policy, Rambus's position would have been "commonly understood" by all JEDEC members to be an open repudiation of that policy. Indeed, Rambus's position led JEDEC 42.3 Chairman Kelley to warn a large group of DRAM engineers that they ought to analyze "potential patent problems or patents that were held by Motorola and Rambus." Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 375).

There was an *additional* conversation at the May 1992 JEDEC meeting that made it even more clear to the JEDEC leadership that Rambus had not accepted any purported obligations under the JEDEC patent policy. As described by Mr. Kelley, he learned at the May 1992 meeting that Rambus would *not* agree to the JEDEC policy on licensing and patents. Kelley testified that [REDACTED]

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that, in his opinion, many of Rambus's claims were anticipated by prior art. Perry Decl., Ex. 8. In particular, Sussman stated that a Motorola patent relating to synchronous DRAMs *predated* Rambus's patent application. Perry Decl., Exs. 8 & 47. It is notable that Motorola subsequently sent JEDEC a letter promising to license its patent on a reasonable and non-discriminatory basis. Perry Decl., Ex. 49. This fact, combined with the NEC representative's prior assurances that Motorola's patents "have priority over Rambus'" patents (Perry Decl., Ex. 47), may explain some JEDEC members' apparent lack of concern over Rambus's possible patent claims. *See also* Perry Decl., Ex. 36 (Prince 2/23/03 Dep. at 30) (rough ASCII) [REDACTED]

[REDACTED]. Regardless of whether industry concerns were alleviated by these views regarding prior art, it is undisputed that Rambus did nothing at all in the May 1992 meeting that lulled JEDEC into believing that it would not someday assert intellectual property rights over technologies included in the SDRAM standard.



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

In sum, Rambus's May 1992 refusal to provide information about its intellectual property, and its simultaneous refusal to agree to comply with the JEDEC licensing and patent policy, could not have misled JEDEC in any way. Quite the contrary. As Complaint Counsel explained at a prehearing conference in this matter, when a JEDEC member refused to provide assurances with respect to its licensing policies, JEDEC recognized that it had "a problem":

[W]e'll show you many letters in which companies involved in this organization do, unlike Rambus, do comply with the rules and do disclose in good faith and then they are asked, will you license this on reasonable and non-discriminatory terms. And in most cases, these companies, because they know that's how this works, they say, yes, we will and here's our letter in which we . . . provide you that assurance . . . . Occasionally – I don't think it happens very often, but occasionally the organization who discloses won't agree to give those assurances, and when that happens, buzzers and lights and red flags go up and JEDEC says, well, we've got a problem here. This organization is not agreeing to provide these assurances. We better look very carefully at this technology.

Perry Decl., Ex. 50 (Transcript of 8/2/02 Prehearing Conference at 60) (statement by Complaint Counsel).

Rambus's position thus could not have been clearer. In May 1992, at only its second meeting as a member, and nearly a year before the SDRAM standard was adopted, Rambus had openly declined to provide information about its intellectual property. It had also explicitly informed the relevant subcommittee chairman that it would not agree in advance to restrictions on its licensing practices with its intellectual property. Rambus was not, as Complaint Counsel has alleged, a "snake in the grass." Instead, it delivered a message that was clear and unambiguous and that could not have lulled, and did not lull, anyone.<sup>21</sup>

**2. Rambus did nothing to lull JEDEC after the May 1992 meeting and prior to its departure from JEDEC in 1996.**

At no time after the May 1992 JEDEC meeting did Rambus do or say anything to suggest that it had changed the position it had taken at that meeting with respect to patent disclosures and licensing. Instead, as Chairman Kelley has testified, Rambus took the very same position in 1993 or 1994, when Rambus representative Crisp again approached Kelley about making a presentation to JEDEC regarding Rambus's technology:

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<sup>21</sup> Rambus's business model, which emphasized the licensing of intellectual property instead of the manufacture or sale of products, was well known to JEDEC members at the time. For example, H-P's JEDEC representative, Hans Wiggers, testified that, even before Rambus began attending JEDEC meetings, H-P had met with some Rambus representatives and understood its business model:

