

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**In the Matter of**

**RAMBUS INC.,**

**a corporation.**

**Docket No. 9302**

**RESPONDENT RAMBUS INC.'S OPPOSITION TO COMPLAINT COUNSEL'S  
MOTION *IN LIMINE* TO PRECLUDE REPORT AND TESTIMONY OF  
WILLIAM L. KEEFAUVER**

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## INTRODUCTION

The Complaint in this matter asks that JEDEC's patent policy be interpreted in a manner that goes far beyond the policies of any other leading high-tech standard developing organization ("SDO"). Complaint Counsel base their proposed interpretation not on specific language from JEDEC or EIA Manuals, but on a "general understanding" of "obligations commonly known within JEDEC." Complaint ¶¶ 21, 24; Complaint Counsel's Response and Objections to Respondent Rambus Inc.'s First Set of Interrogatory Responses ("Interrog. Responses") at 5, 6, 7, 13, 15, 17, 32 (Ex. 2) (defining the scope of JEDEC's policy in terms of members' "general understanding" and noting that "the written rules do not specify" some of the key terms of the policy).

Specifically, Complaint Counsel argue that JEDEC's policy *required* disclosure of patents, *patent applications, and even intentions to file patent applications*, whenever the patent, application, or intention in some sense related to JEDEC's work. *See* Complaint ¶ 24; Interrog. Responses at 4 (Ex. 2). Complaint Counsel also argue that this disclosure must be made "at the earliest possible time." *Id.* at 14.

It is Complaint Counsel's burden to establish that these in fact were the terms of JEDEC's policy as understood by a reasonable JEDEC member. That burden will not be easily carried. In the words of the Federal Circuit, "there is a staggering lack of defining details in the EIA/JEDEC patent policy." *Rambus v. Infineon Techs. AG*, 318 F.3d 1081, 1102 (Fed. Cir. 2003) ("*Infineon*"). Not only does JEDEC's policy lack detail, but the various statements of JEDEC's policy -- in JEDEC's Manuals, meeting minutes, ballot forms, memoranda, and overheads used in JEDEC meetings -- reveal vague and ambiguous, often inconsistent, and

sometimes contradictory terms, concepts, and linguistic formulations, the great majority of which provide no support for Complaint Counsel's interpretation of the policy.

As with any unclear statement (e.g., of law, contract, etc.), accurate interpretation often depends on understanding the context. In this case that context is the general industry practice of leading high-tech SDOs. Mr. Keefauver's expert report and expected testimony provide that context and go on to describe what a reasonable JEDEC member, faced with the confusion surrounding JEDEC's policy, would have understood the terms of JEDEC's policy to be. His testimony is based on experience with SDOs that spans forty years, including almost a decade's experience on the EIA Patent Committee and three or four years as the EIA Patent Committee Chair, experience as one of the primary drafters of EIA's first patent policy, and experience as General Counsel of AT&T and Bell Telephone Laboratories (commonly known as "Bell Labs"). His testimony is also based on a review of the pertinent documents, trial testimony, and deposition testimony generated in this case and the *Rambus v. Infineon* litigation. This experience and investigation provide Mr. Keefauver with a unique perspective as well as breadth and depth of specialized knowledge necessary to navigate the various statements of JEDEC's policy, using the industry practice as revealed through the patent policies of other leading high-tech SDOs as a guide. Mr. Keefauver's testimony will be valuable to the Court in understanding the objectives and practices of high tech SDOs -- including JEDEC -- and thus in interpreting JEDEC's ill-defined and inconsistently explained patent policy.

## **FACTS**

### **I. Mr. Keefauver's Experience With SDOs and Their Patent Policies**

Mr. Keefauver is both an engineer and a lawyer. He received a degree in electrical engineering from Penn State University in 1948, and a law degree from NYU in 1952. *See*

Expert Report of William L. Keefauver (“Keefauver Report”) ¶ 5 (Ex. 1). Mr. Keefauver began working for Bell Labs’ patent organization in 1948, eventually becoming General Patent Attorney in 1972 and Vice President and General Counsel in 1980. *Id.* ¶ 6. With the reorganization of the Bell system on January 1, 1984, Mr. Keefauver became the “Vice President-Law” of AT&T, “with responsibility for all AT&T intellectual property legal matters.” *Id.*

Mr. Keefauver is a former Chair of the Intellectual Property Law Section of the American Bar Association and past President and current Treasurer General of AIPPI (Association International Pour La Protection de la Propriete Intellectuelle), and he has served on several government advisory groups on trade-related intellectual property matters. *Id.* ¶ 7. Mr. Keefauver has also served on and chaired an advisory committee to the Commissioner of Patents and Trademarks of the United States Patent and Trademark Office. *Id.*

Mr. Keefauver’s experience with SDOs dates back to the 1960s, when he was a member of EIA’s Patent Committee -- the Committee responsible for EIA’s patent policy -- for the better part of a decade and chaired EIA’s Patent Committee for three or four years. (Keefauver 3/4/03 Dep. at 74:11-74:18) (Ex. 3). In that position Mr. Keefauver was one of the primary drafters of EIA’s first patent policy. *See* Keefauver Report ¶ 8 (Ex. 1); (Keefauver 3/4/03 Dep. at 42:3-42:12) (Ex. 3). Mr. Keefauver was also involved with SDOs throughout his career at Bell Labs and AT&T. Keefauver Report ¶ 8 (Ex. 1). Mr. Keefauver often oversaw Bell Labs’ and AT&T’s extensive SDO program and counseled company participants on patent disclosure issues in multiple SDOs. *Id.* Since retiring from AT&T in 1989, Mr. Keefauver has stayed abreast of SDO-related matters through his personal contacts and his recent participation in the

2001 Congress of AIPPI, which focused in large part on the relationship between patents and standards. *Id.*

## **II. Materials Considered by Mr. Keefauver in Forming His Opinions**

Mr. Keefauver's opinions are by no means based on his extensive SDO experience alone. In connection with this litigation Mr. Keefauver spent more than 150 hours poring over excerpts of testimony from the *Infineon* trial, depositions from both *Infineon* and this proceeding, discovery responses, many of the significant pleadings of both parties in this litigation, and the Federal Circuit's *Rambus v. Infineon* decision. *See* Keefauver Report ¶ 11, Attachment B (Ex. 1). In addition, Mr. Keefauver studied almost 20,000 pages of documents from JEDEC and six other leading high-tech SDOs. *Id.* These documents included Manuals, by-laws, guidelines, meeting minutes, memoranda, ballot forms, and more.

The patent policies of these six non-JEDEC SDOs are relevant to interpreting JEDEC's policy for at least three reasons. First, JEDEC and its members expressly incorporated or compared JEDEC's patent policy to the patent policy of certain other SDOs, in particular ANSI, EIA and IEEE. *See id.* ¶¶ 2.a, 18; *infra* p. 32. Second, they are the leading U.S. high-tech SDOs and thus were the SDOs most likely to have intellectual property issues similar to JEDEC's; their policies and related documents are therefore most likely to shed light on the factors JEDEC considered in interpreting and implementing its policy. *Id.* ¶ 2. Third, there was considerable overlap between JEDEC's membership and the membership of these other leading high-tech SDOs; JEDEC's members were therefore likely to interpret JEDEC's policy in the context of their experience with these other SDOs' policies. *Id.* In this sense, these SDOs' policies constituted a rough industry standard. *See Id.* ¶¶ 2.b, 18.

The non-JEDEC SDOs studied by Mr. Keefauver are:

- 1) **The American National Standards Institute (“ANSI”)**: Since 1918, the American National Standards Institute, “ANSI”, has been, in effect, the overseer of domestic SDOs. Sometimes described as an “umbrella organization,”<sup>1</sup> ANSI “coordinates the U.S. voluntary consensus standards system, providing a neutral forum for the development of policies on standards issues and serves as a watchdog for standards development.”<sup>2</sup> ANSI “accredits” individual SDOs and determines whether to approve the standards they develop as “American National” standards. *See id.* To become ANSI-accredited, an SDO must “ensure adherence to ANSI’s cardinal principles,” *see id.*, including conforming to ANSI’s patent policy.<sup>3</sup> ANSI conducts periodic “audits” of its member SDOs to ensure continued compliance with its policies and procedures. *See id.* ANSI’s Federation consists of almost 1,000 SDOs, government agencies, institutes, businesses, professional societies, and trade associations. ANSI’s policy is also of particular relevance to JEDEC’s because, as discussed below, *infra* p. 32, JEDEC patent policies and other documents specifically reference ANSI’s policy.
- 2) **The Electronics Industries Alliance (“EIA”)**: EIA is particularly relevant to interpreting JEDEC’s policy because EIA’s policy *was JEDEC’s policy*. *See infra* note 17. Independent of this unique relevance, EIA is also one of the country’s leading high-tech SDOs. Its more than 2,500 members companies comprise more than 80% of the \$430 billion U.S. electronics industry.<sup>4</sup> As its name suggests, EIA is actually an alliance of several high-tech SDOs, including JEDEC, TIA, and others.<sup>5</sup>
- 3) **The Telecommunications Industry Association (“TIA”)**: TIA is “the leading U.S. non-profit trade association serving the communications and information technology industry.”<sup>6</sup> TIA “develops telecommunications standards for user

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<sup>1</sup> ANSI Guidelines for Implementation of the ANSI Patent Policy, at i (Ex. 4); (Keefauver 2/4/03 Dep. at 36:4-36:17) (Ex. 3). As such, ANSI is not, strictly speaking, an SDO itself, because it does not independently develop standards. Nevertheless, it does have a patent policy, which must be followed by all ANSI-accredited SDOs.

<sup>2</sup> *See* ANSI: Frequently Asked Questions, at [http://www.ansi.org/about\\_ansi/faqs/faqs.aspx?menuid=1](http://www.ansi.org/about_ansi/faqs/faqs.aspx?menuid=1) (Ex. 5).

<sup>3</sup> *See* Declaration Concerning TIA IPR Policy and Practice of Dan Bart (“Bart Decl.”) at 1 (Ex. 6) (noting that as an ANSI-accredited SDO “TIA must have an Intellectual Property Rights IPR policy that is identical to or at least not inconsistent with the ANSI Patent Policy”).

<sup>4</sup> *See* About EIA Member Councils, at <http://www.eia.org/about/councils.phtml> (Ex. 7).

<sup>5</sup> About EIA Sectors, at <http://www.eia.org/about/sectors.phtml> (Ex. 8).

