UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

PUBLIC VERSION

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

COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENT RAMBUS INC.'S MOTION FOR SUMMARY DECISION

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Dated: March 25, 2003

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In a motion filed February 27, 2003, Respondent Rambus Inc. ("Rambus") has asked for summary decision on three grounds. As is virtually self-evident, but will nonetheless be thoroughly demonstrated herein, Rambus's stated grounds for summary decision each raise a variety of genuine disputes of material fact, which in themselves require the denial of the motion. Yet the flaws in Rambus's motion extend well beyond the existence of fact disputes. An even more fundamental problem is that Rambus's motion is predicated upon an erroneous characterization of the Commission's Complaint. This is apparent from the very first paragraph of Rambus's supporting memorandum, which states:

> The Complaint alleges that, through its silence at JEDEC meetings, Rambus "lulled" JEDEC members into believing that Rambus had no

> patent interests in the technologies being considered for standardization and that, but for Rambus's silence, JEDEC would have incorporated alternative technologies into the standards at issue that avoid Rambus's patents.

Rambus Mem. at 1 (emphasis added). Rambus's motion thus hinges on the idea that this case is about only one thing: Rambus's failure to call relevant patents and patent applications to JEDEC's attention, in violation of the organization's patent disclosure rules.[1] This is far from an accurate reading of the Commission's Complaint, however. Nor is it an accurate description of the case that Complaint Counsel intends to present in the upcoming hearing.

As stated in the opening sentences of the Commission's Complaint, "[t]hrough this action, the Commission challenges a pattern of anticompetitive acts and practices" by Rambus, including Rambus's concealment of patent-related information "in violation of JEDEC's own operating rules and procedures," as well as "other bad-faith, deceptive conduct." Complaint, ¶¶ 1-2 (emphasis added). As Rambus is well aware, the pattern of bad-faith, deceptive acts at issue here encompasses much more than misleading "silence." It also includes, among other things, affirmatively misleading statements and actions through which Rambus (before and after withdrawing from JEDEC) purposefully sought to – and did – convey to JEDEC's members the false impression that it did not possess intellectual property rights that would, or might, be infringed by JEDEC's SDRAM and DDR SDRAM standards.[2]

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[1] *See also* Rambus Mem. at 59 ("the Complaint's allegations of anticompetitive conduct are predicated on Rambus's alleged breach of a disclosure duty, imposed by JEDEC's rules"); *id.* at 62 (arguing that "Rambus could not have breached any JEDEC disclosure duty, . . . and as a result Rambus cannot be found to have engaged in anticompetitive conduct").

[2] As an example, the expert report of Complaint Counsel's economic expert in this case, Professor Preston McAfee, contains an entire subsection discussing "affirmative conduct" through which Rambus "convey[ed] materially misleading messages to JEDEC and its members." Expert

Likewise, the pattern of anticompetitive acts challenged in this case did more than violate JEDEC's patent disclosure rules. As the Complaint explains, through its challenged conduct, Rambus also violated, undermined, and subverted other JEDEC rules and policies, including

(1) JEDEC's "'basic rule' that standardization programs conducted by the organization 'shall not be proposed for or indirectly result in … restricting competition, giving a competitive advantage to any manufacturer, [or] excluding competitors from the market'" (Complaint, ¶ 19 (emphasis added; quoting EIA Legal Guides, March 14, 1983, JEDEC0009277 at 9282 **[Tab 3]**)[3]); and

(2) a variety of other policies, rules, and procedures through which JEDEC, at all relevant times, sought "to avoid, where possible, the incorporation of patented technologies into its published standards, or at a minimum to ensure that such technologies, if incorporated, will be available to be licensed on royalty-free or otherwise reasonable and non-discriminatory terms" (Complaint, ¶ 20).

This case simply does not turn, as erroneously assumed by Rambus's motion, on the narrow

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Report of R. Preston McAfee at 148, ¶ 212 (emphasis added) **[Tab 1]**. *See also id.* at 155-156, ¶ 223 (noting ways in which, "[b]y virtue of its voluntary participation in JEDEC, . . . Rambus signaled to other JEDEC participants that it would willingly disclose any relevant IP"). Rambus not only is aware that Complaint Counsel and its economic expert have drawn attention to its affirmatively misleading statements and conduct, but in fact, in Professor McAfee's recent deposition in this case, Rambus's counsel spent a considerable amount of time covering these issues. *See, e.g.,* Rough Draft Tr. of McAfee 3/21/03 Dep. at 49 **[Tab 2]** (asking Professor McAfee to "identify" all "affirmative statements made by any employee of Rambus" that served to mislead JEDEC or JEDEC members).

[3] Although the quoted language comes the EIA Legal Guides, it reflects the stated policy of JEDEC during the relevant time period. As noted in Rambus's summary decision papers, "JEDEC was until 1998 an unincorporated division of the EIA [Electronics Industries Association]." Rambus Mem. at 17. JEDEC has since become separately incorporated, but it still maintains a close affiliation with its former patent organization, EIA. *See* Kelly 1/9/01 Dep. at 8 **[Tab 4]** ("JEDEC has been recently incorporated"; "before the first quarter of 2000 . . . JEDEC was an activity within the EIA engineering department"). Moreover, as stated in the Commission's Complaint, JEDEC's rules provide that "all JEDEC meetings 'shall comply with the current edition of EIA Legal Guides,'" and in fact those Legal Guides are "explicitly 'incorporated … by reference' into JEDEC's own governing rules." Complaint, ¶ 18 (quoting JEDEC Manual of Organization and Procedure JM21-K, February 2, 1999, JEDEC0012838 at 870 **[Tab 5]**).

question of whether Rambus's concealment of relevant patents and applications technically violated JEDEC's disclosure rules. Ultimately, the case turns on a much broader question: whether Rambus, through deceptive and exclusionary acts, "has illegally monopolized, attempted to monopolize, or otherwise engaged in unfair methods of competition in certain markets relating to technological features necessary for the design and manufacture of a common form of digital computer memory, known as dynamic random access memory, or 'DRAM.'" Complaint, ¶ 1. This question can and should be answered affirmatively, even in the unlikely event that Rambus could show that it technically did not violate JEDEC's patent disclosure rules.

Complaint Counsel fully intend to prove in the upcoming administrative hearing that Rambus did violate JEDEC's patent disclosure policy, as well other JEDEC policies, rules, and procedures.[4] Likewise, we will show in this memorandum that the question of Rambus's compliance with JEDEC's patent disclosure policy, at the very minimum, raises numerous genuine fact disputes, which preclude summary decision. Nevertheless, even if – contrary to overwhelming evidence – Rambus could demonstrate that it did not technically violate any JEDEC rule, this alone should not allow Rambus to escape liability under controlling case law.

Rambus, with the purpose of excluding competition, has engaged in a pattern of bad-faith, deceptive, and exclusionary acts. Through such acts, Rambus has caused substantial harm to several

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[4] In fact, Rambus itself concedes in its supporting memorandum that the conduct of its designated JEDEC representative, Richard Crisp, violated certain JEDEC rules. *See* Rambus Mem. at 40-42 & n.19 (acknowledging uncontradicted testimony that Mr. Crisp's refusal to respond to patent-related questions posed at a JEDEC meeting, by the subcommittee chairman, "was a violation of the JEDEC patent policy") (emphasis added).

well-defined technology markets[5] and ultimately threatens to cause hundreds of millions, if not billions, of dollars of harm to downstream consumers – *i.e.*, the businesses and individuals throughout this country and the world who buy DRAMs and products, such as personal computers and fax machines, that incorporate modern DRAM devices.[6] Whatever else may be said of Rambus's challenged conduct, it is clear beyond any reasonable dispute that Rambus's actions were unethical and deceptive, and through such actions Rambus consciously subverted, undermined, and violated the integrity of JEDEC's policies and procedures. Even the majority decision in *Rambus Inc. v. Infineon Technologies AG*, 318 F.3d 1081 (Fed. Cir. 2003) (petition for *en banc* rehearing pending) – on which Rambus's motion places considerable reliance (*see* Rambus Mem. at 1-2, 4, 16, 60) – seems to reach this very conclusion.[7]

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[5] In his recent deposition, one of Rambus's economic experts, Dr. Richard Rapp, explained that he essentially accepts, for purposes of conducting economic analysis relevant to this case, the five relevant markets identified in the Commission's Complaint and addressed in the expert report of Complaint Counsel's expert economist, Professor Preston McAfee. *See* Rapp 3/7/03 Dep. at 11 **[Tab 6]** ("although I might not agree with the particular wording of Professor McAfee's market definitions, I don't find the issue one that merits engagement"); *id.* at 70 ("Let us say that I am willing to go along with . . . the definitions proposed by Professor McAfee").

[6] Rambus's other economic expert, Professor David Teece, has acknowledged the potential for Rambus's royalties to result in higher downstream prices being charged to the DRAM consumers. *See* Expert Report of Professor David J. Teece at 70, ¶ 306 **[Tab 7]** ("the positive royalty on DRAMs that embody Rambus's intellectual property could result in somewhat higher prices for those products").

[7] *See Infineon*, 318 F.3d at 1104 (noting that Rambus "wanted to obtain [patent] claims covering the SDRAM standard" and that it "tried to do so" while participating as a member JEDEC, "an open standards-setting committee"; and further concluding that "[s]uch actions" not only fail to "put Rambus in the best light," but indeed "<u>impeach Rambus's business ethics</u>") (emphasis added).

Although Complaint Counsel intends to prove much more (including various violations of JEDEC policies and rules), assuming that the most that could be shown is that Rambus subverted JEDEC's "open standards" process through unethical and deceptive acts, Complaint Counsel submits that such proof alone would be sufficient grounds for imposing liability against Rambus under Section 5 of the FTC Act, as would be true, in the these circumstances, under the Sherman Act as well. While Rambus's motion makes no mention of the controlling legal authorities on this issue, the fact is that "literal compliance" with a standard-setting organization's rules will not, in circumstances such as those presented by this case, allow a defendant to escape antitrust liability. *See Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938, 941 (2d Cir. 1987) (where defendant, with the purpose "of achieving an anticompetitive result," was found to have "subverted," "undermined," and "violated the integrity" of a standard-setting association's processes, the court held, "We refuse to permit a defendant to use its literal compliance with a standard-setting organization's rules as a shield to protect such conduct from antitrust liability.") (emphasis added), *aff'd*, 486 U.S. 492 (1988).[8]

Rambus asserts, in its supporting memorandum, that "[t]he Complaint does not allege that Rambus's JEDEC-related patent disclosure obligation "arises from antitrust law or from overriding principles of public policy." Rambus Mem. at 10. We do not quibble with this statement. Yet we do advance a somewhat different proposition – namely, that Rambus's challenged, bad-faith conduct

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[8] *See also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 498 (1988) (on appeal from Second Circuit, noting that petitioner "did not violate any rules of the Association" but "nonetheless did 'subvert' the consensus standard-making process of the Association," "at least partially motivated by the desire to lessen competition," and concluding that "[t]he antitrust validity of these efforts is not established, without more, by petitioner's literal compliance with the rules") (emphasis added).

subverted and undermined JEDEC's most basic purposes, rules, and procedures, and that this alone, even absent a showing that JEDEC's policies were literally violated, would, in light of all relevant facts, be a sufficient basis upon which to establish liability in this case. This proposition is supported by established case law; it is reflected in the allegations of the Commission's Complaint; and it has previously been highlighted by Complaint Counsel in oral arguments before Judge Timony.[9]

Rambus undoubtedly would prefer to litigate this case solely on the grounds of whether it technically violated JEDEC's patent disclosure rules, especially considering that Rambus seeks to construe those rules so narrowly as to deprive them of any substance or effect. Yet Rambus does not have that option. The issues here are much broader, and the law extends much further. In the end, this case is not about whether JEDEC's rules were technically violated. The issue here is whether a company that achieved its monopoly through a pattern of bad-faith, deceptive, and exclusionary acts – acts that, if they did not violate, plainly undermined and subverted, JEDEC's most basic purposes and policies – should be permitted to go on extracting millions upon millions of dollars in ill-gotten profits, to the detriment of competition and consumers.

For present purposes, the key point is this: Even if the arguments framed by Rambus's motion had merit, they still would not be a valid basis upon which to grant summary decision, for they are

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[9] *See* Tr. of 8/2/02 Sched. Conf. at 28 ("Our concern here . . . is that the conduct at issue <u>threatens the fundamental integrity</u> of the JEDEC standard-setting process"); *id.* at 28 ("JEDEC, like many standards organizations, is built upon a foundation and, frankly, a presumption that its members will operate and participate in <u>good faith</u>"); *id.* at 28-29 ("<u>Far from operating in good faith</u>, Rambus knowingly and intentionally engaged in misleading practices in a manner that <u>violated the most basic rules</u> governing participation in this organization."); *id.* at 54 (this case involves conduct that "<u>subverts</u>" JEDEC's rules); *id.* at 67 (Rambus engaged "in <u>clearly unethical and improper conduct</u>") **[Tab 8]**.

predicated upon an exceedingly narrow, and plainly inaccurate, characterization of what this case is all about, and they utterly ignore controlling principles of antitrust law. As Rambus acknowledges, summary decision may only be entered "when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to such a decision as a matter of law.'" Rambus Mem. at 11 (emphasis added; quoting 16 C.F.R. § 3.24(a)(2)). We will demonstrate in this memorandum both (1) that every argument Rambus has made raises genuine disputes of material fact; and (2) that Rambus has not raised a single argument that, if meritorious, would entitle it to summary decision as a matter of law.

We have structured the remainder of this memorandum as follows: In Section I, we explain in more detail the true nature of the legal and factual issues in this case, correcting the substantial number of inaccuracies embodied in Rambus's motion. We then show that Rambus's motion fails to raise any issue that, even theoretically, could be grounds for summary decision. In Section II, we address the Federal Circuit's recent split decision in *Rambus v. Infineon*. As we explain, far from confirming the merits of the motion, the Federal Circuit's divided ruling in *Infineon* merely underscores the flaws in many of Rambus's summary decision arguments. Indeed, absent vacatur of the majority's opinion in response to the pending motion for *en banc* rehearing, certain findings contained in the Federal Circuit's *Infineon* decision, which are directly contrary to arguments made in Rambus's motion, should be given binding collateral estoppel effect in this case. In Sections III-V, we address, seriatim, the various factual and legal flaws associated with all three of Rambus's stated grounds for summary decision. Finally, in Section VI we discuss the ways in which Judge Timony's recent rulings relating to

Rambus's "spoliation of evidence"[10] and "ongoing fraud"[11] bear upon the present motion for summary decision.

For all of the reasons stated herein, Complaint Counsel respectfully submits that Rambus's motion for summary decision must be denied.[12]

I. Rambus's Motion Is Founded Upon an Erroneous Characterization of the Commission's Complaint and Complaint Counsel's Basic Theory of Liability.

Rambus opens its motion for summary decision by characterizing this case as one based upon an "unprecedented theory of antitrust liability." Rambus Mem. at 1. Rambus then proceeds to outline no fewer than twelve "essential predicate[s]" that it claims "Complaint counsel will be required to establish" in order to prevail. *Id.* at 1, 3. As already discussed above, Rambus's conception of what

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[10] *See* February 26, 2003, Order on Complaint Counsel's Motion for Default Judgment and for Oral Argument at 4 **[Tab 9]** ("I conclude that Rambus's actions . . . amount to spoliation of evidence. Rambus destroyed or failed to preserve evidence for another's use . . . in reasonably foreseeable litigation.") (emphasis added). *See also* February 26, 2003, Order Granting Complaint Counsel's Motion for Collateral Estoppel at 2, 5 **[Tab 10]** (holding that "all of the bases for collateral estoppel warrant a conclusion that Rambus should be barred from relitigating the question of whether its admitted destruction of very large volumes of business records starting in mid-1998 was done 'in part, for the purpose of getting rid of documents that might be harmful' in future anticipated litigation" involving "'its JEDEC-related patents'").

[11] *See* February 28, 2003, Order Concerning Complaint Counsel's Motion to Compel Discovery Relating to Subject Matters as to Which Rambus's Privilege Claims Were Invalidated on Crime-Fraud Grounds and Subsequently Waived at 3 **[Tab 11]** ("I conclude . . . that Rambus was involved in an ongoing fraud post-June 1996 concerning RAM patents it held and had applied for") (emphasis added).

[12] Many of the same points made herein also help to explain why, in Complaint Counsel's view, Your Honor should deny Rambus's recent Motion for Pre-Hearing Determination of Order of Issues to Be Tried. It simply is not true, as that motion erroneously presumes, that "Rambus's liability" in this case "stems" solely from its "intentional violation of [JEDEC's] patent disclosure policy." Memorandum in Support of Respondent Rambus Inc.'s Motion for Pre-Hearing Determination of Order of Issues to Be Tried at 2.

this case is about, and what Complaint Counsel intends to prove, departs dramatically from the clear theory of liability that is spelled out in the Commission's Complaint. Rambus's twelve-point list of purported "essential elements" only confirms the extent to which Rambus's summary decision motion targets a case that the FTC did not bring.[13] This tack of manufacturing a "straw man" rendition of your opponent's case and then hurling criticisms at it in an effort to obtain summary adjudication has been tried before. It is not, however, a strategy that has often met with success. Nor should it be countenanced here. *See, e.g., Kuehne & Nagel, Inc. v. Betterfield, Inc.*, 1987 U.S. Dist. LEXIS 1516, at *2 (N.D. Ill. 1987) ("The motion for summary judgment is utterly without merit. It seeks for its own purposes to characterize plaintiff's action as other than it is, and having erected the straw man, seeks to destroy it.").[14]

In order for Rambus's summary decision arguments to be properly analyzed, it is therefore necessary to first clarify what this case does – and does not – involve, both in terms of the central factual allegations and the basic underlying legal theory. In this section, Complaint Counsel will attempt,

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[13] As we explain below, the elements of proof required to establish antitrust liability are well established and bear no relation to Rambus's twelve-point list. Even the most demanding of Complaint Counsel's three claimed violations – the monopolization claim – only requires proof of <u>two elements</u>. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has <u>two elements</u>: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.") (emphasis added).

[14] *See also Mikulich v. Perez*, 915 S.W.2d 88, 94 (Tex. App. – San Antonio, 1996) (finding that "summary judgment was not properly granted" where the arguments upon which summary judgment was sought "mischaracteriz[ed] appellant's claim"). *Accord Shipley v. Dugan*, 874 F. Supp. 933, 941 (S.D. Ill. 1995) (defendant cannot obtain summary judgment by mischaracterizing plaintiff's claims); *Mitchell v. White Motor Credit Corp.*, 627 F. Supp. 1241, 1251 (M.D. Tenn. 1986) (same).

consistent with space constraints, to provide such an overview, being careful to correct various misconceptions, or mischaracterizations, contained in Rambus's summary decision filings. We will start by summarizing, in condensed form, the nature of what we allege. We will then proceed to explain why – based on the conduct at issue here – our theory of liability is not, as Rambus works mightily to suggest, novel, unprecedented, or exceedingly complex. On the contrary, the legal theory underlying this case is both straightforward and firmly rooted in well-established legal precedents.

A. This Case Challenges a Pattern of Deceptive, Exclusionary Conduct Through Which Rambus Consciously Subverted an Open Standards Process and Thereby Captured a Monopoly in Important Technology-Related Markets.

It would not be practical to attempt to set forth here a full statement of Complaint Counsel's case against Rambus and the substantial evidence on which it is based. The goal of this discussion is necessarily more modest. Specifically, we will summarize below some of the evidence underlying aspects of this case that have been ignored, or obscured, by Rambus's motion for summary decision. In the following section (I.B., *infra*), we will discuss various substantive legal principles that Rambus's motion likewise has ignored or obscured.

1. JEDEC Is Committed to Developing "Open Standards," Avoiding Patents Wherever Possible, and JEDEC's Patent Disclosure Rules Are Only Part of a Broader Collection of Policies, Rules, and Procedures Designed to Achieve This Fundamental Objective.

Rambus's motion focuses considerable attention on the precise nature and scope of JEDEC's patent disclosure policy, but largely ignores the broader purpose of JEDEC, which the patent disclosure policy – along with many other JEDEC policies and principles – is designed to help facilitate. What is JEDEC's broader purpose? Rambus's own Richard Crisp, the company's designated JEDEC representative, once described JEDEC's purpose in these succinct terms: "The job of JEDEC is to create standards which steer clear of patents which must be used to be in compliance with the standard whenever possible." Crisp 8/26/96 E-Mail (R208394 at 395) **[Tab 12]** (emphasis added). JEDEC very likely could not have stated it better. Creating "open" standards, free to be used by anyone, and unencumbered – whenever possible – by private patent rights, is what JEDEC is all about. Mr. Crisp plainly understood this, as would anyone who spent time attending JEDEC meetings or reviewing JEDEC's written policies.[15]

The Commission's Complaint in this case summarizes JEDEC's policies and procedures in some detail. *See* Complaint, ¶¶ 17-24. Among other things, the Complaint notes

- that JEDEC's governing rules provide that standardization programs must be "conducted under strict policies designed to promote and stimulate our free enterprise system and to make sure that laws for maintaining and preserving this system are vigorously followed" (Complaint, ¶ 18 (emphasis added));

- that JEDEC observes a "basic rule" that standardization programs conducted by the organization "shall not be proposed for or indirectly result in … restricting competition, giving a competitive advantage to any manufacturer, [or] excluding competitors from the market" (Complaint, ¶ 19 (quoting EIA Legal Guides, March 14, 1983, JEDEC0009277 at 9282; emphasis added **[Tab 3]**));

[15] Of course, this is not all that Richard Crisp understood about JEDEC's process and procedures. He also came to understand that JEDEC's rules "required disclosure of patent applications," as well as patents, whenever "a showing or a ballot comes to the floor" that raises "potential patent issues" or as to which "there may be patent activity." Crisp 5/2/01 Tr. at 57-58 **[Tab 13]** ("Q. As of September 1995 . . . did you understand the JEDEC patent policy also required disclosure of patent applications? A. I understood it to apply to applications as well, yes."); Crisp 12/5/95 E-Mail (R69697 at 698) **[Tab 14]** (explaining that Rambus would be fulfilling its patent disclosure duties under the JEDEC rules, "[a]s long as we mention that there are potential patent issues when a showing or a ballot comes to the floor"; "we can say when a showing is made that there may be patent activity in that area, etc.") (emphasis added).

- that JEDEC at all times relevant herein has "maintained a commitment to avoid, where possible, the incorporation of patented technologies into its published standards, or at a minimum to ensure that such technologies, if incorporated, will be available to be licensed on royalty-free or otherwise reasonable and non-discriminatory terms" (Complaint, ¶ 20 (emphasis added));

- that JEDEC's rules mandate that the potential use of any "patented items" – or "items and processes for which a patent has been applied" – "be considered with great care" (Complaint, ¶ 22 (quoting JEDEC Manual of Organization and Procedure JEP21-I, October 1993, JEDEC0009323 at 9341 **[Tab 15]**; emphasis added)); and

- that JEDEC's patent disclosure rules are designed to facilitate these broader purposes and objectives (Complaint, ¶ 20).

These very same principles are echoed in the *amicus curiae* brief that JEDEC recently filed with the Federal Circuit in the *Infineon* case, endorsing reconsideration of the panel majority's opinion. As JEDEC states in that brief,

> The importance of open standards, to both the electronics industry and consumers, is well-documented. Standards permit interchangeability between manufacturers' products and increase competition. Because one of the goals of setting open standards is to prevent a single entity from stifling competition, standards setting organizations must be especially careful not to unintentionally standardize patented technology. Accordingly, JEDEC, like most standards setting organizations, has a policy prohibiting the incorporation of patented technology into a standard unless the patent owner is willing to grant a license on reasonable terms. To accomplish its goals, this policy necessarily requires JEDEC committee members to disclose, as early in the standard development process as possible, all patents and applications of which they are aware that might involve the committee's work.

Amicus Curiae Brief of JEDEC Solid State Technology Association in Support of Defendants-Appellees' Petition for Rehearing and Rehearing *En Banc* ("JEDEC *Amicus* Br.") at 2-3 **[Tab 16]** (record citations omitted; emphasis added).

As JEDEC's rules themselves make clear, and JEDEC's recent *Amicus* Brief serves to underscore, the organization's patent disclosure policy cannot be viewed in a vacuum. Rather, that policy is part of a broader scheme of rules and procedures through which JEDEC seeks to achieve a more fundamental set of purposes and objectives – namely,

(1) "setting open standards";

(2) preventing "a single entity from stifling competition";

(3) being "especially careful not to unintentionally standardize patented technology";

(4) "prohibiting the incorporation of patented technology into a standard unless the patent owner is willing to grant a license on reasonable terms"; and

(5) requiring "JEDEC committee members to disclose, as early in the standard development process as possible."

Id.[16]

Anyone who spent time attending JEDEC meetings or reviewing JEDEC's written policies would understand that the organization is firmly committed to these core principles. We know that Mr. Crisp understood very well that "[t]he job of JEDEC is to create standards which steer clear of patents

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[16] JEDEC is by no means alone among standards organizations in its commitment to developing "open" standards, or its desire to avoid patented technologies where possible. Many standards organizations share these principles. In fact, six independent standards development organizations ("SDOs"), representing a broad range of different industries, recently joined together in filing their own *amicus* brief to the Federal Circuit endorsing reconsideration of the majority's decision in *Infineon*. *See Amicus* Brief of Global Platform, Inc., *et al.* in Support of Combined Petition for Panel Rehearing, and Rehearing *En Banc* ("SDO *Amicus* Br.") at 2 **[Tab 17]** ("It is a <u>fundamental goal</u> of each *amicus* to develop <u>'open' standards</u>, *i.e.*, standards that are available to all industry participants and that are not subject to excessive or otherwise unreasonable licensing terms. In pursuit of that goal, each *amicus* has adopted an intellectual property rights ('IPR') policy that addresses the timely disclosure of relevant member-owned intellectual property.") (emphasis added).

which must be used to be in compliance with the standard whenever possible." Crisp 8/26/96 E-Mail (R208394 at 395) **[Tab 12]** (emphasis added). Yet Mr. Crisp was not the only one at Rambus who possessed such an understanding. Rambus's Vice President of Intellectual Property, Joel Karp, also fully appreciated the nature of JEDEC's process. In fact, before joining Rambus in 1997, Mr. Karp served as a JEDEC representative for his prior employer, Samsung, during roughly the same period (in Karp's case, 1990 through 1996) when Rambus was a JEDEC member.[17] Mr. Karp therefore witnessed many of the same DRAM-related presentations that Richard Crisp and others from Rambus observed.[18] Mr. Karp also witnessed first-hand the same internal discussions and activities that informed Richard Crisp's understandings of JEDEC's process and JEDEC's patent-disclosure rules[19] – that is, the same discussions and activities – along with other information – that ultimately caused Mr. Crisp to conclude that JEDEC's rules "required disclosure of patent applications," as well as patents, whenever "a showing or a ballot comes to the floor" that raises "potential patent issues," or as to which

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[17] *See* Karp 8/7/01 Dep. at 313, **[Tab 18]** (confirming that he participated in JEDEC from "December 1990 to March 1996").