Q. You understood Rambus was not a manufacturer of memory?

A. Right, they were basically taking ideas wherever they could find them and gathering them as intellectual property.

Perry Decl., Ex. 23 (Wiggers 12/18/02 Dep. at 17).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In the summer and fall of 1995, Rambus again made it clear to JEDEC and its members that it had not changed its position about intellectual property disclosure and licensing. At the May 24, 1995, JEDEC meeting, presentations were made by several JEDEC members regarding a “next generation” memory technology called “SyncLink.” Perry Decl., Ex. 51. Rambus was asked at the meeting to state whether it had patents that related to the SyncLink technology. Perry Decl., Ex. 52. Rambus gave its response at the very next JEDEC meeting, in September 1995, by providing the following written statement:

At this time, Rambus elects to not make a specific comment on our intellectual property position relative to the Synclink proposal. *Our presence or silence at committee meetings does not constitute an endorsement of any proposal under the committee’s consideration nor does it make any statement regarding potential infringement of Rambus intellectual property.*

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

Rambus thus *again* put all JEDEC 42.3 members on notice that its “presence or silence” at JEDEC meetings did not “make any statement regarding potential infringement of Rambus intellectual property.” *Id.* In addition, Rambus was in this same time period delivering the same message to the group of JEDEC member companies that were working (under the auspices of a separate standard-setting body called the IEEE) to develop the SyncLink technology. In June 1995, Mr. Crisp sent an e-mail to Hans Wiggers, a longtime JEDEC representative for Hewlett-Packard who had been working on the SyncLink technology. Mr. Crisp told Mr. Wiggers – who was at that time also a member of the JEDEC Council (then the governing body of JEDEC) – that SyncLink “has numerous patent issues associated with it.” Perry Decl., Exs. 54 & 55. Mr. Wiggers forwarded Mr. Crisp’s comment to, among others, Mr. Kelley, the Chairman of JEDEC 42.3. *Id.* A few days later, on June 13, 1995, Crisp informed Wiggers that:

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

*is currently pending and we will not make any comment at all about it until it issues.*

Perry Decl., Ex. 56 (emphases added). The message thus remained the same: Rambus “will not make any comment at all about” its pending patents until they issue. *Id.*

In August 1995, Rambus again warned the SyncLink working group that its work might infringe Rambus’s intellectual property. The minutes of the August 21, 1995, meeting of the SyncLink working group state in part as follows:

Richard Crisp, of RamBus, informed us that in their opinion both RamLink and SyncLink may violate RamBus patents that date back as far as 1989. Others commented that the RamLink work was public early enough to avoid problems, and thus might invalidate such patents to the same extent that they appear to be violated. However, the resolution of these questions is not a feasible task for this committee, so it must continue with the technical work at hand.

Perry Decl., Ex. 58. Although this SyncLink meeting was held under the auspices of the IEEE, rather than JEDEC, *all* of the seven companies represented at the SyncLink meeting were also JEDEC member companies, and at least five of the engineers present at the SyncLink meeting were JEDEC representatives who attended the next JEDEC 42.3 meeting on September 11, 1995, at which Rambus warned JEDEC not to rely on its “presence or silence at committee meetings” as making “any statement regarding potential infringement of Rambus intellectual property.” Perry Decl., Ex. 44 (Tabrizi 11/20/02 Dep. at 72-73); Ex. 58.



