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RAMBUS INC.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

HYNIX SEMICONDUCTOR INC.; HYNIX SEMICONDUCTOR AMERICA, INC.; HYNIX SEMICONDUCTOR U.K. LTD.; and HYNIX SEMICONDUCTOR DEUTSCHLAND GmbH, Plaintiff, vs. RAMBUS INC., Defendant.	CASE NO. CV 00-20905 RMW RAMBUS INC.'S DAUBERT MOTION NO. 1 TO EXCLUDE CERTAIN TESTIMONY OF RICHARD J. GILBERT Date: November 21, 2007 Time: 2:00 p.m. Dept: Department 6, 4th Floor Judge: Hon. Ronald M. Whyte
RAMBUS INC., Plaintiff, v. HYNIX SEMICONDUCTOR INC., et al., Defendants	CASE NO.: C 05-00334 RMW **[REDACTED PUBLIC VERSION]**

RAMBUS INC., Plaintiff, v. SAMSUNG ELECTRONICS CO., LTD., et al., Defendants	CASE NO.: C 05-02298 RMW
RAMBUS INC., Plaintiff, v. MICRON TECHNOLOGY, INC. and MICRON SEMICONDUCTOR PRODUCTS, INC., Defendants	CASE NO.: C 06-00244 RMW

TO HYNIX SEMICONDUCTOR INC., HYNIX SEMICONDUCTOR AMERICA INC., HYNIX SEMICONDUCTOR U.K. LTD., HYNIX SEMICONDUCTOR DEUTSCHLAND GmbH (collectively referred to as "Hynix"), MICRON TECHNOLOGY, INC., MICRON SEMICONDUCTOR PRODUCTS, INC. (collectively referred to as "Micron"), NANYA TECHNOLOGY CORPORATION and NANYA TECHNOLOGY CORPORATION U.S.A. (collectively referred to as "Nanya"), SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG SEMICONDUCTOR, INC., SAMSUNG AUSTIN SEMICONDUCTOR, L.P (collectively hereinafter "Samsung") (and all collectively referred to as "the Manufacturers"), AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Plaintiff and Counterclaim-Defendant Rambus Inc. hereby moves for an order excluding from trial certain testimony of Richard J. Gilbert, one of the Manufacturers' expert witnesses. This motion shall be heard at November 21, 2007, at 9:00 a.m., in Courtroom 6 of the above-referenced court, located at 280 South First Street, San Jose, California 95110.

Counterclaimants should be precluded, pursuant to Federal Rules of Evidence 403 and 702, from eliciting testimony from Dr. Gilbert with respect to each and all of the following subjects:

(1) The conclusions ("(a)" through "(h)") summarized at pages six through eight (6-8) of Dr. Gilbert's Rule 26 report;

(2) The relevant market for evaluating Rambus's market power and conduct;

(3) Whether Rambus acquired or has monopoly power in any relevant market;

(4) Whether Rambus's alleged conduct was anticompetitive;

(5) Whether Rambus's alleged conduct caused it to acquire monopoly power or caused anticompetitive harm;

(6) Whether there is a dangerous probability that Rambus will acquire monopoly power in any relevant market;

(7) The contents of the evidence in this case;

(8) The credibility of, weight to be assigned to, or inferences and conclusions to be drawn from the evidence in the case;

(9) Whether JEDEC members should have known that Rambus had relevant intellectual property; and

(10) Whether JEDEC's meeting minutes and the content of its meetings were confidential.

This motion is based upon this Motion, the attached Memorandum of Points and Authorities, the Declaration of Carolyn Hoecker Luedtke in support of the Motion and exhibits thereto, the papers and pleadings on file in this action, and such other and further evidence and argument as may subsequently be presented to the Court.

DATED: October 17, 2007 MUNGER, TOLLES & OLSON LLP

By: */s/ Carolyn Hoecker Luedtke*
Carolyn Hoecker Luedtke

Attorneys for Plaintiff RAMBUS INC.

TABLE OF AUTHORITIES

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In his report, Dr. Richard J. Gilbert, an economist, purports to opine on numerous factual questions that will be central to the jury's decision in this case. He opines about the relevant market, whether Rambus gained monopoly power in that market as a result of JEDEC's adoption of DRAM standards, whether Rambus engaged in anticompetitive conduct, and whether that conduct in fact caused Rambus to gain increased market power. In each instance, however, Dr. Gilbert's testimony is based on assumption, assertion and speculation rather than economic analysis. For example, he *assumes*, without any independent economic analysis, that Rambus engaged in deceptive conduct and misled members of JEDEC; he then purports to *opine* that Rambus's conduct was "anticompetitive" simply *because* it engaged in deceptive conduct and misled members of JEDEC. This pattern of assumption, assertion and speculation, without economic analysis, is repeated over and over again in Dr. Gilbert's proposed testimony, and in each instance the testimony should be disallowed.

Dr. Gilbert also proposes in his Report repeatedly to vouch for the testimony of other experts and to summarize Plaintiffs' allegations and evidence. He has no special expertise that would justify his doing either; merely having a distinguished UC Berkeley economist recite such things, however, has the potential seriously to mislead and prejudice the jury. Such testimony should be disallowed.

Finally, Dr. Gilbert purports to opine on two additional subjects as to which he has no special expertise: whether JEDEC members should have known, based on Rambus's patents and patent applications, that the applications could be amended to read on the proposed DRAM standards; and what information about JEDEC meetings was and was not publicly available.

