UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Public Version

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

MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* TO PRECLUDE REPORT AND TESTIMONY OF WILLIAM L. KEEFAUVER

Complaint Counsel moves *in limine* to preclude and bar respondent Rambus, Inc. ("Rambus") from offering any evidence, and from making any arguments at trial, based upon the opinions of its expert, William L. Keefauver. Mr. Keefauver's opinions are inherently unreliable and do not meet the standard set forth in the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Your Honor should preclude Rambus from offering such irrelevant testimony for a number of reasons. First, the opinions of Rambus's proffered Mr. William are not helpful to Your Honor because they require no specialized knowledge and are largely based on common sense. Second, even if something more than common sense and the testimony of fact witnesses was required to interpret the JEDEC patent policy, Mr. Keefauver's opinions are unreliable because he conducted almost no independent analysis and his opinions are based on unverified assumptions and guesswork. In short, his opinions are impossible to test because they are not based on any methodology other than his own limited experiences and the factual representations

of Rambus's counsel. Expert opinion that is not grounded in the facts of the case does not assist the trier of fact and, therefore, is not admissible. Finally, this is an obvious attempt to use purported expert testimony to relitigate facts decided against Rambus by the Federal Circuit in the *Infineon v. Rambus*[1] litigation; *i.e.*, that the JEDEC patent policy required the disclosure of patent applications.

ARGUMENT

I. Legal Standard

Expert testimony is admissible 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. Federal Rule of Evidence 702. The party offering the expert testimony bears the burden of demonstrating that the proffered testimony meets these requirements. *ID Security Systems Canada, Inc. v. Checkpoint Systems, Inc.*, 198 F. Supp.2d 598, 602 (E.D.Pa. 2002). This standard applies to all subjects of expert testimony, "whether it relates to areas of traditional scientific competence or whether it is founded on engineering principles or other technical or specialized expertise." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

The issue before Your Honor relates to an expert with specialized knowledge, rather than scientific expertise. Mr. Keefauver intends to offer opinions interpreting the meaning and scope of the JEDEC patent policy during Rambus's tenure as a member. For the purpose of this motion, Complaint Counsel does not challenge directly Mr. Keefauver's specialized knowledge.

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[1] *Rambus Inc. v. Infineon Technologies AG*, 155 F. Supp. 2d 668 (E.D. Va. 2001), *vacated in part, aff'd in part, rev'd in part, and remanded*, 318 F.3d 1081 (Fed. Cir. 2003).

But even qualified experts are not permitted to testify concerning lay matters which the trier of fact is able to understand without the expert's assistance. *Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989). Furthermore, the expert's opinion must be based upon some recognized scientific method. *Niebur v. Town of Cicero*, 136 F. Supp.2d 915, 918-19 (N.D.Ill. 2001). Testimony that does not reflect a reliable body of genuine specialized knowledge and is nothing more than common sense is not admissible. *Id.* at 919. Mr. Keefauver's proffered testimony is flawed because the testimony addresses lay matters that Your Honor can fully comprehend through the fact witnesses, the testimony is not based on any specialized knowledge, and the underlying assumptions supporting his theory are inherently unreliable.

II. Mr. Keefauver's Opinions Are Not Helpful to the Trier of Fact Because His Opinions Require No Specialized Knowledge or Expertise

The only patent policy at issue in this case is the patent policy adopted and published by JEDEC. That policy is contained in JEDEC's Manual of Organization and Procedure.[2] Under the guise of expert testimony, Rambus seeks to have Your Honor consider the policies of selected other standard-setting organizations ("SSOs") in interpreting the JEDEC policy. According to Rambus, these non-JEDEC patent policies are relevant because JEDEC members would have understood the JEDEC patent policy only by reference to patent policies having nothing at all to do with JEDEC. The patent policies of unaffiliated organizations, such as ANSI, SEMI, VESA, ITU, and TIA, are plainly irrelevant. There is no evidence that JEDEC's policy is