Rambus's widely broadcast warnings in the summer and fall of 1995 were more than enough to put JEDEC members on notice regarding any threat Rambus posed.<sup>22</sup> Although many of the members' documents from that period have apparently been destroyed or lost,<sup>23</sup> it is clear that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In January 1996, Micron's concerns about Rambus's intellectual property were reflected in the minutes of the SyncLink Consortium, which Micron had by then joined:

Rambus has 16 patents already, with more pending. Rambus says their patents may cover our SyncLink approach even

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<sup>22</sup> In addition to warnings that Rambus delivered directly at JEDEC and SyncLink meetings, Rambus conveyed a similar message in individual meetings with many of the key players in the DRAM manufacturing industry. Rambus CEO Geoff Tate and Rambus Vice President Allen Roberts held a series of meetings with DRAM manufacturers in Asia in October 1995 who were also Rambus licensees. [REDACTED]

[REDACTED] Perry Decl., Exs. 59 & 60 (Tate 1/22/03 Dep. at 304-25).

<sup>23</sup> See, e.g., [REDACTED]

though our method came out of early RamLink work. Micron is particularly concerned to avoid the Rambus patents, though all of us share this concern.

Perry Decl., Ex. 65.

Others who took a close look at Rambus's intellectual property in this time period included Dave Gustavson, a SyncLink founder, who reviewed several European patent applications that Rambus had filed. Perry Decl., Ex. 66 (Gustavson 1/17/03 Dep. at 32, 40).<sup>24</sup> Mr. Gustavson has testified that he recognized *immediately* upon reviewing the Rambus patent applications that they had a broad scope that would apply to virtually any memory device, but that he believed the applications would never be allowed in light of their breadth:

Well, at that time, as I recall, there were only patent applications available and those were just available for the European applications, and so someone got those, and we looked at them and concluded that it wouldn't be possible to build any kind of device that used electricity and wires that would – you know – there's just no way to work around those if you're going to use electricity and wires. Now, obviously those claims aren't going to be granted, but that was what was in the application . . . .

*Id.* at 32.

In sum, during the entire time that Rambus was a JEDEC member, JEDEC was well aware of potential patent issues involving Rambus's intellectual property. Rambus did nothing that could have lulled JEDEC members into believing that these concerns were alleviated. To the contrary, during that entire time, Rambus consistently and loudly

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<sup>24</sup> Rambus's European patent application, which became public in 1991, had the same written description as the U.S. '898 application. *Rambus v. Infineon*, 2003 WL 187265 at \*1.

delivered a message to its fellow JEDEC members that, given its business model, Rambus was not going to disclose its patent applications, that its “presence or silence” at JEDEC meetings did not say anything about “potential infringement of Rambus intellectual property,” and that it would not agree to any restrictions on the licensing of that intellectual property. As a result, *if* the Complaint correctly sets out the scope and extent of Rambus’s disclosure obligations under the JEDEC patent policy, and *if* the existence of those obligations was – as the Complaint alleges – “commonly understood” at JEDEC, then it necessarily follows that *every* JEDEC member was on notice that Rambus would not comply with those obligations.

**3. Rambus did nothing to lull JEDEC after its departure from JEDEC.**

Rambus attended its last JEDEC 42.3 meeting in December 1995. In March 1996, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*<sup>25</sup>

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<sup>25</sup> The statement attributed to the IBM representative is also evidence that JEDEC members believed that there would be ways – whether because of prior art or cross-licensing of patents – to avoid Rambus’s intellectual property claims.

Regardless of whether Rambus was “ousted” from JEDEC or merely resigned, Rambus’s separation from JEDEC was formalized on June 17, 1996, when Rambus sent a letter to the JEDEC office that stated:

I am writing to inform you that Rambus Inc. is not renewing its membership in JEDEC.

Recently at JEDEC meetings the subject of Rambus patents has been raised. *Rambus plans to continue to license its proprietary technology on terms that are consistent with the business plan of Rambus, and those terms may not be consistent with the terms set by standards bodies, including JEDEC 42.3.* A number of major companies are already licensees of Rambus technology. *We trust that you will understand that Rambus reserves all rights regarding its intellectual property.* Rambus does, however, encourage companies to contact Dave Mooring of Rambus to discuss licensing terms and to sign up as licensees.

To the extent that anyone is interested in the patents of Rambus, I have enclosed a list of Rambus U.S. and foreign patents. *Rambus has also applied for a number of additional patents in order to protect Rambus technology.*

Perry Decl., Ex. 3 (emphases added).