<sup>6</sup> *See* TIA Facts At A Glance, at <http://www.tiaonline.org/about/overview.cfm> (Ex. 9).

premises and network equipment, wireless communications, fiber optics, and satellite communications.” Keefauver Report ¶ 2, n.3 (Ex. 1). TIA was formed in 1998 through a combination of the United States Telecommunications Suppliers Association and EIA’s Information and Technologies Group.<sup>7</sup> As such “[t]he TIA standards program came from the EIA . . . roots.” *Id.* Today TIA has over 700 members,<sup>8</sup> a 35 member board, and five divisions.<sup>9</sup> As a long-time member of EIA that actually used EIA’s patent policy, TIA’s patent policy is directly relevant to JEDEC’s because TIA and JEDEC in fact shared *the same* patent policy at least until TIA stopped using EIA’s in May 1993.<sup>10</sup>

- 4) **Semiconductor Equipment and Materials International (“SEMI”):** Semiconductor Equipment and Materials International; (“SEMI”) serves the “global semiconductor equipment, materials, and flat panel display industries.”<sup>11</sup> SEMI has more than 2,500 member companies. *Id.*
- 5) **The Institute of Electrical and Electronics Engineers (“IEEE”):** IEEE “is a leading authority in technical areas ranging from computer engineering, biomedical technology and telecommunications, to electric power, aerospace and consumer electronics.”<sup>12</sup> By the end of 2001, IEEE included 37 separate IEEE societies, four technical councils, and more than 377,000 members in 150 countries. *Id.* IEEE also “produces 30 percent of the world’s published literature in electrical engineering, computers and control technology.” *Id.*
- 6) **VESA:** VESA is a leading high-tech SDO focusing on the video electronics industry.<sup>13</sup> VESA was included among the SDOs whose patent policies Mr. Keefauver considered in large part because it was the SDO at issue in the FTC’s *In re Dell Computer* matter, settled by Consent Decree in 1996.

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<sup>7</sup> See Bart Decl. at 1 (Ex. 6).

<sup>8</sup> See TIA Membership Directory Search, at <http://www.tiaonline.org/membership/members/> (Ex. 10).

<sup>9</sup> See TIA Facts At A Glance, at <http://www.tiaonline.org/about/overview.cfm> (Ex. 9).

<sup>10</sup> See Bart Decl. at 1 (Ex. 6).

<sup>11</sup> See About SEMI, at <http://www.semi.org/web/wcontent.nsf/url/aboutsemi> (Ex. 11); see also Keefauver Report ¶ 2, n.5 (Ex. 1).

<sup>12</sup> About the IEEE, at [http://www.ieee.org/portal/index.jsp?pageID=corp\\_level1&path=about&file=index.xml&xsl=generic.xsl](http://www.ieee.org/portal/index.jsp?pageID=corp_level1&path=about&file=index.xml&xsl=generic.xsl) (Ex. 12); see also Keefauver Report ¶ 2, n.4 (Ex. 1).

<sup>13</sup> VESA Member Benefits, at <http://www.vesa.org/members.htm> (Ex. 13).

### III. The Substance of Mr. Keefauver's Opinions

Mr. Keefauver brought his extensive SDO and intellectual property experience to bear on the materials he reviewed. The results are reflected in Mr. Keefauver's Report.

#### A. Overall Approach

Mr. Keefauver began by analyzing written expressions of JEDEC's written patent policy.<sup>14</sup> Like the Federal Circuit, he quickly found them to be of limited usefulness in determining what the terms of JEDEC's policy were because of their ambiguity, inconsistency, and simple failure to address many of the issues raised by Complaint Counsel's position. In light of this lack of clarity, Mr. Keefauver sought to interpret JEDEC's policy with reference to JEDEC's objectives, the purpose of the patent policy, and industry practice. Keefauver Report ¶¶ 12-17 (Ex. 1). To provide the factual foundation for this analysis he expanded his inquiry to include other JEDEC documents, plus testimony from the *Infineon* trial, and depositions in *Infineon* and this litigation. To this he added documents relating to the patent policies of the other leading high-tech SDOs discussed above. *Id.* ¶ 11, Attachment B (Ex. 1).

Having studied this information, Mr. Keefauver began his analysis from the premise that to interpret an ambiguous SDO patent policy properly one must understand the role of the policy in achieving the SDO's objectives. As he states: "It is difficult, if not impossible, to understand *how* to interpret a policy like JEDEC's without understanding *why* that policy was established in the first place." *Id.* ¶ 3. According to Mr. Keefauver, the primary purpose of all high-tech SDOs is to develop standards to address particular technical problems facing an SDO's members. The

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<sup>14</sup> As Complaint Counsel acknowledges, JEDEC's policy adopted and incorporated EIA's patent policy. *See infra* note 17. Mr. Keefauver also carefully reviewed the written expression of EIA's patent policy.

objective is to solve the problem in the best and most efficient manner possible, i.e., to “formulate standards that utilize the best technology consistent with cost objectives.” *Id.* ¶ 12.

Because the best technologies are often patented, SDOs often develop standards that incorporate intellectual property. Using patented technology in a standard, however, might involve costs that would not be incurred if non-proprietary technology were used. For this reason it may be in the interest of an SDO to find out before the standard is finalized whether a proposed standard incorporates patented technology, so that the SDO can attempt to determine whether the patent holder would be willing to license the patent and/or consider whether an adequate non-proprietary alternative solution to the technical problem is available at a lower overall cost. Patent disclosure policies are designed to alert SDOs when proposed standards require the use of patented technology. *Id.* ¶¶ 12-15.

But SDOs do not simply require “maximum” disclosure of their members’ intellectual property. The terms of an SDO’s patent policy are usually the result of “a rough cost-benefit analysis performed by the SDO which attempts to obtain disclosure of as much *useful* information as possible without imposing unwarranted costs, burdens, or risks on member companies.” *Id.* ¶ 16. Broad disclosure policies can impose high costs both on the SDO itself and on its individual members,<sup>15</sup> including:

- Costs to the SDO and its members of processing and analyzing large amounts of information. Overdisclosure of patent information can paralyze an SDO’s standard-developing activities by turning SDOs into patent debating societies focused more on deciding the validity and scope of patents than solving the problem that the proposed standard is designed to address. *Id.* ¶ 17 (Ex. 1); (*see also* Keefauver Dep. 3/4/03 at 50:4-50:13) (Ex. 3).

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<sup>15</sup> Of course, costs imposed on individual members are also indirect costs to the SDOs. SDOs risk losing members if the costs imposed are greater than the benefits. *See id.* ¶ 17.d (“Although such costs and risks fall directly on the members, they also fall indirectly on the SDOs since membership and participation may be decreased if costs or risks are excessive.”).

- Costs to the SDO and its members of processing inaccurate information. For example, rejecting the best technology because of an inaccurate belief that technology is patented will necessarily result in a lesser standard. This is of particular concern where disclosure of patent applications is being considered because of the inchoate nature of patent applications, and the fact that applications are rarely granted without amendment. *See* Keefauver Report ¶ 17 (Ex. 1).
- The costs of overdisclosure associated with requiring disclosure too early in the standardization process. Standards have a life cycle during which they change, sometimes dramatically. Therefore, to require disclosure before a proposed standard has become “stable” or “mature” may mean that members will have to disclose and re-disclose as the proposed standard evolves. This can be particularly costly where disclosure of patent applications or other confidential information is at issue. *See id.*
- “The costs and risks to member companies if the rules require disclosure of trade secrets or other confidential information such as unpublished patent applications or future plans.” *Id.* ¶¶ 17.d, 33, 38.

Mr. Keefauver’s understanding of these costs and SDOs’ sensitivity to them were derived both from his personal experience with SDOs and from the documents and testimony he reviewed in connection with this case.

With these general considerations in mind, and based on his review of relevant documents and testimony, Mr. Keefauver’s Report sets out a number of opinions about how a reasonable JEDEC member would have understood the terms of JEDEC’s patent policy. Specifically, a reasonable JEDEC member (1) would not have understood JEDEC’s policy to *require* disclosure of *patent applications* or *intentions to file or amend* patent applications; (2) might have understood JEDEC’s policy to apply a higher disclosure standard for active participants -- e.g., presenters -- than for passive members; (3) would have understood JEDEC’s policy to apply only to “essential” patents, not to patents that merely relate to a proposed standard; and (4) would have understood disclosure not to be triggered until a proposed standard has become “stable” or “mature.” Each of these points is discussed below.

**B. A Reasonable JEDEC Member Would Not Have Interpreted JEDEC’s Policy to Require Disclosure of Patent Applications.**

**i) Policy Considerations**

Mr. Keefauver’s Report explains that there are good reasons why an SDO would not require disclosure of patent applications. To require disclosure of patent applications would impose an extremely high and avoidable cost on members. *See id.* ¶ 33. Patent applications are trade secrets, guarded carefully by the companies that have often poured millions of dollars into their research and development. Such intellectual property can be among the most valuable assets for companies like AT&T, Bell Labs, and Rambus. *Id.* ¶ 33. Disclosure of patent applications could put these assets in serious jeopardy, for example, because it might prompt another company to file a competing application more promptly, leading to a potentially costly and risky interference proceeding.<sup>16</sup> *Id.* ¶¶ 33, 38.

Moreover, requiring disclosure of patent applications can pose high and unnecessary costs on the SDO itself. Simply processing the volume of information associated with disclosed patent applications can be quite costly. *Id.* ¶ 34. Recall that the purpose of the disclosure is to alert the SDO to a situation where a proposed standard incorporates proprietary technology and, sometimes, to provide the SDO with the information it would need to design around the standard. *See supra* p. 8. Disclosure of patent applications, therefore, may require the SDO to determine whether the applications, if issued, would be required or “essential” to practice a proposed standard *if* issued. In addition, a patent application provides limited information on which an SDO could rely in determining whether and how to design around it. The application

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<sup>16</sup> An interference proceeding is “a contest between two competing applications for the same invention. It’s a proceeding conducted by the Patent Office . . . to determine who legally is entitled to the patent.” (Keefauver 3/4/03 Dep. at 14:25-15:4) (Ex. 3).

might not be granted at all; even if a patent issues, it is quite common for the PTO to require the applicant to significantly alter or limit the scope of the claims being sought. Therefore, Mr. Keefauver explains, “[b]ecause patent applications *at best* only approximate what the final issued patent and the allowed claims will look like (if the patent is issued at all), they involve great uncertainty, and SDOs would be loathe to . . . design around them.” *Id.* ¶ 35. This suggests a second cost to SDOs of requiring disclosure of patent applications: the risk that the SDO will needlessly attempt to design around application claims that wind up being either significantly modified or not granted at all. Not only would this be a poor use of an SDO’s efforts, but it would also likely result in a second-best technical solution to the problem the standard was intended to solve.

## ii) JEDEC Documents

Mr. Keefauver’s expectation that a reasonable JEDEC member would not have understood JEDEC’s policy to require disclosure of patent applications is supported by his review of JEDEC documents. Prior to 1993, there was no indication that JEDEC’s policy applied to anything beyond “patents.”<sup>17</sup> Complaint Counsel argue that the term “patent” as used in the JEDEC and EIA patent policies actually means both “patents” and patent applications. *See* Complaint Counsel Opposition to Rambus’s Motion for Summary Judgment at 12. But Mr.

