

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**RESPONDENT RAMBUS INC.'S RULE 3.24 SEPARATE STATEMENT OF
MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Rule of Practice 3.24, and in support of its motion for summary decision, Respondent Rambus Inc. (“Rambus”) submits this statement of material facts as to which there is no genuine dispute.

A. Rambus.

1. In April 1990, Dr. Michael Farmwald and Dr. Mark Horowitz filed a patent application describing revolutionary computer-memory technologies they had invented that would enable computer-memory devices (dynamic random access memories, or DRAMs) to keep pace with faster generations of microprocessors by running at much faster speeds than earlier technologies. They assigned this application (“the ‘898 application”) to a company they had founded called Rambus.

2. The key innovations disclosed in the written description in the ‘898 application included forms of technologies later called programmable latency, variable burst length, dual-edge clock (producing a double data rate, or “DDR”) operation, and the use of delay lines (in particular, a delay locked loop (“DLL”) circuit) on the DRAM chip itself. Taken together, these innovations dramatically increase the speed of memory chips. *Rambus Inc. v. Infineon Techs. AG*, ___ F.3d ___, 2003 WL 187265 at *20-21 (Fed. Cir. Jan. 29, 2003) (“*Rambus v. Infineon*”).

3. Rambus chose not to become a manufacturer of DRAMs. Instead, Rambus continued to develop its technology and to make that technology available for license by manufacturers industry-wide, together with testing, design, and implementation services.

4. This business model depends upon intellectual property (primarily patent protection) to help generate royalties and licensing fees, which, along with service fees, are the company's sole sources of income.

B. JEDEC.

5. There exists a standard-setting organizations for semiconductor devices called the Joint Electron Device Engineering Council ("JEDEC"), which was (until recently) an unincorporated division of the Electronic Industries Association ("EIA"), governed by EIA policies.

6. The particular JEDEC committee most involved in this case is the "42.3" subcommittee, which has responsibility within JEDEC for many computer memory devices and whose members include such computer memory manufacturers and users as Siemens (now Infineon), Micron, NEC, Samsung, Toshiba, IBM, Texas Instruments, Hewlett-Packard, and many others. Perry Decl., Ex. 1.¹

7. Rambus attended its first JEDEC meeting as a guest of Toshiba in December 1991, and it formally joined JEDEC in February 1992. Perry Decl., Ex. 2.

8. Rambus attended its last JEDEC meeting in December 1995 and, having been sent a bill for 1996 dues, sent a letter confirming its withdrawal in June 1996. Perry Decl., Ex. 3.

¹ "Perry Decl." refers to the separately filed Declaration of Steven M. Perry, to which all exhibits referred to herein are attached. Some of the exhibits are confidential by virtue of their contents and therefore may not be filed in a public document pursuant to the Protective Order in this case, a copy of which is attached as Exhibit 1 to this Separate Statement.

9. The Complaint asserts that, while a member of JEDEC, Rambus representatives observed efforts at JEDEC to promulgate an industry standard for a synchronous DRAM device called “SDRAM.” Complaint, ¶ 40. The Complaint asserts that Rambus should have disclosed to JEDEC that it believed it had filed or could file patent applications relating to certain features of the SDRAM device.

10. The SDRAM standard was considered within JEDEC 42.3 during 1991 and 1992, adopted in early 1993, and formally announced on March 4, 1993. *Rambus v. Infineon*, 2003 WL 187265 at *2. DRAM manufacturers did not, however, begin manufacturing and selling SDRAM devices until much later – in 1996 and 1997. *See, e.g.*, Perry Decl., Ex. 6 [Gross 12/19/02 Depo., p. 31] [REDACTED]; Perry Decl., Ex. 7 [Kettler 1/15/03 Depo., p. 26] [REDACTED].

11. The Complaint also alleges that JEDEC considered improvements to the SDRAM standard in the early and mid-1990s, and that these discussions ripened into the formal development of a new standard, called “DDR SDRAM,” in the 1996-1999 time period. Complaint at ¶ 27-28.

C. The EIA/JEDEC Patent Policy.

12. According to John Kelly, formerly General Counsel of EIA and now President of JEDEC, the patent disclosure policy with which JEDEC members were required to comply during Rambus’s membership in JEDEC was set forth in “two EIA manuals,” referred to as the *Manual for Committee, Subcommittee, and Working Group Chairmen and Secretaries*, Engineering Publication EP-3-F (“EP-3-F”), published in

October 1981, and the *Style Manual for Standards and Publications of EIA, TIA, and JEDEC*, EIA Engineering Publication EP-7-A (“EP-7-A”), published in August 1990. *See* Perry Decl., Ex. 9 (Kelly 1/9/01 Dep. at 26:5-11).

13. At least prior to 1998, the EIA policies governed the conduct of JEDEC meetings and the obligations of its members. JEDEC’s relationship with EIA changed in 1998, when JEDEC became a more autonomous entity. *See* Perry Decl., Ex. 4 (Kelley 1/10/03 Dep. at. 62:16-24, 63:18-20).

