

1 JOSEPH W. COTCHETT (#36324)
PHILIP L. GREGORY (#95217)
2 COTCHETT, PITRE & McCARTHY
840 Malcolm Road, Suite 200
3 Burlingame, California 94010
Tel: (650) 697-6000 • Fax: (650) 697-0577

4 GREGORY P. STONE (#78329)
5 STEVEN M. PERRY (#106154)
MUNGER, TOLLES & OLSON LLP
6 355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
7 Tel: (213) 683-9100 • Fax: (213) 687-3702

8 JEFFREY L. BLEICH (#144340)
SUSAN T. BOYD (#229664)
9 LEE S. TAYLOR (#243863)
MUNGER, TOLLES & OLSON LLP
10 560 Mission Street, 27th Floor
San Francisco, California 94105-2907
11 Tel: (415) 512-4000 • Fax: (415) 512-4077

12 Attorneys for Plaintiff
RAMBUS INC.

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 CITY AND COUNTY OF SAN FRANCISCO

17 RAMBUS INC.,
18 Plaintiff,
19 v.
20 MICRON TECHNOLOGY, INC., et al.,
21 Defendants.

CASE NO. 04-431105

**RAMBUS'S MEMORANDUM OF POINTS
AND AUTHORITIES IN OPPOSITION TO
HYNIX'S MOTION FOR SUMMARY
JUDGMENT BASED ON FAILURE OF
PROOF AS TO ALLEGED ILLEGAL
AGREEMENT**

Date: February 23, 2009
Time: 1:30 p.m.
Dept: 304
Judge: Hon. Richard A. Kramer

Complaint Filed: May 5, 2004
Trial Date: March 16, 2009

26 **[PUBLIC REDACTED VERSION]**
27
28

FILED
San Francisco County Superior Court
JAN 27 2009
GORDON PARK-LI, Clerk
BY: Deputy Clerk

TABLE OF CONTENTS

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

	<u>Page</u>
I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
II. STATEMENT OF FACTS	1
III. ARGUMENT	5
A. Hynix Has Not Met Its Initial Burden Under Aguilar.....	5
1. Hynix’s Cursory Description Of The Defendants’ Conduct Ignores Numerous Examples Of Parallel Conduct With Respect To Output And Price And Thus Does Not Shift The Burden Of Production.....	6
2. Hynix’s Conclusory Denials Of Wrongdoing Do Not Shift The Burden Of Production	8
3. Mr. Tabrizi’s Statement About Profit Maximization Does Not Address The Evidence Of Collusion Or Parallel Conduct.....	9
B. Even If Hynix Has Met Its Threshold Burden, Rambus Has Made The Necessary Showing Under Aguilar To Preclude Summary Judgment	10
1. Rambus’s Direct Evidence Of Conspiracy Is Sufficient To Defeat An Aguilar Motion.....	10
2. Many Of The Issues Of Fact That Hynix Designated As Material To The Existence Of An Illegal Agreement Are The Subject Of Genuine Dispute.....	12
a. Micron’s Purported Business Strategy Of “Adopting New Technology Late.”	13
b. Craig Barrett’s Purported Statement Regarding Intel’s Relationship With Rambus	14
3. Rambus Has Also Proffered Substantial Evidence Of What Eddins Calls “Plus Factors,” Including “Evidence Implying A Traditional Conspiracy.”	15
C. Hynix’s Argument Regarding Antitrust Injury Provides No Basis For The Dismissal Of Any Claim	18
D. Summary Judgment Should Be Denied As To Rambus’s Other Claims Against Hynix	19
IV. CONCLUSION	20

TABLE OF AUTHORITIES

Page

STATE CASES

1
2
3
4 *Aguilar v. Atlantic Richfield Co.*,
25 Cal.4th 826, 24 P.3d 510 (2001) passim
5 *Eddins v. Redstone*,
134 Cal.App.4th 290 (2006)..... 15, 17, 18
6

