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**FILED**

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27 **UNITED STATES DISTRICT COURT**  
28 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

29 HYNIX SEMICONDUCTOR INC.,  
30 HYNIX SEMICONDUCTOR AMERICA  
31 INC., HYNIX SEMICONDUCTOR U.K.  
32 LTD., and HYNIX SEMICONDUCTOR  
33 DEUTSCHLAND GmbH,

Case No. CV 00-20905 RMW

**MOTION TO COMPEL PRODUCTION OF  
PRE-MARKED TRIAL EXHIBITS FROM  
THE FTC ACTION**

34 Plaintiffs,  
35  
36 v.  
37 RAMBUS, INC.,  
38 Defendant.

Date: March 4, 2004  
Time: 2:00 p.m.  
Place: JAMS – San Jose (telephonic)  
Before: The Hon. Read Ambler (Ret.)  
Special Master



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1 **NOTICE**

2 TO DEFENDANT AND COUNTERCLAIMANT RAMBUS INC. AND ITS COUNSEL  
3 OF RECORD HEREIN:

4 PLEASE TAKE NOTICE that on March 4, 2003 at 2:00 p.m., to be heard telephonically  
5 before the Honorable Read A. Ambler (Ret.) of JAMS' San Jose office, 160 W. Santa Clara Street,  
6 Suite 1150, San Jose, California, plaintiffs and counterdefendants Hynix Semiconductor Inc.,  
7 Hynix Semiconductor America Inc., Hynix Semiconductor U.K. LTD., and Hynix Semiconductor  
8 Deutschland GmbH (collectively, "Hynix") will bring a motion to compel defendant and  
9 counterclaimant Rambus, Inc. ("Rambus") to produce within twelve (12) business days of the  
10 hearing full, unredacted copies of all pre-marked trial exhibits exchanged between the parties in  
11 the case against Rambus before the Federal Trade Commission entitled *In the Matter of Rambus,*  
12 *Inc.*, U.S. Federal Trade Commission Docket No. 9302 (the "FTC Action"). Hynix will also seek  
13 an order requiring Rambus to supplement its responses to Hynix's Third Supplemental Set of  
14 Requests to Defendant Rambus for Production of Documents and Things (the "Third  
15 Supplemental Requests"), Request Nos. 147 – 150, withdrawing all unsupportable objections and  
16 indicating that Rambus will produce all pre-marked trial exhibits.

17 Hynix brings this motion on the grounds that (a) the pre-marked trial exhibits are  
18 responsive to the Third Supplemental Requests, and under Federal Rule of Civil Procedure 34(b),  
19 full copies of the documents should have been produced by February 17, 2003, if not earlier; (b)  
20 the Court previously ordered that the documents be produced by July 1, 2003; (c) Rambus already  
21 agreed to produce them; and (d) the documents are directly relevant to the claims and defenses in  
22 this action and, therefore, any substantive objection to their production is meritless.

23 The motion will be based on this notice, the memorandum of points and authorities that  
24 follows, the Separate Statement in Support of Motion to Compel Pre-Marked Trial Exhibits from  
25 the FTC Action filed herewith (the "Separate Statement"), the Declaration of Geoffrey H. Yost in  
26 Support of Motion to Compel Pre-Marked Trial Exhibits from the FTC Action filed herewith  
27 ("Yost Decl."), any reply briefing submitted by Hynix, the papers in the Court's file on this action,  
28 and upon such additional evidence and/or argument as may be presented at or before the hearing

1 of this matter.

## 2 MEMORANDUM OF POINTS AND AUTHORITIES

### 3 INTRODUCTION

4 Hynix has requested in written discovery and Rambus is refusing to produce the pre-  
5 marked hearing exhibits that Rambus and its opponents exchanged in the related FTC Action.  
6 These pre-marked hearing exhibits are key to understanding what happened at the evidentiary  
7 hearing in the FTC Action between May and August of last year. As the Court is aware, the  
8 factual allegations in the FTC Action parallel the factual allegations raised by Hynix's complaint  
9 in this action. Since there can be no dispute about whether the substance of the trial proceedings  
10 in the FTC Action are directly relevant to the claims and defenses in this action, there can be no  
11 dispute that Hynix is entitled to review and analyze the trial transcript. Throughout the trial,  
12 however, the administrative law judge, lawyers, and witnesses consistently referred to exhibits by  
13 their pre-marked exhibit number. (*See, e.g., Yost Decl., Exhibit A.*) In order to follow the  
14 transcript, it is imperative that one have available copies of the actual pre-marked exhibits. It is all  
15 but impossible to understand the trial transcript fully without them.

