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1 GREGORY P. STONE (State Bar No. 78329)
2 KELLY M. KLAUS (State Bar No. 161091)
3 ANDREA WEISS JEFFRIES (State Bar No. 83408)
4 MUNGER, TOLLES & OLSON LLP
5 355 South Grand Avenue, 35th Floor
6 Los Angeles, CA 90071-1560
7 Telephone: (213) 683-9100
8 Facsimile: (213) 687-3702

9 PETER A. DETRE (State Bar No. 182619)
10 MUNGER, TOLLES & OLSON LLP
11 33 New Montgomery Street, 19th Floor
12 San Francisco, CA 94105-9781
13 Telephone: (415) 512-4000
14 Facsimile: (415) 512-4077

15 Attorneys for Defendant,
16 RAMBUS INC.

17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN JOSE DIVISION

20 HYNIX SEMICONDUCTOR INC.;
21 HYNIX SEMICONDUCTOR AMERICA
22 INC.; HYNIX SEMICONDUCTOR U.K.
23 LTD.; and HYNIX SEMICONDUCTOR
24 DEUTSCHLAND GMBH,

25 Plaintiffs,

26 vs.

27 RAMBUS INC.,

28 Defendant.

29 RAMBUS INC.,

30 Counterclaim-Plaintiff,

31 vs.

32 HYNIX SEMICONDUCTOR INC.;
33 HYNIX SEMICONDUCTOR AMERICA
34 INC.; HYNIX SEMICONDUCTOR U.K.
35 LTD.; and HYNIX SEMICONDUCTOR
36 DEUTSCHLAND GMBH,

37 Counterclaim-Defendants.

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

391

CASE NO. CV-00-20905 RMW

DEFENDANT RAMBUS'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
OPPOSITION TO HYNIX'S MOTION TO
COMPEL PRODUCTION OF PRE-MARKED
TRIAL EXHIBITS FROM THE FTC ACTION

Judge: Hon. Read Ambler (Ret.)
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Dept: JAMS -- San Jose (telephonic)

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. INTRODUCTION 1

II. BACKGROUND 1

 A. Pleadings, Briefs, Filings, Deposition Transcripts, And Hearing Transcripts 1

 B. Rambus’s Conciliatory Agreement To Produce Non-Public Exhibits Presented At The FTC Hearings 2

 C. Proposed Exhibits 4

III. ARGUMENT 6

 A. The Proposed Trial Exhibits Of Rambus And The FTC Are Not Responsive To Hynix’s Third Supplemental Requests For Production. 6

 B. The Court Has Never Ordered Production Of The Proposed Trial Exhibits 7

 C. Rambus’s Agreement Was Clearly Limited To Production Of Non-Public And Admitted Exhibits 7

 D. The Relevance Of The Proposed Trial Exhibits Is Immaterial. 8

 E. Third Party Confidentiality Concerns Also Require Denial Of Hynix’s Motion To Compel Production Of Proposed Trial Exhibits 8

IV. CONCLUSION 10

1 **I. INTRODUCTION**

2 The question before this Court is whether Plaintiffs (collectively herein “Hynix”)
3 are entitled to “full, unredacted copies of all pre-marked trial exhibits” prepared by Rambus and
4 the FTC for use in *In the Matter of Rambus, Inc.*, U.S. Federal Trade Commission Docket No.
5 9302 (the “FTC Action”). Mot.¹ at 1. The answer is no.

6 Hynix already sought production of and received exhibits from the FTC Action.
7 In fact, Hynix brought its dispute about the production of FTC exhibits to this Court last May and
8 June. That dispute was fully resolved by Rambus’s agreement to go above and beyond the scope
9 of Hynix’s requests for production and to produce all non-public and admitted exhibits in the FTC
10 Action. Now, Hynix seeks to go back to the well in order to obtain *proposed* trial exhibits from
11 the FTC Action. Hynix’s motion must be denied.

12 **II. BACKGROUND**

13 All pre-February 2004 correspondence between Hynix and Rambus as well as the
14 parties’ prior briefs to the Court show that production of *proposed* exhibits in the FTC Action was
15 never contemplated by the parties.