14. The Complaint cites a manual published in 1993 not by EIA but by JEDEC, called the “Manual of Organization and Procedure,” which was revised in 1993 and referred to as “JEP 21-I.” The JEP 21-I manual cites, however, to EP-7-A and EP-3-F as the governing policy guides. JEDEC President John Kelly has confirmed that “[t]he JEDEC manual is subordinate to the EIA manual because in the hierarchy of EIA, JEDEC was subordinate to EIA.” Perry Decl., Ex. 10 (4/30/01 Infineon Trial Tr. at p. 317).

15. Mr. Kelly has also explained that JEP 21-I did *not* contain “the JEDEC patent policy” and was in some respects “broader than is required under the patent policy.” Perry Decl., Ex. 9 (Kelly 1/9/01 Dep. at 215-217).

16. There was one other manual issued while Rambus was a JEDEC member that contains references to patent-related disclosures, the 1994 “JC 42 Members’ Manual,” which was intended to “assist new (and established) members in achieving full effectiveness in the standards making process.” Perry Decl., Ex. 11 at R 156887. The “Members’ Manual” provides in part that JEDEC “rigidly adheres” to the EIA policies contained in EP-7-A and EP-3-F. *Id.* at R 156900.

17. The October 1981 EIA policy known as “EP-3-F” provides as follows:

8.3 Reference to Patented Products In EIA Standards

Requirements in EIA Standards which call for the use of patented items should be avoided. No program of standardization shall refer to a product on which there is a known patent unless all the technical information covered by the patent is known to the Formulating committee, subcommittee or working group. The Committee Chairman must also have received a written expression from the patent holder that he is willing to license applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination. Additionally, when a known patented item is referred to in an EIA Standard, a Caution Notice, as outlined in the Style Manual, EP-7, shall appear in the EIA Standard.

Perry Decl., Ex. 12 (§ 8.3).

18. The 1990 EIA manual, known as “EP-7-A” provides, in pertinent part:

3.4 Patented Items or Processes

Avoid requirements in EIA standards that call for the exclusive use of a patented item or process. No program standardization shall refer to a patented item or process unless all of the technical information covered by the patent is known to the formulating committee or working group, and the committee chairman has received a written expression from the patent holder that one of the following conditions prevails:

- (1) a license shall be made available without charge to applicants desiring to utilize the patent for the purpose of implementing the standard; or
- (2) a license shall be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

. . . An appropriate footnote shall be included in the standard identifying the patented item and describing the conditions under which the *patent* holder will grant a license (see 6.5.2).

Perry Decl., Ex. 13 (§ 3.4) (emphasis added).

19. Neither EP-3-F nor EP-7-A makes any reference to an obligation to disclose patents or patent applications.

20. In October 1993, JEDEC issued a revised version of its *Manual of Organization and Procedure*, JEP 21-I. Perry Decl., Ex. 17. The earlier version, JEP 21-H, had contained no reference to the disclosure of patents or patent applications and had simply “incorporated” the EIA legal guides. Perry Decl., Ex. 18. JEP 21-I still cited EP-7-A and EP-3-F as the governing statement of the patent policy, but also included, for the first time, an express reference to an obligation on the part of *committee chairpersons* to “call attention to the obligation of all participants to inform the meeting of any knowledge they may have of any patents, or pending patents, that might be involved in the work they are undertaking.” Perry Decl., Ex. 17 (§ 9.3.1).

21. The JEP 21-I manual further instructed that committee chairpersons would satisfy this requirement by showing members “viewgraphs” that were contained in Appendix E of the manual. *Id.* The viewgraphs in Appendix E contained language that was substantially similar to the language of section 3.4 of EP-7-A, except for the addition of a reference to a “pending patent.” *See* Perry Decl., Ex. 17 (Appendix E at JDC 013325).

22. There is no evidence that Rambus was provided with a copy of JEP 21-I while it was a JEDEC member. In addition, the “viewgraphs” that were displayed to JEDEC 42.3 members after JEP 21-I was adopted did not include any requirement that members disclose anything, did not include any reference to “pending patents,” and instead were comprised solely of the unaltered language of EP-7-A and EP-3-F. On one occasion, at the September 1993 meeting, the chairman showed a new viewgraph, containing

proposed language from an appendix to the not-yet-published JEP 21-I manual. This viewgraph was expressly marked “DRAFT,” with a footnote stating that the “material is a proposed revision” that “has not been approved by JEDEC.” Perry Decl., Ex. 14 (at JDC 001690); Perry Decl., Ex. 15 (R65780). After September 1993, however, only the original viewgraphs were shown to members. Perry Decl., Ex. 14.