Several JEDEC 42.3 representatives have testified that they understood from Rambus’s June 1996 letter, and its reservation of “all rights,” that Rambus did not intend to comply with JEDEC’s patent policies. For example, the current Chairman of the JEDEC Board of Directors, Desi Rhoden, testified that he recalls the letter said “that [Rambus] did not agree with, nor intend to follow, JEDEC patent policy . . . .” Perry Decl., Ex. 68 (Rhoden 1/24/03 Dep. at 33). Similarly, Mr. Tabrizi, a long-time JEDEC representative and committee chair, testified that he understood from Rambus’s withdrawal letter that Rambus refused to “follow the rules” and that “from that point on

[he] understood that Rambus was not agreeing to abide by JEDEC's patent policies."

Perry Decl., Ex. 69 (Tabrizi 3/12/01 Dep. at 328-29).

This same sentiment appears in the official JEDEC minutes of the March 1997 meeting, which state that Rambus had "told JEDEC 42.3 that they do not intend to comply with JEDEC 42.3 patent policies." Perry Decl., Ex. 70 (JDC 002568). As Mr. Wiggers explained, by March 1997, the members of JEDEC 42.3 "all knew that Rambus was trying to license their intellectual property for a fee, and for royalties, and they had no intention of complying with the JEDEC patent policy." Perry Decl., Ex. 23 (Wiggers 12/18/02 Dep. at 159).

Further evidence that the JEDEC leadership did not rely on Rambus's "silence" comes from a March 1998 e-mail by IBM representative Gordon Kelley. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Perry Decl., Ex. 71.

Mr. Kelley explained these views at his deposition:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Perry Decl., Ex. 4 (Kelley 1/10/03 Dep. at 137-38).

In a similar vein, and in language showing no lack of attention to the perceived threat posed by Rambus, [REDACTED]

[REDACTED]

[REDACTED]. Perry Decl., Ex. 72.

Mr. Wiggers explained his reference in his deposition:

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

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

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

These concerns about Rambus again came to the fore at JEDEC in 1997, well after Rambus had left the organization, when JEDEC 42.3 began work on the standardization of a more advanced memory device it called DDR SDRAM. There was discussion within

JEDEC about whether the use of technologies incorporated into the proposed DDR SDRAM standard might infringe Rambus's intellectual property. The minutes of the March 1997 JEDEC meeting reflect that during a presentation regarding an NEC proposal involving DDR SDRAM, a representative stated that "[s]ome on the committee felt that Rambus had a patent on that type of clock design." Perry Decl., Ex. 35 (JDC 002568). The minutes also state that "[o]thers felt that the concept predated Rambus by decades." *Id.*

Hewlett-Packard's JEDEC representative, Hans Wiggers, explained that at the March 1997 meeting, after someone stated that the idea of using double data rate in a memory device had been around for decades, the discussion of Rambus's intellectual property at the meeting essentially ended. Perry Decl., Ex. 23 (Wiggers 12/18/02 Dep. at 159). Mr. Wiggers himself felt strongly that Rambus's use of both clock edges in a memory device was nothing new:

Q. When did you first learn that Rambus was using both the rising edge and the falling edge of the clock in a memory module?

A. I don't know. I think . . . it was probably one of the first things I learned about Rambus.

Q. And at the time you learned that, did you think that was something new?

A. Absolutely not . . . [T]he idea of sending data on both platforms was something already used in SDRAM, it was something we used in scalable coherent interface, SCI . . . . So it was my feeling that Rambus had got the idea from that standards committee, and was taking it as their property.

*Id.* at 26.