[2] The Manual of Organization and Procedure has undergone various revisions over the years, none of which have altered the obligations of members under the patent policy. The revision most relevant to the current dispute is revision 21-I, which was published in October 1993 and was in effect through Rambus's resignation from JEDEC in June 1996. **[Tab 3]**

subordinate to or controlled by any of these organizations.[3] Nevertheless, Rambus hopes to further complicate this case by introducing evidence of the patent policies of several irrelevant SSOs. The fundamental flaw in Rambus's strategy is that it seeks to circumvent the factual findings of the Federal Circuit by introducing through an expert evidence that is nothing more than gussied up factual assertions that have been contradicted by virtually every witness. Instead of relying on an expert who formed his opinions without regard to the record, Your Honor easily could resolve these issues by considering the testimony of fact witnesses who likely are more qualified than Mr. Keefauver to render expert analysis.

In addition to the utter lack of relevance of the non-JEDEC patent policies, Mr. Keefauver's opinions are not helpful because they are based on simple common sense. Even assuming that interpretation of the JEDEC patent policy is a proper subject of expert testimony, Mr. Keefauver readily admits that some of his opinions are based on "common sense."

> Q: . . . What is the basis for your statement that SDOs would be loathe to undertake an effort to design around them [patent applications]?
>
> A: Most of my conclusion is <u>common sense</u>.
>
> Q: Could you explain your understanding of the term or the phrase "might be involved?"
>
> A: . . . so I think one has to apply a rule of reason and put it in context to come up with a <u>common sense</u> interpretation of the term.

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[3] JEDEC was and continues to be affiliated with EIA. Nevertheless, JEDEC and other entities affiliated with EIA, was free to adopt a patent policy that fit their peculiar needs. In any event, there is no inconsistency between the JEDEC policy and the EIA policy. Kelly Dep. (2/26/03) at 41:24-42:8, *In the Matter of Rambus, Inc.* (he understood the EIA policy to require disclosure of patent applications since he began working at EIA in September 1990). **[Tab 4]**

Keefauver Dep. 3/4/03 ("Keefauver Dep.") at 61:9-62:2, *In the Matter of Rambus, Inc.* **[Tab 2]**. Complaint Counsel agrees that a common sense reading of the Jedec Manual of Procedure and the conduct of the JEDEC participants would provide an appropriate basis for Your Honor to determine Rambus's obligations under the patent policy. Common sense, however, does not require the assistance of an expert - not matter how well qualified. *Niebur*, 136 F. Supp.2d at 918-19 ("even a supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method.") (citations omitted).

Expert testimony should be excluded when the expert offers opinions on lay matters that the trier of fact is capable of understanding without the expert's assistance. *Andrews*, 882 F.2d at 708. Mr. Keefauver's admissions during his deposition reveal that specialized knowledge or training is not required to understand the requirements of the JEDEC patent policy. The only thing Mr. Keefauver did was to read the policy, try to put it in context, and make a common sense judgment. Keefauver Dep. at 61:18-62:2 **[Tab 2]**. Although courts have recognized that sometimes it may be difficult to distinguish genuine expertise from "something that is nothing more than fancy phrases for common sense,"[4] no such difficulty is found here. Mr. Keefauver's testified that his opinions are based on common sense and without regard to the evidence in the record.

To the extent that Mr. Keefauver's opinions are not explicitly based on common sense, they appear to be based on: (1) a simple reading of the plain language of the JEDEC patent policy and the patent policies of six other SSOs; (2) his experience as an employee of AT&T and

[4] *See Niebur*, 136 F. Supp.2d at 919 (quoting *United States v. Hall*, 93 F.3d 1337, 1342 (7th Cir. 1996)).

Bell Labs; and (3) the untested factual assertions of Rambus's outside counsel. *Expert Report of William L. Keefauver* ("Keefauver Rep.") at par. 4 **[Tab 1]**; Keefauver Dep. at 55:2-8 **[Tab 2]**. None of these bases require any specialized knowledge or expertise.