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<sup>17</sup> Before (and after) 1993, JEDEC’s patent policy was subordinate to EIA’s. As JEDEC President and EIA General Counsel, John Kelly, explained, “[t]he JEDEC manual is subordinate to the EIA manual, . . . because in the hierarchy of EIA, JEDEC was subordinate to EIA.” (4/30/01 *Infineon* Trial Tr. at 317) (Ex. 16); *see also Infineon*, 318 F.3d at 1096. JEDEC’s 1994 Members Manual specifically provides that JEDEC Committees “adhere rigidly” to the EIA patent policy. *See* JC42 Members Manual (9/94) § 3 (Ex. 17). JEDEC’s adoption of EIA’s policy is sometimes recognized even by Complaint Counsel, *see* Complaint ¶ 18 (noting that “The JEDEC rules provide that all JEDEC meetings ‘shall comply with the current edition of EIA Legal Guides,” and that the guides are explicitly incorporated by reference into JEDEC’s rules); Complaint Counsel Opposition to Rambus’s Motion for Summary Judgment at 3 n.3.

Keefauver explains that a reasonable JEDEC participant would have understood that the two are very different. A patent is a property right granted by the U.S. Patent and Trademark Office, while a patent *application* is an inchoate, confidential request to the USPTO to issue a patent. *See* Keefauver Report ¶ 24 (Ex. 1).

Regardless of the meaning of the word “patent,” no EIA Manual during Rambus’s membership at JEDEC ever prescribed any disclosure obligation whatsoever. The EIA Manuals stated no more than that if a patent were included in a standard, then EIA was to obtain an assurance from the patent holder that it would license the patent in connection with the standard either for free or on “reasonable terms and conditions that are demonstrably free of any unfair discrimination.” *See* Manual for Committee, Subcommittee, and Working Group Chairmen and Secretaries: EP-3-F (Oct. 1981) § 8.3 (Ex. 14); EIA Style Manual for Standards of EIA, TIA, and JEDEC: EP-7-A (Aug. 1990) § 3.4 (Ex. 15). This language is taken from ANSI’s policy and is commonly referred to as the “Licensing Assurance” provision.

In October 1993, JEDEC released JEDEC Manual of Organization and Procedure JEP 21-I (“JEP 21-I”). Complaint Counsel relies heavily on JEP 21-I because it contains three references to “*pending* patents.” JEP 21-I § 9.3 (Ex. 18) (emphasis added). As an initial matter, it is not clear what effect these references had in light of the obvious inconsistency with the EIA Manuals that JEDEC was required to follow.

Beyond that, Mr. Keefauver’s Report explains that these references “are ambiguous, and would not have put a reasonable JEDEC member on notice that it was required to disclose patent applications.” Keefauver Report ¶ 26 (Ex. 1). Mr. Keefauver’s opinion on this point is based on a number of factors. First, none of the three provisions in JEP 21-1 specifically requires disclosure of pending patents. As the Federal Circuit observed, the language of the EIA policies

and JEP 21-I do not “impose any direct duty on members.” *Infineon*, 318 F.3d at 1098. Second, JEP 21-I was not circulated to the general JEDEC membership, only to committee and subcommittee chairmen. Keefauver Report ¶ 28 (Ex. 1). By contrast, the September 1994 *Members’ Manual*, which was circulated to JEDEC’s general membership, makes no reference to any disclosure obligations applicable to anyone other than first presenters of proposed standards. *Id.* ¶ 28.b. Third, the viewgraphs containing JEDEC’s patent policy, shown at the beginning of each JEDEC meeting, followed the language of the EIA Manuals and thus made no mention of patent applications or pending patents, even after JEP 21-I was issued. *Id.* ¶ 28.c. Fourth, the ballot forms used to vote on JEDEC standards referred only to “patents” throughout the entire period during which Rambus was a JEDEC member. *Id.* ¶ 28.d. Finally, the term “pending patents” is unusual and unclear; if JEDEC intended to require disclosure of patent applications one would expect JEDEC to have used that common and unambiguous term. *Id.* ¶ 27.b.

Mr. Keefauver’s Report also relies on more recent JEDEC documents in support of his opinion that a reasonable member would not have understood JEDEC’s policy to require disclosure of patent applications. *Id.* ¶¶ 30, 31. These include the JEDEC Board of Directors Meeting Minutes of February 7-8, 2000, which state that the Board of Directors “*encourage companies to make this kind of disclosures [of patent applications] even though they were not required by JEDEC by-laws.*” Minutes of JEDEC Board of Directors Meeting No. 116 (Ex. 19) (emphasis added). Also, a February 11, 2000 e-mail from Ken McGhee, JEDEC’s long-time Secretary, to members of a JEDEC Subcommittee, stated that by disclosing a patent application the member had “*gone one step beyond the patent policy.*” See 2/11/00 McGhee e-mail to JC 42 (Ex. 20).

### iii) Other Leading High-Tech SDOs

Mr. Keefauver's interpretation of JEDEC's documents is fully consistent with the patent policies his study showed to be in effect at the other leading high-tech SDOs in the early to mid-1990s.

JEDEC was initially part of EIA and, during the term of Rambus' membership, adopted and "adhered rigidly" to EIA's patent policy. *See supra* note 17. In turn, EIA was accredited by ANSI, the recognized leader of U.S. SDOs, which certifies SDOs and their standards as "American National Standards." During the time Rambus was a member of JEDEC, neither ANSI nor EIA required any disclosure of intellectual property whatsoever. EIA's Manuals did not address disclosure at all, *see, e.g., Infineon*, 318 F.3d at 1098 ("The language of EIA's policy statements actually does not impose any direct duty on members . . . this court finds no language -- in the membership application or manual excerpts -- expressly requiring members to disclose information. There is no indication that members ever legally agreed to disclose information."), and ANSI simply *encouraged* voluntary disclosure of *issued patents*. *See Keefauver Report* ¶ 20 (Ex. 1); 4/9/02 and 4/10/02 e-mails between ANSI Vice President and General Counsel Amy Marasco and EIA General Counsel and JEDEC President John Kelly (Ex. 21) ("to my knowledge, there is nothing in the ANSI patent policy or Guidelines that mandates disclosure by anyone at any time.")

ANSI twice has considered extending its patent policy to encompass patent applications. Both times it has decided not to. *See Keefauver Report* ¶ 21 (Ex. 1). As ANSI's General Counsel and Vice President Amy Marasco explained in her recent testimony to the Federal Trade Commission and Department of Justice in connection with their Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy ("FTC/DOJ Hearings"),

“The ANSI Patent Policy does not apply to pending patent applications. This is due to the confidential nature of such applications and the fact that patent applications impose an additional layer of uncertainty (above and beyond the changing technical content of a standard under development) given the dynamic nature of the patent approval process and the fact that a valid patent determination has not yet been made.” 4/18/02 FTC/DOJ Hearing Testimony by Amy Marasco (“Marasco Testimony”) at 10 (Ex. 22); Keefauver Report ¶ 21 (Ex. 1).

From 1990 to 1996, EIA (whose patent policy JEDEC specifically incorporates) *see supra* note 17, TIA, IEEE, and SEMI all had patent policies quite similar to ANSI’s. *None* required disclosure of patents or applications. EIA’s policy did not discuss disclosure at all. In fact, EIA on behalf of JEDEC and together with its sister organization, TIA, submitted comments to the Federal Trade Commission in connection with the *In re Dell Computer* case in 1996, in which EIA’s General Counsel and EIA/TIA’s Vice President John Kelly stated “Both EIA and TIA *encourage* the early, *voluntary* disclosure of *patents*.” 1/22/96 Comments of EIA and TIA Regarding *In re Dell* (Ex. 23) (emphasis added).<sup>18</sup> TIA followed EIA’s policy until 1993, when it adopted a policy “[e]ncouraging” disclosure of “patents” -- still no disclosure *requirement*, and still no mention of patent *applications*. *See* TIA Advisory Note #11 (Ex. 24) (emphasis added); (Bart 1/15/03 Dep. at 89:1-90:20) (Ex. 25).

A 1996 Power Point presentation made at SEMI dealing with patent disclosure set out clearly the fact that SEMI’s policy did not cover patent applications, for reasons perfectly congruent with Mr. Keefauver’s reasoning:

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<sup>18</sup> The FTC confirmed this understanding of EIA’s and TIA’s patent policy in its response to the comment letter. The FTC stated “EIA, and TIA, following ANSI’s procedures *encourage* the early, *voluntary* disclosure of patents, but do not *require* a certification by participating companies regarding potentially conflicting patent interests.” 7/10/96 letter from FTC Secretary Donald S. Clark to Dan Bart (Ex. 28) (emphasis added).

- It is of *extreme importance to differentiate* between a *pending* and an *issued* patent.
- Patents can be and are dealt with by Section 14
- Patent applications cannot be dealt with by the provisions of Section 14
  - the information may not be publicly available
  - the claims, as filed, may differ significantly from the claims that finally issue.

SEMI “Patents and Patents Pending” Presentation (7/14/96) (Ex. 26) (emphasis in original); *see also* (Gehman 2/6/03 Dep. at 146: 7-146:11) (Ex. 27).

IEEE’s patent policy during this period similarly did not require any disclosure at all. As IEEE’s President testified in connection with the FTC/DOJ Hearings: “Participation in standards developing committees is *voluntary* and disclosure of *patents* is based on the *willingness* of the individual participants” *See* Ben Johnson, Comments Regarding Competition and Intellectual Property, 4/17/02, at 1 (Ex. 29) (emphasis added).

Complaint Counsel’s interpretation of JEDEC’s policy to require disclosure of patent applications stands in stark contrast to the uniform approach of these other leading high-tech SDOs. If JEDEC’s policy really did break so dramatically from the near-uniform industry practice, one would expect that JEDEC would have made such a break unmistakably clear, in particular where extremely valuable and confidential patent applications are concerned. Keefauver Report ¶ 29 (Ex. 1); *see also* Expert Report of Professor David J. Teece, at ¶¶ 131-140 (Ex. 30). That did not happen. Mr. Keefauver’s opinion, based on his experience and his review of the extensive record before him, is that Complaint Counsel are incorrect and that a

reasonable JEDEC member would not have understood JEDEC's policy to apply to patent applications.

**C. A Reasonable JEDEC Member Would Not Have Interpreted JEDEC's Policy to Require Disclosure of *Intentions to File Patent Applications*.**

Mr. Keefauver's Report explains that the reasons why an SDO would not require disclosure of patent applications apply with even greater force to disclosure of intentions to file patent applications. *See* Keefauver Report ¶¶ 36-39 (Ex. 1).