16 **A. Pleadings, Briefs, Filings, Deposition Transcripts, And Hearing Transcripts**

17 When Hynix first sought production of documents from the FTC Action, the
18 company asked for “pleadings, briefs, filings, deposition transcripts, and hearing transcripts.”
19 Rambus Ex. A at 1, 5 (5/2/03 Letter Brief).² The parties met and conferred exclusively about
20 these issues. *See* Rambus Ex. B at 2 (Letter from Ms. Nguyen to Mr. Yost, dated 5/13/03, setting
21 agenda for meet and confer to include discussion of “pleadings and transcripts” in FTC Action);
22 Rambus Ex. C at 1 (Letter from Mr. Yost to Andrea Jefferies, dated 5/15/03, describing meet and
23 confer as covering production of “all of the pleadings, deposition transcripts, hearing transcripts,
24 briefs, expert reports and filings from the FTC action”). Counsel for Rambus made it crystal

25 _____
26 ¹ “Mot.” refers to Hynix’s Motion To Compel Production Of Pre-Marked Trial Exhibits From
The FTC Action.

27 ² “Rambus Ex. ___” refers to the exhibits attached to the Declaration Of Andrea Weiss Jeffries In
28 Support Of Defendant Rambus’s Memorandum Of Points And Authorities In Opposition To
Hynix’s Motion To Compel Production Of Pre-Marked Trial Exhibits From The FTC Action.

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1 clear that their discussions focused only on documents that were not publicly available. Rambus
2 Ex. D at 1, 2 n.1 (Letter from Andrea Jefferies to Mr. Yost, dated 5/15/03). There is no question
3 that pleadings, briefs, expert reports and transcripts do not include proposed trial exhibits.³

4 **B. Rambus’s Conciliatory Agreement To Produce Non-Public Exhibits**
5 **Presented At The FTC Hearings**

6 In late May, Hynix sought to expand the parties negotiations surrounding
7 production of documents related to the FTC Action. Hynix began demanding production of
8 exhibits “presented at hearings from the FTC Action.” Rambus Ex. E at 1 (Letter from Mr. Yost
9 to Andrea Jefferies, dated 5/22/03); *see also* Rambus Ex. F at 1 (Letter from Mr. Yost to Andrea
10 Jefferies, dated 5/29/03, seeking “non-public. . . exhibits presented at hearings from the FTC
11 action”). Ultimately, Hynix moved to compel production of “hearing transcripts and associated
12 exhibits” from the FTC Action. *See* Rambus Ex. G at 1 (Hynix’s Letter Brief, dated 6/5/03)
13 (emphasis supplied).⁴

14 Two key facts came out of Hynix’s motion to compel. *First*, the Court determined
15 that “associated exhibits” were *not responsive* to the document requests Hynix claimed they were,
16 *i.e.*, Request Nos. 147-151 of Hynix’s Third Supplemental Set Of Requests To Defendant
17 Rambus For Production Of Documents And Things (the “Third Supplemental Requests”). Order
18 Granting In Part Hynix’s Motion For Order Setting Deadline For Rambus To Complete
19 Production Of FTC Pleadings And Transcripts (the “Deadline Order”), Rambus Ex. H at 2; Order
20 Granting Rambus’ Request For Clarification Of June 13, 2003 Order Granting In Part Hynix’s
21 Motion For Order Setting Deadline For Rambus To Complete Production Of FTC Pleadings And
22 Transcripts (the “Clarification Order”), Rambus Ex. I at 6; *see also* Hynix Ex. B (Third
23 Supplemental Requests).⁵ In fact, the Court specifically held that Requests 147-151 of Hynix’s

24 ³ In this time frame, Hynix’s correspondence focused on “pleadings and transcripts.” “Pleadings”
25 are “[t]he formal allegations by the parties to a lawsuit of their respective claims and defenses,
26 with the intended purpose being to provide notice of what is to be expected at trial.” *Black’s Law*
Dictionary at 1152 (6th ed. 1990). The term “transcripts” commonly refers to a copy of the
record of a trial, hearing or other proceeding as prepared by a Court reporter. *Id.* at 1497.