16 The exhibits are responsive to the Third Supplemental Requests. Those requests seek,  
17 among other things, documents each side served on or produced to the other in the FTC Action.  
18 Hynix has learned that a full set of each side's proposed, pre-marked trial exhibits – the exhibits  
19 themselves, not just exhibit lists – were exchanged electronically between Rambus' counsel and  
20 the FTC complaint counsel in or about May of 2003. (*See Yost Decl., ¶ 3.*)

21 Issues arising from Rambus' failure to produce documents in response to Hynix's Third  
22 Supplemental Requests for Production were before the Court several times last year, culminating  
23 in the Court's June 13, 2003 Order Setting Deadline for Rambus to Complete Production of FTC  
24 Pleadings and Transcripts (the "Deadline Order"). The Deadline Order set July 1, 2003 as the  
25 deadline for producing "all of the requested documents." (Deadline Order, at 2:22-23.) Rambus is  
26 defying that order by failing to produce the pre-marked trial exhibits.

27 Rambus had not previously disputed that exhibits from the FTC Action should be produced  
28 to Hynix. On the contrary, this Court found that Rambus had *agreed* to produce *all* such

1 documents. (See Deadline Order, at 2:11-12; see also, Order Granting Request for Clarification of  
2 June 13, 2003 Order (the “Clarification Order”), at 6:6-8.) Although Rambus obtained  
3 clarification from the Court that the Deadline Order did not address *in camera* trial exhibits and  
4 testimony, Rambus never challenged its obligation to produce any other documents responsive to  
5 the Third Supplemental Requests. All pre-marked FTC trial exhibits, therefore, should have been  
6 produced in response to the Deadline Order.

7 None of the objections and excuses Rambus offered during the lengthy meet and confer on  
8 this issue hold water. Yet Rambus apparently will not produce the pre-marked trial exhibits  
9 exchanged between Rambus and complaint counsel without a court order. This motion, therefore,  
10 should be granted.

## 11 RELEVANT BACKGROUND

### 12 I. THE TRIAL OF THE FTC ACTION

13 The FTC Action came on for evidentiary hearing beginning April 30, 2003 and continuing  
14 until August 1, 2003. The hearing generated a 11,806 page trial transcript. The final exhibit lists  
15 from each side included a total of 2,323 exhibits. (Yost Decl., ¶¶ 3 – 4.) It appears one or more of  
16 the pre-marked exhibits were introduced and/or discussed every day on which witnesses testified.  
17 Throughout the evidentiary hearing, the parties and the administrative law judge referred to  
18 exhibits by the number that the offering party had assigned and marked directly on the front page  
19 of each exhibit. (See, e.g., Yost Decl., Exhibit A.)

20 Prior to the hearing, Rambus and FTC complaint counsel notified the appropriate third  
21 parties if they anticipated using as trial exhibits documents with third party confidential  
22 information. The third parties were thereby given the opportunity to seek *in camera* treatment of  
23 such exhibits. Hynix received one of these notices, and brought its own, successful motion to  
24 secure *in camera* protection for a small minority of the Hynix documents that were to be trial  
25 exhibits. (Yost Decl., ¶ 5.)

### 26 II. HYNIX’S THIRD SUPPLEMENTAL REQUESTS

27 Hynix served its Third Supplemental Requests on January 13, 2003. (See Yost Decl.,  
28 Exhibit B, at 7 – 8.) Request Nos. 147, 148, 149, and 150 collectively seek all documents filed,

1 served, or exchanged between the parties in the FTC Action. In particular, they seek “[a]ll  
2 documents produced or served by [Rambus] in the FTC Action including, but not limited to . . .  
3 exhibits . . .”, and “[a]ll documents the FTC has produced to [Rambus] or served on [Rambus] in  
4 the FTC Action including, but not limited to, . . . exhibits . . .” (*Id.*, at 5:18-20, 6:2-4.)

5 Rambus responded to the Third Supplemental Requests on February 12, 2003, stating that  
6 it would produce some of the documents produced, served, submitted, or filed by Rambus  
7 (Request Nos. 147 – 149), but none of those produced or served by the FTC complaint counsel  
8 (Request No. 150). (*See id.*, Exhibit C, at 6:1-7.)