This same debate went on internally at JEDEC member companies, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Despite the repeated warnings and frequent concerns about Rambus's intellectual property, JEDEC 42.3 adopted the DDR SDRAM standard in 1999. Contrary to Complaint Counsel's allegations, Rambus did nothing that would have conveyed that it believed it had no intellectual property rights reading on the contemplated standards, nor that it intended to acquiesce to the unlicensed use of its proprietary technologies. Uncontroverted evidence demonstrates instead that Rambus conveyed precisely the opposite message to JEDEC 42.3 members and that those members knew that Rambus had patent interests in the technologies that they later included in the DDR SDRAM standard. Given the evidence described herein, Rambus simply cannot be said to have "conveyed a



materially false and misleading impression that JEDEC 42.3 was not at risk of adopting standards that Rambus could later claim to infringe upon its patents,” as Complaint Counsel have alleged. Complaint, ¶ 71.

**III. PARTIAL SUMMARY DECISION IS WARRANTED BECAUSE RAMBUS DID NOT BREACH ANY JEDEC DISCLOSURE DUTY WITH RESPECT TO THE DDR SDRAM STANDARD.**

The Complaint alleges that Rambus has obtained or attempted to obtain monopoly power in four technology markets: the markets for (1) programmable CAS latency (identified in the Complaint as the “latency technology market”); (2) programmable burst length (the “burst length technology market”); (3) on-chip DLL (the “clock synchronization technology market”); and (4) dual-edge clock (the “data acceleration technology market”). Complaint, ¶ 113. The Complaint also alleges a fifth product market comprised of all four technologies combined. *Id.* at ¶ 114. These technologies are relevant, in different ways, to the SDRAM and DDR SDRAM standards.

The SDRAM standard was adopted by JEDEC 42.3 in early 1993. *Rambus v. Infineon*, 2003 WL 187265 at \*2. It incorporates the first two technologies alleged in the Complaint (programmable CAS latency and programmable burst length), but does not require the use of either on-chip DLL or dual-edge clock technology. The DDR SDRAM standard, which was adopted by JEDEC 42.3 in August 1999 and published in June 2000 (Perry Decl., Ex. 74), also incorporates programmable CAS latency and programmable burst length. The DDR SDRAM standard differs from its predecessor, however, in that (among other differences) it also requires the use of on-chip DLL and dual-edge clock technology as well.

As noted above, the Complaint's allegations of anticompetitive conduct are predicated on Rambus's alleged breach of a disclosure duty, imposed by JEDEC's rules, requiring members to declare whether they held patent interests in technologies being considered for standardization. Complaint, ¶¶ 79-80.<sup>26</sup> The indisputable facts demonstrate that the duty to disclose was triggered, at the earliest, only when a standard was formally proposed for committee consideration, and that Rambus had left JEDEC well before that first occurred with respect to the DDR SDRAM standard.

Much of the evidence on this issue is drawn from the *Infineon* litigation, where Infineon alleged, among other claims, that Rambus had committed fraud with respect to the DDR SDRAM standard by failing to comply with JEDEC's patent disclosure rules.

Gordon Kelley, the Chairman of JEDEC 42.3, testified that [REDACTED]

[REDACTED]. Perry Decl., Ex. 16 (Kelley 1/26/01 Dep. at 90-91); Ex. 75 (Brown 1/22/03 Dep. at 59-60). JEDEC's secretary, Kenneth McGhee,

[REDACTED]. Perry Decl., Ex. 76 (McGhee 8/10/01 Dep. at 165, 174). The first formal proposal for standardization of DDR SDRAM did not occur until December 1996, when Fujitsu made a "first showing" on DDR SDRAM that was assigned

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<sup>26</sup> The precise scope of *what* had to be disclosed under JEDEC's patent policy is immaterial for purposes of this argument, which turns solely on the timing of *when* disclosures were required to be made.

item number 815. Perry Decl., Ex. 77. Rambus had long since left JEDEC by then. In fact, Rambus had attended its last JEDEC meeting a full year before, in December 1995, and confirmed its withdrawal from the organization by letter in June 1996. Perry Decl., Ex. 3.

