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

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

Case No. CV 00-20905 RMW

9 Plaintiffs,

10 v.

11 RAMBUS, INC.,

12 Defendant.

13

14 RAMBUS INC.,

Case No. C05-00334 RMW

15

16 Plaintiff,

17

18 v.

19 HYNIX SEMICONDUCTOR INC., HYNIX  
20 SEMICONDUCTOR AMERICA INC.,  
21 HYNIX SEMICONDUCTOR  
MANUFACTURING AMERICA INC.,

**MANUFACTURERS' OPPOSITION TO  
RAMBUS INC.'S DAUBERT MOTION  
NO. 1 TO EXCLUDE CERTAIN  
TESTIMONY OF RICHARD J. GILBERT**

22

23 SAMSUNG ELECTRONICS CO., LTD.,  
24 SAMSUNG ELECTRONICS AMERICA,  
25 INC., SAMSUNG SEMICONDUCTOR,  
26 INC., SAMSUNG AUSTIN  
27 SEMICONDUCTOR, L.P.,

Date: November 21, 2007  
Time: 2:00 p.m.  
Place: Courtroom 6, 4th Floor  
Judge: Hon. Ronald M. Whyte

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NANYA TECHNOLOGY CORPORATION,  
NANYA TECHNOLOGY CORPORATION  
U.S.A.,

**[Redacted Version]**

Defendants.

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<p>RAMBUS INC.,</p> <p>Plaintiff,</p> <p>v.</p> <p>SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG SEMICONDUCTOR, INC., SAMSUNG AUSTIN SEMICONDUCTOR, L.P.,</p> <p>Defendants.</p>	<p>Case No. C 05-02298 RMW</p>
<p>RAMBUS INC.,</p> <p>Plaintiff,</p> <p>v.</p> <p>MICRON TECHNOLOGY, INC., and MICRON SEMICONDUCTOR PRODUCTS, INC.,</p> <p>Defendants.</p>	<p>Case No. C 06-00244 RMW</p>

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LA2:846322.1

1 Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix  
2 Semiconductor Manufacturing America Inc., Hynix Semiconductor U.K. LTD; and Hynix  
3 Semiconductor Deutschland GmbH (collectively “Hynix”), Nanya Technology Corporation  
4 (“Nanya”), Nanya Technology Corporation USA (“Nanya USA”), Micron Technology, Inc., and  
5 Micron Semiconductor Products, Inc. (collectively, “Micron”), Samsung Electronics Co., Ltd.,  
6 Samsung Electronics America, Inc., Samsung Semiconductor, Inc. and Samsung Austin  
7 Semiconductor, L.P. (collectively, “Samsung”) (together, “Manufacturers”) respectfully submit  
8 this memorandum in opposition to Rambus Inc.’s (“Rambus”) Daubert Motion No. 1 To Exclude  
9 Certain Testimony of Richard J. Gilbert.

### 10 11 INTRODUCTION

12 The Manufacturers have designated Dr. Richard J. Gilbert as an economic expert  
13 to testify in this action. Dr. Gilbert is professor in economics at the University of California at  
14 Berkeley, where he served as Chair of the Department of Economics from 2002 to 2005 and  
15 where he currently serves as Chair of the Competition Policy Center. Dr. Gilbert also has a  
16 distinguished record of public service in the field of antitrust economics, serving, *inter alia*, as  
17 Deputy Assistant General Counsel for Economics in the Antitrust Division of the U.S.  
18 Department of Justice from 1993 to 1995. Dr. Gilbert also had a principal role in drafting the  
19 Antitrust Guidelines for the Licensing of Intellectual Property which were adopted by the  
20 Department of Justice and the Federal Trade Commission in 1995. *See* Expert Report of Richard  
21 Gilbert, attached as exhibit A to Declaration of Carolyn Hoecker Luedtke in Support of Rambus  
22 Inc.’s Motion In Limine to Exclude Certain Testimony of Richard J. Gilbert (“Luedtke Decl.”), at  
23 2-3.

24 Ignoring Rambus’s hyperbole, Rambus’s core fear with respect to Dr. Gilbert’s  
25 testimony is that Dr. Gilbert will testify to “damning conclusions” on (1) the definition of the  
26 relevant market, (2) Rambus’s monopoly power, and (3) the economic principles that apply in  
27 determining whether this monopoly power and Rambus’s conduct in acquiring and maintaining  
28 this monopoly power were anticompetitive. *See* Rambus Inc.’s Daubert Motion No. 1 To

1 Exclude Certain Testimony of Richard J. Gilbert (“Mot.”) at 1, 10. In its motion Rambus asks the  
 2 Court to exclude these conclusions under the principles set forth in *Daubert v. Merrell Dow*  
 3 *Pharmaceuticals*, 509 U.S. 579 (1993). But since a *Daubert* motion must “solely be on principles  
 4 and methodology, not on the conclusions they generate,”<sup>1</sup> Rambus has attempted to frame its  
 5 motion as an attack on Dr. Gilbert’s methodology. As will be set forth below, this motion is  
 6 totally without merit, as shown by the legal authority Rambus does not cite, the Opinion of the  
 7 Federal Trade Commission Rambus ignores, and by the testimony of Rambus’s own economic  
 8 experts.

### ARGUMENT

#### I. DR. GILBERT’S REPORT

11 The first four pages of Rambus’s motion, which deals with Dr. Gilbert’s report as  
 12 a whole, claims that:

13 Dr. Gilbert’s report is based on assumption, assertion and speculation  
 14 rather than economic analysis.... Dr. Gilbert concedes (as he must) that he  
 15 lacks expertise with respect to very critical issues: “(i) the technical  
 16 characteristics of alternative DRAM technologies; (ii) the intent of Rambus  
 17 and other participants in JEDEC; (iii) the appropriate legal standard for  
 18 evaluating Rambus’s conduct in JEDEC; (iv) the legal obligations that may  
 19 constrain the use of information Rambus collected as a result of its  
 20 participation in JEDEC; and (v) the technical characteristics of the DRAM  
 21 industry”.... [b]ecause Dr. Gilbert unequivocally states he has no opinion  
 22 on these issues, he should not be able to express any opinion or conclusion  
 23 with respect to them at trial.