[18] *See, e.g.,* [***
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***].

[19] [***
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"there may be patent activity."[20]

Indeed, Mr. Karp not only was active in JEDEC as a Samsung employee, but also authored a sworn declaration commenting upon JEDEC's process and its disclosure requirements, which Samsung used in an effort to counter patent infringement claims filed against it by Texas Instruments. That suit, similar to this one, revolved around Texas Instruments' failure to disclose patent-related materials to JEDEC, and its subsequent effort to enforce such patents over JEDEC-standardized products. In his declaration, Mr. Karp stated:

> I am familiar with the EIA (Electronics Industry Association) patent policy and I understand that other standard-setting groups have similar policies. My understanding of the EIA patent policy is that standards promulgated by standard-setting groups are "open" standards, unless the holder of an intellectual property right has previously disclosed during the standard-setting process its property interest and agreed to license its intellectual property rights on reasonable and non-discriminatory terms, or waive them altogether. . . . It is contrary to industry practice and understanding for an intellectual property owner to remain silent during the standard-setting process – and then after a standard has been adopted and implemented – later attempt to assert that its intellectual property covers the standard and allows it to exclude others from practicing the standard.

Declaration of Joel A. Karp, *In re Certain Electronic Products* (SEC00049 at SEC00050) **[Tab 20]** (emphasis added).

2. JEDEC's Rules Require Members to Act in Good Faith.

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[20] Crisp 5/2/01 Tr. at 57-58, **[Tab 13]** ("Q. As of September 1995 . . . did you understand the JEDEC patent policy also required disclosure of patent applications? A. I understood it to apply to applications as well, yes."); Crisp 12/5/95 E-Mail (R69697 at 698) **[Tab 14]** (explaining that Rambus would be fulfilling its patent disclosure duties under the JEDEC rules, "[a]s long as we mention that there are potential patent issues when a showing or a ballot comes to the floor"; "we can say when a showing is made that there may be patent activity in that area, etc.") (emphasis added).

Through its participation in JEDEC, Rambus not only violated and subverted JEDEC's rules – including but not limited to the patent disclosure rules – but also engaged in conduct that can fairly be characterized as exuding "bad faith." *See* Complaint, ¶¶ 2, 54. As we will explain below, the bad-faith nature of Rambus's conduct is relevant to the application of antitrust law in this setting. It is also relevant as a purely factual matter, however, for JEDEC's rules and procedures themselves create an expectation and duty requiring JEDEC members to act in good faith. Thus, by acting in bad faith – with the purpose of subverting JEDEC's open standards process – Rambus was violating an additional duty incumbent upon all JEDEC members.

There is abundant evidence establishing that JEDEC members, by virtue of their voluntary participation in the organization, commit themselves to comply in good faith with the organization's principles, rules, and procedures. Rambus's lead attorney in this case has acknowledged, for instance, that "it's only reasonable to expect all members of JEDEC to have acted in good faith." Tr. of 8/2/02 Sched. Conf. at 41 **[Tab 8]**. It is also apparent from documents written by Richard Crisp, Rambus's principal representative to JEDEC, that Rambus itself expected fellow JEDEC members to at all times comply with the organization's policies in good faith. *See* Crisp 6/13/95 E-Mail (R69613 at 14) **[Tab 21]** ("I think it is only fair to ask, in fact demand, that you and others play by the rules," referring to possible disclosure within JEDEC of statements made by Crisp within SyncLink). Joel Karp's declaration from the

Texas Instruments litigation also alludes to the requirement of good faith, stating that "<u>[i]t is contrary to industry practice and understanding</u> for an intellectual property owner to remain silent during the standard-setting process – and then after a standard has been adopted and implemented – later attempt to assert that its intellectual property covers the standard and allows it to exclude others from practicing the standard." Declaration of Joel A. Karp, *In re Certain Electronic Products* (SEC00049 at 50) **[Tab 20]** (emphasis added).

Numerous JEDEC participants from companies other than Rambus have testified in deposition that there is indeed a strong expectation of good faith among JEDEC members, and that it would violate a member's duty of good faith if it were to consciously act in ways that were at odds with JEDEC's fundamental goal of developing "open standards." For instance, Desi Rhoden, JEDEC's current Chairman and a long-time participant in the JC-42.3 Subcommittee, has testified, "[E]verything that goes on in JEDEC operates <u>under the principle of good faith</u>. The people who are there are there because they want to develop an <u>open standard</u>." Rhoden 1/24/03 Dep. at 44 **[Tab 22]**. *See also id.* at 135 ("Remember, I said that JEDEC operates under the <u>premise of good faith</u>, and in that premise of good faith I believe it would be good faith for people to disclose that they have the intent to file something that is under consideration, yes.").

Another long-time JEDEC participant – Willibald Meyer of Infineon – gave the following testimony in a deposition taken during the *Rambus v. Infineon* litigation:

> Q. You mentioned in your answer that you expect the other – or you mentioned in your answer about the fair conduct with each other. <u>Did you have an expectation that Rambus and the other members of JEDEC or participants in JEDEC would deal fairly with each other</u>?
>
> A. <u>Yes, absolutely</u>.
>
> Q. <u>Did you have an expectation that Rambus and the other participants and members of JEDEC would deal with each other in good faith</u>?

> A. <u>Yes, of course</u>, which is a necessity when competitors sit together, and in the event that everybody would run out of these meetings and use the information picked up from the meeting, use that for their own purposes of unfair, to seek an unfair advantage on the marketplace other than by competition in the sense of, on the grounds of the common standard, then <u>we have to assume that fairness is one of the priorities</u>.

Meyer 12/14/00 Dep. at 431 **[Tab 23]**.

Other JEDEC participants have expressed the same concept not in terms of "good faith," *per se*, but rather in terms of business ethics. For instance, Dr. Betty Prince, who participated in JEDEC on behalf of several companies, including Philips and Texas Instruments, had this to say in her deposition in the *Micron* case:

> Q. . . . [W]hat was your understanding of what obligations, if any, Phillips had to disclose patents to JEDEC?
>
> A. Same as any other company. The understanding with which the standards community comes together is that <u>these will be open standards</u>. And the JEDEC patent policy was that – if my – my understanding of it was that if you have a patent that affects the standard, then the company needed to present a letter stating that they would abide by the JEDEC patent policy.
>
> Q. . . . [W]hat was your understanding of whether or not the company had to disclose any pending applications that related to what JEDEC was doing?
>
> A. This – my understanding of this was that any company that participated in the standards process <u>ethically</u> couldn't also be patenting things that would be open to standards without agreeing to the JEDEC patent policy.

Prince 3/13/01 Dep. at 88 **[Tab 24]**.[21]

In an *amicus* brief recently filed with the Federal Circuit in the *Infineon* case, a number of JEDEC-participating companies – including AMD and Hewlett-Packard – have sought to underscore that the expectation of good faith, particularly with regard to patent disclosure, is centrally important to proper functioning of JEDEC and other "open" standards organizations.

> Broad participation in industry standards setting organizations ("SSOs") has long played a key role in the development of multiple-source, standardized products. Compliance with industry standards ensures compatibility of parts made by different manufacturers, and produces distinct cost advantages for manufacturers and consumers.
>
> Patent disclosure policies have for just as long been central to ensuring that technologies are not adopted as standards without a clear view of the patent landscape. These policies embody both the obligation, and the understanding, of SSO members that <u>good faith must govern their participation in standards setting bodies</u>.
>
> * * *
>
> Like many SSOs, given the choice between competing technologies, JEDEC prefers to adopt as standards technologies that are free from patent claims. Standards that are subject to patent claims carry significant costs that do not encumber otherwise <u>open standards</u>. To ensure that decisions throughout the standard-setting process are illuminated by knowledge of potential patent assertions, many SSOs, including JEDEC, have adopted patent disclosure policies. The specific terms of these policies vary, but they share many common requirements. A core requirement is that members must disclose patent

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[21] Rambus's supporting memorandum, perhaps unintentionally, draws attention to this general duty of good faith by pointing to testimony from, among others, Farhad Tabrizi of Hynix (a former JEDEC committee chairman), to the effect that Rambus's failure to comment, when asked about its intellectual property at a JEDEC meeting, amounted to a violation of JEDEC's rules. *See* Rambus Mem. at 40-42. It is implicit in this testimony that the JEDEC "rule" that may be breached by such conduct is the "rule," or expectation, of good-faith participation.

> rights that they believe may cover a proposed standard. The clear intent is that disclosures occur early enough in the process so that members may make fully informed decisions regarding the direction the standard is taking. <u>This duty, and good faith adherence to its requirements, go to the very heart of standard-setting activities</u>.

Brief of *Amici Curiae* Advanced Micro Devices, Inc., *et al.* in Support of the Petition for Rehearing and Rehearing *En Banc* ("AMD, *et al. Amicus* Br.") at 1-2, 4 **[Tab 25]** (emphasis added).[22]

3. By Concealing Relevant Patent Information, Rambus Not Only Violated JEDEC's Disclosure Rules But Also Violated and Subverted JEDEC's Broader Policies, Rules, and Procedures.

As explained above, Rambus's motion for summary decision is founded upon an erroneous premise – that is, the notion that the only JEDEC "rules" placed in issue by the Commission's Complaint are JEDEC's patent disclosure rules. Complaint Counsel fully expects to prove, in the upcoming administrative hearing, that Rambus <u>did</u> violate JEDEC's patent disclosure rules. The point Complaint Counsel wishes to make here, however, is that Rambus's conduct also violated many <u>other</u> JEDEC policies, rules, and procedures, including the well-understood duty of good faith. Moreover, to the extent Rambus's conduct did not directly violate JEDEC's rules, such conduct, at a minimum, clearly undermined and subverted JEDEC's process and the organization's most fundamental principles.

It would not be practical to set forth here all of the voluminous evidence that Complaint

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[22] *See also* SDO *Amicus* Br. at 3-4 **[Tab 17]** ("For standard setting to be successful, participants need to adopt standardization policies that will minimize the likelihood that they will inadvertently commit themselves to using standardized technologies subject to intellectual property claims of others. Moreover, lest they fall into a trap of their own devising, each participant needs to have faith that their partners in the process are <u>acting in good faith</u> towards the same, common goal.") (emphasis added).

Counsel intends to rely upon in establishing these propositions. But of course, the basic facts relating to Rambus's JEDEC participation are really not in dispute. In fact, the broad factual outline can be gleaned from the Federal Circuit's majority decision in *Infineon*, and from Judge Timony's recent order concerning the Rambus's document destruction. The Federal Circuit majority, for instance, acknowledges that Rambus "wanted to obtain [patent] claims covering the SDRAM standard," and that it "tried to do so" while participating as a member JEDEC, "an open standards-setting committee." *Infineon*, 318 F.3d at 1104 (emphasis added). Yet, as Judge Timony recently concluded, "Rambus never disclosed to other JEDEC participants that it either held or had applied for patents that would be infringed upon by the proposed JEDEC standards." February 26, 2003, Order on Complaint Counsel's Motion for Default Judgment and for Oral Argument at 3 **[Tab 9]** (emphasis added). As Judge Timony also noted, "Rambus was advised by its counsel," during the time it participated as a member of JEDEC, "that this participation, combined with its failure to disclose the existence of the patents that would be infringed by the proposed JEDEC standard, could" – due the "misleading"[23] nature of Rambus's conduct – "create an equitable estoppel that would make it difficult, if not impossible, for Rambus to enforce its patents and, most importantly, to collect royalties or damages

[23] *See* Diepenbrock 3/14/01 Dep. at 141 **[Tab 26]** (Mr. Diepenbrock, Rambus's in-house patent counsel, feared that Rambus could be judged to have engaged in "misleading conduct" and that other JEDEC participants, having "relied upon" such conduct "to the[ir] prejudice," could successfully assert the defense of equitable estoppel if sued by Rambus for patent infringement). *See also id.* at 148 ("I explained [to Richard Crisp] that there are certain doctrines in patent laws, equitable doctrines that can render a patent unenforceable. And one of those doctrines is laches, and the other is equitable estoppel, two of them. And that he was running a risk that equitable estoppel, which might have been construed by his actions, would render some or – some patents that had issued unenforceable, and that we did not want to take that risk.").

from patent infringements resulting from the proposed JEDEC standards." *Id.* As the evidence plainly shows, it was these very concerns about equitable estoppel, coupled with fears of potential antitrust liability fueled by the FTC's December 1995 proposed consent order in *In re Dell Computer Corporation*, that ultimately led to Rambus's decision to withdraw from JEDEC in June 1996.[24]

Hence, the conduct we are dealing with in this case, at minimum, involves a company participating in an "open standards" organization, at a time when it was seeking to secure patent rights over those same standards. It did so in a manner that the company's own lawyers believed was misleading and courted serious legal risks. And it participated in the organization without ever disclosing to the organization the fact that the company believed it possessed patents, or patent applications, that would very likely be infringed by products built in compliance with the organization's standards.

Does this conduct violate JEDEC's patent disclosure rules? We will show that it does. That is, we will show that under any reasonable interpretation of JEDEC's patent disclosure policy, during the period in which it was a JEDEC member, Rambus possessed at least one issued patent and numerous Rambus patent applications that bore a sufficiently close relationship to JEDEC's work to trigger a

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[24] As Complaint Counsel has previously pointed out, in the wake of *Dell*, Rambus's outside patent counsel, Lester Vincent, who had advised Rambus for years to withdraw from JEDEC, suddenly became emphatic in his calls for Rambus to withdraw. *See* Handwritten Notes of Vincent, from January 1996 (R203881) **[Tab 27]** ("No further participation in any standards body . . . do not even get **close**!!") (triple underlining in original). *See also* Diepenbrock 4/11/01 Dep. at 262 **[Tab 28]** ("[H]e" – referring to Lester Vincent – "said that Dell had been estopped from enforcing [a] patent" and that this "supported his . . . previous statements to Rambus people that they should not participate" in standard-setting activities); *see also id.* at 263 ("He told me that he had advised – previously advised people, before I had arrived apparently, that they shouldn't attend those meetings" because "there's an equitable estoppel issue").

clear duty to disclose.

Does this conduct also violate other JEDEC rules, in addition to the patent disclosure policy? We will show this as well. Among other things, Rambus's conduct violated JEDEC's "basic rule" that standardization programs conducted by the organization "shall not be proposed for or indirectly result in … restricting competition, giving a competitive advantage to any manufacturer, [or] excluding competitors from the market." EIA Legal Guides, March 14, 1983, JEDEC0009277 at 9282 **[Tab 3]** (emphasis added). Rambus's conduct also violated JEDEC rules designed to avoid, where possible, the incorporation of patented technologies into its published standards, or at a minimum to ensure that such technologies, if incorporated, will be available to be licensed on royalty-free or otherwise reasonable and non-discriminatory terms. Finally, Rambus's conduct also violated the general requirement of good faith. By depriving JEDEC of critically important, patent-related information, Rambus manipulated an otherwise pro-competitive, open standards process, causing that process to become a vehicle for endowing monopoly power upon a single firm, to the enduring detriment of JEDEC and its broader membership, not to mention the relevant markets at issue in this case. Complaint Counsel submit that such conduct could not possibly be more at odds with JEDEC's fundamental rules and purposes.[25]

Although Complaint Counsel will show that JEDEC's rules are directly breached when one of

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[25] The organization's recent amicus submission to the Federal Circuit suggests that JEDEC agrees with this assertion. *See* JEDEC *Amicus* Br. at 3-4 **[Tab 16]** (stating that the majority's "narrow" interpretation of JEDEC's rules "flies in the face of JEDEC and its members' long-held understanding that the patent policy broadly requires committee members to disclose patents 'that might be involved in the work they are undertaking'").

the organization's members knowingly engages in conduct such as this, it would not matter for purposes of antitrust liability if these actions were found to be consistent with JEDEC rules. Even if Rambus's conduct did not technically violate JEDEC's rules, Rambus's actions most certainly subverted, undermined, and violated the integrity of JEDEC's central purposes, rules, and procedures. As we will explain below, as a legal matter there is no meaningful difference between violation and conscious subversion in this context. Stated differently, whether a rule violation can be established or not, when a firm achieves monopoly power (or otherwise substantially impairs competition) as a consequence of subverting the otherwise pro-competitive purposes of a standard-setting organization, this plainly rises to the level of an antitrust violation.

4. Rambus Engaged in Affirmatively Misleading Conduct, Both During and After Its Membership in JEDEC.

Finally, as touched on above, it bears emphasis that this case – contrary to the claims upon which Rambus's motion is predicated – is not solely about "Rambus's silence." Rambus Mem. at 1. Though Rambus's wrongful concealment of patent-related information from JEDEC is a central issue in this litigation, the broader pattern of deceptive conduct challenged by the Commission's Complaint also includes a variety of affirmatively misleading acts.

As Complaint Counsel's economic expert recently testified, Rambus's "very . . . presence" at JEDEC meetings was misleading in the sense that "[i]t created in the minds of the other members an expectation of behavior," which Rambus then violated. Rough Draft Tr. of McAfee 3/21/03 Dep. at 38-39 **[Tab 2]**. Choosing voluntarily to attend JEDEC, in other words, was an affirmative act by

Rambus, which communicated, or "signaled," something that was untrue – namely, that Rambus intended to "play by the rules." Crisp 6/13/95 E-Mail (R69613 at 614) **[Tab 21]**. Through the manner in which it participated in JEDEC, Rambus further reinforced, in the minds of other JEDEC members, the expectation that it would "play by the rules." *Id*. The following affirmative acts – among others – served to reinforce the misleading impression that Rambus could be trusted to make appropriate patented-related disclosures:

(1) In 1992, Richard Crisp voted "no" on several ballot items relating to the work of JEDEC's JC-42.3 subcommittee, and then he later explained the basis for his "no" votes (*see* Complaint, ¶ 53);

(2) in September 1993, Mr. Crisp disclosed to the JC-42.3 subcommittee the fact that Rambus had recently obtained a new patent – U.S. Patent No. 5,423,703 ("'703 patent'") (*see* Complaint, ¶ 76);

(3) in September 1995, Mr. Crisp read a letter to the JC-42.3 subcommittee purporting to respond to patent-related issues pertaining to the SyncLink technology, which was the subject of a presentation at a previous JC-42.3 meeting, in May 1995 (*see* Complaint, ¶¶ 72-73); and

(4) in June 1996, when it withdrew from JEDEC, Mr. Crisp provided an additional letter that, among other things, purported to list all of the patents that had been issued to Rambus by that date (*see* Complaint, ¶¶ 72-73).

These actions, taken together with Rambus's very presence at JEDEC, served to convey the impression that Rambus was a full-fledged participant in JEDEC, and that it could be trusted to abide by the minimum obligations associated with JEDEC membership. This in itself was misleading, since Rambus privately knew that it had no intention of complying with such obligations. Yet these actions were made all the more misleading as a result of Richard Crisp's efforts to draw attention to Rambus's past JEDEC participation in an effort to assuage concerns about potential Rambus patent claims relevant to the SyncLink technology.

The relevant incident is memorialized in an e-mail that Mr. Crisp authored and sent while attending the September 1995 meeting of the JEDEC JC-42.3 subcommittee, which was held in Crystal City, Virginia. As noted above, it was at this meeting that Mr. Crisp read aloud to the membership Rambus's written response to patent-related questions that had been raised at the previous JC-42.3 meeting in May 1995. As reported in Mr. Crisp's e-mail account of the meeting:

> The patent statement was read and generated some discussion. Basically, Kelley of IBM said that he heard a lot of words, but did not hear anything said. I reminded them that first of all we are in Washington DC, so it is in keeping with what one would expect to hear in this town (got a lot of laughs which helped to keep things civil) and that we actually did say something. . . . <u>I also reminded them that we have actually reported a patent to the committee in the past and in so doing it put us in a league within JEDEC which has only a small number of members</u>.

Crisp 9/11/95 E-Mail (R69676 at 76-77) **[Tab 29]** (emphasis added). As this e-mail shows, Rambus's participation in JEDEC – including its disclosure of the '703 patent, which Rambus has acknowledged was not relevant to JEDEC's work – not only conveyed a misleading impression, but Rambus then sought to capitalize on that misimpression in an effort to minimize concerns that it was not being sufficiently forthcoming. In simple words, the message Mr. Crisp sought to convey was this: "You can trust us. If we have something to disclose, we will do so, just as we have done before." This was not <u>silence</u>. It was a highly deceptive, affirmative misrepresentation.

This was, however, not the only affirmatively misleading statement or action by Rambus. The SyncLink letter itself was an affirmatively misleading statement, inasmuch as it did not disclose anything of substance. As Gordon Kelley of IBM apparently stated, he "heard a lot of words, but did not hear anything said." *Id.* Yet the fact is that Rambus plainly did believe that SyncLink infringed, or likely would infringe, Rambus patents, and in fact Rambus was working assiduously to nail down patent coverage over future SyncLink devices, with the expectation that it could potentially "<u>collect big royalty checks</u>" from makers of SyncLink technology. Crisp 8/30/95 E-Mail (R69693 at 95) **[Tab 30]** (emphasis added).[26] Rambus's JEDEC withdrawal letter, similarly, was highly misleading, inasmuch as it omitted from the list of patents that was attached to the letter the only Rambus patent that was relevant to JEDEC's work. *See* Complaint, ¶¶ 72-73.

These are merely examples of the affirmatively misleading actions that comprise a part of the overall pattern of deceptive conduct challenged by the Commission's Complaint. A more exhaustive summary is beyond the scope of this memorandum. What should be emphasized, however, is that Rambus's affirmatively misleading conduct did not cease when Rambus withdrew from JEDEC. For years thereafter, Rambus continued to conceal the patent-related information that it had wrongfully withheld from JEDEC, and it purposely conveyed misleading messages in the press and elsewhere in an effort to squelch suspicions that Rambus might possess patents rights covering aspects of the JEDEC

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[26] *See also, e.g.,* [***
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************************************]; Tate 8/4/97 E-Mail to David Mooring, et al. (R233868) **[Tab 33]** ("competitive solutions like <u>ddr/sldram are likely to infringe</u>") (emphasis added); [***
***].

standards. *See, e.g.*, [******************
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***********************].[27]

B. Rambus's Challenged Conduct Plainly Violates Well-Established Principles of Antitrust Law.

In addition to mischaracterizing the nature and scope of Complaint Counsel's factual contentions, Rambus's summary decision motion seeks to convey a misleading impression as to the state of the law relating to the type of antitrust violation outlined by the Complaint. While Rambus suggests that this case is predicated upon an "unprecedented" and "novel" "theory of antitrust liability" (Rambus Mem. at 1, 3), in truth the legal underpinnings of this case are quite sound and well established. Moreover, based on the controlling case law – essentially all of which Rambus's summary decision

[27] As recounted in Complaint Counsel's Motion for Default Judgment, when Joel Karp was first hired by Rambus it was understood within the company that "his role" would be "to prepare and then to negotiate to license our patents for infringing drams (and potentially other infringing ic's)," with a particular emphasis on preparing patent actions against JEDEC-compliant DDR SDRAMs. Tate 10/1/97 E-Mail to exec@rambus.com (R233872) **[Tab 37]**. Not wanting this information to leak outside the company, Rambus CEO Geoffrey Tate cautioned his team to "keep this confidential" – then added, "[W]hen joel starts we have to have our spin control ready for partners/etc as to why we are hiring him and what he will be doing. my thought is we say externally that joel is coming on board to help us with contracts and ip licensing." *Id.* (emphasis added). This is yet another piece of the broader pattern of misleading conduct at issue in this case.

motion ignores[28] – there is little doubt but that the conduct described herein constitutes a antitrust violation.

1. The Elements of Proof Required by Complaint Counsel's Antitrust Claims Are Well Established.

The Commission has brought this case under Section 5 of the FTC Act, which bars "unfair methods of competition." 15 U.S.C. § 45(a)(1). That term, of course, encompasses both "practices that violate the Sherman Act and the other antitrust laws," as well as "practices that the Commission determines are against public policy for other reasons." *Federal Trade Comm'n v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986); *see also Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972) (Section 5 empowers the FTC "to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws"). In this case, two of the Commission's three Section 5 claims are based on principles emanating from Section 2 of the Sherman Act – *i.e.*, the monopolization and attempted monopolization claims. The third and final claim stated by the Complaint alleges that, in addition to monopolization and attempted monopolization, Rambus has engaged more generally in "unfair methods of competition" within the reach of Section 5.

Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations."

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[28] It is interesting to note that Rambus's summary decision motion is essentially devoid of any discussion of antitrust law. Indeed, Rambus's motion devotes far more attention to discussing contract law than antitrust, perhaps in recognition that the fact that antitrust law reaches considerably further than common-law tort and contract principles in an effort to correct the serious public (as opposed to private) harms that antitrust violations – including those at issue here – can inflict.

15 U.S.C. § 2. A Section 2 monopolization offense requires proof of only two elements: "(1) the possession of monopoly power in a relevant market, and (2) the willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 (1985) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). By contrast, the offense of attempted monopolization under Section 2 of the Sherman Act requires proof of three elements: (1) exclusionary or anticompetitive conduct; (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Thus, for proof of either claim, exclusionary or anticompetitive conduct, of the type Rambus is alleged to have engaged in, is required.

As noted above, Section 5 of the FTC Act provides the Federal Trade Commission with the authority to define and proscribe "unfair methods of competition." 15 U.S.C. § 45(a)(1). Accordingly, the Commission may sanction "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit." *E.I. Du Pont de Nemours & Co. v. Federal Trade Comm'n*, 729 F.2d 128, 136-37 (2d Cir. 1984); *see also Grand Union Co. v. Federal Trade Comm'n*, 300 F.2d 92 (2d Cir. 1962). It is firmly established that this "gap-filling" or "spirit" provision confers broad authority on the Commission to "declare trade practices unfair." *Federal Trade Comm'n v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966). Specifically, "Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many variable and unfair practices which prevail in commerce." *The Atlantic Refining Co. v. Federal Trade Comm'n*, 381 U.S. 357, 365 (1965) (citing S. Rep. No. 592, 63d Cong., 2d Sess., 13 (1914)).

Pursuant to this authority, the Commission has successfully attacked "collusive, predatory, restrictive [and] deceitful conduct that substantially lessens competition." *Du Pont*, 729 F.2d at 137. "[T]he Commission has applied Section 5 to activities that violate the spirit of certain Sherman and Clayton Act sections that were clearly intended to promote competition and deter anticompetitive acts." *In the Matter of General Motors Corp.*, 103 F.T.C. 641, 701 (1984). Moreover, "the FTC has proceeded against single-actor conduct which is unfair competitive behavior but which falls short of an attempt to monopolize under Section 2 of the Sherman Act." *In the Matter of Ethyl Corp.*, 101 F.T.C. 425, 597 (1983), *vacated sub nom. E.I. Du Pont de Nemours & Co. v. Federal Trade Comm'n*, 729 F.2d 128, 136-37 (2d Cir. 1984).

