UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC

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

RAMBUS INC.'S MOTION IN LIMINE TO EXCLUDE CERTAIN OPINION TESTIMONY OF R. PRESTON McAFEE

Respondent Rambus Inc. ("Rambus") hereby moves *in limine* for an order excluding certain opinion testimony of Complaint Counsel's designated expert witness, R. Preston McAfee, from the hearing set to begin April 30, 2003. The grounds for the motion are set forth below.

I. INTRODUCTION AND BACKGROUND

Complaint Counsel have served two reports from Dr. McAfee. A copy of his original report, served on or about December 9, 2002, is attached as Exhibit A to the Appendix of Non-Public Exhibits filed herewith ("Appendix") and a copy of his rebuttal report, served on or about January 27, 2003, is attached as Exhibit B to the Appendix. As these reports make clear, Complaint Counsel, at least originally, viewed Dr. McAfee as their omnibus expert. Among other things, his reports purport to set forth opinions regarding Rambus's state of mind, and the state of mind of various Rambus employees; the duty to disclose patents and patent applications imposed by JEDEC's rules; the expectations of JEDEC members regarding disclosure of patents and patent applications; the scope of Rambus's patent claims, that is, what technology was covered by Rambus's patent claims; and the cost and performance of various technologies, as compared to the cost and performance of various technologies covered by Rambus's patents. When Dr. McAfee was deposed on March 21, 2003, however, he admitted that he had no basis on which to opine as to the issues just identified. In some instances he conceded he had no factual basis for such opinions; in other instances he acknowledged that he had no expertise.

For the reasons set forth below, Dr. McAfee should be precluded from proffering at

the hearing in this matter any opinions as to the following issues:

- Rambus's state of mind, and the state of mind of any of its current or former employees;

- What duty to disclose patents and/or patent applications was imposed by JEDEC's rules in effect during the time that Rambus employees attended JEDEC meetings;

- What the expectations were of JEDEC's members regarding what patents and/or patent applications would be disclosed during the time that Rambus employees attended JEDEC meetings;

- Whether claims in Rambus's patents or patent applications covered any particular technology utilized in DRAMs; and

- What were the cost and performance of various "alternative" technologies as compared to the cost and performance of the technologies covered by Rambus's patents.

II. ARGUMENT

A. Dr. McAfee's Opinion Testimony Regarding Rambus's State of Mind Is Inadmissible Because He Is Not Qualified To Opine About Rambus's Subjective Intentions, Beliefs, Knowledge, And Motivations.

1. Dr. McAfee Purports To Express Numerous Opinions About Rambus's State Of Mind.

The Complaint in this matter alleges that Rambus has monopolized or attempted to monopolize certain markets for technology related to dynamic random access memory ("DRAM") in violation of § 5 of the FTC Act. As recognized in a previous Opinion in this matter, the Complaint's "core allegation" is that "through omissions, Rambus intentionally misled the members of JEDEC with regard to the possible scope of Rambus's pending or future patent applications, in violation of the purported JEDEC patent disclosure policy. Complaint at 2, 47-55, 70-80." See Opinion Supporting Order Denying Motion of Mitsubishi Electric & Electronics USA, Inc. to Quash or Narrow

Subpoena, November 18, 2002, p. 4. Moreover, to prevail on its charge of monopolization, Complaint Counsel must demonstrate that Rambus acted willfully to acquire monopoly power. See Von Kalinowski et al., Antitrust Laws and Trade Regulation § 25.02. To prevail on its charge of attempted monopolization, Complaint Counsel must demonstrate that Rambus acted with specific intent to monopolize. See *id*. at § 26.01[1].