19 See Mot. at 1:7-9, 4:2-7, 23-25.

20 Given this mischaracterization, the Manufacturers will first give a brief overview  
 21 of the legal standards governing expert testimony, Dr. Gilbert’s report, and the proper economic  
 22 analysis upon which it is based. The manufacturers will then discuss the specific opinions  
 23 Rambus is trying to exclude.

24 In an antitrust case, the role of an economist: “is to apply microeconomic theory to  
 25 the messy facts of a case and thereby clarify for the trier of fact how competitors are interacting  
 26 with each other and their environment.” Gregory J. Werden, Economic Evidence on the

27 <sup>1</sup> *Daubert v. Merrell Dow Pharmaceuticals* 509 U.S. 579, 594-595 (1993); see also *Rebel Oil*  
 28 *Co., Inc. v. Atlantic Richfield Co.*, 146 F. 3d 1088 (9th Cir. 1998) (test for admission of expert  
 testimony is not correctness of expert’s conclusions, but soundness of his methodology).

1 Existence of Collusion: Reconciling Antitrust Law With Oligopoly Theory, 71 Antitrust L.J. 719,  
2 789 (2004) (cited with approval in *Champagne Metals v. Ken-Pac Metals*, 485 F.3d 1073, 1080  
3 (10th Cir. 2006)). Because economists are not the “finder of fact” who determine which of the  
4 “messy facts” the jury should believe, it is appropriate for an economist to base his opinion on  
5 assumed facts, the existence or non-existence of which is for the jury to determine. In basing his  
6 or her opinion on such facts, the economist *must* both make clear what facts he or she is assuming  
7 and make clear that these are assumptions, not facts within the economist’s personal knowledge.  
8 *Champagne Metals v. Ken-Pac Metals*, *supra*, 485 F.3d at 1080.

9           The second general principle of economic analysis Rambus ignores is that because  
10 economists are typically experts in the field of economics but not all other fields, economists  
11 frequently base their opinions on the opinions of other experts. This is entirely appropriate.  
12 Under Rule 703, “an expert’s testimony may be formulated by the use of the facts, data and  
13 conclusions of other experts.” *Asad v. Continental Airlines, Inc.*, 314 F. Supp. 2d 726, 741 (N.D.  
14 Ohio 2004) (citing *Barris v. Bob’s Drag Chutes & Safety Equipment, Inc.*, 685 F. 2d 94, 102 n.10  
15 (3d Cir. 1982)).

16           When Rambus complains that Dr. Gilbert opinions are based on “assumptions”  
17 and on the opinions of other experts where he admits “he has no independent opinion,” Rambus  
18 is actually attacking Dr. Gilbert for following these rules and making clear that he is doing so.

19           Dr. Gilbert begins his report by stating:

20           My testimony provides a framework for understanding and examining the  
21 competitive issues in this case. Specifically I employ economic analysis to  
22 describe the nature of the allegations in this case and conditions under  
23 which the alleged conduct resulted in the acquisition of market power.

24 Luedtke Decl., Exh. A at 4.

25           Dr. Gilbert then makes clear that he is not usurping the role of the jury but instead:

26           My testimony is based on the following key assumptions. In later sections  
27 of my report, I discuss some of the evidence pertaining to these  
28 assumptions. In doing so, however, I want to make clear that I am not  
reaching my own independent conclusions with regard to those issues.

*Id.* at p. 5-6.

1           Following his listing of his assumptions, Dr. Gilbert then states the economic  
2 conclusions he reached on issues he addresses. *Id.* at 6-8. In the remainder of the report Dr.  
3 Gilbert sets forth in detail the basis for his assumptions and conclusions.

4           The fact that Dr. Gilbert's conclusions are based on economic analysis and not  
5 mere "speculation" will be shown separately for each conclusion Rambus attacks. But as a  
6 preliminary example, Dr. Gilbert defines the relevant markets as "technology markets," included  
7 in which are the claimed Rambus features and their close substitutes which perform the same  
8 function. *Id.* at 34. Dr. Gilbert is neither departing from economic theory or speculating in  
9 reaching his conclusion on this subject. Dr. Gilbert cites and applies the Antitrust Guidelines for  
10 the Licensing of Intellectual Property, the drafting of which he led, and particularly § 3.2.2 which  
11 defines "Technology Markets," in reaching his conclusions on the appropriate economic  
12 definition of the market.<sup>2</sup> Far from basing his assumptions on "speculation" as to what "close  
13 substitutes" were available to JEDEC before the standards were adopted, Dr. Gilbert sets forth in  
14 detail the bases for these assumptions. For latency technology, for example, he identified setting  
15 latency with one or more fuses, setting latency by antifusing, identifying CAS latency with pin  
16 voltage, and using an asynchronous DRAM design as alternatives. *Id.* at 34. He makes the same  
17 detailed analysis for each of the other claimed Rambus features and their alternatives. *Id.* at 35-7.

18           It is true of course, that in this area, as well as in other pertinent areas of his report,  
19 Dr. Gilbert carefully identifies his source for the assumptions that form the basis for his economic  
20 analysis and makes clear that he is basing his testimony on assumptions drawn from the reports of  
21 other experts, and other evidence. That is what an expert is supposed to do. The fact that Dr.  
22 Gilbert does not falsely claim personal knowledge or expertise in each of these areas, or  
23 personally provide all of the evidence required to support his opinions, is not a basis for excluding  
24 the conclusions he reaches based on the assumed facts and his economic analysis.

25  
26  
27 <sup>2</sup> Luedtke Decl., Exh. A at 34, n. 113. Rambus claims that Dr. Gilbert does not apply these  
28 guidelines, but Rambus cites to § 3.21, which deals with "Product Markets," not § 3.2.2, the  
section Dr. Gilbert actually applied. *Mot.* at 5-6, fn 2.