II. THE APPLICABLE LEGAL STANDARDS

Federal Rule of Evidence 702 permits witnesses qualified as experts to offer opinion testimony only if:

> (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3)

> the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. To be admissible under Rule 702, expert testimony must be (1) based on the special knowledge of the expert; (2) helpful to the finder of fact; and (3) reliable. *See id.*; *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589-91 (1993); *see also Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1063 (9th Cir. 2002) (the "central concern" of Rule 702 is whether the proposed expert testimony is helpful to the finder of fact) (citation omitted). The burden is on the party offering the expert testimony to prove by a preponderance of the evidence that the testimony satisfies these requirements. *Lust By and Through Lust v. Merrell Dow Pharms.*, 89 F.3d 594, 598 (9th Cir. 1996); *In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791, 804 (N.D. Ohio 2004); *see Daubert*, 509 U.S. at 592 n.10 (admissibility of expert testimony "should be established by a preponderance of proof.").

It is not enough for a party to show that its witness has special expertise. The party must also demonstrate that, in forming the proffered opinions, the witness has actually applied that expertise properly to the facts of the case, and in a manner that would be helpful to the finder of fact. *See Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1315-16 (9th Cir. 1995) (remand decision)) ("something doesn't become 'scientific knowledge' just because it's uttered by a scientist"): Fed. R. Evid. 702 Advisory Committee's Notes (2000) ("The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case."). "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *GE v. Joiner*, 522 U.S. 136, 146 (1997). Thus, opinion testimony should be excluded where "the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion." *In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d at 804; *see GE v. Joiner*, 522 U.S. at 146 ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."). And an expert's conclusions must have a sound basis at each step of the analysis: "[*A*]*ny* step that renders the analysis unreliable under the

Daubert factors renders the expert's testimony inadmissible." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994).

Nor does the fact that a proposed expert may have considerable "credentials" mean that his testimony should more readily be admitted. To the contrary, proposed expert testimony that falls short of *Daubert*'s "standard of evidentiary reliability," 509 U.S. at 590, must be excluded precisely because the jury might otherwise be unduly influenced by the the expert's "aura of authority." *Mukhtar*, 299 F.3d at 1063. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595; *see also United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979) (expert testimony can create "substantial danger of undue prejudice and confusion because of its aura of special reliability and trustworthiness") For that reason, a trial judge must exercise more, not less control, over expert witnesses in order to protect against possible prejudice. *Id.*

III. DR. GILBERT SHOULD NOT BE ALLOWED TO TESTIFY TO CONCLUSIONS THAT ARE NOT BASED ON ECONOMIC ANALYSIS

A. Overview Of Dr. Gilbert's Report

Dr. Gilbert describes his testimony as "employ[ing] economic analysis to describe the nature of the allegations in this case and the conditions under which the alleged conduct resulted in the acquisition of market power." In fact, Dr. Gilbert does little more than *assume* that Rambus engaged in the conduct alleged by Plaintiffs, which he conclusorily labels as "anticompetitive," and then speculate that such behavior may have resulted in Rambus's acquisition of market power. At each step of Dr. Gilbert's testimony, assumption, assertion and speculation are used in place of economic analysis. This is precisely the sort of prejudicial expert testimony—where an expert essentially just waves his hand over the plaintiff's allegations and says the magic words needed for a finding of liability—that a court, as gatekeeper, must keep from the jury. *See Joiner*, 522 U.S. at 146 (a court need not "admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert"); *DSU Med. Corp. v. JMS Co., Ltd.*, 296 F. Supp. 2d 1140, 1147 (N.D. Cal. 2003) (same). *See also Daubert*, 509 U.S. at 595 ("Expert evidence can be both powerful and quite misleading because of the difficulty in

evaluating it.") (citation omitted).

At the outset, Dr. Gilbert concedes (as he must) that he lacks expertise with respect to various crucial issues: "(i) the technical characteristics of alternative DRAM technologies; (ii) the intent of Rambus and other participants in JEDEC; (iii) the appropriate legal standard for evaluating Rambus's conduct in JEDEC; (iv) the legal obligations that may constrain the use of information that Rambus collected as a result of its participation in JEDEC; and (v) the technical characteristics of the DRAM industry." Declaration of Carolyn Hoecker Luedtke in Support of Rambus Inc.'s Motion in Limine to Exclude Certain Testimony of Richard J. Gilbert ("Luedkte Decl."), Exh. A at 4.

Dr. Gilbert then makes a series of "key assumptions," as to which he unequivocally states, "I am not reaching my own independent conclusions with regard to these issues." *Id.* at 5. Those assumptions include, among others, (1) that when JEDEC was considering including each of Rambus's technologies in JEDEC standards, there were "viable alternatives" for those technologies, (2) that there was a "widely-held expectation among JEDEC members that a participant would disclose known patents and patent applications, as well as planned applications," (3) that "Rambus undertook a course of conduct that deceived and misled JEDEC member companies with respect to the scope of Rambus's actual and prospective patents and its intention to assert patent rights against JEDEC-compliant DRAMs," and (4) that "JEDEC member companies would have incurred substantial costs to switch to an interface technology that did not incorporate the Rambus technologies." *Id.* 5-6. As to these assumptions, each of which is indispensable to one or more of Dr. Gilbert's opinions, Dr. Gilbert concedes that he has formed no opinion based on his expertise in economics.