In an effort to meet their burden, Complaint Counsel retained Dr. McAfee "to conduct an economic analysis of certain actions allegedly undertaken by Rambus, and to develop expert opinions and conclusions relating to the nature of Rambus's alleged conduct and the effects or potential effects, if any, of such conduct on competition." Rebuttal Expert Report of R. Preston McAfee, ¶ 1 (included in Appendix as Exhibit B). Included among the proposed opinion testimony set forth in Dr. McAfee's original report (Exhibit A in Appendix) were many conclusions about Rambus' state of mind during the relevant time period. For example, Dr. McAfee opined that:

> "Rambus at times deliberately sought to convey through the actions and statements of its representatives that it would comply with JEDEC's rules regarding the disclosure of any relevant IP, when in fact Rambus had no such intention." Expert Report of R. Preston McAfee, ¶ 16.
>
> "Rambus had IP that it knew or believed related to standards being developed at JEDEC. Rambus knowingly and deliberately did not disclose its IP in accordance with JEDEC policy." *Id*. at ¶ 28.
>
> "Rambus's overall strategy appears to have been motivated in significant part both by a desire to collect royalties on SDRAM and DDR SDRAM and a desire to raise the costs of these technologies, against which Rambus's proprietary RDRAM technology competes." *Id*. at ¶ 217.

Dr. McAfee's rebuttal report contained similar – perhaps even bolder – conclusions about Rambus's state of mind. For example, Dr. McAfee opined that:

> "Rambus did not disclose its IP according to JEDEC policy because of its intent to monopolize. If it turns out, arguendo, that as a matter of semiconductor engineering, that there were no viable alternatives to Rambus IP, Rambus's behavior still reflected an intent to monopolize." Rebuttal Report of R. Preston McAfee, ¶ 94.

> "Rambus willfully neglected to disclose the existence of these patent rights to JEDEC, contrary to JEDEC rules." *Id.* at ¶ 97.

For the reasons set forth below, any testimony by Dr. McAfee regarding the foregoing conclusions and others like them should be excluded from the hearing in this matter.

2. Dr. McAfee's Opinions About Rambus' State Of Mind Are Not Informed By His Expertise.

Rule 702 of the Federal Rules of Evidence provides for the admissibility of expert testimony in the federal courts, setting the following parameters:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Fed. R. Evid. 702. [1] Although Rule 702 affords a court wide latitude to admit expert

[1] Although not strictly controlling in this proceeding, Rule 702 and the case law construing and applying it should inform this court's assessment of the admissibility of expert testimony in this proceeding. See In re Herbert R. Gibson, Jr., 1978 FTC LEXIS 375, at *2, n. 1 (May 3, 1978) (Federal Rules of Evidence are "persuasive authority" in FTC adjudicative hearings).

testimony, such testimony is inadmissible if it does not meet two related requirements: (1) it must be based on the special knowledge of the expert; and (2) it must be helpful to the finder of fact. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-91 (1993); Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1211 (D.C. Cir. 1997); Andrews v. Metro North Commuter R. Co., 882 F.2d 705, 708 (2d Cir. 1989) ("For an expert's testimony to be admissible . . . it must be directed to matters within the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help."); United States v. Jackson, 425 F.2d 574, 576 (D.C. Cir. 1970) ("'To warrant the use of expert testimony . . . two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.'") (quoting McCormick, Evidence § 13)). The burden is on the party offering the proposed expert opinion testimony to prove by a preponderance of the evidence that the testimony satisfies the requirements for admissibility. See Daubert, 509 U.S. at 592 n.10.

An expert for one purpose is not an expert for all purposes. "Even where a witness has special knowledge or experience, qualification to testify as an expert also requires that the area of the witness's competence matches the subject matter of the witness's testimony." See 29 Wright and Gold, Federal Practice & Procedure § 6265 at p. 255 & nn.34 & 35 (1997) (hereinafter "FP&P"). Accordingly, not all opinions that happen to be

held by an expert are "expert opinions." See United States v. Benson, 941 F.2d 598, 604 (7th Cir. 1991). Opinions falling outside the expert's area of expertise are inadmissible. See, e.g., Watkins v. Schriver, 52 F.3d 769, 771 (8th Cir. 1995) (affirming exclusion of neurologist's testimony "that the [plaintiff's neck] injury was more consistent with being thrown into a wall than with a stumble into the corner"); Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339-40 (7th Cir. 1989) (rejecting economist's opinion that defendant's conduct "was contrary to good faith and fair dealing"); Lithuanian Commerce Corp. v. Sara Lee Hosiery, 177 F.R.D. 245, 260 (D.N.J. 1997), vacated in part on other grounds, 179 F.R.D. 450 (D.N.J. 1998) (striking opinion of textile expert that "replacement of nylon 66 with nylon 6 in a product without informing the customer . . . is poor commercial practice bordering on fraud").