1 **II. THE CONCLUSIONS RAMBUS ATTACKS ARE BASED ON SOUND**  
 2 **ECONOMIC PRINCIPLES AND METHODOLOGY**

3 **A. Dr. Gilbert's Methodology for Defining The Relevant Markets Is Consistent**  
 4 **With Standard Economic Analysis**

5 The Rambus attack on Dr. Gilbert's market definition is based: (1) on a  
 6 misstatement of the opinion Dr. Gilbert will express, and (2) a claim that Dr. Gilbert cannot base  
 7 his testimony on assumed facts unless he has personal expertise in areas such as the technological  
 8 characteristics and cost of DRAM alternatives. Neither claim supports Rambus's motion.

9 Rambus claims that Dr. Gilbert's definition of the market is not supported despite the fact that its  
 10 own economic expert states in his report that: [REDACTED]

11 [REDACTED] Report of Richard T. Rapp attached as exhibit A to Confidential  
 12 Declaration of Belinda M. Vega ("Conf. Vega Decl.") at 14. The Manufacturers will nevertheless  
 13 respond to Rambus's arguments.

14 **1. Dr. Gilbert Has Clearly Defined the Relevant Markets**

15 Rambus attacks Dr. Gilbert's definition of the relevant market, stating:

16 Nowhere does Dr. Gilbert opine that he has determined, based on economic  
 17 analysis, what the relevant product market actually is or should be (or  
 18 whether there are other "reasonable" market definitions"). Instead, after  
 19 describing the six technologies (about which he has conceded he has no  
 20 expertise), Dr. Gilbert merely states that the six markets "constitute the  
 21 appropriate relevant markets *if* no other technologies are close substitutes  
 22 for the technologies in each market."

23 *See Mot. at 5:13-18.*

24 This is an incorrect statement that Rambus can only support by giving the Court a  
 25 misleadingly partial quotation from Dr. Gilbert's report. Dr. Gilbert's report describes the way an  
 26 economist defines markets [Luedtke Decl., Exh. A at 34]. It then describes how this results in six  
 27 technology markets in this case, consisting of the Rambus claimed technical features at issue in  
 28 this action and the alternatives to these features Dr. Gilbert assumes (based on expert testimony)  
 existed in the market before the JEDEC standards at issue were adopted. *Id.* at 34-6. Then, in the  
 full section of the report partially cited by Rambus, Dr. Gilbert states:

1           These six markets constitute the appropriate relevant markets if no other  
 2 technologies are close substitutes for the technologies in each market. For  
 3 example, I understand that all SDRAM designs considered for  
 4 standardization at JEDEC included a technology that addresses the  
 5 DRAM's latency. *Other (non-latency) technologies were thus not close  
 6 substitutes for latency technologies for designing a DRAM interface. It  
 7 is my understanding that the same is true for the other five technologies  
 8 identified above.*

9 *Id.* at 36-7 (emphasis added).

10           Rambus criticizes Dr. Gilbert for not stating “*whether* there are close substitutes for  
 11 the products at issue.” Mot. at 5:20 (emphasis in the original). That criticism ignores the  
 12 framework of Dr. Gilbert’s report. Dr. Gilbert has made it crystal clear that in areas where he is  
 13 not an expert, such as the technological characteristics and price of the claimed Rambus features  
 14 and their alternatives, he is relying on the assumptions (and bases) stated and identified in his  
 15 report. Luedtke Decl., Exh. A at 5. In defining the relevant market, Dr. Gilbert states:  
 16 “Furthermore, I assume that each of the Rambus features and its close substitutes enable a  
 17 function *for which there are not other close substitutes.*” *Id.* at 34 (emphasis added). By the test  
 18 Rambus itself poses and using the generally accepted methodology he explicitly identifies, Dr.  
 19 Gilbert has in fact defined the relevant markets.<sup>3</sup>

20           **2. The Methodology Used By Dr. Gilbert in Defining the Relevant  
 21 Markets is Consistent With Sound Economic Principles**

22           Rambus also criticizes Dr. Gilbert for not doing his own independent analysis of  
 23 the cost and technological characteristics of both the Rambus features and their alternatives. Mot.  
 24 at 5-6. Rambus states:

25           Dr. Gilbert has done no economic analysis whatsoever to answer the  
 26 economic question material to the relevant product market here - whether  
 27 there were close substitutes for Rambus’s technologies.

28 *Id.* at 6:1-3.

<sup>3</sup> Dr. Gilbert does add one caveat which is entirely consistent with the framework of his analysis. He states that if there were asynchronous alternatives to the synchronous architecture that uses the alleged Rambus features, then the market could be a broader market for DRAM architectures. Luedtke Decl., Exh. A at 37. Whether there were such alternatives of course is a question for the jury. Dr. Gilbert is merely giving the jury the framework in which to analyze this issue if they do reach this conclusion.

1 Rambus's criticism is not that Dr. Gilbert has not done an economic analysis in  
2 defining the technology markets in this case. The criticism instead is that Dr. Gilbert, as an  
3 economist, has not made his own independent study of the technological characteristics and costs  
4 of the claimed Rambus features and their alternatives. If this criticism is a basis for excluding  
5 economic testimony on the issue of market definition, no economist who is not also an expert in  
6 DRAM manufacturing and cost analysis could offer any opinion on that issue in this case.

7 In presenting his economic analysis of the significance of the assumed fact that  
8 there were commercially viable alternatives to the claimed Rambus features, Dr. Gilbert clearly  
9 states that his testimony is based on the assumption that "For each of the technologies on which  
10 Rambus has asserted patent claims, there existed viable alternatives at the time JEDEC was  
11 considering inclusion of that technology in the JEDEC standards." Luedtke Decl, Exh. A at 34.  
12 Neither Dr. Gilbert nor any other economist who is not an expert in DRAM technology and cost  
13 is qualified to offer a personal opinion on the technological feasibility or cost of the alternatives  
14 and Dr. Gilbert makes clear that he is not offering such an opinion. Instead, Dr. Gilbert makes  
15 explains that his assumption that commercially viable alternatives to the claimed Rambus features  
16 existed is based on the testimony of Joseph McAlexander and Dr. Christopher McArdle, expert  
17 witnesses who will be called by the Manufacturers to apply their expertise in the fields of DRAM  
18 performance and cost analysis to these issues.<sup>4</sup> This forms the basis for Dr. Gilbert's analysis of  
19 the economic significance of these assumptions. This is precisely the approach Rambus's own  
20 economic witnesses take in forming their opinions on the technical issues beyond their own  
21 personal expertise.<sup>5</sup>

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26 <sup>4</sup> Luedtke Decl., Exh. A at 5 (assumption b); 34-6; *see also* Declaration of Dr. Richard J. Gilbert  
filed concurrently herewith.

