

PUBLIC

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION



In the matter of)

RAMBUS INC.,)

a corporation.)

Docket No. 9302

BRIEF OF AMICI CURIAE MICRON TECHNOLOGY, INC., SAMSUNG ELECTRONICS CORPORATION LTD., AND HYNIX SEMICONDUCTOR, INC. IN OPPOSITION TO RAMBUS'S MOTION TO RECONSIDER THE COMMISSION'S REMEDY ORDER IN THE MATTER OF RAMBUS INC.

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- *“[T]he FTC rates only apply to infringement occurring after the Order becomes effective. Indeed it is likely that any remedy order affecting past infringement would exceed the Commission’s statutory power.”* Rambus’s Case Management Conference Statement, Hynix Semiconductor, Inc. v. Rambus Inc., Case No. CV-00-20905, (N.D. Cal. Feb. 14, 2007).

IDENTITY AND INTEREST OF AMICI CURIAE

Amici Curiae Micron Technology, Inc. (“Micron”), Samsung Electronics Corporation, Ltd. (“Samsung”), and Hynix Semiconductor, Inc. (“Hynix”) (collectively “Amici”) are leading global semiconductor companies that design, manufacture, and sell dynamic random access memory (“DRAM”), including single data rate synchronous DRAMs (“SDR” or “SDR SDRAMs”) and double data rate synchronous DRAMs (“DDR” or “DDR SDRAMs”). Amici contribute billions of dollars in annual sales to the U.S. and world economy, invest hundreds of millions of dollars in research and development, hold thousands of United States patents, employ thousands of people both in the United States and overseas, and are members of a variety of standard-setting organizations (“SSOs”), including the JEDEC Solid State Technology Association (“JEDEC”). They are among the many firms victimized by Rambus’s unlawful conduct.

On August 2, 2006, the Commission unanimously found that Rambus had “exploited its participation in JEDEC to obtain patents that would cover technologies incorporated into now-ubiquitous JEDEC memory standards, without revealing its patent position to other JEDEC members. As a result, Rambus was able to distort the standard-setting process and engage in an anticompetitive ‘hold up’ of the computer memory industry.” (Opinion of the Commission, August 2, 2006, at 3 (hereinafter “Liability Opinion”).) Rambus’s deceptive course of conduct

gave it unlawful monopoly power in violation of Section 2 of the Sherman Act and Section 5 of the FTC Act. (*Id.*)

On February 5, 2007, the Commission issued its Opinion of the Commission on Remedy (hereinafter “Remedy Opinion”) and accompanying Final Order on the appropriate remedy for Rambus’s anticompetitive conduct (hereinafter “the Order”). The Commission explained that the Order’s purpose is “to restore – to the extent possible – the competitive conditions that would have existed but for Rambus’s unlawful conduct.” (Remedy Opinion at 27.) The Order prohibits Rambus from engaging in future deception in connection with standard-setting activities, and also significantly limits Rambus’s ability to collect “fees, royalties, or other payments” relating to SDR and DDR SDRAM.¹

First, the Order sets the “Maximum Allowable Royalty Rates” (hereinafter “Maximum Rates”) that Rambus can charge on its patents for JEDEC-Compliant SDR SDRAM at 0.25% and JEDEC-Compliant DDR SDRAM at 0.50%. (Order I.J.1.) Both rates drop to 0% after three years. (Order I.J.2.) Second, the Order prohibits Rambus from collecting or attempting to collect royalties that exceed those rates. (Order IV.A.) Third, Rambus is barred from further prosecution of infringement actions against persons manufacturing, selling, or using SDR SDRAM and DDR SDRAM for compensation in excess of the Maximum Rates. (*Id.* at VI.) Finally, Rambus must offer any interested person a license to its relevant patents for JEDEC-Compliant SDR and DDR SDRAM products at royalties no greater than the Maximum Rates. (*Id.* V.A.)

¹ (Order IV-VI.) The Order also limits Rambus’s ability to collect fees, royalties, and payments on certain JEDEC-Compliant Non-DRAM products. (*See Id.*)

As active participants in SSOs and as manufacturers of JEDEC-Compliant DRAMs and related products, Amici have a strong interest in ensuring that the anticompetitive effects of Rambus's willful and intentional violations, as unanimously found by the Commission, are fully remedied, and that the Commission continues to establish strong precedents that protect against standard-setting abuses and deter others from repeating Rambus's egregious anticompetitive conduct.

Amici previously joined in a brief before the Commission expressing their views on an appropriate remedy for Rambus's conduct.² The Commission accepted that brief on October 19, 2006.³ Amici submit this brief now to urge that the Commission deny the Petition of Respondent Rambus Inc. for Reconsideration of the Commission's Final Order and the Motion of Respondent Rambus Inc. for Stay of Order Pending Appeal, to express their view of the proper construction of that Order, and to request that the Commission clarify the Order to close the door on Rambus's efforts to continue to reap monopoly rents from its unlawful conduct.

ARGUMENT

I. RAMBUS IS ADVANCING AN IMPROPER AND ANTICOMPETITIVE CONSTRUCTION OF THE ORDER

The Commission's Remedy Opinion stated that "[h]aving found liability, we want a remedy strong enough to restore ongoing competition and thereby to inspire confidence in the standard-setting process." (Remedy Opinion at 11.) To accomplish those objectives, the Order limits Rambus's ability to take prospective steps to seek and to collect not only ongoing royalties, but also damages for alleged past infringement of the relevant patents by those who

² See Br. of Amici Curiae Nvidia Corporation, et al. on the Issue of the Appropriate Remedy for Rambus's Violations of the FTC Act, Sept. 15, 2006.

³ See Order Granting Mot. for Leave to File Briefs, Amici Curiae, Oct. 19, 2006.

manufacture, use, or sell JEDEC-Compliant DRAMs and Non-DRAM products. This approach is compelled by the Commission’s finding that if Rambus had not engaged in deceptive conduct, it could not have obtained patent royalties or damages in excess of the Maximum Rates.

(Remedy Opinion at 22-23.) A remedial order that failed to bar future efforts by Rambus to seek and collect royalties and damages for alleged past infringement could permit Rambus to continue to reap the rewards of its unlawful conduct by collecting additional unlawfully obtained monopoly rents of over a billion dollars. Such an order would encourage rather than deter future abuses of the standard-setting process.

Rambus argues that it can continue to sue for and collect royalties unlimited by the Commission’s Order in regard to infringements that occurred during the very period it was violating the law – up to the date of the Commission’s Order. The Rambus position, however, is largely premised on a debilitating misconstruction of that Order that sharply and indefensibly limits its scope: Rambus declares that it “does not understand the Commission’s Order to limit the judicial remedies that Rambus may seek for *pre*-Order infringement of its patented technologies, regardless of the date the action is commenced.” (Reconsideration Br. at n.8 (emphasis in original).)⁴ Similarly, Rambus expressly asks the Commission to “clarify” that the Order does not require it to “forego” royalties allegedly owed, but not yet collected, for use of its claimed technologies prior to the effective date of the Order. (Reconsideration Br. at 5.)

Rambus has explicitly argued in private litigation that the Order has no effect on its future efforts to collect the very monopoly rents this Commission has declared unlawful. In a

⁴ See also Reconsideration Br. at 4 (“[T]he Commission intended only to prevent Rambus from asserting claims to above-MAR rates for use after the effective date of the Order”).

case management statement filed in its patent litigation against Hynix in the Northern District of California, Rambus claimed that:

[P]aragraph IV A, makes very clear that the “Maximum Allowed Royalty Rates” described in the Order apply *only* to “the manufacture, sale or use of [certain defined devices] after the date this Order becomes final” In other words, *the FTC rates only apply to infringement occurring after the Order becomes effective. Indeed, it is likely that any remedy order affecting past infringement would exceed the Commission’s statutory powers.*

Rambus’s Case Management Conference Statement, *Hynix v. Rambus*, Case No. CV00-20905, Feb. 14, 2007, attached as Ex. 1 (hereinafter “Case Mgt. Statement”) (emphasis added).⁵ On being informed of Rambus’s position, Judge Whyte observed that Rambus’s interpretation of the Order “would make the F.T.C.’s remedy pretty ineffectual.” (*Hynix v. Rambus* CMC Hearing Tr. at 24:8-9, February 16, 2007, attached as Ex. 2).)

Rambus’s positions both in its Petition and before the District Court are flatly inconsistent with the Commission’s key liability findings, and with the remedial purposes of the Order that the Commission expressed in its Remedy Opinion. Rambus takes the view that this Order allows Rambus to undertake and profit from the very conduct that the Commission unanimously found to be part and parcel of its anticompetitive scheme. Rambus argues that it should be free under the Order not only to seek monopoly rents from existing licensees and companies, such as Amici, whom it already has sued, but even to sue additional companies from whom it has not yet sought monopoly profits. Allowing such an outcome threatens to inflict over a billion dollars in added costs on the market and on consumers, and would encourage and embolden future wrongdoers.

⁵ See also *Hynix v. Rambus* CMC Hearing Tr. 21:20-22:4, February 16, 2007, attached as Ex. 2.

The Commission should reject Rambus's arguments and, if necessary, modify its Order to ensure that none of those harms comes to pass.

II. RAMBUS'S CONSTRUCTION OF THE ORDER IS IN CONFLICT WITH THE COMMISSION'S KEY FINDINGS.

The Commission unanimously found that Rambus engaged in deceptive conduct that was intentional, willful, and "sufficient, without more, to justify broad fencing-in relief." (Remedy Opinion at 26.) This deception gave Rambus monopoly power over the JEDEC standards for SDR SDRAM and DDR SDRAM, and as such constituted a violation of Section 2 of the Sherman Act and Section 5 of the FTC Act.

Having determined that Rambus's monopoly power derived from its deception, the Commission's Remedy Opinion seeks to reconstruct the competitive conditions that would have prevailed "but for" its JEDEC misconduct. The Commission concluded that "in the 'but for' world Rambus's royalty rates would have been negotiated under the constraint of a RAND commitment." (Remedy Opinion at 17.) In other words, Rambus would have licensed its relevant patents on reasonable and non-discriminatory ("RAND") terms, including reasonable royalty terms, to all those implementing the relevant JEDEC SDR standards.

In order to determine the maximum royalty rates that would have resulted from such RAND-constrained negotiations, the Commission employed a method similar to that often used in patent infringement cases – attempting to reconstruct the results of a hypothetical *ex ante* license negotiation between the accused infringer and the licensor.⁶ Specifically, the Commission sought to determine "what royalty rates would have resulted from *ex ante* SDRAM negotiations among the parties had Rambus not engaged in the unlawful conduct." (Remedy

⁶ See, generally, *Georgia-Pac. Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970).

Opinion at 17, 18.) As the Commission observed, the “*ex ante* value of a technology is the amount that the industry participants would have been willing to pay to use a technology over its next best alternative *prior to the incorporation of the technology in a standard.*” (*Id.* at 17 (emphasis added) (citation and quotation marks omitted).)

Thus, in the “but for” world on which the Commission’s remedy determination was based, a world in which Rambus had properly disclosed its patents and patent applications rather than seeking to hijack the JEDEC standards, there would have been no point in time at which companies implementing those standards to make, use, or sell SDR or DDR SDRAM would have been subject to royalty rates any higher than the Commission’s Maximum Rates.⁷ Accordingly, there is no logical basis to allow Rambus to demand from users of the JEDEC SDR and DDR SDRAM standards compensation for alleged past infringement over and above the Maximum Rates. Rather, by the logic of Remedy Opinion, the caps embodied in the Maximum Rates must apply to any amounts Rambus seeks to collect – whether in the form of royalties, damages, or any other payments.

Amici believe that it was the Commission’s intent that the Maximum Rates in fact act as *maximum rates*, and request that the Order be clarified to ensure that Rambus cannot evade that determination.

⁷ Rambus apparently agrees with this characterization of the Commission’s remedy: “[the Order] is intended to emulate, on a forward-looking basis, conditions in the but-for world in which Rambus never deceived JEDEC members about its patent interests. Thus the Commission has determined what it believes to be the royalty rates that Rambus would have charged in the but-for world.” (Reconsideration Br. at 11-12.)

III. RAMBUS’S CONSTRUCTION OF THE ORDER IS INCONSISTENT WITH THE REMEDIAL PURPOSES OF THE ORDER

Rambus’s construction of the Order is contrary not merely to the logic of the Commission’s remedy decision, but also to the Commission’s articulation of the Order’s key purposes. The Commission explained the Order’s remedial purposes in clear and forceful terms: “Paragraphs IV-VII [of the remedial Order] are *designed to restore – to the extent possible – the competitive conditions that would have existed but for Rambus’s unlawful conduct.*” (Remedy Opinion at 27.) In particular, paragraph IV of the Order is designed “to *preclude Rambus from continuing to collect monopoly rents* with respect to JEDEC-Compliant DRAM and Non-DRAM Products.” (Remedy Opinion at 28-29 (emphasis added).) These two purposes cannot be squared with Rambus’s interpretation of the Order, which permits the violator to continue its attempts to collect the profits of its unlawful monopoly in the form of damages or royalties that far exceed the royalty rates the Commission set.

As discussed above, the Commission found that the competitive conditions that would have prevailed in the absence of Rambus’s unlawful conduct included a license to Rambus’s relevant patents available to all who wish to implement the relevant JEDEC standards on reasonable and non-discriminatory terms, at royalty rates no greater than the Maximum Rates. Consequently, any Order that restores the competitive conditions that would have existed absent Rambus’s violation cannot permit Rambus to take steps after the Order is final to collect additional compensation for its patents over and above what the Commission determined were the Maximum Rates Rambus would have been able to demand. Amici believe the Commission’s Order, properly interpreted, is consistent with that approach.

Similarly, given the Commission’s determination that Rambus would have been able to collect no more than the Maximum Rates in the “but for” world, any amounts in excess of the

Maximum Rates that Rambus collects would constitute rents from its unlawfully acquired monopoly. Paragraph IV is designed to prevent Rambus from “continuing to collect monopoly rents.” That purpose is achieved only if Rambus is prevented in the future from seeking or collecting any amounts in excess of the Maximum Rates for alleged infringement of its patents by SDR and DDR SDRAM occurring *before*, as well as after the date the Order becomes final.

IV. RAMBUS IS DISTORTING THE LANGUAGE OF THE COMMISSION’S ORDER

In its recent case management statement in district court, Rambus claimed that paragraph IV(a) of the Order “makes very clear that . . . the FTC [Maximum Allowable Royalty] rates only apply to infringement occurring *after* the Order becomes effective.” (Case Management Statement at 1-2) (emphasis in original.) But simply stating that something is “very clear” does not make it so. The better interpretation – the only one consistent with the purposes and other provisions of the Order – is that paragraph IV(a) limits the steps Rambus can take in the future to seek or collect payments for SDR and DDR SDRAM sales, regardless of when those sales were made.

The disputed paragraph provides that Rambus “shall cease any and all efforts by any means, either directly or indirectly, . . . to seek to collect or to collect . . . any fees, royalties or other payments, in cash or in kind, relating to the manufacture, sale, or use of any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product *after the date this Order becomes final*, that are in excess of the Maximum Allowable Royalty Rates or are otherwise inconsistent with this Order.” (Order at IV.A. (emphasis added).) Rambus claims that “after the date this Order becomes final” qualifies “manufacture, sale or use” and thus leaves it free to undertake any future conduct to seek whatever rate of compensation it wishes for alleged infringement occurring before the Order. Rambus makes similar arguments regarding Order

paragraphs VI and VII. (*See, e.g.*, Reconsideration Brief at 9 (Section VII applies to “post-Order infringement”).)

Rambus’s interpretation of the Order is inconsistent with the Remedy Opinion, the stated purposes of the Order, and other provisions in the Order. As the Remedy Opinion makes clear, the Order is intended to “restore” the “but for” world. It would be inconsistent to allow Rambus to take prospective steps that seek to collect payments greater than those it would have received in the “but for” world.