Mr. Keefauver's testimony is no more helpful in interpreting the JEDEC patent policy than the dozens of engineers and JEDEC participants on Complaint Counsel's and Rambus's witness lists. When asked how one could become an expert in this field, Mr. Keefauver responded that after working for less than ten years at one of the companies involved in this area "a certain amount of knowledge rubs off after a while." Keefauver Dep. at 73:5-74:6 **[Tab 2]**. By his definition, Farhad Tabrizi, Tom Landgraf, Ilan Krashinsky, Dr. Betty Prince, Hans Wiggers, and many others are all experts. But they all are more qualified than Mr. Keefauver to opine on the meaning of the JEDEC patent policy because they have practical experience in interpreting and applying the policy in real life situations.

Finally, the interpretation of the JEDEC patent policy is a lay matter and is not a proper subject of expert testimony. Indeed, during the *Infineon* litigation Rambus agreed with the Court that interpretation of the JEDEC patent policy was not the proper subject of expert testimony. Rambus's counsel objected to witnesses giving opinion testimony regarding the meaning of the patent policy. Rambus's objection, however, was not limited to lay witnesses attempting to provide expert opinions. In fact, Rambus's attorney stated "I don't think it's [the JEDEC patent policy] a proper subject of expert testimony." Testimony of John Kelly, April 30, 2001, Trial Tr. at 251, *Rambus v. Infineon* **[Tab 5]**. The court agreed, stating "No, it isn't. That's why it wouldn't make any sense to designate him [John Kelly] as an expert." *Id.* Rambus cannot object to expert testimony in one proceeding, but then seek to admit expert testimony concerning the

identical issue in another proceeding.

III. Mr. Keefauver's Opinions Are Unreliable Because They are Based on Insufficient Data and Untested Facts

The data undergirding Mr. Keefauver's opinion is unreliable and inadmissible, or what Judge Milton Shadur in the Northern District of Illinois might call, "the Rule 702 equivalent of what in early computer vocabulary bore the label 'GIGO' ("garbage in, garbage out"). *Kay v. First Continental Trading, Inc.*, 976 F.Supp. 772, 776 (N.D.Ill. 1997) (rejecting expert's opinion for using unreliable information). Mr. Keefauver's opinions are unreliable because of the glaring lack of due diligence to gather the most basic data to support his theory. While Mr. Keefauver understands that there are dozens of standard setting organizations just in the United States, his review is limited to the patent policies of only six, including JEDEC's.[5] This fact is significant because Mr. Keefauver's conclusion is based, in large part, on the theory that JEDEC members would have understood the requirements of the JEDEC patent policy in light of their experience in other SSOs. Keefauver Rep. at par. 2(b) (experience with other SSOs "would have set the foundation for their 'common understandings'" of the JEDEC policy). **[Tab 1]**. As discussed below, Mr. Keefauver performed no investigation to verify his guesses. Keefauver Dep. at 36:18-37:8 **[Tab 2]**. But even if he had verified whether JEDEC members also were members of ANSI or SEMI, his sampling of six or eight out of hundreds of SSOs is insufficient to produce reliable results. Thus, assuming *arguendo* that Mr. Keefauver's general theory is true (and it is

[5] Keefauver Dep. at 24:13-18 (citing EIA, TIA, IEEE, JEDEC, VESA, and SEMI). **[Tab 2]**. Although his report relies upon the ANSI patent policy, Mr. Keefauver noted correctly that ANSI is not an SSO. *Id.* at 24:24-25:2. Mr. Keefauver also was vaguely familiar with the patent policies of two international SSOs, CCITT and ITU, but those do not appear to form the basis of his opinion and are not mentioned in his report. *Id.* at 29:18-30:17.

not), he provides no reason why his selection of these five non-JEDEC SSOs is particularly relevant to the exclusion of the dozens of other SSOs operating in the United States. There is no evidence that the five non-JEDEC patent policies that he reviewed are in any way representative of the field. By sampling only a limited number of SSO patent policies and guessing at which other SSOs JEDEC members would have participated in, Mr. Keefauver does not provide Complaint Counsel or Your Honor with a sufficient factual basis upon which to test his theory.[6]

As noted, Mr. Keefauver's opinion primarily is based on the fiction that JEDEC members would have understood the JEDEC patent policy in light of the policies of other SSOs to which they belonged. But there is not a scintilla of evidence in the record to support the basic assumptions underlying this theory.