FEDERAL CASES

7
8 *Amarel v. Connell*,
102 F.3d 1494 (9th Cir. 1996)..... 18
9 *Atlantic Richfield Co. v. USA Petroleum Co.*,
495 U.S. 328 (1990) 19
10 *Broadcom Corp. v. Qualcomm Inc.*,
543 F.3d 683 (Fed. Cir. 2008)..... 7
11 *Brunswick Corp. v. Pueblo Bowl-O-Mat*,
429 U.S. 477 (1977)..... 19
12 *Champagne Metals v. Ken-Mac Metals, Inc.*,
458 F.3d 1073 (10th Cir. 2006)..... 17, 19
13 *In re Citric Acid Litig.*,
191 F.3d 1090 (9th Cir. 1999)..... 15
14 *In re Citric Acid Litig.*,
996 F. Supp. 951 (N.D. Cal. 1998) 15
15 *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*,
906 F.2d 432 (9th Cir. 1990)..... 10
16 *In re Flat Glass Antitrust Litig.*,
385 F.3d 350 (3d Cir. 2004)..... 7, 16
17 *In re High Fructose Corn Syrup Antitrust Litig.*,
295 F.3d 651 (7th Cir. 2002)..... 7
18 *In Re Vitamins Antitrust Litig.*,
320 F.Supp.2d 1 (D.D.C. 2004) 18
19 *Knevelbaard Dairies v. Kraft Foods, Inc.*,
232 F.3d 979 (9th Cir. 2000)..... 19
20 *NCAA v. Board of Regents*,
468 U.S. 85 (1984)..... 20
21 *Rossi v. Standard Roofing, Inc.*,
156 F.3d 452 (3d Cir. 1998)..... 10, 12, 18
22 *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*,
530 F.3d 204 (3d Cir. 2008)..... 10
23 *Tunica Web Adver. v. Tunica Casino Operators Ass'n, Inc.*,
496 F.3d 403 (5th Cir. 2007)..... 10, 11, 12
24 *United States v. Alston*,
974 F.2d 1206 (9th Cir. 1992)..... 20
25
26
27
28

TABLE OF AUTHORITIES
(continued)

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

Page

Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko, LLP,
540 U.S. 398 (2004)..... 20

TREATISES

Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group
2008)
¶ 10.245.16..... 5
¶ 10.95.1..... 12

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Rambus alleges in this action that Hynix and its co-defendants participated in an unlawful
3 conspiracy to restrict production and fix the price of RDRAM memory devices. Complaint ¶¶ 1,
4 95, 101-104. Rambus further alleges that “[a]s a direct result of Defendants’ unlawful
5 combination and conspiracy, Defendants’ alternative memory chip designs have become the *de*
6 *facto* industry standards, and Rambus’s memory chip design has been relegated to a niche role.”
7 *Id.*, ¶ 12. Because Rambus was entitled to receive a royalty on the sale of such devices,
8 Defendants’ conduct “has had a dramatic adverse effect on the royalties Rambus has collected
9 and will collect. . . .” *Id.*, ¶ 104.

10 Hynix has moved for summary judgment on Rambus’s claims against it on two grounds:
11 (1) that Rambus supposedly “cannot prove an illegal agreement” involving Hynix; and (2) that
12 Rambus supposedly has “fail[ed] to quantify the duration and extent of the alleged price
13 manipulation and output restriction.” Hynix Notice of Motion at 1-2. Hynix’s motion is
14 meritless and should be denied, for two principal reasons:

- 15 • Hynix has failed to address the material evidence showing the existence of an
16 illegal agreement, and thus has failed to meet its threshold burden under *Aguilar v.*
17 *Atlantic Richfield Co.*, 25 Cal.4th 826 (2001).
- 18 • The presence of direct evidence of conspiracy, and the existence of numerous
19 disputed issues of fact, require that Hynix’s motion be denied.