Other provisions in the Order further undermine Rambus’s position that the Maximum Rates apply only to post-Order infringement. For example, paragraph V requires Rambus to make available a license under the relevant patents at no greater than the Maximum Rates. On its face, this license Rambus is required to grant is unlimited in time. Therefore, the most reasonable interpretation of this provision is that the license caps royalties for all past and future infringement at the Maximum Rates. Unlike Rambus’s construction of the Order, such an interpretation is fully consistent with the Commission’s intent to restore the competitive conditions of the “but for” world.

Amici respectfully request that the Commission clarify these key remedial paragraphs of the Order, as well as any other provisions it deems necessary. An amended Order or a statement explaining the effect of the existing Order would ensure that the Commission’s directives are correctly understood by all and properly adhered to by Rambus.

V. THE COMMISSION HAS THE AUTHORITY TO ENJOIN RAMBUS FROM PROSPECTIVELY SEEKING ADDITIONAL DAMAGES

Rambus's assertion to the contrary notwithstanding, the Commission's remedial authority is broad enough to enjoin Rambus from any future actions to seek or collect damages or royalties for alleged past infringement that exceed the maximum rates the Commission has set. There is nothing compensatory or punitive about such a prospective remedy.

A. The Commission's Remedial Powers are Broad

It is well-settled that the Commission has broad remedial powers – as it recognized in its own Opinion:

(T)he Commission has “wide latitude for judgment” in selecting a remedy, subject to the constraint that it must be reasonably related to the violation. . . . The Commission is authorized to both prohibit the practices that it has found unlawful and – in order to prevent future unlawful conduct – to “fence-in” the violator with provisions that are broader in scope. *So long as the remedy has a reasonable relationship to the violation* that the Commission has found, the Commission may “close all roads to the prohibited goal,” including proscribing conduct that is lawful.

(Remedy Opinion at 26 (emphasis added) (citations omitted); *see also Jacob Seigel Co. v. FTC*, 327 U.S. 608 (1946); *FTC v. National Lead Co.*, 352 U.S. 419 (1957).) Here, there clearly is a reasonable relation between a remedy order limiting the amount of royalties and damages Rambus may collect, including payments for alleged past infringement, and the violation that the Commission unanimously found.

In fact, the Commission already considered and rejected the very position that Rambus now advances. (Remedy Opinion at 6) (“Rambus would have us conclude that it can continue to reap the royalty rates it is now charging (*and demanding in pending litigation*). Rambus asserts that this conclusion is supported by the Supreme Court's decision in *FTC v. Ruberoid Co.*, in

which the Court held that the Commission cannot order compensatory or punitive relief. *We disagree with Rambus.*”) (emphasis added) (citations omitted).)

The Commission is correct that nothing in *FTC v. Ruberoid Co.*, 343 U.S. 470, 472 (1952) or other authority constrains the Commission from limiting or even banning the *future* enforcement of particular patents. In its analysis of the proper scope of FTC orders, the Court in *Ruberoid* stated only that “Orders of the Federal Trade Commission are not intended to impose *criminal punishment* or *exact compensatory damages* for past acts, but to prevent illegal practices in the future.” *Id.* at 473. Here, the Commission found that Rambus’s assertion of patents against JEDEC-Compliant DRAM – regardless of whether for past or future sales – was an essential part of the conduct that gave rise to a Section 2 violation. After all, if Rambus had never asserted its patents against SDR or DDR SDRAM, there would have been no impact or damages. *Ruberoid* thus confirms that the Commission has the power to prevent Rambus’s future efforts to seek payments for SDR or DDR SDRAM for payments in excess of the Maximum Rates, regardless of whether for past or future sales.

Nothing about the remedy here is compensatory or punitive. The Commission’s Order, standing alone, does not compel Rambus to return the hundreds of millions of dollars in unlawful monopoly profits it already has collected as of the effective date of the Order. Amici, however, do believe that the Commission should bring a separate district court action under Section 13(b) of the FTC Act, 15 U.S.C. §§ 41-58, for disgorgement of the unlawful monopoly rents Rambus already has extracted and that the victims of Rambus’s conduct should also be free to pursue such remedies as are available to them. For purposes of this motion, however, Amici simply are asking the Commission to clarify that the Order does what the Remedy Opinion says it should do: prevent Rambus from seeking or collecting *in the future* any further rents on a monopoly the

further rents on a monopoly the Commission unanimously determined to be illegally obtained. Because such an Order would constrain only what actions Rambus takes in the future, it is the sort of “prospective only” remedy that the Commission and Complaint Counsel have agreed is appropriate. (*See* Remedy Opinion at 7.)

B. The Commission Has Enjoined Collection of Royalties for Past Damages in Other Matters

The Commission’s Order in *Unocal* – a recent case with very similar facts to those here – is instructive. To remedy the respondent’s deceptive and exclusionary conduct in that case, the Commission insisted on an order barring the respondent from enforcing its patent rights against gasoline made in compliance with the regulations. *In re Union Oil Co.*, No. 9305, 2005 WL 2003365 (F.T.C. Aug., 2005). The Commission’s Order in *Unocal* explicitly barred the respondents there from collecting any further damages for past infringement of the relevant patents:

[R]espondent shall cease and desist from any and all efforts, and shall not undertake any new efforts, by any means, directly or indirectly, . . . to assert or enforce any of the Relevant U.S. Patents against any Person, *to recover any damages or costs for alleged infringements of any of the Relevant U.S. Patents*, or to collect any fees, royalties or other payments, in cash or in kind, for the practice of any of the Relevant U.S. Patents.

(*Id.*) Rambus has engaged in deceptive and exclusionary conduct at least as serious as that of *Unocal* – conduct that also has had the effect of subverting a standard and exposing users of the standards to unlawful and excessive monopoly royalties. Rambus ought to be subject to the same remedy and, like *Unocal*, precluded from exploiting its monopoly power in the collection of damages as well as royalties.

In another case based on actions similar to, if less egregious than, Rambus’s conduct, the Commission previously ordered Dell to stop enforcing its relevant patent against the standard

affected by its deceptive conduct. *In re Dell Computer Corp.*, 121 F.T.C. 616, 624 (1996). In the *Dell* case, the respondent belonged to an SSO that had considered, and ultimately adopted, a “VL-bus standard.” *Id.* at 616-18. Dell had a patent that covered the VL-bus standard, but the Commission found that respondent had failed to disclose that patent and misled the SSO into adopting the standard. *Id.* at 624. To remedy the respondent’s deceptive and exclusionary conduct, the Commission issued an order barring the respondent from enforcing its relevant patents against the standard. That remedy necessarily also prohibited Dell from collecting further damages for alleged past infringement from those practicing the standard. *Id.* at 626.

Because in this matter there has been a fully litigated and unanimous finding of willful exclusionary and deceptive conduct, rather than a resolution by Consent Order, there is an even stronger basis than there was in either *Dell* or *Unocal* for the Commission to ensure that Rambus is entirely barred from seeking or collecting additional monopoly rents in the future.

VI. STRONG POLICY CONSIDERATIONS FAVOR ELIMINATING RAMBUS’S PROSPECTIVE ABILITY TO COLLECT MONOPOLY RENTS

The appropriate remedy in this case – the one imposed by the Order as properly construed – is to bar Rambus from future conduct that would exploit its monopoly power, and prevent it from seeking or collecting royalties or past damages of any kind in excess of the rates the Commission found would have prevailed in the “but for” world. Strong public policy considerations counsel against any narrower construction of the Order that would allow Rambus to go on profiting from its past misconduct after it has been found liable for a violation after a full investigation and trial.

A. Rambus’s Construction Would Allow Rambus to Take Prospective Steps to Profit from its Anticompetitive Conduct

Rambus’s construction of the Order would allow it to continue to seek and collect monopoly rents over a vast base of affected sales on which it has not heretofore obtained any

royalties. The potential additional amounts Rambus stands to collect could total in the hundreds of millions to more than one billion dollars. Complaint Counsel warn that Rambus could seek \$500 million or more in damages for pre-Order alleged infringement of its relevant patents relating to JEDEC-Compliant DRAMs.⁸ Published data suggest that such a figure is, if anything, overly conservative. Although sales of these products are now in decline, SDR and DDR SDRAM have been the leading computer memory technologies for years. Data from the Gartner Group, a well-known industry analyst firm, show that SDR and DDR SDRAM sales amounted to over \$143 billion between January 1999 and December 2006. (See SDR and DDR DRAM Sales and Royalty Analysis, attached as Ex. 3.)

There is evidence in the record to suggest that roughly half of the DRAM industry by market share was licensed and paying royalties to Rambus for SDR and DDR SDRAM during the 2000-2001 time frame. (See Compl. Counsel Proposed Findings of Fact ¶¶ 2010, 2012.) Assuming, conservatively, that no more than 50% sales of SDR and DDR from 1999 through 2006 were made under license, then these data suggest that Rambus may not yet have collected a royalty on approximately \$71 billion or more of JEDEC-Compliant SDR and DDR SDRAM sales made before the effective date of the Order. And that figure does not account for the substantial excess royalties Rambus wrongfully could seek to collect on JEDEC-Compliant Non-DRAM Products. Using the rate of 0.75% for SDR and 3.5% for DDR previously negotiated between Rambus and certain DRAM manufacturers as a guide,⁹ Rambus could attempt to collect after the effective date of the Order approximately \$1.4 billion in damages for past sales,

⁸ See Complaint Counsel's Response on Reconsideration at 3, n.6 ("\$500 million or more in damages (the vast majority of which would be unlawful monopoly profits.").

⁹ See Order Granting Hynix's Motion for a New Trial on the Issue of Damages Unless Rambus Elects Remittitur of the Jury's Award to \$133,584,129 at 6:20-22, *Hynix Semiconductor Inc. v. Rambus, Inc.*, No. CV-00-20905 (attached as Ex. 4).

according to its narrow interpretation of the Order. The difference between the amount Rambus could collect at the 0.75%/3.5% royalty rate that Rambus has extracted from licensees (not to mention the 1.0%/4.25% royalty rates it seeks in litigation) and the maximum amounts it could collect under the 0.25%/0.50% Maximum Rates that the Commission has set would be approximately \$1.1 billion on JEDEC-Compliant DRAM Products alone. As the Commission has observed “[n]umbers of this magnitude are not easily overlooked.” (Liability Opinion at 75-76, n.409.)

B. Under Rambus’s Construction, the Remedy Order Would Have Virtually No Market Impact

Commissioner Harbour, in her dissent, expressed concern that the Commission’s remedy for Rambus’s violation could have declining impact over time, because the Order omits DDR SDRAM from the relevant JEDEC products affected. (*See* Harbour Dissent at 9.) As Commissioner Harbour correctly observed, DDR2 SDRAMs already account for the majority of mainstream DRAMs sold today, while SDR and DDR SDRAM products “soon will be obsolete.” (*Id.*) Consequently, any remedy that covers Rambus’s conduct directed at SDR and DDR sales occurring after the Order has become final, but ignores future conduct targeting SDR and DDR sales that occurred before the Order, would have virtually no market impact: In fact, Gartner data projections suggest that approximately 93% of the SDR SDRAM and 86% of the DDR SDRAM that will be sold through 2010 already has been sold as of January 2007. *See* SDR and DDR DRAM Sales and Royalty Analysis, Ex. 3. Thus, even though the Commission found that SDR and DDR SDRAMs were directly affected by Rambus’s exclusionary and deceptive conduct, under Rambus’s view of the Order it should be free to charge unlimited monopoly rates over 86 to 93% of affected product sales over time. Amici respectfully submit

that sound exercise of the Commission's remedial discretion cannot be consistent with such a meager remedy.

C. Rambus's Construction of the Order Would Encourage Rather Than Deter Future Violations

Amici agree with Complaint Counsel that the Commission may, and indeed should, consider the deterrent effect of its Order in fashioning appropriate and effective relief. (*See Oral Argument Tr. 28:6-29:10.*) But if Rambus were allowed to take prospective steps in an attempt to collect over a billion dollars in unlawful monopoly rents, even after a unanimous finding of a willful violation, that would send a powerful message to potential wrongdoers that the risks of pursuing an anticompetitive and deceptive patent "hold up" strategy are low, while the potential rewards are very great.

Moreover, to the extent that respondents are allowed to profit from any delay in issuance of a final order, the Commission will create incentives for dilatory and bad faith conduct in litigation.¹⁰ The Commission's investigation of Rambus for its anticompetitive behavior has taken more than five years. Rambus has been found to have committed a "willful and intentional" violation, after having resisted the Commission's enforcement efforts through a litigated judgment and appeal. If Rambus now finds itself free not only to retain the monopoly profits it collected during those years, but also to pursue more than a billion dollars of additional

¹⁰ Such an outcome would be particularly egregious given the degree of the dilatory and bad faith litigation conduct in this case, including where the respondent has been found to have: (1) relied on material false statements to forestall Commission action in this case, *see, e.g.* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents, at 15 (Rambus "was not seeking any patents that covered the SDRAM standard during the time that the standard was being considered by JEDEC" (quoting CX1883, Memorandum for the United States Federal Trade Commission staff, Feb. 20, 2001 at 10)); and (2) failed to produce material documents under circumstances that the Commission found "raise[d] potentially disturbing issues regarding the adequacy, completeness and reliability of the record in this matter." Order Granting in Part Complaint Counsel's Motion to Compel Production of, and to Reopen the Record to Admit, Documents Related to Rambus Inc.'s Spoliation of Evidence; and Granting Rambus's Unopposed Motion for Release of Testimony, May 13, 2005 at 3.

monopoly profits it claims were accrued during this same period of delay, then notwithstanding the Commission's action, Rambus truly will have succeeded in reaping the fruits of its anticompetitive scheme. The Commission should permit no such result. A remedy as ineffective as Rambus's interpretation of the Order would have no deterrent effect whatsoever, and would provide substantial encouragement for future violators.

VII. THE MODIFICATIONS RAMBUS SEEKS IN ITS PETITION FOR RECONSIDERATION WOULD UNDERMINE THE KEY PURPOSES OF THE ORDER AND SHOULD BE DENIED

Rambus's Petition for Reconsideration represents a laundry list of different requests for modification of the Order, each of which is directed at undermining some aspect of the Commission's remedy. Amici, like Complaint Counsel, believe that none of Rambus's requests for modification of the Order is necessary and none should be granted. Three of Rambus's specific requests are particularly outrageous.

First, speaking once again as if the Order applied only to "post-Order infringement," Rambus asks the Commission to "confirm" that under the Order Rambus may seek not only the Maximum Rates set by the Commission but also treble damages for alleged willful infringement, attorneys fees, interest, and injunctions. (Reconsideration Brief at 9-10.)

Such an interpretation would be squarely at odds with the purposes of the Order and would render the Maximum Rates meaningless as an actual cap on Rambus's compensation for its relevant patents. Complaint Counsel are correct that the Commission should reject this naked attempt to maneuver around the Order.

Second, Rambus seeks a modification of the Order requiring prospective licensees either to forego the benefit of the remedies the Commission found necessary to protect competition, or

else abandon their rights to pursue relief in other forums. (Reconsideration Brief at 11-13.)¹¹

The Commission should reject this unjustified attempt to induce Rambus's intended victims to give up their litigation rights. It would be a misuse of the Commission's remedial authority to discourage private litigants from further exploring issues such as spoliation and DDR 2 lock-in where additional evidence not available in this proceeding might support additional relief. (*See* Complaint Counsel's Response on Reconsideration at 4-5.)

Finally, while the Commission's definition of JEDEC-Compliant is unambiguous – SDRAM or DDR SDRAM that complies with the relevant standard – Rambus's remarks concerning its "understanding" of the Commission's definitions could create confusion about that term. (Reconsideration Br. at 14 n.10.) For example, Rambus first suggests that "JEDEC-Compliant" DRAMs are those that include required "features." Such a gloss on the definition could lead to needless debates in the future about whether, for example, circuits needed to ensure that a DRAM meets JEDEC timing specifications are "features specified" in the standards. Rambus then suggests that the Commission should redefine "comply[ing]" with a JEDEC standard to mean merely including features required to make the product interoperable." (*Id.*) While interoperability is one goal of JEDEC standards, it would be counterproductive to introduce a new limitation on the Order that would invite controversy about whether any particular aspect of the standard is "required" for interoperability. Accordingly, the Commission should simply reject Rambus's "understandings" in favor of the plain meaning of "JEDEC-Compliant."