The costs to members of disclosing an intention to file or amend a patent application could be far higher even than the costs of disclosing a patent application. If an intention to file were disclosed it would invite others to rush to file an application first, thereby significantly reducing the possibility that the actual inventor would receive the patent.

Disclosure of an intention to file or to amend a patent application would provide little benefit to an SDO to offset these costs. It is difficult to imagine how an SDO would attempt to design around an intention to file a patent application even if it wanted to. Standards like SDRAM and DDR SDRAM are extremely complex and detailed. Keefauver Report ¶ 36 (Ex. 1). To re-design a certain aspect of the standard to avoid intellectual property requires a detailed understanding of the precise scope of the intellectual property being designed around. This requires both a technical specification and a statement of the exact claim at issue. But no such specification or claims exist in connection with an intention to file. This would make designing-around an intention to file virtually impossible. *Id.* Moreover, if an SDO fell into the practice of designing around intentions to file it would invite abuse from SDO members; a member opposed to a particular standard could effectively torpedo it simply by making the unverifiable claim that it intends to file an application that would cover the standard. *Id.* ¶ 37.

Perhaps more important for purposes of determining what a reasonable member would have understood JEDEC's policy to require, neither JEDEC's policy, nor the policies of any of the other leading high-tech SDOs Mr. Keefauver considered, make any reference to disclosure of intentions to file patent applications.

**D. In Evaluating Any Disclosure Obligation, Consideration Should Be Given to the Nature and Extent of a Member's Participation.**

Mr. Keefauver's Report explains that SDO patent policies frequently apply different terms to active proponents of a standard than to other members. *Id.* ¶¶ 47-49 (Ex. 1). For example, EIA's original patent policy, drafted by Mr. Keefauver's Committee, "envisioned no more than that a person *making* a standards proposal should disclose any patents his company held on what was being proposed." *Id.* ¶ 47 (emphasis added). This was done because the presenter was in the best position to know whether aspects of the proposal were covered by patents and because the presenter "is usually the member with the most to gain from approval of the standard." *Id.*

Mr. Keefauver's opinion is that JEDEC's policy is unclear on this point. The language of JEDEC's policy refers to "participants," which could reasonably be read to refer only to active participants, rather than passive, non-voting members. JEDEC's ballots, which permit abstentions, also suggest that non-active members need not disclose. *Id.* ¶¶ 48-49.

**E. Leading High-Tech SDO Patent Policies Cover Only "Essential" Patents.**

Complaint Counsel interpret JEDEC's policy to require disclosure when a patent or patent application relates to a proposed standard in some largely undefined way. *See* Interrog. Responses at 4 (describing how JEDEC's policy applied to "all patents or patent applications that a JEDEC member knew or believed covered, might cover, or arguably could cover aspects of JEDEC's standards"). Whatever the limits of this amorphous relationship between the patent

and proposed standard, Complaint Counsel certainly interpret the term to encompass patents that are not “essential.” Mr. Keefauver’s Report explains that such an approach would be inconsistent with the practice of other SDOs, would be unworkable in practice, and is not supported by the language of JEDEC’s policy. Thus, a reasonable JEDEC member would have understood JEDEC’s policy to apply only to essential patents, i.e., patents required to practice a particular standard.

ANSI has made clear that its policy applies only to “essential” patents. In her FTC/DOJ Hearing testimony, ANSI’s General Counsel and Vice President Amy Marasco explained: “The ANSI Patent Policy applies only to ‘essential’ patents. . . . if the patent is not essential, then the same concerns are not present in that the patent holder cannot ‘block’ others from implementing the standard. . . . It also is difficult to ascertain the degree to which a patent has to ‘relate to’ the standard in order to be covered by the Policy. . . . This would be, at best, a nebulous and to some degree arbitrary determination.” Marasco Testimony at 8 (Ex. 22) (emphasis in original), *quoted in* Keefauver Report ¶ 41 (Ex. 1).

As reflected by ANSI’s policy, and as explained by Ms. Marasco and Mr. Keefauver, disclosure of patents other than essential patents makes little sense. The purpose of a patent disclosure policy is to allow an SDO to consider whether to secure a Licensing Assurance or design around a patent where the costs of a proposed standard might be inefficient because of the inclusion of intellectual property in the standard. Requiring disclosure of all patents that somehow relate to a proposed standard would inundate an SDO with information irrelevant to this purpose. If the patent is not essential then there is no need to get a license or design around it, and no need for the SDO to know about it. An SDO policy that required disclosure of non-

essential patent applications would inundate the SDO with worthless information *and* impose high costs and unacceptable risks the SDO's members. *See* Keefauver Report ¶¶ 32-38 (Ex. 1).

Not surprisingly, EIA -- to whose patent policy JEDEC "adhere[d] rigidly" -- TIA, SEMI, and IEEE all followed ANSI's approach. *See* EIA Style Manual for Standards and Publications of EIA, TIA, and JEDEC EP-7-A (Aug. 1990) § 3.4 (Ex. 15) (applying patent policy to "standards that call for the *exclusive use* of a patented item or process"); TIA Advisory Note #11 (Ex. 24) ("[e]ncouraging early identification of patents *required* for compliance with TIA standards") (emphasis added); (Gehman 2/6/03 Dep. at 58:17-59:6, 70:15-70:20) (Ex. 27); Ben Johnson, Comments Regarding Competition and Intellectual Property, 4/17/02, at 2 (Ex. 29) (IEEE's standard setting activities would "become unworkable . . . if disclosure requirements were extended to patents that *relate (but are not essential)* to a proposed standard") (emphasis added); Keefauver Report ¶ 42 (Ex. 1).

**F. A Reasonable JEDEC Participant Would Have Understood JEDEC's Patent Policy to Apply Only When a Proposed Standard Was "Mature" and "Stable."**

It is the norm for proposed standards to change many times between first proposal and final approval. Keefauver Report ¶ 50 (Ex. 1). These changes can be quite significant (Gehman 2/6/03 Dep. at 82:20-83:2) (Ex. 27); often they are not simply linear evolutions of a proposed standard, but complete overhauls. Keefauver Report ¶ 50 (Ex. 1). The changes can be especially pronounced when dealing with complex technical standards like SDRAM and DDR SDRAM. *Id.* at 51. This raises the question of *when* in the standard developing process disclosure is appropriate

Complaint Counsel concede that JEDEC's "written rules do not specify when in the JEDEC work cycle such patent-related disclosures are triggered," *see* Interrogatory Responses at

13, but Complaint Counsel nevertheless assert that “it was well understood . . . that JEDEC participants are expected to disclose patent-related information at the *earliest possible time*.” *Id.* at 13-14 (emphasis added). Mr. Keefauver’s Report explains, however, that such an interpretation of JEDEC’s patent policy makes little sense from the perspective of either JEDEC or its members.

Mr. Keefauver’s analysis of the timing issue again starts from an understanding of the purpose of a patent policy in furthering the objectives of the SDO. Specifically, Mr. Keefauver considered the costs and benefits of disclosure at various points in the standard development process. He determined that the benefits of such early disclosure would be slight and the costs high.

Disclosure too early in a process that is often in flux until a standard is balloted will make it difficult for members to determine whether their intellectual property will in fact be necessary to practice the standard. Any disclosures, therefore, run a high risk of being inaccurate. Such inaccurate disclosure -- i.e., disclosure of patents that are not ultimately required to practice the standard -- are of no benefit to the SDO. As IEEE’s President explained in his testimony at the FTC/DOJ Hearings in 2002, “[i]f disclosure of issued patents is expected too early in the process -- i.e., *before the draft standard has reached a level of stability* -- more patents may be disclosed than those that are essential, since it may be too early to determine exactly those that will be required for implementation.” *See* Ben Johnson, Comments Regarding Competition and Intellectual Property, 4/17/02, at 5 (emphasis added) (Ex. 29).

The costs of early disclosure, on the other hand, can be quite high. If disclosure is triggered immediately upon the proposal of a standard, then presumably it is also triggered with every change to the standard until it is finally approved. This interpretation of JEDEC’s rule

would result in the need (assuming disclosure is *required* at all) to disclose and re-disclose over and over as a proposed standard changes. If the items disclosed are patent applications, this broad disclosure can put at risk a large amount of valuable intellectual property.

Mr. Keefauver's opinion is that the approach that a reasonable engineer would expect and, in his experience, the approach actually followed by SDOs, is to trigger disclosures (whether required or merely encouraged) when a proposed standard becomes "stable" or "mature" -- that is, when it has been considered and revised sufficiently that it has more or less stopped changing. Keefauver Report ¶ 50 (Ex. 1). At that point, and only at that point, will the members be able to determine with reasonable accuracy whether their intellectual property is likely to be essential to practice the proposed standard. *Id.* at ¶¶ 50-53. Using the point of stability or maturity as the trigger will therefore protect members from the costs of unnecessary disclosure while providing the SDO with the information it needs to secure a License Assurance or design around an essential patent.

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Mr. Keefauver's opinions expose the problems with Complaint Counsel's interpretation of each of the main parameters of JEDEC's policy. But they also do more than that -- they show just how untenable Complaint Counsel's *overall* interpretation of JEDEC's patent policy is. Each of the problems with Complaint Counsel's interpretation multiplies the problems created by the last. If disclosure is interpreted to be *required* rather than *encouraged*, then members will overdisclose to ensure they do not lose their intellectual property rights. If patent *applications* are *required* to be disclosed, then members will be forced to place at risk valuable intellectual property and SDOs will have to process even more information of questionable relevance in light of the fact that many applications are not granted or are ultimately limited by the PTO. If

members are *required* to disclose all patents and *patent applications* that merely somehow *relate to* a proposed standard, rather than being “essential,” then JEDEC would have been flooded with patents and applications that were irrelevant to its work. And if JEDEC’s policy were interpreted to *require* disclosure of all patents and *applications related to* a standard, *at the earliest possible time*, then the amount of irrelevant information disclosed would again be multiplied into a tidal wave of disclosure as members would be forced to disclose and re-disclose all related patents and patent applications as a proposed standard changes.

If JEDEC’s policy were the one Complaint Counsel describes JEDEC would long ago have drowned in patent disclosures. It did not. The disclosures called for by Complaint Counsel’s interpretation simply were not made. *See* Memorandum in Support of Respondent Rambus Inc.’s Motion For Summary Decision, at 30-32; JC-42.3 9/13/96 Meeting Minutes “Patent Tracking List” (Ex. 31). For these reasons, and because the other leading high-tech SDOs studied by Mr. Keefauver did not require anything like the disclosure Complaint Counsel argue JEDEC required, Mr. Keefauver concludes that reasonable JEDEC members would not have understood the policy to be as Complaint Counsel allege.