23. According to the JC 42 Members’ Manual, a member that was *presenting* a technology to JEDEC for standardization “must reveal any known or expected patents, *within his company*, on the material presented.” Perry Decl., Ex. 14 (R 156900).

24. The JC 42 Members’ Manual contains no reference to disclosure of patents or patent applications by *non-presenters*.

25. Rambus’s JEDEC representative, Richard Crisp, has testified that he reviewed the JC 42 Members’ Manual in the summer of 1995 and saw that companies presenting their technologies for standardization needed to disclose their patent applications. Perry Decl., Ex. 19 (Crisp 11/8/00 Dep. at 190).

26. During its entire tenure as a JEDEC member, Rambus never proposed or advocated the adoption of any standard or technology. In fact, Rambus made no presentations at all, and it voted at only one meeting, when it voted *against* four proposals. Perry Decl., Ex. 5.

D. The EIA/JEDEC Patent Policy Encouraged, But Did Not Require, Disclosure Of Intellectual Property.

27. The evidence shows that JEDEC members and the JEDEC leadership understood during the time that Rambus was a JEDEC member that members were

encouraged, but not *required*, to make a “voluntary” disclosure of their intellectual property in certain circumstances.

28. The evidence also shows that JEDEC members and the JEDEC leadership possessed a wide variety of understandings of the EIA/JEDEC patent policy, and that important JEDEC members treated disclosure as entirely voluntary. For example, IBM informed JEDEC on several occasions, without retribution or rebuke, that it would not disclose its intellectual property position at JEDEC meetings. The minutes of the March 1993 meeting of JEDEC 42.3 state, for example, that “IBM noted that their view has been to ignore [the] patent disclosure rule because their attorneys have advised them that if they do then a listing may be construed as complete.” Perry Decl., Ex. 20.

29. In August 1993, IBM again informed the JEDEC leadership that it would not disclose its intellectual property rights, this time in connection with a technology referred to as “BGA.” In a memo to JEDEC entitled “BGA Patent/License Rights,” IBM’s JEDEC representative (and JEDEC 42.3 subcommittee chair) Gordon Kelley stated bluntly that:

IBM Intellectual Property Law attorneys have informed me that we will not use JEDEC as a forum for discussing this subject. It is the responsibility of the producer to evaluate the subject and to work out the proper use of rights. So, I can not confirm or deny any IPL rights.

Perry Decl., Ex. 21. The JEDEC minutes of December 1993 record yet another representation along these lines by IBM. Perry Decl., Ex. 22.

30. At about the same time, both IBM and Hewlett-Packard announced at a JEDEC meeting that confidentiality concerns prevented them from disclosing the existence

of patent applications. Long-time Hewlett-Packard representative (and JEDEC committee chair) Hans Wiggers, explained what happened:

Q. Do you remember anything that Gordon Kelley ever said about IBM's position with respect to the JEDEC patent policy?

* * *

A. . . . Jim Townsend had invited a lawyer from a firm that I don't remember to give us a presentation after the regular session to talk about patents. Okay. That is – and I'm – I'm not sure whether this all happened the same meeting or not, but there – the following discussions came up there. Gordon Kelley said 'Look. I cannot disclose – my company would not let me disclose all the patents that IBM is working on because, you know, I just can't do that. The only thing we will do is we will follow the JEDEC guidelines and – or rules on whatever and we will make them available.'

And I piped up at that point and said 'The same is true for HP.'

* * *

Q. Okay. Did Mr. Townsend [the JC 42 committee chairman] have any response when you and Mr. Kelley talked about what your company's positions were?

A. I think he just took it as – I don't know that he had a particular response to that. I think everybody – my impression was that everybody thought that that was a reasonable position to take. We could not even know all the patents that people in our companies were working on. And if we did know it, we certainly were not in a position to divulge that to anybody.

Perry Decl., Ex. 23 (Wiggers 12/18/02 Dep. at 57-58, 60).

31. In March 1994, JEDEC Secretary Kenneth McGhee sent a memorandum to Jim Townsend, the Chairman of the JEDEC 42 Committee, that stated, in part, that

JEDEC's legal counsel had said "that he didn't think it was a good idea to require people at JEDEC standards meetings to sign a document assuring anything about their company's patent rights" Perry Decl., Ex. 26.

32. Mr. McGhee similarly stated in a February 2000 memo that "The JEDEC patent policy concerns items that are known to be patented that are included in JEDEC Standards. Disclosure of patents is a very big issue for Committee members and cannot be required of members at meetings." Perry Decl., Ex. 27. Mr. McGhee also stated that a member that had disclosed a patent application had "gone one step beyond the patent policy," and that JEDEC "encourages this type of activity from any member." *Id.*

33. Motorola's JEDEC representative in the early 1990s, David Chapman, similarly testified that while he understood that "we were expected to disclose granted patents," the disclosure by JEDEC members of patent applications would have "gone beyond" the patent policy and would have involved "company confidential" information. Perry Decl., Ex. 24 (Chapman 1/23/03 Dep. at 20:8-21:13).