27 <sup>5</sup> Rambus's economic expert Dr. David Teece states in his report filed in this action: [REDACTED]

28 [REDACTED] Conf. Vega Decl., ex. B (Expert Report of  
David Teece) at 10, ¶ 36.

1           **Dr. Gilbert's Opinion That Adoption of the JEDEC Standard Resulted in**  
2           **Rambus's Acquisition of Monopoly Power Is Based On Sound Economic**  
3           **Analysis**

4           Rambus attacks Dr. Gilbert's opinion that Rambus acquired durable monopoly  
5           power as a result of the adoption of the JEDEC SDRAM and DDR standards. Mot. at 6-9.

6           Rambus states:

7           Dr. Gilbert purports to offer "conclusions" relevant to two questions that  
8           are crucial to that issue [Rambus's monopoly power]: first, whether there  
9           were viable alternatives to Rambus's technologies before JEDEC  
10           incorporated them into SDRAM and DDR standards; and second, whether,  
11           after standardization, the cost of switching to alternative technologies  
12           ("switching costs") enhanced Rambus's market power and rendered it  
13           "durable." Dr. Gilbert's purported conclusions are again nothing more  
14           than assumptions that are cloaked in economic language but not based on  
15           any economic analysis.... Dr. Gilbert should not be allowed to prejudice  
16           the jury by offering purported expert "conclusions" that depend entirely on  
17           Dr. Gilbert's having simply assumed the answer to a factual question that is  
18           for the jury to decide and with respect to which Dr. Gilbert offers no  
19           expertise.

20           Mot. at 6-9.

21           The section of Dr. Gilbert's report to which this complaint is addressed is Section  
22           VII (pp. 38-68). In this section Dr. Gilbert explains the economic significance of testimony that  
23           will be offered by percipient and expert witnesses that while there were commercially viable  
24           alternatives to the claimed Rambus features available before the JEDEC standards were adopted,  
25           the industry was locked in to DRAM standards containing the claimed Rambus features at the  
26           time Rambus disclosed its patent claims for the first time. As Dr. Gilbert explains, the economic  
27           significance of these facts, if accepted by the jury, is that (1) Rambus acquired monopoly power  
28           by its deception in not disclosing its patent claims to JEDEC members at a time they could have  
29           adopted alternatives to an interface containing the claimed Rambus features, and (2) this  
30           monopoly power is durable because the industry was in a position where it could not as a  
31           practical matter switch to these alternatives by the time Rambus did disclose its patent claims.  
32           Luedtke Decl., Exh A at 6, 68.

33           Rambus's criticism of Dr. Gilbert's report in this area is really not that it disagrees  
34           with his economic analysis. Rambus states "Dr. Gilbert himself recognizes that his assumption--

1 that that there existed viable alternatives to Rambus's technologies--*by itself answers the relevant*  
 2 *economic questions about market power.*" Mot. at 8:3-5. But, says Rambus, "if Dr. Gilbert's  
 3 *assumption* is wrong and there were *not* viable alternatives, all the key answers are automatically  
 4 reversed: Rambus's market power, if any, would *not* have been constrained by alternative  
 5 technologies prior to JEDEC's decision; no such constraint would have been weakened by early  
 6 2000; and, most importantly, JEDEC's decision would *not* have enhanced by Rambus's market  
 7 power." Mot. at 7:26-8:2 (emphasis in the original). Rambus will have ample opportunity to  
 8 attempt to prove the premise of *its* assumptions. It is for the jury, not Dr. Gilbert or Rambus's  
 9 counsel, to make a factual determination on this issue. The role of Dr. Gilbert is to explain the  
 10 economic significance of a finding that there were alternatives and a finding the JEDEC members  
 11 were in fact locked in by the time Rambus disclosed its claims and this is clearly relevant  
 12 economic testimony.

13 C. **Dr. Gilbert's Opinions That Rambus Possesses Monopoly Power or That**  
 14 **There is a Dangerous Probability that Rambus Will Obtain Monopoly Power**  
 15 **Are Proper**

16 Rambus claims that unless Dr. Gilbert can offer an opinion on whether JEDEC  
 17 standard DRAMs infringe Rambus's patents, he cannot offer an opinion on whether Rambus has  
 18 obtained monopoly power in the relevant markets. Mot. at 9-10. Rambus states:

19 Dr. Gilbert acknowledges that his opinion that Rambus has monopoly  
 20 power depends upon the validity of its patents and whether "JEDEC-  
 21 compliant SDRAM and DDR\*SDRAMs infringe Rambus's patents," an  
 22 issue that "is unresolved and remains pending in a number of litigations."  
 23 Exh. A at 8. He states that he has "no opinion as to whether DRAMs that  
 24 are complaint with [JEDEC] standards infringe Rambus's patents. *Id.* at 5.  
 25 n.1. And he acknowledges that he cannot opine whether Rambus has  
 26 monopoly power without answering that question.... For this additional  
 27 reason, Dr. Gilbert should not be allowed to testify that Rambus has  
 28 monopoly power in any relevant market.

Mot. at 9-10.