Unfair conduct that has a demonstrable anticompetitive effect is unlawful under Section 5 of the FTC Act. Indeed, the Commission has expressly concluded that "Section 5 was not intended to be subject to the same limitations as the Sherman Act and the Clayton Act when there is good evidence that the challenged practices have anticompetitive effects very similar to those prohibited by those two Acts." *Ethyl*, 101 F.T.C. at 597. Thus, "conduct which excludes competitors unfairly," and "in turn . . . lead[s] to monopoly pricing," is unlawful under Section 5. *See Ethyl*, 101 F.T.C. at 598.[29]

Although the bounds of Section 5 may well extend more broadly, Complaint Counsel advances

[29] A requirement that the Commission show anticompetitive effects fully satisfies the limitations placed upon the FTC's authority by various courts designed to avoid an "abuse" of the FTC's power. *See Du Pont*, 729 F.2d at 137. For example, *Du Pont* demands that any conduct that the Commission deems unlawful have a line of demarcation between "conduct that is anticompetitive and legitimate conduct that has an impact on competition." *Id.* at 138; *see also Boise Cascade Corp. v. Federal Trade Comm'n*, 637 F.2d 573, 581 (9th Cir. 1980) (court would not uphold violation in "absence of some reliable indicator that a practice had an effect on overall price levels"; "the Commission must find . . . an actual effect on competition to make out a Section 5 violation").

the third and final "unfair methods of competition" claim in this case as one entailing proof falling somewhere in between that which would be required to establish, on the one hand, monopolization, or on the other, attempted monopolization, under Section 2 of the Sherman Act. Accordingly, in addition to demonstrating that Rambus's conduct was "unfair" as that term has been defined by the case law, Complaint Counsel intends to show at a minimum that Rambus's conduct has resulted in a material, adverse effect on competition (*i.e.*, more than the type of threatened effect that might suffice for attempted monopolization).

Despite the variances in proof requirements applicable to these three claims, Complaint Counsel intends to pursue simultaneously all three of the violations outlined in the Commission's Complaint and is entitled to prevail upon proof of any one of these claims.

2. It Is Well Established That Manipulation of a Standard-Setting Process in Order to Restrict Competition or Attain a Monopoly Can Violate the Antitrust Laws, and Lead to the Unenforceability of Patents.

The specific legal underpinnings of this case have solid roots in antitrust law. Even before the relevant antitrust principles emerged, however, misconduct of the sort alleged here had been addressed in other legal contexts. Whether the issue arises in an antitrust context, in a patent context, or in the context of common-law fraud claims – as was true in the *Infineon* case – the remedy typically has been the same: patent holders whose patents cover standards by virtue of wrongful conduct have been forbidden from enforcing their patents, where doing so would permit the patent holder to capture ill-gotten gains.

The earliest cases addressing the specific form of misconduct at issue here arose in the context of patent suits. *Stambler v. Diebold, Inc.*, 11 U.S.P.Q.2d 1709, 1988 WL 95479 (E.D.N.Y., Sept. 2, 1988), *aff'd mem.*, 878 F.2d 1445 (Fed. Cir. 1989), is one example. That case dealt with an inventor who participated in a standard-setting organization for automatic-teller machines, where he became aware that the SSO was considering the adoption of technology that would infringe his patent. He left the SSO without informing the organization of his patent, and did not seek to enforce the patent until roughly ten years later, once the standard incorporating his patent had been widely adopted throughout the industry. The court held that the inventor's failure to identify his patent was an affirmatively misleading breach of a duty to speak. 1988 WL 95479, at *6. On this basis, the court estopped the inventor from enforcing his patent.

In another case, *Wang Laboratories, Inc. v. Mitsubishi Electronics America, Inc.*, 103 F.3d 1571 (Fed. Cir. 1997), the court deemed Wang to have granted an implied license to Mitsubishi after it deceived Mitsubishi into adopting its patented technology for Mitsubishi's new memory chips. Mitsubishi met with Wang on several occasions to discuss the design its new memory chips, which Wang sought to purchase from Mitsubishi. Wang offered several suggestions, which happened to involve the use of technology for which Wang held patents. Wang did not disclose its patent position to Mitsubishi, however, and Mitsubishi adopted Wang's proposals. Mitsubishi subsequently began to mass-produce these chips, selling many of them to Wang, and in the process setting a *de facto* industry standard. Several years later, Wang sued Mitsubishi for patent infringement. The court held that Wang's course of conduct entitled Mitsubishi to an implied license to the patents. 103 F.3d at 1582. It thus precluded Wang from using its deceptive conduct to enrich itself through royalty payments.

Just as courts, in the patent context, have been quick to condemn deceptive conduct designed to capture patent rights over an industry standard, antitrust law has dealt harshly with conduct – deceptive or otherwise – through which either a single firm, or multiple firms, seeks to manipulate the activities of a standard-setting organization ("SSO") to achieve an anticompetitive result. Courts typically start from the baseline presumption that standard-setting activities, properly focused and contained, serve to promote consumer welfare. *See Indian Head, Inc. v. Allied Tube & Conduit Corp.,* 486 U.S. 492, 501 (1988). At the same time, courts have recognized that, because of the influential nature of standards, such organizations often wield "great power in the Nation's economy." *American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570 (1982). Antitrust law, quite properly, has been applied to scrutinize the activities of SSOs to ensure that their activities have not been co-opted to benefit some or all of the association's members to the detriment of consumers. *See Hydrolevel*, 456 U.S. at 571 (SSOs are "rife with opportunities for anticompetitive behavior"); *Radiant Burners, Inc. v. Peoples Gas, Light and Coke Co.*, 364 U.S. 656, 658 (1961). Accordingly, an SSO and its participants must operate within certain prescribed areas of conduct that are reasonable and applied with an even hand. When an SSO's activities "are not based on 'objective standards,'" thereby allowing it to act as an exclusionary mechanism, the Sherman Act is violated. *See Radiant Burners*, 364 U.S. at 658. Similarly, where an SSO fails to take adequate safeguards to protect the integrity of its decisions, allowing its members "to frustrate the competition in the marketplace," this too can lead to a violation of the antitrust laws. *Hydrolevel*, 456 U.S. at 571. Indeed, the Supreme Court has upheld antitrust liability against companies that manipulate or subvert a standard-setting process in order to induce to cause the adoption of standards they favor, or the rejection of standards they oppose. *See Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 486 U.S. 492 (1988).

Similarly, the Commission has taken enforcement action – even prior to this case – based on allegations that a firm misled a standard-setting group into selecting a standard over which the company held patent rights. It charged Dell Computer Corporation ("Dell") with engaging in unfair methods of competition by undermining the standard-setting process for the standard governing signals between a computer and its peripherals – a standard established by an organization known as VESA. *See In the Matter of Dell Computer Corp.*, 121 F.T.C. 616 (1996). After allowing VESA to promulgate a standard and letting computer companies to adopt it, Dell threatened to exercise patent rights that it had not previously disclosed to the association.[30] The FTC majority, in accepting a consent decree that barred Dell from enforcing the patent at issue, determined that the wide acceptance of the standard "effectively conferred market power upon Dell as the patent holder," and that this market power "was not inevitable," as evidence showed that had VESA been aware of Dell's patent, it would have implemented a different, nonproprietary design. *Dell*, 121 F.T.C. at 624 n.2. More generally, it concluded that the deceptive conduct before an SSO violates the Sherman Act and the FTC Act.[31]

[30] As part of the approval process, a Dell representative allegedly certified that he knew of no patent, trademark, or copyright that the bus design would violate.

[31] It should also be noted that deceptive conduct, when it results in marketplace injury, is often reachable under the antitrust laws, regardless of the factual context in which it occurs. *See, e.g., Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 783-84 (6th Cir. 2002) (destroying and removing competitors' racks and point-of-sale advertising, providing misleading sales information to store managers in order to minimize space made available to competitors, and entering into exclusive arrangements with retailers violated Section 2); *National Ass'n of Pharmaceutical Manufacturers, Inc. v. Ayerst Labs.*, 850 F.2d 904, 916 (2d Cir. 1988) (deceptive advertising used to perpetuate patent monopoly potentially violated Sherman Act);*United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir.) (deceiving applications developers using Sun's Java programming language by falsely telling the developers that Microsoft's software would allow applications using them to work on all computer platforms constituted violation of Section 2), *cert. denied*, 534 U.S. 952 (2001); *Taylor Publishing Co. v. Jostens, Inc.*, 216 F.3d 465, 482 (5th Cir. 2000) (defendant's hiring of its competitor's employees combined with a practice of steering the competitor's customers to the company could be predatory); *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*,

3. Rambus and Its Experts Are Well Aware That Conduct of the Type Alleged Here Can Properly Be Subjected to Liability Under the Antitrust Laws.

Building upon the authorities discussed above, and others, many legal commentators have written about the potential for manipulation of a standard-setting process to result in antitrust liability. As one expert in the field has noted, "The literature on antitrust and SSOs is voluminous." Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1894 n.11 (2002). What is perhaps more interesting is that Rambus's own experts in this case have contributed to this literature, in ways that lend support to the general proposition that antitrust law should have a role in policing the conduct of firms that participate in standard-setting activities in a manner that gives rise to, or otherwise threatens, marketplace injury.

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**********], is the potential for "lock-in" that can occur when a standard-setting organization adopts, and the relevant industry implements, widely adopted industry standards. [*************

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148 F.3d 1080, 1087 (D.C. Cir. 1998) (misrepresentations to advertisement purchasers about competitor's radio-signal coverage sufficient to state claim under Section 2); *Du Pont*, 729 F.2d at 137 ("collusive, predatory, restrictive [and] deceitful conduct that substantially lessens competition" violates FTC Act).

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******************]. As Your Honor can see, [*************] not only acknowledges that antitrust law has an important role to play in policing anticompetitive conduct occurring in the context of private standard-setting activities, but in defending this proposition he essentially <u>describes this case</u>.

It is not only Rambus's experts, however, that understand the important role played by antitrust law in this area. Rambus itself understands this, and has for some time. In May 1993, Rambus's outside patent counsel – Lester Vincent – forwarded to Richard Crisp a detailed presentation underscoring the legal risks associated with "Patents and Industry Standards." May 4, 1993, Letter from Vincent to Crisp, Attaching Presentation Entitled "Patents and Industry Standards" (V1231 at V1232) **[Tab 39]**. Among other things, the presentation explained that, when a participant in a standard-setting process seeks to enforce patents covering the relevant standards, there are <u>not one, but two</u> "possible legal theories for non-enforcement":

- "<u>Estoppel</u>," and
- "<u>Antitrust</u>."

Id. (V1242) (emphasis added). The presentation further explained that affirmatively misleading conduct need not exist in order for such legal theories to apply; "<u>intentionally misleading silence</u>" might be sufficient if, for instance, the patent holder had a "duty to speak." *Id.* (V1244) (emphasis added).

Mr. Vincent again drew Rambus's attention to the potential for such misleading conduct to create antitrust-related legal risks in December 1995, when he forwarded to Richard Crisp a copy of the Federal Trade Commission's proposed consent order in *Dell*, which Mr. Vincent's firm previously had obtained from an FTC staff attorney.[32] Mr. Vincent was understandably concerned by the *Dell* Consent Order.

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[32] *See* Vincent 12/19/95 Letter to Anthony Diepenbrock (R202778) **[Tab 40]**; *see also* FTC Staff Attorney Paul Nolan 12/8/95 Facsimile to Stephen Spoonseller, Attaching FTC Proposed Consent Order and Press Release (V1862-87) **[Tab 41]**.

The *Dell* Consent Order not only provided tangible proof that conduct of the sort Rambus had been engaging in could be of significant interest to federal antitrust officials, but it also demonstrated the breadth of potential antitrust-based remedies relating to such conduct – namely, orders rendering undisclosed patents unenforceable against <u>any</u> affected party. The possibility of such antitrust remedies being imposed against it was a serious concern to Rambus, as well. Indeed, prior to the *Dell* decision, Rambus's management had justified ignoring Mr. Vincent's and Mr. Diepenbrock's advice to withdraw from JEDEC in part based on the perception that the legal remedies for equitable estoppel were considerably more narrow than this. As Richard Crisp reasoned,

> The only thing lost [due to the successful assertion of equitable estoppel] is the ability to enforce our rights <u>against those that can prove estoppel applies</u> . . . . We do not have our patent invalidated. It is still enforceable on other devices.

Crisp 9/23/95 E-Mail to Tate, et al. (R233837) **[Tab 42]** (emphasis added).

Although Mr. Vincent previously had advised Rambus to withdraw from JEDEC, as noted above, in the wake of *Dell* his calls for Rambus's withdrawal became far more emphatic: "No further participation in any standards body . . . do not even get **<u>close</u>**!!" Handwritten Notes of Vincent, from January 1996 (R203881) **[Tab 27]** (triple underlining in original). This time, Rambus followed Mr. Vincent's advice. By late January 1996, the internal decision to withdraw from JEDEC had been made. As Richard Crisp reported, "in the future, the current plan is to go to no more JEDEC meetings <u>due to fear that we have exposure in some possible future litigation</u>." Crisp 1/22/96 E-Mail to Tate (R234662 at 663) **[Tab 43]** (emphasis added). Thus, it appears that, after learning of the Commission's *Dell* Consent Order, Rambus and its lawyers finally came to the mutual conclusion that the "downside risk" of continued participation in JEDEC was simply too great. *See* Vincent 3/14/01 Dep. at 191 **[Tab 44]** ("given Dell's decision, my advice was . . . if you do a balancing of the upside potential versus the downside risk, it would be prudent to withdraw. . .").

Thus, despite its attempts to suggest that the theory of liability in this case is "novel" and "unprecedented" (Rambus Mem. at 1, 3), the fact is that Rambus and its lawyers have long recognized the risks of antitrust liability associated with this very conduct, and it was precisely this concern that led Rambus to finally acquiesce to its lawyers' demands that it cease participating in JEDEC.[33]

4. Well-Established Case Law Holds That Where a Firm Consciously Subverts the Purposes of a Standard-Setting Organization, This Can Lead to Antitrust Liability, and "Literal Compliance" with the Organization's Rules Is No Defense.

The legal principles discussed above reflect the paramount objective of preserving the neutrality and fairness of the standard-setting process to ensure that the public value of industry standards is not misappropriated to serve the private ends of a single firm, or group of firms, bent on achieving an undeserved monopoly. There is no prescribed form of conduct that must exist before antitrust law can take effect as a mechanism for ensuring that the public interest is served through an industry standard-setting process. Theoretically, any form of conduct – deception or otherwise – that subverts the proper ends of a standard-setting collaboration, causing the process to be corrupted, and the public interest to be harmed, could give rise to antitrust concerns. This is one of the lessons of *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (2d Cir. 1987), *aff'd*, 486 U.S. 492 (1988). The other

[33] *See also* Teece 3/13/03 Dep. at 281 **[Tab 45]** (stating, with reference to Rambus's participation in JEDEC, that "if it wasn't for the . . . FTC *Dell* decision, they might still be there."

lesson of *Allied Tube* – as noted above – is that when a firm or group of firms, with the purpose "of achieving an anticompetitive result," has "subverted," "undermined," and "violated the integrity" of a standard-setting association's processes, "literal compliance" with the organization's rules will not serve as a defense to antitrust liability. *See id.* at 947 ("We refuse to permit a defendant to use its literal compliance with a standard-setting organization's rules as a shield to protect such conduct from antitrust liability") (emphasis added).

The factual backdrop in *Allied Tube* was a private standard-setting process overseen by the National Fire Protection Association ("NFPA"). In a nutshell, the defendant – Allied, a steel pipe producer – was alarmed by the prospect that the plaintiff – Indian Head, a polyvinyl chloride ("PVC") pipe producer – might succeed in persuading the NFPA to adopt, for the first time, a PVC-based, as opposed to steel-based, standard for electrical conduit. Allied therefore enlisted the help of other steel pipe manufacturers in an effort to block the adoption of a PVC-based standard. The scheme they used to achieve this end essentially involved "stuffing the ballot box." Although in doing so Allied was technically "[a]cting within the letter of NFPA rules," it alone "arranged for 155 persons . . . to join the NPFA, to register as voting members, and the attend the annual meeting to note against the [PVC] proposal," at a cost of over $100,000, much of that covering membership fees. *Allied Tube*, 817 F.2d at 940. Other steel-pipe manufacturers did the same, and in the end they succeeded in defeating the PVC standard proposal. Indian Head (referred to by the name of its subsidiary, "Carlon," in the court's opinion), naturally appealed to NFPA's "Standards Council," which in turn referred the matter to the "Board of Directors." *Id.* at 941. Yet the Board denied the appeal, "[f]inding that the NFPA rules had been circumvented, but not violated." *Id.* (emphasis added).

Indian Head then took its case to federal court, charging that Allied had violated the Sherman Act. *Id.* The case was tried to a jury, which ultimately found that "Allied's conduct subverted the consensus standard-making process of the NFPA, and constituted an unreasonable restraint of trade in violation of the antitrust laws." *Id.* From there, the case proceeded to the Second Circuit, where, among other things, Allied claimed that, "as a matter of law, its conduct did not constitute an unreasonable restraint of trade." *Id.* at 946. The Second Circuit, in a unanimous decision, disagreed, holding that, "although Allied acted within the letter of the NFPA's rules," its conduct nonetheless

- "'<u>circumvented</u>' NFPA rules,"
- "<u>subverted</u>" NFPA's process,
- "<u>violated the integrity</u>" and was "<u>inconsistent with the intent</u>" of "NFPA's procedures,"
- was "inconsistent with <u>the concept</u> of 'consensus' standard-making," and
- was done with the purpose "of achieving an anticompetitive result – the exclusion of PVC conduit from the marketplace."

817 F.2d at 947 (emphasis added). Concluding its opinion, the court stated, "We refuse to permit a defendant to use its <u>literal compliance</u> with a standard-setting organization's rules as a shield to protect such conduct from antitrust liability." *Id.* (emphasis added). The case then was reviewed, on *certiorari*, by the Supreme Court, which, in upholding liability, echoed the words of the Second Circuit, stating: "The antitrust validity of these efforts is not established, without more, by petitioner's <u>literal compliance</u> with the rules." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 509 (1988) (emphasis added).

Since the *Allied Tube* decisions were handed down, they have had considerable influence on the application of antitrust law in the standard-setting arena. By no means, however, has *Allied Tube*'s influence been limited to cases involving "subversion" of a standard-setting process through the same or similar means. Nor has *Allied Tube*'s "subversion" holding been limited in application to cases involving concerted, as opposed to unilateral, conduct.[34] As evidence for both propositions, we note that the Commission's majority statement in *Dell* – a matter in which, as here, the Commission challenged <u>unilateral</u>, <u>deceptive</u> conduct – expressly relied upon *Allied Tube* for the proposition that "a standard-setting organization may provide a vehicle for a firm to undermine the standard-setting process in a way that harms competition and consumers." *Dell*, 121 F.T.C. at 626. *See also Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 526 (5th Cir. 1999) (applying *Allied Tube* in the context of claims of unilateral monopolization, and noting that the Second Circuit in *Allied Tube* found that the behavior at issue "constituted exclusionary conduct"); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 23 (2d ed. 1999) (discussing *Allied Tube* as an example of the sort of "exclusionary conduct" that, when used as a means to achieve monopoly, can impose a substantial "social cost"); Mark R. Patterson, *Antitrust Liability for Collective Speech: Medical Society Practice Standards*, 27 IND. L. REV. 51, 84 (1993) (interpreting *Allied Tube* as "show[ing] little tolerance for deception in the standard-setting process").

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[34] Indeed, one of Rambus's lead lawyers, then a senior antitrust enforcement official with the Antitrust Division of the U.S. Department of Justice, has publicly acknowledged the application of *Allied Tube* to antitrust claims involving allegations of unilateral conduct. *See* A. Douglas Melamed, *Network Industries and Antitrust*, Address Before The Federalist Society (Apr. 10, 1999), 1999 WL 1257308, *6 (D.O.J.) (discussing *Allied Tube* as an example of various types of "anticompetitive tactics" through which firms may seek "to give themselves preferential access to controlling standards at the expense of competitors and sometimes at the expense of superior standards").

II. The Federal Circuit's Split Decision in *Infineon* Contradicts Many of Rambus's Arguments and, Unless Vacated *En Banc*, Should Preclude Summary Decision.

One of the principal themes of Rambus's summary decision motion is the suggestion that Complaint Counsel's arguments in this case are somehow at odds with "the contrary holding of the Federal Circuit" in *Rambus v. Infineon*. Rambus Mem. at 1. Of course, when Rambus speaks of the "Federal Circuit's" decision, it is principally referring to the two-judge majority opinion in that case – authored by Judge Rader and joined by Judge Bryson – as opposed to the articulate dissent authored by Judge Prost. Complaint Counsel has not previously had the opportunity to comment, in any detail, on the Federal Circuit's recent split decision in the *Infineon* case, and its relevance to the issues being litigated in this case. In doing so now, we wish to make the following overriding points:

(1) the Federal Circuit's decision in *Rambus v. Infineon* is of limited relevance here given significant differences in the substantive legal claims, standards of proof, and factual records that are at issue here as compared to what was at issue in the April-May 2001 patent and fraud trial that is the subject of the Federal Circuit's appellate rulings;

(2) though Rambus, through its motion for summary decision, seeks to convey the impression that the Federal Circuit majority opinion in *Infineon* is wholly favorable to Rambus's positions in this litigation, this plainly is not true; indeed, much of Rambus's motion is dedicated to making arguments that are squarely at odds with the holdings of the Federal Circuit majority;

(3) the fact that Rambus, in its motion, finds it necessary to argue against the holdings of the Federal Circuit majority merely underscores the self-evident truth that Rambus's motion raises numerous disputes of material fact;

(4) to the extent the Federal Circuit majority's opinion is predicated upon fact findings that contradict Rambus's summary decision arguments, this not only argues in favor of denying Rambus's motion due to fact disputes; it also suggests that Rambus should be barred from relitigating those fact issues on grounds of equitable estoppel – that is, unless the opinion of the *Infineon* majority is vacated in response to the pending motion for *en banc* reconsideration; and

finally

(5) to the extent Your Honor gives any consideration to the Federal Circuit majority opinion – as urged by Rambus – we ask that Your Honor also take account of the views expressed by the dissent, as well as the views expressed in Infineon's pending petition for *en banc* review and the three *amicus* briefs that have been submitted in support of that petition.

Given space constraints, we will comment further here on only a few of these points.

A. Rambus's Summary Decision Arguments Conflict With Many Aspects of the Federal Circuit Majority Opinion in the *Infineon* Case.

It goes without saying that Rambus's arguments in support of summary decision are contradicted by the jury's verdict in *Infineon*, the district court's post-trial rulings in that case, and the views expressed by Judge Prost, in her strong dissent from the Federal Circuit's majority opinion. What may come as more of a surprise, however, is that Rambus's summary decision arguments directly contradict various aspects of the Federal Circuit majority decision as well. The discussion below draws attention to a number of the more significant contradictions.[35]

1. Rambus's Motion Contradicts the Federal Circuit Majority on the Question of Whether JEDEC's Rules Impose a Mandatory Patent Disclosure Duty.

A significant portion of Rambus's motion is dedicated to casting doubt on whether JEDEC's rules in fact impose <u>any</u> "obligation or duty . . . on JEDEC members to disclose patents <u>or</u> patent applications." Rambus Mem. at 19 (emphasis in original). Rambus seeks through its motion to persuade

[35] As noted above, the Federal Circuit majority concluded that Rambus's conduct, while technically not in violation of JEDEC's rules, was nonetheless sufficiently at odds with the purposes and spirit of the rules as to be <u>unethical</u>. *See supra* n.7. This provides, in itself, a sufficient predicate for antitrust liability under the controlling legal authorities addressed in this memorandum.

Your Honor that JEDEC's rules established no mandatory duty to disclose whatsoever, either with regard to issued patents or patent applications. *See id.* at 21 (suggesting that JEDEC's rules "did not expressly require <u>any disclosures of any kind</u>") (emphasis added). By advancing such an extreme argument, Rambus has taken a position at odds with the unanimous views of the *Infineon* jury, the *Infineon* trial judge, the Federal Circuit dissent in *Infineon*, <u>and</u> the Federal Circuit majority. That is, Rambus's motion seeks to protest an issue that <u>all</u> of these diverse factfinders in the *Infineon* suit actually <u>agreed</u> on.

The *Infineon* trial court, in upholding the jury's fraud verdict against Rambus, confirmed "the existence of a <u>duty to disclose</u> at JEDEC." *Rambus Inc. v. Infineon Technologies AG*, 164 F. Supp. 2d 743, 752 (E.D. Va. 2001) (emphasis added). The Federal Circuit dissent concludes, without reservation and in accord with the *Infineon* trial court, that JEDEC's rules establish a "<u>duty of disclosure</u> required by all members of JEDEC." *Rambus Inc. v. Infineon Technologies AG*, 318 F.3d 1081, 1110 (Fed. Cir. 2003) (emphasis added). The Federal Circuit majority, although it comes to the conclusion differently, ultimately concurs in these views. According to the *Infineon* majority, such an obligation cannot be discerned from the language of JEDEC's rules alone. "Nevertheless," the majority concludes, because "JEDEC members <u>treated</u> the language " of JEDEC's rules "as <u>imposing a disclosure duty</u>, this court likewise <u>treats this language as imposing a disclosure duty</u>." *Id.* at 1098 (emphasis added). Thus, through its motion for summary decision, Rambus has taken a stance that pits it not only against the Commission's allegations in this case, and an overwhelming body of contrary evidence, but also every reviewer of the relevant facts in the *Infineon* case. Put simply, no one – not even the Federal Circuit majority – agrees with Rambus's extreme and unsupported claim that, under

JEDEC's rules, disclosure of patents was "was merely voluntary." Rambus Mem. at 4 (emphasis added).

2. Rambus's Motion Contradicts the Federal Circuit Majority on the Question of Whether JEDEC's Members Understood the Organization's Rules to Impose a Mandatory Disclosure Duty.

Rambus does not stop at denying the existence of a mandatory disclosure rule. Rambus further claims that JEDEC's members and the leadership of JEDEC "understood" that there was no mandatory disclosure. In Rambus's words, while "JEDEC members and the JEDEC leadership may have understood the JEDEC patent policy as encouraging member companies to disclose their intellectual property, they did not understand that policy to require disclosure of intellectual property." Rambus Mem. at 23 (emphasis in original). *See also id.* at 26 (suggesting that JEDEC members "believed that disclosure of patents and, in particular, patent applications was voluntary rather than mandatory") (emphasis added); *id.* at 29 (arguing that "JEDEC members and the JEDEC leadership understood . . . that members were encouraged, but not required, to make a 'voluntary' disclosure of their intellectual property in certain circumstances") (emphasis added); *id.* at 29 n.12 (arguing that "members did not act as if such disclosures were mandatory"). Again, in making these contentions, Rambus has placed itself at odds with the unanimous views of the jury, trial court, and both appellate opinions in the *Infineon* litigation.