34. Rambus itself declined to comment on two separate occasions, in 1992 and 1995, when asked about its intellectual property. Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 379-80). On neither occasion did anyone inform Rambus that disclosure was mandatory rather than voluntary.

35. In January 1996, shortly after Rambus had attended its final JEDEC meeting, the EIA provided comments to the FTC with respect to a proposed Consent Order between the FTC and Dell Computer Corporation ("*Dell*").

36. In that letter, submitted by an EIA Vice President and by its General Counsel, the EIA stated that it “*encourage[s]* the early, voluntary disclosure of patents that relate to the standards in work.” Perry Decl., Ex. 28 (emphasis added).

37. In July 1996, the FTC responded to the EIA’s January 1996 letter in a letter signed by FTC Secretary Donald Clark. The letter stated that:

EIA and TIA, following ANSI procedures, *encourage* the early, voluntary disclosure of patents, but do not *require* a certification by participating companies regarding potentially conflicting patent interests.

Perry Decl., Ex. 29 (emphasis added). The FTC’s letter points out that the EIA policy was different from the policy of the standard-setting organization involved in the *Dell* case, where the policy *did* require the disclosure of “potentially conflicting patent interests.” *Id.*

38. There is no evidence that any EIA official ever informed the FTC that its understanding regarding the “voluntary” nature of patent disclosure under the EIA’s policies was incorrect.

39. On July 10, 1996, JEDEC Secretary Kenneth McGhee sent a memorandum to all “JEDEC Council Members and Attendees” regarding the FTC’s Final Consent Order in the *Dell* case stating in part that:

[REDACTED]

Perry Decl., Ex. 30 (emphasis added).

E. The EIA/JEDEC Patent Policy Only Involved Disclosure of “Essential” Patents.

40. There is nothing in either the written policies or the actual practices of JEDEC's members to support a duty to disclose any patent or patent application that "relates to" a proposed JEDEC standard, as the Complaint alleges.

41. The language of the EIA/JEDEC policy refers only to standards that "*call for the use of patented items.*" Perry Decl., Ex. 12 (§ 8.3) (emphasis added).

42. JEDEC's policy manual JEP 21-I similarly refers only to standards that "*require the use of patented items.*" Perry Decl., Ex. 17 (§ 9.3) (emphasis added). And as noted above, Mr. McGhee's July 10, 1996 memo to all JEDEC Council members stated that the EIA encouraged the voluntary disclosure only of "essential" patents.

43. Infineon's JEDEC representative Willi Meyer testified that it was his understanding the disclosure duty applied only to patents "related to the work at JEDEC in the sense that it described features that were *necessary to meet the standard.*" Perry Decl., Ex. 31 (Meyer Infineon Trial Tr. at 117:12-14) (emphasis added).

44. JEDEC 42.3 subcommittee chairman Gordon Kelley testified that the
[REDACTED]
[REDACTED]
[REDACTED] Perry Decl., Ex. 16 (Kelley 1/26/01 Dep. at 73-76, 89-92) (emphasis added).

45. This narrower understanding of the scope of the disclosure duty is consistent with the JEDEC goal of ensuring that standards incorporating patented items or processes can be practiced under reasonable and non-discriminatory license terms.

46. It is also consistent with the evidence. In particular, while Gordon Kelley testified that “hundreds, if not thousands,” of patents related to DRAMs, *see* Perry Decl., Ex. 16 (Kelley 1/26/01 Dep. at 157-60), the JEDEC “patent tracking” list maintained by the JC 42 Committee Chairman listed only 65 patents or patent applications as of 12/95 that were disclosed to JEDEC 42.3 since the tracking list was first created over four years earlier, in September 1991. Perry Decl., Ex. 32. Of the 65 entries, only five state “pending,” apparently in reference to a patent application. *Id.*

F. Rambus Did Not Lull Any JEDEC Member Into Believing That Rambus Would Not Have Or Would Not Enforce Intellectual Property With Respect To Features Incorporated Within The SDRAM Or DDR SDRAM Standards.

47. Complaint Counsel allege that Rambus intentionally gave the members of JEDEC 42.3 the “materially false and misleading impression . . . that JEDEC, by incorporating into its SDRAM standards technologies openly discussed and considered during Rambus’s tenure in the organization, was not at risk of adopting standards that Rambus could later claim to infringe upon its patents.” Complaint at ¶ 71. Complaint Counsel do not, however, allege that Rambus *encouraged* JEDEC to adopt any technologies that utilize Rambus’s intellectual property. Complaint Counsel also do not allege that Rambus ever made any affirmative representation that it had no relevant intellectual property. Instead, Complaint Counsel’s central claim is that Rambus’s “omissions” intentionally lulled JEDEC into adopting standards that utilize Rambus’s intellectual property.

