GREGORY P. STONE (SBN 78329)
STEVEN M. PERRY (SBN 106154)
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100; Facsimile: (213) 687-3702
E-mail: gregory.stone@mto.com; steven.perry@mto.com

PETER A. DETRE (SBN 182619)
CAROLYN HOECKER LUEDTKE (SBN 207976)
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105-2907
Telephone: (415) 512-4000; Facsimile: (415) 512-4077
E-mail: peter.detre@mto.com; carolyn.luedtke@mto.com

PIERRE J. HUBERT (Pro Hac Vice)
CRAIG N. TOLLIVER (Pro Hac Vice)
McKOOL SMITH PC
300 West 6th Street, Suite 1700
Austin, TX 78701
Telephone: (512) 692-8700; Facsimile: (512) 692-8744
E-mail: phubert@mckoolsmith.com;
ctolliver@mckoolsmith.com

Attorneys for Plaintiff
RAMBUS INC.

UNITED STATES DISTRICT COURT

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 REPLY IN SUPPORT OF DAUBERT MOTION NO. 1 TO EXCLUDE CERTAIN TESTIMONY OF RICHARD J. GILBERT

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

RAMBUS INC., Plaintiff, v. HYNIX SEMICONDUCTOR INC., et al., Defendants	CASE NO.: C 05-00334 RMW
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

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I. INTRODUCTION

Rambus does not dispute that Dr. Gilbert is an expert economist. Nor does Rambus dispute that Dr. Gilbert has identified various assumptions that he is making and the conclusions he claims to have reached based on those assumptions. And Dr. Gilbert certainly *says* that he used "economic analysis" to reach those conclusions. In the words of the Ninth Circuit, however, "[w]e've been presented with only the expert['s] qualifications, [his] conclusions and [his] assurances of reliability. Under *Daubert*, that's not enough." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) (remand decision); *accord In re Meridia Products Liability Litigation*, 328 F.Supp.2d 791, 806 (N.D. Ohio 2004).

What Federal Rule of Evidence 702 and the Supreme Court's decision in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (hereinafter "*Daubert*"), require is that the Court examine the *methodology* used by the expert and determine both whether that methodology is reliable and whether it has been reliably applied to the facts at issue. Fed.R.Evid. 702; *Daubert*, 509 U.S. at 592. Thus, "the party proffering the evidence must explain the expert's methodology and demonstrate in some objectively verifiable way that the expert has both chosen a reliable scientific method and followed it faithfully." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d at 1319 n.11; *see also id*. at 1319 ("the experts must explain precisely how they went about reaching their conclusions"). As the author cited by the Manufacturers states:

> [T]he admissibility of expert economic testimony turns on three questions: Is the witness an expert in the relevant field of economics? Does the testimony employ sound methods from the relevant field of economics? And does the testimony reliably apply sound methods to the facts of the case?

Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law With Oligopoly Theory*, 71 Antitrust L.J. 719, 784-785 (2004) (hereinafter "Werden"). If the methodology employed does not satisfy "professional norms," the testimony is inadmissible even though the witness is "a Ph.D. in economics from a reputable university and an experienced consultant in antitrust economics." *Id*. (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1365 (7th Cir. 1996) (Posner, C.J.), *vacated on other grounds*, 522 U.S. 3 (1997)). "The most important general rule for evaluating the admissibility of expert economic testimony is that inferences may

not be based on the '*ipse dixit* of the expert' but rather must have a basis in economic theory." Werden, at 794; *see General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) (court not required to admit "opinion evidence which is connected to existing data only by the *ipse dixit* of the expert").

Here, the Manufacturers have answered only the first question—Dr. Gilbert is indisputably an expert in the relevant field of economics. But, other than the repeated assertion that Dr. Gilbert has used "economic analysis," the Manufacturers fail to show what economic methodologies he used to get from his assumptions to his conclusions or that he used any such methodologies in a reliable manner. Rambus shows in its Motion and below that this is true with respect to each of Dr. Gilbert's key conclusions.

What Dr. Gilbert has done here is analogous to an algebra student who is assigned a set of word problems by his teacher, and who then looks in the back of the book, finds the expected answers, and provides those answers on his take-home exam. When the teacher says, "you need to show your work," the student says, "no, you should just rely on the fact that I've always been a good math student." The student, of course, would and should fail the exam. So too here, Dr. Gilbert fails the *Daubert* test, and his testimony should be excluded.