In upholding the jury's fraud verdict against Rambus, the *Infineon* trial court repeatedly confirmed that "it was very clear to the membership that disclosure of applicable patents and patent applications was a requirement." 164 F. Supp. 2d at 751 (emphasis added). *See also id.* at 752 ("all members . . . had a known duty to disclose") (emphasis added).[36] The Federal Circuit dissent concurs in this view, *see Infineon*, 318 F.3d at 1111 ("the members of JEDEC understood the JEDEC policy to require that is members disclose patents and pending patent applications") (emphasis added), as does the Federal Circuit majority. Indeed, as noted above, in concluding that JEDEC's rules should be treated "as imposing a disclosure duty," the Federal Circuit majority placed particular emphasis on the manner in which JEDEC's members understood and applied the organization's rules. Because JEDEC members "treated" the rules "as imposing a disclosure duty," the majority concluded that it "likewise" must interpret JEDEC's rules to "impos[e] a disclosure duty." *Id.* at 1098 (emphasis added).

Thus, Rambus stands alone in making the extreme claim that "JEDEC members . . . did not understand" JEDEC's rules "to require disclosure of intellectual property." Rambus Mem. at 23 (emphasis in original).

3. Rambus's Motion Contradicts the Federal Circuit Majority on the Question of Whether the JEDEC Disclosure Duty Extends to Patent Applications as Well as Issued Patents.

In addition to arguing that JEDEC's policies "did not expressly require any disclosures of any kind," Rambus Mem. at 21, Rambus makes the somewhat less extreme argument that JEDEC's rules, while they may have required disclosure of relevant patents, "did not require disclosure of pending patent applications." Rambus Mem. at 21 (emphasis added). Less extreme though it may be, this argument

[36] In fact, Judge Payne concluded that "Rambus officials themselves understood that it was JEDEC's practice to require disclosure of [patents and] pending patent applications." *Id.* at 752 (emphasis added).

finds no substantial support in the record and stands in direct conflict with the consistent conclusions of the *Infineon* jury, trial court, and both appellate opinions.

The *Infineon* trial court, in denying Rambus's post-trial motion for judgment as a matter of law ("JMOL"), concluded "on the basis of clear and convincing evidence, that . . . all [JEDEC] members, at all times here pertinent, had a <u>known duty to disclose patent applications</u>," as well as issued patents. 164 F. Supp. 2d at 751 (emphasis added). The Federal Circuit dissent plainly concurred with this conclusion: "Documents and witness testimony show that the members of JEDEC understood the JEDEC policy to require that its members disclose patents <u>and pending patent applications</u> that might be involved in the standard setting process." *Infineon*, 318 F.3d at 1111 (emphasis added). On the question of whether pending patent applications as well as patents are encompassed by the JEDEC disclosure duty, the Federal Circuit majority does not part company with the dissent or the *Infineon* trial court. According to the majority, "At least by 1993, the EIA/JEDEC patent policy <u>required</u> members to disclose patents <u>and patent applications</u> 'related to' the standardization work of the committees." *Id.* at 1085 (emphasis added). *See also id.* at 1097 (noting that JEDEC Manual JEP 21-I, published in October 1993, "included a policy revision <u>expressly adding 'patent applications' to the policy language</u>") (emphasis added).

Yet again, Rambus stands alone in arguing that JEDEC's rules "did <u>not</u> require disclosure of <u>pending patent applications</u>." Rambus Mem. at 21 (emphasis added).

4. Rambus's Motion Contradicts Federal Circuit Majority on the Question of Whether JEDEC's Rules Require Disclosure of All Patents and Applications That "Relate to" JEDEC's Work.

Turning from the question of whether there was a disclosure duty to the issue of how broadly such a duty applied, in its motion Rambus contends that "there is nothing in either the written policies or the actual practices of JEDEC's members to support" a requirement that "any patent or patent application that relates to a proposed JEDEC standard" must be disclosed. *Id.* at 29 (emphasis added). *See also id.* at 10 ("Rambus strongly disputes" the proposition that "JEDEC required members to disclose all patents and patent applications that . . . 'related to' the work of the relevant JEDEC committee") (emphasis added). In taking this position, Rambus once again distinguishes itself from the views of the Federal Circuit majority, the Federal Circuit dissent, the *Infineon* trial court, and the *Infineon* jury.

As already noted, the *Infineon* trial court concluded that all JEDEC members, at all pertinent times, "had a known duty to disclose patent applications that related to the SDRAM standard-setting effort." 164 F.Supp.2d at 752 (emphasis added). *See also id.* at 748 ("JEDEC policy required members to disclose patents and patent applications that related to JEDEC's standard- setting work."). Echoing the language of the Commission' Complaint and the literal words of JEDEC's JEP 21-I Manual (adopted in October 1993), Judge Prost, in her dissenting opinion, similarly concludes that JEDEC's rules require members to "disclose patents and pending patent applications that might be involved in the standard setting process." *Infineon*, 318 F.3d at 1110 (emphasis added).[37] The Federal Circuit majority – using language closely tracking the trial court's ruling, but also consistent with the dissent –

[37] *Compare* Complaint, ¶ 79 (describing the "basic disclosure duty applicable to all JEDEC members" as a "duty to disclose the existence of any patents or pending patent applications it knew or believed 'might be involved in' the standard-setting work that JEDEC was undertaking") (emphasis added), *with*, JEDEC Manual of Organization and Procedure JEP21-I, ¶ 9.3.1 (referring 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.") (emphasis added).

likewise concludes that, "[a]t least by 1993, the EIA/JEDEC patent policy required members to disclose patents and patent applications 'related to' the standardization work of the committees." *Id.* at 1085 (emphasis added). While the majority acknowledges that "the JEDEC policy does not use the language 'related to,'" it notes that "the parties consistently agree" with this interpretation of what "the JEDEC policy language requires." *Id.* (emphasis added).

Thus, Rambus's strong denial that there is any rule within JEDEC requiring disclosure of patents or patent applications that "relate to" the organization's standardization work contradicts the views of the trial court and both Federal Circuit opinions in the *Infineon* case. In fact, given the *Infineon* majority's observation that Rambus and Infineon "consistently agree[d]" with this interpretation of what "the JEDEC policy language requires," it would appear that Rambus's current position on this issue conflicts with the position that Rambus itself took before the Federal Circuit. *Id.*

5. Rambus's Motion Contradicts the Federal Circuit Majority on the Question of Whether JEDEC's Disclosure Rules Applied to All Members, Including Rambus.

Finally, beyond denying the existence of JEDEC's patent disclosure policy – and the fact that, at least by 1993, it "required members to disclose patents and patent applications 'related to'" JEDEC's "standardization work," *Infineon*, 318 F.3d at 1085 (emphasis added) – Rambus's motion also seems to contest that the policy applied to Rambus at all. That is, by contending "there is no evidence that Rambus," "while it was a JEDEC member," "was provided with a copy" of any JEDEC Manual describing such a patent disclosure rule, Rambus suggests that it was somehow not under any obligation to comply with JEDEC's policy. Rambus Mem. at 22.[38] This is yet another instance in which Rambus's summary decision arguments directly conflict with the unanimous views of the *Infineon* jury, the *Infineon* trial judge, the Federal Circuit dissent in *Infineon*, and the Federal Circuit majority, <u>and</u> with Rambus's own prior positions in the *Infineon* litigation.

The *Infineon* trial court could not have been clearer on this point. In fact, the court commenced its analysis of Rambus's JMOL by observing that "Rambus <u>acknowledges</u> . . . <u>it had a duty to disclose</u> any issued patents while it was a member of JEDEC and participated in JEDEC's standard-setting process." 164 F.Supp.2d at 751 (emphasis added). The only "dispute at trial," the court explained, "was whether <u>patent applications</u> were required to be disclosed." *Id.* (emphasis in original). The court then proceeded to conclude that Rambus's acknowledged duty to disclose extended not only to patents, but to patent applications as well. *See id.* at 752 (concluding that "<u>all members</u>" of JEDEC, including Rambus, "had a <u>known duty to disclose</u> patent applications that related to the SDRAM standard-setting effort") (emphasis added). The Federal Circuit dissent certainly agreed that Rambus was subject to the same disclosure duty that applied to all Rambus members, as did the Federal Circuit majority. *See Infineon*, 318 F.3d at 1100 (referring to "<u>Rambus's</u> duty to disclose") (emphasis added); *id.* at 1110 (same).

Thus, like the other arguments highlighted above, Rambus's contention that the JEDEC disclosure rules somehow were not applicable to Rambus is contradicted by the unanimous conclusions of all of the judges (trial and appellate) that reviewed these issues in the context of the *Infineon* litigation.

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[38] Rambus's assertion that it never received the JEDEC Manual is flatly wrong. *See* discussion *infra* at page 83.

Taken together, these various contradictions between Rambus's summary decision arguments and the consensus views of all the various judges that have passed on related issues in the context of the *Infineon* patent and fraud litigation, serve to highlight the extreme nature of Rambus's arguments and, at a minimum, the many factual disputes that Rambus's argument raise.

B. Rambus's Summary Decision Arguments Conflict With Many Aspects of the Federal Circuit Majority Opinion in the *Infineon* Case.

To the extent Your Honor gives any consideration to the rulings of the Federal Circuit majority in the *Infineon* case, Complaint Counsel requests that Your Honor give equal consideration to the views expressed by the dissent, as well as the views expressed in Infineon's pending petition for *en banc* review and the three *amicus* briefs that have been submitted in support of that petition. All of the materials are provided as attachment to this memorandum. *See* Petition for Rehearing and Rehearing *En Banc* of Defendants-Appellees Infineon Technologies AG, et al. **[Tab 46]**; *Amicus Curiae* Brief of JEDEC Solid State Technology Association in Support of Defendants-Appellees' Petition for Rehearing and Rehearing *En Banc* **[Tab 16]**; *Amicus* Brief of Global Platform, Inc., *et al.* in Support of Combined Petition for Panel Rehearing, and Rehearing *En Banc* **[Tab 17]**; Brief of *Amici Curiae* Advanced Micro Devices, Inc., *et al.* in Support of the Petition for Rehearing and Rehearing *En Banc* **[Tab 25]**.

III. Rambus's First Summary Decision Point, Relating to the "Clarity" of JEDEC's Disclosure Rules, Is Invalid as a Matter of Law and Raises Numerous Fact Disputes.

Rambus argues that it is entitled to summary decision in its favor because the "vague and indefinite contractual obligations purportedly imposed by the JEDEC patent disclosure policy are [not] a legally sufficient basis on which to premise antitrust liability." Rambus Mem. at 4. This argument, as advanced by Rambus in support of its motion, is without even a colorable basis in law, as discussed below. Moreover, the very facts urged by Rambus as grounds for its motion show that the policy of JEDEC to avoid inclusion of proprietary technology in its standards, and favoring early and meaningful disclosure of patents and patent applications relating to its standard-development work, should have been abundantly clear to any good-faith participant in JEDEC. Only a participant such as Rambus, hoping to skate as close as possible to the edge of the JEDEC rules while undermining the plainly stated purposes of the organization, could complain of a lack of clarity in the JEDEC rules and policies.

A. Rambus Fails to Set Forth Even a Colorable Basis in Law for Its Argument That Lack of Clarity in the JEDEC Rules Would Preclude Antitrust Liability.

Rambus urges the proposition that antitrust liability cannot be imposed for its conduct because the JEDEC patent policy "was not sufficiently defined, as a matter of law, to form the basis of contractual *or* antitrust liability." Rambus Mem. at 13 (emphasis in original). Rambus's fixation on the clarity of the JEDEC rules fundamentally misapprehends (or distorts) the legal basis of the violation alleged in the Complaint here.

Even full literal compliance with the JEDEC rules, if that could be demonstrated here, would not shield Rambus from antitrust liability. As discussed above, well-established antitrust precedent from the Supreme Court itself recognizes that the private standard-setting process can be "rife with opportunities for anticompetitive activity," including the risk that members of a standard organization may seek to harm competitors "through manipulation of [the organization's] codes." *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). It is the subversion of the standards process for anticompetitive gain that gives rise to the antitrust offense charged here, whether or not there has been literal compliance with the private rules of the standards organization.

The body of significant antitrust precedent discussed above is nowhere even mentioned in connection with Rambus's motion for summary decision. Moreover, that body of law contradicts fundamentally the legal proposition upon which Rambus seeks summary decision – that is, the notion that a lack of clarity in the JEDEC rules would preclude imposition of antitrust liability against Rambus in this case. What the Supreme Court and Second Circuit made clear in *Allied Tube* is that even full literal compliance with the rules of a standard-setting organization does not preclude antitrust liability, where a defendant has manipulated the purposes and rules of the organization in order to achieve anticompetitive effects in the market as a whole. The clarity of the organization's rules, and the defendant's literal compliance with them, is <u>not</u> dispositive of the issue of antitrust liability.

The cases cited by Rambus in support of its legal argument on this issue are not remotely relevant. Rambus first cites various contract law precedents for the unremarkable proposition that in a suit for breach of contract, a lack of sufficient definiteness may preclude enforcement of a contract term. Rambus Mem. at 14-15. <u>But this is not a contract suit</u>. The Complaint issued by the Commission does not seek to vindicate the contract rights of JEDEC members as against Rambus for violation of their mutual undertakings as JEDEC members. The Commission's complaint seeks to remedy the damage that Rambus has done <u>to the marketplace</u> by consciously subverting the JEDEC standard-setting process for its own anticompetitive gain.[39]

Neither do any of the antitrust cases cited by Rambus (Rambus Mem. at 15) remotely support the proposition urged by Rambus as the legal grounds for summary decision. None of these cases suggests that a lack of clarity in the rules of a standard-setting organization will preclude the imposition of antitrust liability for abuse of the standard-setting process. Indeed, none of the cases involves abuse of the standard-setting process or an antitrust violation even obliquely similar to the conduct at issue here.[40] To the extent these cases have any relevance here, it is in their discussion of clarity in antitrust rules. The

[39] Indeed, courts draw a sharp distinction between contracts cases and those involving antitrust and other statutory violations. In *United States v. Loew's, Inc.*, for example, a tying case involving conditioning the sale of feature films on the purchase of packages containing inferior films, the Supreme Court determined that "the thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified. Contractual obligations cannot thus supersede statutory imperatives." 371 U.S. 38, 51 (1962) (emphasis added). Similarly, in a Sherman Act Section 2 case brought against the San Jose Mercury News, the Court heeded plaintiff's request "to admonish the jury that this was an antitrust case, not a contract action." Order Denying Plaintiff's Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial, *High-Technology Careers v. San Jose Mercury News*, 1995 WL 115480, *4-5 (N.D. Cal. 1994). Likewise, in a case alleging violations of the Securities Exchange Act of 1934, the court ignored defendant's argument that investors received what was promised in its agreements, observing: "But this is not a contract case; this is a securities fraud case." *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1463 (7th Cir. 1992).

[40] *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990) (cited Rambus Mem. at 15), was a decision dealing with an alleged anticompetitive "price squeeze" by a regulated utility; then-Circuit Judge Breyer's comment on the need for clarity in antitrust rules was made in passing in connection with the interaction between antitrust law and utilities regulation (*id.* at 22). *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216 (10th Cir. 1986), (cited Rambus Mem. at 15) was an antitrust case based on the refusal of a manufacturer of kitchen equipment to grant a distributorship and focused on the vertical distribution practices of a single firm. In *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 512 (7th Cir. 1982) (cited Rambus Mem. at 15), Judge Posner remarked that issues of alleged misuse arising from the terms under which a patent was licensed were to be determined by reference to established antitrust principles. *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984) (cited Rambus Mem. at 15) addressed the question of parallel pricing and terms of competing producers of a gasoline additive.

clarity of the relevant antitrust rule here – one may not subvert a standard-setting process in order to gain or maintain an unlawful monopoly – is without question. The Supreme Court itself has made this pronouncement. And Rambus has violated this clear antitrust rule. The cases provide no support for Rambus's attempt to convert a supposed lack of clarity in JEDEC's rules into a defense to its antitrust violation. Finally, Rambus's attempt to suggest a constitutional basis for its motion for summary decision, which it relegates to a footnote (Rambus Mem. at 16 n.6), also is without merit.[41]

In short, Rambus fails to present even colorable support for the legal proposition upon which it bases its request for summary decision, and ignores directly contrary antitrust precedent from the United

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[41] Rambus suggests that there are First Amendment-based, heightened procedural standards that apply to this case because the case involves liability "on the basis of speech (including silence)." Rambus Mem. at 16 n.6. A finding of such constitutionally-based procedural requirement would have startling implications for antitrust enforcement, which in virtually every case rests liability in some fashion on speech (or silence) of commercial actors. The only support offered by Rambus for this radical proposition is a "*see generally*"citation to a government *amicus* brief in a pending Supreme Court case. The case involves the question of First Amendment protection for a telemarketer's fraudulent solicitations of charitable contributions. The portion of the brief cited by Rambus in no way supports the proposition urged by Rambus; it is nothing more than a discussion of various states' law of fraud. In fact, the position urged by the government in that brief is that the First Amendment is <u>not</u> implicated by the conduct at issue. Brief of the United States and Federal Trade Commission as *Amici Curiae* in *Ryan v. Telemarketing Associates, Inc.*, S.Ct No. 01-1806 (filed Dec. 2002) at 6 ("The First Amendment <u>does not preclude</u> the government from prohibiting fraud or prosecuting those who intentionally deceive others for monetary gain.") (emphasis added).

Rambus also argues that there are "serious due process questions" raised by basing liability here on what it believes are vague "contractual" obligations of JEDEC (Rambus Mem. at 16 n.6). The cases cited, however, are Supreme Court precedents setting out the "void-for-vagueness" doctrine relating to the constitutionality of statutes; they contain no suggestion that vagueness in contract terms, or in the rules of private organizations, has any constitutional implication whatever. *Connally v. General Constr. Co.*, 269 U.S. 385 (1926); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

States Supreme Court.

B. The Rambus Request for Summary Decision on This Ground Raises Numerous Issues of Disputed Fact.

As explained above, despite Rambus's best efforts to limit its duties and obligations under the antitrust laws to the narrowest possible reading of the specific requirements of the JEDEC disclosure policy, antitrust liability in this matter does not rest on a strict interpretation of the JEDEC policy. Even if Your Honor were to entertain Rambus's arguments on this point, however, there is a wealth of evidence to establish that JEDEC rules and policies imposed a duty on Rambus to disclose to JEDEC patents and patent applications that might be involved in JEDEC's work. Rambus's contention that the JEDEC disclosure policy was too unclear to impose any duty is refuted by the documentary and testimonial evidence showing the multiple occasions on which members were informed or reminded of their disclosure obligations, by testimony demonstrating the clear and consistent understanding that JEDEC members had of the disclosure policy, and by testimony and documentary evidence demonstrating that Rambus shared other JEDEC members' understanding of the JEDEC disclosure policy.

1. JEDEC Members Were Informed or Reminded of their Obligations Under the JEDEC Disclosure Policy on Multiple Occasions by a Variety of Different Means.

Rambus seeks to portray this as case involving an alleged violation of a single, technical rule that appears in written form in only one document. This could not be further from the truth. The disclosure obligation at issue in this case is part of a variety of JEDEC rules and policies, including the most basic rules of JEDEC's standardization process. As clearly articulated in the EIA Legal Guides (under which all JEDEC standardization programs operate):

> All EIA standardization programs shall be conducted in accordance with the following basic rules: (1) They shall be carried on <u>in good faith</u> under policies and procedures which will assure fairness and unrestricted participation . . . (5) They shall not be proposed for or indirectly result in . . . <u>restricting competition</u>, <u>giving a competitive advantage</u> to any manufacturer, <u>excluding competitors</u> from the market.

EIA Legal Guides, March 14, 1983, JEDEC0009277 at 9282 **[Tab 3]** (emphasis supplied).

To ensure that these "basic rules" were observed during its standard-setting work, JEDEC adopted and applied a number of specific provisions. First, JEDEC specifically provided that all of its meetings "shall be conducted within the current edition of EIA legal guides . . . incorporated herein by reference." JEDEC Manual of Organization and Procedure, JEP 21-I ("JEDEC Manual" or "JEP 21-I"), October 1993, JEDEC009323 Sec. 9.1 at 9340 **[Tab 15]**. JEDEC also stated that JEDEC standards "that require the use of patented items should be considered with great care." *Id*. Sec. 9.3 at 9341. In addition, JEDEC's rules provide that "committees should ensure that no program of standardization shall refer to a product on which there is a known patent unless all the relevant technical information covered by the patent is known to the formulating committee or subcommittee, or working group." *Id*. The JEDEC Manual further provides:

> If the committee determines that the standard requires the use of patented items, then the committee chairperson <u>must receive</u> a written assurance from the organization holding rights to such patents that a license will be made available without compensation to applicants desiring to implement the standard, or written assurance that a license will be made available to all applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

Id. (emphasis added); *see also* JEDEC Manual at 9349; EIA Style Manual for Standards and

Publications of EIA, TIA, and JEDEC, EP-7-A, August 1990, JEDEC0009401 Sec. 3.9 at 9409-9410 **[Tab 47]**.

To implement these rules, JEDEC further adopted a disclosure policy, pursuant to which all members had an obligation to disclose patents and patent applications that might involve the work of a JEDEC committee. As stated in the JEDEC Manual:

> The Chairperson of any JEDEC committee, subcommittee, or working group must call to the attention of all those present the requirements contained in EIA Legal Guidelines, and call attention to <u>the obligation of all participants</u> 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.

JEDEC Manual Sec. 9.3.1 at 9341-9342 **[Tab 15]** (emphasis added). The disclosure policy ensured that JEDEC committees and their members would be informed of relevant patents, because only with such knowledge could they fulfill the requirements to consider "the use of patented items . . . with great care," "ensure that . . . all the relevant technical information covered by the patent is known," and obtain "a written assurance from the [patent holder] . . . that a license will be made available . . . under reasonable [and non-discriminatory] terms and conditions." *Id.* Sec. 9.1, 9.3 at 9340-9341 **[Tab 15]**.

Between December 1991 and June 1996, when Rambus was a member of JEDEC, JEDEC leadership and members took a series of steps to ensure that all members understood these obligations. JEDEC staff and leadership conveyed the existence and scope of the patent policy to members, *inter alia*, orally at every meeting, in every set of minutes, in JEDEC and EIA Manuals, and through the application of the policy to the real-life disclosure (and in some cases non-disclosure) of patents and patent applications. Every step of the JEDEC process contained some statement – either oral or written – that informed members of their obligations as a voluntary member of an organization, the primary purpose of which was to develop standards that were free of cumbersome intellectual property claims. Through presentations, documents, and actual practice, all JEDEC members became aware of their obligations under the patent policy.

The spearhead of the JC-42 committee's effort to educate its members was the late Jim Townsend of Toshiba.. Mr. Townsend was the chair of the JC-42 committee when Rambus attended its first JEDEC meeting in December 1991. Beginning in mid-1991, before the JEP 21-I Manual was adopted, Mr. Townsend made an oral presentation of the JEDEC patent and disclosure policies at the beginning of every meeting of the JC-42.3 subcommittee. (Indeed, at the very first meeting it attended, even before officially joining JEDEC, Rambus observed its first of many of Mr. Townsend's presentations on the patent policy. *See* JC-42.3 Committee on RAM Memories, Meeting Minutes No. 60, 12/4-5/91 (JEDEC0014181 at 191) **[Tab 48]** ("PATENT MATTERS Mr. Townsend presented the patent policies and a list of patents identified.").)

JEDEC participants uniformly remember the Townsend presentations as one of the most important sources of information about the JEDEC disclosure policy:

> Q: And how was the policy communicated to the members?
>
> A: Jim Townsend ran a session that ran one hour and sometimes more that presented the policy, asks – asked for any new issues and showed a tracking record of all of the past and with the addition of new issues. He kept that going for every meeting.

Kelley 1/26/01 Dep. at 94-95 **[Tab 49]**.

> Q: Well, Mr. Williams, isn't it also true, though, that the foils that

were put up at the beginning of the meetings talking about the patent disclosure policy from JEDEC, at least in the time that you were there from '91 to '93, did not contain the language "patent applications" or "pending patent applications" in discussing the JEDEC patent policy; correct?

A: The foils presented might not have the word "pending patents." But the presentation of the foils did include those words.

Q: Were those words spoken by someone?

A: Yes.

Q: And who were the words spoken by?

A: Jim Townsend.

Q: At every meeting that you attended?

A: As far as I can recall.

Williams 4/12/01 Dep. at 200-201 **[Tab 50]** (objections omitted).

Q: How did you come to have an understanding of the contents of the JEDEC patent policy?

A: Through several means. Early on those means would have included discussions with Gordon Kelley. In 1990 I believe a new style manual was published which included a more detailed policy. And at least by 1991 Jim Townsend was regularly reviewing policy at the start of meetings and in fact, including a patent tracking list.

Kellogg 2/24/03 Dep. at 14-15 **[Tab 51]**.[42]

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[42] Mr. Townsend was not the only participant to provide patent presentations to the membership. The chairpersons of every committee and subcommittee were charged with giving a patent presentation at the beginning of each session. *See* Tabrizi 3/12/01 Dep. at 272-273 **[Tab 52]** (stating that he discussed the obligation to disclose patent applications in his role as a chairman).

Of course, the patent presentations were not the only means that Mr. Townsend utilized to keep the membership well aware of their obligations under the patent policy. He also developed a memorandum soliciting patent-related information that, although nominally directed to members who previously had disclosed patent information, was included in the minutes of each meeting. For example, in the minutes of the September 1992 meeting (which Rambus attended), Attachment "A" is a memo entitled "Patent Issues in JEDEC." The "Patent Issues" memos request members to "report your company's position on patents held or <u>applied for</u>." JC-42.3 Committee on RAM Memories, Minutes of Meeting No. 64, 8/16-17/92, JEDEC0014916 at 14928 **[Tab 53]** (emphasis added). The memos also attached the patent tracking list that alerted participants to some of the patent related information that had been disclosed. That JEDEC members understood their obligations included disclosure of patent applications is confirmed by the existence of pending patents on the patent tracking list. *See, e.g., id.* at 14931.

In addition to the dozens of presentations and patent disclosures that occurred during the JEDEC meetings or were otherwise reflected in the JEDEC minutes, members were informed of the patent policy through the various JEDEC and EIA publications that addressed the policy. The JEDEC Manual set forth in the most specific terms members' obligations under the JEDEC disclosure policy. In October 1993, the Manual was revised to emphasize to members that the disclosure policy was obligatory, that it applied to all participants, and that it applied with equal force to patent applications:[43]

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[43] The 1993 revision did not entail a change in the patent policy; rather it was a mere clarification of what the members and the JEDEC staff previously understood. *See, e.g.,* Meyer 12/13/00 Dep. at 177-179 **[Tab 72]**; Tabrizi 3/12/01 Dep., at 280-281 **[Tab 52]**; Russell 1/31/01 Dep. at 296-297 **[Tab 54]**. Furthermore, the 21-I Manual is entirely consistent with longstanding EIA

> **9.3.1 Committee Responsibility Concerning Intellectual Property**
> The Chairperson of any JEDEC committee, subcommittee, or working group must . . . 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.