48. The uncontroverted evidence demonstrates, however, that JEDEC 42.3 recognized very early that Rambus had sought and might one day assert intellectual

property claims over important features contained in the SDRAM and DDR SDRAM standards. The undisputed evidence also shows that JEDEC 42.3 members chose to disregard that risk, in the apparent belief that Rambus would not be able to obtain valid patent rights to the technologies in issue.

49. For example, [REDACTED]

[REDACTED]

Perry Decl., Ex. 37. Samsung's JEDEC representative, Gil Russell, expressed the same view in a September 1992 report of that month's JEDEC meetings:

NEC revealed several interesting facts regarding their proposal for Synchronous DRAM NEC has an on-chip clock which requires 20 MA in standby mode. *This reinforces our opinion that the NEC proposal is the Rambus device with a synchronous interface. NEC is trying to preserve development costs.*

Perry Decl., Ex. 38 (emphasis added).

50. In a similar vein, the JEDEC 42.3 representative of Siemens (now Infineon), Willi Meyer, wrote in April 1992 that “[t]he original idea of SDRAM is based on the fundamental ideas of a simple clock input (IBM toggle pin) *and the complex Rambus structure.*” Perry Decl., Ex. 39 (I 252168) (emphasis added). In April 1992, Meyer wrote that Rambus was demanding royalties from Samsung “because of similarity of SDRAMs with the architecture of Rambus memories. IBM is therefore seriously considering purchasing a license . . . as a precaution.” Perry Decl., Ex. 40.

51. In May 1992, when Meyer prepared a chart comparing the “pros” and “cons” of SDRAMs and Rambus DRAMs, one of the two “cons” he listed with respect to SDRAMs was that “2-bank sync may fall under Rambus patents.” Perry Decl., Ex. 41.

55. Another JEDEC representative, who was also a committee chair, Farhad Tabrizi, testified that Mr. Crisp's position was *itself* an open and obvious violation of JEDEC's patent policy:

Q. And if you asked a representative to comment about his company's patents or patent applications, you expected the representative to give you the information; correct?

A. That's right.

* * *

Q. [I]f the company refused to provide their position or any information about the patent position, that would be a violation of JEDEC patent policy, as you understood it?

A. That's correct.

Perry Decl., Ex. 44 (Tabrizi 11/20/02 Dep. at 27-28).

56. Other JEDEC participants agree with this conclusion. *See, e.g.*, Perry Decl., Ex. 45 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Perry Decl., Ex. 48 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In short, *if* Complaint Counsel is correct about the

disclosure requirements of the patent policy, then Rambus's decision not to respond to inquiries about its intellectual property in May 1992 was a violation of that policy, raised a "red flag" and did nothing to "lull" JEDEC members.

57. It is clear that no one was, in fact, lulled. Roughly one week after the May 1992 meeting, Siemens' JEDEC 42.3 representative Willi Meyer reported that:

[REDACTED]

[REDACTED] Perry Decl., Ex. 46 (emphasis added). It is thus obvious that Siemens' concerns about the "patent situation with Rambus" were not alleviated by Crisp's refusal to comment at the May 1992 meeting.

58. In addition, in June 1992, IBM's Gordon Kelley prepared a chart entitled "COMPARE ALTERNATIVES for Future High Performance, High Volume DRAM Designs." The chart listed "Pros" and "Cons" of Sync DRAMs and Rambus DRAMs; one of the two "cons" listed for Sync DRAMs was "Patent Problems? (Motorola/Rambus)." Perry Decl., Ex. 47.

59. Mr. Kelley has testified that [REDACTED]

[REDACTED]

[REDACTED]. Perry Decl., Ex. 25 (Kelly 4/13/01 Dep. at 374). He has also testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 374, 379).

60. Mr. Kelley testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 375).

61. Under the Complaint’s description of the JEDEC patent policy, Rambus’s position would have been “commonly understood” by all JEDEC members to be an open repudiation of that policy. In any event, Rambus’s position led JEDEC 42.3 Chairman

Kelley to warn a large group of DRAM engineers that they ought to analyze “potential patent problems or patents that were held by Motorola and Rambus.” Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 375).

62. Mr. Kelley also learned at the May 1992 JEDEC meeting that Rambus apparently did *not* agree to the JEDEC policy on licensing and patents. Kelley testified that [REDACTED]

[REDACTED]

Perry Decl., Ex. 25 (Kelley 4/13/01 Dep. at 380).

63. At no time between the May 1992 JEDEC meeting and its withdrawal from JEDEC did Rambus do or say anything to suggest that it had changed the position it had taken at that meeting with respect to patent disclosures and licensing. Chairman Kelley testified that Rambus took the very same position in 1993 or 1994, when Rambus representative Crisp again approached Kelley about making a presentation to JEDEC regarding Rambus’s technology:

[REDACTED]

[REDACTED]

Perry Decl., Ex. 4 (Kelley 1/10/03 Dep. at 37). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

64. Rambus was again asked, in 1995, to respond to questions about its intellectual property. At the May 24, 1995, JEDEC meeting, presentations were made by several JEDEC members regarding a “next generation” memory technology called “SyncLink.” Perry Decl., Ex. 51. Rambus was asked at the meeting to state whether it had patents that related to the SyncLink technology. Perry Decl., Ex. 52.