¹¹ Amici also agree with Complaint Counsel that the Commission should deny Rambus's requests for modification of the Order to permit collection of multiple royalties on a single product, and to reverse the Commission's finding that Maximum Rates should decline to zero before Rambus's relevant patents expire. (*See* Complaint Counsel's Response on Reconsideration at 5-6.)

VIII. A STAY OF THE COMMISSION'S ORDER WOULD BE INAPPROPRIATE

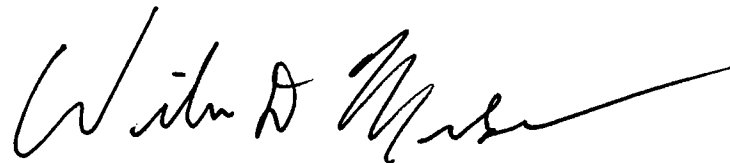
Amici also oppose Rambus's separately filed Motion for Stay of the Commission's cease and desist Order pending appeal. As noted above, it has been more than five years since the Commission first commenced its investigation of Rambus's anticompetitive conduct. Those who have been disadvantaged by Rambus's anticompetitive behavior should not be required to wait even longer before they begin to enjoy the protection the Order affords against Rambus's continued attempts to profit from that deceptive conduct. This is particularly so because Rambus already is seeking in the interim to obtain inconsistent decisions in other forums, such as the Hynix litigation in the Northern District of California.

CONCLUSION

For the reasons stated above, Amici Curiae Micron, Samsung, and Hynix respectfully request that the Commission deny Rambus's petition for reconsideration and motion for stay, and clarify the Commission's Order to ensure that Rambus is not permitted to continue seeking and collecting unlawful monopoly rents in the form of royalties or damages for alleged patent infringement occurring before the effective date of the Order.

Dated: March 1, 2007

Respectfully submitted,



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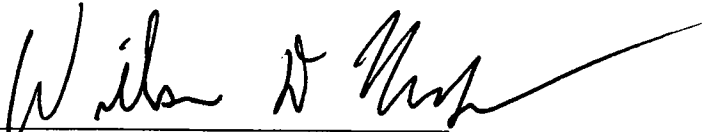
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CERTIFICATE OF SERVICE

I, Wilson D. Mudge, hereby certify that, on this the 1st day of March, 2007, I caused copies of the foregoing MOTION OF MICRON TECHNOLOGY, INC., SAMSUNG ELECTRONICS CORPORATION, LTD., AND HYNIX SEMICONDUCTOR, INC. IN OPPOSITION TO RAMBUS'S MOTION TO RECONSIDER THE COMMISSION'S REMEDY ORDER to be served by the method indicated below upon the following:


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Via Hand Delivery

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13 RAMBUS INC.

14
15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION

18 HYNIX SEMICONDUCTOR INC.; HYNIX
SEMICONDUCTOR AMERICA, INC.;
19 HYNIX SEMICONDUCTOR U.K. LTD.; and
HYNIX SEMICONDUCTOR
20 DEUTSCHLAND GmbH,
21 Plaintiff,
22 vs.
23 RAMBUS INC.,
24 Defendant.

CASE NO. CV 00-20905 RMW
**RAMBUS'S CASE MANAGEMENT
CONFERENCE STATEMENT**

Date: February 16, 2007
Time: 10:30 a.m.
Ctm: 6
Judge: Hon. Ronald M. Whyte

25 AND RELATED CROSS-ACTIONS.
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1 Rambus Inc. ("Rambus") respectfully submits this Case Management Conference
2 Statement in connection with the Court's February 16, 2007 conference in this matter.

3 **I. TRIAL DATE**

4 Hynix counsel Allen Ruby has informed us that his trial conflict with the "Micrel" action
5 will prevent him from commencing trial in this matter on the (tentatively set) March 19, 2007
6 date. The Court has previously set a July 9, 2007 trial date.

7 **II. IMPACT OF FTC DECISION**

8 The FTC released the public version of its remedy opinion on February 5, 2007. Rambus
9 provided the Court with a courtesy copy the same day. The FTC's Order will not be effective
10 until April 2, 2007, at the earliest. *See* 16 C.F.R. § 356. Rambus will file a motion to stay the
11 Commission's Final Order, as well as a Petition for Review in a Court of Appeals.

12 Regardless of whether the FTC's liability decision may be "final" in April for purposes of
13 appeal, however, it is *not* "final" for purposes of Clayton Act § 5(a) and cannot form the basis for
14 *prima facie* findings here, for the reasons set forth in Rambus's prior briefs and in its
15 Supplemental Brief in Opposition to Motion re FTC Findings on Prima Facie Evidentiary Effect,
16 filed on February 8, 2007. *See, e.g., McDonald v. Schweiker*, 726 F.2d 311, 313 (7th Cir. 1983)
17 (observing that "the term 'final judgment,' which appears 151 times in the United States Code,
18 does not have a single fixed meaning" and that when used in Clayton Act § 5(a), it "denotes the
19 judgment that writes *finis* to the entire litigation, after all appellate remedies have either been
20 exhausted or, as here, abandoned").

21 The Commission's Final Order also has no impact on the existing damages award from
22 the patent phase of trial. The Commission stated in its remedy decision that the royalty rate
23 restrictions it was imposing represented a "forward-looking remedy" that was "prospective only."
24 *See* 2/2/07 Order on Remedy at 2, 7. Hynix appears to suggest, however, that the FTC Order bars
25 Rambus from collecting past royalties in excess of the "FTC rates." The paragraph of the Order
26 that Hynix refers to, paragraph IVA, makes very clear that the "Maximum Allowed Royalty
27 Rates" described in the Order apply *only* to "the manufacture, sale or use of [certain defined
28 devices] after the date this Order becomes final . . ." Order at 7. In other words, the FTC rates

1 only apply to infringement occurring *after* the Order becomes effective. Indeed, it is likely that
2 any remedy order affecting past infringement would exceed the Commission's statutory powers.
3 Acknowledging this tension, the Commission distinguished a recent D.C. Circuit decision
4 involving the remedies available under the RICO statute by pointing out that that decision
5 "rejected a disgorgement order, not an order *prospectively* terminating the ill effects of unlawful
6 conduct." 2/3/07 Remedy Opinion at 4 (emphasis added).

7 In short, while the FTC has attempted to cap the royalties Rambus may seek for post-
8 4/2/07 infringement, its Order deliberately does not affect past royalties paid or awarded.
9 Hynix's additional argument – that the Commission has "gutted" the evidentiary value of
10 Rambus's prior license agreements and has rendered them "inadmissible – is the same argument
11 made in Hynix's motion for a new trial on patent damages, which the Court denied.
12 Consequently, as the Court held in denying Hynix's motion, the damages verdict cannot be
13 revisited until after the Phase III trial is concluded (if then).¹

14 This case will be seven years old this summer. Rambus's appeal of the FTC's decision is
15 likely to take eighteen months or more. In light of the § 5(a) finality issue, there is no basis for
16 any further delay based on the FTC's proceedings.

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¹ Nor does the remedy ruling serve any basis for vacating the bond requirement. To the contrary, the FTC's decision to enter a "prospective" remedy order that does not affect past infringement, combined with Hynix's request for a substantial additional trial delay to accommodate its counsel's schedule, supports an increase, not a decrease, in the bond, to reflect Hynix's ongoing infringement.

1 **III. OTHER PRE-TRIAL ISSUES**

2 Rambus requests that the Court schedule a Pre-Trial Conference for June 29, 2007 in
3 connection with the July 9, 2007 trial date. In addition, in light of the delay until July 2007 to
4 accommodate Mr. Ruby's trial schedule, Rambus requests leave to file a motion for summary
5 judgment on Hynix's monopolization claim. Rambus proposes that the Court hear the motion on
6 April 6, 2007.²

7
8 DATED: February 14, 2007

MUNGER, TOLLES & OLSON LLP

SIDLEY AUSTIN LLP

9
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11 By: 

Steven M. Perry

12 Attorneys for Defendant and Counterclaim-Plaintiff
13 RAMBUS INC.

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20 ² Rambus's motion will demonstrate that Hynix's portion of the Joint Pre-Trial Statement, along
21 with such decisions as *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. ____, ____, 126
22 S.Ct. 1281, 1291 (2006), make it clear that Hynix cannot make a sufficient showing of market
23 power to defeat summary judgment on its monopolization claim. Hynix does not admit that any
24 of Rambus's patents are valid, nor does it allege that all JEDEC-compliant SDRAMs and DDR
25 SDRAMs infringe any Rambus patent. In addition, Rambus currently has less than 30% of
26 worldwide SDRAM and DDR production under license. As a consequence, while Hynix might
27 have an equitable estoppel defense or even a fraud claim that requires a full trial, it cannot show
28 that Rambus has obtained market power – a strict threshold requirement of an actual
monopolization claim and one that is well suited for summary judgment. *See, e.g., United Air
Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 741-2 (2d Cir. 1989) (affirming summary
judgment because defendant with 31% market share “lacks the market power necessary to
constitute a national monopoly”); *Dimmitt Agri Industries, Inc. v. CPC Intern., Inc.*, 679 F.2d
516, 528-9 (5th Cir. 1982) (reversing jury verdict on monopolization claim in light of defendant's
25% market share); *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945)
(33% share is “certainly” not a monopoly); *Pilch v. French Hospital*, 2000 WL 33223382 at *7
(C.D. Cal. 2000) (same).

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PROOF OF SERVICE BY HAND

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within entitled action; my business address is 560 Mission Street, 27th Floor, San Francisco, California.

On February 14, 2007, I served the following document(s) described as:

RAMBUS'S CASE MANAGEMENT CONFERENCE STATEMENT

by placing a true copy thereof enclosed in sealed envelope addressed as follows:

Geoffrey H. Yost, Esq.
Thelen Reid Brown Raysman & Steiner LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3601

I caused such envelope to be delivered by hand by Wheels of Justice, 657 Mission Street, Suite 502, San Francisco, California, 94105 to the office of the addressee.

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on February 14, 2007, at San Francisco, California.

Teresa Ramirez

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO:

3 I, the undersigned, declare: that I am employed in the aforesaid County; I am over the age
4 of 18 and not a party to the within action; my business address is 560 Mission Street, 27th Floor,
San Francisco, California 94105.

5 On February 14, 2007, I served upon the interested party(ies) in this action the foregoing
6 document(s) described as:

7 **RAMBUS'S CASE MANAGEMENT CONFERENCE STATEMENT**

8 By placing the original a true copy thereof enclosed in sealed envelope(s) addressed
9 as stated on the attached service list.

10 **BY FEDERAL EXPRESS PRIORITY OVERNIGHT DELIVERY (AS INDICATED**
11 **ON SERVICE LIST)** I caused such envelope(s) to be placed for Federal Express
12 collection and delivery at San Francisco, California. I am "readily familiar" with the
13 firm's practice of collection and processing correspondence for Federal Express mailing.
Under that practice it would be deposited with the Federal Express office on that same day
with instructions for overnight delivery, fully prepaid, at San Francisco, California in the
ordinary course of business.

14 **BY MAIL (AS INDICATED ON ATTACHED SERVICE LIST)** I caused such
15 envelope(s) to be deposited with postage thereon fully prepaid in the United States mail at
16 a facility regularly maintained by the United States Postal Service at San Francisco,
17 California. I am "readily familiar" with the firm's practice of collecting and processing
18 correspondence for mailing. Under the practice it would be deposited with the U.S. Postal
19 Service on that same day with postage thereon fully prepaid at San Francisco, California in
the ordinary course of business. I am aware that on motion of the party served, service is
presumed invalid if postal cancellation date or postage meter.

20 **BY ELECTRONIC MAIL (AS INDICATED ON SERVICE LIST)** I caused such
21 documents to be sent by electronic mail for instantaneous transmittal via telephone line.

22 I declare that I am employed in the office of a member of the Bar of this Court at whose
23 direction the service was made.

24 Executed on February 14, 2007, at San Francisco, California.

25 _____
26 Teresa Ramirez
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SERVICE LIST
Hynix v. Rambus, Inc.
USDC CV-00-20905 RMW

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HYNIX SEMICONDUCTOR, INC.,)	C-00-20905-RMW
)	FEBRUARY 16, 2007
PLAINTIFF,)	
V.)	PAGES 1-39
RAMBUS, INC.,)	
DEFENDANT.)	

THE PROCEEDINGS WERE HELD BEFORE
THE HONORABLE UNITED STATES DISTRICT
JUDGE RONALD M. WHYTE

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(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

page 2

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SAN JOSE, CALIFORNIA FEBRUARY 16, 2007

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)
THE CLERK: NEXT MATTER C-00-20905, HYNIX VERSUS RAMBUS. ON FOR DEFENDANT'S MOTION TO CONFIRM WITHDRAWAL OF JURY DEMAND WITH RESPECT TO FRAUD CLAIM.

MR. PERRY: GOOD MORNING, YOUR HONOR. STEVE PERRY FOR RAMBUS.

MR. RUBY: GOOD MORNING. ALLEN RUBY FOR HYNIX.

MR. NISSLY: GOOD MORNING. KEN NISSLY ALSO FOR HYNIX.

THE COURT: ALL RIGHT. DID YOU SEE THE QUESTION THAT I ASKED?

MR. RUBY: YES.

THE COURT: OKAY. MR. PERRY, DO YOU WANT TO ADDRESS THAT?

MR. PERRY: IT'S OUR MOTION, YOUR HONOR, SO I'D BE HAPPY TO.

THE COURT'S QUESTION WAS ABOUT WHETHER HYNIX CLAIMS ACTUAL INJURY AND AS A BASIS FOR PUNITIVE DAMAGES.

page 4

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IS THERE A JURY TRIAL EVEN IF THERE ARE NO COMPENSATORY DAMAGES? THE ANSWER IS NO. THE FIRST THING TO LOOK TO IS THAT THIS IS AT BOTTOM A CONSTITUTIONAL QUESTION EVEN IF IT'S STATE CLAIM, THE AVAILABILITY OF A JURY TRIAL IN THIS COURTROOM. UNDER THE GRANITE STATE CASE, 76 FED. 3D. AT 1026. THE FEDERAL LAW GOVERNS THE QUESTION.

BUT THERE ARE STATE LAW QUESTIONS INVOLVED. LET ME GET TO ACTUAL INJURY UNDER THE SEVENTH AMENDMENT ANALYSIS WITHOUT A SHOWING OF COMPENSATORY DAMAGES.

UNDER THE SEVENTH AMENDMENT YOU LOOK AT THE NATURE OF THE RELIEF SOUGHT, THE REMEDY THAT IS SOUGHT. THE SPINELLI CASE FROM THE NINTH CIRCUIT TELLS US, AND WE CITED IT, THAT THE SUPREME COURT HAS HELD FOUR SEPARATE TIMES THAT THE NATURE OF THE REMEDY SOUGHT IS THE MOST IMPORTANT ISSUE UNDER THE SEVENTH AMENDMENT. AND THERE ARE A LOT OF REPORTED CASES WHERE A PLAINTIFF WHO HAS CLEARLY SUFFERED ACTUAL INJURY ONLY SEEKS AN INJUNCTION AND NEITHER SIDE GETS A JURY TRIAL.

MOST RESENT SUCH CASE FROM THE FEDERAL CIRCUIT IS, IS THE TECHNOLOGY LICENSING CASE 423 F. 3D. AT 969. THE PATENTEE ALLEGED INFRINGEMENT AND

page 5

1 SOUGHT BOTH ACTUAL DAMAGES FOR THE INFRINGEMENT AND
2 AN INJUNCTION AND THEN DECIDED THAT HIS ACTUAL
3 DAMAGES WEREN'T BIG ENOUGH TO JUSTIFY PURSUING AND
4 HE DROPPED THE CLAIM. SO HE ONLY HAS AN INJUNCTION
5 BUT HE HAS ACTUAL INJURY AND THE FEDERAL CIRCUIT
6 SAID THAT THE SEVENTH AMENDMENT TELLS US THAT IT'S
7 THE NATURE OF THE REMEDY SOUGHT.