JEDEC Manual of Organization and Procedure, JEP 21-I, October 1993, JEDEC009323 at 9341 **[Tab 15]** (emphasis added). JEDEC also added a footnote to section 9.3 (JEDEC009341) of the JEDEC Manual, which refers to the use of a "patented item," to clarify that the term "patented" also refers to items covered by a pending patent:

> ***For the purpose of this policy, the word "patented" also includes items and processes for which a patent has been applied and may be pending.*

(Emphasis in original). In addition to the operative language contained in the body of the Manual, Appendix E to the 21-I Manual (JEDEC009348-50) contained the following summary of the EIA/JEDEC patent policy.

> Standards that call for the use of a patented item or process may not be considered by a JEDEC committee unless all of the relevant technical information covered by the patent or pending patent is known to the committee, subcommittee, or working group.

Id. at 9349 (emphasis added).

In addition to the Chairman presentations, minutes, "Patent Issues" memos, patent tracking list, and the various Manuals, JEDEC placed a reminder notice on the top of the "Meeting Attendance

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policy. As explained by John Kelly, JEDEC's President and General Counsel, his understanding since he began working at EIA in 1990 was that the EIA patent policy required the disclosure of patent applications. Kelly 2/26/03 Dep. at 41-42 **[Tab 55]**.

Roster" that each participant in a JEDEC meeting was required to sign. The caption at the top of the Meeting Attendance Roster contained the following language: "Subjects involving <u>patentable</u> or patented items shall conform to EIA Policy. . . Consult EIA General Counsel about any doubtful question." *See* JEDEC Meeting Attendance Roster with Part I, General Guides Applicable to all EIA activities, I140075-76 **[Tab 56]** (emphasis added).

As an added precaution, in case relevant patents or applications had not been disclosed (as they should have been) during the committee work, JEDEC also added a separate set of boxes to the ballot form again indicating the obligations of participants to disclose relevant patent information. *See, e.g.*, JEDEC Ballot JC-42.3-92-83, item 376.1, June 11, 1992, (J0009473-75) **[Tab 57]**.

Members also understood their obligations by participating in or observing discussions of patent-related issues within JEDEC. By far the most memorable of such events between 1991 and 1996 was the controversy involving the alleged failure of Texas Instruments to disclose properly its issued patent relating to Quad CAS technology. After JEDEC adopted the standard, Texas Instruments began to assert patent rights over devices using its patented Quad CAS technology. The issue first arose at the JC-42.3 subcommittee meeting in September 1993, when Micron accused Texas Instruments of having failed to comply with the JEDEC disclosure policy. JEDEC Secretary Ken McGhee summarized the incident in a memorandum to JEDEC and EIA General Counsel John Kelly:

> TI did not disclose to the Committee that they had this patent until JEDEC approved some standards. The Committee is very suspicious of TI because TI did not pursue any requests for royalties until after the JEDEC standard was approved.

Ken McGhee, Memorandum, 11/2/93, JDC0013975 **[Tab 58]**. The issue came to a head at the

December 1993 meeting of the JC-42.3 subcommittee. The meeting minutes summarize in formal terms what many witnesses recall as a heated debate:

> Mr. Kelley noted that the letter from TI [explaining its position] does not address the key issue that the Committee was not informed of TI's patent. TI was asked why the Committee was not informed of the patents. TI did not respond because litigation is going on. . . . –Samsung: We are reluctant to vote yes [on the ballot relating to the proposed standard] because we do not think TI is following the patent policy. . . . Micron noted that all companies should have equal access to a standard developed by the Committee. . . . –Sanyo: It is understood that if and when TI conforms to the EIA policy, work should continue. . . . if TI has knowingly and intentionally violated the EIA/JEDEC patent policy, EIA may need to consider additional actions/discussions with TI.

JC-42.3 Committee on RAM Memories, Minutes of Meeting No. 69, 12/8-9/93, JEDEC0015652 at 0015659 **[Tab 59]**. The following month, Gordon Kelley of IBM wrote to Buf Slay of Texas Instruments expressing concern about the impact that TI's conduct could have on JEDEC's work:

> I am and have been concerned that this issue can destroy the work of JEDEC. If we have companies leading us into their patent collection plates, then we will no longer have companies willing to join the work of creating standards . . .. If we allow JC-42 standards to be used for patent collection purposes, then we do a great disservice to the very industry that feeds us.
>
> The issue on the Quad-CAS patents has brought my concern to the surface. If we on JEDEC council do not deal with it completely, we set ourselves up for bigger problems in the future.

Kelley 1/14/94 Letter (JEDEC0000002) **[Tab 60]**. At the following meeting in March 1994, the issue arose again. TI requested a clarification of the Committee's interpretation of the patent policy. The minutes record the following discussion:

> Applicability of patents to use of JEDEC standards was discussed. The issue is

> warning, IBM noted. Failure to disclose a patent prevents the Committee from considering the standard.
>
> The Committee was asked if the patent policy is clear. The Committee felt it was clear.

JC-42.3 Committee on RAM Memories, Minutes of Meeting 70, 3/9/94, JEDEC0015797, at JEDEC0015800-01 **[Tab 61]**. Again, while the JEDEC minutes are dry, the passion aroused by the debate is reflected in the following entry: "Sanyo moved to have TI withdraw from the Committee activity until the legal aspects of the proposal are reviewed. The motion was tabled." *Id*.

In response to Texas Instruments' request for clarification, JEDEC and EIA General Counsel, John Kelly, issued a statement regarding the JEDEC patent policy. Mr. Kelly wrote, "[w]ritten assurance must be provided by the patent holder when it appears to the committee that the candidate standard <u>may require</u> the use of a patented invention." Kelly 3/29/94 memo to Ken McGhee (JDC013843 at JDC013844) **[Tab 62]** (emphasis in original). On May 12, 1994, JC-42 Secretary, Ken McGhee, forwarded Mr. Kelly's response to all members of the JC-42 committee. (JDC013843) **[Tab 62]**.

Thus, Rambus's attempt to focus attention solely on the JEP 21-I Manual is a deliberate effort to distract attention from the volume of other evidence demonstrating that the JEDEC disclosure policy was one part of a set of rules and procedures intended to prevent JEDEC standards from being hijacked by a company asserting patent rights, and that these rules and procedures were reflected in a series of JEDEC documents, oral presentations and discussions, and the practice of JEDEC members.

2. JEDEC Members Clearly Understood the Obligations Imposed by JEDEC's Disclosure Policy.

JEDEC's multiple efforts to inform members of the requirements of its disclosure policy were, in total, very effective. While it might be possible to criticize any one JEDEC document, standing alone, as being insufficient to inform members of all aspects and details of the disclosure policy, the combination of the sign-in sheet, the JEP 21-I Manual, the ballot forms, Jim Townsend's oral presentations at the beginning of each meeting, Mr. Townsend's follow-up memoranda to members holding relevant patents or applications, and discussion and debate within JEDEC (both written and oral) were more than sufficient to inform members of the substance or their obligations under the JEDEC rules.

This is demonstrated clearly through the testimony of a large number of witnesses in this matter. Contrary to the assertions of Rambus, witnesses had a very clear understanding of the JEDEC disclosure policy. Indeed, reviewing the testimony of witnesses on both Complaint Counsel's and Rambus's preliminary witness lists, the consistency of their testimony is striking. Not only representatives of JEDEC itself, but multiple witnesses representing many different JEDEC members have testified in detail with respect to both the purposes and the details of the JEDEC disclosure policy.[44] Almost uniformly, this testimony is consistent from one witness to another, and inconsistent with every one of Rambus's tortured interpretations of the policy.[45]

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[44] Most of the testimony quoted in this section was not part of the record on appeal in *Rambus v. Infineon*, and therefore was not considered by the Federal Circuit in connection with its opinion in that case.

[45] These witnesses do not, as Rambus elsewhere has tried to imply, represent merely the DRAM manufacturers currently in litigation with Rambus, namely Infineon, Micron, and Hynix. Rather, these witnesses also include representatives of memory manufacturers such as Mitsubishi and NEC (which have merged their memory manufacturing operations into a joint venture named Elpida), as well

JEDEC representatives and members understood clearly that JEDEC implemented a patent policy, consisting of a disclosure obligation and an assurance with respect to licensing terms,[46] in

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as Samsung, which have signed license agreements with Rambus relating to the manufacture of SDRAMs and DDR SDRAMs, and may therefore have a strategic interest in seeing their competitors Infineon, Micron, and Hynix lose in their respective litigations against Rambus. Indeed, the witnesses quoted below represent the full diversity of the JC-42.3 subcommittee itself, including representatives of companies that no longer produce memory, such as Texas Instruments, companies that design high-performance computer and server systems that use memory, such as IBM and Hewlett-Packard, companies that design other products that incorporate memory, such as Philips, and companies that design chipsets and graphics processors that interface with memory, such as Intel and nVidia.

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support of JEDEC's goal of setting "open" standards that do not unintentionally permit one company to obtain monopoly power and collect royalties by means of asserting a patent over a technology used in the standard. John Kelly, President and General Counsel of JEDEC, explained the purpose of the JEDEC policy most articulately:

> Q. All right. And what is your understanding as -- from whatever sources it was derived?
>
> A. My understanding of the reason for the patent policy is that the patent owner in effect is given a monopoly by the federal government over a particular technology, and that the patent policy is designed to disclose the existence of those rights or the claim to those rights <u>as early in the process as possible</u> so that EIA and its standard developing committees do not inadvertently give that patent owner <u>additional market power</u> over and beyond that which was conferred by the federal government and thereby create a real monopoly over a particular line of commerce or over a particular technology. <u>So it's designed in general to avoid the serious antitrust problems that could arise if a patent owner were to embed its technology or that technology were to be embedded in a standard without the knowledge of the other players in the industry</u>.

Kelly 1/9/01 Dep. at 37-38 **[Tab 64]**.[47] Other JEDEC members have described the purpose of the

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[47] Mr. Kelly's testimony continued:

> Q. What's the nature of the antitrust problem you were just referring to?
>
> A. The nature of the antitrust problem is that any standard developing organization that has the potential to speak for the industry has the potential to confer market power by adopting a standard. <u>And to the extent that the owner of a patent gains additional market power over and beyond that</u>

policy in similar, if less elaborate, terms. For example, Samuel Calvin and Kevin Ryan, long-time representatives of Intel and Micron, respectively, at the JC-42.3 subcommittee and both included on Rambus's preliminary witness list, each described the purpose of the policy simply:

> Q. Did you understand the rationale behind that policy at JEDEC?
>
> A. Yes, although I can't tell you a time, exactly. I did understand the rationale.
>
> Q. Okay. And what was your understanding of the rationale?
>
> A. The rationale is to not issue a standard for general use unless you were aware of any of the patent liabilities that might affect it.

Calvin 1/13/03 Dep. at 81 **[Tab 65]**.

> Q. . . . Well, what is the intent of the patent policy? To disclose patents whose claims relates to the work of the committee or whose description relates to the work of the committee?
> . . .

> which is conferred by the ownership of its patent, there is potentially an antitrust issue there. It could be creation of a, just a monopoly, it could be a creation of a higher level of market power than it would have otherwise have had. It could be a monopoly situation, depending upon the facts in that particular case. But clearly that's a path down which no standard developing organization wants to proceed. So as a consequence the rule is that the existence of a patent and I anticipate your question including a patent application, needs to be disclosed at the earliest possible time in the process to avoid those untoward consequences.

Kelly 1/9/01 at 38-39 **[Tab 64]**.

THE WITNESS: The intent of the policy is not to put a standard in place that would involve or include the payment of royalties.

Ryan 4/26/01 Dep. at 137 **[Tab 66]**. Barry Wagner, representative of nVidia at the JC-42.3 subcommittee, also described the purpose of the policy in very similar terms:

> Q. What was your understanding of the patent policy?
>
> A. My understanding is the spirit of the policy is to make sure that if we're standardizing something that is going to have an issue that people need to get a license for any aspect of it, the group has an obligation to make that public so the group can decide whether or not they want to proceed down that path or go in a different direction, the main goal being not to waste everybody's time developing things that everybody is going to have to pay royalties on. That's not the objective of the group.

Wagner 1/16/03 Dep. at 49-50 **[Tab 67]**.[48]

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[48] See also the description given by Tom Landgraf, who represented Hewlett-Packard at the JC-42.3 subcommittee during the early 1990s:

> I think it's disingenuous for us at HP to – to interpret this first sentence in a way that would be advantageous to us – that is, if we participate in an open standards committee, we vote on standards, we intend to use products that are made according to these standards, and financially, you know, given advantage to our customers – you know, lower costs, et cetera – and, at the same time, we participate in these, but we are secretly developing some work which will – which has – which we patented, we're basically doing – we're – we're lying to the committee – we're saying, okay, on the one hand, we are standardizing – we will support a standard, but we don't have a patent, and, then, later – six months down the road or 12 months down the road – come back and say, oh, by the way, we do have a patent. We had something that was applied for, but it wasn't strictly patented at the time that we should have made a comment.
>
> I mean, the spirit is that you participate in an open thing. . . .

JEDEC representatives and members have also described the JEDEC disclosure obligation in remarkably similar terms. Ken McGhee, JEDEC Secretary to the JC-42.3 subcommittee, described the disclosure policy:

> Q. What is your understanding of the JEDEC patent policy that existed between 1991 and 1996? . . .
>
> A. . . . the policy was basically that if a standard in development related to a patent that somebody that was a member of the committee was either in the process of getting or already had issued, a pending or issued patent, there was a responsibility to disclose that to the committee.

McGhee 8/10/01 Dep. at 65-66 **[Tab 69]**. [*************************************
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]. In deposition testimony, Gordon Kelley of IBM, Farhad Tabrizi of Hynix, Willi Meyer of Infineon, Gil Russell (who represented Samsung, NEC and Infineon at the JC-42.3 subcommittee over the years), Barry Wagner of nVidia, and Jackie Gross of Hewlett-Packard all were fully consistent in their descriptions of the JEDEC disclosure obligation:

> Q. We've mentioned the JEDEC patent policy here today. Between 1991 and 1996 what do you believe the patent policy in JEDEC to be?

> [E]verybody's benefitting by sharing this information and potentially lowering costs for ourselves, for our customers, et cetera, and I think that's the way we approach it.

Landgraf 12/17/02 Dep. at 125-126 **[Tab 68]**.

A. The stated policy was that, first of all, all member companies would notify the committee of patents that they were aware of that applied to a proposed standard. And another requirement was that they would agree that their licensing practice to all other member companies of JEDEC would be all companies would be licensed, excepting none, and that the license would be either free or offered at reasonable rates, without exception. <u>It was to be an open standard.</u>

Kelley 1/26/01 Dep. at 75-76 **[Tab 49]**.

Q. And do you have any understanding one way or the other whether a company that believes it has patents or patent applications that cover or apply to a standard should be required under the policies in existence between, let's say, 1991 and 1996 to disclose those patents or patent applications to the committee?

. . .

A. I believe that through the discussion at every meeting in that time frame of the JEDEC and EIA patent policy that <u>it was very clear to the membership</u> that disclosure of applicable patents and patent applications was key to the operation of our committee, that it was required, that it was an obligation upon the membership.

Kelley 1/26/01 Dep. at 277-278 **[Tab 49]**.[49]

Q. Let me ask it this way: What was the patent policy concerning

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[49] Rambus strives in vain to show that JEDEC committee leaders, such as Gordon Kelley of IBM, also disregarded the patent policy. As Mr. Kelley testified, however, IBM committed to making active disclosure of all patents and patent applications of which Mr. Kelley was personally aware, "but with the corporation being so large, I could not assure the committee that it was a complete list." Kelley 1/26/01 Dep. at 85 **[Tab 49]**. In other words, he could not conduct a search throughout all of IBM for relevant patents or patent applications. Nor, for that matter, do JEDEC's rules require such a search. Likewise, David Chapman of Motorola, another company that Rambus alleges refused to follow the patent policy with respect to applications, also disclosed actual patent applications. *See* Chapman 1/23/03 Dep. at 42 **[Tab 70]** ("Whether or not the fact that Motorola is making application for a patent in some particular general area would be hard to consider terribly confidential").

disclosure of patents at JEDEC during the time that you attended JEDEC meetings?

A. I was a chairman, and before every meeting I would explain to everybody . . . [i]f you are aware of any patent or patent application that relates to any proposal, you are required to bring it up and make sure people make their decision with open-minded. And if you have a patent or patent application, you just have to follow the rules that we will license in a nondiscriminatory and a reasonable basis to everyone. So I would repeat that every meeting at the beginning of the meeting.

Tabrizi 3/12/01 Dep. at 272-273 **[Tab 52]**.

Q. The question is, sir, what was your understanding of the JEDEC patent policy in July, June and July 1992?

THE WITNESS: The understanding was that the holders of a patent or an application should make the committee aware in the case that they were aware of that, the application of the patent which they held or had filed was in relationship to the work in JEDEC that we were doing.

Meyer 4/26/01 Tr. at 142-143 **[Tab 71]**.

Q. OK. And what was your understanding of that policy in 1988?

A. That participants in the standards making process were required to report any patents or applications of patents that may affect standards work in progress.
. . .

Q. BY MR. PENDARVIS: And was it your understanding then in 1988, that this policy was a mandatory -- that is, you said participants were required to report, you understood it was mandatory, right?

A. Yes.

Q. And that's different from encouraging people to report, right?

A. No. It was mandatory.

Q. OK. In other words, it was not your understanding that the policy was to simply encourage reporting?

A. No, it was mandatory.

Russell 1/31/01 Dep. at 294 **[Tab 54]**.

Q. So please state for me what is the JEDEC patent policy.

A. I don't recall it word for word. It basically says that if you have a patent or patent pending that you believe is relevant to anything that's being discussed that you have an obligation to send a letter to the committee stating that you will license it either freely or without discrimination to others.

Wagner 1/16/03 Dep. at 47 **[Tab 67]**.

Q. Do you have an understanding of what JEDEC's patent disclosure policy is?
. . .

A. My understanding of the patent disclosure policy is only secondhand, but my understanding is that, as a JEDEC member, you agree to disclose if you are seeking a patent on any of the areas discussed at a JEDEC meeting.

Gross 1/24/01 Dep. at 22 **[Tab 73]**.[50]

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[50] See also testimony of Betty Prince, former representative of Philips and Texas Instruments to the JC-42.3 subcommittee:

Q. And during that time, what was your understanding of what obligations, if any, Philips had to disclose patents to JEDEC?

A. Same as any other company. The understanding with which the standards community comes together is that these will be open standards. And the JEDEC patent policy was that -- if my -- my understanding of it was that if you have a patent that affects

Similarly, witnesses consistently have testified in a manner that directly contradicts Rambus's revisionist attempts to put its spin on the clear obligations of the JEDEC disclosure policy. Rambus tries, for example, to argue that the JEDEC policy did not require disclosure of patent applications. Rambus simply ignores not only the documentary evidence described above, but also the directly contradictory testimony of Brett Williams of Micron, Farhad Tabrizi of Hynix, Gil Russell (who represented Samsung, NEC and Infineon at the JC-42.3 subcommittee), Samuel Calvin of Intel, Sam Chen of Mitsubishi, Charles Donohoe of Samsung, Tom Landgraf of Hewlett-Packard, Charles Furnweger (formerly of NEC), and Betty Prince (who represented Philips and Texas Instruments at the JC-42.3 subcommittee):[51]

> Q. . . . Here's where I'm coming from: I think you have been very consistent and I don't mean to be testifying or commenting on your testimony. That's improper. But it's my understanding, and this goes to the foundation of my question, that you have been clear, very clear, from the very beginning that it was your understanding in 1991 when you assumed your duties as the representative from Micron Technology to JEDEC, that the patent disclosure policy included applications <u>and pending applications</u>; am I correct?
>
> A. <u>That is correct</u>.

Williams 4/12/01 Dep. at 198 **[Tab 50]**.

> <u>the standard</u>, then the company needed to present a letter stating that they would abide by the JEDEC patent policy.

Prince 3/13/01 Dep. at 88 **[Tab 24]**.

[51] Samuel Calvin of Intel, Sam Chen of Mitsubishi, Charles Furnweger (formerly of NEC), and Betty Prince (formerly of Philips and Texas Instruments) were all listed by Rambus on its preliminary witness list.

Q. And it was your understanding that the policy applied to both patents <u>as well as patent applications</u>, correct?

A. <u>Absolutely.</u>

Russell 1/31/01 Dep. at 294-295 **[Tab 54]**.

Q. Okay. And was it the policy of JEDEC to require disclosure of <u>patent applications</u> during the entire period of time that you were attending JEDEC meetings?

A. <u>Yes</u>.

Tabrizi 3/12/01 Dep. at 279 **[Tab 52]**.

Q. . . . at some point in time, your understanding was that companies were required to disclose <u>anything in the matter of intellectual property</u>. Is that your understanding?

A. <u>Yes</u>. That is my understanding.

Q. And what do you mean by "anything in the matter of intellectual property"? Were there some bounds to that?

A. Yeah. Well, yes. I mean, my understanding is <u>either patented or submitted for a patent.</u>

Calvin 1/13/03 Dep. at 86 **[Tab 65]**.

Q . . . . Okay. Did the JEDEC disclosure policy require the disclosure of patents?
. . .

THE WITNESS: Yes, that's my understanding.

Q . (BY MR. CATT) Did the policy also require the disclosure of <u>application</u>s?
. . .

A. <u>Yes, if you are aware of it.</u>

Chen 1/16/03 Dep. at 102 **[Tab 74]**.

Q. Is it your understanding that the JEDEC patent policy requires disclosure of patent applications, as well as patents?

A. Yes.

Q. And how long has JEDEC's patent policy required disclosure of patent applications?

A. Well, I think it's gone back a long time, but it was formally put into writing, I believe, in early 1993, or sometime in 1993.

Donohoe 2/6/01 Dep. at 174 **[Tab 75]**.

Q. Okay. And does this policy that's printed here, on 15 and 16, apply to patent applications?

. . .

THE WITNESS: Well, the way I always treated this was that it applied to both patents that – that were being applied for as well as patents that were owned because . . . the intention of the policy is to standardize things without any kind of hidden agendas, if you will . . .

. . .

I think the distinction between patent applications and patent pending was -- I mean, I think if you make a distinction between the two, then you're really violating the spirit of how the entire organization works, and, so, we didn't attempt to make that distinction, that's how we operated, and I think the vast majority of the companies in JEDEC would probably come – agree with my – my assessment on this.

Landgraf 12/17/02 Dep. at 118-120 **[Tab 68]**.

Q. OK. Now, put aside the policy. As NEC and NECEL's representative at JEDEC, did you have an understanding that the JEDEC members were disclosing patent applications that could affect JEDEC standards?

A. Yes.

. . .

Q. . . . Did you have an understanding as NEC and NECEL's representative at JEDEC from 1993 through 1999 that JEDEC members were as a matter of practice disclosing <u>all pending patent applications that could affect JEDEC standards</u>?

A. <u>Yes</u>.

Furnweger 6/29/01 Dep. at 83-84 **[Tab 76]**.

Q. What was your understanding – during the time that you were at Philips, what was your understanding of whether or not the company had to disclose any pending applications that related to what JEDEC was doing?

A. This – my understanding of this was that any company that participated in the standards process <u>ethically couldn't also be patenting things that would be open to standards without agreeing with the JEDEC patent policy</u>.

Prince 3/13/01 Dep. at 88 **[Tab 24]**.

Q. Was it your understanding that was the first time that Philips had any obligation to say anything to JEDEC about that patent after it was issued?

A. My personal opinion is that a company has a responsibility, if they participate in the standards process, to disclose relevant patents that they have with regard to that.

Q. <u>Patent or patent applications or both</u>?

A. <u>Ethically they are the same</u>.

Prince 3/13/01 Dep. at 91-92 **[Tab 24]**.

Likewise, Rambus's attempts to assert that the disclosure duty was somehow restricted to members making presentations finds no support among either Complaint Counsel's or its own

witnesses' testimony. John Kelly, President and General Counsel of JEDEC, Ken McGhee, the JEDEC Secretary to the JC-42.3 subcommittee, and [**********************************
***], all refute Rambus's attempts artificially to limit the Rambus disclosure obligation:

> Q. In 1991 and in 1992, let's just start with that, how does one subject himself to be subject to the duty to follow the EIA patent policy?
>
> A. I guess the best way I can answer that question is by joining and participating.

Kelly 1/9/01 Dep. at 65-66 **[Tab 64]**.

> Q. And I asked you earlier if there was any different duty for a sponsor of a standard to disclose patents or patent applications if in fact there's a duty to do that?
>
> A. Right.
>
> Q. Then any other member, I don't know if I got an answer from that.
>
> A. I think my answer was that <u>the duty is based on knowledge and the duty is not higher or different for a sponsor per se unless they have a higher degree of knowledge. It's all tied to knowledge</u>.

Kelly 1/9/01 Dep. at 68-69 **[Tab 64]**.

> Q. Yes. <u>Any difference in the disclosure requirements for patents or applications for patents that pertained to a sponsor, as opposed to any other member of JEDEC</u>?
>
> A. <u>No.</u>
>
> Q. So whatever any member of JEDEC was expected to do, that was expected of a sponsor of a ballot item?

A. It was expected of everybody.

Q. No more, no less, though, for a sponsor, true?

A. Right.

McGhee 12/19/00 Dep. at 126 **[Tab 77]**.

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Rambus's assertion that the disclosure obligation was somehow limited only to presenters also flies in the face of testimony of Gil Russell (who represented Samsung, NEC and Infineon at the JC-42.3 subcommittee meetings) and Sam Calvin of Intel:

Q. Now was it your understanding that the policy requiring disclosure of patent applications applied not only to the presenter of a proposal but also to other JEDEC members?

A. Yes.

Q. OK. So your understanding was that someone was in the office and they were not the presenter of a proposal. They nevertheless had an obligation to disclose patent applications that might materially affect the proposed standard?

A. Yes.

Russell 1/31/01 Dep. at 450 **[Tab 54]**.

Q. Okay. Now, let's look at the situation where members are observing a showing or presentation by another member.

A. Uh-huh. (Witness answers affirmatively.)

Q. What are a -- based upon your understanding of the JEDEC policies, what are the members' obligations vis-a-vis disclosing patents?

A. To the extent that you are aware, with the possible extension of NDA's, you have an obligation to also make known – so the answer is it would be the same, based on your – your – your knowledge of applicable patents.

. . .

Q. So, then, it sounds to me like you're saying that <u>there were no differences in the duties between – as between a presenter, on the one hand, and a member who is observing, on the other</u>? Is that what you're saying with respect to the patent disclosure policy?

A. <u>Yes. Yes</u>….

Calvin 1/13/03 Dep. at 121-122 **[Tab 65]**.