As an initial matter, because Dr. Gilbert expressly and unequivocally states that he has no independent opinion about these issues, he should not be allowed to express any opinion or conclusion with respect to them at trial. At various places in his Report, Dr. Gilbert recites these assumptions as if they were either undisputed facts or his own conclusions. He should not be allowed to do that at trial. At most, he should be allowed to say only that he *assumed* that these things were true in reaching other conclusions but that he has not brought his expertise to bear on

them.

Based on these assumptions, Dr. Gilbert then expresses eight purported "conclusions." *Id.* 6-8. His report and deposition testimony reveal, however, that none of these conclusions is based on *economic* analysis by Dr. Gilbert and that all should therefore be disallowed.

B. Opinions About The Relevant Product Market (Conclusion "A")[1]

A crucial economic issue in the case is the definition of the relevant product market. That definition will guide the jury's determination whether Rambus had monopoly power at any relevant time before, during or after JEDEC's standardization of its technologies in SDRAM. Dr. Gilbert provides no economic analysis that would be helpful to the jury on this issue.

Dr. Gilbert states that "[a] *reasonable* relevant [product] market for purposes of assessing Rambus's challenged conduct consists of six technology markets corresponding to the six Rambus technologies, and the set of technologies that were close substitutes for each, for use in high-speed DRAMs." *Id.* at 7 (emphasis added). Nowhere does Dr. Gilbert opine that he has determined, based on economic analysis, what the relevant product market actually is or should be (or whether there are other "reasonable" market definitions"). Instead, after describing the six technologies (about which he has conceded he has no expertise), Dr. Gilbert merely states that the six markets "constitute the appropriate relevant markets *if* no other technologies are close substitutes for the technologies in each market." *Id.* at 36 (emphasis added). The crucial *economic* question in defining a relevant market, however, is *whether* there are close substitutes for the products at issue. To say, "a technology is a relevant market if there are no close substitutes for the technology," as Dr. Gilbert does, is simply to define what the term "relevant market" means generally, not to determine based on economic analysis what any *particular* relevant market is.[2]

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[1] Rambus has organized its argument headings around key factual issues that the jury will need to address—relevant market; acquisition of market power; monopoly power; anticompetitive conduct; and causation. In each heading, Rambus also identifies which of Dr. Gilbert's purported "conclusions" relate to that factual issue and should be disallowed based on the argument included under that heading.

[2] Dr. Gilbert references the U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (1995), *see* Exh. A at 34 n.113, which in turn reference those agencies' 1992 Horizontal Merger Guidelines with regard to market definition.

Dr. Gilbert has done no economic analysis whatsoever to answer the economic question material to the relevant product market here—whether there were close substitutes for Rambus's technologies. He does explain how, in theory, one way that such economic analysis might be done, by evaluating the comparative performance and price of the various technologies. Luedtke Decl., Exh. A at 40. But no such analysis of *these* technologies appears in his Report, and he admits that he has done none. Luedtke Decl., Exh. D at 117.

Instead, he has merely assumed the answer. See Exh. A at 5 (assumes what the six technologies "at issue" are), at 34 ("I assume that each of the Rambus technologies and its close substitutes enable a function . . . for which there are no other close substitutes"). The closest Dr. Gilbert comes to analysis, rather than assumption, is to say that "[it] appears to be the case [that no other technologies are close substitutes for the technologies in each market]." *Id.* at 36. His sole basis for this is not economic analysis, however, but his understanding, "[f]or example," that "all SDRAM designs considered for standardization at JEDEC included a technology that addresses the DRAM's latency." *Id.* But the fact that a standard-setting body may not have considered alternatives could mean simply that the members all recognized the superiority of one, rather than that there were no other technologies that were close substitutes. Dr. Gilbert provides no basis in economics for defining a relevant market based upon what was considered or not considered by a standard-setting organization. He simply substitutes what he understands was the implicit judgment of JEDEC members—the basis for which is not disclosed—for the use of economic analysis.

C. Opinions About Rambus's Alleged Acquisition Of Monopoly Power (Conclusions "B," "C," And "D")

A second important issue in the case will be whether Rambus acquired monopoly power in any relevant market as a result of JEDEC's decision to standardize the six Rambus

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See Intellectual Property Guidelines § 3.21. Exh. B at 1610-1611. The Merger Guidelines describe a very precise economic methodology for identifying close substitutes and thereby defining a relevant market. *See* Horizontal Merger Guidelines § 1.0 (describing methodology based on whether "only present and future producer or seller of [products] likely would impose at least a 'small but significant and nontransitory increase in price'"). Exh. C at 4. Dr. Gilbert does not purport to have utilized that methodology in any respect.

technologies. Dr. Gilbert purports to offer "conclusions" relevant to two questions that are crucial to that issue: first, whether there were viable alternatives to Rambus's technologies *before* JEDEC incorporated them into the SDRAM and DDR standards; and, second, whether, *after* standardization, the cost of switching to alternative technologies ("switching costs) enhanced Rambus's market power and rendered it "durable." Dr. Gilbert's purported conclusions are again nothing more than assumptions that are cloaked in economic language but not based on any economic analysis. Again, he offers nothing that would be of assistance to the jury.

