PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

MOTION BY RESPONDENT RAMBUS INC. FOR PRE-HEARING DETERMINATION OF ORDER OF ISSUES TO BE TRIED; MEMORANDUM IN SUPPORT THEREOF

Respondent Rambus Inc. ("Rambus") respectfully submits this motion pursuant to Rules of Practice 3.41(b)(3) and 3.43(b)(1) for a pre-hearing determination of the order of issues to be tried. The Rules of Practice afford administrative law judges with broad discretion to expedite proceedings by determining the order in which issues will be resolved. This authority is similar to the discretion conferred upon district judges by F.R.Civ.Pro. 16(c)(4) and 42(b), which are often invoked to defer "costly and possibly unnecessary proceedings pending resolution of potentially dispositive preliminary issues." *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002).

As explained in the attached Memorandum, the nature and scope of the disclosure obligations, if any, that were imposed upon Rambus by virtue of its membership in JEDEC are fundamental, threshold issues whose resolution could dispose of the proceeding on its merits and would, at a minimum, streamline and expedite the

subsequent presentation of evidence on the complex technical issues that divide the parties.

For these reasons, as set forth more fully in the attached Memorandum, Rambus requests that Your Honor enter the [Proposed] Order Determining Order of Issues to Be Tried, filed herewith.

DATED: March ___, 2003 Respectfully submitted,

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

MEMORANDUM IN SUPPORT OF RESPONDENT RAMBUS INC.'S MOTION FOR PRE-HEARING DETERMINATION OF ORDER OF ISSUES TO BE TRIED

I. INTRODUCTION AND SUMMARY OF ARGUMENT

An order requiring that certain potentially dispositive issues be resolved in advance of other issues is "frequently a sensible method for expediting the decision of cases." *Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir. 1999). For the reasons set out in this memorandum, this is such a case. Accordingly, and pursuant to Rules of Practice 3.41(b)(3) and 3.43(b)(1), Respondent Rambus Inc. ("Rambus") respectfully submits this memorandum in support of its motion for a pre-hearing determination of the order of the issues to be tried.

The Complaint in this matter asserts that Rambus has monopolized or attempted to monopolize four supposedly separate markets for technologies related to computer memory devices. Complaint, ¶ 122. According to the Complaint, Rambus's liability stems from its intentional violation of a patent disclosure policy adopted by a standards-setting body known as the Joint Electron Device Engineering Council ("JEDEC"). As discussed in this memorandum, the nature and scope of the disclosure obligations, if any, that were imposed upon Rambus by virtue of its membership in JEDEC are fundamental, threshold issues whose resolution could well dispose of the entire proceeding. At a minimum, the early resolution of these issues will likely expedite the presentation of evidence as to all of the other issues – each of which is considerably more complex and time-consuming than these threshold issues.

Rambus does not seek by this motion any delay in the hearing in this matter. If further proceedings are required after the resolution of the JEDEC policy issues, Rambus would anticipate that such proceedings could begin immediately. Accordingly, and for

the reasons discussed in more detail below, Rambus requests that Your Honor enter the [Proposed] Order Determining Order Of Issues To Be Tried, filed herewith.

II. ARGUMENT

A. The Rules And Case Law Strongly Support The Early Resolution Of Potentially Dispositive Issues.

Under the Rules of Practice, an Administrative Law Judge may order a separate hearing of "any claim" or of "any separate issue" when such a hearing "will be conducive to expedition and economy." Rule of Practice 3.41(b)(3). *See also* Rule 3.43(b)(1) (authorizing the Administrative Law Judge to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. . . .") The federal courts follow the same approach. *See, e.g., Jinro America Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 998 (9th Cir. 2001) (observing that "the district court has broad discretion to bifurcate a trial to permit deferral of costly and possibly unnecessary proceedings pending resolution of potentially dispositive preliminary issues.").