> Q: What is the basis for your statement that the JEDEC members were also members of these other high-tech SDOs?
>
> A: Well, I looked at the companies who participated in JEDEC, and were members of JEDEC, and I'm personally familiar with most of them, with their technology, and most of them are companies with technology interests which impact all of these SDOs. And from the fact that they participate in JEDEC, I <u>assume</u> that they also participate in these other SDOs.
>
> Q: Did you do any investigation to determine whether or not your assumption was correct?
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> A: <u>No, I did not</u>.

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[6] *See IQ Product Co. v. Pennzoil Products Co.*, 305 F.3d 368, 376 (5th Cir. 2002) (excluding two experts when neither conducted any market or survey research or any data subject to testing and one of the opinions was based on common sense). Mr. Keefauver did not even know whether Rambus, his own client, participated in other SSOs. Keefauver Dep. at 38:12-13 ("Rambus, I don't know, they certainly should be [participating in IEEE].") **[Tab 2]**

Keefauver Dep. at 36:18-37:8. **[Tab 2]**. When later asked whether his opinion that JEDEC members would "reach a corporate understanding of what the various patent policies are" is based on any evidence in the record, he replied "No, it's not." *Id.* at 40:12-19. In short, Rambus seeks to have Your Honor rely on an opinion that is not based on the facts of this case, but based solely on Mr. Keefauver's "common sense" reading of the JEDEC patent policy and unverified assumptions concerning JEDEC members's participation in other organizations.

Mr. Keefauver's assumptions should have been easy to verify through a minimal amount of discovery. Rambus could have asked JEDEC members about their participation in other SSOs, but it did not. A few simple questions on an issue that is fundamental to Mr. Keefauver's opinions would not have unduly complicated the discovery process. Instead of making this minimal effort, Rambus would prefer Your Honor to rely upon Mr. Keefauver's guesses and common sense.

Although Rambus did not deem it necessary to ask real witnesses about their experiences with other SSOs, Complaint Counsel did. In response to Complaint Counsel's questions, J. Reese Brown, a long-time JEDEC attendee and retired employee of UNISYS, testified concerning his experience with Mr. Keefauver's selection of SSOs:

> Q: Are you familiar with an organization called TIA?
>
> A: Vaguely.
>
> Q: Are you a member of it - - or have you ever been a member of it?
>
> A: I've never had any association with it at all.
>
> Q: Have you ever read TIA's patent policy?

A: No.

Q: Have you ever read ANSI's patent policy?

A: Not that I recollect.

* * *

Q: During the - - any of the time that you were active in IEEE, did IEEE have a patent policy?

A: They probably did, but I am unaware of any of the details of it.

Q: Are you familiar with a group called SEMI?

A: Vaguely. Semiconductor Electronic Manufacturers Association or Institute or something like that.

* * *

Q: During that time, 1991 to 1996, did you ever read SEMI's patent policy?

A: No.

Brown Dep. 1/22/03 at 53:17-55:12, *In the Matter of Rambus, Inc.* **[Tab 6]**. The record shows that not a single witness has testified that he or she interpreted the JEDEC patent policy in light of the patent policy of another SSO.[7] More importantly for this motion, however, is that Rambus never even bothered to ask. Because Rambus never asked such basic questions, Mr. Keefauver's opinions are not grounded in any facts.