As to the first question, Dr. Gilbert quite explicitly concedes both that he has no expertise and that he has merely assumed the answer. *See* Exh. A at 4 ("technical characteristics of alternative DRAM technologies" are beyond his expertise); at 5 (assumes that "there existed other viable alternatives" for each of the technologies"), at 34 ("I have assumed for the sake of my analysis that for each of the Rambus technologies there existed close substitutes"), at 40 ("I have assumed . . . there existed several commercially viable alternatives for each of the Rambus technologies"). Dr. Gilbert, being a professor of economics, is able to explain that "[t]he degree to which an alternative technology is a substitute for a technology covered by a Rambus patent depends on both its performance and its price." *Id.* at 40. Dr. Gilbert has, however, done no analysis of either the performance or the price of any purported alternative to Rambus's technologies. Exh. D at 117.

Two of Dr. Gilbert's "conclusions" turn *entirely* on the his assumption that there were viable alternatives to Rambus's technologies prior to JEDEC's standardization of SDRAM and DDR: (1) conclusion "(b)"—that, prior to JEDEC's decision, "Rambus's market power in each of the six relevant markets would have been disciplined by viable alternative technologies"; and (2) conclusion "(c)"—that, in early 2000, "the competitive viability of the technological alternatives to the Rambus technologies was significantly weakened." *Id.* 7. These "conclusions" would be necessary, but not sufficient, prerequisites to any finding that Rambus gained monopoly power as a result of the JEDEC decision. But if Dr. Gilbert's *assumption* is wrong and there were *not* viable alternatives, all the key answers are automatically reversed: Rambus's market power, if any, would *not* have been constrained by alternative technologies prior to JEDEC's decision; no

such constraint would have been "weakened" in early 2000; and, most importantly, JEDEC's decision would *not* have enhanced Rambus's market power.

Dr. Gilbert himself recognizes that his assumption—that there were commercially viable alternatives to Rambus's technologies—by itself answers the relevant economic questions about market power. He states that, "[b]ased on this assumption, *it necessarily follows* that Rambus did not have significant *ex ante* market power in any of the relevant technology markets . . .." Exh. A at 40. It is thus the assumption, not economic analysis, that is the entire basis for Dr. Gilbert's purported "conclusions" about market power. Such circular reasoning is not admissible expert testimony. *See In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d at 805 (excluding expert testimony based on "circular logic").

Dr. Gilbert should not be allowed to prejudice the jury by offering these purported expert "conclusions" that depend entirely on Dr. Gilbert's having simply assumed the answer to a factual question that is for the jury to decide and with respect to which Dr. Gilbert offers no expertise.

The same is true of Dr. Gilbert's purported "conclusions" about "switching costs." *See* Exh. A at 7 ("conclusions" c, d & e). In his report, Dr. Gilbert offers a general explanation of the concepts of "lock-in" and "switching costs." *Id.* at 41-44. But the relevant question for the jury here will be not whether "lock-in" and "switching costs" can exist *in theory*, but whether, given the particular technologies at issue, those phenomena existed *in the DRAM industry* as a result of JEDEC's standardization of SDRAM and DDR. With respect to *that* question, Dr. Gilbert does not have sufficient expertise and has not performed his own analysis.

Dr. Gilbert acknowledges that he has not reached an independent conclusion whether, "[i]n the first half of 2000, JEDEC member companies would have incurred substantial costs to switch to an interface technology that did not incorporate the Rambus technologies." *Id.* at 6. Dr. Gilbert further admits that he has no expertise with respect to "the technical characteristics of alternative DRAM technologies" or "the technical characteristics of the DRAM industry." *Id.* at 4. Those characteristics are, of course, crucial to any assessment of the cost to switch from one technology to another. *See, e.g., id.* at 44 ("process would be quite costly due to the required re-design, testing and production of components and motherboards that support the new interface").

Dr. Gilbert further admits that, "[a]s an economist, it is beyond my training and expertise to reach my own independent conclusions regarding the specific costs that DRAM suppliers and other industry participants would incur in conjunction with a switch to an interface technology that avoided Rambus's claimed patent rights." *Id.* at 47-48.

Notwithstanding this admitted and complete lack of expertise, in *three* of his "conclusions," Dr. Gilbert purports to offer expert testimony about the amount and substantiality of the actual switching costs those suppliers and others would face. *See id.* at 7 ("(b)": "[Alternative technologies'] viability was substantially reduced as a result of the switching costs"; "(c)": "a reasonable estimate of switching costs totals billions of dollars for each individual generation"; "(d)": "Because of the substantial cost, risk and time that would be required to switch to alternative non-infringing technologies . . .."). Dr. Gilbert should not be allowed to testify to any of these conclusions, each of which is admittedly beyond his expertise, not based on independent analysis by Dr. Gilbert, and instead based solely on the conclusions and assertions of others.

D. Opinions About Rambus's Monopoly Power (Conclusions "E" And "H")

Dr. Gilbert concludes in his report that "Rambus has achieved a monopoly position in the relevant markets," and "Rambus's monopoly position is durable." Exh. A at 7; *see also id.* at 68 (same). This conclusion is necessarily and avowedly premised on Dr. Gilbert's conclusions about the relevant product market and switching costs: if the relevant product market were broader, Rambus's share might be lower; if switching costs were lower, Rambus' market position might not be durable. For the reasons explained above, these underlying premises of Dr. Gilbert's conclusion about monopoly power are themselves based on assumptions rather than expert economic analysis. Dr. Gilbert should therefore not be allowed to testify to his conclusion that Rambus has attained a monopoly position or that such position is durable.