As noted above, Dr. McAfee is an economist by education, training and experience. See Rebuttal Expert Report of R. Preston McAfee, ¶ 1. Nothing in Dr. McAfee's two reports or his curriculum vitae suggests that he has "knowledge, skill, experience, training, or education," Fed. R. Evid. 702, that would give him "specialized knowledge" of, or insight into, Rambus's subjective state of mind. Indeed, given the nature of opining about the subjective intentions, beliefs, or motivations of another, it is difficult to imagine credentials that would qualify him to testify as an expert about this subject matter. See, e.g., Taylor v. Evans, 1997 U.S. Dist. Lexis 3907, at *5 (S.D.N.Y. Apr. 1, 1997) ("[M]usings as to defendants' motivations would not be admissible if given by any witness – lay or expert."). [2]

[2] Along with determinations of a party's negligence and a witness's credibility, a party's state of mind is

Like a neurologist opining about the cause of an injury, or an economist or textile expert opining about the ethics or legality of a particular business practice, or a law enforcement officer opining about the state of mind of a suspect, Dr. McAfee does not speak from his expertise when he opines about Rambus' subjective state of mind. Watkins, 52 F.3d at 771; Benson, 941 F.2d at 604; Mid-State Fertilizer, 877 F.2d at 1339-40; Lithuanian Commerce Corp., 177 F.R.D. at 260. His testimony on this subject accordingly is inadmissible.

3. Dr. McAfee's Opinions About Rambus's State Of Mind Are Also Inadmissible Because They Would Do Nothing That Your Honor Cannot Do For Himself.

Where, as here, an expert's opinion is informed not by his special expertise but rather by the expert's common sense or human intuition, the opinion is inadmissible not only for lack of qualification, but also because it does nothing for the finder of fact that he could not do for himself. See Fed. R. Evid. 702 advisory committee's note (urging as a measure of admissibility "the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute") (quotations omitted); see also Salem v. United States Lines Co., 370 U.S. 31, 35 (1962); United States v. Cruz, 981 F.2d 659, 664 (2d Cir. 1992) (holding expert testimony is inadmissible unless subject matter has "esoteric aspects reasonably

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one of a short list of "subject matters that the courts have held to be committed exclusively to the finder of fact and thus not amenable to expert testimony." See Weinstein's Federal Evidence § 702.03[3]; FP&P § 6264 at p. 216 (noting that, in determining the admissibility of proposed expert testimony, the court must consider whether the testimony "will undermine . . . the trier-of-fact's powers to decide the meaning of evidence and the credibility of witnesses").

perceived as beyond the ken of the jury"); Scott v. Sears, Roebuck & Co., 789 F.2d 1052, 1055 (4th Cir. 1986) ("Rule 702 makes inadmissible expert testimony as to a matter which obviously is within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance."); FP&P § 6264.