27 ⁴ Hynix also sought to compel production of *in camera* testimony in the FTC Action.

28 ⁵ “Hynix Ex. _____” refers to the exhibits attached to the Declaration Of Geoffrey H. Yost In
Support Of Motion To Compel Production Of Pre-Marked Trial Exhibits From The FTC Action.

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1 Third Supplemental Requests, “do not seek hearing exhibits” from the FTC action. Rambus Ex.
2 I at 6. Despite that fact, Rambus had, during the meet and confer process, agreed to produce
3 some of the hearing exhibits. The Court expressly found that Rambus’s agreement was “beyond
4 the scope of Hynix’s requests.” Rambus Ex. I at 6. The Court’s Deadline and Clarification
5 Orders thus did not order Rambus to produce FTC exhibits, as Hynix now attests, rather they
6 merely documented Rambus’s own agreement.

7 *Second*, Rambus’s agreement was both clear and all-inclusive. Rambus agreed to
8 produce exactly those documents requested by Hynix: “non-public. . . hearing transcripts and
9 *associated exhibits*.” Rambus Ex. H at 2. Rambus explicitly announced its understanding, at the
10 June 24, 2003 hearing before this Court, that “associated” meant “admitted:”

11 Hynix continues to use the word associated exhibits. We
12 understand that to mean exhibits admitted at the hearing because we
13 have no other way to understand what associated means, I just want
14 to make sure we’re all clear on that.

14 *See* Rambus Ex. J at 32:3-6 (6/24/03 transcript). Indeed, Rambus reiterated its understanding of
15 “associated exhibits” several times throughout the hearing. *E.g., id.* at 5:3-8:2 (discussing the fact
16 that production of “exhibits admitted at the FTC proceeding” or “exhibits admitted at trial”
17 should be delayed until the conclusion of trial as “new exhibits are being admitted every day”),
18 21:13-21 (discussing review of “admitted exhibits”), and 23:20-24:7 (discussing the fact that it is
19 not yet clear what exhibits will be “admitted at the trial”). Consistent with these statements,
20 Rambus’s subsequent letters to Hynix focused exclusively on admitted exhibits. *See* Rambus Ex.
21 K at 1-2 (Letter from Andrea Jefferies to Mr. Yost, dated 7/16/03, discussing production of “*in*
22 *camera* exhibits entered into evidence”); Rambus Ex. L at 1 n.1 (Letter from Andrea Jefferies to
23 Mr. Yost, dated 8/7/03, stating “it is only the materials admitted in the FTC proceeding *in camera*
24 that are at issue here”). Not once did Hynix so much as comment on the scope of Rambus’s
25 agreement. It certainly never objected to it.

26 Rambus reiterated its understanding of “associated exhibits” numerous times
27 because it was critical that the parties and the Court have a clear understanding of the scope of
28 Rambus’s agreement to produce exhibits. As Rambus made clear to Hynix on several occasions,

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1 as well as to the Court, production of any exhibits had to occur under the constraints of the FTC
2 protective order and third parties would have to be notified that their documents were subject to
3 disclosure in the present litigation. Rambus Ex. J at 5:3-8:25. Rambus explained at the June 24,
4 2003 hearing:

5 [B]ecause the FTC proceeding is ongoing, and new exhibits are
6 being admitted every day, not every day, but on an ongoing basis, it
7 would be an extremely burdensome process for us to continue to
8 have to keep up with which exhibits get admitted and then notifying
9 third parties.

10 So what we would propose to do in terms of timing of all the FTC
11 materials would be to put that at the expected end of the FTC
12 proceeding itself.

13 Rambus Ex. J at 7:19-8:1. Thus, Rambus made it clear that to the extent it was agreeing to
14 produce FTC exhibits, it would need to do so all at once. The third party notification process was
15 simply too burdensome for Rambus to go through on a piecemeal basis. Again, in response to
16 Rambus's statement about new exhibits being "admitted" everyday, and its need to notify third
17 parties about these *admitted* exhibits all at once, Hynix never asserted any desire for or
18 entitlement to proposed trial exhibits.