In addition, Dr. Gilbert acknowledges that his opinion that Rambus has monopoly power depends upon the validity of its patents and whether "JEDEC-compliant SDRAM and DDR*SDRAMs infringe Rambus's patents," an issue that "is unresolved and remains pending in a number of litigations." Exh. A at 8. He states that he has "no opinion as to whether DRAMs

that are compliant with [JEDEC] standards infringe on Rambus's patents." *Id.* at 5 n.1. And he acknowledges that he cannot opine whether Rambus has monopoly power without knowing the answer to that question. *See id.* ("To the extent these DRAMs are found non-infringing or otherwise unenforceable, it is my opinion [not that Rambus has monopoly power but] that Rambus's alleged conduct has a dangerous probability of resulting in an anticompetitive position in the relevant markets.") For this additional reason, Dr. Gilbert should not be allowed to testify that Rambus has monopoly power in any relevant market.

Dr. Gilbert's plan to substitute an opinion about "dangerous probability" is equally flawed. If, as he acknowledges, Rambus cannot exercise monopoly power without, among other things, valid and enforceable patents that are infringed by the Manufacturers' products, Rambus could only have a "dangerous probability" of achieving monopoly power *if there is a dangerous probability that Rambus will prevail on its patent claims*. While Rambus believes it will prevail on those claims, Dr. Gilbert neither has the expertise to opine to that effect nor is likely to do so. Accordingly, he should not be permitted to speculate about those claims in the guise of an opinion that Rambus has a "dangerous probability" of acquiring monopoly power (that is, winning its patent claims).

E. Opinions About Rambus's Alleged Anticompetitive Conduct (Conclusion "F")

Dr. Gilbert states in his report that "Rambus'[s] conduct should be deemed anticompetitive because Rambus manipulated the expectations of JEDEC members and distorted the standard setting process." Exh. A at 8. He states that "[t]he relevant issue is whether Rambus acquired heightened market power from conduct other than competition on the merits." *Id.* Later, he states in conclusory terms that "[t]he alleged conduct reasonably is not characterized as competition on the merits but rather as a concerted course of deceptive practices that skewed the standards setting process . . .." These could be damning conclusions, if credited by a jury. Under analysis, however, they amount to nothing more than the attachment of the label "anticompetitive," without economic analysis, to Plaintiffs' allegations, which Dr. Gilbert simply assumes to be true. This would not assist, although it is almost sure to mislead, the jury. It is

precisely the sort of expert "*ipse dixit*" that a trial court, acting as "gatekeeper," should not allow a jury to hear. *See GE v. Joiner*, 522 U.S. at 146.

Dr. Gilbert merely assumes, without reaching independent conclusions, all of the premises for his opinion that Rambus engaged in anticompetitive conduct. Thus, he *assumes* that there was a "widely-held expectation" among JEDEC members that members would disclose patent information (including "planned applications") "that related to the standard setting work at JEDEC." Exh. A at 5-6. In deposition, Dr. Gilbert testified [redacted] [redacted] Exh. D at 128-129. Thus, Dr. Gilbert apparently concludes that Rambus acted "deceptively" and "anticompetitively" because, he assumes, it failed to live up to expectations held by *some* of JEDEC's members but *not necessarily shared* by 1/3, or maybe even 49%, of its members.

Dr. Gilbert offers no *economic* analysis that demonstrates either that JEDEC's members were likely to hold these expectations or that it was reasonable for them to do so. Instead, Dr. Gilbert offers his personal interpretation of the JEDEC manual, *id.* 17, and selectively recites evidence that he claims renders his assumption about the members' expectations "reasonable," Exh. A at 19-24. But Dr. Gilbert has no more expertise to interpret the words of the JEDEC manual or to assess evidence about the states of mind of the members of JEDEC than the Court or the jurors. None of this testimony should be allowed. At most Dr. Gilbert should be allowed to testify that he assumed some JEDEC members had certain expectations but has no expert opinion whether they did or not.

Dr. Gilbert does offer some purportedly economic justification for the proposition that members of JEDEC (or any other standard setting organization) would expect each other not to engage in "deceptive actions" for the purpose of distorting the proper decision-making process of the organization. *See* Exh. A at 24 (explaining that companies would be less likely to participate in standard setting organization if they thought other members would be able, "through [] deceptive actions," to "hold-up other members"). But that expectation is not what is at issue here—Rambus's alleged lack of disclosure could not even arguably be considered "deceptive" in

the first place unless there was a rule, or at least a universal expectation, that members *would* disclose their patent plans.[3] Dr. Gilbert never offers any explanation, based on economic analysis, why JEDEC members would hold *that* expectation in the absence of an actual rule.[4]

Perhaps most remarkably and prejudicially, Dr. Gilbert simply assumes that "[d]uring the time Rambus was a member of JEDEC and thereafter, Rambus undertook a course of conduct that deceived and misled JEDEC member companies." *Id.* at 5. He recites the evidence that Plaintiffs claim supports that assumption, but he has no more expertise to evaluate that evidence than the jurors. He then purports to "conclude" that "Rambus's conduct should be deemed anticompetitive *because* Rambus manipulated the expectations of JEDEC members and distorted the standard setting process." *Id.* at 8 (emphasis added). But Dr. Gilbert offers no economic analysis in his report to support the embedded, but crucial, conclusion that "Rambus manipulated the expectations of JEDEC members and distorted the standard setting process." That is his *assumption*; "anticompetitive" is simply the label that he, by "*ipse dixit*," attaches to it.