[7] Dr. Betty Prince testified that although she had never seen the ANSI patent policy, she understood it to be the same as the JEDEC policy. Prince Dep. 2/24/03 at 173:2-16, *In the Matter of Rambus, Inc.* **[Tab 7]**. But her understanding is directly contrary to what Rambus and Mr. Keefauver would have Your Honor assume. Dr. Prince incorrectly understood that the ANSI policy *did* require the disclosure of patent applications. *Id.* Thus, even if Mr. Keefauver's basic premise is true, his application of the theory to the facts of this case is highly suspect. Based on Dr. Prince's testimony, it is more likely that JEDEC participants would have interpreted the patent policies of other SSOs in light of JEDEC's requirements, not the converse.

Apparently, Mr. Keefauver defines "members" as the companies that send employees to participate in JEDEC. While this is technically accurate, it is also misleading. Even if the corporate members participate in other SSOs, there is no evidence in the record or in Mr. Keefauver's report or testimony that indicates: (1) how information regarding non-JEDEC patent policies is provided to the employees who participate in JEDEC; or (2) why a corporate member or its participating employee would disregard the plain language of the JEDEC patent policy and the course of conduct in JEDEC meetings in favor of following the patent policy of another organization.

Mr. Keefauver's opinions also are not helpful to Your Honor because he relies upon the untested factual contentions of Rambus's lawyers. For example, paragraph 26 of the Keefauver report states that the JEDEC Manual of Organization and Procedure 21-I was distributed only to committee chairpersons. When asked for the basis of that statement, Mr. Keefauver responded that he asked "Ijay Palansky [Rambus's outside counsel] what the distribution was of this manual." Keefauver Dep. at 55:2-55:8 **[Tab 2]**. Obviously, Mr. Palansky's "testimony" is inadmissible and speculative. Similarly, any expert opinion that relies on the factual representations of counsel is just as inadmissible and speculative. Upon further questioning, Mr. Keefauver was unable to identify the testimony of a single witness who did not receive the 21-I manual.[8] Of course, given that he essentially disregarded the record, it is not clear that any

[8] Keefauver Dep. at 55:18-21 **[Tab 2]**. Rambus's Memorandum in Support of Summary Decision argues that Rambus did not receive the 21-I manual. (Mem. at 22). Rambus's claim is downright preposterous given that Richard Crisp admitted receiving a copy in 1995, reading it, and understanding that it applied to patent applications. Crisp Dep. 8/10/01 at 851:8-853:4, *Micron v. Rambus* **[Tab 8]**. Your Honor can only assume that the copy Mr. Crisp received in 1995 fell victim to Rambus's document destruction program and, therefore, assertions concerning the non-receipt of the 21-I manual should viewed in light of Judge Timony's rulings

testimony on this issue would have influenced his opinion. Again, the lack of effort to verify basic facts renders Mr. Keefauver's opinions unreliable and, therefore, inadmissible. Rambus could have asked non-Chairman participants whether they received the 21-I Manual, but it either did not ask or it did not provide Mr. Keefauver with the answers. Now Rambus seeks to profit from its lack of diligence by offering Mr. Keefauver's musings. *Mitchell v. Gencorp, Inc.*, 165 F.3d 778, 781 (10th Cir. 1999) (rejecting expert testimony where conclusions were little more than guesswork). As Judge Posner explained in *In re James Wilson Associates*, 965 F.2d 160, 173 (7th Cir. 1992) (citation omitted),

> If for example the expert witness (call him A) bases his opinion in part on a fact (call it X) that the party's lawyer told him, the lawyer cannot in closing argument tell the jury, "See, we proved X through our expert witness, A."

Likewise, Rambus cannot introduce its attorney's testimony as proof of the distribution of the JEDEC Manual of Organization and Procedure. Nor may it rely on Mr. Keefauver's opinions, which explicitly are based on attorney testimony.