II. DR. GILBERT SHOULD NOT BE ALLOWED TO TESTIFY TO CONCLUSIONS THAT HAVE NOT BEEN SHOWN TO BE BASED ON A RELIABLE ECONOMIC METHODOLOGY

A. Opinions About The Relevant Product Market (Conclusion "A")

The Manufacturers' defense of Dr. Gilbert's report concerning the relevant product market provides a perfect opportunity to illustrate the emptiness of Dr. Gilbert's proffered testimony. In short, as the Manufacturers recite, Dr. Gilbert rightly says that the economic question to be decided in order to define a relevant product market is whether certain products (or technologies) are "close substitutes." The very authorities cited by Dr. Gilbert establish that whether technologies are close substitutes and therefore in the same relevant product market is an economic question that requires a particular economic methodology. But Dr. Gilbert merely *assumes* the answer to that question and does no economic analysis of it whatsoever, using either the accepted economic methodology or any other (except "*ipse dixit*"). His testimony is therefore

not admissible.

The Manufacturers state that "Dr. Gilbert's report describes the way an economist defines markets." Opp. at 7 (citing page 34 of Dr. Gilbert's report). On that page, Dr. Gilbert indeed sets forth an accurate definition of what an economist means by a relevant product market—"[t]echnology markets consist of the intellectual property that is licensed and its close substitutes; that is, the technologies or goods that are close enough substitutes significantly to constrain the exercise of market power with respect to the intellectual property that is licensed"—citing the U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (1995), at § 3.22. Declaration of Carolyn Hoecker Luedtke in Support of Motion to Exclude Certain Testimony of Richard Gilbert ("Luedtke Decl."), Exh. A at 34. In other words, the *economic question* that must be answered in order to define a relevant market is: "which technologies are close substitutes for each other?" But Dr. Gilbert then says, "I have *assumed* for the sake of my analysis that for each of the Rambus technologies there existed close substitutes at the time JEDEC was considering inclusion of that technology in JEDEC standards." *Id*. (emphasis added). Thus, after defining the material *economic* question, he proceeds merely to assume the answer to that question and, based purely on that assumption, to offer a purportedly "expert economic" opinion. This is nothing more than the "*ipse dixit*" of a Ph.D. economist—irrelevant but sure to be prejudicial.

The Manufacturers take Rambus to task for citing section 3.21 of the Intellectual Property Guidelines, rather than section 3.22, when criticizing Dr. Gilbert for not applying the economic methodology called for by those Guidelines to determine a relevant market. *See* Opp. at 6 n.2; Motion at 5-6 n.2. *Both* sections 3.21 *and* 3.22 expressly state, however, that the methodology to be used to determine a relevant product market in the intellectual property area is the same as that used under the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines: "To identify a technology's close substitutes and thus to delineate the relevant technology market, the Agencies will, if the data permit, identify the smallest group of technologies and goods over which a hypothetical monopolist of those technologies and goods likely would exercise market power—for example, by imposing a small but significant and

nontransitory price increase." Intellectual Property Guidelines, § 3.22 (the section cited by Dr. Gilbert); *see id*. n.20 ("This is conceptually analogous to the analytical approach to goods markets under the 1992 *Horizontal Merger Guidelines*."); *id*. § 3.21 ("the Agencies will approach the delineation of relevant market . . . as in section 1 of the [Merger Guidelines]").

The Merger Guidelines describe a very specific economic methodology for determining the relevant product market. *Horizontal Merger Guidelines* § 1.1.1. Nowhere does Dr. Gilbert apply this economic methodology, or any other, to define the relevant product market. He does not, with respect to any technology, ask "what would happen if a hypothetical monopolist of that product imposed at least a 'small but significant and nontransitory' increase in price, but the terms of sale of all other [technologies] remained constant." *See id.* He does not consider the likely reactions of buyers of the various technologies, and specifically does not consider, among other things, "evidence that buyers have shifted or have considered shifting purchases"; "evidence that sellers base business decisions on the prospect of buyer substitution between [technologies] in response to relative changes in price"; or "the influence of downstream competition faced by buyers in their output markets." *See id*. And Dr. Gilbert never analyzes for any technology whether it is the "next best substitute" for another, meaning that it is "the alternative, which, if available in unlimited quantities at constant prices, would account for the greatest value of diversion of demand in response to a 'small but significant and nontransitory' price increase." *See id*. n.8.