With respect to expert opinion about a party's state of mind, courts repeatedly have recognized that such testimony does nothing to assist the factfinder because an "expert" is in no better position to draw common sense inferences or form intuitions about a party's intent than a layman. In Woods v. Lecureux, 110 F.3d 1215 (6th Cir. 1997), for example, the court concluded that it was proper to exclude expert testimony that a prison warden acted with "deliberate indifference" to the safety of an inmate. The court reasoned that "whether a prison official acted with deliberate indifference depends on that official's state of mind." *Id.* at 1221. See also Benson, 941 F.2d at 604 (holding it was error to admit testimony of an IRS agent that defendant received Social Security benefits knowing he was not entitled to them because the agent "was no more qualified than the jury was to answer this question, and offered no special knowledge or skill that would be particularly helpful in arriving at an answer"); Dahlin v. Evangelical Child and Family Agency, 2002 U.S. Dist. Lexis. 24558, at *9-10 (N.D. Ill. Dec. 18, 2002) (excluding psychologist's testimony that defendant had fraudulent intent, reasoning that the psychologist "can render an opinion regarding [defendant's] intent only by drawing inferences from the evidence" and that the plaintiffs "have not persuaded the Court that [the psychologist] is any more qualified than an ordinary juror to draw those inferences"); Isom v. Howmedica, Inc., 2002 U.S. Dist. Lexis 9116, at *4-5 (N.D. Ill. May 20, 2002) (excluding doctor's testimony that

defendant medical product manufacturer's conduct was "willful and wanton" for the same reason).

Because Dr. McAfee's testimony regarding Rambus's state of mind would be nothing but an attempt to substitute his inferences and intuitions for Your Honor's own inferences and intuitions, it should be excluded.

B. Dr. McAfee's Opinion Testimony Regarding What Patents Or Patent Applications Were Required By JEDEC's Rules To Be Disclosed Is Inadmissible Because, By His Own Admission, He Is Not Qualified To Opine Regarding This Issue.

As noted above, many of the opinions set forth in Dr. McAfee's two reports are premised on his opinion as to whether Rambus complied with a duty to disclose patents or patent applications that was imposed by JEDEC's rules. See *supra* at 3-4. However, at his deposition, Dr. McAfee made plain that he would not be testifying to what JEDEC's duty to disclose was, because that was a legal question – not one to be answered by economists.

> "The phrase "duty" is not really an economic phrase. I understand that to be a legal phrase, so that is to say, whether the members had a duty or not is not actually a matter for – for an economic analysis but rather a legal analysis.
>
> * * * *
>
> I understand – so I don't consider that I'm making a finding about duty to disclose."

McAfee Deposition Transcript (hereinafter "Tr.") at 74-75 (March 21, 2003), a copy of which transcript is attached in its entirety as Exhibit C to the Appendix filed herewith. As Dr. McAfee later confirmed in a somewhat different context, "I – well, even if complaint counsel does ask me to express a legal opinion, I intend not to." Tr. at 136-37.

Just as Dr. McAfee is not qualified to opine as to Rambus's motives or state of mind, he is not, by his own admission, qualified to testify to what duty of disclosure is imposed by JEDEC's rules. Rather, as he recognizes, this is a question of law, and thus is a question ultimately for Your Honor. See Rambus Inc. v. Infineon Technologies AG, 318 F.3d 1081, 1087, nn. 2 & 3 (Fed. Cir. 2003) ("While this court reviews this [existence of a duty to disclose] as a factual question, a review of the relevant law of other states and Virginia's law on other tort duties strongly suggests that this issue may well be a legal question with factual underpinnings." *Id*. at n. 3.)

For these reasons, Rambus requests that Your Honor enter an Order precluding Dr. McAfee from opining as to what duty of disclosure is imposed by JEDEC's rules.

C. Dr. McAfee's Opinion Testimony Regarding The Expectations Of JEDEC Members Regarding What Patents Or Patent Applications Would Be Disclosed Also Is Inadmissible.

Apparently recognizing that he cannot testify to what "duty" was imposed by JEDEC's rules, Dr. McAfee at his deposition shifted his analysis from one of duty, to one of expectations.[3] For instance, he said at one point, "what I've done is make an assumption about the expectation of the members, and I've supported that assumption with a great deal of evidence, I believe, but I've found that the expectation of the members was that they would disclose patents and patent applications that were relevant to the