Dr. Gilbert's deposition testimony confirms that his purported conclusions about "deception" are not based on economic analysis and therefore would not assist the factfinder. Dr. Gilbert effectively admitted that even Rambus's assumed failure to comply with "widely-held" expectations at JEDEC would *not* constitute deception as an economist defines it (the only sort of "deception" that is relevant to his purported expert testimony). Asked to provide an economic definition of "deception," Dr. Gilbert testified that [redacted]

[3] Dr. Gilbert rightly disavows any "special expertise to address whether Rambus's conduct violated JEDEC's written rules." Exh. A at 18. But he then states, "even if Rambus did not violate a particular JEDEC disclosure rule, this would not exonerate Rambus of possible antitrust liability." *Id.* 19. This is a legal conclusion to which Dr. Gilbert may not properly testify. *See Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1066 n.10 (9th Cir. 2002) ("an expert witness cannot give an opinion as to her *legal conclusion*) (emphasis in original); *United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999) (legal conclusions are "inappropriate matter for expert testimony").

[4] Dr. Gilbert suggests that the absence of an explicit JEDEC rule requiring disclosure does not mean that Rambus's conduct was not anticompetitive, because "except for conduct that is illegal *per se*, monopolization cases do not involve actions (or inactions) for which there are explicit prohibitions," giving as examples exclusive dealing and below-cost pricing. Exh. A at 18-19. The problem with that analysis, aside from having to do with legal rules not economic ones, is that the anticompetitive nature of an exclusive dealing arrangement or below-cost pricing does not depend upon the existence of a rule (or expectation) among competitors that has allegedly been violated. Here, in the absence of a rule or at the very least a universal expectation of disclosure, Rambus's alleged conduct would not have been either deceptive or anticompetitive.

Exh. D at 259-60 (REDACTED). Asked what economic principles one applies to decide that certain instances of "asymmetric information" constitute deception and others do not, Dr. Gilbert testified that one of REDACTED *Id.* 260-61 (emphases added). That, of course, is common sense. If only *some* members of a group have certain expectations, and only *some* members are aware that *some* of the others have those expectations, it is impossible to conclude, from a failure to meet those expectations, either that deception was intended or that the group has been deceived. Here, as noted, Dr. Gilbert assumes only that certain expectations were "widely-held" among JEDEC members—by perhaps two-thirds of the members; and he assumes only that "most" JEDEC members did not believe that Rambus might have or might acquire patents on the technologies incorporated into the SDRAM and DDR standards. Exh. A at 6. Those assumptions, even if they were supported by the evidence, would not satisfy Dr. Gilbert's own explanation of the prerequisites to a finding of *economic* deception—the only kind about which he might be qualified to testify.

Dr. Gilbert's opinion that Rambus's alleged nondisclosure constituted "deceptive conduct" and was "anticompetitive" depends upon his assumption that Rambus did not have procompetitive justifications for failing to disclose the claims of some of its pending applications. As Laurence Pretty, one of Rambus's experts, has pointed out, however, Rambus was justified in keeping its applications confidential, because (among other reasons) (1) disclosing pending claims would allow a competitor to obstruct the patent prosecution process and substantially delay the issuance of a patent, for example by provoking an interference proceeding in the Patent Office, Luedtke Decl. Exh. E at ¶¶ 50-51, and (2) given that the applicant cannot know the scope of the claims that will ultimately issue, early disclosure of claims or other representations of expected claim scope could expose the applicant to allegations of misrepresentation and potential liability, *id.* ¶¶ 47-49. Although Dr. Gilbert opines that some potential reasons for keeping patent claims confidential did not apply to Rambus, Rpt. 83-86, he fails to address these two reasons for confidentiality that plainly did apply to Rambus, and he has no expertise to do so. Rambus was

expressly advised by its counsel not to disclose its applications in part because of the danger that a third party could provoke an interference at the patent office and impede issuance of the patent. Luedtke Decl. Exh. F. In his reply report responding specifically to Mr. Pretty, Dr. Gilbert again fails to address these reasons for confidentiality, suggesting that he simply has no answer to them. Luedtke Decl. Exh. G. Having failed to rebut, or even address, certain of Rambus's business justifications for keeping patent applications confidential, Dr. Gilbert should not be permitted to opine that Rambus's conduct was anticompetitive.

In sum, Dr. Gilbert should not be permitted to testify either that Rambus deceived or misled JEDEC member companies, Exh. A at 5, or that Rambus's alleged conduct was "anticompetitive," *id.* 8. Dr. Gilbert admits that he only assumed the first, and his deposition testimony demonstrates that the assumption is false as a matter of economics; and he has provided no economic analysis—just circular reasoning based on the false assumption—in support of his purported "conclusion" that Rambus's alleged conduct was anticompetitive. Permitting this sort of unsupported but sweeping "expert" characterization of Rambus's conduct would be highly prejudicial. *See United States v. Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2002) (when an expert conveys "sweeping conclusions" about the defendant's activities, such testimony "deviat[es] from the strictures of Rules 403 and 702" and "may come dangerously close to usurping the jury's function").