Dr. Gilbert might properly have assumed that certain technologies performed the same functions as others; or that some technologies performed those functions faster; or that some were less costly to manufacture. Those are technical and business questions about which Dr. Gilbert is not an expert. But the question whether, in light of those assumptions, the technologies are "close substitutes" and therefore in the same market is an economic question that requires economic analysis of hypothetical price changes and the market's likely response to those price changes. Dr. Gilbert did no such analysis. He should accordingly not be permitted to testify with respect to the relevant product market.

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

The Manufacturers' defense of Dr. Gilbert with respect to Rambus's alleged acquisition of monopoly power is equally thin. The best they can offer is the conclusory assertion that Dr. Gilbert "explains the economic significance of testimony that will be offered by percipient and expert witnesses . . . ." Opp. at 10; *see also id.* at 11 ("[t]he role of Dr. Gilbert is to explain the economic significance of [certain findings]"). Nowhere do the Manufacturers explain what economic *methodology* Dr. Gilbert used to reach his purported conclusions about the "economic significance" of the testimony or "explain precisely how [he] went about reaching [his] conclusions." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d at 1319 & n.11; *see also* Werden, at 795 (noting that *Daubert* motions should force "an expert economist to provide a detailed explanation of the theoretical or empirical basis for any inferences"). In fact, Dr. Gilbert has done nothing more than attach "economic" *labels* to his assumptions: he *assumes* there were alternatives available to JEDEC when they chose Rambus's technologies, *assumes* Rambus did not disclose certain things, and then simply attaches the label "acquisition of monopoly power by deception" to JEDEC's standardization of Rambus's technologies; similarly, he *assumes* that there were substantial "switching costs" and then attaches the label "durable monopoly power" to the market's choice of Rambus's technologies.

Because the Manufacturers have neither explained the economic methodology that Dr. Gilbert used to reach conclusions about the "economic significance" of testimony nor demonstrated that he used that methodology correctly and reliably, his testimony with respect to Rambus's alleged acquisition of monopoly power should be excluded. *See* Werden, at 792-793 (arguing that "any opinions from economic experts on the import of [testimony and documentary evidence about competitor communications] should be excluded under Rule 702 because such opinions are not based on the application of economics").

C. Opinions About Rambus's Monopoly Power (Conclusions "E" and "H")

The Manufacturers do not dispute that Dr. Gilbert's opinions that Rambus possesses monopoly power and that there is a dangerous probability that Rambus will acquire such power

depend upon *both* his conclusions about the relevant product market *and* the validity of Rambus's patents—an issue that is unresolved and about which Dr. Gilbert has no expertise. Rambus has shown above that Dr. Gilbert's conclusion about the relevant product market should be excluded. With respect to the patent issue, the only defenses of Dr. Gilbert's opinions the Manufacturers offer are (1) that Rambus is "manipulat[ing] the trial schedule" and (2) that others (the FTC and Dr. Rapp) have indicated that Rambus has monopoly power. *See* Opp. at 11-12. Rambus responds to the first point in its reply memorandum in support of summary judgment on the Manufacturers' monopolization claims. The latter point is obviously irrelevant to whether *Dr. Gilbert* may offer an expert opinion about Rambus's alleged monopoly power. His opinion must be based on *his* economic analysis of the facts, not opinions or findings by others. *See generally* Rambus's Reply in Support of Motion for Summary Judgment No. 1, at 10-11.

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

In defense of Dr. Gilbert's conclusory "opinion" that Rambus's alleged conduct was "anticompetitive," the Manufacturers assert that (1) Dr. Gilbert "makes clear that he is applying economic analysis" and has "appl[ied] microeconomic theory"; and (2) the testimony of one of Rambus's experts (Dr. Rapp) shows that "antitrust economists do analyze and form opinions on exactly the type of conduct analyzed by Dr. Gilbert." Opp. at 13, 14. The problem is that, while the second is true in concept, Dr. Gilbert never explains what economic analysis or microeconomic theory he in particular has applied to the facts in order to reach his purported conclusions. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d at 1319 ("the experts must explain precisely how they went about reaching their conclusions"). In fact, as demonstrated in Rambus's motion, Dr. Gilbert has again merely attached an "economic" label, "anticompetitive," to Rambus's alleged conduct.

