PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

BRIEF IN SUPPORT OF RESPONDENT RAMBUS INC.'S ANTICIPATED OBJECTIONS TO THE TESTIMONY OF PRESTON MCAFEE

Yesterday, Complaint Counsel served Respondent Rambus Inc. ("Rambus") with 142 pages of demonstratives, which we understand are intended to be used by Professor R. Preston McAfee in conjunction with his anticipated three days of testimony. Based on these demonstratives, Rambus anticipates that Professor McAfee's testimony will likely run afoul of the Court's April 21, 2003 Order on Motions In Limine as well as the rule that expert witnesses cannot simply present summaries of evidence in areas outside their expertise. While Rambus's counsel believes that these issues are most efficiently addressed during the course of Professor McAfee's testimony, and plan to raise specific objections as the examination proceeds, Rambus files this brief to alert the Court of the bases for Rambus's objections.

I. THE COURT'S ORDER ON MOTIONS IN LIMINE

The Court has already ruled that Professor McAfee "will not be allowed to testify as to any aspect of": (1) "Respondent's state of mind"; (2) "the disclosure duties (if any) imposed by JEDEC's rules"; (3) "the state of mind or expectations of JEDEC members

concerning patent disclosure"; and (4) "the scope of Respondent's highly technical patents." Order on Motions In Limine at 14-15. Professor McAfee's demonstratives, however, strongly suggest that Complaint Counsel may seek to elicit testimony in these areas.

Several demonstratives show that Professor McAfee intends to testify as to Rambus's state of mind. For instance, one demonstrative indicates that Professor McAfee will testify that "Rambus wanted flexibility to charge different royalty rates" and that "Rambus wanted RDRAM to succeed." Ex. A, slide 124. What Rambus "wanted" is simply another way of stating Rambus's state of mind. Another demonstrative implies that Complaint Counsel intend to elicit testimony that "Rambus knowingly incurred risk of having patents found unenforceable" and that "Rambus expected compensating benefits from disclosure." Ex. A, slide 128. Yet another demonstrative shows that Professor McAfee intends to testify that Rambus made "a conscious choice to jeopardize the enforceability of patented intellectual property." Ex. A, slide 121. Again, this is nothing more than testimony regarding Rambus's state of mind, which the Court has already excluded.

Similarly, the demonstratives suggest that Complaint Counsel may bring out testimony regarding the disclosure duties (if any) imposed by JEDEC's rules and the state of mind or expectations of JEDEC members concerning patent disclosure. Specifically, one of Professor McAfee's demonstratives goes into detail about the JEDEC patent policy, stating, for example, that JEDEC has a "[p]reference to avoid patents," that the policy requires "[e]arly disclosure/ good faith" and that it "applies to patents/ patent

applications relevant to JEDEC standards." Ex. A, slide 46. The Court's order, however, stated that Professor McAfee "will not be allowed to testify as to any aspect of" the JEDEC disclosure duties or the expectations of JEDEC members concerning patent disclosure. Order on Motions In Limine at 14-15.

Should Complaint Counsel pose questions to Professor McAfee in these areas, Rambus will object to such testimony.

II. THE DEMONSTRATIVES ALSO INDICATE THAT PROFESSOR MCAFEE IMPROPERLY WILL SEEK TO SUMMARIZE COMPLAINT COUNSEL'S EVIDENCE

Based on the demonstratives provided to Rambus yesterday, Rambus also anticipates that Complaint Counsel may seek to have Professor McAfee give improper summaries of the record evidence developed so far. As an initial matter, such testimony in this case would be cumulative. See 16 C.F.R. § 3.43. The parties should marshal the facts in their post-hearing briefs, not through a witness who will take up valuable trial time by simply repeating the evidence. Furthermore, under the Federal Rules of Evidence, an expert cannot, under the guise of providing "expert opinion," serve simply to summarize prior fact testimony and, in effect, provide the offering party an opportunity to give an early summation of evidence favorable to its case.

An expert is limited to testifying regarding the factual bases to which he has actually applied his "scientific, technical, or other specialized knowledge" in order to arrive at his expert opinions. Federal Rules of Evidence 702, 703; see, e.g., Pretter v. Metro North Commuter R. Co., 2002 WL 31163876 (S.D.N.Y. 2002) (expert cannot testify to percipient facts even though he read sworn deposition testimony, because he

lacked personal knowledge; expert may testify about underlying facts only if he were actually bringing to bear his scientific expertise).

As the Fourth Circuit stated in United States v. Johnson, 54 F.3d 1150 (4th Cir. 1995), although "Rule 703 of the Federal Rules of Evidence allows an expert witness to base his opinion upon earlier trial testimony," the Rule does not afford experts unlimited license to testify in a manner that "simply summarizes the testimony of others without first relating that testimony to some 'specialized knowledge' on the expert's part" as required under Rule 702. Id. The danger, of course, is that expert summaries of fact testimony unrelated to specialized knowledge may improperly bolster the credibility of that prior testimony.

For these reasons, when a witness wishes to base an opinion on a factual conclusion for which he is not bringing his expertise to bear, it is often preferable to present an expert's opinions in the context of factual assumptions or hypotheticals based on the evidence to be proved in the case. See, e.g., Wiseman v. Reposa, 463 F.3d 226, 227-28 (1st Cir. 1972) ("We do say that we would prefer asking a hypothetical question to an expert witness who was not consulted for treatment, rather than using him to get a detailed history of the alleged accident before the jury under the guise of a medical opinion").

Telling examples of what appear to be Professor McAfee's efforts to repeat and summarize evidence already in the record – and evidence outside his area of expertise – are his repeated quotations of testimony this Court already has heard from Professor Jacob and Mr. Macri. E.g., Ex. A, slides 72-75, 79-82, 89, 93-96 and 99. Such

testimony by Professor McAfee is well beyond the scope of his economic expertise and is, moreover, unnecessarily cumulative.

Particularly in this case, repeating evidence already in the record will unduly prolong this proceeding without any corresponding benefit to the adjudicatory process. F.R.Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). As previously noted, it appears that much of Professor McAfee's testimony will be cumulative of what is in the record. Post-trial briefing will provide Complaint Counsel ample opportunity to highlight and organize that evidence; there is no need for Professor McAfee to attempt that function.

Finally, to the extent Professor McAfee will seek to offer factual evidence, rather than opinion, that is not already in the record, he is without personal knowledge and lacks the requisite foundation to do so. It nevertheless appears that he may attempt to do so. See, e.g., Ex. A, slides 4, 6, 12, 18-21, and 29.

III. CONCLUSION

Should Complaint Counsel elicit the types of testimony outlined above, the Court should sustain Rambus's objections to this improper testimony.

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CERTIFICATE OF SERVICE

I, James M. Berry, hereby certify that on June 25, 2003, I caused a true and correct copy of *Brief In Support Of Respondent Rambus Inc.'s Anticipated Objections To The Testimony Of Preston McAfee* to be served on the following persons by hand delivery:

Hon. Stephen J. McGuire Chief Administrative Law Judge Federal Trade Commission, Room H-112 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580	M. Sean Royall, Esq. Deputy Director, Bureau of Competition Federal Trade Commission, Room H-372 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580
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