As Rule 3.41(b)(3) demonstrates, "administrative judges have great discretion in determining which issues to consider first" in an effort to expedite adjudicative proceedings. *Dick v. Dept. of Veterans Affairs*, 290 F.3d 1356, 1363 (Fed. Cir. 2002). This authority "is akin to that granted district court judges by Federal Rule of Civil Procedure 16(c)(4), which allows district court judges to govern the order of proof presented at trial, and to allow separate trials of particular issues." *Id*. Numerous courts have entered or affirmed orders requiring that certain issues be resolved first, especially when the district court's goal is to "avoid[ ] a difficult question by first dealing with an

easier, dispositive question." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 (9th Cir. 2001). In *Jinro*, for example, a case involving breach of contract, fraud and RICO claims, the trial court had ordered that "an initial determination should be made whether the parties had entered into a valid agreement and, if so, what that agreement entailed." *Jinro*, 266 F.3d at 998. The Court of Appeals held that the lower court's "approach was a reasonable way to promote clarity and judicial economy, because the validity of the contract directly informed the resolution of the other claims." *Id*. *See also Cook v. United Service Auto. Ass'n.*, 169 F.R.D. 359, 361 (D. Nev. 1996) (same).

In short, both district courts and administrative law judges have "broad discretion" to defer "costly and possibly unnecessary proceedings pending resolution of potentially dispositive preliminary issues." *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002); *Dick*, 290 F.3d at 1363. For the reasons set out below, Your Honor should enter such an order here.

B. The Early Resolution Of Issues Relating To The Nature And Scope Of The JEDEC Patent Policy Would Be Highly Conducive To Expedition And Economy.

Here, as in *Jinro* and the other cases described above, an early resolution of issues relating to the nature and scope of any disclosure obligations imposed by the JEDEC patent policy would "promote clarity and judicial economy" and would substantially expedite these proceedings. *Jinro*, 266 F.3d at 998. The Complaint in this matter alleges that while Rambus was a JEDEC member, the JEDEC patent policy required members to disclose all patents and patent applications that "might be involved in" or that were

"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.

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. The Complaint does not, however, allege the existence of any *written* contract between Rambus and JEDEC that contains the patent disclosure obligations 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. *Id*., ¶¶ 21, 24.

Rambus has filed a Motion for Summary Decision that contends that the JEDEC patent policy was so poorly defined and inconsistently applied that any breach of the obligations it purportedly imposed could not give rise to antitrust (or even contractual) liability.[1] If Your Honor were to deny Rambus's pending motion, the matter would

[1] Rambus's motion also seeks summary decision or partial summary decision on the ground that: (1) JEDEC's leadership and its members were well aware that Rambus might assert intellectual property rights with respect to features incorporated in JEDEC standards; and (2) Rambus could not have breached any duty of disclosure with respect to the DDR SDRAM standard because the DDR standardization process did not begin until after Rambus had left JEDEC.

proceed to a hearing. At that hearing, Complaint Counsel would bear the burden of proving that the JEDEC patent policy was as broad, as clear and as commonly understood as the Complaint alleges. *In addition*, Complaint Counsel would also bear the burden of proving, for each of the purported "technology markets" at issue, *at least* the following elements:

(1) that Rambus had issued patents, pending patent applications, or an intent to file or amend such applications (depending on how the patent policy is defined) that covered or related to the particular technology or feature in question;

(2) that Rambus deliberately failed to disclose information called for by the JEDEC patent policy, with the intent to monopolize a relevant market;

(3) that because of Rambus's purported failure to comply with JEDEC's policy, JEDEC and its members did not have reason to know of or suspect Rambus's potential patent interests when the relevant standards were adopted;

(4) that at the point in time when Rambus supposedly should have disclosed its intellectual property claims or intentions to JEDEC, there were feasible, non-infringing alternatives with respect to *each* feature or technology, and that JEDEC would have adopted each of these alternative features or technologies;