19 Notably, during the time of the parties' meet and confer and while the Court was
20 considering Hynix's motion to compel, Hynix was receiving daily transcripts from the FTC
21 proceedings. If Hynix was unable to understand those transcripts without also having a set of the
22 proposed exhibits, as it now contends, *see* Mot. at 2, it should have raised this issue at the June
23 hearing. This is particularly true where, as indicated above, Rambus had expressly limited its
24 agreement to non-public and admitted exhibits and clearly explained the burdensome nature of
25 the third party notification process.

26 **C. Proposed Exhibits**

27 On December 29, 2003, Hynix asked Rambus to produce "a full set of the parties'
28 non-confidential trial exhibits." Hynix Ex. D. at 1. Consistent with prior correspondence,
Rambus responded by noting that it had, months before, complied with the parties' agreement by
producing all *admitted* exhibits that had been produced *in camera*. Rambus Ex. M at 1 (Letter

1 from Mr. Patterson to Mr. Yost dated 1/23/04). In an e-mail dated February 5, 2004, Hynix
2 informed Rambus that it intended to file a “motion to compel the production of all FTC trial
3 exhibits (whether admitted into evidence or not).” Rambus Ex. N (E-mail from Mr. Yost to Ms.
4 Augustson). This was the very *first* mention of production of exhibits *not admitted* into evidence.
5 Attempting to bolster its untenable position in its letter of February 10, 2004, Hynix asserted,
6 incorrectly, that the proposed exhibits of Rambus and the FTC in the FTC Action are responsive
7 to the Third Supplemental Requests and further stated, also incorrectly, that Rambus had agreed
8 to produce these proposed exhibits. *See* Hynix Ex. H at 2.

9 On February 12, the parties met and conferred on a number of topics. The parties
10 resolved all issues except for production of FTC proposed exhibits. As for the FTC exhibits,
11 counsel for Rambus explained that production of proposed trial exhibits was not contemplated by
12 Hynix’s requests for production, Rambus’s prior agreement concerning FTC materials, or the
13 Court’s Deadline and Clarification Orders. Rambus reminded Hynix that, in fact, the scope of
14 Rambus’s agreement was expressly limited to non-public and admitted exhibits. Rambus further
15 explained that it had specifically sought clarity on the scope of the agreement in the May-June
16 time frame because of the burden associated with the third-party notification process. Hynix
17 responded by letter, misrepresenting the nature of the meet and confer and erroneously asserting
18 that this Court had “ordered” Rambus to produce the proposed exhibits. Hynix Ex. I at 1, 2
19 (Letter from Mr. Yost to Ms. Augustson, dated 2/15/04). Hynix then moved to compel
20 production of the proposed trial exhibits.

21 On February 24, 2004, days after filing the present motion, Hynix served
22 Plaintiffs’ Fourth Set of Supplemental Requests To Defendant Rambus For Production Of
23 Documents And Things (“Fourth Supplemental Requests), implicitly acknowledging the
24 deficiencies of its present motion. Request no. 192, in contrast to Requests 147-50 of the Third
25 Supplemental Requests, asks for:

26 All documents constituting pre-marked, potential, or actual trial
27 exhibits the parties prepared for the 2003 evidentiary hearing in the
28 FTC Action, regardless of whether such documents were entered
into evidence.

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Rambus Ex. O at 12.

III. ARGUMENT

Hynix asserts that it is entitled to all *proposed* FTC exhibits, whether admitted or not, on four grounds: (i) the documents are responsive to its supplemental requests and under Federal Rule of Civil Procedure 34(b); (ii) the Court ordered the production of these documents; (iii) Rambus agreed to produce these documents; and (iv) the documents are directly relevant to the claims and defenses in this action. These arguments are without merit.

A. The Proposed Trial Exhibits Of Rambus And The FTC Are Not Responsive To Hynix’s Third Supplemental Requests For Production.

Contrary to Hynix’s assertion, the proposed trial exhibits of Rambus and the FTC are *not* responsive to the Requests 147-150 of Hynix’s Third Supplemental Requests. This Court has already rejected that argument:

Requests 147-151 do not seek hearing exhibits. Only request 151 can be construed to seek hearing transcripts, and the request is limited to the testimony of current or former Rambus employees.