Both Dr. Rapp's and Dr. Gilbert's deposition testimony demonstrate that Dr. Gilbert has in fact *not* applied economic analysis to reach the conclusion that Rambus's alleged conduct was anticompetitive. Dr. Gilbert's key assertion about Rambus's conduct is that it "reasonably is not characterized as competition on the merits but rather as a concerted course of deceptive practices

. . . ." Luedtke Decl., Exh. A, at 16; *see id*. at 8 ("The relevant issue is whether Rambus acquired heightened market power from conduct other than competition on the merits."). Dr. Gilbert's assertion that Rambus's conduct was "anticompetitive" turns on his conclusion that the conduct was "deceptive."

The Manufacturers rely on Dr. Rapp's testimony about the circumstances when an economist might consider "opportunistic behavior" to create an antitrust concern. Opp. at 14 (citing Confidential Decl. of Belinda Vega in Support of Opp. to Daubert Motion No. 1 ("Conf. Vega Decl."), Exh. C, at 129-31 (Rapp Depo.)). But Dr. Gilbert does not discuss "opportunistic" behavior; he discusses allegedly "deceptive" behavior. Two pages earlier, Dr. Rapp stated quite plainly, "Economics is silent on what is and is not deceptive behavior. And -- for that reason, Professor Gilbert, in his capacity as an economic expert, has nothing to contribute to that subject." Declaration of Miriam Kim in Support of Reply in Support of Daubert Motion No. 1, Exh. A at 127 (Rapp Depo.); *see also* Conf. Vega Decl., Exh. A at 17 (Rapp Expert Report) ("economics has no part in Professor Gilbert's thinking about conduct"); *id*., at 18 ("[A]ccording to Professor Gilbert, deception is anticompetitive if the achievement of a monopoly position is an after-effect. This is the fundamental teaching of Professor Gilbert's report and, of course, there is no economics to be found in it.").

Dr. Gilbert's own testimony demonstrates that his purported conclusion that Rambus's alleged conduct was "deceptive" is not based on economics. While he claimed that economists analyze "deception" that occurs due to "asymmetric information," he admitted that, to an economist, such deception occurs only when "everybody know that everybody has [the same] expectations." Luedtke Decl., Exh. D at 260-61 (Gilbert Depo.); *see* Motion at 12-13. That, of course, was not true of JEDEC's members. To the extent that economic analysis has any relevance to whether Rambus's conduct was "deceptive," Dr. Gilbert's owns testimony shows that the conduct was *not*. Dr. Gilbert's conclusory assertion that Rambus's conduct was "deceptive"—and therefore "anticompetitive"—is thus not based on economic analysis and cannot be admissible expert economic testimony.[1]

[1] As with the relevant product market, the fact that the FTC may have made certain findings about

E. Opinions About Causation (Conclusion "G")

Rambus has explained in detail that Dr. Gilbert's proposed testimony about causation is entirely speculative, and that he has admitted as much in his deposition. Motion at 14-17. Unable to explain away these facts, the Manufacturers again resort simply to asserting repeatedly that Dr. Gilbert did employ "economic analysis," without explaining what economic methodology he used or how.

The one contrary instance is where the Manufacturers assert that Dr. Gilbert "based his analysis on the economic incentives that rational economic actors in the place of Rambus and the members of JEDEC would have." Opp. at 16-17. But even with respect to that "rational actor" methodology, Dr. Gilbert admitted that his testimony was speculative. Thus, for example, on the crucial issue whether it would have been economically rational for Rambus to give JEDEC a RAND commitment (with the result that its technologies would have been standardized even if additional disclosures had been made), Dr. Gilbert testified, "I would be in the speculative realm." Luedtke Decl., Exh. D at 247 (Gilbert Depo.). He further admitted that he had done no economic analysis to determine whether the royalty rates that would have resulted from such a RAND commitment would have been higher, lower or the same as those that Rambus actually charged or offered. *Id*. at 67-70, 72-73, 207-09. He therefore has no basis in economics to opine that Rambus's allegedly "deceptive" conduct either caused the standardization of its technologies by JEDEC or resulted in higher prices, and he therefore has no basis to offer expert testimony that such conduct resulted in Rambus's acquisition of monopoly power or any anticompetitive effect.