3. Rambus Understood the Obligations Imposed by the JEDEC Disclosure Policy.

Rambus's attempts to apply spin to the interpretation of the JEDEC disclosure obligation are particularly disingenuous in light of the evidence showing that, at the time it was a member, Rambus's own understanding of the JEDEC disclosure policy was identical to that of the witnesses quoted above. Indeed, certain of Rambus's assertions are breathtaking in their sheer audacity. Rambus states, for example, "there is no evidence that Rambus was provided with a copy of JEP 21-I while it was a JEDEC member." Rambus Mem. at 22. Highly inconvenient to Rambus's argument is the fact that Rambus produced, from its own files, a nearly complete copy of the JEP 21-I Manual bearing Rambus production numbers. R173458 *et. seq.* **[Tab 15A]** Furthermore, Rambus simply ignores, and apparently hopes that Your Honor and Complaint Counsel will not notice, the testimony of Richard Crisp, Rambus's primary representative at the JEDEC JC-42.3 subcommittee, which clearly establishes (1) that he not only received the JEP 21-I Manual, but also that it was given to him at his specific request; (2) that it was the material that JEDEC provided to members for the purpose of understanding their obligations under the JEDEC disclosure policy; and (3) that he in fact read the document and understood the disclosure obligations set forth in that document:

> Q. Did you ever get a copy of 21-I while you were at JEDEC?
>
> A. I think I did.
>
> Q. When did you get a copy of 21-I?
>
> A. It was in 1995.
>
> Q. And how did you come to get that copy in 1995?
>
> A. I had made a request to be given whatever kind of manual they must have had there for members that outlined what the patent policy was.

Crisp 8/10/01 Dep. at 851-852 **[Tab 78]**.[52]

> Q. And when you got a copy of 21-I, did you read it?
>
> A. I read – I didn't read all of it, but I looked through it, I believe – I believe I read a lot of it. I don't think I read all of it.

[52] Rambus elsewhere has tried to label JEP 21-I as "the Chairman's manual made available to the Chairman." *See* Statement of Gregory P. Stone, Tr. of 8/2/02 Sched. Conf. at 35 **[Tab 8]**. Rambus's position likewise ignores Richard Crisp's clear testimony that JEP 21-I was the JEDEC Manual "for members that outlined what the patent policy was."

> Q. Okay. Based on your reading of 21-I, did you come to some understanding of what the written patent policy was of JEDEC?
>
> A. I think I did, yes.
>
> Q. What was that understanding?
>
> A. Well, <u>they wanted to know about both patents and patent applications that might relate to the works that were going on within JEDEC</u>.

Crisp 8/10/01 Dep. at 852-853 **[Tab 78]**.[53]

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[53] Richard Crisp testified further:

> Q. You said that you did not know until 1995 that JEDEC required the disclosure of patent applications. But the fact is that the JEDEC 1993 manual says exactly that, doesn't it?
>
> A. It is true that the JEDEC 1993 manual says that there needs to be a disclosure of applications . . . . But it was not really until I was finally given a copy of the manual in 1995 that I actually saw it in writing, as I recall.
>
> Q. Well, you said that – you agreed that the manual itself in October of 1993 contained the requirement that both patents and patent applications be disclosed; correct?
>
> A. I believe that's what I've testified, yes.

Crisp 8/10/01 Dep. at 910 **[Tab 78]**.

To the extent that Rambus is arguing that it does not have in its files a complete copy of the JEP 21-I Manual, because the copy produced from its files is missing the final three pages, the most logical assumption is that the complete copy of JEP 21-I that Mr. Crisp received in 1995 fell victim to Rambus's document "retention" program. Rambus's assertions concerning its alleged non-receipt of the 21-I Manual should viewed in light of Judge Timony's rulings on the collateral estoppel effect of Rambus's efforts to destroy documents in advance of litigation. (*See* Order Granting Complaint Counsel's Motion for Collateral Estoppel, dated February 26, 2003 **[Tab 10]**). Complaint Counsel is entitled to an inference that Rambus received the 21-I Manual. Indeed, Rambus's attempt to take

Richard Crisp's receipt of, and understanding of the contents of, the JEP 21-I Manual are problematic facts for Rambus. But other facts ignored by Rambus are equally inconsistent with the thrust of its summary decision arguments. For example, Richard Crisp admitted that he observed Jim Townsend's presentations explaining the JEDEC patent policy at each of the meetings that he attended:

> Q. Did Chairman Townsend or anyone else regularly start these JEDEC meetings with a presentation on the patent policy of JEDEC?
>
> . . .
>
> THE WITNESS: I believe that he generally made some sort of a presentation about patent policy.
>
> . . .
>
> Q. At each of the meetings you attended he did, right?
>
> . . .
>
> THE WITNESS: I believe that he did.

Crisp 11/9/00 Dep. at 306-307 **[Tab 79]**.[54] Richard Crisp also testified that when attending at least

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advantage of the absence from its files of the complete JEP 21-I Manual, despite the clear evidence that Mr. Crisp received, reviewed and understood the document, emphasizes the need for presumptions of the type entered by Judge Timony.

[54] As a result of these presentations by Mr. Townsend and other sources of information, Richard Crisp became aware that JEDEC had a disclosure requirement near the beginning of his involvement in JEDEC:

> Q. Now, you became aware right at the start of your involvement as the JEDEC representative that Rambus – that JEDEC had a patent policy; correct?
>
> . . .
>
> THE WITNESS: I believe that I became aware of that at some point in time near the beginning of my involvement.
>
> . . .

some JEDEC meetings, he saw the JEDEC sign-in sheet stating that "Subjects involving patentable or patented items shall conform to EIA Policy (reverse side). Consult the EIA General Counsel about any doubtful question."[55] Richard Crisp also observed, and in an e-mail to others at Rambus commented in detail upon, the debate within JEDEC concerning Texas Instruments' alleged failure to disclose the existence of a relevant patent on a timely basis. Crisp wrote, "TI was chastized [sic] for not informing JEDEC that it had a 1987 patent on quad CAS devices . . .. The bottom line is that all quad CAS devices will be removed from [JEDEC] standard 21-C." Crisp 10/5/93 E-mail (R69511) **[Tab 81]**. At a subsequent meeting, Crisp observed further debate on the issue. He wrote:

> The meeting opened with a lot of controversy regarding Patents. . . Micron says the policy exists due to anti-trust concerns. That if a group of companies wanted to keep out competition they could agree amongst themselves to standardize something that is patented and not license those that they do not want to compete with.

> Q. Okay. You knew that it had at least some disclosure requirement; correct?
>
> A. I think I was generally aware of that, yes.

Crisp 7/20/01 Dep. at 434 **[Tab 80]**.

[55] Richard Crisp testified:

> Q. You don't dispute that this [DTX 50] is a form of sign-in sheet that was used during the time you were a representative at JEDEC, do you?
>
> . . .
>
> THE WITNESS: I will only say there was some point in time that I believe this was used while I was there at JEDEC. I'm not certain it was used for the entire time I was there. I believe this was the one that was used.

Crisp 7/20/01 Dep. at 439-440 **[Tab 80]**.

Crisp 3/9/94 E-mail (R69525-26) **[Tab 82]**.[56] Crisp later testified that the discussions of the quad CAS incident he observed in JEDEC caused him to come to understand the JEDEC disclosure policy.[57] Based on the Townsend presentations at every meeting, the sign-in sheet, the quad CAS

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[56] Crisp elaborated on his understanding of the discussion in deposition testimony:

> Q. But certainly there was a great deal of discussion concerning the concern over Texas Instruments' patent and the quad CAS technology; right?
>
> A. I think that's a fair way to characterize.
>
> Q. And the concern was that the quad CAS technology, if incorporated into the JEDEC standard, would impose upon any prospective user of the JEDEC standard the potential need to pay royalties to Texas Instruments; right?
>
> A. Well, I think it's true that that's what the concern was. Whether or not the concern was well-founded based on the facts of the particular issue I think was an unsettled issue as a result of this meeting.

Crisp 4/23/01 Dep. at 176-177 **[Tab 83]**. *See also* Crisp 12/5/95 E-mail (R69697-8) **[Tab 14]** ("SSTL passed 30/0 and was sent to council. However Hitachi stated that they had a patent relating to it. This created a big ruckus. The major thrust of the criticism of Hitachi was that they waited until the ballots had been passed before mentioning that they had a patent.").

[57] Crisp testified:

> Q. . . . When did you come to understand the JEDEC patent policy? When did you come to have an understanding of the JEDEC patent policy for the first time?
>
> A. It was sometime during 1993 when there was a discussion that occurred within a JEDEC meeting about some sort of a dispute between Micron and TI and whether or not TI made the proper disclosures. There was a lot of discussion relating to that, the policy.

debate spanning a number of meetings, the 21-I Manual, and other events and discussions within JEDEC, Richard Crisp and others at Rambus came to have an accurate understanding of the JEDEC disclosure policy.[58]

The testimony of Richard Crisp and others flatly contradicts Rambus's current assertion that the JEDEC disclosure policy did not require the disclosure of patent applications. Crisp's testimony, on three separate occasions, could not be clearer:

> Q. As of September 1995 . . . did you understand the JEDEC patent policy to also require disclosure of patent applications?
>
> A. <u>I understood it to apply to applications as well, yes</u>.

Crisp 11/8/00 Dep. at 190 **[Tab 84]**.

> Q. When is the first time, sir, that you believed patent applications had to be disclosed under the JEDEC patent policy?
>
> A. Sometime in 1995 I received a copy of the patent policy as part of the users in the manual that they had that was to be used to tell people what the rules were. And I read in there that it applied to patent policies.

Crisp 11/8/00 Dep. at 199 **[Tab 84]**.

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[58] *See* Crisp 8/26/96 E-mail (R208394 at 208395) **[Tab 12]** ("The job of JEDEC is to create standards which steer clear of patents which must be used to be in compliance with the standard whenever possible."); Crisp 12/5/95 E-mail (R69697-98) **[Tab 14]** ("So the conclusion I reach here is that we can abide by the patent policy on a case by case basis. . . . As long as we mention that there are <u>potential patent issues</u> when a showing or a ballot comes to floor, then we have not engaged in "inequitable behavior. . . . <u>The things we should not do are to not speak up when we know that there is a patent issue</u>.") (emphasis added); Crisp 9/23/95 E-mail (R233837 at 838) **[Tab 42]** (" . . . As time passed some of the patents issued and then we have not really made the committees aware of this fact. . . . It seems to me that we should re-evaluate our position relative to what we decide to keep quiet about, and what we say we have.").

Q. Patent applications?

A. Patent applications, that's right.

Crisp 5/2/01 Tr. at 60 **[Tab 13]**.

Q. Okay. Based on your reading of [the JEP] 21-I [Manual], did you come to some understanding of what the written patent policy was of JEDEC?

A. I think I did, yes.

Q. What was that understanding?

A. Well, they wanted to know about both patents and patent applications that might relate to the works that were going on within JEDEC.

Crisp 8/10/01 Dep. at 853 **[Tab 78]**. Others at Rambus shared this understanding. For example, Anthony Diepenbrock, in-house counsel at Rambus, also admitted that, based on information provided to him by Richard Crisp,[59] he thought that the JEDEC disclosure policy might require disclosure of patent applications:

Q. When you say "a duty might attach," you mean a duty to disclose pending applications?

...

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[59] Anthony Diepenbrock testified:

Q. How did you come to learn about the JEDEC patent policy, patent disclosure policy?

THE WITNESS: That's my recollection, that Mr. Crisp told me that such a policy existed.

Diepenbrock 3/14/01 Dep. at 152-153 **[Tab 85]**.

> A.	As I recall thinking about it, there – I believe that the JEDEC disclosure policy might have required that not just issued patents but pending applications be made available to members of the meetings, if there were a duty to disclose that information, that possibly pending applications might have to be disclosed.

Diepenbrock 3/14/01 Dep. at 155 **[Tab 85]**.

Similarly, testimony of Rambus witnesses flatly contradicts Rambus's current assertions that the JEDEC disclosure obligation was limited to companies making presentations. Anthony Diepenbrock testified that the JEDEC disclosure duty might attach based on <u>Rambus's attendance</u> at JEDEC meetings, even though Rambus was not presenting any proposals at JEDEC:

> Q.	My question is: What was the conclusion?
>
> A.	The conclusion is that a duty -- there was a risk that a duty might attach if he were <u>attending</u> those meetings.

Diepenbrock 3/14/01 Dep. at 154-155 **[Tab 85]**. In a subsequent deposition, he expanded on his testimony, and clarified that the JEDEC rules did not make any distinction between active participants and observers:

> Q.	And what did you conclude in that regard? Is that where you said that you didn't want to take the risk, so you just decided to get out?
>
> A.	What I recall is that after reading these rules, it appears that <u>you can't sit on the fence</u>; either you are participating or you are not participating the rules would like to have it. And because the rules have that kind of tone to them, that raises the risk that Richard's participation is active participation because there's no – <u>there's no observing status</u>. That's enough for me to have a risk.
>
> Q.	So what you are saying is the rules contemplate people who

attend and people who don't attend, and that's really the only distinction?

A Right. They don't make a distinction about someone who's there but not attending.

Diepenbrock 4/11/01 Dep. at 278-279 **[Tab 86]**.

Based on their understanding of Rambus's membership in JEDEC and attendance at JEDEC meetings, Rambus's lawyers concluded that Rambus might well incur obligations that, if not fulfilled, could render their patents unenforceable. Lester Vincent, Rambus's outside counsel, informed Rambus representatives of concerns with respect to equitable estoppel if "Rambus creates impression on JEDEC that it would not enforce its patent[s] or patent appl[ication]s." Lester Vincent, Handwritten Notes, March 27, 1992, R203254 **[Tab 89]**. Both Lester Vincent and Anthony Diepenbrock recognized that Rambus ran a serious risk that its patents would be held to be unenforceable due to its participation in, and lack of disclosure to, JEDEC. Lester Vincent testified:

Q. Did you tell Richard Crisp and Allen Roberts that at this March 27th, 1992 meeting, that they should not participate in JEDEC?

A. I'm having trouble remembering what I said at this specific meeting beyond [the handwritten notes]. But I do want to say that I believe at some point early on, and I don't know whether it was at this particular meeting, that <u>I believe I said I didn't think it was a good idea.</u>
. . .

Q. The downside risk was that somebody was going to raise the issue of equitable estoppel if Rambus attended JEDEC?

A. Right. I mean, we were having this meeting about the implications, that's right.

Vincent 4/11/01 Dep. at 320-321 **[Tab 87]**. Anthony Diepenbrock reached the identical conclusion, and provided similar advice:

> Q. Did you discuss with Mr. Crisp whether or not the JEDEC policies, by attending the JEDEC meetings, he was obligated under the JEDEC patent disclosure policies to disclose Rambus patents or patent applications related to what was being discussed at the meetings he attended?
>
> . . .
>
> A. We never discussed whether he was under any particular duty or not. We just simply said <u>there was a risk of equitable estoppel or other legal problems if he continued to attend those meetings</u>. We were not presenting legal conclusions.
>
> Q. Okay. And I guess what was the risk that you conveyed to him, I mean, did you explain why there was a risk?
>
> A. Yes.
>
> Q. What did you explain?
>
> A. I explained that there are certain doctrines in patent laws, equitable doctrines that can render a patent unenforceable. And one of those doctrines is latches, and the other is equitable estoppel, two of them. And that <u>he was running a risk that equitable estoppel</u>, which might have been construed by his actions, would render some or – some patents that had issued unenforceable, and that we did not want to take that risk.

Diepenbrock 3/14/01 Dep. at 147-148 **[Tab 85]**.[60]

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[60] The conclusions of Messrs. Vincent and Diepenbrock are fully consistent with the statements of Joel Karp, a Samsung representative at the JC-42.3 subcommittee through 1997 who later joined Rambus and became responsible for planning Rambus's patent enforcement and licensing program. While still at Samsung, Mr. Karp stated in an affidavit that, based on his participation in JEDEC and his understanding of the EIA patent policy, that "standards promulgated by standard-setting groups are '<u>open' standards</u>, unless the holder of an intellectual property right has previously disclosed during the standard-setting process its property interest . . . ." Declaration of Joel Karp, before the International Trade Commission, May 15, 1996, SEC00049 **[Tab 88]** (emphasis added). He added, "<u>It is contrary to industry practice and understanding for an intellectual property owner to remain silent during the</u>

In sum, contrary to the assertions of Rambus, the JEDEC disclosure policy was clearly understood by JEDEC members. The substance of the policy was conveyed to members in a number of different ways, including both written documents and oral presentations and discussions. The testimony of numerous JEDEC members demonstrates clearly that a common understanding of that policy was shared by members at large. Rambus's veiled contentions that the policy was voluntary, that it did not apply to applications, and that it applied only to presenters are each flatly contradicted by the testimony of a large number of JEDEC members. Not surprisingly, although Rambus attempts to deny it now, the contemporaneous evidence confirms that even Rambus shared the common understanding of the JEDEC disclosure policy.

For all of the reasons stated in the earlier sections of this memorandum, despite Rambus's best efforts to recast this matter into a far narrower case than is described in the Commission's Complaint, antitrust liability in this matter does not hinge on a strict interpretation of the specific elements of the JEDEC disclosure obligation. Even if Your Honor were to consider Rambus's argument, however, and evaluate Rambus's liability in light of the content of the JEDEC disclosure policy, there is a wealth of evidence to establish that the JEDEC disclosure policy imposed a duty on Rambus to disclose to JEDEC patents <u>and patent applications</u> that <u>might be involved in</u> JEDEC's work. Complaint Counsel expects to introduce at trial substantial evidence that Rambus failed to fulfill this clear obligation to

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<u>standard-setting process – and then after a standard has been adopted and implemented – later attempt to assert that its intellectual property covers the standard</u> and allows it to exclude others from practicing the standard." *Id.* (emphasis added) .

JEDEC.[61]

IV. Rambus's Second Summary Decision Point, Relating to JEDEC's "Reliance" on Rambus's "Silence," Is Legally Invalid and Rests on Numerous Disputed Facts.

Rambus argues as a second ground for summary decision in its favor that, regardless of any conduct in violation of the policies and rules of JEDEC, the members of JEDEC were on notice that Rambus would not comply with the patent policy of JEDEC and were aware of the possibility that Rambus might assert its patent rights with respect to the subject matter of the JEDEC standards. This means, according to Rambus, that Complaint Counsel cannot establish that Rambus conduct was the cause of the anticompetitive effects because there is not proof that JEDEC and its members relied upon Rambus's "omissions." Rambus Mem. at 33-34. This argument fundamentally distorts the relevant law, as discussed below, and (as with every other part of the Rambus motion) rests on fundamentally disputed facts. It cannot form the basis for summary decision.

A. Rambus Fundamentally Misapplies the Law of Causation in Antitrust Cases.

While Complaint Counsel must prove causation to win its antitrust case, Rambus greatly overstates Complaint Counsel's burden. Rambus deceptively attempts to import the elements of a plaintiff's burden in a common-law fraud case into Complaint Counsel's antitrust case. Such an effort is entirely unwarranted, and fatally undermines the legal basis for their argument. As explained below, the standard for causation is less stringent in an antitrust case, rendering irrelevant whether other JEDEC

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[61] Judge Timony has already entered presumptions, of course, that "Rambus knew or should have known from its pre-1996 participation in JEDEC that developing JEDEC standards would require the use of patents held or applied for by Rambus," and that "Rambus never disclosed to other JEDEC participants the existence of these patents." Order On Complaint Counsel's Motions for Default Judgment and for Oral Argument at 9 (February 26, 2003) **[Tab 9]**.

members relied upon Rambus's statements. Moreover, even if the elements of a fraud claim were relevant here, Rambus's own cited case-law, as well as ample additional authority, confirms that on the evidence as presented by Rambus, Rambus's conduct was deceptive and fraudulent.

To satisfy its burden of proving causation, Complaint Counsel need show only that Rambus's deceptive acts, accomplished through its lack of disclosure, implied denials of relevant patents and patent applications, and partial disclosures of putatively relevant patents, were a "material cause" of JEDEC's decision to adopt standards incorporating Rambus propriety technology. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). Accordingly, Complaint Counsel "need not exhaust all possible alternative sources of injury in fulfilling [its] burden." *Id.*; *see also Law v. National Collegiate Athletic Ass'n*, 5 F. Supp. 2d 921, 927 (D. Kan. 1998) (Complaint Counsel "need not rule out 'all possible alternative sources of injury'"). Rather, it is required to show "only that the violation 'played a substantial part' in causing anticompetitive harm." *The Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 711 (2d Cir. 1983).[62] Here, it is clear that Rambus's deceptive actions had a material effect on JEDEC's determination to adopt a standard that read on Rambus's patents. Even more clear is that, at a minimum, there is a genuine issue of material fact as to whether Rambus's conduct was a material cause of JEDEC's decision.

Rambus offers no support for its claim that "[l]ike a plaintiff making similar allegations in support of a fraud claim, Complaint Counsel must prove that JEDEC and it[s] members acted in reliance on

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[62] Furthermore, Complaint Counsel need show only that Rambus's conduct caused some of the alleged consumer harm. *See William Inglis & Sons Baking Co. v. Continental Baking Co.*, 942 F.2d 1332, 1339 (9th Cir. 1991).

Rambus's alleged failure to disclose." Rambus Mem. at 35. In other words, Rambus contends, Complaint Counsel must prove actual fraud. Section 2 of the Sherman Act and Section 5 of the FTC Act are not so limited. Indeed, the few cases Rambus cites in support of its remarkable proposition relate purely to standards for fraud, and thus do not support Rambus's proposition at all. *See Alicke v. MCI Communications Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997) (allegedly fraudulent billing practices by long-distance carriers); *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 827 (4th Cir. 1999) (alleged fraud in commercial-banking transactions). Rambus also cites *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998), for this proposition. That case at least relates the to antitrust laws, but it simply applies the *Walker Process* doctrine,[63] one element of which is a showing of fraud on the patent office. As Rambus notes, "Complaint Counsel have not alleged that Rambus obtained its patents through fraud." Rambus Mem. at 36 n.17. The elements of a *Walker Process* claim thus have no bearing on this action.[64] In short, the law simply does not support Rambus's purported articulation of what Complaint Counsel must prove.

As explained above, Complaint Counsel need show only that Rambus's deceptive conduct was a material cause of the consumer harm alleged. Of course, while Rambus is entitled to advance its own

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[63] As Rambus notes, *Walker Process Equipment v. Food Machine & Chemical Corp.*, 382 U.S. 172 (1965), held that enforcement of a fraudulently obtained patent could violate Section 2 of the Sherman Act.

[64] Moreover, the higher standard of proof required for the fraud element of a *Walker Process* claim does not apply to all of the elements of such an antitrust case. *See Ramsey v. United Mine Workers of Am.*, 401 U.S. 302, 311 (1971) (clear-and-convincing standard applicable only to one element of antitrust case requiring proof of union's connection with anticompetitive activities). Although Rambus does not appear to claim otherwise, the reasons supporting a higher standard of proof on the fraud element of a *Walker Process* case are not present here.

causation theories, such theories are only alternatives for the finder of fact to consider. *See Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1042 (9th Cir. 1988). Thus even where there are possible "intervening causes," as Rambus posits, causation may still be proven where the antitrust harm "flowed from the anticompetitive conduct." *Id.* Here, Rambus's contention that JEDEC and its members should have realized that Rambus was failing to comply with the JEDEC disclosure rules is, at best, a possible contributing cause. Yet the primary cause of the anticompetitive harms complained of here is Rambus's wrongful, deceptive conduct.

The rule of causation in antitrust cases means that even where the result complained of might have arisen also because of factors not related to the defendant's conduct, if the defendant's conduct was a material cause, it is properly the subject of antitrust liability. *See, e.g., Sullivan v. National Football League*, 34 F.3d 1091, 1103 (1st Cir. 1994) (finding NFL liable for anticompetitive ban on public ownership of franchises despite plaintiff-owner's failure to request exception to ban and minimal proof that a public sale would have succeeded); *see also Andrx Pharmaceuticals, Inc. v. Biovail Corp.*, 256 F.3d 799, 808-09 (D.C. Cir. 2001) (holding that FDA restrictions on entry into drug market did not defeat causation from anticompetitive agreement that prevented entry). Here, Rambus failed to disclose its intellectual property, in violation of JEDEC's policy. Moreover, it deceived JEDEC members by strongly implying that it <u>was</u> complying by disclosing the '703 patent and by using elusive language to suggest that it had nothing to disclose. That conduct alone was sufficient to cause JEDEC to adopt a standard that infringed Rambus patents, even if the members of JEDEC contributed to that result through their failure to see Rambus's "red flags." Simply put, even if JEDEC members somehow were negligent (which we submit they were not, and, on summary decision, it must be presumed they were not), that negligence was, at best, one of two reasons leading to the adoption of the JEDEC standards. Accordingly, Rambus is not entitled to summary judgment on the ground that its lack of disclosure did not cause JEDEC to adopt standards that read on Rambus's patents.

Even if Rambus's statement of the law were correct (and it is not), Rambus still would not be entitled to summary decision. Cases addressing fraud demonstrate that Complaint Counsel has adduced facts, which if viewed favorably to Complaint Counsel (as they must on summary decision), show that each of the elements of a fraud claim, as *Bank of Montreal* sets them out, has been met here. Rambus made "(1) a false representation, (2) of material fact, (3) made intentionally and knowingly, (4) with intent to mislead," upon which (5) JEDEC members relied, and from which (6) damages flowed. *Bank of Montreal*, 193 F.3d at 826. Rambus does not appear to seek summary judgment on any of these elements, other than the fifth, reliance. Nor could it, as it is amply clear that, under Virginia and California law, a false representation can be demonstrated by showing, *inter alia*, "affirmative misrepresentations" <u>or</u> "omission" or "concealment." *Bank of Montreal*, 193 F.3d at 827; *accord*, *Allen Realty Corp. v. Holbert*, 318 S.E.2d 592, 597 (Va. 1984) ("Concealment of a material fact by one who knows that the other party is acting upon the assumption that the fact does not exist constitutes actionable fraud."); *Wilkins v. National Broadcasting Corp.*, 71 Cal.App.4th 1066, 1082 (1999) (listing four circumstances "in which nondisclosure or concealment may constitute actionable fraud").[65] It is therefore quite appropriate, even in a fraud case, for Rambus to be found liable for

[65] Complaint Counsel does not concede that Virginia fraud law is applicable in this proceeding. It argues on the basis of Virginia and California fraud law because those two states are among those with the closest connection to Rambus (which has its principal place of business in California) and JEDEC (which is headquartered in Virginia).

failing to disclose relevant information, particularly when it was charged by its participation in JEDEC with an obligation to do so.