F. Opinions About Causation (Conclusion "G")

The basis for Dr. Gilbert's opinion with respect to causation ("The Causal Link Between Rambus's Conduct and Its Ex Post Market Power") appears on page 69 of his Report, Exh. A. There, Dr. Gilbert reiterates two of his major assumptions: Assumption No. 1: "Prior to JEDEC approval of the SDRAM and DDR SDRAM standards, each of the Rambus technologies now at issue faced competition from viable alternatives." *See id.* 5 (listing assumption, with no independent conclusion, that there existed viable alternatives to Rambus's technologies). Assumption No. 2: "[O]nce the industry became locked-in to these technologies, the viability of competing alternatives was greatly diminished." *See* Exh. A at 6 (listing assumption, with no independent conclusion, that in early 2000 JEDEC member companies faced substantial

switching costs). *With nothing further*—no intervening economic analysis based upon these assumptions—Dr. Gilbert opines, "[*t*]*hus*, as a result of the challenged conduct, Rambus was able to achieve a degree of market power that it otherwise would not have obtained." *Id.* at 69.

Dr. Gilbert asserts that, had Rambus not engaged in "the actions (or inactions) at issue," there could have been "a number of potential outcomes." *Id.* at 8. In his Report, he claims these "rang[e] from the Rambus technologies not being incorporated into the SDRAM standard to a diminution in the royalties that Rambus is able to extract." *Id.* Implicitly, Dr. Gilbert excludes, in his Report, the potential outcome that Rambus's technologies would still have been incorporated into the SDRAM standard and the royalties would have been the same—because Rambus's technologies are superior, even accounting for any royalties, and the royalties it has charged or sought to charge are reasonable. His exclusion of that potential outcome is, of course, crucial, because under that outcome the world would be no different than it is and Rambus's alleged conduct would have had no anticompetitive effect. Dr. Gilbert's deposition testimony reveals, however, that he has no basis other than speculation for the exclusion of that potential outcome.

Several issues must be addressed in order to assess whether Rambus's alleged nondisclosures affected the market outcome. First, one must consider whether, had Rambus disclosed its patent intentions, JEDEC would plausibly have demanded that Rambus give a RAND commitment as a condition to standardizing the Rambus technologies. If not, then the Rambus technologies would have been standardized without a RAND commitment and the world would be no different. If one assumes a demand would have been made by JEDEC, there are two alternative paths. If one assumes that Rambus would have refused to give a RAND commitment, one must consider whether JEDEC would as a result have decided not to standardize Rambus's technologies. (Whether this is even a real, as opposed to a theoretical, issue depends, of course, upon the accuracy of Dr. Gilbert's initial assumption that viable alternatives to those technologies even existed.) If, on the other hand, one assumes that Rambus would have given a RAND commitment, one must consider whether the resulting royalties would have been materially different than those Rambus actually charged or offered to charge.

As to each of these issues, Dr. Gilbert effectively admitted in his deposition that he either has no opinion or has no basis to form an opinion as an economist. Thus, when asked whether the world would be any different if, prior to standardization of Rambus's technologies, Rambus had disclosed to JEDEC that it claimed to have valid patents for those technologies, Dr. Gilbert admitted, "I REDACTED Exh. D at 99-100.[5] Asked a similar question later in his deposition, Dr. Gilbert confirmed his earlier testimony, stating REDACTED

l. *Id.* 264-66. Such speculation about causation is not appropriate expert testimony and should be excluded. *See Daubert*, 43 F.3d at 1322 (remand decision) (excluding expert causation testimony where experts "testif[ied] to a possibility rather than a probability") (*quoting Turpin v. Merrell Dow Pharmaceuticals*, 959 F.2d 1349, 1360 (6th Cir. 1992).

Asked specifically for his opinion, as an economic expert, whether it would have been economically rational for Rambus to give a RAND commitment, Dr. Gilbert said, "I REDACTED s." *Id.* at 247, 248. Thus, Dr. Gilbert has no basis for concluding that, had the JEDEC members demanded a RAND commitment, Rambus would not have given one. He therefore has no basis to opine that, had Rambus made further disclosures, and even assuming that alternative viable technologies existed, its technologies would not still have been standardized.

Dr. Gilbert further admitted that he has no basis for expressing an opinion whether the royalty rates that would have resulted from a RAND commitment are higher, lower or the same as those that Rambus has actually charged or offered. He testified that he has done no independent analysis whether the difference between the present level of royalties and those that Rambus would have charged under a RAND commitment is "greater than zero, less than zero, or zero."

[5] Dr. Gilbert also said "REDACTED or. Exh. D at 99-102.

Id. at 230. Dr. Gilbert admitted that he has ' REDACTED

Id. at 207-09. He declined even to express any opinion whether, had Rambus made further disclosures, the DRAM manufacturers would have been willing to negotiate license agreements with Rambus. *Id.* at 102-03. Dr. Gilbert further testified that he had done no independent analysis of what royalty rates would have resulted from any such negotiations and did not have sufficient information to do such an analysis. *Id.* at 72-73. And he has not done the analysis that would be required to form an opinion whether the royalty rates that Rambus in fact offered to, for example, Micron are consistent with the rates that would have been charged under a RAND commitment. *Id.* at 67-70.

In sum, Dr. Gilbert has no basis to opine, based on the assumption that Rambus made additional disclosures during the standardization process: (1) whether JEDEC members would have demanded a RAND commitment; (2) whether Rambus would have made such a commitment; (3) whether, if Rambus refused, JEDEC would still have standardized its technologies; or (4) whether, if Rambus made a RAND commitment, the resulting royalties would be different from those Rambus has actually charged or offered to charge. Dr. Gilbert therefore has no basis to express any opinion whether Rambus's alleged conduct caused any anticompetitive effect.