### **ARGUMENT**

Apart from rhetoric and accusation, Complaint Counsel ask Your Honor to preclude Mr. Keefauver from testifying for two reasons: (a) because his testimony will be irrelevant, or simply “common sense,” and so will not be helpful to the Court, and (b) because he “conducted almost no independent analysis and his opinions are based on unverified assumptions and guesswork.” Complaint Counsel Memorandum in Support of Motion *In Limine* To Preclude Report And Testimony of William L. Keefauver (“Motion”) at 1. Neither argument is correct.

Contrary to Complaint Counsel's contentions, Mr. Keefauver's testimony is not only helpful, but necessary to provide the context required for the Court and the Commission to interpret the ambiguous and inconsistent articulations of JEDEC's patent policy. Expert testimony such as Mr. Keefauver's -- providing context or information about industry practice -- is common, particularly in aid of interpretation of ambiguous statutes or contracts. Complaint Counsel's assertions about the unreliability of Mr. Keefauver's opinions are based on minor criticisms of points that are for the most part collateral to Mr. Keefauver's opinions, misrepresentations or selective quotation of Mr. Keefauver's deposition, and a general disregard of Mr. Keefauver's Report. At most, such criticisms are appropriate for cross-examination; they provide no proper basis for preventing him from testifying. *See Sphere Drake Ins. PLC v. Trisko*, 226 F.3d 951, 955 (8th Cir. 2000) ("Attacks on the foundation for an expert's opinion, as well as the expert's conclusions, go to the weight rather than the admissibility of the expert's testimony." (citation omitted)); *see also Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.") (citation omitted); Complaint Counsel's Opposition to Schering Plough's Motion *In Limine* to Exclude Testimony of Umesh V. Banakar and Martin J. Adelman, at 5, *Schering Plough Corp. v. Upsher-Smith Labs, Inc.*, No. 9297 (F.T.C. filed Jan 22, 2002) (emphasizing that cross-examination rather than exclusion is the proper way to challenge an expert witness' conclusions, inferences, and factual support).

**I. Mr. Keefauver’s Expert Testimony Will More than Assist the Court, It Will Provide Important Context Necessary To Interpret JEDEC’s Ambiguous Patent Policy.**

Federal Rule of Evidence 702 provides:

If scientific, technical *or other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise 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 reliability to the facts of the case.”

Fed. R. Evid. 702 (emphasis added). As is made clear from Rule 702, the touchstone of expert witness qualification is specialized knowledge, whether that specialized knowledge stems from skill, experience, training, or education. *Id.* This specialized knowledge need not be “scientific,” but may be any “technical” or otherwise specialized knowledge that assists the trier of fact in deciding the case. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).<sup>19</sup>

Complaint Counsel concede that Mr. Keefauver possesses the necessary specialized knowledge to be certified as an expert. Motion at 3 (“Complaint Counsel does not challenge directly Mr. Keefauver’s specialized knowledge.”). Rather than challenging his qualifications, in its first Argument Complaint Counsel suggest reasons why Mr. Keefauver’s testimony would not “assist the trier of fact.”

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<sup>19</sup> Complaint Counsel assert that the opinions of even experts with specialized knowledge based on experience, like Mr. Keefauver, “must be based on some recognized scientific method.” Motion at 3. It is not clear what Complaint Counsel means by “scientific method.” All that is required in the case of an expert testifying based on experience is that the expert logically apply his specialized experience to a relevant factual record. *See United States v. Frazier*, No. 01-14680, 2003 WL 480129, at \*5 (11th Cir. Feb. 26, 2003) (“In expert testimony based on experience it is unlikely that reliability will be established through statistics. Reliability in this particular case is established by [the expert’s] precision and logic.”); *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000) (*Daubert* factors do not apply to opinions of expert testifying about gang affiliations, “whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it.”).

Whether expert testimony will assist the trier of fact is essentially a question of whether the proffered testimony is relevant and whether the substance of the testimony addresses matters with which a lay jury may not be familiar: “Anyone with relevant expertise enabling him to offer responsible opinion testimony helpful to judge or jury may qualify as an expert witness.” *Tuf Racing Prods., Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000); *see also United States v. Frazier*, No. 01-14680, 2003 WL 48129, at \*5 (11th Cir. Feb. 26, 2003) (vacating conviction because of trial court’s erroneous exclusion of defendant’s expert who had “developed specialized and relevant knowledge in an area unknown to most lay people.”).<sup>20</sup> Consistent with this broad standard, any question of whether expert testimony will assist a finder of fact must be resolved in favor of admissibility: “Testimony from an expert is *presumed* to be helpful unless it concerns matters within the everyday knowledge and experience of a lay juror. *Kopf v. Skyrn*, 994 F.2d 374, 377 (4th Cir. 1993) (emphasis added); *see also Sphere Drake Ins. PLC*, 226 F.3d at 954-55 (“Expert testimony should be admitted if the expert’s specialized knowledge will assist the trier of fact in determining an issue in the case. Doubts regarding whether an expert’s testimony will be useful should generally be resolved in favor of admissibility.”) (internal quotation omitted); *see also First Tennessee Bank Nat’l Ass’n v.*

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<sup>20</sup> *See also Finley*, 301 F.3d at 1008 (“Expert testimony assists the trier of fact when it provides information beyond the common knowledge of the trier of fact.”); *United States v. Lopez-Lopez*, 282 F.3d 1, 13-15 (1st Cir.) (affirming admission of expert testimony about the drug trade challenged as “plain vanilla” testimony about matters with which the jury was familiar on the ground that aspects of the drug smuggling business were not “common knowledge”), *cert. denied*, 122 S.Ct. 2642 (2002); *United States v. Romero*, 189 F.3d 576, 584 (7th Cir. 1999) (affirming denial of motion in limine where expert on child molester’s testimony was “critical in dispelling from the jurors’ minds the widely held stereotype of a child molester as a ‘dirty old man in a wrinkled raincoat’ who snatches children off the street as they wait for the school bus”); *United States v. Johnson*, 28 F.3d 1487, 1496-97 (8th Cir. 1994) (holding that expert testimony providing a “global understanding of drug distribution networks” was helpful to the jury and so admissible).

*Barreto*, 268 F.3d 319, 333 (5th Cir. 2001) (“Rule 702 should be broadly interpreted on the basis of whether the use of expert testimony will assist the trier of fact.” (quoting *Davis v. Combustion Eng’g, Inc.*, 742 F.2d 916, 919 (6th Cir. 1984))).

As explained below, Mr. Keefauver’s extensive experience with the patent policies of high-tech SDOs allows him to provide context and insight about these unusual organizations beyond the knowledge and experience of laypeople, and critical to allow proper interpretation of JEDEC’s policy.

**A. Mr. Keefauver’s Expert Analysis of Prevailing High-Tech SDO Patent Policy Industry Practice Provides Important Context.**

Complaint Counsel’s first argument appears to be that Mr. Keefauver’s opinions will not be of assistance to the Court because they are nothing more than a “simple reading of the plain language” of the patent policies of JEDEC and six other leading high-tech SDOs based on nothing more than “common sense” and “his experience as an employee of AT&T and Bell Labs.” Motion at 4-6. Complaint Counsel suggest that such opinions “require no specialized knowledge,” *id.* at 1, and thus are the proper subject of lay, not expert, testimony. But the language of JEDEC’s rule is anything but “plain,” and Mr. Keefauver’s forty years of experience with SDOs, including many years as the Chair of EIA’s Patent Committee and the General Counsel and Vice President of AT&T and Bell Labs, enable him to provide specialized expertise that is particularly relevant to this case.

**i) The Language of JEDEC’s Policy is Anything But “Plain.”**

Deciphering the terms of JEDEC’s patent policy is a complex task. For starters, there is no single written expression of the patent policy addressing all of its terms. Even Complaint Counsel admit that JEDEC’s policy is stated in various “JEDEC and EIA Manuals,” *see, e.g.*, Complaint Counsel Opposition to Rambus’s Motion for Summary Judgment at 58, 60, 63;

ballots used for voting on JEDEC standards, *id.* at 65; JEDEC meeting minutes, *id.* at 61, 66; “dozens” of presentations, *id.* at 63, 66; JEDEC memoranda, *id.* at 64-65; meeting attendance roster forms, *id.* at 65; and documents recording disputes relating to interpretation of JEDEC’s policy, *id.* at 65-67. In addition, as Complaint Counsel recognize, the actual conduct of JEDEC members is relevant to interpreting JEDEC’s patent policy. *Id.* at 65.

To make matters worse, these various sources are not consistent with respect to many of the critical aspects of JEDEC’s policy. For example, unlike JEP 21-I, on which Complaint Counsel rely heavily because of its references to “pending patents,” the subsequent September 1994 “Members’ Manual” nowhere refers to “pending patents,” and states instead only that “First Presenters” must “reveal any known or *expected patents*.” *See* JC-42 Members’ Manual (Sept. 1994) §4.1 (Ex. 17) (emphasis added). The EIA Manual, to which JEDEC’s patent policy “adhere[d] rigidly,” *see id.* §3, on the other hand, does not discuss disclosure of intellectual property *at all*, it simply states that where a standard requires use of a “patented item,” a committee chairman should secure a license from the “patent holder.” *See* EP-7-A § 3.4 (Ex. 15). Nowhere in any of these Manuals is “pending patent,” “expected patent,” or “patented item” defined.

The confusion in JEDEC’s policy is apparent even from the terms of the various ballot forms used at JEDEC from 1992 from 1999. A ballot used in 1992 and 1995 asked, “If anyone receiving this ballot is aware of *patents involving* this ballot, *please* alert the Committee.” *See* JEDEC Ballot (6/11/92) (Ex. 32) (emphasis added); JEDEC Ballot (1/30/95) (Ex. 33) (emphasis added). One ballot used in November 1992 included a space for members to indicate if they were “aware of *patents related to* this ballot that the Committee *should consider* during the balloting process.” *See* JEDEC Ballot (11/16/92) (Ex. 34) (emphasis added) And some ballots

used in 1997 stated “If anyone receiving this ballot is aware of *patents involving the subject*, please alert the Committee.” See JEDEC Ballot (11/14/97) (Ex. 35) (emphasis added). Not only do these ballots mention only “patents” rather than “pending patents,” “expected patents,” or “patented items,” but the various ballot forms request information based on different relationships between the patent and the matter being balloted: “patents *involving th[e]* ballot,” “patents *related to* the ballot,” and “patents *involving the subject*.”