[3] This is not the only instance in which Dr. McAfee at his deposition changed his opinions from those set forth in his reports. For instance, although nowhere disclosed in his reports, at his deposition Dr. McAfee also purported to contend that Rambus may have engaged in "improper behavior" other than a failure to disclose patents or patent applications to JEDEC. See Tr. at 40. However, since Dr. McAfee conceded that no such "other" "improper behavior" resulted in improperly obtained market power (see Tr. at 39), there should be no need to address these new allegations, as they should have no bearing on this proceeding. However, if Complaint Counsel intend to "morph" their case into something new and different – and something they have not pled – then Rambus reserves the right to challenge such an attempt and to challenge any effort Dr. McAfee might make to testify as an expert on "other" "improper behavior."

discussion going on at that time." Tr. at 73. As it turns out, Dr. McAfee's conclusions as to what the expectations were of JEDEC members are critical to his opinions, because he was quite firm that if Rambus had acted in "accordance with the expectations of JEDEC members," his "conclusions [would] be overturned." Tr. at 78.

But Dr. McAfee has no expertise or training that enables him to testify to what expectations were held by JEDEC members. Just as he cannot testify to the state of mind of Rambus, so can he not testify to the state of mind or expectations of JEDEC members. See *supra* at 4-9. The grounds previously discussed at length compel the conclusion that Dr. McAfee should not be permitted to testify to the expectations of JEDEC members, whether individually or collective.

But there is more. Dr. McAfee has no factual basis whatsoever for any "opinion" regarding the expectations of JEDEC members. For example, he conceded at his deposition that he did not know if what he assumed were the members' expectations had ever been set forth in writing.

> "I think there's an understanding among the JEDEC members, and we've looked at the – at the – at this document. But is it in writing specifically? I don't know.
>
> * * * *
>
> Let me say first that what's in writing changes over time. I think I should see if I can look up precisely what is in – I don't specifically recall what's in writing and I'm not finding it when I look through this section."

Tr. at 168.

He also acknowledged that he had seen no evidence of conduct consistent with what he was prepared to opine were JEDEC members' expectations regarding disclosure

of an intention to amend claims in a patent application, or a belief that claims in an application could be amended, to cover technology then under discussion at JEDEC.[4]

> "Q: And I guess in looking through all the JEDEC minutes you found lots of instances where that had happened, people had disclosed an intention to apply for patents?
>
> Mr. Royall: Objection, argumentative.
>
> A: Actually, I know of very few circumstances where JEDEC standards involve any – any patented technology at all, and so no, I haven't seen many examples of that.
>
> Q: Have you seen any examples?
>
> A: I don't believe so."

Tr. at 164.

Perhaps most telling is that Dr. McAfee ultimately conceded he had absolutely no evidence to support his opinion that JEDEC members expected that an intention to amend, or a belief that claims in a pending application could be amended to cover a particular technology, would be disclosed.

> "Q: Okay. Give me just a minute and I will [take a break]. Has any JEDEC member expressed to you in your interviews or have you seen any deposition testimony of any JEDEC member where they said, "What we expect was that if you have an application, and even if the claims don't cover the subject matter, if you thought you might be able to amend the claims to

[4] In light of the Federal Circuit's decision that during the time it was a JEDEC member Rambus did not have any issued patents or any pending patent applications with claims that read on either the SDRAM or DDR-SDRAM specifications, a point which Dr. McAfee concedes (see Tr. at 124), Dr. McAfee's opinions focus on whether JEDEC members had an expectation that other members would disclose that they intended to amend claims pending in a patent application, or believed that they could amend those claims, so as to cover technology being incorporated into a specification. It thus is of obvious significance that Dr. McAfee conceded that this "expectation" was not to be found in writing and that, so far as he was aware, no JEDEC member had ever acted consistent with this "expectation." More fundamentally, at the appropriate time Rambus will ask Your Honor to rule, as the Federal Circuit has ruled, that "[t]he JEDEC policy, though vague, does not create a duty premised on subjective beliefs. . . . A member's subjective beliefs, hopes, and desires are irrelevant." Rambus Inc., 318 F.3d at 1104.

cover the subject matter, we expected you to disclose it"?