### 9 **III. MEET AND CONFER HISTORY AND THE DEADLINE ORDER**

10 Following a lengthy meet and confer process<sup>1</sup> and two motions to compel, Rambus  
11 abandoned its boilerplate objections to Request Nos. 147 – 150 (addressed in the Separate  
12 Statement) when it “agreed to produce FTC materials, including hearing transcripts and exhibits”  
13 in response to Hynix’s second motion to compel, which sought a deadline for the production of  
14 such materials. (Clarification Order, at 6:6 – 9.) The sticking point, however, was Rambus’ failure  
15 to comply with the protective order from the FTC action, which requires Rambus to “promptly”  
16 notify the relevant third parties whenever it receives a discovery request that seeks documents  
17 containing any third party’s confidential material. On June 4 and June 6, 2003, some five months  
18 after receiving the Third Supplemental Requests, Rambus finally sent out notifications to  
19 numerous third parties informing them of their right to intervene to prevent the production to  
20 Hynix of any confidential information in documents responsive to the requests. (*See* Deadline  
21 Order, at 2:13-19.)

22 Hynix subsequently moved for a deadline “to complete the production of full, unredacted  
23 copies of all non-public pleadings, briefs, filings, deposition transcripts, deposition exhibits and  
24

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25 <sup>1</sup> Last year’s extensive meet and confer communications regarding the FTC Action documents is  
26 described in detail in Hynix’s May 6, 2003 Letter Brief in Support of Motion to Compel  
27 Production of FTC Pleadings and Transcripts and in Hynix’s June 5, 2003 Letter Brief in Support  
28 of Motion for Order Setting Deadline for Rambus to Complete Production of FTC Pleadings and  
Transcripts. Hynix requests that the Court take judicial notice of the “Background” section of  
these letter briefs and the associated exhibits pursuant to Federal Rule of Evidence 201.

1 hearing transcripts and associated exhibits from the FTC action.” (Deadline Order, at 2:7-11.) The  
2 motion was heard on June 12, 2003, and the following day the Court issued the Deadline Order,  
3 which granted Hynix’s motion in part. The Deadline Order gave third parties additional time to  
4 intervene and protect their confidential information. “With respect to all third parties who fail to  
5 intervene by June 30, 2003,” the Court ordered, “Rambus shall personally serve upon Hynix *all of*  
6 *the requested documents* no later than July 1, 2003.” (*Id.*, at 2:21-23 (emphasis added).)  
7 Additionally, Rambus was to produce all requested documents that contained no third party  
8 confidential information even sooner, by June 30, 2003. (*Id.*, at 2:23-25.)

9 By July 2, 2003 Rambus had produced many, but not all of the documents it was ordered  
10 to produce. In the meantime, a dispute arose regarding *in camera* trial testimony and exhibits, a  
11 second hearing was held, and the Court issued its Clarification Order. The Clarification Order  
12 reiterates that Rambus agreed to produce hearing transcripts *and* exhibits. (Clarification Order, at  
13 6:7-8.) Rambus did not complete its production of *in camera* trial exhibits until January 23, 2004,  
14 and only after notifying third parties of the Third Supplemental Requests a second time. (Yost  
15 Decl., ¶ 8.)

16 Late last year, counsel for Hynix reviewed the FTC Action documents Rambus had  
17 produced in July and September and discovered that except for some of the *in camera* exhibits,  
18 Rambus had failed to produce any trial exhibits, whether proposed or actually admitted into  
19 evidence. (*See* Yost Decl., ¶ 9.) On December 29, 2004, counsel for Hynix wrote to counsel for  
20 Rambus requesting that Rambus set a date for the production of the pre-marked trial exhibits. (*See*  
21 *id.*, Exhibit D.) Rambus did not respond. (*Id.*, ¶ 10.)

22 Counsel for Hynix wrote again on January 20, 2004, requesting a response to the  
23 December 29 letter. (*See id.*, Exhibit E.) Finally, on January 23, 2004, a paralegal at Rambus’  
24 counsel’s law firm responded by saying, “Rambus agreed to produce all *in camera*, admitted trial  
25 exhibits from the FTC action,” suggesting Rambus had agreed to produce no other exhibits. (Yost  
26 Decl., Exhibit F., at 1.) This assertion is contradicted by both the Deadline Order and the  
27 Clarification Order, and the letter failed to provide any assurance that the trial exhibits would be  
28 produced. Accordingly, Hynix reserved the date for this hearing, and notified counsel for

1 Rambus. (Yost Decl., ¶ 12.)

2       It was only then that Rambus' counsel "perked up," claiming that there had been no meet  
3 and confer on the subject of the FTC trial exhibits, and that Hynix was seeking to "expand prior  
4 agreements concerning production." (*Id.*, Exhibit G, at 1.) Of course, the parties have been  
5 meeting and conferring regarding the Third Supplemental Requests in general and the production  
6 of FTC Action hearing exhibits in particular for the past year. (*See* footnote 1 above; Yost Decl.,  
7 Exhibits D - J, ¶ 15.) Nevertheless, Hynix's counsel invited counsel for Rambus to further meet  
8 and confer on this subject in a conference call. (*See id.*, Exhibit I, at 1.)