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

Throughout his Report, Dr. Gilbert describes the testimony of other witnesses, both lay and expert, in ways that go well beyond disclosing the *assumptions* that Dr. Gilbert is making. A few examples of something that recurs throughout his Report include: (1) "Based upon my review of the evidence, I view this assumption [about the subjective 'expectations' of JEDEC

Rambus's conduct is irrelevant to whether Dr. Gilbert should be permitted to offer expert economic testimony to the jury in this case. *See* Opp. at 14-15 n.7.

members] as reasonable." Luedtke Decl., Exh. A at 19-20; (2) "Given the evidence described above, I find credible the assumption that there was a widespread expectation among JEDEC members . . . ." *Id*. at 24; (3) "Testimony presented at the FTC trial suggests that industry participants generally came to appreciate Rambus's claims in early to mid-2000." *Id*. at 46; (4) "[T]he foregoing testimony is consistent with Dr. McCardle's overarching conclusion [about switching costs]." *Id*. at 55; (5) "There is substantial evidence that backwards compatibility was a primary goal for JEDEC members during the development of a DDR2 standard." *Id*. at 62; (6) "Due to the various costs and risks described above, the industry has a strong preference for an evolutionary migration path." *Id*. at 67; and (7) "Prior to JEDEC approval of the SDRAM and DDR SDRAM standards, each of the Rambus technologies now at issue faced competition from viable alternatives." *Id*. at 69.

None of these is framed by Dr. Gilbert as an assumption. Yet all are either matters to be determined exclusively by the jury without expert assistance or matters about which Dr. Gilbert admits he has no expertise. The situation is directly analogous to that in *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073 (10th Cir. 2006), on which the Manufacturers rely. There, the party offering the expert economist argued that he was just offering opinions based on assumed facts. But the Tenth Circuit stated, "in reviewing Dr. Murry's report, it is not clear to us (nor, do we think, would it be clear to a jury) that this is what Dr. Murry intended to do." *Id*. at 1080 n.4. As an example, the Court noted that "Dr. Murry's report states that 'Champagne . . . experienced difficulty acquiring sales persons because prospective employees feared Champagne would be unable to acquire the supplies of critical aluminum products from the mills at competitive prices.'" *Id*. The Court held that "[t]his sounds like a *confirmation* (rather than an *assumption*) of the fact that Champagne had trouble hiring . . . ," and that such assertions would confuse, rather than assist, the jury. *Id.*

This is precisely the situation here. Dr. Gilbert repeatedly *confirms* as fact things he is supposed to be assuming and *vouches* for expert opinions that are others', not his. Such testimony will likely confuse and certainly prejudice the jurors, who would likely assume that, because it comes from a court-approved expert and a distinguished professor, Dr. Gilbert's

testimony in all areas is entitled to significant weight. For that additional reason, his testimony should be excluded.

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

The Manufacturers only basis for arguing that Dr. Gilbert should be allowed to opine (1) whether JEDEC members should have known that Rambus had relevant intellectual property rights and (2) whether JEDEC's meeting minutes were confidential is that Rambus objects to Dr. Gilbert's *not* opining whether Rambus's interest in keeping patent information confidential is a procompetitive justification for its conduct. Opp. at 17-18. The Manufacturers are comparing apples and oranges. Whether maintaining the confidentiality of patent information is pro-competitive is an economic question, and one would therefore expect an economist assessing the effect of Rambus's alleged conduct on competition to address the question. By contrast, whether JEDEC members should have known Rambus had certain IP rights and whether meeting minutes are confidential are plainly *not* economic, but factual, questions within the sole province of the factfinder. Dr. Gilbert should not be allowed to prejudice the jury with purportedly "expert" opinions about those two issues.

V. CONCLUSION

For all the reasons set forth in Rambus's motion and above, Rambus's motion to exclude certain expert testimony offered by Dr. Gilbert should be granted.

DATED: November 7, 2007

MUNGER, TOLLES & OLSON LLP

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

Attorneys for Plaintiff RAMBUS INC.