Although Rambus overstates Dr. Gilbert's opinion on the issue of patent validity<sup>6</sup>,  
 the premise of this argument is the same premise asserted in Rambus's pending Motion for

<sup>6</sup> Dr. Gilbert stated in the referenced section of his report that he assumed the validity of  
 Rambus's patents for purposes of his opinion, not that he "cannot opine of Rambus's monopoly  
 power" without knowing the answer to the question of whether they are valid or invalid. *See*

1 Summary Judgment No. 1 On Manufacturer's Monopolization and Attempted Monopolization  
2 Claims -- that unless the Manufacturers (or in this case Dr. Gilbert) admit that their products  
3 infringe Rambus's patents, there can be no finding of monopoly power. Rambus's position is an  
4 abuse of the consolidation order requiring Micron and Nanya to try conduct issues before  
5 infringement and validity issues are resolved, and it underscores the need for a trial protocol that  
6 will prevent Rambus from claiming a failure of proof on these issues in the conduct trial, and then  
7 asserting them to be true in the patent trial. That aside, Rambus's attempt to manipulate the trial  
8 schedule provides no basis for the seclusion of Dr. Gilbert's testimony.

9 Dr. Gilbert's conclusion on this issue is the same conclusion the FTC reached,  
10 based, as is Dr. Gilbert's opinion, on economic analysis and expert economic testimony:

11 Rambus held over 90 percent of the market in the relevant markets.  
12 JEDEC's standards have been ubiquitous in the computer industry: from  
13 1998 on, the decided majority of DRAMS sold have complied with the  
14 JEDEC SDRAM and SDRAM standards. Rambus claims that its patents  
15 are necessary to make, use, or sell DRAMs that comply with JEDEC  
16 standards. Courts typically find such a high market share sufficient to infer  
17 the existence of monopoly power. ***The ALJ determined that Rambus  
18 possessed monopoly power in the four technology markets alleged and  
19 Rambus does not dispute his findings in this respect. We reach the same  
20 conclusion, and find that Rambus did acquire a monopoly position.***

21 Public Vega Decl., ex. 1 at 73 (emphasis added).

22 It is noteworthy that one of the evidentiary sources the FTC cited for these  
23 findings was the testimony of Dr. Richard Rapp, Rambus's economic expert in the FTC  
24 proceedings and in this case. As stated in the FTC opinion, Dr. Rapp testified that Rambus  
25 possessed market power in the four technology markets at issue in the FTC proceedings (and  
26 here). *Id.* at 73 (n. 399). This explains why Rambus has not presented a declaration that the  
27 Manufacturers could reply to, by Dr. Rapp or any other declarant or cited any authority in support  
28 of its claim that a reasonable economist applying generally accepted economic methodology  
cannot reach the conclusion stated by Dr. Gilbert on this subject.

Rambus also claims that Dr. Gilbert cannot testify that even if Rambus's patents  
are ultimately held to be invalid, Rambus's assertion of these patents has created a dangerous

Luedtke Decl., Exh. A at 8.

1 probability of creating an anticompetitive monopoly position. Mot. at 10. The basis for this  
2 claim is not that Dr. Gilbert has not applied a generally accepted economic methodology to his  
3 analysis. It is that Dr. Gilbert does not “have the expertise” to offer an opinion on whether  
4 Rambus will or will not prevail on its claims. *Id.* This is simply a rehash, in an even more  
5 attenuated context, of the argument that an economist cannot offer an opinion in this area unless  
6 he can testify, based on his own personal expertise, that Rambus will prevail on its patent claims.  
7 For the same reasons previously discussed, this claim does not support exclusion of Dr. Gilbert’s  
8 testimony.

9  
10 **D. Dr. Gilbert’s Opinions on Rambus’s Anticompetitive Conduct Are Based On  
Proper Economic Analysis**

11 Rambus’s attack on Dr. Gilbert’s opinion that Rambus’s conduct was  
12 anticompetitive again relies primarily on the claim that Dr. Gilbert is not entitled to assume  
13 certain facts, the accuracy of which are in the exclusive province of the jury, or to explain to the  
14 jury the economic significance of those facts. Mot. at 10-14. Rambus states:

15 Dr. Gilbert states in his report that “Rambus’s[s] conduct should be  
16 deemed anticompetitive because Rambus manipulated the expectations of  
17 JEDEC members and distorted the standard setting process.”... Dr. Gilbert  
18 merely assumes, without reaching independent conclusions, all of the  
19 premises for his opinion that Rambus engaged in anticompetitive  
conduct... Dr. Gilbert offers no *economic* analysis that demonstrates either  
that JEDEC’s members were likely to hold expectations or that it was  
reasonable for them to do so.

20 Mot. at 10-11.

21 This claim is again inaccurate. As shown by Dr. Gilbert’s report, Dr. Gilbert  
22 carefully sets forth the framework of his report, and makes clear that he is applying economic  
23 analysis to assumed facts rather than usurping the role of the jury in “finding” those facts (*See*

24 Section I, *infra*). Under the heading “Analytical Framework” Dr. Gilbert explains:

25 This section briefly explains the framework I employ to assess conduct by  
26 Rambus in connection with its participation in the JEDEC DRAM standard  
27 setting committee and its conduct outside that committee, both during and  
28 after its membership in JEDEC. I direct my analysis to whether Rambus  
attained a monopoly position or achieved a high probability of obtaining a  
monopoly position through conduct that is, from an economic standpoint,  
inconsistent with competition on the merits, i.e. anticompetitive conduct.

1 Luedtke Decl., Exh A at 13.

2 In the present case the jury will determine whether Rambus did or did not  
3 successfully deceive JEDEC, whether Rambus did or did not know that JEDEC members  
4 expected it to disclose patent claims that related to the standards, whether Rambus acted in good  
5 faith in participating in JEDEC, and whether Rambus did or did not acquire its monopoly position  
6 as a result of its deception. The role of the economist is to “apply microeconomic theory” to  
7 these facts (*see p. 2, infra*) and that is exactly what Dr. Gilbert has done. Rambus complains that  
8 this testimony will result in “damning conclusions, if credited by a jury.” Mot. at 10:23-5. While  
9 this is undoubtedly accurate, and explains Rambus’s motion, the fact that an economic expert  
10 applying generally accepted principles of economic analysis comes to “damning conclusions” is  
11 not a proper basis for a *Daubert* motion.