These are only a few examples of the many inconsistencies, if not contradictions, among the documents setting forth or describing JEDEC’s patent policy. As the Federal Circuit put it:

In this case there is a *staggering lack of details* in the EIA/JEDEC patent policy. When direct competitors participate in an open standards committee, their work necessitates a written patent policy with clear guidance on the committee’s intellectual property position. A policy that does not define clearly *what, when, how, and to whom* the members must disclose does not provide a firm basis for the disclosure duty necessary for a fraud verdict. Without a clear policy, members form vaguely defined expectations as to what they believe the policy requires -- whether the policy in fact so requires or not. JEDEC could have drafted a patent policy with a broader disclosure duty. . . . It could have. It simply did not.

*Infineon*, 318 F.3d at 1102 (emphasis added) (internal footnote omitted).<sup>21</sup>

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<sup>21</sup> Complaint Counsel assert, inexplicably, that one “fundamental flaw” in Rambus’s offering Mr. Keefauver’s testimony is that it seeks “to circumvent the factual findings of the Federal Circuit.” Motion at 4. Complaint Counsel conveniently ignore the fact that the Federal Circuit decided *in favor of Rambus* and that its descriptions of the facts were almost entirely consistent with Mr. Keefauver’s. Mr. Keefauver’s testimony will provide expert testimony on exactly the important issues about JEDEC’s policy that the Federal Circuit correctly and in the most forceful terms found lacking: what it applied to, when it was triggered, who it applied to, and what information had to be disclosed.

ii) **Mr. Keefauver’s Testimony Will Assist Your Honor in Understanding Industry Practice and the Factors Considered by SDOs in Drafting and Implementing Patent Policies -- Precisely the Context Necessary to Interpret JEDEC’s Policy Correctly.**

Expert testimony is regularly admitted to assist interpretation of ambiguous contracts or rules; for example, by interpreting the contract or rule in light of relevant industry practice. *See Travelers Indemnity Co. v. Scor Reins. Co.*, 62 F.3d 74, 78 (2d Cir. 1995) (“A court may admit extrinsic evidence to interpret ambiguous provisions of contracts. Parties may offer evidence of custom or practice to interpret the meaning of a term used in a contract.”); *see also Commercial Union Ins. Co. v. Seven Provinces Ins. Co., Ltd.*, 217 F.3d 33, 38 (1st Cir. 2000) (finding that district court properly admitted expert testimony “to testify to what the terms [of an ambiguous agreement] must have meant in light of industry practice.”); *Cree v. Flores*, 157 F.3d 762, 773-74 (9th Cir. 1998) (affirming admissibility of expert testimony of tribal elder in interpreting Indian treaty).

Such testimony is particularly appropriate in this case because understanding high-tech SDOs and their patent policies are not subjects about which a layperson has knowledge. SDOs are unusual creatures. They are not corporations. Nor are they trade associations. They are groups of competitors who join together to address -- and sometimes prescribe solutions to -- common technical issues. They are inherently affected by a tension between corporate self-interest and mutual cooperation (not to mention antitrust concerns). SDO rules and policies are designed to alleviate this tension by protecting corporate interests while furthering the purposes of the organization. SDOs are certainly not entities about which a layperson has knowledge.

Mr. Keefauver’s testimony about these unusual entities, therefore, provides the context regarding industry practice necessary to properly understand the issues before the Court.

Properly interpreting JEDEC’s rule requires a sophisticated understanding of high-tech SDOs,

including their goals, practices, and operations, and knowledge of the considerations such SDOs take into account when forming and implementing their patent policies. Courts commonly admit expert testimony to provide just this type of context where necessary to inform the fact finder's consideration of the issues. *See, e.g., United States v. Molina*, 172 F.3d 1048, 1056 (8th Cir. 1999) (affirming admissibility of expert testimony regarding the “modus operandi of drug dealers” because “such testimony provides a *context for the jury*”) (emphasis added); *Travelers Indemnity Co.*, 62 F.3d at 77-78 (affirming admissibility of expert testimony explaining industry custom and practice); *Johnson*, 28 F.3d at 1497 (affirming admissibility of testimony where “[t]he jury’s understanding of the conspiracy was aided by a *global understanding* of drug distribution networks”) (emphasis added).

Nevertheless, Complaint Counsel insist that this context, i.e., the policies of these six non-JEDEC SDOs, is “plainly irrelevant.”<sup>22</sup> In fact, the context provided by the patent policies of these other leading high-tech SDOs therefore is relevant, if not essential: (1) because JEDEC expressly adopted or referred to these patent policies; (2) because these SDOs promulgated their policies in response to the same intellectual property issues JEDEC sought to address in promulgating its policy; (3) because JEDEC’s members were also members of these other SDOs and therefore would have interpreted JEDEC’s ambiguous policy in light of their experience with the other SDOs’ policies -- i.e., their experience with industry practice; and (4) because the industry practice they comprise illustrates how untenable Complaint Counsel’s interpretation of JEDEC’s rule is. These are discussed below.

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<sup>22</sup> Complaint Counsel’s position is contradicted by Complaint Counsel’s own attempt to use the practices of non-JEDEC SDOs as support for its Opposition to Rambus’s Motion for Summary Judgment. *See* Complaint Counsel Opposition to Rambus’s Motion for Summary Judgment at 14, n.16.

Contrary to Complaint Counsel's assertions, Motion at 8-11, it is apparent that JEDEC members *in fact* interpreted JEDEC's policy in reference to a number of other SDO's policies. JEDEC expressly incorporates EIA's patent policy; JEDEC "adhere[d] rigidly" to it. *See supra* note 17. EIA's policy is therefore clearly relevant. JEDEC has also referred to its own policy as subject to the terms of ANSI's policy. *See, e.g.*, JC-42 Members Manual (Sept. 1994) (Ex. 17) (cover page graphic showing JC42 as subordinate to EIA, and EIA subordinate to ANSI); 5/29/94 Letter from John Kelly, JEDEC President, to Ken McGhee, JEDEC Secretary (Ex. 36) (discussing "ANSI/JEDEC" patent policy); 5/12/94 Letter from Ken McGhee to JC-42 Committee Members (Ex. 37) (same). JEDEC members have described JEDEC's policy as "essentially the same as ANSI's policy." (Hays 02/20/03 Dep. at 82:20-82:22) (Ex. 38). The policy of ANSI, the leader of U.S. SDOs, is clearly relevant.

JEDEC members, too, have repeatedly referred to the policies of other SDOs, including IEEE and VESA. For example, the Minutes of a meeting of the "SyncLink Consortium," which was made up of a subset of JEDEC members, state that the group sought a "JEDEC-like clause. (Which is similar to ANSI clause, which is similar to IEEE clause.)" 5/13/96 SyncLink Minutes at 1 (Ex. 39). And at least one witness has stated that he believed that VESA's policy was "generally similar" to ANSI's and that ANSI's policy was generally similar to JEDEC's. (Hays 02/20/03 Dep. at 86:5-86:7) (Ex. 38).

The relevance of non-JEDEC SDO patent policies is also supported by the fact that many JEDEC members were also members of the six non-JEDEC SDOs whose patent policies Mr. Keefauver studied. Complaint Counsel say that "there is not a scintilla of evidence" to support Mr. Keefauver's assertion that there would be significant overlaps in membership, Motion at 8, but they evidently did not check the facts: At least *thirty-eight* of JEDEC's current members are

also members of SEMI; *twenty-seven* are members of TIA; *twenty-eight* are members of VESA; and *seventy-two* are members of IEEE.<sup>23</sup>

Finally, the patent policies of these SDOs are relevant for the additional reason that they stand in such stark contrast to Complaint Counsel's interpretation of JEDEC's rule. These SDOs' patent policies: (1) *did not require* any disclosure at all; (2) applied only to issued patents, not to patent applications; (3) applied only to "essential" patents, not to patents merely "related to" or "involved in" the standard development work of the SDO; and (4) although silent as to the time that disclosure was encouraged, the actual practices of these SDOs contradict Complaint Counsel's contention that JEDEC's policy required disclosure "as early as possible." *See supra* pp. 14-22. As Mr. Keefauver's Report points out, given the profound divergence between Complaint Counsel's interpretation of JEDEC's policy and the actual policies of these other SDOs, one would have expected that, had JEDEC actually intended the policy alleged by Complaint Counsel and thus such a departure from the practices of other leading high-tech SDOs, it would have made its position quite clear. Otherwise, such a dramatic change would have invited misunderstanding, misapplication, and noncompliance. Keefauver Report ¶ 29 (Ex. 1); *see also* Expert Report of Professor David J. Teece, at ¶¶ 131-140 (Ex. 30).

**B. Mr. Keefauver's Opinions Are Based on Far More than Mere "Common Sense."**

Complaint Counsel's argument that Mr. Keefauver should not be allowed to testify because his opinions are based on "common sense," Motion at 4-6, is difficult to understand except as a careless mischaracterization of one isolated statement given by Mr. Keefauver at his

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<sup>23</sup> These numbers were derived from a comparison of the membership lists available on each SDO's website: <http://www.jedec.org/>; <http://www.semi.org/>; <http://www.tiaonline.org/>; and <http://www.ieee.org/portal/index.jsp>.

deposition. When his Report and deposition are read as a whole, it is clear that Mr. Keefauver's opinions are based squarely on Mr. Keefauver's extensive, specialized experience with SDOs and their patent policies and his comprehensive review of tens of thousands of pages of documents, trial transcripts, deposition transcripts, pleadings, and discovery responses, all directly relating to JEDEC's patent policy and the policies of other leading high-tech SDOs. Though consistent with common sense, Mr. Keefauver's opinions are based on much more.

Notably, Complaint Counsel do not take the position that Mr. Keefauver's opinions are *not sensible*; they simply take issue with the fact that he said in his deposition that his opinions were based in part on "common sense." In relying entirely on these apparently magic words, Complaint Counsel at best simply elevates form over substance. Of course, common sense can and should play a role in any expert's opinion. Complaint Counsel's argument must therefore be that Mr. Keefauver's opinion is based *exclusively* on common sense. Complaint Counsel eventually admits as much when it stretches to state -- incorrectly -- that Mr. Keefauver testified that his opinions are based on common sense "*without regard to the evidence in the record.*" Motion at 4 (emphasis added). That is clearly false. *See* Keefauver Report ¶ 11, Appendix B (Ex. 1). Even the one deposition response quoted by Complaint Counsel in its brief makes clear that when Mr. Keefauver stated that his opinion was based in part on common sense he was simply stating, in a rather humble fashion, that he was applying logic and his experience to the issues at hand in light of *specific* record evidence he *specifically* referenced -- a point that would have been made clear had Complaint Counsel quoted Mr. Keefauver's entire response:

Q: Could you explain your understanding of the term or the phrase "might be involved"?

A: Well, first, the term is a very broad and somewhat ambiguous term, so I think one has to apply a rule of reason and put it in context to come up with a common sense interpretation of that term.

Q: And what is your rule of reason, common sense interpretation of the term?