8 THERE'S A LOT OF CASES LIKE THAT IN
9 FEDERAL COURT AS TO WHETHER OR NOT YOU CAN GET A
10 JURY IF THE REMEDY SOUGHT ARE INJUNCTIVE RELIEF
11 EVEN THOUGH THERE IS ACTUAL DAMAGES.

12 THE COURT: JUST OUT OF CURIOSITY WAS
13 THAT JUDGE SEEBORG'S CASE?

14 MR. PERRY: WHO, I DON'T REMEMBER, YOUR
15 HONOR, I'M SORRY.

16 THE COURT: OKAY. I THINK IT MIGHT HAVE
17 BEEN.

18 MR. PERRY: BUT THERE'S A FACTUAL REASON
19 WHY IN THIS CASE THEY CAN'T SHOW ACTUAL INJURY IN
20 THE FIRST PLACE.

21 THEY, REGARDLESS OF WHETHER THEY CAN GET
22 DAMAGES, THEY CAN'T SHOW ACTUAL INJURY. AND THAT'S
23 BECAUSE AS YOUR HONOR'S AUGUST 2, 2006 ORDER ON THE
24 LAST JURY TRIAL ISSUE POINTS OUT, HYNIX HAD
25 INITIALLY DISCLOSED IN ITS INITIAL DISCLOSURES IN

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1 2000 OR 2001 THAT IT WAS CLAIMING ACTUAL DAMAGES
2 SUCH AS LOST SALES OR UNNECESSARY INVESTMENTS,
3 BUILDING FACTORIES THAT THEY DIDN'T HAVE TO.

4 WE SENT THEM DISCOVERY REQUESTS ON THOSE
5 ISSUES. WE WANTED TO SEE THE EVIDENCE AND OF A
6 LONG DELAY, HYNIX CAME BACK TO US AND SAID THAT
7 THEY WEREN'T GOING TO PROVIDE THE INFORMATION
8 BECAUSE THEY'RE NOT GOING TO CLAIM ACTUAL DAMAGES,
9 EXCEPT LITIGATION COSTS. SO THEY DIDN'T GIVE US
10 THE EVIDENCE ON WHETHER OR NOT THEY HAD LOST SALES
11 OR LOST INVESTMENTS AND THAT WAS A STRATEGIC
12 DECISION ON THEIR PART.

13 WE THINK THAT EVIDENCE WOULD SHOW THAT
14 THEY HAVEN'T SPENT TIME ON TRYING TO DESIGN AROUND
15 OUR PATENTS. THEY DIDN'T LOSE ANY SALES BECAUSE
16 THEY ASSERTED OUR PATENTS AGAINST THEM. THEY HAVE
17 BEEN DOING FINE. THEY HAD THEIR MOST PROFITABLE
18 QUARTER IN YEARS THIS PAST QUARTER, BUT WE DON'T
19 KNOW WHAT THE EVIDENCE WILL SHOW AND THE COURT
20 DOESN'T KNOW WHAT THE EVIDENCE WILL SHOW ON ACTUAL
21 INJURY AND HYNIX CAN'T NOW COME IN HAVING MADE THAT
22 STRATEGIC DECISION AND SAY, OH, YEAH, WE NOW HAVE
23 EVIDENCE OF ACTUAL INJURY BECAUSE NOW WE WANT TO
24 GAIN A LITIGATION ADVANTAGE FROM HAVING ACTUAL
25 INJURY. THEY GOT THE LITIGATION ADVANTAGE ALREADY

¶page 7

1 BY, BY PRESERVING THIS EVIDENCE IN KEEPING IT OUT
2 OF OUR SIGHT.

3 ASSUME THIS WAS AN ENVIRONMENTAL CASE AND
4 THE PLAINTIFF HAD TWO PARCELS OF LAND. AND THE
5 PLAINTIFFS SAID THAT THE DEFENDANT'S FACTORY HAD
6 POLLUTED THE GROUNDWATER OR PARCEL ONE AND WAS
7 ABOUT TO POLLUTE THE GROUNDWATER OR PARCEL TWO. SO
8 THEY WANTED DAMAGES ON PARCEL ONE AND AN INJUNCTION

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ON PARCEL TWO AND THE DEFENDANT SAID I WANT TO GET ON YOUR LAND ON PARCEL ONE AND TEST THE WATER. AND THE PLAINTIFF SAID ULTIMATELY I DON'T WANT YOU TO COME ON THE LAND. I'LL JUST SEEK AN INJUNCTION.

WELL, HE CAN'T GET A JURY TRIAL ON HIS CLAIM ABOUT POLLUTION BY SAYING I HAD ACTUAL INJURY ON PARCEL ONE BECAUSE HE DIDN'T LET THE DEFENDANT FIND OUT IF THERE WAS ACTUAL INJURY AND WE HAVE THE SAME SITUATION HERE WHERE A LONG TIME AGO HYNIX MADE A STRATEGIC DECISION THAT IT WOULD NOT CLAIM ANY INJURY THAT WAS COMPENSABLE AT DAMAGES OTHER THAN ITS LITIGATION COSTS AND WE KNOW UNDER GRAY ON A FRAUD CLAIM THAT THEY CAN'T RECOVER THAT.

SO THERE'S A LEGAL ISSUE UNDER THE SEVENTH AMENDMENT THAT LOOKS AT REMEDY AND THERE'S A FACTUAL ISSUE HERE WHERE THEY SIMPLY CAN'T, CAN'T COME IN AND ALLEGE ACTUAL INJURY. AND IN THEIR

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OPPOSITION TO OUR MOTION, THEY DIDN'T CITE ANY EVIDENCE. THEY SIMPLY SHOWED YOUR HONOR WHAT THEIR INITIAL DISCLOSURES HAVE SAID.

WELL, THE INITIAL DISCLOSURES DON'T HAVE ANY MEANING ANY MORE, THEY DISAVOWED THEM AND THEY WOULDN'T LET US TAKE DISCOVERY ON THEM AND THEY HAVEN'T AND IT'S THEIR BURDEN ON THIS MOTION. THEY HAVEN'T SHOWED ACTUAL INJURY AND THEY'RE BARRED FROM DOING SO.

BUT YOUR HONOR ALSO ASKED ABOUT PUNITIVE DAMAGES AND IS THAT ENOUGH TO GET A JURY IN FEDERAL COURT ON A STATE LAW FRAUD CLAIM? AND THAT RAISES TWO QUESTIONS. THE FIRST ONE IS CALIFORNIA SUBSTANTIVE LAW, CAN YOU GET PUNITIVE DAMAGES UNDER CALIFORNIA LAW OF FRAUD WITHOUT GETTING AN AWARD OF COMPENSATORY DAMAGES? AND SECOND, EVEN IF YOU CAN, DOES THAT TRIGGER A SEVENTH AMENDMENT RIGHT UNDER FEDERAL LAW?

AND THE LAST TIME THAT I FOUND THAT THE CALIFORNIA SUPREME COURT SPOKE TO THE FIRST QUESTION WAS IN THE KIZER CASE IN 1991 AND THE POTTER CASE IN '93. KIZER, K-I-Z-E-R, THE COURT SAID, QUOTE, "ACTUAL DAMAGES ARE AN ABSOLUTE PREDICATE FOR AN AWARD OF EXEMPLARY OR PUNITIVE DAMAGES."

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THE COURT: I'M FAMILIAR WITH THAT CASE.

MR. PERRY: AND POTTER WAS INSTRUCTING THE TRIAL COURT IT SAYS, QUOTE, "PUNITIVE DAMAGES MAY BE ASSESSED IN UNINTENTIONAL TORT CASES SO LONG AS ACTUAL SUBSTANTIAL DAMAGES HAVE BEEN AWARDED."

NOW, THAT'S 6 CAL. 4TH AT 821.

I KNOW THAT SINCE THEN THERE HAVE BEEN SOME CONFLICTING OPINIONS IN THE COURT OF APPEALS AND SOME SUGGESTIONS THAT WHERE THERE'S BEEN ACTUAL INJURY YOU CAN GET PUNITIVE DAMAGES.

THE COURT: DOESN'T KIZER SAY THAT?

MR. PERRY: NO. KIZER SAID WHERE THERE'S ACTUAL DAMAGES AWARDED. THE QUESTION IS A DAMAGE AWARD VERSUS A SHOWING OF INJURY.

THE COURT: I THOUGHT -- MAYBE I'M REMEMBERING WRONG, BUT I THOUGHT KIZER DEALT WITH A SITUATION WHERE, WHERE IT BASICALLY SAID NOMINAL

18 DAMAGES REQUIRE ACTUAL INJURY. IF THERE IS ACTUAL
19 INJURY YOU CAN GET PUNITIVE DAMAGES WHICH, WHICH
20 IMPLIES THAT IF YOU HAVE NOMINAL, IF YOU HAVE
21 ACTUAL INJURY REGARDLESS OF WHETHER YOU GET ANY
22 DOLLARS FOR IT, YOU COULD GET PUNITIVE DAMAGES BUT
23 MAYBE I'M WRONG.

24 MR. PERRY: THAT'S NOT HOW I REMEMBER
25 KIZER, YOUR HONOR, BUT IT'S BEEN, I'VE GOT TO SAY,
¶page 10

1 SINCE I WROTE THE PAPERS THE LAST TIME I LOOKED AT
2 IT.

3 THE COURT: OKAY.
4 MR. PERRY: BUT THE, BUT EVEN UNDER YOUR
5 HONOR'S APPROACH TO KIZER, YOU WOULD HAVE TO HAVE A
6 SHOWING OF ACTUAL INJURY AND WE DON'T THINK THEY
7 CAN COME IN AND HAVE EVIDENCE OF THAT BECAUSE OF
8 THEIR DISCOVERY CONDUCT AND, AND IN ANY EVENT,
9 THERE IS STILL THE FEDERAL QUESTION, IS THERE A
10 SEVENTH AMENDMENT JURY RIGHT ON A CALIFORNIA LAW
11 CLAIM REGARDLESS OF WHETHER OR NOT YOU WOULD IN
12 STATE COURT BE ABLE TO SAY THAT I'M ENTITLED TO A
13 JURY BECAUSE I'VE GOT A NOMINAL DAMAGES CLAIM AND I
14 WANT TO GET PUNITIVE DAMAGES ON THAT IF I SHOW
15 FRAUD.

16 THE QUESTION IS STILL WHETHER OR NOT THAT
17 WOULD TRIGGER THE SEVENTH AMENDMENT JURY RIGHT
18 BECAUSE THE JURY RIGHT DOESN'T TRAVEL EVEN IN A
19 DIVERSITY CASE TO FEDERAL COURT. IT'S A SEVENTH
20 AMENDMENT ANALYSIS.

21 AND THERE'S THE DESIGN STRATEGIES CASE
22 FROM LAST YEAR AND IN THE SOUTHERN DISTRICT 367
23 F.SUPP. 2D AT 643 WHICH HOLDS THAT A CLAIM FOR
24 PUNITIVE DAMAGES STANDING ALONE DOES NOT CREATE A
25 JURY TRIAL RIGHT UNDER THE SEVENTH AMENDMENT.
¶page 11

1 SO, SO THE -- WE DON'T THINK THEY CAN GET
2 THERE ON THE STATE LAW QUESTION OR THE FEDERAL LAW
3 QUESTION AND THEY CAN'T SHOW ACTUAL INJURY TO GET
4 NOMINAL DAMAGES IN ANY EVENT BUT, BUT EVEN IF THEY
5 COULD GET A DOLLAR FOR NOMINAL DAMAGES, EVEN IF
6 THEY COULD COME IN WITH SOME EVIDENCE OF ACTUAL
7 INJURY, AND I KNOW THAT THEIR ACTUAL INJURY CLAIM
8 IS NOT GOING TO INCLUDE THE PATENT VERDICT BECAUSE
9 THEY HAVEN'T PAID IT YET AND THEY'RE NOT GOING TO
10 PAY IT. THEY DON'T EVEN WANT TO BOND IT ANY MORE.
11 THEY HAVEN'T ASSERTED THAT IT'S ACTUAL DAMAGES AND
12 IT'S TOO LATE TO DO THAT BUT I'M ANTICIPATING THAT
13 PERHAPS THEY MIGHT. SO LET ME PAUSE A MOMENT ON
14 THAT.

15 THEY HAVE AN INJUNCTION CLAIM. THE
16 INJUNCTION CLAIM THEY SAY WILL WIPE OUT THE DAMAGE
17 AWARD.

18 IF THEY PREVAIL, AND IN PHASE THREE,
19 THEIR VIEW IS THAT THEY DON'T HAVE TO PAY THE
20 AWARD. SO THEY CAN'T BOTH BOOTSTRAP THE PROSPECT
21 THAT THEY MIGHT PAY THE AWARD IF THEY LOSE PHASE
22 THREE INTO A JURY TRIAL IN PHASE THREE WHEN IF THEY
23 WIN WE WILL NEVER HAVE TO PAY IT.

24 IN ANY EVENT, THEY HAVE NEVER ALLEGED
25 THAT THEY PAID A DIME TO US. THEY DON'T INTEND TO
¶page 12

1 PAY A DIME TO US AND THEY CONTINUE TO INFRINGE.
2 BUT LET'S GET BACK TO THE NOMINAL DAMAGES
3 AWARD. THE -- WE KNOW THAT THAT'S A DOLLAR UNDER
4 NINTH CIRCUIT LAW. AND, AND THAT MEANS UNDER THE
5 DUE PROCESS CASES IF YOU HAVE A, IF YOU HAVE A
6 DOLLAR, YOU CAN'T SUDDENLY GET \$10,000, \$100,000 OR
7 A MILLION DOLLARS IN PUNITIVE DAMAGES.
8 YOU HAVE AN UNDETERMINED AMOUNT OF, OF
9 COMPENSATORY DAMAGES OR PERHAPS NO COMPENSATORY
10 DAMAGES AT ALL AND ONLY A DESIRE BY THE STATE TO
11 SAY YOU HAVE DONE A BAD THING, WE CAN'T FIND THAT
12 YOU SUFFERED ANY, YOU CAUSED ANY ACTUAL DAMAGES,
13 WE'RE GOING TO MAKE YOU PAY A DOLLAR JUST AS A
14 STATEMENT OF OUR PUBLIC POLICY THAT YOU SHOULDN'T
15 HAVE DONE THE BAD THING. THAT'S OFTEN THE REASON
16 GIVEN FOR NOMINAL AWARD.
17 WELL, THAT DOESN'T, AS A DUE PROCESS
18 MATTER, TRANSLATE UNDER GORE AND STATE FARM, AND
19 THE OTHER CASES, TRANSLATE INTO AN AWARD OF
20 PUNITIVE DAMAGES. THAT COULD EXCEED THE SEVENTH
21 AMENDMENT THRESHOLD. YOU COULDN'T HAVE A 20 TO 1
22 RATIO SUDDENLY PAST MUSTER UNDER THE DUE PROCESS
23 CASES THAT HAVE COME ALONG IN THE PAST 10 TO
24 15 YEARS.

25 IT WAS HYNIX'S BURDEN -- LET ME FINISH UP

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1 WITH THAT ISSUE. IT'S HYNIX'S BURDEN ON THIS. WE
2 WERE THE ONLY ONES TO FILE A JURY DEMAND. THEY
3 COULD RELY UPON OUR JURY DEMAND, BUT WHEN WE
4 WITHDRAW IT AND THEY NOW WANT A JURY, IT'S THEIR
5 BURDEN TO SHOW THAT THEY'RE ENTITLED TO IT. IF
6 THERE'S A SHOWING THAT MUST BE MADE OF ACTUAL
7 INJURY, IT'S THEIR BURDEN ON THIS MOTION TO COME IN
8 WITH IT.

9 THE, THE -- IT IS ALWAYS A BURDEN ON THE
10 PARTY THAT WANTS THE JURY TRIAL TO SHOW IT AND
11 THAT'S TRUE REGARDLESS OF THE PUBLIC POLICY THAT
12 SAYS THAT A JURY TRIAL SHOULD BE JEALOUSLY GUARDED.