Mr. Royall: Can I hear that back?

(The last question was read by the reporter.)

Mr. Royall: Objection, vague, ambiguous.

A: It may be an assumption on my part or there may be evidence that I'm forgetting as I sit here today, that my understanding of relevant patent applications would incorporate the circumstances where the claims could be amended to cover the standard, but that may be an assumption on my part because as I sit here today I can't think of actually a piece of evidence that I can point to, which would include deposition testimony."

Tr. at 173-74.[5]

In sum, Dr. McAfee is not qualified to express an opinion regarding the expectations of JEDEC members, any more than he is qualified to express an opinion regarding Rambus's state of mind. Moreover, his deposition testimony revealed that he has absolutely no factual basis for any opinion he might try to proffer regarding the expectations of JEDEC members.

D. Dr. McAfee, By His Own Admission, Is Not Qualified To Express An Opinion Regarding Whether Rambus Had Or Has Any Patent Claims That Cover A Particular Technology.

As Your Honor is well aware, an important issue in this case, as it was in the Infineon case, is whether Rambus had obtained patent coverage, or had filed patent claims seeking coverage, over technologies incorporated in JEDEC standards for SDRAM or DDR-SDRAM. See, e.g., Rambus Inc., 318 F.3d at 1104-05. Dr. McAfee is not qualified

[5] Even if Dr. McAfee later remembers some evidence that he forgot at his deposition, he will not be able to base any opinion regarding what the expectations were of JEDEC members, since he only interviewed two JEDEC members. Tr. at 174 (When asked to name all the JEDEC members he had interviewed, Dr. McAfee said, "So we spoke of Desi Rhoden already. One of the people I interviewed from Dell was a JEDEC member, but his name is escaping me as I sit here today. And as I sit here today I am unable to think of the name of anyone else that I interviewed.").

to opine on this issue, although he purports to do so.[6]

Obviously, nothing in Dr. McAfee's training or experience as an economist qualifies him express opinions about the scope of patent claims. Moreover, he concedes that he is not qualified to render such opinions.

> "I did at one time look at one of Rambus's patents but not with the purpose of establishing, does this cover the – the technologies at issue, and in particular, I don't think I'm personally equipped to be able to look at a patent and say, this covers a technology such as programmable CAS latency.
>
> * * * *
>
> I don't know that I could look at Rambus's patents and come to a conclusion about whether they have – they cover any specific technologies. That's not my role as an economist."

Tr. at 31, 33.[7]

Going even further, Dr. McAfee concedes that he has no basis on which to disagree with the Federal Circuit's views as to the scope of Rambus's patent coverage.

> "My understanding of the – so the federal circuit knows patent law – the judges who wrote that opinion know patent law, and I am not an expert in patent law. I am not in a position to render an opinion about the scope of the claims of Rambus's patents at all – excuse me, did I say the scope of the claims? Yes, the – well, what are the admissible claims under Rambus's patents at all."

Tr. at 101. He then acknowledges that he has not relied on the opinion of anyone else that is contrary to the view expressed in the majority's decision in *Infineon*.

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[6] See, e.g., Expert Report of R. Preston McAfee, ¶ 28 (describing Rambus's intellectual property as "JEDEC-related" and thus, in Dr. McAfee's opinion, required to be disclosed.

[7] At another point in his deposition Dr. McAfee expressed his opinion that even engineers could not determine the scope of a patent's claims; that task must be left to patent attorneys. Tr. at 95-96; Tr. at 124 ("I don't have any – any direct knowledge of what Rambus's patent claims actually are during this period or any period because my understanding is that requires a level of expertise that calls for a patent attorney.")

> "I cannot think of a single instance where I'm relying on someone's opinion about Rambus's – the scope of Rambus's patent claims that is in – that is contrary to the majority opinion of the federal circuit …."

Tr. at 103.[8]

Thus, Dr. McAfee should not be permitted to testify to any opinion regarding the scope of Rambus's patent claims, nor should he be permitted to rely on the opinion of any other expert that would be contrary to the majority opinion of the Federal Circuit. His opinions must rise or fall, quite reasonably in fact, on the Federal Circuit's views as to the scope of Rambus's patent claims.