9       Counsel conducted an hour-long, telephonic meet and confer discussion on February 12,  
10 2004 in which the majority of the time was spent discussing Rambus' failure to produce the FTC  
11 trial exhibits. Rambus' counsel raised three substantive objections to the production during that  
12 call:

- 13       1.       Some of the exhibits were only "marginally relevant";
- 14       2.       Some of the exhibits contain confidential third party information; and
- 15       3.       The exhibits may have been destroyed.

16 (Yost Decl., ¶ 15; *see* Exhibit I.)

17       During the call and again in a February 15, 2004 letter, Hynix's counsel explained why  
18 these objections were invalid, and reiterated the basis for Hynix's demand for a full set of the pre-  
19 marked trial exhibits. (*Id.*) Rambus responded with a cryptic and accusatory February 18 letter,  
20 offering only the conclusory statement that the production of the pre-marked trial exhibits would  
21 "exceed the scope of our prior agreement and impose substantial burdens on Rambus." (*Id.*,  
22 Exhibit J, ¶ 2.)

23       It seems highly improbable that Rambus destroyed its copies of each side's pre-marked  
24 exhibits, since the FTC Action is not expected to be heard and decided by the full commission  
25 until 2005. Rambus' destruction of these documents, which have been subject to the Third  
26 Supplemental Requests since January of 2003 and to the Deadline Order since June of 2003,  
27 would amount to litigation misconduct. In any event, other than *in camera* trial exhibits produced  
28 just last month, to date Rambus has produced to Hynix none of the pre-marked FTC Action trial

1 exhibits. Nor has Rambus agreed to a date for their production. (Id., at ¶ 18.)

## 2 ARGUMENT

### 3 I. HYNIX IS ENTITLED TO THE PROPOSED FTC TRIAL EXHIBITS 4 BECAUSE THEY ARE RELEVANT TO THE CLAIMS AND DEFENSES IN 5 THIS ACTION

6 It is undisputed that the FTC Action is based on many of the same allegations as those set  
7 forth in the complaint in this action. As Hynix has noted to the Court in previous motions, the  
8 FTC's claims against Rambus raise the some of the same issues with respect to many of the same  
9 technologies as those at issue in this action. Both Hynix and the FTC assert anticompetitive acts  
10 and practices by Rambus in connection with the patenting and licensing of DRAM technology.  
11 (FTC Complaint, ¶¶ 1, 91 – 120;<sup>2</sup> Second Amended Complaint, ¶¶ 32 – 34, 78 – 88, 99 – 110.)  
12 Both allege misconduct by Rambus in connection with its membership at JEDEC. (FTC  
13 Complaint, ¶¶ 2, 47 – 55, 70 – 90; Second Amended Complaint, ¶¶ 37 – 77, 125 – 158.)  
14 Accordingly, the evidence and submissions in the FTC Action will necessarily be relevant to  
15 Hynix's claims and defenses in this action.<sup>3</sup>

16 Rambus does not appear to dispute that most of the proposed trial exhibits, particularly  
17 those ultimately admitted into evidence, are therefore relevant to Hynix's claims and defenses.  
18 Instead, Rambus complains only that exhibits not admitted into evidence would be "marginally  
19 relevant," and therefore need not be produced. Anything marginally relevant to claims and  
20 defenses in this action, however, is by definition discoverable. Rule 26(b)(1) does not distinguish  
21 between degrees of relevance.

22 Furthermore, Hynix disagrees that *any* of the proposed exhibits would be "marginally  
23 relevant." In reality, Rambus should already have produced to Hynix most if not all of the  
24 documents that constitute the pre-marked exhibits; the issue here is that Hynix does not know  
25 which documents line up with which of the exhibit numbers arbitrarily assigned by the parties for

26 <sup>2</sup> The complaint from the FTC Action is before the Court, attached as Exhibit B to the Request for  
27 Judicial Notice in Support of Motion to Compel re Second Supplemental Requests for Production  
of Documents, filed February 9, 2003.

28 <sup>3</sup> A further discussion of relevance is set forth in the Separate Statement filed herewith.