A: It seems that the common sense interpretation of the term is that the “might be involved in” should be interpreted as meaning required or essential, it would be infringed by any broader interpretation that would open the floodgates to a lot of useless irrelevant information which would consume the time of the SDO digesting it.

Q: So, the word “might,” how do you define the term “might” in this instance?

A: Again, it’s an ambiguous phrase, might be involved. If they literally meant that in its broadest construction, their [JEDEC’s] tracking list would have been a volume, not just a couple pages of lists that had patents . . . .”

(Keefauver Dep. 3/4/03 at 61:19-62:16) (Ex. 3).

Even this one exchange demonstrates that Mr. Keefauver’s opinion on this issue was based on both his SDO experience and specific evidence. Mr. Keefauver’s experience is implicated by his explanation of how Complaint Counsel’s interpretation of JEDEC’s policy would “open the floodgates to a lot of useless irrelevant information which would consume the time of the SDO digesting it.” And rather than testifying “without regard to the record” as Complaint Counsel suggest, Motion at 4, Mr. Keefauver *in this very exchange* specifically stated that his opinion is based in part on JEDEC’s tracking list. He explained that if “might be involved in” were interpreted by JEDEC members as broadly as Complaint Counsel suggest, then JEDEC’s patent tracking list -- a list of patents disclosed by JEDEC members who have thousands of patents in the field of memory technology -- would have been “volumes,” not “just a couple of pages.”

Ultimately, Complaint Counsel’s argument undercuts itself, as Complaint Counsel admits that Mr. Keefauver’s opinions are based on not only common sense but also JEDEC’s patent policy and those of several other SDOs, and his experience as the person ultimately responsible

for overseeing the SDO activities of AT&T and Bell Labs. Motion at 5-6. This should dispose of Complaint Counsel's "common sense" challenge to Mr. Keefauver's expert testimony.

**C. Complaint Counsel's Final Two Arguments That Mr. Keefauver's Opinions Are Not Helpful to the Trier of Fact Are Without Merit.**

At the end of its first Argument, Complaint Counsel throw in two additional points, each without merit. First, Complaint Counsel say that "Mr. Keefauver's testimony is no more helpful in interpreting the JEDEC patent policy than the dozens of engineers and participants" listed on the parties' witness lists. Motion at 6. Complaint Counsel base this argument on the assertion that Mr. Keefauver testified at his deposition that simply working for ten years at a company involved in the high-tech area is sufficient to qualify someone as an expert. But even if Mr. Keefauver's opinion of the legal standard for qualifying an expert were relevant, he did *not* say that simply working at a high-tech company for ten years was adequate. He said that working full time for some years in a position "overlook[ing] all of the standards activities" of a company like AT&T might be enough. (Keefauver 3/4/03 Dep. at 73:23-74:6) (Ex. 3). Of course, the issue is not whether others *could* be qualified as experts, the issue is whether Mr. Keefauver *does* qualify. Mr. Keefauver's decades of experience more than suffice, and Mr. Keefauver offers something that few others can: a comprehensive knowledge of the patent policies of the leading high-tech SDOs in the early to mid-1990s.

Second, Complaint Counsel argue that a convoluted one page exchange between the lawyers and the Judge in the *Rambus v. Infineon* trial somehow precludes Rambus from offering Mr. Keefauver as an expert in this case. *See* Motion at 6. According to Complaint Counsel, Rambus's attorney "agreed with the Court that interpretation of the JEDEC patent policy was not the proper subject of expert testimony." *Id.* But it is not clear from the cited excerpt whether prior rulings made in that case not applicable to this case were involved, whether the witness

involved had been offered there as an expert, or whether the subject matter of the witness' testimony was the same as Mr. Keefauver's. In any event, Complaint Counsel offer no authority for their position that, even assuming their characterization were accurate, it would foreclose Rambus from offering such Mr. Keefauver in this, different litigation.

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In short, Complaint Counsel's argument that Mr. Keefauver's testimony is unhelpful and irrelevant has no merit. Mr. Keefauver's expert testimony is not only relevant, it is essential.

**II. Mr. Keefauver's Report Is a Comprehensive, Considered, Reliable Application of his Substantial Expertise to the Issues at Hand.**

Complaint Counsel's second argument is that Mr. Keefauver's opinions are "unreliable" because of his allegedly "glaring lack of due diligence to gather the most basic data to support his theory." Motion at 7. Once again, Complaint Counsel have ignored the thousands of pages of documents, transcripts, discovery, etc., that Mr. Keefauver spent more than 150 hours reviewing as the foundation for his opinions.

Complaint Counsel's argument boils down to four criticisms. First, that Mr. Keefauver's reliance on the patent policies of six out of dozens of SDOs operating in the United States was unsound. *Id.* at 7-8. Second, that Mr. Keefauver's reliance in part on representations of counsel as support for a single premise of a single opinion somehow invalidates his testimony as a whole. Third, that Mr. Keefauver's opinions are unreliable because he did not in his deposition identify any "independent or authoritative survey or other data" that would be a "reliable substitute for his failure to conduct his own investigation." Motion at 12. And fourth, that Mr. Keefauver's experience is insufficient basis for his expert testimony. These criticisms are incorrect as a matter of fact and unsound as a matter of law. At most these are matters for cross-examination, not preclusion of Mr. Keefauver's expert testimony.

**A. The Subset of Non-JEDEC SDOs on Which Mr. Keefauver’s Opinions Rely Was Reasonably Selected Based on JEDEC’s Express Reliance on Their Patent Policies and Because, As Leading High-Tech SDOs, They Had Similar Intellectual Property Issues and Memberships to JEDEC.**

Complaint Counsel’s primary attack on the reliability of Mr. Keefauver’s expert testimony is that “he provides no reason why his selection of these five [sic] non-JEDEC SDOs is particularly relevant to the exclusion of the dozens of other SDOs operating in the United States.” Motion at 8. In fact, Mr. Keefauver’s Report explains that these SDOs were selected for three reasons.

First, as discussed above, JEDEC itself has indicated that the patent policies of several SDOs are relevant to its policy. *See supra* pp. 31-38. Not only do JEDEC Manuals adopt EIA’s policy and reference ANSI’s, but other JEDEC documents and testimony of JEDEC members show that JEDEC’s policy was understood in light of the policies of these SDOs. *Id.*

Second, as also set out above, because the six SDOs that Mr. Keefauver studied are the leading high-tech SDOs in the United States, he concluded that they faced the same issues regarding intellectual property as JEDEC, and so would be likely to have similar patent policies. As described in greater detail above, *supra* pp. 5-6, the six SDOs are: (1) ANSI, the recognized leader of U.S. SDOs; (2) EIA, of which JEDEC was once a part and whose patent policy JEDEC explicitly followed; (3) TIA, the leading U.S. SDO serving the telecommunications field and which, like JEDEC, was affiliated with EIA and shared EIA’s patent policy until 1993; (4) SEMI, with more than 2,500 member companies in the global semiconductor equipment, materials, and flat panel industries; (5) IEEE, a leading authority in fields from computers to aerospace to biotechnology; and (6) VESA, a leading SDO in the video electronics industry and the SDO at issue in the Commission’s *In re Dell* case.

Third, these SDOs were selected because their membership overlapped with JEDEC's. *See supra* pp. 32-33. The last point is relevant because it is reasonable to assume, consistent with Mr. Keefauver's experience at AT&T and Bell Labs, that their common members would have interpreted JEDEC's patent policy in light of their experiences with the policies of the other SDOs of which they were also members. *See Keefauver Report* ¶ 2 (ex. 1); (Keefauver 3/4/03 Dep. at 42:3-43:12) (Ex. 3.)

Complaint Counsel argue that there are hundreds of SDOs and that there is "no evidence that [these six SDOs] that he reviewed are in any way representative of the field." Motion at 8. But the vast majority of these other SDOs deal with decidedly non-technology-oriented matters and so would not be useful benchmarks or provide useful context with which to interpret JEDEC's rule.<sup>24</sup> In fact, most probably have no need for a patent policy at all because they rarely deal with patents.

JEDEC's own website confirms the special relevance of the six non-JEDEC SDOs studied by Mr. Keefauver. JEDEC's website contains direct links to the websites of ten other SDOs. Of these ten, two are international SDOs (the IEC (Commission Electronique Internationale) and JEITA (Japan Electronics and Information Technology Association), three

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<sup>24</sup> Exhibit 40 is the first fifteen pages of a list of ANSI-accredited SDOs. *See* ANSI Accredited Standards Developers, at <http://public.ansi.org/ansionline/Documents> (Ex. 40). The list illustrates just how irrelevant most SDOs are likely to be to the task of interpreting JEDEC's policy. There clearly was no error in Mr. Keefauver's decision not to consider SDOs like the Automotive Glass Replacement Safety Standards Committee, Air Conditioning Contractors of America, Air Movement Control Association, American Association of Nurserymen, American Boat and Yacht Counsel, American Brush Manufacturers Association, American Concrete Institute, American Dental Association, and American Forest & Paper Association. Indeed, if Mr. Keefauver had reviewed the intellectual property positions of these other SDOs, his Report would no doubt have concluded that only a small portion of SDOs have any patent policy at all, and Complaint Counsel would no doubt be seeking exclusion of his opinions on the ground that the patent policies of "nurserymen" are irrelevant.

are affiliated with EIA (CEA, ECA, GEIA), and *four* -- ANSI, EIA, TIA, and IEEE -- were included among the six that Mr. Keefauver studied. *See* JEDEC - Welcome to JEDEC, at <http://www.jedec.org/> (including “Other Industry Links”). Clearly JEDEC understands that these SDOs are the most relevant to JEDEC’s work.

Complaint Counsel also argue that even if JEDEC’s member companies participated in multiple high-tech SDOs with patent policies similar to JEDEC’s, there is no evidence or testimony that indicates that the particular individual attending JEDEC was aware of the other SDO policies, or “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.” Motion at 11.

Addressing the second point first, Complaint Counsel’s argument once again assumes a conclusion without any basis: that the language of JEDEC’s policy was “plain.” Mr. Keefauver does not contend that a JEDEC member would “disregard” JEDEC’s policy and follow the policy of another SDO; that is a straw man. Mr. Keefauver states instead that, in his opinion, the practice and policy of the other SDOs of which the JEDEC members were also members provided the context and background that would inform their understanding of JEDEC’s policy.

Turning to the first point, Complaint Counsel again misstate Mr. Keefauver’s testimony. Mr. Keefauver *did* explain how different SDO participants representing the same company would exchange information. He described in particular how information about the patent policies of different SDOs in which a company participated would be disseminated to the SDO participants through communications with supervisors and/or patent attorneys who oversaw activities in multiple SDOs. (*See* Keefauver 3/4/03 Dep. at 39:14-40:4; 42:3-43:13) (Ex. 3); *see*

also 5/13/96 SyncLink Minutes at 1 (Ex. 39) (stating that the group sought a “JEDEC-like clause. (Which is similar to ANSI clause, which is similar to IEEE clause.)”).