Rambus makes the bold but unsupportable claim that JEDEC members did not rely upon Rambus's misleading equivocations and partial denials. In a fraud case, however, a plaintiff need show only that its reliance was "reasonable." *E.g.*, *Hitachi Credit America Corp. v. Signet Bank*, 166 F.3d 614, 629 (4th Cir. 1999); *Garrett v. Perry*, 346 P.2d 758, 760 (Cal. 1959). Furthermore, where a fraud defendant throws another person "off guard" or "diverts" that person from learning the truth, reliance is readily justified. *See Bank of Montreal*, 193 F.3d at 830; *Hitachi Credit*, 166 F.3d at 629 ("A buyer may therefore recover for fraud if the seller does or says anything to divert the buyer 'from making the inquiries and examination which a prudent man ought to make.'"). Thus, even with possible knowledge that Rambus patents may have covered the technologies under consideration, any suspicions "were allayed by [Rambus's] subsequent reassurances," which would entitle JEDEC members to rely upon them. *Garrett*, 346 P.2d at 760. This is particularly true because Rambus had "superior knowledge" of the relevant facts. *Id.*

The question of JEDEC's reliance upon Rambus's omissions and material misstatements is not properly resolved on summary decision. Indeed, "the reasonableness of the reliance is ordinarily a question of fact." *Guido v. Koopman*, 1 Cal.App.4th 837, 843 (1992); *Brownlee v. Vang*, 235 Cal.App.2d 465, 473 (1965) ("Whether or not fraud exists, including the element of reliance, is ordinarily a question of fact for the fact-finding entity."). Here, there is ample evidence, contrary to Rambus's assertions, showing that JEDEC's reliance was reasonable.

Any suspicions that JEDEC members may have had about Rambus's patents were allayed by

Rambus's failure to inform JEDEC that it did, in fact, have patent rights that potentially covered the technologies under consideration at JEDEC, and by other affirmatively misleading conduct by Rambus. "[T]he receipt of some unfavorable information [does not] preclude" reliance when "suspicions . . . arising from the information [a party] has obtained upon his investigations were allayed by defendant's subsequent reassurances." *Garrett*, 346 P.2d at 760. Indeed, "one 'must not say or do anything to throw another off his guard or to divert him from making the inquiries and examination which a prudent man ought to make.'" *Wells v. Wells*, 401 S.E.2d 891, 893 (Va. App. 1991) (quoting *Horner v. Ahern*, 153 S.E.2d 216, 219 (Va. 1967)); *see Hitachi Credit*, 166 F.3d at 629 (quoting *Horner*).

B. Rambus's Request for Summary Decision on This Ground Raises Numerous Issues of Disputed Fact.

Rambus's deliberate mischaracterizations of both Complaint Counsel's theory and the evidence are insufficient to overcome the high burden required for summary decision. While it is true that membership in JEDEC does carry a duty (which Rambus proudly admits that it violated) to speak when it relates to intellectual property, the Complaint is not limited to Rambus's violation of that duty through silence. It is not simply Rambus's silence, but also Rambus's affirmative and intentional misrepresentations in violation of the purposes and rules of JEDEC, that forms the basis of the Commission's Complaint.

Somewhat incongruously, Rambus argues that notwithstanding its admitted but misleading refusal to provide accurate information about its intellectual property claims, members of JEDEC were or should have been aware that Rambus held intellectual property that covered SDRAMs. The vague concerns of a few JEDEC members, however, must be viewed in the context of Rambus's attempts to market its proprietary RDRAM device. During the early 1990s, Rambus approached numerous DRAM manufacturers seeking in the hopes of signing license agreements for the production of RDRAM. For example:

> Q: Mr. Sussman, how did you first hear about Rambus?
>
> A: From Billy Garrett in December of 1991.
>
> Q: And what were the circumstances under which you heard about Rambus from Mr. Garrett?
>
> A: He wanted to provide information to me on Rambus saying that they had approached NEC Corporation and was looking for my help in convincing NEC that they should license Rambus' IP.

Sussman 5/21/01 Dep. at 93-94 **[Tab 90]**. Thereafter, Mr. Garrett provided Mr. Sussman with an overview of Rambus technology focusing on a few items that Garrett described as the "core of the technology." *Id.* at 96. Those core features, as described to Mr. Sussman, were "CMOS low voltage interface, a multiplex bus protocol, and a system clock de-skew by taking the clock and turning it around and sending it back with the data." *Id.* at 97. None of these disclosures to Mr. Sussman or any other potential licensee put JEDEC members on notice that Rambus's patents were applicable to SDRAM. Indeed, each of the 150 claims of the original '898 application (except those dealing with low-skew clock and packaging issues) is limited to the narrow-bus, multiplexed, packetized design. *See* Expert Report of Bruce Jacob at 30 **[Tab 91]**. This architecture was fundamentally different from the architectures under consideration at JEDEC and no JEDEC member is likely to have confused the two approaches to DRAM design. *See* Expert Report of Bruce Jacob at 27-36 **[Tab 91]**. Moreover, even if the claims contained in the '898 application were not specifically limited to the narrow-bus design, because all of the inventions described in the application were discussed in the context of Rambus's "revolutionary" system, no reasonable JEDEC member would have understood the application to cover SDRAMs. *Id.* at 33-34.

At least by June 1992, Rambus believed that SDRAMs infringed on claims in some of its patent applications. *See, e.g.,* Rambus, Inc., 1992-1997 Business Plan (R46394 at 410) **[Tab 92]** ("we believe that Sync DRAMs infringe on some claims in our filed patents"). JEDEC members, believing that any Rambus patent applications were directed toward Rambus's proprietary RDRAM architecture, were unlikely to make any connection between Rambus's potential patents and SDRAMs. Rambus, however, consciously avoided putting JEDEC on notice that Rambus's intellectual property might have broader applications than RDRAM. In fact, Rambus's own documents illustrate the deliberate and deceptive decision to leave JEDEC in the dark. For example,

[***
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**].

See also Crisp 9/23/95 E-mail (R233837 at 838) **[Tab 42]** ("As time passed some of the patents issued and then <u>we have not really made the committees aware of this fact</u> . . . . It seems to me that we should re-evaluate our position relative to what we decide to <u>keep quiet about</u>, and what we say we have.") (emphasis added).

Rambus went beyond mere silence, however, in its effort to deceive JEDEC. Indeed, Rambus did "speak" on the issue of its intellectual property, albeit in a manner that served to mislead JEDEC and its members. For instance, at a JEDEC meeting in September 1993, Rambus disclosed the '703

patent to JEDEC even though Rambus knew that '703 did not relate to any work going on in the committee. (*See* Crisp 5/2/01 Tr. at 197-98 **[Tab 13]**). Rambus also disclosed a number of patents in June 1996 when it resigned from JEDEC. Notably absent from this list, however, was the '327 patent, which contained claims covering dual-edge clock. (*See* Crisp 5/2/01 Tr. at 225 **[Tab 13]**). In fact, [**
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*************************************]; *see also* [**************************
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****
***].

Thus, there is a material issue of fact as to whether Rambus knowingly disclosed irrelevant patents to throw JEDEC off the scent, while deliberately holding back disclosure on patents that actually would have made a difference in the outcome of the standard. Any "red flags" allegedly raised would have been lowered due to Rambus's intentionally incomplete and misleading disclosures. It is disingenuous for Rambus to argue that it put JEDEC on notice about Rambus's intention to <u>not</u> comply with the disclosure obligations contained in the patent policy while asking Your Honor to completely ignore the disclosures that Rambus did make. These deliberately misleading disclosures, together with other affirmatively misleading misconduct discussed above, plainly preclude summary decision for

Rambus.

Contrary to its contention today, Rambus did not "openly repudiate"[66] its duty to disclose patents and patent applications that might relate to the work of JEDEC. (Rambus Mem. at 44) The primary evidence offered by Rambus relating to its purported "open repudiation" of the JEDEC rules is that on two occasions [***********] informed Gordon Kelley of IBM that Rambus would not agree to license its technology on reasonable and non-discriminatory ("RAND") terms. (Rambus Mem. at 44, 47). Rambus conveniently glosses over the very significant distinction between the disclosure and the licensing assurance provisions of the JEDEC patent policy. Simply put, disclosure is required; RAND licensing is not.[67] A refusal to license on RAND terms does not suggest a refusal to disclose the existence of relevant technology.

In fact, in his deposition testimony, Gordon Kelley, whom Rambus cites at length, on numerous occasions distinguishes between the licensing and disclosure parts of the policy. Mr. Kelley also has

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[66] Gidwani 1/14/03 Dep. at 35 **[Tab 96]** (never understood that Rambus would not comply with JEDEC patent policy); McGrath 12/16/02 Dep. at 128 **[Tab 97]** (no recall of Rambus stating that it would not comply with patent policy).

[67] Although RAND licensing is not required according to the patent policy, JEDEC rules forbid the standardization of patented technology without RAND assurances. In 1994, in response to a similar policy adopted by another influential SSO, JEDEC did consider adding a requirement that members agree to a mandatory RAND licensing provision, but that concept was rejected for various reasons (*See* JEDEC0000278 **[Tab 98]**). JEDEC's consideration and ultimate rejection of a mandatory RAND policy is an excellent example of why each SSO is entitled to adopt its own policy based on the peculiar factors affecting its members and their products. *See* Keefauver 3/8/03 Dep. at 10 **[Tab 99]** (agreeing that each organization has the right to adopt its own policies). Moreover, it is evidence that such policies are not vague or arbitrary afterthoughts, but the result of a careful weighing of the benefits and costs of the various requirements. Most important for present purposes, however, it is clear that this discussion had nothing to do with and, therefore, did not alter the obligation of a JEDEC member to disclose its intellectual property rights even if the member exercised its right to refuse RAND licenses.

testified that, while Mr. Crisp informed him that Rambus would not offer to license its patents under the JEDEC licensing requirements, he never informed him that Rambus would not abide by JEDEC's disclosure policy. For example, during his deposition taken during the Micron litigation on April 25, 2001, Kelley testified as follows at page 109-110 **[Tab 100]**:

> Q. . . . After Rambus began attending JEDEC committee 42.3, did Rambus indicate in any way that it would not agree to the disclosure obligation of the committee?
>
> A. Not to me.
>
> Q. To your knowledge did it – Rambus indicate this to anybody else?
>
> A. Not to my knowledge.
>
> Q. Did Rambus ever agree to not disclose – – ever indicate that it was not agreeing to the requirement of disclosing pending patents pursuant to the patent tracking list?
>
> A. Not to my knowledge.

Later on during the same deposition at page 128, Kelley reiterates that his discussions with Crisp were limited to the licensing requirements:

> Q. Now, you testified about a couple of conversations that you had with Mr. Crisp. Do you recall that, that testimony?
>
> A. Yes, I do.
>
> Q. During those conversations, did Mr. Crisp indicate to you that Rambus would not comply with the JEDEC disclosure obligation regarding any intellectual property that Rambus might have had that related to SDRAMs?
>
> A. The conversation that I had with him only addressed the topic of licensing. He had notified me that there were one or more

> Rambus patents [relating to Rambus's RDRAM architecture], and I was interested in whether they agreed to the JEDEC policy on licensing and royalties for those patents.

In fact, Mr. Kelley's testimony, rather than supporting Respondent's assertion that Rambus had openly repudiated its duty to disclose, supports the exact opposite position. In testifying on how Mr. Crisp came to disclose the '703 patent, Mr. Kelley stated that after Mr. Crisp approached him a second time requesting to make a presentation, Mr. Kelley asked the committee whether it was prepared to hear such a presentation. Mr. Kelley testified that the committee on hearing of Mr. Crisp's request asked Mr. Crisp whether Rambus had any relevant patents. Mr. Crisp responded by disclosing the '703 patent. Crisp 4/23/01 Dep. at 176-180 **[Tab 101]**. Thus, rather than repudiating the disclosure policy, Mr. Crisp, by disclosing the '703 patent, actually suggested to the committee that he was abiding by the policy.

The failure to disclose patents and patent applications related to the 1995 SyncLink proposal (Rambus Mem. at 47) also presents an issue of fact. Mr. Crisp's statements to Mr. Wiggers in June 1995 (*id.* at 48) are vague and misleading. Mr. Crisp vehemently objected to broad distribution of his comments concerning Rambus patents, citing copyright protection on his own email (*see* 69612 **[Tab 103]**). [**
***]. Once again, Rambus fraudulently thwarted legitimate attempts by JEDEC and other organizations to determine if there were any "patent problems" associated with Rambus technology.

Rambus, citing a few vague documents from the spring of 1992, asserts that at least Siemens (later Infineon) and IBM were aware of Rambus patents on two-bank design. (Rambus Mem. at 39-

40). In fact, what these firms were aware of was "a rumor" about the possibility of Rambus patents. Meyer 4/26/01 Tr. at 130 **[Tab 71]**. When at a JEDEC meeting in May of 1992 Mr. Crisp of Rambus was asked whether he wished to comment on those rumors, he responded with a shake of his head. According to one of those present, this nonverbal response was interpreted to the group by the chairman of the meeting as meaning "[t]hey don't have anything to say about that." *Id.* at 137.

This was in no way an open and unambiguous repudiation of the JEDEC disclosure policy, or notice to JEDEC members of a conflict with the developing SDRAM standard. Such a "no comment" response from a JEDEC member would sensibly be understood to mean simply that the member had nothing to say. *See, e.g.,* Rhoden 1/24/03 Dep. at 182 **[Tab 22]**. Contrary to Rambus's contention now, the rumor and response by Mr. Crisp did not "raise a red flag" (Rambus Mem. at 42). In fact, Mr. Meyer of Siemens, author of one of the documents cited by Rambus, testified that he and others at Siemens did not believe that by developing a SDRAM product they were running a risk of infringing Rambus patents. He believed that any such risk was removed by the fact that the JEDEC standard was the result of repeated discussions with all JEDEC participants, and the fact that JEDEC was "very sensitive" to the issue of including patented items in its standards. Meyer 4/25/01 Tr. at 310-311 **[Tab 104]**.

Rambus is unable to cite any testimony, from three private lawsuits or from the discovery in this proceeding, that any JEDEC participant knew that Rambus's patent applications covered the technologies at issue. The vague, out-of-context documents on which Rambus relies do not obscure the fact that Rambus never made any disclosure to JEDEC that its patents or patent applications might involve the work that JEDEC was undertaking in the early 1990's.[68]

Even assuming, counter-factually, that one or two JEDEC participants had actual knowledge from a Rambus employee that Rambus believed its intellectual property covered technologies incorporated into SDRAM and DDR, Rambus still would not be entitled to summary decision. The fact is, Rambus had a disclosure duty to the JEDEC organization and the <u>entire</u> JEDEC membership. Yet, at best, the documents upon which Rambus relies suggest only that fewer than five JEDEC members may have had some vague suspicion about potential patent issues relating to Rambus. Even if this were true, there is substantial evidence to suggest that Rambus's pattern of misleading conduct was designed

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***************], the documents that Rambus cites again show that JEDEC members were kept in the dark about Rambus's patents. The documents that Rambus cites as evidence of
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Rambus also has submitted a supplemental filing suggesting that in the 1993 time frame Mitsubishi ("MELCO") was aware that Rambus had intellectual property claims related to features used or proposed in SDRAM devices. Supplemental Rule 3.24 Separate Statement in Support of Rambus Inc.'s Motion for Summary Decision, filed March 18, 2003. But the isolated internal documents that Rambus relies on for this proposition are in stark contrast to the actions actually taken by MELCO with respect to any supposed Rambus rights. [******************
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[****************]. MELCO was an active producer of SDRAM products; had it known or believed that Rambus had intellectual property rights that extended to these products, *********
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to minimize or eliminate any such suspicions by JEDEC members.

Obviously, only Rambus knew what was contained in its patent applications. No amount of independent investigation by third parties would have been sufficient to obtain the information JEDEC needed to avoid incorporating Rambus technology into the SDRAM and DDR standards. Vague assertions of "patent problems" coupled with: (1) claiming copyright protection on e-mails; and (2) statements reflecting an inability to determine the scope of its own patent applications does not rise to the level of "consistently and loudly" delivering any message to JEDEC or anyone else. (Rambus Mem. at 52).

Nor did JEDEC or its members simply ignore Rambus's possible intellectual property claims. It is axiomatic that one cannot design around what one does not know. A generalized understanding that Rambus, like many other firms in the industry, was seeking patents on its intellectual property is inadequate to put anyone on notice as to the particular inventions that Rambus believed it invented and how those purported inventions might intersect with JEDEC's efforts to standardize SDRAM and DDR SDRAM.[69] Rambus now seeks to benefit from violating its voluntarily assumed duty by capitalizing on the same vague concerns that it fraudulently permitted to exist. As Siemens/Infineon representative Meyer testified, there were some features of SDRAM that looked similar to the Rambus technology, but he did not understand Rambus to claim that these features were proprietary. (Meyer 4/25/01 Tr. at 290 **[Tab 104]**). When JEDEC members attempted to learn the facts in order to avoid costly patents,

[69] Kelly 2/26/03 Dep. at 114-15 **[Tab 55]** (policy requires disclosure of enough information for the committee to understand the nature of the technology and how it related to the work of the committee).

Rambus made no comment until it disclosed its irrelevant '703 patent.

The truth is, what Rambus obviously knew – and depended upon – was that JEDEC members had no real idea what intellectual property Rambus owned. The record is full of testimony that JEDEC members in fact did not know what Rambus's intellectual property claims were. *See, e.g.*, Russell 2/13/03 Dep. at 102 **[Tab 108]** ("I did not know what the Rambus device was."); [** ***********************]; Prince 2/24/03 Dep. at 31 **[Tab 109]** ("I was not familiar with the Rambus patent."); Wiggers 12/18/02 Dep. at 145 **[Tab 110]** (reviewed Rambus issued patents "much later"); Gidwani 1/14/03 Dep. at 15 **[Tab 96]** (never saw a Rambus patent application); Landgraf 12/17/03 Dep. at 175 **[Tab 68]** (not familiar with Rambus patent); Kelley 1/26/01 Dep. at 53-56 **[Tab 49]** (never saw a Rambus issued patent or analyzed any Rambus patents or patent applications); Powell 1/15/03 Dep. at 22 **[Tab 111]** (never saw a Rambus patent application in the early 1990s); Sussman 1/15/03 Dep. at 130-31 **[Tab 112]** ("I don't know what patent claims they [Rambus] had.").

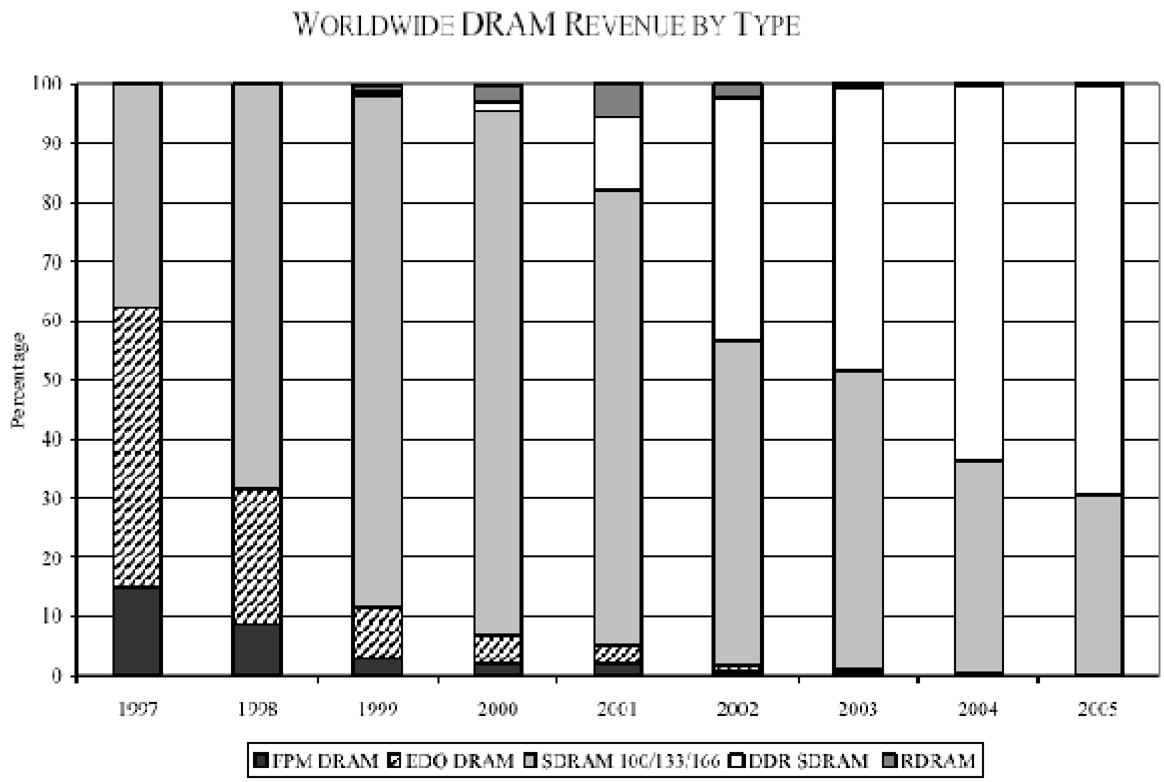
In short, the Rambus argument for summary decision in its favor on this ground is based on a fundamental misinterpretation of law and a large body of disputed fact. The argument cannot be the basis for summary decision in its favor.

V. Rambus's Final Summary Decision Point, Seeking Partial Summary Decision With Respect to the DDR Standard, Is Likewise Flawed.

In addition to its arguments seeking summary decision in full, Rambus moves for partial summary decision in its favor with respect to the JEDEC standard for DDR (short for "double data rate") SDRAM, on grounds that this standard was not considered by JEDEC until after Rambus had resigned as a member of the JEDEC organization. Rambus Mem. at 58-62. This argument is groundless, for reasons discussed below.

At the outset, we note that, although Rambus devotes only four pages of its memorandum to this argument, the practical result of a partial summary decision on this issue would be of great significance in terms of the worldwide market for memory chips. Memory chips compliant with the JEDEC DDR standard account for the majority of the current market, and their portion of the market continues to grow as they supplant the prior generation of JEDEC standard technology, SDRAM. The following shows actual and projected worldwide market share of the various DRAM architectures, including SDRAM and DDR, based on projections made by an industry group in 2001:[70]

[70] [**]. The source of the data for the graph is Semico, DRAM Survivors vs. The Weakest Links (Third Quarter Perspective) (August 2001).



The small argument that Rambus makes on this point is, therefore, one with very large market implications.

As it does elsewhere in support of its motion, Rambus rests this argument on a mischaracterization of the anticompetitive conduct alleged in the complaint. It parses the JEDEC rules in a manner it finds convenient and argues that Rambus had long left JEDEC before there was any obligation on it to make disclosure of its claims to intellectual property rights in the subject matter of the DDR standard. Rambus Mem. at 59. The argument – like Rambus's motion in general – fails to address the purpose of JEDEC, which was crystal-clear, to develop open and non-proprietary standards, available for industry use royalty-free or for a reasonable and non-discriminatory licensing fee. As discussed above, the gravamen of the antitrust violation alleged in the Complaint is not merely

Rambus's violation of the specific JEDEC patent disclosure rules, but more fundamentally its efforts over nearly a decade to undermine and subvert the institutional purposes of JEDEC in an effort to secure patent rights over JEDEC's widely-adopted DRAM standards.

A. JEDEC Was Engaged in Ongoing Standard-Development Work for a Future Generation of Memory Technology Long Before Rambus Left the Organization.

Rambus's narrow parsing of the JEDEC disclosure rules to argue for partial summary decision with respect to the DDR standard is based on temporal sleight-of-hand. Contrary to the suggestion advanced by Rambus in support of its motion, the DDR standard is not a freestanding result of informed JEDEC decision-making that occurred entirely after Rambus's departure. Rather, the work that ultimately culminated in the DDR standard began during Rambus's tenure as a member. As discussed below, some of the elements of the DDR standard, by Rambus's own admission, were contained in the SDRAM standard that was adopted in the early 1990s when Rambus was a member of JEDEC. Some of the elements of the DDR standard were considered for the earlier SDRAM standard but not adopted. In the period after the adoption of the SDRAM standard, and over the course of two and a half years before Rambus's departure as a JEDEC member, JEDEC considered a series of possible technologies for inclusion in the next generation of SDRAM, which eventually became known as DDR. Throughout all this ongoing standard development work, Rambus pursued its strategy of concealment of its claims to intellectual property in technologies under consideration by JEDEC.

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In short, there can be no doubt that Rambus was aware long before it left JEDEC that the organization was engaged in work on a standard for the next generation of SDRAM technology, and that this work involved technologies that Rambus claimed as its own. These technologies were ultimately embodied in the DDR standard. As discussed below, the Rambus misconduct at issue in the Complaint permeates not only the SDRAM standard that was adopted during its time as a JEDEC member, but also the DDR standard that was adopted after it left.

B. Rambus Itself Admits That The DDR Standard Embodies Proprietary Technologies Considered and Adopted by JEDEC During the Period When Rambus Was a JEDEC Member.

As Rambus itself notes in support of its motion, the JEDEC DDR standard, adopted in August 1999 and published in June 2000, embodies four specific relevant technologies identified in the Commission's Complaint. Rambus Mem. at 58. These same technologies were described in the original patent application ("the '898 application") filed in April 1990 by Drs. Farmwald and Horowitz, the founders of Rambus. Rambus Mem. at 6. During and after the time Rambus was a member of JEDEC, and continuing through the time that JEDEC published the DDR standard, Rambus failed to disclose to JEDEC its claim of proprietary rights in this technology, despite the crystal-clear institutional policy of JEDEC favoring open standards and discouraging the development of standards based on proprietary technology.

Rambus admits that two of the relevant technologies embodied in the DDR standard (those involving "programmable CAS latency" and "programmable burst length") also were embodied in the earlier SDRAM standard, adopted by JEDEC in 1993 when Rambus was a member. Mem at 58. The DDR standard, as this circumstance makes clear, is built upon the prior work of JEDEC in standard development for the SDRAM standard. This sort of evolutionary development, building on the work that has gone before, is a common pattern of JEDEC's standards work.

As a logical matter, the fact that these two relevant technologies were considered and adopted as part of the SDRAM standard before being carried over in the later DDR standard is sufficient in itself to preclude entry of partial summary decision with respect to the DDR standard. Any failure by Rambus to disclose the existence of its proprietary interest in these technologies is pertinent not only to the SDRAM standard, but also to the continued embodiment of these technologies in the later DDR standard. This is true even if, for purposes of argument, one were to credit Rambus's assertion that its disclosure obligations ended in June 1996 when it resigned its JEDEC membership. If Rambus wrongly failed to disclose its interest in the technologies in connection with the earlier standard, adopted during the time when it was a member of JEDEC, its failure necessarily taints the subsequent next-generation

DDR standard that embodies the same technologies.

Moreover, this taint of concealment extends not only to the two technologies carried over to the DDR standard from the earlier SDRAM standard, but also to the two additional relevant technologies (involving "on-chip DLL" and "dual-edge clock") that were first embodied in the later DDR standard. As Rambus admits, all four of these relevant technologies derive from the same invention described in the original '898 patent application. Rambus Mem. at 6.

C. Contrary to Rambus's Assertions, <u>All</u> of the Relevant Technologies Contained in the DDR Standard Were Considered by JEDEC as Part of Its Standards Work During the Time Rambus Was a JEDEC Member.