IV. DR. GILBERT SHOULD NOT BE ALLOWED TO VOUCH FOR THE TESTIMONY OF OTHER WITNESSES OR TO SUMMARIZE PLAINTIFFS' ALLEGATIONS OR EVIDENCE

Dr. Gilbert repeatedly and at length summarizes, evaluates, draws inference from and vouches for Plaintiffs' allegations and the testimony of other witnesses. *See, e.g.*, Exh. A at 20-24, 25-32, 44-68. Thus, for example, as purported support for his "conclusions" about switching costs, Dr. Gilbert devotes more than twenty pages of his report to summarizing and vouching for the purported expert testimony of Christopher McCardle, Desi Rhoden and various other witnesses, and describing documents. Even if Dr. Gilbert's summaries of the evidence were accurate, they would do nothing for the factfinder that the factfinder could not do for itself. Further, his evaluations of that evidence, especially on subjects about which he admits to having

no special expertise, *see, e.g., id.* at 55 ("the foregoing testimony is consistent with Dr. McCardle's overarching conclusion [about switching costs]"), and his drawing of inferences and non-economic conclusions from the evidence, *see, e.g., id.* at 46 ("Testimony presented at the FTC trial suggests that industry participants generally came to appreciate Rambus's claims in early to mid-2000."), directly invade the province of the factfinder. The proffered testimony should therefore be excluded. *See United States v. Finley*, 301 F.3d 1000, 1009-10 (9th Cir. 2002) (medical expert who merely recites the allegations of the alleged victim "'in the guise of a medical opinion . . . does not assist the trier of fact as required by Rule 702") (quotations and citations omitted); *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 842 (9th Cir. 1995) (trial court properly excluded from bench trial the proposed testimony of experts as to what could be heard in a tape-recorded conversation because "hearing is within the ability and experience" of the factfinder); *United States v. Benson*, 941 F.2d 598, 604-05 (7th Cir. 1991) (trial court abused discretion by allowing government to introduce testimony of IRS agent whose testimony consisted primarily of "drawing inferences from the evidence that he was no more qualified than the jury to draw").

Moreover, such trial testimony would be tantamount to argument of counsel made through the mouth of someone cloaked in the mantle of an expert. *See Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992) ("[T]he trial judge ought to insist that a proffered expert bring to the jury more than the lawyers can offer in argument."); *Green v. Kinney Shoe Corp.*, 715 F. Supp. 1122, 1123 (D.D.C. 1989) (excluding expert testimony that amounted to the "kind of argument [that] may be made, based on the evidence, by lawyers in closing argument"). Because of the aura of reliability that surrounds expert testimony, such testimony would be likely to encroach upon the role of the factfinder and be unduly prejudicial to Rambus. *See Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 732 (8th Cir. 2006) ("courts must guard against invading the province of the jury on a question which the jury was entirely capable of answering without the benefit of expert opinion") (quotations omitted); *see also United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (acknowledging the "aura of reliability" that attaches to expert testimony and holding that expert testimony that encroached upon the "traditional province of the jury to assess witness

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credibility" was properly excluded).

Such testimony is also likely to amount to a "'needless presentation of cumulative evidence'" and a "'waste of time.'" *Dukagjini*, 326 F.3d at 54 (quoting Rule 403). Under both Rule 403 and Rule 702, Hynix should be precluded from eliciting from Dr. Gilbert any purported summaries of the evidence or suggestions about the inferences and conclusions it supports.

V. DR. GILBERT SHOULD NOT BE ALLOWED TO EXPRESS OPINIONS ABOUT ADDITIONAL SUBJECTS AS TO WHICH HE HAS NO SPECIAL EXPERTISE

Dr. Gilbert purports to offer opinions on two additional subjects, about which he does not even claim to have any special expertise. The first is, "Should JEDEC Members Have Known that Rambus Had Relevant IP?" Exh. A at 76-80. The answer to that depends, not on economics, but on what JEDEC members knew about Rambus's intellectual property rights, when they knew those things, and what they could have inferred from what they knew. None of those things is within the special expertise of Dr. Gilbert as an economist. Instead, Dr. Gilbert simply offers to substitute his conclusions about the evidence for that of the factfinder. *See, e.g.*, Exh. A at 78 ("JEDEC members who reviewed the written description do not appear to have believed that it pertained to the proposed standards"); *id.* ("a review of Rambus internal communications shows . . . that Rambus was attempting . . . to conceal the fact that it would claim patent rights . . . .").

The second subject is whether JEDEC's meeting minutes were confidential. *Id.* at 80-83. Certainly this is not an economic question. Again, Dr. Gilbert simply offers to serve as the factfinder. *See, e.g.*, Exh. A at 81 ("there is evidence that not everything that is discussed at the meetings is included in the minutes"); *id.* ("Rambus's internal communications suggest that it believed JEDEC discussions were confidential").

Dr. Gilbert's purported opinions with respect to these two subjects should be excluded because he has no special expertise that would be helpful to the jury and his opinions are irrelevant.

VI. CONCLUSION

For all the foregoing reasons, Rambus's motion to exclude certain expert testimony offered by Dr. Gilbert should be granted.

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