12 Rambus also claims that Dr. Gilbert’s conclusion that Rambus achieved a  
13 monopoly position by deception is not based on an analysis an economist would make [Mot. at  
14 12], apparently believing that by making this claim Rambus establishes it. But Rambus’s own  
15 economic expert Dr. Richard Rapp admitted, setting aside semantic differences, that antitrust  
16 economists do analyze and form opinions on exactly the type of conduct analyzed by Dr. Gilbert.

17 Dr. Rapp testified that

18 [REDACTED]  
19 [REDACTED] Conf. Vega Decl., ex. C (Deposition of Richard T. Rapp at 129-131).

20 Asked what those circumstances were, Dr. Rapp testified:

21 And I’m not sure that this list is comprehensive. But the three things that  
22 come to mind is that, first of all, it -- the -- the element of opportunism  
23 arises from some kind of competitive -- of some distortion of competition.  
24 The second is that it creates what I’ll call, for want of a better phrase,  
25 undue, u-n-d-u-e, market power. And, three, that there be injury or  
26 anticompetitive harm to competition.

27 *Id.* at 129:1-131:17.

28 Substitute the words “deceptive conduct” for “opportunistic conduct” in this  
testimony and the result is the exact same economic analysis Dr. Gilbert applied in this case.<sup>7</sup>

<sup>7</sup> Rambus also makes the remarkable assertion, again without citation or authority, that Dr. Gilbert’s testimony relating to JEDEC should be precluded because Rambus’s failure to disclose

1  
2 **E. Dr. Gilbert's Testimony On the Impact of Rambus's Conduct Is Proper**

3 Rambus attacks Dr. Gilbert's testimony about the impact of Rambus's conduct,  
4 stating:

5 The basis for Dr. Gilbert's opinion with respect to causation ("The Causal  
6 Link Between Rambus's Conduct and Its Ex Post Market Power") appears  
7 on page 69 of his Report, Exh. A. There, Dr. Gilbert reiterates two of his  
8 major assumptions: Assumption No. 1 "Prior to JEDEC approval of the  
9 SDRAM and DDR SDRAM standards, each of the Rambus new  
10 technologies now at issue faced competition from viable alternatives. *See*  
11 *id.* 5. (listing assumption, with no independent conclusion, that there  
12 existed viable alternatives to Rambus's technologies). Assumption No. 2:  
13 "[O]nce the industry became locked-in to these technologies, the viability  
14 of competing alternatives was greatly diminished." *See* Exh. A at 6 (listing  
15 assumption, with no independent conclusion, that in early 2000 JEDEC  
16 member companies faced substantial switching costs. *With nothing further*  
17 - no intervening economic analysis based on these assumption - Dr. Gilbert  
18 opines, "[t]hus, as a result of the challenged conduct, Rambus was able to  
19 achieve a degree of market power that it otherwise would not have  
20 obtained. *Id.* at 69 (emphasis in the original).

21 Mot. at 14:20-15-3 (emphasis in original).

22 With respect to "Assumption 1" and "Assumption 2," this memorandum has  
23 already established that Dr. Gilbert's testimony in these areas will be based on his economic  
24 analysis of the assumed facts. On the issue of causation, Dr. Gilbert plainly does employ  
25 economic analysis. In fact, he goes through his analysis step by step. Dr. Gilbert explains:

26 The critical nexus between Rambus's conduct and its heightened market  
27 power is the influence its actions had on the decisions made by JEDEC  
28 members in developing and adopting the relevant DRAM standards. Had  
Rambus not engaged in the disputed conduct, JEDEC members would have  
had new information about Rambus's IP, and its intention to assert its  
claimed patent rights, that would have influenced their decision-making  
within the standards setting process.

Luedtke Decl., Exh. A at 69.

Dr. Gilbert then goes through each of the possible scenarios that could have

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its patent claims "could not arguably be considered 'deceptive' in the first place unless there was a rule, or at least a universal expectation, that members *would* disclose their patent plans." Mot. at 11-12:2 (emphasis in the original). This statement is directly contradicted by the FTC finding that "whether the SSO requires disclosure should be judged not only by the letter of its rules, but also on how the rules are interpreted by its members, as evidenced by their behaviour as well as by their statements of what they understand the rules to be." Public Vega Decl., ex. 1 at 35 (FTC Opinion). It also ignores the FTC's finding, based on this standard, that JEDEC expected and Rambus knew JEDEC expected the disclosure discussed by Dr. Gilbert. *Id.* at 52-59.

1 occurred if Rambus had disclosed its technology. *See Id.* at 70-73. For example, he states:

2 [i]f the Rambus technologies were viewed as being equal to or, at best,  
3 only slightly better than the available alternatives, I believe the most  
4 plausible outcome is that the Rambus technologies would not have been  
5 incorporated into the JEDEC SDRAM and DDR\* SDRAM standards.  
6 Under this assumption, the limited potential benefit, if any, of including the  
7 Rambus technologies in the standard would be outweighed by the cost of  
8 negotiating a license *ex ante* and by the risk that foregoing a license and  
9 relying solely on a RAND<sup>8</sup> assurance could result in costly future litigation  
10 over the precise royalty rate that satisfies the term “reasonable.”

7 *Id.* at 72.

8 Applying economic analysis, Dr. Gilbert then explains:

9 Suppose that a JEDEC member believed that a RAND commitment for one  
10 of the six technologies allegedly covered by Rambus intellectual property  
11 would result in an expected royalty of  $r_1$ . As above, assume that the  
12 royalty on the alternative technology,  $r_2$ , would equal zero. If  $r_1 > v_1 - v_2$ ,  
13 that is, if the JEDEC member expected Rambus’s “reasonable” royalty rate  
14 to exceed the expected additional value from using one of the Rambus  
15 technologies, the member would have an economic incentive to vote for  
16 the alternative technology.

14 *Id.* at 73.