13 IT'S ALSO TRUE THAT THERE'S A PUBLIC
14 POLICY IN FAVOR OF TRIAL ON THE MERITS, BUT THAT
15 DOESN'T MEAN WHEN PLAINTIFFS DON'T MEET THEIR
16 OBLIGATION TO COME IN WITH SUBSTANTIVE EVIDENCE ON
17 A SUMMARY JUDGMENT MOTION THE PUBLIC POLICY HAS TO
18 GET OUT OF THE WAY. IT WAS HYNIX'S BURDEN AND THEY
19 FAILED TO MEET IT.

20 THE COURT: OKAY.

21 MR. RUBY: TO FOCUS ON YOUR HONOR'S
22 QUESTION, IF THERE IS ACTUAL INJURY SHOWN AN AWARD
23 EVEN OF NOMINAL DAMAGES OF A DOLLAR THAT, THAT
24 UNDER I DON'T THINK IT'S DISPUTED THAT, THAT
25 SUPPORTS AND CAN SUPPORT AN AWARD OF PUNITIVE

page 14

1 DAMAGES.

2 PUNITIVE DAMAGES ARE PRAYED FOR IN THE
3 COMPLAINT, PARAGRAPH 8 OF THE PRAYER. PUNITIVE
4 DAMAGES, EVEN IF THIS WERE ONLY NOMINAL DAMAGES OF
5 A DOLLAR AWARDED, CAN BE GREATLY IN EXCESS OF \$20.
6 THERE ARE MANY, MANY, MANY CASES.

7 THE COURT: AND WHAT ABOUT THEIR ARGUMENT
8 THAT, THAT YOU, YOU HAVE GIVEN UP ANY RIGHT TO

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CLAIM ACTUAL INJURY?

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10 MR. RUBY: WITH RESPECT, WE DISAGREE. I
11 MEAN, THIS HAS BEEN THE SUBJECT OF CONSIDERABLE
12 DISCUSSION IN PRIOR PAPERS. IF I COULD PLEASE
13 INVITE YOUR HONOR'S ATTENTION, YET AGAIN, TO, TO
14 THE INTERROGATORY ANSWERS WHICH, WHICH WERE SERVED
15 IN THIS ACTION, IDENTIFYING AREAS OF ACTUAL INJURY,
16 SOME OF THEM WERE DIGESTED AT PAGE 7 OF OUR
17 RESPONSIVE BRIEF IN THIS CASE.

18 THEY LAY OUT THE AREAS OF ACTUAL INJURY
19 CLAIMED BY, BY HYNIX.

20 IF THERE WAS BEEN NO DISCOVERY NOR
21 ABILITY TO QUANTIFY THE FINANCIAL EFFECTS OF, OF
22 THOSE CLAIMS OF ACTUAL INJURY, THAT'S WHAT NOMINAL
23 DAMAGES ARE FOR.

24 NOMINAL DAMAGES, OF COURSE, ALLOW AN
25 AWARD TO, TO, AS THE CALIFORNIA CASES SAY,

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1 ESTABLISH THE EXISTENCE, THE INVASION OF A LEGAL
2 RIGHT WHICH CANNOT BE QUANTIFIED. SO BY
3 DEFINITION, THE, THE AWARD OF NOMINAL DAMAGES MEANS
4 THAT IT CANNOT BE ESTABLISHED WHAT AN AMOUNT IS
5 AND, AND WITH RESPECT TO IT'S BEEN SUBMITTED,
6 SEVERAL TIMES, WHAT THOSE AREAS OF INJURY ARE.

7 THE COURT: AS A PRACTICAL MATTER, IF, IF
8 THE CASE WENT TO TRIAL AND RAMBUS TOOK THE POSITION
9 THAT YOU HADN'T SUFFERED ANY ACTUAL DAMAGES, OR
10 ACTUAL INJURY, HOW WOULD YOU PROVE IT?

11 MR. RUBY: WELL, WE WOULD PROVE MUCH OF
12 THE PROOF THAT THE JURY WOULD ALREADY HEAR IN THE
13 ANTITRUST CASE ANYWAY AND THAT IS THE EXISTENCE OF
14 A MONOPOLY BY DEFINITION INJURES SOMEONE WHO WISHES
15 TO COMPETE IN THAT MARKET.

16 I MEAN, THAT -- I DON'T WANT TO GET OFF
17 THE QUESTION YOUR HONOR ASKED, BUT AMONG, AMONG
18 OTHER FEATURES OF THIS MOTION IS THE REALITY THAT
19 THE JURY IS GOING TO HEAR SUBSTANTIALLY THE SAME,
20 MUCH OF THE SAME EVIDENCE AND, AND IF WE ARE GOING
21 TO BE ABLE TO PROVE THAT RAMBUS HAS CREATED A
22 MONOPOLY WITH THE CONSEQUENT EFFECTS ON COMPETITION
23 THAT A MONOPOLY ALWAYS HAS, THEN EVEN IF WE DON'T
24 GO ANY FURTHER, RAMBUS -- EXCUSE ME, HYNIX WILL
25 HAVE PROVED ACTUAL INJURY. I MEAN, I HOPE THAT'S

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1 RESPONSIVE TO YOUR HONOR'S QUESTION AND I'M TRYING
2 TO STAY TO THE MAINSTREAM.

3 OKAY.

4 MR. RUBY: SO AS TO THE SEVENTH AMENDMENT
5 ISSUE, THE \$20 THRESHOLD, AGAIN, EVEN IF THERE WERE
6 AN AWARD OF NOMINAL DAMAGES OF A DOLLAR, THE --
7 THERE ARE MANY, MANY CASES WHICH, WHICH UPHOLD
8 PUNITIVE DAMAGES VASTLY GREATER THAN, THAN THE \$20.

9 THE WHOLE ISSUE OF CAMPBELL AND
10 MULTIPLIERS INsofar AS THEY, THEY CONSTRUE
11 PARTICULAR AWARDS, AS YOUR HONOR PROBABLY KNOWS
12 BETTER THAN ANY OF US, IS STILL VERY MUCH UNDER
13 CONSIDERATION BY THE COURTS BUT IT'S QUITE A
14 CONSERVATIVE POSITION TO SAY THAT THE \$20 THRESHOLD
15 IS NOT, IS NOT AN ISSUE HERE.

16 AND AS FAR AS THE ACTUAL INJURY AND THE
17 PROOF OF ACTUAL INJURY THAT'S BEEN DONE AND IT

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18 WOULD BE INEVITABLY THE SUBJECT OF PROOF AT THE
19 ANTITRUST TRIAL.

20 SO I DON'T HAVE, WITH RESPECT, UNLESS
21 THERE ARE OTHER QUESTIONS OR OTHER AREAS THAT WE
22 CAN ADDRESS, I'LL SIT DOWN.

23 THE COURT: OKAY.

24 MR. RUBY: THANK YOU.

25 THE COURT: DO YOU WANT TO COMMENT,

¶page 17

1 MR. PERRY?

2 MR. PERRY: QUICKLY, YOUR HONOR. WITH
3 RESPECT TO THE ANTITRUST CLAIM AND THE, AND THE
4 ACTUAL INJURY CLAIM THERE. THE INTERROGATORY
5 RESPONSES WERE JUST A LIST OF ALLEGATIONS. WE WERE
6 NOT PROVIDED WITH ANY INFORMATION WITH RESPECT TO
7 ALLEGED INJURIES.

8 THERE'S NO EXPERT WITNESS WHO HAS
9 EXAMINED HYNIX'S OPERATIONS OR -- AND WHO IS
10 OFFERING AN OPINION ON HYNIX'S INJURY. THERE'S NO
11 PERCIPIENT WITNESS WHO HAS EVER BEEN IDENTIFIED AS
12 SOMEONE WHO CAN SPEAK TO THAT AND AS FAR AS WE CAN
13 TELL HYNIX HAS NEVER PAID A DIME AS A RESULT OF
14 RAMBUS'S PATENTS, NOT A DIME. IT DIDN'T AFFECT ITS
15 BUSINESS OPERATIONS IN ANY WAY, AND, IN FACT,
16 ALTHOUGH IT OFTEN COMPLAINS ABOUT THE LEVELING OF
17 COSTS IN THIS BUSINESS, IT IS HYNIX THAT UNLIKE OUR
18 LICENSEES HAS HAD THE FREE USE OF OUR PATENTS FOR
19 SEVEN YEARS.

20 THE ONLY DAMAGES THAT THEY HAVE CLAIMED
21 ARE THAT THEY HAD TO PAY THEIR LAWYERS TO FIGHT OUR
22 PATENTS AND THAT'S NOT DAMAGES UNDER THE FRAUD
23 CLAIM. SO THEY CAN'T PROVE ACTUAL INJURY WITH
24 RESPECT TO THE FRAUD CLAIM. THEY CAN ONLY ALLEGE
25 IT AND THEY HAVE NEVER GIVEN US ANY EVIDENCE TO

¶page 18

1 BACK IT UP.

2 SO THEY CAN'T NOW SAY THEY GET A JURY
3 BECAUSE THEY HAD ACTUAL INJURY.

4 THE COURT: WOULD THE, IF HYNIX WAS
5 PROVED TO BE A MONOPOLIST, WOULDN'T THAT IN AND OF
6 ITSELF SUGGEST ACTUAL DAMAGE?

7 MR. PERRY: RAMBUS A MONOPOLIST DOES NOT
8 CREATE NECESSARILY OUR MARKET SHARE, OUR ALLEGED
9 MARKET SHARE, WHICH ACTUALLY DOESN'T EXCEED
10 30 PERCENT.

11 IF WE WERE SOMEHOW PROVED TO BE A
12 MONOPOLIST, THAT DOESN'T SHOW ANY INJURY TO HYNIX.
13 HYNIX MUST ALWAYS SHOW INJURY TO ITSELF IN ORDER TO
14 RECOVER ANYTHING, IN ORDER TO OBTAIN INJUNCTIVE
15 RELIEF.

16 THEY'RE NOT ACTING AS A PRIVATE ATTORNEY
17 GENERAL HERE. THEY'RE NOT ACTING AS THE DEPARTMENT
18 OF JUSTICE TO GO OUT AND CRUSH MONOPOLISTS WHEREVER
19 THEY FIND THEM. THEY'RE A PRIVATE PLAINTIFF. THEY
20 CAN'T GET RELIEF WITHOUT SHOWING ACTUAL INJURY TO
21 THEMSELVES.

22 THE COURT: OKAY. THANK YOU. I WOULD
23 LIKE TO GO AHEAD, UNLESS THERE'S A REASON THAT
24 WE'RE MISSING NECESSARY PLAYERS, TO DISCUSS THE
25 STATUS CONFERENCE BECAUSE, BECAUSE I THINK THERE

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1 IS, THERE IS -- I JUST WANT TO GET SOME IDEAS
2 BECAUSE I THINK WE NEED TO SET ASIDE A HALF A DAY
3 IN THE NEXT WEEK OR TWO TO, TO SORT A LOT OF THINGS
4 OUT.

5 MR. NISSLY: FINE WITH US, JUDGE.

6 MR. PERRY: LET ME BRING UP MY
7 COLLEAGUES, YOUR HONOR.

8 MR. NISSLY: SURE.

9 THE COURT: LET ME JUST ASK A COUPLE OF
10 QUESTIONS TO FIND OUT IF THERE IS DISAGREEMENT
11 BETWEEN THE PARTIES AND THEN GO FROM THERE.

12 DOES THE F.T.C. REMEDY DECISION, AND I
13 KNOW, MR. PERRY, YOU'RE GOING TO ANSWER THIS, BUT
14 AFFECT RAMBUS'S RIGHT TO COLLECT DAMAGES FOR PAST
15 INFRINGEMENT FOR WHICH THE INFRINGER HAS NOT PAID?

16 MR. PERRY: YES, YOUR HONOR. IT DOESN'T
17 AFFECT IT AT ALL. THE ORDER IS VERY CLEAR THAT IT,
18 IT KICKS IN WITH RESPECT TO, WITH RESPECT TO
19 MANUFACTURE OR SALE OF DEVICES THAT OCCUR AFTER THE
20 EFFECTIVE DATE OF THE ORDER. THAT'S IN THE, IN THE
21 FINAL ORDER ITSELF. IT'S IN PARAGRAPH 4.

22 MR. NISSLY: WE DON'T AGREE WITH THAT
23 READING OF THE ORDER, YOUR HONOR. WE THINK THAT
24 RAMBUS'S READING IS FAR TOO NARROW AND THAT THAT
25 READING IS COMPLETELY AT ODDS WITH THE LANGUAGE

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1 OF THE F.T.C.'S OPINION IN THAT REGARD SO WE THINK
2 THAT THAT READING IS WAY TOO CRAMPED. AND IN ANY
3 EVENT, OF COURSE WE'RE NOT ASKING YOU TO ENFORCE
4 THE F.T.C.'S ORDER.

5 THE COURT: I UNDERSTAND THAT. IS IT
6 YOUR POSITION, MR. NISSLY, THAT THE F.T.C. ORDER
7 PRECLUDES RAMBUS FROM, FROM SUING FOR PAST
8 INFRINGEMENT FOR OTHER THAN THOSE SET ROYALTIES?

9 MR. NISSLY: IN A NEW SUIT? IS THAT THE
10 COURT'S --

11 THE COURT: IN A NEW SUIT OR IN A
12 CONTINUATION OF AN EXISTING SUIT?

13 MR. NISSLY: WELL, AS WE STUDY THE ORDER,
14 WE'RE NOT QUITE SURE WE UNDERSTAND EXACTLY THE FULL
15 IMPLICATIONS OF THAT. IT HAS OCCURRED TO US, FOR
16 EXAMPLE, THAT UNDER RAMBUS'S INTERPRETATION THEY
17 COULD FILE A SUIT IN THIS COURT TOMORROW AGAINST A
18 COMPANY CALLED WINBOND, JUST, FOR EXAMPLE, IT'S
19 ANOTHER DRAM PRODUCER, ONE OF THE FEW THAT THEY
20 HAVEN'T SUED SO FAR, AND ARGUE THAT THEY CAN SUE
21 WINBOND FOR PATENT INFRINGEMENT UP UNTIL THE DATE
22 OF FINALITY OF THE F.T.C. ORDER.

23 THE COURT: CAN.

24 MR. PERRY: I'M NOT GOING TO SPEAK ABOUT
25 WINBOND. I KNOW NOTHING ABOUT WINBOND. IF

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1 MR. NISSLY IS TRYING TO GET ANOTHER CLIENT WITH A
2 DOJ ACTION, I'M NOT HERE TO SAY ANYTHING ABOUT
3 WINBOND.

4 THE COURT: NO. THEORETICALLY IF THERE
5 IS SOMEONE WHO HAD INFRINGED YOUR PATENTS, COULD
6 YOU SUE THEM?

7 MR. PERRY: IT SPECIFICALLY SAYS THAT
8 IT'S PROSPECTIVE AND FORWARD LOOKING AND IT DOES

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NOT DO ANYTHING WITH RESPECT TO VALIDITY AND INFRINGEMENT ISSUES.

SO WE COULD CERTAINLY ASSERT OUR PATENTS AGAINST ANYONE WITH RESPECT TO VALIDITY AND INFRINGEMENT ISSUES. AND THEN THE COMMISSION GOES ON TO SAY THAT WHAT YOU CAN'T DO IS TRY TO COLLECT IN EXCESS OF, OF THE RATES WE, WE HAVE COLLECTED FOR YOU FOR THE MANUFACTURE AND SALE OF ANY DEVICE THAT OCCURS AFTER THE EFFECTIVE DATE OF THE ORDER.

AND THEY DID IT THAT WAY BECAUSE OF THE STATUTORY LIMITATIONS ON THE REMEDY?

THE COURT: WELL, ANSWER MY QUESTION. WHAT YOU'RE SAYING IS THAT IF THERE IS ANOTHER INFRINGER OUT THERE THAT YOU HAVEN'T SUED WHO INFRINGED, HAS BEEN INFRINGING FOR YEARS, YOU COULD SUE THEM FOR INFRINGEMENT, COLLECT DAMAGES FROM THEM UP UNTIL THE DATE OF THE FINALITY OF THE

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F.T.C. ORDER AND AT WHATEVER RATES YOU COULD PROVE YOU ARE ENTITLED TO?

MR. PERRY: THAT'S CLEARLY WHAT THE OPINION SAYS, YOUR HONOR.