Mr. Keefauver's opinions also are unreliable because he could not identify any independent or authoritative survey or other data that would be a reliable substitute for his failure

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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 9]** Moreover, Rambus did produce a copy of the 21-H manual (R173484) **[Tab 10]**, which was the predecessor of 21-I even though no Rambus employee was ever a committee chair. Complaint Counsel is entitled to an inference that Rambus received 21-I. Rambus, of course, is entitled to rebut that inference by clear and convincing evidence, which is virtually impossible in the face of Mr. Crisp's very clear testimony. Finally, any adverse inferences on this issue that Rambus is unable to rebut should be binding on Rambus's experts.

to conduct his own investigation.[9] Mr. Keefauver's unfamiliarity with scholars in the field is not surprising given that he appears to rely only on his informal contacts with former colleagues in order to keep up to date. Keefauver Dep. at 68:20-69:24 **[Tab 2]**. Mr. Keefauver's inability to identify any literature is due to the fact that he did not conduct any research whatsoever.

> Q: How would an expert in this area keep current with what's happening in the field?
>
> A: I think you have to stay in personal contact with the engineers who participate in SDOs
>
> Q: Anything else?
>
> A: That's the best way that comes to mind. Again, I would look for literature, but to my knowledge, I have not made a formal search of this subject. But that's certainly a possibility. I have a new approach.
>
> Q: When you say you haven't made a formal search, is there some lesser than formal search that you conduct?
>
> A: No, I didn't make any search at all.

Keefauver Dep. at 69:25-70:13. **[Tab 2]**. Obviously, Mr. Keefauver will not find any authoritative scholarship if he refuses to take a single moment to look for it. Expert opinions should be made of sturdier stuff.

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[9] Although Mr. Keefauver could not identify any other surveys performed by scholars in the field, David Teece, one of Rambus's other experts cites a draft article by his colleague Dr. Mark Lemley for his survey of twenty-nine SSOs. *Expert Report of David Teece* at 28, n. 63. **[Tab 11]** The draft article recently was published and the survey expanded to include forty-three different SSOs. Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889 (2002). The fact that Rambus's economic expert relies on authorities that Mr. Keefauver has never even considered is a telling indictment of just how little help Mr. Keefauver's opinions will provide. If Mr. Keefauver's is of no help to Rambus's own experts, then how can he be of any help to Your Honor or the Commission?

Nor does Mr. Keefauver's limited personal experience with standard setting organizations provide sufficient data upon which to form a reliable basis for expert testimony. *See Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025-26 (10th Cir. 2002) (excluding testimony based, in part, on limited personal experience). Mr. Keefauver's experience is based on his time at AT&T and Bell Labs. While he did spend some time on the EIA patent committee more than thirty years ago, he has never participated in a committee that actually developed standards. Keefauver Dep. at 27:13-23 **[Tab 2]**. His experience is limited to advising the attorneys who advised the engineers actually participating in the standard setting process. *Id.* at 29:3-9. Thus, Mr. Keefauver's experience since the 1960's is two steps removed from the actual application of patent policies.

Interestingly, Mr. Keefauver's experience, to the extent that it is useful at all, is inconsistent with his opinions. Sometime in the 1980's, (Mr. Keefauver retired in 1989), he advised an AT&T or Bell Labs employee to disclose a patent application even though Mr. Keefauver understood that such a disclosure was not required by the SSO's patent policy. *Id.* at 31:17-34:22. Although Mr. Keefauver opines that the "costs" to the SSOs and its members and the lack of useful information in patent applications suggests that applications should not be disclosed (*see* Keefauver Rep. at par. 17 **[Tab 1]**; Keefauver Dep. at 13:13-14:7 **[Tab 2]**), none of those concerns prevented the disclosure in this instance notwithstanding the fact that disclosure was not required.

In sum, Mr. Keefauver conducted no independent research or survey. He is not aware of the existence of, much less did he consult, any academic articles or texts on the subject. Indeed, his basic opinions were formed before he read any of the testimony in this matter. If all that is required is to read six patent policies and guess that JEDEC members would assume that JEDEC

follows the ANSI policy, then surely Your Honor does not require expert assistance. Furthermore, Mr. Keefauver's opinions appear to be in direct conflict with his actual work experience at AT&T and Bell Labs. In sum, the work conducted by Mr. Keefauver in this matter falls far short of the requirements of *Daubert*.