**B. Mr. Keefauver’s Reliance on, Among Other Things, a Representation of Counsel as to a Single Fact Provides No Basis to Exclude His Testimony.**

One of Mr. Keefauver’s opinions is that a reasonable JEDEC member would have understood JEDEC’s policy to cover (i.e., encourage, though not require, disclosure of) issued patents but not patent applications. *One* basis of *one* of the premises for this *one* opinion was his understanding that the JEDEC Manual containing the patent policy language on which Complaint Counsel principally relies (JEP 21-I) was distributed to committee chairs but not generally to other JEDEC members. *One* of the sources of this understanding was a representation from Rambus’s counsel. Complaint Counsel’s argument that this reliance is grounds for precluding Mr. Keefauver’s testimony is nonsense.

The several bases for Mr. Keefauver’s understanding that JEP 21-I is not reasonably interpreted to require disclosure of patent applications are set out in paragraph 28 of his Report. These include the fact that the 1994 JEDEC “Members Manual” made no mention of disclosure of patent applications or even “pending patents” with respect to anyone other than first presenters, that the viewgraph displayed at the beginning of every JEDEC meeting did not mention patent applications (or “pending patents”), and that JEDEC’s ballots requested only information about issued patents. Keefauver Report ¶ 28 (Ex. 1). The final reason listed is that JEP 21-I was a “Chairman’s” Manual and was not distributed to members.

At deposition, Mr. Keefauver explained that his understanding that JEP-21-I was distributed only to committee chairs was based in part on the fact that “the manual by its very structure was directed to committee chairs.” (Keefauver 3/4/03 Dep. at 55:25 to 56:1) (Ex. 3). Most of the Manual deals with issues that would be of concern primarily if not exclusively to

committee chairs,<sup>25</sup> and the *very language* on which Complaint Counsel rely in support of its interpretation of JEDEC's patent policy addresses what the committee Chairman must tell members, *not* what members themselves must do. *See* JEDEC Manual of Organization and Procedure JEP 21-I (Oct. 1993) § 9.3.1 (Ex. 18). An additional basis for his understanding of the Manual's distribution was a representation of counsel. However, even if that were the only basis for his understanding -- which it is not -- there would be no basis to exclude Mr. Keefauver's testimony, even on this one point. *See Mannino v. Internat'l Mfg. Co.*, 650 F.2d 846, 851-53 (6th Cir. 1981) (reversing exclusion of expert based in part on reliance on information provided by attorney because Rule 703 expressly provides that bases of expert opinion need not be independently admissible; "[g]reat liberality is allowed the expert in determining the basis of his opinions").

**C. Complaint Counsel's Argument that Mr. Keefauver Did Not Rely on Academic Surveys of SDO Patent Policies Is Untenable in Light of the Fact that There Are No Surveys of SDO Patent Policies in the Early to Mid-1990s.**

Complaint Counsel argue that Mr. Keefauver's Report is unreliable because Mr. Keefauver "could not identify any independent or authoritative survey or other data that would be a reliable substitute" for his alleged lack of investigation. Motion at 12. The argument ignores two important facts: (1) Mr. Keefauver did study the six most relevant SDOs; and (2) Complaint Counsel are unable to identify any authoritative survey of SDO patent policies in the early to mid-1990s that Mr. Keefauver should have considered but did not.

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<sup>25</sup> Examples include Section 1.4 (Notice of Meetings and Minutes), Section 2 (council membership, chairs, meetings, motions), Section 3 (Committee organization, scope, chairs), and Section 7 (Liaison and Communications: "It is the responsibility of all committee Chairpersons to maintain effective liaison with JEDEC committees and other organizations"). *See* JEDEC Manual of Organization and Procedure JEP 21-I (Oct. 1993) (Ex. 18).

The only survey Complaint Counsel mentions is the survey of 43 SDOs conducted by Mark Lemley. Motion at 13, n.9. But Mr. Lemley's survey addressed SDO patent policies as they existed as of *June 2002*, six years after Rambus left JEDEC. Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1904 n.48 (2002). Contrary to Complaint Counsel's argument, Mr. Keefauver's independent study of the relevant-in-time patent policies of the most relevant in-focus high-tech SDOs, rather than relying on this one secondary source, is a perfectly legitimate and reliable approach.

**D. Mr. Keefauver's Forty Years of Experience With SDOs Is More Than Adequate to Qualify Him to Testify as an Expert.**

Complaint Counsel's Motion *begins* by indicating that it "does not challenge directly Mr. Keefauver's specialized knowledge." Motion at 2. It is unclear, therefore, what argument they are making at the very *end* of their Motion, when they appear to challenge just that. *Id.* at 14. In any event, there is no question that Mr. Keefauver's experience is more than enough to qualify him as an expert.

As discussed above, the Rule 702 standard for qualification of an expert is "specialized knowledge" gained through skill, experience, training or education. Fed. R. Evid. 702. This standard is to be applied permissively: "As long as some reasonable indication of qualifications is adduced, the court may admit the evidence without abdicating its gate-keeping function. After that, qualifications become an issue for the trier of fact rather than for the court . . . ." *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 507 (5th Cir. 1999).

Mr. Keefauver's specialized knowledge results from education (his degrees in engineering and law) and his forty years of experience with high-tech SDOs and their patent policies. Mr. Keefauver's involvement in SDOs began in the early 1960s. Complaint Counsel grudgingly admit that Mr. Keefauver "did spend some time on the EIA patent committee,"

Motion at 14, but they fail to mention that he was a member of the EIA Patent Committee for the better part of a decade, Chair of the Committee for three or four years, and one of the primary drafters of EIA's first patent policy. (Keefauver 3/4/03 Dep. at 42:7-42:12, 74:11-75:3) (Ex. 3); Keefauver Report ¶ 8 (Ex. 1). Complaint Counsel also argue that Mr. Keefauver's experience since his time at EIA is questionable because it consisted primarily of oversight of AT&T's and Bell Lab's SDO participants when Mr. Keefauver was General Counsel and Vice President of those companies, rather than direct involvement in the SDOs himself. But experience gained as a supervisor is especially useful in understanding the high-tech SDO industry practice regarding interpretation of patent policies. *See United States Fid. & Guar. Co. v. Stulco, Inc.*, 171 F.R.D. 305, 306-07 (D. Kan. 1997) (denying motion to exclude expert testimony on grounds that management experience in the insurance industry qualifies witness as an expert on claims handling procedures even though the witness was never himself a claims handler).<sup>26</sup>

In short, Complaint Counsel's last ditch attempt to discredit Mr. Keefauver's credibility, based in large part Complaint Counsel's own mischaracterization of the record, should be rejected. Mr. Keefauver's opinions are based on a careful review of an extensive and relevant

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<sup>26</sup> Complaint Counsel argue that Mr. Keefauver's experience is inconsistent with his opinions because he advised one of his employees to disclose a patent application "even though Mr. Keefauver understood that such a disclosure was not required by the SSO's patent policy," Motion at 15. But Mr. Keefauver explained at deposition that the reason he advised disclosure was because it involved the rare situation in which the AT&T or Bell Labs employee *who was proposing the standard* to the SDO was the one who had submitted the patent application to the PTO. (Keefauver 3/4/03 Dep. at 32:18-33:23) (Ex. 3). Rambus was never in that situation because it was never a presenter at JEDEC. Moreover, Mr. Keefauver's testimony on this point is perfectly consistent with Section VII.D of his Report, captioned "In Evaluating the obligation to make disclosures, consideration should be given to the nature and extent of the member's participation," Keefauver Report ¶¶ 47-49 (Ex. 1), in which Mr. Keefauver explains that there are good reasons for imposing a higher disclosure obligation on companies that propose standards.

record, including documents relating to patent policies of the very SDOs that JEDEC documents, JEDEC members, and even JEDEC's webpage acknowledge are particularly relevant. These provide a reliable basis for Mr. Keefauver's opinions. To the extent Complaint Counsel quibble with the accuracy of some of the bases of Mr. Keefauver's opinions it is their right to cross-examine him, but Complaint Counsel has offered no basis for precluding any of Mr. Keefauver's testimony, let alone for barring Mr. Keefauver from testifying altogether.

### CONCLUSION

For the foregoing reasons, Complaint Counsel's motion to exclude the expert Report and testimony of William Keefauver should be denied.

DATED: April 11, 2003

Respectfully submitted,

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Gregory P. Stone  
Steven M. Perry  
Peter A. Detre  
Sean P. Gates  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue, 35<sup>th</sup> Floor  
Los Angeles, California 90071  
(213) 683-9100  
(213) 687-3702 (facsimile)

A. Douglas Melamed  
IJay Palansky  
Kenneth A. Bamberger  
WILMER, CUTLER & PICKERING  
2445 M Street, NW  
Washington, DC 20037  
(202) 663-6000

Sean C. Cunningham  
John M. Guaragna  
GRAY, CARY, WARE & FREIDENRICH LLP  
401 "B" Street, Suite 2000  
San Diego, California 92101  
(619) 699-2700

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

**CERTIFICATE OF SERVICE**

I, IJay Palansky, hereby certify that on April 11, 2003, I caused a true and correct copy of the public versions of *Respondent Rambus Inc.'s Opposition to Complaint Counsel's Motion in Limine to Preclude Report and Testimony of William L. Keefauver* and *Respondent Rambus Inc.'s Opposition to Complaint Counsel's Memorandum in Support of Motion in Limine to Preclude Opinions of Richard T. Rapp and David J. Teece Regarding "Efficient Breach" Theory* to be served on the following persons by hand delivery:

Hon. Stephen J. McGuire  
Administrative Law Judge  
Federal Trade Commission  
Room H-112  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

M. Sean Royall, Esq.  
Deputy Director, Bureau of Competition  
Federal Trade Commission  
Room H-372  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Donald S. Clark, Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Malcolm L. Catt, Esq.  
Attorney  
Federal Trade Commission  
Room H-372  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Richard B. Dagen, Esq.  
Assistant Director  
Bureau of Competition  
Federal Trade Commission  
Room H-372  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

\_\_\_\_\_  
IJay Palansky

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

_____	)	
In the Matter of	)	
	)	
RAMBUS INC.,	)	Docket No. 9302
a corporation,	)	
_____	)	

**CERTIFICATION**

I, Jacqueline M. Haberer, hereby certify that the electronic copy of *Respondent Rambus Inc.'s Opposition to Complaint Counsel's Motion In Limine to Preclude Report and Testimony of William L. Keefauver* accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on April 11, 2003 by other means:

**Jacqueline M. Haberer**  
**April 11, 2003**