15 For each step of the analysis, Dr. Gilbert identifies the facts and evidence that he  
16 assumed and considered [*See, e.g., Id.* at 70-74] in conducting his analysis and reaching his  
17 conclusion that Rambus’s deceptive conduct resulted in the acquisition of durable monopoly  
18 power.

19 When asked at his deposition if he believed the “world would have been different”  
20 if Rambus had in fact disclosed its patent applications and plans, Dr. Gilbert testified:

21 In my report, I explain why the world would be different, why a RAND  
22 commitment would be different; why adopting alternative technologies  
23 would be different. So I mean, there is always the possibility that things  
24 could be the same. I mean, I can’t say that that possibility, that probability  
25 is zero, but I gave good reasons in my report for why I wouldn’t think they  
26 would be the same, the outcomes would be the same

24 Luedtke Decl., ex. D at 265:20-266:4.

25 Dr. Gilbert makes clear in his deposition and in his report that his testimony in  
26 this area is based on his analysis of the economic incentives that rational economic actors in the

27 \_\_\_\_\_  
28 <sup>8</sup> A “RAND” letter is a letter in which a holder of a patent commits to making his technology or  
product available to all on “reasonable and non discriminatory” terms.

1 place of Rambus and the members of JECEC would have. He is not attempting in another sense  
2 to testify to what Rambus or the members of JEDEC would have done. While Rambus is critical  
3 of Dr. Gilbert for making this distinction, it is entirely consistent with this Court's prior orders  
4 and with the role of an economic expert.

5 The Court has already held, in the context of *in limine* motions directed to the  
6 testimony of Rambus economist Dr. David Teece and Hynix economist Roy Weinstein, that  
7 "Teece cannot testify as to what decision Rambus would have made with respect to a RAND  
8 commitment or letter" [See August 3, 2006 hearing transcript at 121:14-18] and "The Court has  
9 a problem with either expert testifying as to what would have occurred (as opposed to what could  
10 have occurred) if Rambus disclosed its patent applications and intentions." See August 3, 2006  
11 Tentative Order at 4. The testimony Dr. Gilbert will offer on this subject is and will be in strict  
12 compliance with these directives, focusing as he did in his deposition on the incentives indicating  
13 what a rational economic actor in the place of JEDEC or Rambus could have done, or not done,  
14 if Rambus had made the proper disclosures.

15 F. **Rambus's Alternative Complaints That Dr. Gilbert Considered or Did Not**  
16 **Consider Rambus's Claimed Reasons for Non Disclosure Have No Basis**

17 Rambus presents a number of "justifications" for its refusal to disclose its patent  
18 applications and plans and for its inconsistent claim that JEDEC members knew of these patent  
19 applications and claims. Mot. at 13-14, 19. In attacking Dr. Gilbert's report, Rambus seems to  
20 have a hard time deciding which approach it wants to take on what Dr. Gilbert should address. At  
21 pages 13-14 of its memorandum Rambus complains that Dr. Gilbert did not address two of its  
22 alleged "pro-competitive" justifications for nondisclosure and concludes:

23 Having failed to rebut, or even address, certain of Rambus's business  
24 reasons for keeping patent applications confidential, Dr. Gilbert should not  
be permitted to opine that Rambus's conduct was anticompetitive.

25 *Id.* at 13-14.

26 But on page 19 of its memorandum, addressing Dr. Gilbert's response to other  
27 Rambus's "justifications" for nondisclosure -- that JEDEC members already knew the scope of  
28

1 Rambus's patent claims and that JEDEC minutes were public -- Rambus complains that Dr.  
2 Gilbert does address its claims. *Id.* at 19.

3           The short answer to both of these arguments is that Dr. Gilbert will state the basis  
4 for his assumptions in each area of his testimony so the jury will understand its context. He will  
5 testify to the economic factors that would cause a rational economic actor in Rambus's position to  
6 disclose or not disclose, and a rational JEDEC member to decide to adopt or not adopt a standard.  
7 If Rambus believes there are factors Dr. Gilbert has not considered, it is free to cross examine him  
8 on those subjects. The party offering expert testimony need not "demonstrate to the judge by a  
9 preponderance of the evidence that the assessments of [its] expert[s] are *correct*, [it] only [has] to  
10 demonstrate . . . that [the] opinions are reliable." *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d  
11 717, 744 (3d Cir. 1994) (emphasis in original); *see also, In re Japanese Electronic Products*  
12 *Antitrust Litigation*, 723 F. 2d 238 at 277 (3d Cir. 1983) *rev'd on other grounds*,  
13 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)..

14  
15 **III. DR. GILBERT'S RELIANCE ON THE EXPERT TESTIMONY OF TECHNICAL**  
**EXPERTS IS NOT IMPROPER "VOUCHING"**

16           Rambus attacks Dr. Gilbert's report by stating that:

17           Dr. Gilbert repeatedly and at length summarizes, evaluates, draws  
18 inferences from and vouches for Plaintiff's allegations and the testimony of  
19 other witnesses. *See, e.g., Exh. A at 20-24, 25-32, 44-68.*

19 Mot. at 17.

20           As set forth in detail above, Dr. Gilbert's reliance on technical experts is entirely  
21 proper. In order for the jury to understand the bases for his opinions, Dr. Gilbert intends to  
22 explain the bases, including the evidence offered by the technical experts upon whom he will rely.  
23 Rambus characterizes this as "vouching" for those experts. It is nothing of the sort.

24           The jury will decide to accept or not accept the testimony of the technical experts  
25 called by the Manufacturers and Rambus on the subjects covered in Dr. Gilbert's report. The  
26 testimony Dr. Gilbert will identify the portions of his opinions are based on the testimony of  
27 technical experts. This is absolutely necessary so the jury can properly evaluate Dr. Gilbert's  
28

1 opinions based on their acceptance or rejection of the opinions and assumed facts on which he  
2 relies.

3  
4 **CONCLUSION**

5 For all the foregoing reasons, Rambus's motion to exclude certain expert  
6 testimony offered by Dr. Gilbert should be denied in its entirety.