Rambus Ex. I at 6 (emphasis supplied). While Requests 147 and 150 reference “exhibits,” it is clear from the context that the “exhibits” referenced are exhibits to pleadings, such as exhibits to a motion for summary judgment. *See* Hynix Ex. B. The only reason why Hynix has received the non-public and admitted exhibits from the FTC Action it has received is because Rambus *agreed* to produce those materials. The Court recognized this fact in its Clarification Order. Rambus Ex. I at 6. Hynix’s reliance on its requests for production, therefore, is inapt. Hynix’s vague reference to Federal Rule of Civil Procedure 34(b), *see* Mot. at 1, does not cure this deficiency.

On February 24, 2004, Hynix served its Fourth Supplemental Requests. These requests implicitly acknowledge that Hynix has overstated its position in this motion and that the proposed trial exhibits of Rambus and the FTC are not responsive to Requests 147-51 of its Third Supplemental Requests. Request 192 of the Fourth Supplemental Requests seeks:

All documents constituting pre-marked, potential, or actual trial exhibits the parties prepared for the 2003 evidentiary hearing in the FTC Action, regardless of whether such documents were entered into evidence.

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1 Rambus Ex. O at 12 (Request No. 192).

2 **B. The Court Has Never Ordered Production Of The Proposed Trial Exhibits.**

3 Hynix asserts that this Court ordered, in its Deadline Order, production of
4 Rambus's and the FTC's proposed trial exhibits. Mot. at 2. Hynix is mistaken.

5 The Deadline Order states: "Rambus has *agreed* to produce all of the requested
6 documents that have not drawn any third party objections." Rambus Ex. H at 2 (emphasis
7 supplied). The Court did not *order* production of any hearing exhibits, as those exhibits were not
8 responsive to Hynix's requests for production. Rambus Ex. I at 6. The Court only confirmed
9 Rambus's agreement to produce the "requested documents," which included "non-public. . .
10 hearing transcripts and associated exhibits." Rambus Ex. H at 2 . As explained in section II.B
11 above, Rambus explicitly stated its position that "associated exhibits" meant and means "admitted
12 exhibits," *see* Rambus Ex. J at 32:3-6 (6/24/03 transcript) and Rambus Ex. L at 1 n.1 (Letter from
13 Andrea Jefferies to Mr. Yost, dated 8/7/03, stating "it is only the materials admitted in the FTC
14 proceeding *in camera* that are at issue here"), and Hynix never contested this understanding.

15 Rambus has complied with the Deadline Order. It produced all non-public and
16 admitted exhibits to Hynix on September 3, 2003. The Deadline Order requires no more.

17 **C. Rambus's Agreement Was Clearly Limited To Production Of Non-Public**
18 **And Admitted Exhibits.**

19 Hynix cites the Deadline Order and Clarification Order for the proposition that
20 Rambus previously agreed to produce the proposed trial exhibits of Rambus and the FTC. Mot.
21 at 2-3. The orders make clear that Rambus agreed only to produce non-public and admitted
22 exhibits in the FTC Action. Rambus Ex. H at 1; *see also* Rambus Ex. J at 32:3-6 ("We
23 understand [associate exhibits] to mean exhibits admitted at the hearing because we have no other
24 way to understand what associated means, I just want to make sure we're all clear on that.");
25 Rambus Ex. K at 1-2 (7/16/03 letter discussing production of "*in camera* exhibits entered into
26 evidence"); Rambus Ex. L at 1 n.1 (8/7/03 letter limiting discussion to admitted exhibits).

27 Rambus was explicit in stating the scope of its agreement in order to ensure
28 complete resolution of the FTC production at one time. As counsel for Rambus explained, the

1 process of notifying third parties was “extremely burdensome,” Rambus Ex. J at 7:21, and
2 Rambus wanted to make sure that everyone was in agreement before undertaking that process.
3 Hynix did not object to the scope of Rambus’s agreement at the time, or at any time until
4 February 2004. It is entirely unreasonable for Hynix to seek now to expand its reach and to seek
5 to impose burdens on Rambus it should have easily anticipated.