IV. Rambus is Estopped From Arguing or Presenting Any Evidence that the JEDEC Patent Policy Did Not Apply to Patent Applications

Finally, Rambus should be precluded from offering any testimony – expert or otherwise – concerning whether the JEDEC patent policy applied to patent applications. That issue was squarely before the Federal Circuit in the *Infineon* litigation and was decided against Rambus. Rambus has not appealed that decision and, therefore, is bound by it. The issues concerning which Mr. Keefauver intends to testify were actually litigated in the *Infineon* case, were actually and necessarily determined in that proceeding, and applying estoppel against Rambus would not "work an unfairness." *E.g.*, *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986); *Montana v. United States*, 440 U.S. 147, 153 (1979); *accord Mother's Restaurant, Inc. v. Mama's Pizza*, 723 F.2d 1566. 1571 (Fed. Cir. 1983); *United States v. Weems*, 49 F.3d 528, 531-32 (9th Cir. 1995).

CONCLUSION

The proffered expert testimony of William Keefauver is not admissible because Mr. Keefauver's common sense opinions essentially are lay testimony that requires no specialized knowledge, Mr. Keefauver's opinions are based upon unreliable assumptions and rank guesswork, and Rambus is estopped from contesting the fact that the JEDEC patent policy requires the disclosure of patent applications. Therefore, Your Honor should grant Complaint

Counsel's motion to exclude Mr. Keefauver's report and prohibit Mr. Keefauver from testifying in this matter.

Respectfully submitted,

_____

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Geoffrey D. Oliver
Jerome A. Swindell

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Dated: March 26, 2003

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Public Version

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MOTION *IN LIMINE* TO
PRECLUDE REPORT AND TESTIMONY OF WILLIAM L. KEEFAUVER

Complaint Counsel hereby moves for entry of an order precluding the report and testimony of William L. Keefauver. Rambus intends to offer Mr. Keefauver as an expert in interpreting the duties that the JEDEC patent policy imposed on JEDEC's members. Mr. Keefauver's proffered testimony neither will be helpful to Your Honor nor is it based upon reliable methods, facts and or data. Therefore, it is irrelevant to this case. In addition, some of the matters concerning which Mr. Keefauver intends to testify were litigated and necessarily decided in *Rambus Inc. v. Infineon Technologies AG*, 155 F. Supp. 2d 668 (E.D. Va. 2001), *aff'd in part and rev'd in part*, 318 F.3d 1081 (Fed Cir. 2003), and should be given collateral estoppel effect in this proceeding. Rambus should be barred from relitigating the same factual issues here. We respectfully submit that Your Honor should grant this Motion for the reasons set forth in Complaint Counsel's Memorandum in Support of Motion *In Limine* to Preclude Report and Testimony of William Keefauver, filed March 26, 2003.

* * * * *

Respectfully submitted,

_____

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Dated: March 26, 2003

UNITED STATES OF AMERICA
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[PROPOSED] ORDER

Upon consideration of the Motion *In Limine* to Preclude Report and Testimony of William Keefauver, dated March 26, 2003,

IT IS HEREBY ORDERED that Complaint Counsel's Motion is Granted.

_____
Stephen J. McGuire
Chief Administrative Law Judge

Date: _____

Tabs not included in public version.

CERTIFICATE OF SERVICE

I, Emily Pitlick, hereby certify that on May 28, 2003, I caused a copy of the following materials:

1. Motion *In Limine* to Preclude Report and Testimony of William L. Keefauver;

2. Memorandum in Support of Motion *In Limine* to Preclude Report and Testimony of William L. Keefauver;

3. [Proposed] Order; and

4. Corresponding Declaration,

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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_____
Emily Pitlick