The Rambus argument for partial summary decision is based on further logical and temporal sleights-of-hand. Rambus argues that it was under no obligation to disclose its intellectual property claims prior to the time that there was any "formal proposal for standardization" of relevant technologies, and asserts that no such formal proposal occurred as to the contents of the DDR standard before it resigned its JEDEC membership. Rambus Mem. at 59-60. This is a highly formalistic argument, and the truth is that neither leg of this reasoning justifies entry of summary decision.

Rambus's citation to the deposition testimony of Gordon Kelley in the *Infineon* litigation demonstrates the formalistic character of the Rambus argument. Rambus cites Mr. Kelley for the proposition that the JEDEC disclosure duty was "formally triggered" only during the balloting on a proposed standard (Rambus Mem. at 59), but the fundamental thrust of Mr. Kelley's testimony is quite different from Rambus's argument. What Mr. Kelley in fact testified to was that, although balloting was "the formal time" that JEDEC members were called on to check a box to indicate that they were unaware of patents applying to a standard proposal (Kelley 1/26/01 Dep. at 91 **[Tab 49]**), the usual practice, based on his participation as a JEDEC representative of IBM, was for disclosure to occur when he "recognized that a new [standard] proposal was going to be impacted by a patent." *Id.* Mr. Kelley testified that this occurred much earlier in the standards process – "[a]t the time of discussion, and discussion occurred many months before you get to balloting" (*id.* at 91-92). While Rambus prefers to focus on formalities, the substance of the JEDEC policy was to foster early disclosure, as soon as it was clear that a technology under discussion might be affected by a patent or patent application. *See* discussion *supra,* Section III.B.2.[71]

The second leg of Rambus's argument for partial summary decision is equally formalistic. Rambus argues that the first "formal proposal for standardization" and the assignment of an "item number"with respect to the one particular presentation associated with the eventual DDR standard did not occur until December 1996, after it had left the organization. (Rambus Mem. at 59-60). Yet the fact is that discussion among JEDEC members of the technologies embodied in the DDR standard had begun well before Rambus left JEDEC. As noted above, Rambus itself concedes that two of the technologies contained in the DDR standard ("programmable CAS latency" and "programmable burst length") had been discussed and in fact embodied in the SDRAM standard long before Rambus left the organization. The two other relevant technologies embodied for the first time in the DDR standard (involving "on-chip DLL" and "dual-edge clock") also were considered long before Rambus's departure, and long before the assignment of a formal item number for what would eventually become

[71] As Mr. Kelley explained, "it is most important at the time of balloting that you disclose any information where a patent or patent application applies. However, it was encouraged, and in my case practiced, that we would disclose it as soon as possible." (Kelley 1/26/01 Dep. at 118 **[Tab 46]**).

the DDR standard. This is consistent with the common practice at JEDEC of considering various technologies, sometimes under somewhat different names, as part of the process of developing new generations of technology standards.[72]

There is abundant evidence that JEDEC was engaged in ongoing standards development efforts for the next generation of SDRAM technology long before Rambus resigned as a JEDEC member. Within only months after adopting the SDRAM standard in 1993, JEDEC members turned their attention to the next generation of memory technology. In addition to continuing work to implement the SDRAM standard, JEDEC began to discuss and debate the concepts and technologies that ultimately would become known as DDR. While the term "DDR" did not come to represent these discussions until 1996, certain of the discussions are easily identifiable under monikers such as "2nd Generation SDRAM," "Future Generation Sync DRAM," and "Future SDRAM." These discussions included specific consideration of the on-chip DLL and dual-edge clock technologies, over which Rambus claims proprietary rights:

- ! As early as 1991, and again in early 1992, IBM representatives to JEDEC made a presentation entitled "High-Speed Toggle for Microprocessor Applications" that embodied dual-edge clock technology. These discussions were in the context of JEDEC considerations of the SDRAM standard.[73]

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73 [**]; JC-42.3 Committee Minutes 12/4-5/91, R65095 at 114-115 **[Tab 114]**; JC-42.3 Committee Minutes, 2/27-28/92, R65189 at 65199 **[Tab**

! Rambus's own representative to JEDEC, Mr. Crisp, testified that at JEDEC meetings he attended in April and May 1992 there were discussions about embodying dual-edge clock technology in the SDRAM standard then under consideration.[74] His notes reflect that at that time IBM made a proposal pertaining to a DRAM chip with a "dual edge triggered output register" – a form of dual-edge clock technology.[75] Minutes of the May 1992 JEDEC meeting confirm that an IBM representation made a presentation on technology including "dual edge clock."[76]

! The consensus of the JEDEC group that considered dual-edge clock technology in 1992 in connection with the SDRAM standard was that the technology was not needed at the time, but that the technology could be used in the next generation JEDEC standard in order to increase the data rate.[77]

! As early as September 1994, at a JEDEC meeting in Albuquerque, there was a presentation made by NEC pertaining to on-chip PLL technology, a variant of the on-chip DLL technology that was later embodied in the DDR standard.[78]

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[74] Crisp 5/2/01 Tr. at 112, 114, 118-119 **[Tab 13]**.

[75] R45724 **[Tab 116]**.

[76] JC-42.3 Committee Minutes, 5/7/92, R65286 at 65301 **[Tab 117]**.

[77] Russell 1/30/01 Dep. at 268-274 **[Tab 118]**.

[78] [**]; JC-42.3 Committee Minutes, 9/13/94, R66143 at 148, 186-189 **[Tab 134]**. This particular NEC presentation did not escape the attention of Rambus's JEDEC representative, Richard Crisp, who immediately e-mailed his colleagues at Rambus about this new development and the "patent issues" it raised:

> Subject: JEDEC #3 (NEC PROPOSES PLL ON SDRAM!!!) ....
>
> ... ******The big news here is the inclusion of a PLL enable mode option.******* .... *****They plan on putting a PLL on board their SDRAMs to improve the output delay by about 2 ns. They want to put the PLL on every chip and let the user use it or not depending on whether they need it. The advantages cited are the power and the lock time. Furnweger billed this as

! In March 1995, at a JEDEC meeting attended by Mr. Crisp for Rambus, there was a presentation by MOSAID proposing to amend the CAS latency feature in "Future Generation Sync DRAM."[79] CAS latency was a feature in the earlier SDRAM standard.

! In May 1995, at a JEDEC meeting attended by Mr. Crisp for Rambus, there was a presentation by Mitsubishi Electric pertaining to "64Mbit SyncLink" including dual-edge clock technology.[80]

! In September 1995, at a JEDEC meeting attended by Mr. Crisp for Rambus, there was discussion among JEDEC members concerning a process for developing a standard for a "next generation" of SDRAM. A "task group on SDRAM features" was formed, and it was agreed that a survey ballot be prepared and sent seeking JEDEC members' views on particular technologies to be included in a future SDRAM standard.[81]

! The survey ballot distributed during the Fall of 1995 sought JEDEC members' views "regarding potential modifications to the JEDEC standard for future SDRAMs."[82] Among the technologies specifically inquired about in the survey ballot were on-chip PLL/DLL and dual-edge clock.[83]

> "the most exciting thing" in the presentation. .... Obviously we need to think about our position on this for potential discussion with NEC regarding patent issues here. ****I believe that we have now seen that others are seriously planning inclusions of PLLs on board DRAMs. . . .

R157024 **[Tab 119]** (emphasis in original).

[79] JC-42.3 Committee Minutes, 3/15/95, R66320 at 66326, 66373-66375 **[Tab 120]**.

[80] JC-42.3 Committee Minutes, 5/24/95 **[Tab 121]**.

[81] JC-42.3 Committee Minutes, 9/11/95, R66450 at 66454, 66456 **[Tab 122]**.

[82] R194425 at -427 **[Tab 123]**.

[83] The survey asked "Does your company believe that an on chip PLL or DLL is important to reduce the access time from the clock for future generations of SDRAM?" and "Does your company believe that future generations of SDRAMs could benefit from using BOTH edges of the clock for sampling inputs?" R194425 at R194436 **[Tab 123]**.

! In December 1995, at a JEDEC meeting attended by Mr. Crisp for Rambus, the results of the survey were discussed, including both on-chip PLL/DLL and dual edge clock[84] The JEDEC minutes show that one JEDEC member disclosed to the group that it had a patent pending on DLL, remarking that the pending patent involved a particular implementation of the technology that might not be required to use a standard.[85] In contrast, Mr. Crisp of Rambus remained silent about his firm's intellectual property rights to the same technology.

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! At a meeting in January 1996, JEDEC members continued their discussions about "Future SDRAM" technologies, including a presentation by Micron on the use of on-chip PLL/DLL.[87] Mr. Crisp, though he did not attend the meeting, received a copy of the meeting minutes, which he distributed to Rambus management. [********************
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**][88] No disclosure of Rambus technology claims was made by Rambus, however.

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[84] JC-42.3 Committee Minutes, 12/6/95, JC05173 at 05189-90 **[Tab 124]**.

[85] *Id.* at 05175 **[Tab 124]**.

[86] [***].

[87] JC-42.3 Committee Minutes, 1/31/96, R66308 at 66316 **[Tab 126]**.

[88] [**]. In a recent deposition, Richard Barth, who served as a high-level technical engineer for Rambus from 1990 to 1999, confirmed that the subject matter of the Micron presentation involved technology over which Rambus claimed intellectual property rights. Barth 1/7/03 Dep. at 83 ("Q. Does any of these three pages look like it involves technology that Rambus had invented? A. There are certainly techniques that we used. Does it sound like ones that we invented, yeah, sounds like.")

! Discussions of the contents of a possible "Future SDRAM" standard continued at a JEDEC meeting in March 1996, including a presentation by Samsung concerning PLL/DLL technologies,[89] and in June 1996, including a presentation by the EIAJ concerning these same technologies.[90] Both of these meetings occurred prior to the date that Rambus resigned as a member of JEDEC.

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In short, there is abundant evidence that the relevant technologies embodied in the DDR standard and over which Rambus claims proprietary rights were discussed at JEDEC during the time Rambus was a member. It is also clear that the process of developing a "Future SDRAM" standard was already underway for months and even years before Rambus resigned from JEDEC, even though

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89 JC-42.3 Committee Minutes, 3/20/96, JDC002374 at 02408-09 **[Tab 128]**.

90 JC-42.3 Committee Minutes, 6/5/96, R66585 at 66605-06 **[Tab 129]**.

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no "item number" had yet been assigned to those efforts by JEDEC. Rambus was aware not only of the discussions at JEDEC but also of plans by chip-makers to incorporate the new technologies in next-generation versions of SDRAM products. The highly formalistic argument made by Rambus in support of its motion for partial summary decision ignores the actual process of standards development at JEDEC and disregards the substantial evidence that all of the relevant technologies embodied in the DDR standard were discussed during the time Rambus was a JEDEC member.

D. The Decision on This Issue in the *Infineon* Litigation, Which Involved a Different Issue of Law, a More Limited Factual Record, and a Different Standard of Proof, Does Not Warrant Summary Decision Here.

In support of its motion for partial summary decision as to the DDR standard (Rambus Mem. at 60), Rambus cites the District Court and Court of Appeals decisions in the *Infineon* litigation. *Rambus, Inc. v. Infineon Techs. AG,* 164 F.Supp.2d 743 (E.D. Va. 2001), *vacated in part, reversed in part, affirmed in part, and remanded*, 318 F.3d 1081 (Fed. Cir. 2003). In that case Infineon, after being sued for infringement by Rambus for manufacturing memory chips compliant with the JEDEC SDRAM and DDR standards, charged Rambus with fraud in connection with its conduct at JEDEC. Rambus focuses in particular on the ruling that Infineon failed to establish that Rambus had committed fraud by failing to disclose its claims to proprietary technology embodied in the JEDEC DDR standard. 164 F.Supp.2d at 766-767; 318 F.3d at 1105.

Rambus cannot (and indeed does not) argue that the *Infineon* ruling on this issue is binding by collateral estoppel or res judicata principles on the Commission or Complaint Counsel, who were not party to that proceeding.[94] Rambus apparently finds the ruling persuasive, however, because the ruling on this issue reflects a formalistic approach similar to that urged here by Rambus in seeking summary decision as to the DDR standard. However, the *Infineon* ruling, though addressing the same conduct, is only marginally relevant to the issues here because (among other things) the ruling involved a different issue of law, a more limited factual record, and a different standard of proof than pertains here. It cannot be the basis for partial summary decision.

As a matter of law, the *Infineon* ruling on the DDR standard differs critically from the violation at issue here. Both the district court decision and the court of appeals decision rest expressly on an interpretation of the Virginia law of fraud, not on antitrust law principles pertaining to the subversion of the standard-setting process for anticompetitive gain. 164 F.Supp.2d at 765; 318 F.3d at 1105. The ruling rests on an interpretation of the JEDEC rules alone; specifically, that the rules imposed no disclosure obligation on Rambus prior to the time that "formal work" on the DDR standard was begun, as signified by the assignment of an administrative "item number" by JEDEC. 164 F.Supp.2d at 766; 318 F.3d at 1105. The ruling makes no attempt even to consider the possibility that Rambus might have complied with the literal requirements of the JEDEC rules but nonetheless subverted the purposes of JEDEC for anticompetitive ends – the conduct explicitly recognized by the Supreme Court as the basis for antitrust liability in *Allied Tube*.[95]

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[94] Neither res judicata nor collateral estoppel binds a person who was not a party to the proceeding in which the ruling was rendered. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979). Furthermore, "collateral estoppel . . . simply does not apply against the government." *United States v. Mendoza*, 464 U.S. 154, 162 (1984).

[95] Even under the law of fraud, the reasoning of the *Infineon* case would not apply to the conduct alleged in the Complaint here. The Complaint in this matter does not allege mere silence by

Moreover, the *Infineon* ruling rests heavily on the trial court's weighing of the limited record before it, in light of the heightened burden of proof applicable to fraud claims. The trial court in fact recognized that there was evidence of "several presentations" relating to dual-edge clock and on-board DLL/PLL technologies from 1991 to 1996, during the time that Rambus was a member of JEDEC. 164 F.Supp.2d at 766. It nonetheless concluded that Infineon had failed to produce "clear and convincing" evidence that Rambus had a duty to disclose its claim to this relevant technology prior to the assignment of an "item number" signifying the formal beginning of the DDR standard-setting process. *Id.* This conclusion rested in large part on the trial court's evaluation of the testimony of a single witness, upon whose testimony it found that Infineon had "almost exclusively" relied at trial and in

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Rambus concerning its rights in the relevant technologies, but an on-going pattern of conduct intended to mislead and deceive JEDEC members. Precedent from the law of fraud clearly establishes that there is no need to search for a duty to disclose if the conduct at issue goes beyond silence, and includes conduct such as statement of half-truths or concealment of material information. *See United States v. Keplinger*, 776 F.2d 678, 697 (7th Cir. 1985) ("Omissions or concealment of material information can constitute fraud ... without proof of a duty to disclose the information pursuant to a specific statute or regulation."); *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1222 (9th Cir. 1999) ("One who makes a representation that is misleading because it is in the nature of a 'half-truth' assumes the obligation to make a full and fair disclosure of the whole truth.") (*quoting Gregory v. Novak*, 121 Ore. App. 651, 855 P.2d 1142, 1144 (Or. Ct. App. 1993)). The law of fraud also recognizes that one who has made a statement that becomes misleading by reason of intervening circumstances is under a duty to make corrective disclosure if another is relying on the misleading statement. *Koch v. Williams*, 193 Cal. App. 2d 537, 541 (1961) ("One who learns that his statements, even if thought to be true when made, have become false through a change in circumstances, has the duty before his statements are acted on to disclose the new conditions to the party relying on his original representations."); *Ware v. Scott*, 257 S.E.2d 855, 858 (Va. 1979). For these reasons, even under the law of fraud the premise of the *Infineon* ruling – that Rambus must be found to have violated a specific *independent* duty to disclose – is misplaced when considered in light of the larger pattern of deceptive conduct alleged in the Complaint here.

the post-trial briefing on this issue. *Id*.[96]

The fact that the *Infineon* decision rests on a different rule of law, and on the trial court's weighing of a different factual record under a different burden of proof, makes the ruling of limited utility as the basis for partial summary decision here. If anything, even a cursory reading of the opinions of the *Infineon* courts on this issue demonstrates that the ruling was reached only after assessing a factual record as to which there were substantial contested issues. The *Infineon* ruling itself demonstrates that Rambus cannot meet the heavy burden of demonstrating uncontested facts and a controlling rule of law warranting partial summary decision as to the DDR standard.

VI. Judge Timony's Recent Rulings Concerning Rambus's "Spoliation of Evidence" and "Ongoing Fraud" Further Underscore the Appropriateness of Denying Summary Decision.

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[96] The witness was Reese Brown, a consultant employed by JEDEC. 164 F.Supp.2d at 766. Complaint Counsel believe that, even on the record before it, the trial court's conclusions concerning Rambus's conduct as to technologies contained in the DDR standard were incorrect. For example, the trial court conjectured that the several presentations on relevant technologies during Rambus's tenure at JEDEC could have been "for informational purposes only" and not with a view toward standardizing the technology. 164 F.Supp.2d at 766. But the record shows, based on the testimony of Rambus's own representative, that the IBM presentations on dual-edge clock technology in April and May 1992 were made specifically in connection with the SDRAM standard then under consideration by JEDEC, though ultimately the technology was not included in the SDRAM standard that was adopted. Crisp 5/2/01 Tr. at 112, 114, 118-119 **[Tab 13]**. Similarly, the discussion of dual-edge clock and on-chip PLL/DLL technologies throughout the 1994-1996 period, and specifically at the December 1995 JEDEC meeting, was manifestly not simply for informational purposes, but was made explicitly in the context of the members' consideration of "potential modifications to the JEDEC standard for future SDRAMs." R194425 at -427 **[Tab 123]**.

More fundamentally, Complaint Counsel believe that the *Infineon* courts' approach to the issue of the DDR standard was fundamentally flawed, in part because it reflects no effort whatever to interpret the disclosure obligation under the JEDEC rules in light of the purpose of the JEDEC organization to develop open standards that do not embody proprietary technology.

A. Judge Timony's Crime-Fraud Ruling Prevents the Entry of Summary Decision.

In an order issued on February 28, 2002, Judge Timony ruled that "Complaint Counsel has made a sufficient *prima facie* showing that Rambus was involved in an ongoing fraud post-June 1996 concerning the RAM patents it held and had applied for to permit discovery under the crime-fraud exception." Order Concerning Complaint Counsel's Motion to Compel Discovery Relating to Subject Matters as to Which Rambus's Privilege Claims Were Invalidated on Crime-Fraud Grounds and Subsequently Waived at 3 **[Tab 11]**. This order entitles Complaint Counsel to the discovery of otherwise privileged communications between Rambus and its lawyers even after Rambus left JEDEC. *Id.* Rambus has moved for reconsideration of the crime-fraud ruling. Assuming the order remains undisturbed, however, it entitles Complaint Counsel to additional discovery on matters that go to the heart of this motion, and to the heart of this case. The experience in the *Infineon* proceedings suggests that this additional discovery could prove critical. There, documents obtained after the piercing of the attorney-client privilege caused Rambus representatives to change their prior testimony.[97] There is no reason to expect a different outcome here.

A host of cases hold that the entry of summary adjudication is inappropriate when – as in this case – the non-moving party has been unable to complete discovery on issues relevant to the motion seeking summary disposition. *E.g., Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865, 870 (11th Cir. 1988) ("This court has often noted that summary judgment should not be

[97] "Rambus representatives . . . hindered discovery efforts by providing false or misleading testimony," only later to change their testimony when "confronted with documents obtained after the piercing of the attorney-client privilege." *Rambus, Inc. v. Infineon Technologies*, 155 F. Supp. 2d 668, 681-832 (E.D. Va. 2001).

granted until the party opposing the motion has had an adequate opportunity for discovery."); *Tarleton v. Meharry Medical College*, 717 F.2d 1523, 1535 (6th Cir. 1983) ("[s]ummary judgment should not ordinarily be granted before discovery has been completed."); *Fernandez v. Bankers Nat. Life Ins. Co.*, 906 F.2d 559, 570 (11th Cir. 1990) ("This court previously has reviewed the Supreme Court's direction for ruling on summary judgment motions found in [the Supreme Court cases] *Celotex*, *Anderson* and *Matsushita* and concluded that the common denominator of those cases is 'that summary judgment may only be decided upon an adequate record.'") (citations omitted).

B. Judge Timony's Rulings Concerning Rambus's Spoliation of Evidence Likewise Prevent the Entry of Summary Decision.

Finally, the fact that Judge Timony ordered adverse inferences against Rambus to remedy its "spoliation of evidence" should likewise prohibit the entry of a summary decision in this case. Judge Timony concluded that Rambus engaged in "intentional destruction of documents that it knew or should have known were relevant to reasonably foreseeable litigation" involving "JEDEC standards" for DRAM. Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument ("Adverse Inference Order") at 6, 8 **[Tab 9]**. Judge Timony further concluded that Rambus's "utter failure to maintain an inventory of the documents its employees destroyed makes it impossible to discern the exact nature of the relevance of the documents destroyed to the instant matter." *Id.* at 7. Based on these and other factual determinations, Judge Timony concluded that Rambus engaged in "spoliation of evidence" (*id*. at 4) and imposed as a remedy seven rebuttable presumptions against

Rambus.[98]

Under such circumstances, courts agree that summary disposition may not be granted in favor of the spoliator. *E.g.*, *United States v. Kronisch*, 150 F.3d 112 (2d Cir. 1998). In *Kronisch*, which Judge Timony cites in the Adverse Inference Order, the plaintiff claimed that he was unwittingly drugged with LSD as part of a confidential CIA drug research program. The CIA destroyed all files relating to the program years before the plaintiff filed suit. The Second Circuit ruled that the jury,

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[98] The adverse presumptions include:

1. Rambus knew or should have known form its pre-1996 participating in JEDEC that developing JEDEC standards would required the use of patents held or applied for by Rambus;

2. Rambus never disclosed to other JEDEC participants the existence of these patents;

3. Rambus knew that its failure to disclose the existence of these patents to other JEDEC participants could serve to equitably estop Rambus from enforcing its patents as to other JEDEC participants;

4. Rambus knew or should have known from its participation in JEDEC that litigation over the enforcement of its patents was reasonably foreseeable;

5. Rambus provided inadequate guidance to its employees as to what documents should be retained and which documents could be purged as part of its corporate document retention program;

6. Rambus's corporate document retention program specifically failed to direct its employees to retain documents that could be relevant to any foreseeable litigation; and

7. Rambus's corporate document retention program specifically failed to require employees to create and maintain a log of the documents purged pursuant to the program.

Adverse Inference Order at 9 **[Tab 9]**.

assuming it found the CIA had an obligation to preserve the documents, was entitled to infer that the destroyed documents would have supported plaintiff's case. Moreover, it held that "the possibility that the jury would choose to draw such an inference, along with the plaintiff's other circumstantial evidence that he was drugged by the CIA . . . is enough to entitle plaintiff to a jury trial." *Kronisch*, 150 F.3d at 130. Significantly, the court reasoned:

> At the margin, where the innocent party has produced some (not insubstantial) evidence in support of its claim, the intentional destruction of relevant evidence by the opposing party may push a claim that might not otherwise survive summary judgment over the line. In the absence of such a result, . . . the purposes of the adverse inference are eviscerated.

Kronisch, 150 F.3d at 128.

Other cases have relied on the *Kronisch* ruling to reach a similar result. For example, *Byrnie v. Town of Cromwell*, on which Judge Timony also relied in issuing his Adverse Inference Order, involved a discrimination case in which the school district had destroyed relevant hiring records. 243 F.3d 93 (2d. Cir. 2001). There, the Second Circuit denied the school district's motion for summary decision because the adverse inference of spoliation had raised a genuine dispute over material facts. The court reasoned, "'if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper' . . . The spoliation of evidence germane 'to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.'" *Byrnie*, 243 F.3d at 101, 107 (quoting *Kronisch*, 150 F.3d at 126). *See also Pelletier v. Magnusson*, 195 F.Supp.2d 214, 236-37 (D. Me. 2002) ("[T]he argument and factual support advanced by [plaintiff] as to the spoliation of the documents are sufficient to get him over the summary judgment hurdle as to [three defendants] . . . . [Plaintiff] has produced some evidence supporting his claim . . . and the intentional destruction of relevant evidence by the defendants has pushed 'a claim that might not otherwise survive summary judgment over the line.'") (quoting *Kronisch*, 150 F.3d at 128) (other citations omitted).

The relevant facts of the instant proceeding are even more compelling than those in *Kronisch* and *Byrnie*. Like the CIA and school district, Rambus also intentionally destroyed relevant documents. Moreover, Judge Timony's Adverse Inference Order establishes not only that Rambus had a duty to preserve the documents, but that it intentionally destroyed them to prevent their use in litigation, and ordered adverse inferences accordingly. Thus, the adverse inferences are not just a possibility in this case, but a reality. Finally, unlike in those cases, where the plaintiffs had proffered only marginal circumstantial evidence to support their cases, the evidence marshaled above establishes persuasive support for Complaint Counsel's allegations.

Even the spoliation of a single document has been deemed sufficient to defeat a motion for summary judgment. For example, in *Trist v. First Federal Sav. & Loan Ass'n of Chester*, the court declined to grant summary judgment in a complex antitrust case because the defendant failed to produce a single questionnaire. The court determined that proof of spoliation could support an inference that the defendants engaged in a conspiracy, and therefore raised genuine issues of fact. 466 F. Supp. 578 (E.D. Pa. 1979). Rambus, in contrast, destroyed not one document, but millions,[99] and

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[99] Joel Karp, Rambus's Vice President of Intellectual Property and the person charged with overseeing the development and implementation of Rambus's "document retention" program, sent an E-mail to all Rambus staff on the day Rambus launched the program explaining that "[i]t took about 5 hours to completely fill the shredding truck (<u>capacity is 20,000 lbs</u>). They are now on their way to the

rendered it "impossible to discern the exact nature of the relevance of the documents destroyed to the instant matter." These circumstances, especially in light of the numerous adverse inferences already in place, raise significant genuine issues of fact, and preclude the entry of a summary decision in Rambus's favor.

For all the reasons set forth above, Rambus's motion for summary decision should be denied.

Respectfully submitted,

____
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Dated: March 25, 2003

recycling plant in San Jose and won't be back today. They feel they can finish the job tomorrow. Worst case is they might have to come back Tuesday to pick up anything that still remains after tomorrow's session." Karp 9/3/98 E-mail (RF0684604) (emphasis added) **[Tab 133]**.

Tabs 1-134 are REDACTED

CERTIFICATE OF SERVICE

I, Melissa Kassier, hereby certify that on April 9, 2003, I caused a Public copy of the following materials:

1. Complaint Counsel's Memorandum In Opposition To Respondent Rambus Inc.'s Motion for Summary Decision,

to be served upon the following persons:

by hand delivery to:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

and by electronic mail and overnight courier to:

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