THE COURT: AND THEN AFTER THE FINALITY OF THE DECISION YOU COULD ONLY GET THE F.T.C. IMPOSED RATES.

MR. PERRY: UNLESS IT'S STAYED THAT'S WHAT WE UNDERSTAND THE ORDER TO SAY, YOUR HONOR.

THE COURT: ALL RIGHT. AND YOU OBVIOUSLY DISAGREE.

MR. NISSLY: WE DON'T AGREE WITH THAT AND WE DON'T THINK THAT'S WHAT THE COMMISSION INTENDED NOR IS IT THE IMPORT OF THEIR OPINION.

MR. PERRY: OF COURSE, IF THAT'S THE CASE, YOUR HONOR, THEN HYNIX IS GETTING A WINDFALL AND OUR LICENSEES HAVE BEEN PAYING US, OF COURSE, AND WHAT THE F.T.C. HAS DONE IS SAY TO INFRINGERS THAT THEY GET A FREE PASS AND MR. NISSLY'S OFT TO QUOTED REMARKS IN HERE ABOUT HOW YOUR HONOR NEEDS TO LEVEL THE INDUSTRY HAVE COME TO NOT.

THE COURT: WELL, JUST TO FOLLOW UP, AND, I, I OBVIOUSLY I'M JUST RAISING QUESTIONS, I'M NOT ANSWERING ANYTHING.

DO YOU THINK, MR. NISSLY, THAT SOMEONE

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WHO HAS BEEN PAYING PURSUANT TO A LICENSE CAN NOW GO BACK AND, AND GET MONEY BACK?

MR. RUBY: YES, WE THINK THAT'S WHAT THE COMMISSION MEANT WHEN IT TALKS ABOUT RESCISSION. IT SAYS THAT EXISTING LICENSEES CAN RESCIND, AND, OF COURSE, THE ESSENCE OF RESCISSION IS PUT THE PARTIES BACK IN THE POSITION THAT THEY WERE BEFORE THEY ENTERED INTO THE CONTRACT. SO WE THINK THAT PEOPLE WHO HAVE PAID ARE ENTITLED TO RESCIND.

THE COURT: AND YOUR POSITION WOULD BE THAT THEY CAN ONLY DO IT AFTER THE FINALITY IN THE ORDER?

MR. PERRY: AND, YOUR HONOR, WE POINTED OUT TO THE DECISION THAT THERE'S A RICO DECISION PHILIP MORRIS THAT SAYS THAT RICO DOES NOT ALLOW FOR DISGORGEMENT.

AND THE FEDERAL TRADE COMMISSION IN ITS

18 OPINION SAYS THAT WE'RE NOT DOING DISGORGEMENT
19 HERE. THAT CASE IS DISTINGUISHABLE. WE'RE NOT
20 ORDERING ANY DISGORGEMENT. WE'RE SIMPLY ORDERING
21 PROSPECTIVE RELIEF. THEY DIDN'T ORDER RESCISSION.
22 THEY USED THE WORD "RESCIND" AND WE'LL GET
23 CLARIFICATION FROM THE FEDERAL TRADE COMMISSION ON
24 THAT, BUT IT'S CLEAR THAT THEY DID NOT INTEND THAT
25 WE GIVE BACK THE HUNDREDS OF MILLIONS OF DOLLARS

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1 ALL IN ONE FAIL SWOOP, AND IF THEY DID, YOUR HONOR,
2 WE'RE PRETTY CERTAIN THEY WILL STAY THE ORDER
3 BECAUSE THAT'S A LOT OF MONEY FOR THE FEDERAL TRADE
4 COMMISSION TO ORDER A SMALL COMPANY LIKE RAMBUS TO
5 GIVE BACK IN A FAIL SWOOP. THEY DIDN'T MEAN TO DO
6 IT AND IT'S INCONSISTENT WITH THEIR OPINION.

7 THE COURT: AS A PRACTICAL MATTER, AND
8 I'M NOT SAYING YOUR ANALYSIS IS WRONG, BUT IT WOULD
9 MAKE THE F.T.C.'S REMEDY PRETTY INEFFECTUAL, WOULD
10 IT NOT?

11 MR. PERRY: WELL, YOUR HONOR, THE F.T.C.

12 THE COURT: BECAUSE WE'RE BEYOND THE
13 TECHNOLOGY AT THIS POINT.

14 MR. PERRY: WELL, THE F.T.C. WAS BUILT
15 THAT WAY. IT IS PURELY INTENDED TO ISSUE CEASE AND
16 DESIST ORDERS IN 2002 AND WHEN WE FILED A MOTION TO
17 STAY THE CASE PENDING THE COURT -- OF THE F.T.C.
18 CASE PENDING THE COURT OF APPEALS RULING IN
19 INFINEON, THE LAWYERS FOR THE F.T.C. CAME IN AND
20 SAID YOU CAN'T STAY THE CASE BECAUSE WE CAN ONLY
21 ISSUE PERSPECTIVE RELIEF. SO EVERY DAY THAT GOES
22 BY, THERE'S, THERE'S LICENSE FEES GOING TO RAMBUS
23 THAT WE COULD NEVER EFFECT HERE.

24 THE F.T.C. UNDERSTANDS THE LIMITS OF ITS
25 POWERS IN THIS DECISION. WE THINK THEY HAVE GONE

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1 BEYOND THE POWERS IN SETTING RATES BUT THEY
2 CERTAINLY RECOGNIZE THAT THEY WERE LIMITED IN THEIR
3 ABILITY TO AFFECT DISGORGEMENT IN A CASE LIKE THIS.

4 THE COURT: THERE'S OBVIOUSLY A
5 DISAGREEMENT WHICH, WHICH WAS DISCUSSED BEFORE AS
6 TO WHETHER THE -- WHEN THE F.T.C. DECISION BECOMES
7 FINAL.

8 MR. NISSLY: YES, YOUR HONOR.

9 MR. PERRY: WELL, IT BECOMES FINAL FOR
10 PURPOSES OF EFFECTIVENESS IN TERMS OF ITS IMPACT ON
11 US AND OUR BUSINESS RELATIONSHIPS 60 DAYS FROM WHEN
12 IT WAS SERVED ON FEBRUARY 2ND, I BELIEVE IS THE
13 DATE.

14 THE COURT: RIGHT. WE'RE TALKING ABOUT
15 FILE FOR THE PURPOSES OF PRIMARY FACTOR AND
16 COLLATERAL ESTOPPEL OR WHATEVER.

17 MR. PERRY: RIGHT. WELL, THE ONLY CASES
18 WE FOUND IN THE DOJ DISTRICT COURT JUDGMENT CONTEXT
19 SAY THAT FINALITY MEANS AFTER ALL APPEALS ARE
20 FOREGONE AND HYNIX HAS NEVER CITED ANYTHING TO THE
21 CONTRARY.

22 MR. NISSLY: YOUR HONOR, IF I MAY RESPOND
23 TO THAT COMMENT, BUT I DIDN'T WANT TO STEP ON YOU.

24 THE COURT: NO, I'M FINE. I'M RAISING
25 ISSUES AS OPPOSED TO RESOLVING ANYTHING. JUST TO

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1 GIVE IDEAS OF WHAT NEEDS TO BE ADDRESSED.
2 MR. NISSLY: WE BELIEVE RAMBUS IS FLATLY
3 WRONG IN ITS FINALITY ARGUMENT. THERE IS A
4 SPECIFIC PROVISION IN THE F.T.C., IN THE CODE THAT,
5 THAT, THAT SPEAKS TO THE ISSUE OF FINALITY OF THE
6 F.T.C.'S OPINION AND IT MAKES IT CLEAR THAT IT'S
7 FINAL IN 60 DAYS AFTER IT'S ISSUED UNLESS IT'S
8 STAYED BY EITHER THE COMMISSION OR COURT OF
9 APPEALS.

10 THE AUTHORITIES THAT RAMBUS HAS SUBMITTED
11 TO THE COURT ON THIS POINT, INCLUDING THEIR
12 SUPPLEMENTAL BRIEF THAT THEY FILED LAST WEEK, ARE
13 NOT ADDRESSING THE RELEVANT FINALITY PROVISION. SO
14 THERE CLEARLY IS AN ISSUE, YOU RESERVED THAT ISSUE
15 THE FINALITY ARGUMENT IN YOUR ORDER OF LAST AUGUST,
16 BUT, WE, WE SIMPLY BELIEVE THAT RAMBUS HAS GOT THIS
17 ONE WRONG.

18 THE COURT: IF, IF THE CONDUCT PHASE
19 RESULTS IN A VERDICT IN FAVOR OF RAMBUS, HOW DOES
20 THAT -- HOW IS THAT TREATED VIS-A-VIS THE F.T.C.
21 ORDER?

22 MR. PERRY: YOU GET A FINAL JUDGMENT
23 FINALLY, YOUR HONOR, AFTER SEVEN AND A HALF YEARS.
24 I ASSUME WE WOULD HAVE A FINAL JUDGMENT AT THAT
25 POINT AND IT WOULD GO UP ON APPEAL BUT THE PATENT

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1 VERDICT IS INEFFECTIVE.

2 THE ONLY QUESTION IS WHETHER OR NOT THE
3 COURT WOULD, WOULD BE IMPACTED BY, BY THE F.T.C.
4 RATES AFTER APRIL IN DETERMINING, DETERMINING IN
5 PROVING UP WHAT THE ADDITIONAL INFRINGEMENT DAMAGES
6 ARE AFTER APRIL AND THAT, AND THAT DEPENDS IN PART
7 ON WHETHER, WHETHER WE WANT TO SEEK THOSE AND
8 WHETHER OR NOT, WHETHER OR NOT HYNIX IS WILLING TO
9 PAY THEM AND, AND TAKE A LICENSE, WHICH THEY
10 HAVEN'T TOLD US AND, AND, AND WHETHER OR NOT THE
11 ORDER, THE F.T.C. ORDER IS STAYED.

12 MR. NISSLY: AT A MINIMUM, YOUR HONOR, WE
13 WOULD BE ENTITLED TO A NEW TRIAL ON THE ISSUE OF
14 PATENT DAMAGES. AS WE TOLD YOU IN THE MOTION WHICH
15 WE FILED A MONTH OR SO AGO WHICH YOU DENIED WITHOUT
16 PREJUDICE, THE IMPACT OF THE F.T.C.'S OPINION IS
17 THAT, THAT THE ROYALTY RATES, WHICH WERE SET IN THE
18 PATENT CASE, THE, THE 0.75 AND 3 AND A HALF PERCENT
19 WERE SET ONLY ON THE BASIS OF EVIDENCE THAT THE
20 F.T.C. HAS NOW FOUND WHERE LICENSE AGREEMENTS WERE
21 REQUIRED AT THE -- PARDON ME.

22 THE COURT: WELL, THIS IS WHERE I'M
23 HAVING SOME, SOME ANALYTICAL PROBLEMS. IF THE
24 PATENT -- IF THE CONDUCT PHASE WENT FORWARD AND IT
25 WAS DETERMINED IN THE CONDUCT PHASE THAT, THAT

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1 RAMBUS DID NOT COMMIT ANY ANTITRUST VIOLATION, OR
2 WAS NOT GUILTY OF UNFAIR COMPETITION, WOULDNT THAT
3 MEAN THAT, THAT THERE WAS NO PROBLEM WITH THE, WITH
4 THE CALCULATION OF THE, OF THE ROYALTY RATES IN THE
5 TRIAL?

6 MR. NISSLY: WELL, YOUR HONOR, WE HAVEN'T
7 SORTED OUR WAY COMPLETELY THROUGH ALL OF THIS
8 MATRIX BUT WE BELIEVE THE ANSWER TO THE COURT'S

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QUESTION IS NO BECAUSE OF THE IMPACT OF THE F.T.C. FINDINGS THAT WE'RE ENTITLED TO A NEW TRIAL ON THE DAMAGE ISSUE BECAUSE OF THE EVIDENCE THAT WAS USED BY RAMBUS TO, TO, TO GO TO THE JURY ON THAT POINT WAS, WAS THE RESULT OF THEIR ILLEGAL CONDUCT AS DETERMINED BY THE F.T.C.

THE COURT: BUT THE CONDUCT PHASE DETERMINED THAT IT WASN'T ILLEGAL CONDUCT, WOULDN'T YOU HAVE TWO CONFLICTING RESULTS?

MR. NISSLY: WELL, THAT WOULD BE CERTAINLY ANOTHER QUESTION TO KEEP US UP LATE AT NIGHT BUT WE THINK THAT, THAT IN ANY EVENT WOULD BE ENTITLED TO A NEW TRIAL ON THAT ISSUE.

THE COURT: MR. PERRY, WHAT IS YOUR VIEW IF THE CONDUCT PHASE WENT FORWARD AND YOU PREVAILED?

MR. PERRY: HYNIX'S POSITION SEEMS TO BE

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THAT THEY GET COLLATERAL ESTOPPEL EFFECT FROM THE F.T.C.'S RULING EVEN IF THEY LOSE THEIR OWN TRIAL AND THAT CAN'T BE THE CASE. IF WE WIN PHASE THREE THEN WE GET FINAL JUDGMENT.

THE COURT: AND WHAT EFFECT DOES THAT PHASE THREE FINAL JUDGMENT HAVE ON THE F.T.C.?

MR. PERRY: WELL, WHEN WE'RE, I ASSUME WE'RE BY THAT POINT IN THE COURT OF APPEALS, WE'RE BRIEFING THE APPEAL FROM THE F.T.C. DECISION AND THAT DECISION MAY HAVE AN IMPACT ON THE COURT OF APPEALS JUST LIKE THE FEDERAL CIRCUIT'S OPINION MAY HAVE AN IMPACT ON THE COURT OF APPEALS WHEN THEY REVIEW THE FEDERAL TRADE COMMISSION'S DECISION.

THE COURT: SAY THAT AGAIN.

MR. PERRY: WHEN THE COURT OF APPEALS IS REVIEWING THE F.T.C.'S DECISION, IT WILL HAVE IN FRONT OF IT THE FEDERAL CIRCUIT'S OPINION IN INFINEON. IT WILL HAVE IN FRONT OF IT WHATEVER THE RESULT IS HERE AND THE FEDERAL -- THE COURT OF APPEALS WILL MAKE WHATEVER, WHATEVER.

THE COURT: THE APPEAL FROM THE F.T.C. GOES WHERE?

MR. PERRY: IT GOES TO ANY CIRCUIT COURT WHERE THE ALLEGED, ALLEGED UNLAWFUL ACTS TOOK PLACE.

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WE HAVE A WIDE CHOICE, IT'S UP TO US, IT WON'T GO TO THE FEDERAL CIRCUIT BECAUSE OF, OF THE STATUTE SETTING UP THE FEDERAL CIRCUIT.

THE COURT: OKAY. SAMSUNG AND MICRON AND NANYA ALL ARE MAKING ESSENTIALLY THE SAME CONDUCT CLAIM THAT HYNIX IS.

MR. NISSLY: YES, YOUR HONOR.

THE COURT: DOES IT MAKE SENSE AT THIS POINT IN TIME FOR THOSE TO ALL BE CONSOLIDATED?

MR. NISSLY: WELL, WE THINK IT DOES. WE SUGGESTED THAT TO YOU IN OUR CASE MANAGEMENT CONFERENCE STATEMENT AND, AND OBVIOUSLY EVERYBODY NEEDS AN OPPORTUNITY TO, TO STATE THEIR CLAIMS IN THAT REGARD AND SO OUR SUGGESTION TO YOU WAS THAT YOU SET A BRIEFING SCHEDULE FOR THAT QUESTION AND, AND TAKE IT UP.

THE COURT: WHAT IS YOUR POSITION ON

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THAT?

MR. PERRY: YOUR HONOR, WE HAVE ONLY JUST
BEGUN TO THINK ABOUT THAT. MY SUSPICION IS THAT
THERE WOULD BE OPPOSITION FROM, FROM SAMSUNG MICRON
AND NANYA AND, AND THAT WE MAY NOT HAVE TO EVER
COME TO JUDGMENT ON IT BUT CERTAINLY IF, IF THEIR
RESPONSE IS THAT THEY NEED THEIR OWN TWO YEARS OF
DISCOVERY, THEY NEED TO, TO TAKE MORE DEPOSITIONS

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OF OUR EXPERTS OR OUR PEOPLE, THEY HAVE TO COME UP
WITH THEIR OWN EXPERTS.