E. Dr. McAfee Should Not Be Permitted To Testify To The Cost And Performance Of Various "Alternative" Technologies As Compared To The Cost And Performance Of Technologies Covered By Rambus's Patents.

In his original report, Dr. McAfee describes four distinct product markets, and a cluster product market. Expert Report of R. Preston McAfee, ¶¶ 147-197. In so doing, he describes certain technologies as commercially viable alternatives to the technologies invented by Rambus. See, e.g., *id*. at ¶¶ 150. 152-53, 159, 163-64. Not surprisingly, he recognizes that the commercial viability of these "alternative" technologies depends on the level of performance they provide, and their cost. In his rebuttal report, Dr. McAfee goes even further, taking cost data provided by Mr. Geilhufe, one of Rambus's experts, and using that data (after manipulation) to suggest what the cost differentials are between technologies invented by Rambus and the "alternative" technologies postulated by Dr.

[8] In fact, Dr. McAfee acknowledges that he does not rely on the work of any expert to establish the scope of Rambus's patents. Tr. at 32 ("I'm not relying – well – I'm not relying on the work of any expert to establish that Rambus's patents cover programmable CAS latency.")

McAfee. Rebuttal Report of R. Preston McAfee, ¶¶ 16-34. However, Dr. McAfee provides no cost estimates of his own. Although it *may* (or may not) be appropriate for Dr. McAfee to rely upon the cost estimates of Mr. Geilhufe, he should not be permitted to testify at trial to any other cost estimates because he has no factual basis for doing so. See Tr. at 224-25.

Dr. McAfee also testified at his deposition that he has not made any effort to quantify the technical differences or performance differences between the technologies invented by Rambus and the alternative technologies postulated by Dr. McAfee. Tr. at 231-38. After much back and forth, Dr. McAfee admitted that he had not quantified the performance differences, although he did contend that he had performed a market-definition analysis.

> "I do not give a dollar value for any of the technologies, which I believe actually is an answer you've already gotten from me earlier. I don't give a specific dollar value for any of the technologies. However, I have performed a market-definition analysis."

Tr. at 235-36. Dr. McAfee then went on to testify that

> "JEDEC is an organization composed of a large variety of different members with different company – from different companies. They have differing applications in mind. They have differing sets of customers that they're serving. They have different technologies at their manufacturers. Those companies are going to have different evaluations of the performance differences, and to suggest that there's some method of saying 'the performance difference,' which I believe was a phrase in your question, it strikes me as being misguided."

Tr. at 236-37. When then asked if he had performed any analysis in an effort to model how any particular JEDEC member had analyzed various technologies from a performance

point of view, Dr. McAfee conceded that he had not. Tr. at 237-38.

Having not quantified costs or performance differences between the technologies invented by Rambus and the alternative technologies he postulates, and having no factual basis on which to do so, Dr. McAfee should not be permitted to testify to the relative cost or performance of "alternative" technologies as compared to the cost and performance of the technologies invented by Rambus.

III. CONCLUSION

For the foregoing reasons, Rambus respectfully requests that Your Honor grant its motion *in limine* and enters an order precluding Dr. McAfee from testifying at the hearing in this matter on any of the following issues:

- Rambus's state of mind, and the state of mind of any of its current or former employees;
- What duty to disclose patents and/or patent applications was imposed by JEDEC's rules in effect during the time that Rambus employees attended JEDEC meetings;
- What the expectations were of JEDEC's members regarding what patents and/or patent applications would be disclosed during the time that Rambus employees attended JEDEC meetings;
- Whether claims in Rambus's patents or patent applications covered any particular technology utilized in DRAMs; and
- What were the cost and performance of various "alternative" technologies as compared to the cost and performance of the technologies covered by Rambus's patents.

DATED: March ___, 2003 Respectfully submitted,

_____

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