1 purposes of the evidentiary hearing. Additionally, the parties' designation and disclosure of  
2 anticipated trial exhibits is the best indication of what constitute the most relevant documents in  
3 the case, culled from the larger set of documents exchanged in pre-hearing discovery. The fact  
4 that a party made a "judgment call" not to introduce a given exhibit into evidence once trial was  
5 underway, or that the ALJ refused to admit a given exhibit, does not mean the exhibit was not  
6 relevant. A document that is highly relevant may nevertheless be excluded from evidence by a  
7 party's choice or by a judge's ruling that could be based on any number of reasons not related to  
8 relevance. Indeed, admissibility at trial is not the standard for discoverability. (*See Fed. Rule Civ.*  
9 *Proc. 26(b)(1).*)

10 Contrary to its latest assertions, Rambus agreed to produce all exhibits from the FTC  
11 action, including those from last year's lengthy evidentiary hearing. Even if it had not so agreed,  
12 the pre-marked trial exhibits must be produced because they are among the most relevant  
13 documents generated from the FTC Action, they are crucial to understanding the trial transcript,  
14 and Hynix asked for them in discovery over a year ago. Rambus should be ordered to produce  
15 them.

16 **II. THIRD PARTY CONFIDENTIALITY CANNOT BE USED TO DELAY**  
17 **PRODUCTION YET AGAIN BECAUSE RAMBUS HAS ALREADY**  
18 **NOTIFIED THIRD PARTIES ABOUT THIS DISCOVERY**

19 Rambus asserts that before producing the FTC trial exhibits, it will again have to notify  
20 third parties that their confidential information is about to be produced to Hynix. It relies on the  
21 FTC protective order for this position. Paragraph 16 of the FTC protective order is clear,  
22 however: Rambus should have notified third parties "promptly" after receiving the requests from  
23 Hynix in February 2003.<sup>4</sup> Far too much time has passed since Rambus received Hynix's Third  
24 Supplemental Requests for Rambus still to be notifying third parties.

25 Besides, Rambus purportedly *completed* the notification of third parties on June 6, 2003.  
26 Rambus sent out more notices to third parties about the *in camera* material on August 18, 2003.

27 <sup>4</sup> The FTC protective order is before the Court attached as Exhibit O to Hynix's June 5, 2003  
28 Letter Brief in Support of Motion for Order Setting Deadline for Rambus to Complete Production  
of FTC Pleadings and Transcripts.

1 (Yost Decl., ¶ 8.) These notifications were in addition to the notification Rambus and complaint  
2 counsel provided to third parties *before* the evidentiary hearing regarding pre-marked exhibits that  
3 contained their confidential information. With all these notifications, Rambus should have  
4 covered all of the third party confidential information subject to the Third Supplemental Requests.  
5 Moreover, third parties with concerns about particular exhibits would have moved for *in camera*  
6 treatment, and Rambus purports to have produced to Hynix all the *in camera* trial exhibits already.  
7 If Rambus feels compelled to notify third parties yet again, it should have done so already, or in  
8 the two weeks remaining before the hearing of this motion.

9 Rambus is still using third party confidentiality to block discovery of documents from the  
10 FTC action when it was ordered to resolve the issue last year. The full set of pre-marked FTC  
11 Action trial exhibits constitutes documents that Rambus and FTC complaint counsel were  
12 otherwise prepared to place into evidence at a public hearing and thus into the public record,  
13 except those documents that would receive *in camera* treatment (which documents Rambus should  
14 have produced to Hynix already). Confidentiality issues have been resolved. This is simply not a  
15 valid basis for refusing to produce these documents. Rambus must stop using third party  
16 confidentiality as a delaying tactic and produce the pre-marked trial exhibits now.

### 17 CONCLUSION

18 Rambus has strung out this FTC Action document production far too long. This case is  
19 months from trial and even though Hynix properly requested the FTC trial exhibits over a year  
20 ago, it still does not have them. Without them, Hynix is effectively blocked from learning what  
21 happened at the FTC Action trial. Accordingly, Hynix requests that the Court order Rambus to

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1 produce to Hynix's counsel within twelve (12) court days of the hearing of this motion a  
2 complete set of the pre-marked trial exhibits exchanged between the parties in the FTC Action.

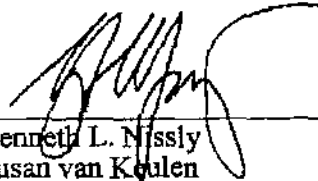
3 Dated: February 19, 2004

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