65. Rambus provided its response at the very next JEDEC meeting, in September 1995, by making the following written statement:

At this time, Rambus elects to not make a specific comment on our intellectual property position relative to the Synclink proposal. *Our presence or silence at committee meetings does not constitute an endorsement of any proposal under the committee’s consideration nor does it make any statement regarding potential infringement of Rambus intellectual property.*

Perry Decl., Ex. 52 (emphasis added). Rambus’s statement was also published in full in the official JEDEC minutes of the September 1995 meeting. Perry Decl., Ex. 53.

66. In June 1995, Mr. Crisp sent an e-mail to Hans Wiggers, a longtime JEDEC representative for Hewlett-Packard who had been working on the SyncLink technology. Mr. Crisp told Mr. Wiggers – who was at that time also a member of the JEDEC Council

(then the governing body of JEDEC) – that SyncLink “has numerous patent issues associated with it.” Perry Decl., Ex. 54 & 55.

67. Mr. Wiggers forwarded Mr. Crisp’s comment to, among others, Mr. Kelley, the Chairman of JEDEC 42.3. *Id.* A few days later, on June 13, 1995, Crisp informed Wiggers that:

[R]egarding patents, I have stated to several persons that my personal opinion is that the Ramlink/SyncLink proposals will have a number of problems with Rambus intellectual property. We were the first out there with high bandwidth, low pincount, DRAMs, our founders were busily at work on their original concept before the first Ramlink meeting was held, and their work was documented, dated and filed properly with the US patent office. Much of what was filed has not yet issued, and I cannot comment on specifics as these filings are confidential. I was asked at the last JEDEC 42.3 meeting to report on our patent coverage relative to SyncLink as proposed at JEDEC 42.3 at the next meeting in Crystal City in September. Our attorneys are currently working on this, so I think I will be in a position to make some sort of official statement at that time and plan to do so. In the meantime, I have nothing else to say to you or the rest of the committee about our patent position. *If you want to search for issued patents held by Rambus, then you may learn something about what we clearly have covered and what we do not. But I must caution you that there is a lot of material that is currently pending and we will not make any comment at all about it until it issues.*

Perry Decl., Ex. 56 (emphasis added); Perry Decl., Ex. 57.

68. In August 1995, Rambus again warned the SyncLink working group that its work might infringe Rambus’s intellectual property. The minutes of the August 21, 1995, meeting of the SyncLink working group state in part as follows:

Richard Crisp, of RamBus, informed us that in their opinion both RamLink and SyncLink may violate RamBus patents that date back as far as 1989. Others commented that the RamLink work was public early enough to avoid problems, and thus

might invalidate such patents to the same extent that they appear to be violated. However, the resolution of these questions is not a feasible task for this committee, so it must continue with the technical work at hand.

Perry Decl., Ex. 58.

69. Although this SyncLink meeting was held under the auspices of the IEEE, rather than JEDEC, *all* of the seven companies represented at the SyncLink meeting were also JEDEC member companies, and at least five of the engineers present at the SyncLink meeting were JEDEC representatives who attended the next JEDEC 42.3 meeting on September 11, 1995. Perry Decl., Ex. 44 (Tabrizi 11/20/02 Dep. at 72-3; Perry Decl., Ex. 58.

70. In that same time period – the fall of 1995 – Rambus CEO Geoff Tate and Rambus Vice President Allen Roberts held a series of meetings with DRAM manufacturers in Asia in an effort to convince the manufacturers to become Rambus licensees. [REDACTED]

[REDACTED]

[REDACTED] Perry Decl., Ex. 59; Perry Decl., Ex. 60 (Tate 1/22/03 Dep. at 304-325).

71. Leading DRAM manufacturer Micron [REDACTED]

[REDACTED]. Perry Decl., Ex. 64. [REDACTED]

[REDACTED]



Id.

72. In January 1996, Micron's concerns about Rambus's intellectual property were reflected in the minutes of the SyncLink Consortium, which Micron had by then joined:

Rambus has 16 patents already with more pending. Rambus says their patents may cover our SyncLink approach even though our method came out of early RamLink work. Micron is particularly concerned to avoid the Rambus patents, though all of us share this concern.

Perry Decl., Ex. 65.