(5) that the purported alternative features or technologies would, when used in combination, be both compatible with one another and less expensive than features or technologies that required royalty payments to Rambus;

(6) that DRAM manufacturers were "locked in" to producing JEDEC-compliant SDRAM devices to such a degree that they could not switch to a noninfringing

alternative technology to avoid Rambus's patent claims;

(7) that, once it adopted the SDRAM standard in 1993, JEDEC was "locked in" to a particular DRAM development path and had no choice but to adopt the DDR SDRAM standard in 1999, even though its members were aware of Rambus's patent interests before then and even though they knew that Rambus was not complying with the "commonly known" JEDEC rules now asserted in the Complaint; and

(8) that once the DRAM manufacturers began implementing the DDR SDRAM standard at issue, they were and are unable as a practical matter to switch to other DRAM designs even if those designs would be less costly to them.

Complaint Counsel would bear the burden of proof with respect to each of these issues for each of the four "technology markets" at issue.[2] It is undisputed that the

[2] Paragraph 113 alleges that Rambus's alleged failure to comply with its alleged disclosure obligations resulted in the monopolization or attempted monopolization of four "technology markets:"

(1) the alleged market for technologies used to specify the length of time – or "latency" period – between the memory's receipt of a read request and its release of data corresponding with the request (the so-called "latency technology market");

(2) the alleged market for technologies used to specify the number of times information (data) is transmitted between the CPU and memory – *i.e.*, the "burst length" – associated with a single request or instruction (the so-called "burst length technology market");

(3) the alleged market for technologies used to synchronize the internal clock that governs operations within a memory chip and the system clock that regulates the timing of other system functions (the so-called "clock synchronization technology market"; and

(4) the alleged market for technologies used to accelerate the rate at which data are transmitted between the CPU and memory (the so-called "data acceleration technology market").

resolution of these issues will require a substantial amount of highly technical and detailed expert testimony. As just one example, Rambus has filed herewith the portions of the parties' expert reports that relate to the hotly disputed question of whether there were at the relevant times commercially feasible, non-infringing alternatives to just one of the features or technologies at issue, programmable burst length. *See* Declaration of Steven M. Perry ("Perry Decl."), exs. A-B.

Rambus does not suggest that Your Honor would be unable, in time, to resolve the many disputes between the parties' experts regarding the existence and feasibility of alternative technologies or the other technical issues addressed in the experts' reports. The point of this motion is that *if* there are threshold issues whose resolution would eliminate the need to address these complex issues, or whose resolution would expedite the examination of these complex issues, the threshold issues should be resolved first. For example, if Your Honor were to decide in the initial phase of the hearing that disclosure of patent applications was voluntary rather than mandatory -- as much of the evidence (including JEDEC's own Board minutes) suggests and as many of the witnesses (including JEDEC committee chairs) have stated -- then the matter could be concluded at this point. If, on the other hand, Your Honor were to decide that Rambus was obligated to disclose pending patent applications that related in some way to the JEDEC standardization process, but that it did not have to disclose an *intent* to file or amend an application in the future, the experts and other witnesses would be able to focus closely in the second phase of the hearing on the particular claims that were contained in Rambus's pending patent applications at the relevant times. Or, as a third alternative, if Your Honor

were to decide that the JEDEC disclosure obligations changed over time, as some witnesses have testified, the experts and other witnesses would similarly be able to focus their testimony on the particular intellectual property issues that would be relevant under the particular patent policy in force at any particular time.

Rambus estimates that "Phase 1" of the hearing would take no more than 6-8 trial days. "Phase 2," if necessary, is likely to take 5-6 weeks. Under these circumstances, the order sought by this motion falls squarely within the types of orders contemplated by Rule 3.41(b)(3), for it would clearly "be conducive to expedition and economy."

III. CONCLUSION

For the foregoing reasons, Rambus respectfully requests that the Proposed Order Determining Order Of Issues To Be Tried be entered.

DATED: March __, 2003 Respectfully submitted,

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