6 One argument Hynix puts forth as a basis for expanding Rambus’s original
7 agreement it that it is “all but impossible” for Hynix to understand the FTC trial transcripts
8 without a full set of pre-marked exhibits. Mot. at 2. Hynix fails to mention that it was receiving
9 daily transcripts from the FTC proceedings when the parties were litigating the scope of
10 Rambus’s agreement to produce FTC materials in June. Nevertheless, Hynix did not seek
11 production of the proposed exhibits until eight months later. Hynix’s arguments ring hollow
12 come too late.

13 **D. The Relevance Of The Proposed Trial Exhibits Is Immaterial.**

14 Hynix next argues that the proposed trial exhibits should be produced because they
15 are relevant. Mot. at 7-8. Hynix is not entitled to the parties’ proposed exhibits in the FTC
16 Action simply because they might be relevant. As discussed in Part III.A, Hynix’s Third
17 Supplemental Requests, which are the only requests at issue in this motion, do not seek these
18 documents. Hynix’s failure to comply with Rule 34 obviates the need for Rambus to address now
19 the relevance of these documents.
20

21 **E. Third Party Confidentiality Concerns Also Require Denial Of Hynix’s**
Motion To Compel Production Of Proposed Trial Exhibits.

22 Hynix asserts that third parties have been adequately notified that their confidential
23 information may be used in the present lawsuit. Mot. at 8-9. Hynix focuses on two separate
24 notices to third parties: (i) notices from Rambus in the course of the present litigation and (ii)
25 notices from Rambus and the FTC prior to the FTC Action. *Id.* Neither notice covers production
26 of proposed FTC exhibits to Hynix.
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As outlined in Part II, all communications between Hynix and Rambus prior to February 2004 (*i.e.*, this month), focused exclusively on non-public exhibits admitted in the FTC Action. Accordingly, Rambus's prior communications with third parties about disclosure of their materials to Hynix concerned only *admitted* exhibits. Were the Court to now require Rambus to produce all *proposed* exhibits, Rambus would have to undertake another effort to contact all third parties whose confidential information is implicated by those exhibits and again obtain their consent to production. Such a Herculean effort is not warranted where Hynix could have moved for production of all proposed exhibits when it moved for production of the non-public admitted exhibits.

The notices sent in the FTC action are also inadequate. Rambus and/or the FTC notified third parties that they anticipated using the third parties' documents in the course of the FTC proceeding and invited the third parties to seek *in camera* treatment of their documents. *See, e.g.*, Rambus Ex. P (Letter from Mr. Perry of Munger, Tolles & Olson LLP to Hynix, dated 4/1/03); Rambus Ex. Q (Letter from Mr. Catt of the FTC to Hynix, dated 4/1/03). The notices did not inform the third parties that their documents could be used in future litigation beyond the FTC Action. While it is perhaps arguable that a party's failure to seek *in camera* treatment of proposed exhibits for the FTC Action renders those documents non-confidential, Rambus must protect itself against lawsuits from third parties that challenge the disclosure of their confidential information. Rambus must send a clear statement notifying third parties of the proposed use of their documents in the present action. Such an effort is not warranted where Hynix could have sought production of these documents earlier.

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1 **IV. CONCLUSION**

2 There is no basis for Hynix's motion. The Court's own orders reveal that: (1)
3 proposed exhibits for the FTC Action are not responsive to Hynix's Third Supplemental
4 Requests; and (2) Rambus agreed to produce only non-public and admitted exhibits to Hynix; and
5 (3) Rambus was never ordered to produce anything beyond these materials. The motion must be
6 denied.

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9 DATED: February 26, 2004

MUNGER, TOLLES & OLSON LLP
GREGORY P. STONE
KELLY M. KLAUS
ANDREA W. JEFFRIES
PETER DETRE

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13 By: _____



ANDREA W. JEFFRIES

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15 Attorneys for Defendant and Counterclaim-
16 Plaintiff RAMBUS INC.
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