73. Others who took a close look at Rambus's intellectual property in this time period included Dave Gustavson, a SyncLink founder, who reviewed several European patent applications that Rambus had filed. Perry Decl., Ex. 66 (Gustavson 1/17/03 Dep. at 32, 40). Mr. Gustavson has testified that he recognized *immediately* upon reviewing the Rambus patent applications that they had a broad scope that would apply to virtually any memory device, but that he believed the applications would never be allowed in light of their breadth:

Well, at that time, as I recall, there were only patent applications available and those were just available for the European applications, and so someone got those, and we looked at them and concluded that it wouldn't be possible to build any kind of device that used electricity and wires that would – you know – there's just no way to work around those if you're going to use electricity and wires. Now, obviously those claims aren't going to be granted, but that was what was in the application

Id.

74. In sum, during the entire time that Rambus was a JEDEC member, JEDEC was well aware of potential patent issues involving Rambus's intellectual property.

G. Rambus Did Nothing To Lull JEDEC Members After It Left JEDEC.

75. Rambus did nothing after leaving JEDEC that could have lulled JEDEC members into believing that these concerns were alleviated.

76. Rambus attended its last JEDEC 42.3 meeting in December 1995. In March 1996, [REDACTED]

[REDACTED]

[REDACTED] Perry Decl., Ex. 67.

77. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

78. Rambus's separation from JEDEC was formalized on June 17, 1996, when Rambus sent a letter to the JEDEC office that stated:

I am writing to inform you that Rambus Inc. is not renewing its membership in JEDEC 42.3.

Recently at JEDEC 42.3 meetings the subject of Rambus patents has been raised. *Rambus plans to continue to license its proprietary technology on terms that are consistent with the business plan of Rambus, and those terms may not be consistent with the terms set by standards bodies, including JEDEC 42.3.* A number of major companies are already licensees of Rambus technology. *We trust that you will understand that Rambus reserves all rights regarding its intellectual property.* Rambus does, however, encourage

companies to contact Dave Mooring of Rambus to discuss licensing terms and to sign up as licensees.

To the extent that anyone is interested in the patents of Rambus, I have enclosed a list of Rambus U.S. and foreign patents. *Rambus has also applied for a number of additional patents in order to protect Rambus technology.*

Perry Decl., Ex. 3 (emphases added).

79. Several JEDEC 42.3 representatives have testified that they understood from Rambus's June 1996 letter, and its reservation of "all rights," that Rambus did not intend to comply with JEDEC's patent policies. For example, the current Chairman of the JEDEC Board of Directors, Desi Rhoden, testified that he recalls the letter said "that [Rambus] did not agree with, nor intend to follow, JEDEC patent policy" Perry Decl., Ex. 68 (Rhoden 1/24/03 Dep. at 33).

80. Similarly, Mr. Tabrizi, a long-time JEDEC representative and committee chair, testified that he understood from Rambus's withdrawal letter that Rambus refused to "follow the rules" and that "from that point on [he] understood that Rambus was not agreeing to abide by JEDEC's patent policies." Perry Decl., Ex. 69 (Tabrizi 3/12/01 Dep. at 328-29).

81. This same sentiment appears in the official JEDEC minutes of the March 1997 meeting, which state that Rambus had "told JEDEC 42.3 that they do not intend to comply with JEDEC 42.3 patent policies." Perry Decl., Ex. 70. As Mr. Wiggers explained, by March 1997, the members of JEDEC 42.3 "all knew that Rambus was trying to license their intellectual property for a fee, and for royalties, and they had no intention

of complying with the JEDEC 42.3 patent policy.” Perry Decl., Ex. 23 (Wiggers 12/18/02 Dep. at 159:19-22).

82. In a March 1998 e-mail by IBM representative Gordon Kelley, [REDACTED]

[REDACTED]

[REDACTED]

Perry Decl., Ex. 71.

83. Mr. Kelley explained these views at his deposition:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Perry Decl., Ex. 4 (Kelley 1/10/03 Dep. at 137-8).

84. In a similar vein, [REDACTED]

[REDACTED]

[REDACTED]. Perry Decl., Ex. 72.

Mr. Wiggers explained his reference in his deposition:

Q. Why would you refer to Rambus as the dark side?

A. Well, because Rambus was trying to stifle the whole open standardization process and trying to do a grab for controlling the whole memory business.

Perry Decl., Ex. 23 (Wiggers 12/18/02 Dep. at 174).

85. The minutes of the March 1997 JEDEC meeting also reflect that during a presentation regarding an NEC proposal involving DDR SDRAM, a representative stated that “[s]ome on the committee felt that Rambus had a patent on that type of clock design.” Perry Decl., Ex. 70. The minutes then state that “[o]thers felt that the concept predated Rambus by decades.”

86. Hewlett-Packard’s JEDEC representative, Hans Wiggers, explained that at the March 1997 meeting, after someone stated that the idea of using double data rate in a memory device had been around for decades, the discussion of Rambus’s intellectual property at the meeting essentially ended. Perry Decl., Ex. 23 (Wiggers 12/18/02 Dep. at 159).