IF THEY'RE NOT GOING TO RELY UPON THE
CASE THAT WE ALREADY PRETRIED AND INSTEAD WANT
ANOTHER TWO YEARS THEN I SUSPECT WE'RE GOING TO SAY
THAT THIS CASE IS ALREADY SEVEN YEARS OLD AND THOSE
CASES ARE ONE YEAR OLD, TWO YEARS OLD, WE SHOULDN'T
NOW HAVE A TRIAL OF PHASE THREE IN HYNIX TWO YEARS
FROM NOW. BUT, BUT I CAN'T, I CAN'T CONFIRM THAT
THAT'S WHERE WE END UP.

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THE COURT: DOES NOT THE, THE -- IS THE
ISSUE OF ROYALTIES ON THE DDR2 AND THE RAMBUS'S OR
RATHER RAMBUS'S CURRENT PRODUCT OR, OR TECHNOLOGY
MORE IMPORTANT FOR RESOLUTION AT THIS POINT THAN
THE, THAN THE CONDUCT WITH RESPECT TO THE -- I
GUESS WHAT I'M TRYING TO SAY, NOT VERY WELL, AREN'T
WE REALLY TALKING ABOUT JUST DOLLARS AT THIS POINT
WITH RESPECT TO THE EXISTING HYNIX VERSUS RAMBUS
CASE WHERE, WHERE THAT, THAT THE 00 CASE WHEREAS
THE, THE NEWER CASE IS MORE IMPORTANT FROM, FROM
THE STANDPOINT OF, OF WHAT IS ON THE MARKET NOW?

MR. NISSLY: PERHAPS I COULD ANSWER IT
THIS WAY, YOUR HONOR: THE CURRENT PRODUCT MIX IN
THE MARKET PLACE THIS YEAR 2006 WILL BE MORE DDR2
THAN THE OTHERS.

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WE ARE STILL MANUFACTURING AND SELLING
SOME SDR, ALTHOUGH A VERY SMALL PERCENTAGE, AND
DDR, BUT DDR2 IS THE PREDOMINANT MEMORY IN THE
MARKET NOW. AND SO THE COURT'S QUESTION TO SOME
EXTENT, YES, THIS CASE, THE 00905 CASE AND, AND
INCLUDED MORE OF THE SDR AND THE DDR BUT THE COURT
WILL RECALL THAT OUR DDR2 PRODUCTS WERE FOUND TO
INFRINGE ON THE SAME BASIS AS SDR AND DDR WHICH IS
ONE OF THE PIECES OF EVIDENCE WE WILL HAVE WHICH
WAS NOT BEFORE THE F.T.C. ON THAT CONDUCT OR
EARLIER ISSUE.

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MR. PERRY: YOUR HONOR, MR. NISSLY WILL
KNOW BETTER THAN WE WILL WHAT THEIR PRODUCTS,
PRODUCT MIX IS INTENDED TO BE IN 2007 AND 2008.

I THINK THAT, THAT IT'S, IT'S IMPORTANT
FOR RAMBUS TO GET RESOLUTION AND, AND JUDICIAL
REVIEW OF, OF THE PATENT VERDICT IT HAS OBTAINED
THAT IT WOULD BE UNFORTUNATE IF IT WAS ALL PUT OFF
BUT, BUT, UM, I UNDERSTAND THAT THERE'S A LOT OF
DIFFERENT DEVELOPMENTS IN THESE CASES AND I THINK
THAT IT'S HARD TO KNOW WHERE, WHERE SAMSUNG,
MICRON, AND NANYA, FOR EXAMPLE, WANT TO HAVE THOSE
CLAIMS TRIED.

THEY HAVE PRESENTED, ESSENTIALLY THOSE
SAME CLAIMS IN ANOTHER FORUM AND IT WOULD BE

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1 UNFORTUNATE IF THEY, IF THEY WERE PLAYING WITH THEM
2 OFF ONE AGAINST THE OTHER.

3 THE COURT: WELL, WHAT I SUGGEST IS THIS:
4 THAT ONE OR BOTH OF YOU VOLUNTEER TO, TO MAKE
5 CONTACT WITH MICRON, NANYA, AND SAMSUNG AND WORK
6 OUT A DATE WHERE YOU COULD ALL COME IN AND SPEND
7 SAY HALF A DAY WITH ME CLEARING THAT DATE OBVIOUSLY
8 WITH THE CLERK.

9 AND THEN BEFORE THAT HEARING FILE WITH ME
10 A JOINT STATEMENT AS TO, AS TO HOW YOU FEEL THE
11 CASES SHOULD PROCEED FROM THIS POINT FORWARD AND IN
12 THIS COURT SETTING FORTH WHAT YOU AGREE ON AND WHAT
13 YOU DISAGREE ON AND LISTING ISSUES THAT YOU THINK
14 NEED RESOLUTION IN ADDITION TO THOSE THAT ARE
15 ALREADY UNDER SUBMISSION AND THAT WE GO FROM THERE.

16 MR. NISSLY: WE'LL DO THAT, YOUR HONOR.
17 THAT'S FINE.

18 THE COURT: I MUST BRING UP AGAIN HAVE
19 YOU THOUGHT ABOUT GETTING TOGETHER AND TRYING TO
20 RESOLVE THIS MESS?

21 MR. NISSLY: WELL, WE HAVEN'T, YOUR
22 HONOR. BUT --

23 MR. PERRY: WELL --

24 MR. NISSLY: PARDON ME. BUT AS THE COURT
25 NOTED IN YOUR ORDER OF LAST YEAR THE FINDINGS AND

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1 THE RULINGS OF THE F.T.C. CLEARLY CHANGE THE
2 DYNAMIC HERE AND PART OF THAT INQUIRY INTO HOW THE
3 CASE MOVES FORWARD IF YOU WANT TO SEND US TO
4 MAGISTRATE SEEBORG I'M SURE ON BEHALF OF HYNIX THAT
5 WILL WORK FINE WITH US.

6 MR. PERRY: MR. NISSLY MAY HAVE FORGOTTEN
7 THAT JUDGE KRAMER HAD THE SAME QUESTION WITH US
8 LAST MONTH AND TRIED TO WORK OUT MEDIATION WITH
9 JUSTICE KAY OR SOMEBODY IN THAT CASE. WE'RE HAPPY
10 TO MEDIATE IN FRONT OF ANYBODY WITH ANYBODY AT ANY
11 TIME AND IS OUR POSITION AND WE DON'T CARE IF IT'S
12 JUDGE SEEBORG OR JUSTICE KAY BUT JUDGE KRAMER HAD
13 THE SAME THOUGHT A MONTH AGO.

14 THE COURT: WHO WOULD YOU PREFER?

15 MR. NISSLY: WELL, WE BELIEVE THAT
16 MAGISTRATE JUDGE SEEBORG HAS MORE EFFORT, I
17 SHOULDN'T SAY MORE EFFORT, BUT MORE BACKGROUND IN
18 THIS CASE AND HAS SPENT MORE TIME IN IT IN TERMS OF
19 MEDIATION AND HE WOULD BE MORE EFFECTIVE. NO
20 DISRESPECT TO JUDGE KAY BUT WE FELT THAT MAGISTRATE
21 JUDGE SEEBORG SIMPLY HAD A BIGGER INVESTMENT IN IT.

22 MR. PERRY: THEY BOTH HAVE AN INVESTMENT,
23 YOUR HONOR, BUT LIKE I SAID, WE DON'T CARE. I
24 THINK IT MIGHT BE FUN TO HAVE BOTH OF THEM. I
25 THINK WE MIGHT FIND DIFFERENT PERSPECTIVE ON THE

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1 DIFFERENT CASES. THERE IS, IN OUR VIEW, A
2 SUBSTANTIAL THREAT OF LIABILITY UP IN THE SAN
3 FRANCISCO SUPERIOR COURT CASE THAT JUDGE SEEBORG
4 MAY NOT RECOGNIZE BECAUSE IT'S NOT IN THIS BUILDING
5 AND VICE VERSA AND I UNDERSTAND THE VICE VERSA
6 ASPECT OF IT BUT WE'LL GO WHERE EVER WITH ANYBODY.

7 THE COURT: HOW ABOUT A SETTLEMENT
8 CONFERENCE WITH BOTH OF THEM AT THE SAME TIME?

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MR. NISSLY: FINE, YOUR HONOR.
MR. PERRY: WE CAN SELL TICKETS, YOUR HONOR.
MR. NISSLY: WE ARE GOING TO NEED A BIG BUILDING.
THE COURT: LET ME.
MR. PERRY: YOUR HONOR, IN PART, IT'S SERIOUS BECAUSE IF WE HAVE THAT MANY PARTIES AND THAT MANY LAWYERS IT REALLY ENDS UP WITH A LOT OF PEOPLE SITTING AROUND AND THEY COULD DO SOME TAG TEAM EFFECTIVELY SO THERE'S NOT FIVE PEOPLE AND THEIR CLIENTS.
THE COURT: LET ME EXPLORE THAT IDEA TO SEE IF IT MAKES SENSE AND BECAUSE AS I HAVE SAID MANY TIMES BEFORE, NOT ONLY DOES THIS CASE STRIKE ME, I THINK IT STRIKES ANY REASONABLE OUTSIDE OBSERVER AS ABSURD THAT IT ISN'T RESOLVED BECAUSE

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THE PARTIES CAN USE EACH OTHER TO THEIR BENEFIT AND TO CONTINUE FIGHTING WITH, WITH NO FINAL RESOLUTION IN THE HORIZON. I MEAN, EVEN IF I GO WITH, WITH SPEED AT THIS POINT AND FINALIZE THE HYNIX RAMBUS DISPUTE, THAT CERTAINLY IS JUST THE END OF A FIRST PHASE AND THE BEGINNING OF A NEXT.
AND, AND CERTAINLY, AND MAYBE THE PARTIES DON'T CARE BUT FROM A PUBLIC INTEREST STANDPOINT, IN PUBLIC GOOD STANDPOINT, IT'S JUST A SHAME THAT THESE CASES AREN'T SETTLED. THERE'S, THERE'S TECHNOLOGY OUT THERE THAT SHOULD BE AVAILABLE TO THE PUBLIC AT THE BEST POSSIBLE PRICES AND TO CONTINUE TO LITIGATION CERTAINLY CREATES ALL KINDS OF PROBLEMS LET ALONE SPENDING A TREMENDOUS AMOUNT OF THE COURT'S TIME. I MEAN, TO BE BLUNT, IF YOU CONSIDER THE, THE TEAMS OF ATTORNEYS INVOLVED FOR EACH OF THE PARTIES AND RECOGNIZE THAT THE, THAT THE COURTS WORKING BASICALLY WITH ONE JUDGE PART-TIME AND ONE LAW CLERK PART-TIME IS AN INCREDIBLE UNDERTAKING WHICH, YOU KNOW, IT'S PART OF MY JOB AND I'M WILLING TO DO IT BUT IT DOES MEAN THAT AT TIMES THINGS DON'T GET DONE AS QUICKLY AS I IDEALLY WOULD LIKE AND THERE'S JUST BETTER WAYS OF RESOLVING THIS, THIS DISPUTE THAN, THAN CONTINUING IN LITIGATION.

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WITH THAT SPEECH I'LL END AND YOU'LL GET IN CONTACT WITH MS. GARCIA AND WORK OUT A DATE.
I THINK WE SHOULD PLAN A GOOD HALF DAY, AND I WILL TALK TO JUDGE SEEBORG AND SEE WHAT HIS REACTION IS TO THE IDEA OF, OF COMBINING WITH JUDGE KRAMER FOR A SETTLEMENT CONFERENCE AND IF THAT MAKES SENSE WE CAN -- HE OR I CAN CONTACT JUDGE KRAMER.
MR. PERRY: JUSTICE KAY.
THE COURT: JUSTICE KAY. WHY DID I SAY KRAMER?
MR. PERRY: IT'S HIS CASE. JUSTICE KAY WAS THE MEDIATOR UP THERE.
MR. NISSLY: I DID HAVE ONE OTHER ITEM THAT I WOULD LIKE TO RAISE WITH THE COURT BRIEFLY IF I MIGHT. AND THAT IS THE RELEASE OF THE BOND. THE COURT ORDERED US TO POST A BOND AS YOU RECALL.

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THE COURT: RIGHT.
MR. NISSLY: THE REQUIREMENT OF THE BOND WAS AS A CONDITION OF THE STAY. THE STAY IS NOW EXPIRED.

THE COURT: RIGHT.
MR. NISSLY: THAT BOND IS QUITE EXPENSIVE AS WE PUT INTO THE COURT. THERE'S NO REASON FOR IT. WE WOULD LIKE IT TO BE RELEASED AND

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EXONERATED.
THE COURT: WHY DON'T YOU DO A MOTION ON AN ORDER SHORTENING TIME SO I CAN RESPOND.

MR. PERRY: WE THINK IT'S STILL APPROPRIATE TO HAVE THEM IN PLACE. THERE'S ONE OTHER ISSUE I WOULD LIKE TO RAISE AND MAYBE IT'S THE SAME ONE ALLEN WANTS TO RAISE.

GIVEN THE NUMBER OF PEOPLE INVOLVED WE STILL UNDERSTAND WE HAVE A TENTATIVE SCHEDULE SET IN THIS COURT FOR JULY 7TH OR 9TH.

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THE COURT: RIGHT.
MR. PERRY: WE ASKED FOR LEAVE TO FILE A SUMMARY JUDGMENT MOTION ON THE MONOPOLIZATION CLAIM. WE THINK THERE'S A REASON TO GET RID OF THAT CLAIM AND SOLVE ALL OF THE PROBLEMS AND IN LIGHT OF WHAT HAPPENED IN THE PATENT CASE AND THEREAFTER.

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THE COURT: WHY DON'T WE DISCUSS WHETHER OR NOT YOU CAN MAKE THAT MOTION AT OUR UPCOMING HEARING.

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MR. NISSLY: FINE.
MR. RUBY: YOUR HONOR, VERY BRIEFLY TO PUT SOMETHING ON THE RECORD THAT I DON'T THINK CHANGES ANYTHING. AS YOUR HONOR KNOWS WE'RE SET FOR TRIAL JULY 9TH, I THINK WE'RE ALL, WE

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UNDERSTAND THAT.
THERE WAS A, A PROVISIONAL DATE OF MARCH 19TH THAT WAS SET LONG AGO. I, I HAVE INDICATED AT THE TIME IT WAS SET BACK IN AUGUST THAT I THOUGHT I WOULD BE IN TRIAL IN MARCH ON A LONG CASE.

HUH, AND YESTERDAY I WAS NOTIFIED THAT THAT LONG CASE HAS SETTLED AND I IMMEDIATELY NOTIFIED ALL COUNSEL. LIKE I SAID, I DON'T THINK IT CHANGES ANYTHING. I THINK, I THINK JULY IS STILL THE TRIAL DATE. BUT I WANTED TO MAKE THAT DISCLOSURE ON THE RECORD.

THE COURT: I DON'T THINK AT THIS POINT IT'S REALISTIC TO THINK ABOUT MARCH.