7  
8 Dated: October 31, 2007

9 By: /s/ Wallace A. Allan  
Wallace A. Allan  
KENNETH R. O'ROURKE (Bar No. 120144)  
Email: [korourke@omm.com](mailto:korourke@omm.com)  
10 WALLACE A. ALLAN (Bar No. 102054)  
Email: [tallan@omm.com](mailto:tallan@omm.com)  
O'MELVENY & MYERS LLP  
400 South Hope Street, Suite 1060  
11 Los Angeles, California 90071-2899  
Telephone: (213) 430-6000  
12 Facsimile: (213) 430-6407

13  
14 ALLEN RUBY (Bar No. 47109)  
Email: [allenruby@aol.com](mailto:allenruby@aol.com)  
RUBY & SCHOFIELD  
15 125 South Market Street, Suite 1001  
San Jose, California 95113-2285  
16 Telephone: (408) 998-8500  
Facsimile: (408) 998-8503

17  
18 KENNETH L. NISSLY (Bar No. 77589)  
Email: [kennissly@thelen.com](mailto:kennissly@thelen.com)  
19 SUSAN van KEULEN (Bar No. 136060)  
Email: [svankeulen@thelen.com](mailto:svankeulen@thelen.com)  
20 GEOFFREY H. YOST (Bar No. 159687)  
Email: [gyost@thelen.com](mailto:gyost@thelen.com)  
21 THELEN REID BROWN RAYSMAN & STEINER  
LLP  
22 225 West Santa Clara Street, Suite 1200  
San Jose, California 95113  
23 Telephone: (408) 292-5800  
Facsimile: (408) 287-8040

24  
25 DANIEL J. FURNISS (Bar No. 73531)  
Email: [dfurniss@townsend.com](mailto:dfurniss@townsend.com)  
26 THEODORE G. BROWN III (Bar No. 114672)  
Email: [tgbrown@townsend.com](mailto:tgbrown@townsend.com)  
27 JORDAN TRENT JONES (Bar No. 166600)  
Email: [jtjones@townsend.com](mailto:jtjones@townsend.com)  
28 TOWNSEND and TOWNSEND  
and CREW LLP

1  
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26  
27  
28

379 Lytton Avenue  
Palo Alto, Californiaa 94301  
Telephone: (650) 326-2400  
Facsimile: (650) 326-2422

Attorneys for Defendants  
HYNIX SEMICONDUCTOR INC., HYNIX  
SEMICONDUCTOR AMERICA INC., and  
HYNIX SEMICONDUCTOR MANUFACTURING  
AMERICA INC.

David J. Healey  
MATTHEW D. POWERS (Bar No. 104795)  
Email: [matthew.powers@weil.com](mailto:matthew.powers@weil.com)  
EDWARD R. REINES (Bar No. 135930)  
Email: [edward.reines@weil.com](mailto:edward.reines@weil.com)  
WEIL, GOTSHAL & MANGES LLP  
201 Redwood Shores Parkway  
Redwood Shores, CA 94065  
Telephone: (650) 802-3000  
Facsimile: (650) 802-3100

DAVID J. HEALEY (admitted pro hac vice)  
Email: [david.healey@weil.com](mailto:david.healey@weil.com)  
ANITA E. KADALA (admitted pro hac vice)  
Email: [anita.kadala@weil.com](mailto:anita.kadala@weil.com)  
WEIL, GOTSHAL & MANGES LLP  
700 Louisiana, Suite 1600  
Houston, TX 77002  
Telephone: (713) 546-5000  
Facsimile: (713) 224-9511

Attorneys for Defendants  
SAMSUNG ELECTRONICS CO., LTD.,  
SAMSUNG ELECTRONICS AMERICA, INC.,  
SAMSUNG SEMICONDUCTOR, INC., and  
SAMSUNG AUSTIN SEMICONDUCTOR, L.P.

Craig R. Kaufman  
ROBERT E. FREITAS (Bar No. 80948)  
Email: [rfreitas@orrick.com](mailto:rfreitas@orrick.com)  
CRAIG R. KAUFMAN (Bar No. 159458)  
Email: [ckaufman@orrick.com](mailto:ckaufman@orrick.com)  
VICKIE L. FEEMAN (Bar No. 177487)  
Email: [vfeeman@orrick.com](mailto:vfeeman@orrick.com)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
1000 Marsh Road  
Menlo Park, CA 94025  
Telephone: (650) 614-7400  
Facsimile: (650) 614-7401

Attorneys for Defendants  
NANYA TECHNOLOGY CORPORATION, and  
NANYA TECHNOLOGY CORPORATION U.S.A.

1  
2  
3  
4  
5  
6  
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15  
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17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Jared Bobrow  
JARED BOBROW (Bar No. 133712)  
Email: [jared.bobrow@weil.com](mailto:jared.bobrow@weil.com)  
WEIL GOTSHAL & MANGES LLP  
201 Redwood Shores Parkway  
Redwood Shores, CA 94065  
Telephone: (650) 802-3034  
Facsimile: (650) 802-3100

WILLIAM C. PRICE (Bar No. 108542)  
Email: [william.price@quinnemanuel.com](mailto:william.price@quinnemanuel.com)  
HAROLD A. BARZA (Bar No. 80888)  
Email: [halbarza@quinnemanuel.com](mailto:halbarza@quinnemanuel.com)  
JON R. STEIGER (Bar No. 229814)  
Email: [jonsteiger@quinnemanuel.com](mailto:jonsteiger@quinnemanuel.com)  
ROBERT J. BECHER (Bar No. 193431)  
Email: [robertbecher@quinnemanuel.com](mailto:robertbecher@quinnemanuel.com)  
QUINN EMANUEL URQUHART OLIVER &  
HEDGES, LLP  
865 South Figueroa Street, 10th Floor  
Los Angeles, CA 90017  
Telephone: (213) 443-3000  
Facsimile: (213) 443-3100  
Attorneys for Defendants MICRON  
TECHNOLOGY, INC. and MICRON  
SEMICONDUCTOR PRODUCTS, INC