87. Mr. Wiggers himself felt strongly that Rambus’s use of both clock edges in a memory device was nothing new:

Q. When did you first learn that Rambus was using both the rising edge and the falling edge of the clock in a memory nodule?

A. I don't know. I think . . . it was probably one of the first things I learned about Rambus.

Q. And at the time you learned that, did you think that was something new?

A. Absolutely not . . . [T]he idea of sending data on both platforms was something already used in SDRAM, it was something we used in scalable coherent interface, SCI So it was my feeling that Rambus had got the idea from that standards committee and was taking it as their property.

Id.

88. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

89. In sum, Rambus did nothing that would have conveyed that it believed it had no intellectual property rights reading on the contemplated standards, nor that it intended to acquiesce to the unlicensed use of its proprietary technologies.

H. Rambus Had No Duty of Disclosure With Respect To The DDR SDRAM Standard, Because The Undisputed Evidence Shows That The Development Of That Standard Did Not Begin Until After Rambus Left JEDEC.

90. The Complaint alleges that Rambus has obtained or attempted to obtain monopoly power in four technology markets: the markets for (1) programmable CAS latency (identified in the Complaint as the “latency technology market”); (2) programmable burst length (the “burst length technology market”); (3) on-chip DLL (the “clock synchronization technology market”); and (4) dual-edge clock (the “data acceleration technology market”). Complaint at 28-29, ¶ 113. The Complaint also alleges a fifth product market comprised of all four technologies combined. *Id.* at 29, ¶ 114.

91. The SDRAM incorporates the first two technologies alleged in the Complaint (programmable CAS latency and programmable burst length), but does not require the use of either on-chip DLL or dual-edge clock technology. The DDR SDRAM standard also incorporates programmable CAS latency and programmable burst length. The DDR SDRAM standard differs from its predecessor, however, in that it also requires the use of on-chip DLL and dual-edge clock technology as well.

92. The DDR SDRAM standard was adopted by JEDEC 42.3 in August 1999 and published in June 2000. Perry Decl., Ex. 74.

93. The duty to disclose imposed by JEDEC was triggered only when a standard was formally proposed for committee consideration. Gordon Kelley, the Chairman of JEDEC 42.3, testified that [REDACTED]. Perry Decl., Ex. 16 (Kelley 1/26/01 Dep. at 90-91).

94. JEDEC's secretary, Kenneth McGhee, testified that [REDACTED]. Perry Decl., Ex. 76 (McGhee 8/10/01 Dep. at 165, 174). Rambus attended its last JEDEC meeting in December 1995, and confirmed its withdrawal from the organization by letter in June 1996. Perry Decl., Ex. 3.

95. In granting Rambus judgment as a matter of law on Infineon's fraud claim with respect to the DDR SDRAM standard, the district court stated that "JEDEC Committee JC-42.3 did not begin working on the standard for DDR SDRAM until December 1996," well after Rambus left JEDEC, and thus Infineon had failed to prove that any duty to disclose arose as to DDR SDRAM. *Rambus, Inc. v. Infineon Technologies AG*, 164 F. Supp. 2d 743, 765 (E.D. Va. 2001).

96. The Federal Circuit agreed that the JEDEC disclosure duty "did not arise before legitimate proposals were directed to and formal consideration began on the DDR-SDRAM standard," and that this first occurred in December 1996. *Rambus Inc. v. Infineon Technologies AG*, ___ F.3d ___, 2003 WL 187265 at *20 (Fed. Cir. Jan. 29, 2003).

97. The Federal Circuit affirmed judgment as a matter of law in Rambus’s favor on Infineon’s fraud claim “[b]ecause Infineon did not show that Rambus had a duty to disclose before the DDR-SDRAM standard-setting process formally began.” *Id.* at *21.

98. The undisputed contemporaneous evidence confirms that the DDR SDRAM standard-setting practices did not formally begin until December 1996.

99. The first formal proposal for standardization of DDR SDRAM did not occur until December 1996, when Fujitsu made a “first showing” on DDR SDRAM that was assigned item number 815. Perry Decl., Ex. 77 (JDC 00252-29)

100. In a March 9, 1998, e-mail addressed to the members of JEDEC 42.3, Desi Rhoden, the Chairman of the JEDEC Board of Directors, [REDACTED]

[REDACTED] Perry Decl., Ex. 78. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

101. [REDACTED]

[REDACTED]

[REDACTED] Perry Decl., Ex. 79.

102. Because Rambus was no longer a JEDEC member when JEDEC was undertaking its DDR SDRAM standardization efforts, it had no duty of disclosure with respect to the technologies or features incorporated into those standards.

DATED: March ____, 2003

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
)

RAMBUS INCORPORATED,)
a corporation.)
_____)

Docket No. 9302

CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on March 4, 2003, I caused a true and correct copy of the public version of *Respondent Rambus Inc.'s Rule 3.24 Separate Statement of Material Facts as to Which There is No Genuine Issue* to be served on the following persons by hand delivery:

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