MR. RUBY: OKAY. THANK YOU VERY GOOD.
MR. NISSLY: THANKS, YOUR HONOR.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

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Exhibit 3 - SDR and DDR DRAM Sales and Royalty Analysis

I. SDR and DDR Worldwide Revenues for 1999-2009 (Actual and Projected)

<u>Calendar Year</u>	<u>World Wide DRAM Revenues (\$m) [1]</u>	<u>SDR DRAM Market Share (Percentage of Unit Shipments) [2]</u>	<u>Estimated SDR World Wide Revenues (\$m)</u>	<u>DDR DRAM Market Share (Percentage of Unit Shipments) [2]</u>	<u>Estimated World Wide DDR DRAM Revenues (\$m)</u>	<u>Total Worldwide SDR & DDR DRAM Revenues (\$m)</u>
1999	\$23,149	84.2%	\$19,495	0.0%	\$0	\$19,495
2000	\$31,551	85.7%	\$27,051	1.1%	\$359	\$27,411
2001	\$11,626	81.0%	\$9,413	8.6%	\$1,003	\$10,415
2002	\$15,481	55.5%	\$8,595	37.9%	\$5,863	\$14,457
2003	\$17,521	22.4%	\$3,925	72.5%	\$12,704	\$16,629
2004	\$26,317	17.6%	\$4,619	72.8%	\$19,154	\$23,773
2005	\$25,206	12.3%	\$3,094	58.2%	\$14,674	\$17,768
2006	\$33,867	9.1%	\$3,067	29.9%	\$10,127	\$13,194
2007	\$38,972	6.7%	\$2,610	12.0%	\$4,690	\$7,300
2008	\$40,580	4.6%	\$1,878	8.3%	\$3,349	\$5,226
2009	\$27,366	2.9%	\$799	6.7%	\$1,836	\$2,635

[1] Source: Worldwide DRAM Revenue History and Forecast, 2000-2010, Gartner Dataquest (November 2006)

[2] Source: Long-Term Worldwide DRAM Technology Forecast, 1999-2010 Table 7-1, Gartner Dataquest (November 2006)

Exhibit 3 - SDR and DDR DRAM Sales and Royalty Analysis

II. 1999-2009 Distribution of DDR and SDR DRAM Sales (Actual and Projected)

	<u>World Wide SDR Revenues (\$m)</u>	<u>World Wide DDR Revenues (\$m)</u>	<u>Total Worldwide SDR & DDR DRAM Revenues (\$m)</u>
1999-2006 SDR & DDR Totals:	\$79,257.64	\$63,884.19	\$143,141.83
1999-2009 SDR & DDR Totals:	\$84,544.26	\$73,759.62	\$158,303.88
Percentage of Projected 1999-2009 SDR & DDR DRAM Revenue earned by 12/31/06:	<u>93.7%</u>	<u>86.6%</u>	

Exhibit 3 - SDR and DDR DRAM Sales and Royalty Analysis

III. Difference Between Commission Royalty and Hypothetical Rambus Recovery on 1999-2006 SDR & DDR Revenues [3]

**Estimated Royalty
Revenues (\$m)**

SDR DRAM:

Rambus Rate (0.75%):	\$297.22
Commission Maximum Rate (0.25%):	\$99.07
Difference Between Royalty Rates:	<u>\$198.14</u>

DDR DRAM:

Rambus Rate (3.5%)	\$1,117.97
Commission Maximum Rate (0.05%)	\$159.71
Difference Between Royalty Rates:	<u>\$958.26</u>

Total Excess Royalty (SDR & DDR DRAM): \$1,156.41

[3] Calculations assume that 50% of all Worldwide SDR & DDR DRAM sold during 1996-2006 was not previously subject to a Rambus royalty

United States District Court
For the Northern District of California

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E-filed on: 7/14/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HYNIX SEMICONDUCTOR INC., HYNIX
SEMICONDUCTOR AMERICA INC.,
HYNIX SEMICONDUCTOR U.K. LTD., and
HYNIX SEMICONDUCTOR
DEUTSCHLAND GmbH,

Plaintiffs,

v.

RAMBUS INC.,

Defendant.

No. CV-00-20905 RMW

ORDER GRANTING HYNIX'S MOTION
FOR A NEW TRIAL ON THE ISSUE OF
DAMAGES UNLESS RAMBUS ELECTS
REMITTITUR OF THE JURY AWARD TO
\$133,584,129

[Re Docket Nos. 2064, 2065]

The jury awarded Rambus Inc. ("Rambus") damages in the amount of \$306,967,272 in the patent phase of this trial. Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor U.K. Ltd., and Hynix Semiconductor Deutschland GmbH (collectively, "Hynix") move for a new trial on the issue of damages or, in the alternative, for remittitur. Rambus opposes the motion. The court has reviewed the papers and considered the arguments of counsel. For the reasons set forth below, plaintiffs' motion for a new trial on the issue of damages is GRANTED unless Rambus files notice with the court within thirty (30) days of this order accepting remittitur of

ORDER GRANTING HYNIX'S MOTION FOR A NEW TRIAL ON THE ISSUE OF DAMAGES UNLESS RAMBUS ELECTS
REMITTITUR OF THE JURY AWARD TO \$133,584,129—C-00-20905 RMW
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1 the jury award to \$133,584,129 for damages through December 31, 2005.¹

2 **I. ANALYSIS**

3 **A. A Reasonable Royalty**

4 "[U]pon finding for the claimant the court shall award the claimant damages adequate to
5 compensate for the infringement, but in no event less than a reasonable royalty for the use made of
6 the invention by the infringer." 35 U.S.C. § 284. Section 284 establishes a floor below which
7 damage awards may not fall. *See Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320,
8 1326 (Fed. Cir. 1987). The "reasonable royalty" analysis may be measured by "[w]hat a willing
9 licensor and a willing licensee would have agreed upon in a suppositious negotiation for a
10 reasonable royalty." *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1121
11 (S.D.N.Y. 1970); *see also Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1078 (Fed. Cir.
12 1983) (describing the hypothetical negotiation as one "resulting from arm's length negotiations
13 between a willing licensor and a willing licensee").

14 The burden of proving damages rested with Rambus.² Its expert, Professor David J. Teece,
15 testified that appropriate royalty rates were 0.75% for Hynix's SDRAM device and 3.50% for the
16 DDR SDRAM ("DDR") device. The parties agree that the evidence supports these royalty rates.
17 Rambus, however, claims that the higher rates, as necessarily applied by the jury, are supported by
18 the evidence. Teece testifies that his rates were conservative because: (1) rates in comparable
19 licensing agreements reflected an uncertainty discount; (2) a hypothetical negotiation required
20 consideration of only United States sales as opposed to comparable licensing agreements which
21 were based upon worldwide sales; (3) comparable licensing agreements included up-front fees in
22 addition to the running royalty rates; and (4) a published survey indicated higher royalty rates are

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24 ¹ In light of the court's conclusion that the damages found by the jury are not supported
25 by the weight of the evidence, the court will not separately discuss Hynix's assignments of evidentiary
error. However, the court does not find them meritorious.

26 ² Prior to trial, the parties stipulated that SDRAM and DDR sales through December 31,
27 2005 were \$1,702,544,332 and \$2,742,557,314, respectively, representing the royalty base for the
28 damages period through December 31, 2005. Thus, the issue on damages was essentially limited to a
determination of the appropriate royalty rates for the two types of devices.

1 commanded by revolutionary technologies.

2 The explanations provided by Teece do support a conclusion that his suggested royalty rates
3 were conservative, but he provided no meaningful guidelines to quantify any adjustment to his
4 suggested rates. In fact, one could reasonably infer that if he could have quantified an adjustment
5 without merely speculating, he would have done so.

6 **B. Adjustments to Reasonable Royalty Rates**

7 The question, then, is whether there is sufficient evidence regarding these factors to provide
8 the jury with a basis to make a reasonable upward adjustment to Teece's royalty rates, as opposed to
9 leaving the jury to make such an estimate by mere speculation and conjecture. "[A] trier of fact
10 must have some factual basis for a determination of a reasonable royalty." *Unisplay S.A. v. Am.*
11 *Elec. Sign Co.*, 69 F.3d 512, 517 (Fed. Cir. 1995). Testimony by an expert must be "more than
12 belief or unsupported speculation." *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993).
13 A jury's award of infringement damages cannot be upheld if the amount is "clearly not supported by
14 the evidence, or based only on speculation or guesswork." *Union Carbide Chems. & Plastics Tech.*
15 *Corp. v. Shell Oil Co.*, 425 F.3d 1366, 1373 (Fed. Cir. 2005) (internal quotation and citations
16 omitted).

17 **1. Uncertainty Discount**

18 Teece testified that his proposed rates were conservative because they did not account for an
19 "uncertainty discount" that a negotiating patentee and licensee take into account because of
20 uncertainty as to whether the patents are actually valid and infringed at the time of negotiations.
21 Here, in contrast, the patents were assumed valid and infringed for purposes of the damages
22 calculation. Teece testified upon cross-examination that certain published statistics have shown that
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1 53.4% of litigated patents are found valid.³ On redirect Teece quantified the effect of uncertainty
2 using an analogy:

3 Q: [Mr. Stone] Now, as an economist, if I have the opportunity to win a bet for
4 \$2, and if my chances of [winning] a \$2 bet are 50 percent, what would I be
willing to pay?

5 A: [Professor Teece] Well, it depends on your risk proclivities, but you might
be willing to pay a buck.

6 Q: [Mr. Stone] Okay. So if the chances, if in 2000 the various companies who
7 were negotiating with Rambus thought that there was a 50-50 chance and it
was the 50-50 chance that led them to agree to pay 0.75 and 3.5, if we now
8 assume, that's at the 50 percent rate – if we now assume the patents are valid
and infringed so it's 100 percent, or a sure thing, what would these
computations lead to as the royalty rates that would be agreed?

9 A: [Professor Teece] If you knew that the patent was valid and infringed and
you were willing to pay a buck before, you'll pay two bucks now, so the rates
would be twice [what] they would otherwise be.

10 Tr. Trans. 1167:5-25. Therefore, Teece implied that elimination of uncertainty could have the effect
11 of doubling the royalty rates. Teece also testified that the license agreement negotiated between
12 Rambus and Hitachi, another DRAM manufacturer, provided for a 1% royalty rate for the SDRAM
13 and a 4.25% royalty rate for the DDR. Teece explained that while the agreement with the other
14 DRAM manufacturers were negotiated outside of litigation, the agreement with Hitachi was
15 negotiated after litigation for patent infringement had already commenced. Tr. Trans. 971:2-981:11;
16 1058:7-12; Tr. Ex. 5661. Therefore, that fact suggests that the removal of some of the uncertainty
17 about infringement or invalidity of the Rambus patents may justify a similar higher rate.

18 **2. U.S.-Only Sales Base**

19 Teece further testified that his suggested royalty rates were based on a comparison with
20 license agreements that covered worldwide sales whereas the hypothetical negotiations
21 contemplated a U.S.-only sales base. Teece explained that a negotiating patentee would generally
22 agree to a lower royalty rate for a worldwide license because the patentee would not have to
23 separately obtain and enforce licenses outside the U.S., where patent rights may not be as protected
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26 ³ However, Teece did not offer an opinion about these surveys because, pursuant to the
27 court's motion *in limine* ruling, the underlying surveys were statistically insignificant and did not
28 provide a valid legal basis to support an expert opinion quantifying the uncertainty discount. Mar. 1,
2006 Order on Mots. *In Limine* at 13-14.

1 or protectable as in the U.S. Therefore, narrowing the royalty base to only the U.S. would lead to a
2 higher royalty rate. In particular, Teece stated that the running royalty might be one, two, or three
3 (but not four) times higher, and that "there would be a premium, for sure." Tr. Trans. 1127:8-10.
4 This testimony as to the possible effect of basing royalty rates on United States' sales only was pure
5 speculation. No quantitative evidence was introduced.

6 **3. Up-Front Fees**

7 Teece also noted that the comparable license agreements with seven other DRAM
8 manufacturers each included an up-front fee in addition to the running royalty rate. However, his
9 opinion as to the appropriate Hynix/Rambus royalty rates did not take into account the payment of
10 any up-front fees. At trial, Rambus introduced an exhibit which indicated the up-front fee amount
11 for each of the seven comparable license agreements upon which Teece based his reasonable royalty
12 rates. See Tr. Ex. 5661. However, Teece testified that although "it's not uncommon, in a patent
13 licensing arrangement, to have, in addition to a running royalty, an up-front fee," he concluded that
14 there would not be an up-front fee in the instant hypothetical negotiation. Tr. Trans. 1057:24-
15 1058:2; 1060:19-1061:10. As Teece explained on direct examination, he excluded an up-front
16 payment in his opinion on the appropriate royalty rates because "it's not entirely clear to me why
17 these payments were made. In some cases it was for past infringement, in some cases it was not."
18 Tr. Trans. 1061:3-10. There was no other evidence from which the jury could have reasonably
19 inferred that a Hynix/Rambus license would have included an up-front payment.

20 **4. Revolutionary Technologies**

21 Teece also testified that a survey published in 1997 in *Les Nouvelles* supports royalties in the
22 range of 5% to 10% for "revolutionary technologies." At the same time he noted that the 5% to 10%
23 range of royalty rates is an average across different industries and includes those for pharmaceutical
24 licenses, which tend to command higher rates, and licenses for medical equipment and software,
25 which tend to command very high rates. Tr. Trans. 1072:11-20; 1145:4-19. Teece declined to opine
26 that the claims-in-suit represented revolutionary technologies. Teece also noted that another survey,
27 which he considered along with the *Les Nouvelles* survey, stated a median royalty rate of 3.2% for
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1 the electronics industry. Tr. Trans. 1073:22-1075:4. No evidence was introduced that provided
2 guidelines or a basis to adjust for the nature of the Rambus inventions. Therefore, the inclusion of
3 any amount in the royalty rate because the Rambus patents involved "revolutionary technology"
4 would be the result of speculation. Further, although there may have been revolutionary aspect to
5 some of Rambus' patents (e.g., the use of a narrow multiplexed bus), no evidence established a basis
6 for including any particular amount because of the alleged revolutionary technology or that the
7 particular patent-in-suit involved revolutionary technology, no evidence established a basis for
8 including any particular amount.

9 **C. Remittitur**

10 "[T]he use of remittitur enables parties to avoid the delay and expense of a new trial when a
11 jury's verdict is excessive in relation to the evidence of record." *Unisplay*, 69 F.3d at 519 (citing 11
12 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil 2d* §
13 2815 (2d ed. 1995)). In the Federal Circuit, the "maximum recovery rule" applies in calculating
14 excessive damages to remit. *Id.* This rule "requires that the determination be based on the highest
15 amount of damages that the jury could properly have awarded based on the relevant evidence." *Id.*
16 Applying the maximum recovery rule here, the evidentiary record as a whole could support only one
17 basis for quantifying an upward adjustment to Teece's proposed royalty rates. As was presented to
18 the jury, the rates in the Hitachi license agreement were 1% for SDRAM and 4.25% for DDR.
19 Teece explained to the jury that the rates for Hitachi may have been higher because the negotiations
20 were made after patent infringement litigation between the parties had commenced. In comparison,
21 the other DRAM manufacturers negotiated the lower rates of 0.75% for SDRAM and 3.50% for
22 DDR outside of litigation. Teece also explained that a negotiating patentee and licensee generally
23 agree to a lower royalty rate if there is uncertainty as to whether the patents are actually valid and
24 infringed. The jury could have reasonably concluded that because the patents are assumed valid and
25 infringed, Teece's proposed reasonable royalty rates might be adjusted upward to the rates in the
26 Hitachi agreement to reflect the effect of uncertainty about the patents-in-suit.

27 Although the evidence supports that Teece's proposed rates are conservative, the evidence as
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1 to how conservative is insufficient to justify any particular amount in excess of the royalty rates in
2 the Hitachi license agreement. Teece did not adjust for the factors that he described as making his
3 opinion conservative. Presumably, he did not adjust for them because, at least in part, he believed
4 that the amount of any adjustment would be speculative and subject to conjecture. The record
5 supports a maximum recovery of \$133,584,129, which is the royalty amount calculated using the
6 Hitachi royalty rates.⁴ The jury awarded damages totaling \$306,967,272. Accordingly, the court
7 finds remittitur of \$173,383,143 of the jury award is warranted.

8 **IT IS HEREBY ORDERED THAT,**

9 Hynix's motion for a new trial on the issue of damages is GRANTED unless Rambus files
10 notice with the court within thirty (30) days of this order accepting remittitur of the jury award to
11 \$133,584,129 for damages through December 31, 2005.

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13 DATED: 7/14/2006

Ronald M Whyte

RONALD M. WHYTE
United States District Judge

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27 ⁴ This total is obtained by applying 1% to the stipulated SDRAM sales (through December
28 31, 2005) of \$1,702,544,332 and 4.25% to the stipulated DDR sales (through December 31, 2005) of
\$2,742,557,314.