Both the district court and the Federal Circuit in *Infineon* concluded on these facts that Rambus had not breached any duty to disclose with respect to the DDR SDRAM standard. In granting Rambus judgment as a matter of law on Infineon's fraud claim with respect to the DDR SDRAM standard, the district court stated that "JEDEC Committee JC-42.3 did not begin working on the standard for DDR SDRAM until December 1996," well after Rambus left JEDEC, and that Infineon had thus failed to prove that Rambus had any duty to disclose as to DDR SDRAM. *Rambus, Inc. v. Infineon Techs. AG*, 164 F. Supp. 2d 743, 765 (E.D. Va. 2001). The Federal Circuit unanimously agreed that the JEDEC disclosure duty regarding the DDR SDRAM standard "did not arise before legitimate proposals were directed to and formal consideration began on the DDR-SDRAM standard," and that this first occurred in December 1996, long after Rambus had withdrawn from JEDEC. *Rambus v. Infineon*, 2003 WL 187265 at \*20. The court affirmed judgment as a matter of law in Rambus's favor on Infineon's fraud claim "[b]ecause Infineon did not show that Rambus had a duty to disclose before the DDR-SDRAM standard-setting process formally began." *Id.* at \*21.<sup>27</sup>

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<sup>27</sup> Although Complaint Counsel have repeatedly referred to the Federal Circuit's ruling as a "split decision," the panel was unanimous in concluding on Infineon's cross-appeal that no duty to disclose ever arose with respect to the DDR SDRAM standard while Rambus was a member of JEDEC. *See id.* at \*33 (Prost, J., dissenting in part) (dissenting only

The additional relevant evidence produced in these proceedings simply confirms that the DDR SDRAM standardization process did not begin at JEDEC until December 1996. For example, in a March 9, 1998, e-mail addressed to the members of JEDEC 42.3,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Perry Decl., Ex. 79.

In light of this evidence, the Court should grant partial summary decision in Rambus’s favor as to three of the five technology markets alleged in the Complaint. The indisputable facts establish that: (1) any JEDEC disclosure duty that existed was not triggered until (at the earliest) a formal proposal for standardization was made; (2) the first formal proposal for standardization of DDR SDRAM did not occur until December 1996; and (3) Rambus had withdrawn from JEDEC well before then. Rambus therefore could

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from the majority’s decision to reverse the district court’s denial of Rambus’s motion for judgment as a matter of law as to SDRAM).

not have breached any JEDEC disclosure duty with respect to the DDR SDRAM standard. Because precisely such a breach is an essential predicate for the Complaint's allegations of anticompetitive conduct in the markets for on-chip DLL and dual-edge clock technology, as well as the market for those two technologies combined with programmable CAS latency and programmable burst length, partial summary decision is warranted.

### **CONCLUSION**

The undisputed evidence demonstrates unequivocally that the governing EIA and JEDEC patent policies did not set forth a disclosure duty with sufficient clarity to form the basis of antitrust liability. Moreover, even if that were not the case, in adopting both the SDRAM and DDR SDRAM standards, JEDEC 42.3 members recognized the threat Rambus's portfolio of inventions posed to the standards and, in the face of that knowledge, chose to rely on their belief that Rambus would be unable to obtain valid patent rights to the technologies in issue. As a result, Complaint Counsel cannot prove causation and reliance here. For each of these reasons, Your Honor should enter a summary decision dismissing the action.

At the very least, there is no genuine issue as to any of the facts establishing that formal standardization work on the DDR SDRAM standard began long after Rambus left JEDEC. Rambus could not have breached any JEDEC disclosure duty with respect to the DDR SDRAM standard, and as a result Rambus cannot be found to have engaged in anticompetitive conduct with respect to three of the five technology markets alleged in the Complaint. Partial summary decision is therefore warranted with respect to those technology markets.

DATED: February \_\_\_\_, 2003      Respectfully submitted,

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

**CERTIFICATE OF SERVICE**

I, Jacqueline M. Haberer, hereby certify that on February 28, 2003, I caused a true and correct copy of the public version of the *Memorandum in Support of Respondent Rambus Inc.'s Motion for Summary Decision* to be served on the following persons by hand delivery:

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