20 **II. STATEMENT OF FACTS**

21 Rambus will prove at trial that Hynix played a pivotal role in the Defendants’ concerted
22 efforts to prevent RDRAM’s adoption as the mainstream memory standard. Rambus has
23 separately submitted its responses to Hynix’s Separate Statement of Undisputed Facts. As these
24 responses demonstrate, most of Hynix’s “undisputed” material facts are subject to genuine
25 dispute. Hynix’s motion and its Separate Statement also fail to address the substantial evidence
26 of Hynix’s participation in unlawful conspiratorial conduct that caused RDRAM to become a
27 “niche” product. Some of that evidence is presented below:

- 28 1. In late November 1999, Intel released its “Camino” and “Carmel” chipsets that

1 enabled RDRAM memory to be used with Intel's Pentium III processors. See Rambus's Separate
2 Statement in Opposition to Hynix's Motion for Summary Judgment – Additional Facts (“RSS-
3 AF”), ¶ 48.

4 2. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] See Rambus's Separate Statement of Facts in Opposition to Hynix's Motion for
9 Summary Judgment (“RSS”), ¶ 22.

10 3. The Defendants were aware in December 1999 and January 2000 that Dell, IBM
11 and Compaq had launched new computer products that included RDRAM memory and that those
12 companies were experiencing a surge in demand for their RDRAM-based product lines. RSS-AF,
13 ¶¶ 51, 55. In a February 16, 2000 email, for example, a Micron sales representative reported that
14 he had “just talked to someone at Samsung who said that Compaq is pressing hard for Rambus
15 support” and that Compaq had made a “sooner than expected technology switch (towards
16 Rambus) based on the apparent success Dell is having.” RSS-AF, ¶ 59.

17 4. Hynix was well aware in this time period that Dell and other computer
18 manufacturers required lower DRAM pricing in order to ramp their new product lines. [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED] RSS, ¶ 14; Hamilton Decl., ex. 48.

24 5. The Defendants chose collusion, not competition, in response to customer
25 demands for lower prices. A February 8, 2000 email by Hynix sales representative Charles Byrd,
26 for example, reported that he had learned *from Samsung* that Infineon “apparently did a stupid
27 thing on RDRAM pricing” to Compaq by offering a “lower price” than Samsung. RSS-AF, ¶ 60.
28 Infineon's “stupid” mistake was in “quot[ing] pricing without first checking with” Samsung. *Id.*

1 The Samsung employee also told Hynix's Byrd that unlike Infineon, NEC had "checked with"
2 Samsung and was "in line with [Samsung] pricing." *Id.*

3 6. In April 2000, Hynix's Byrd prepared a chart showing DRAM supplier prices for
4 six RDRAM modules. Byrd reported that Samsung had established a "reference price" for
5 RDRAM that Samsung "does not want anyone to go below." RSS-AF, ¶ 63. Hynix and
6 Samsung held regular meetings in this time period to discuss the respective companies' "Rambus
7 status" and RDRAM "production plan." RSS-AF, ¶ 62.

8 7. In May 2000, Dell informed Hynix and other DRAM manufacturers that RDRAM
9 prices were too high and that unless the manufacturers provided Dell with future RDRAM price
10 projections that showed substantial declines, Dell would alter its future product roadmap to
11 include more SDRAM and DDR and less RDRAM. RSS-AF, ¶¶ 65-66. As a Dell manager put it
12 in May 2000, Dell's "message to [DRAM suppliers] is drop prices or we will continue to decrease
13 our RDRAM forecasts and we will architect next generation systems around DDR." RSS, ¶ 14;
14 Hamilton Decl., exs. 55, 236.

15 8. After receiving Dell's price targets, [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED] RSS-AF, ¶ 69.

19 On June 7, 2000, a Hynix Vice President sent separate emails to an Infineon executive and five
20 Micron executives informing them that Hynix would not meet Dell's price targets and asking
21 them to join Hynix in sending Dell a message that it should reconsider its RDRAM support.
22 RSS-AF, ¶ 71.¹

23 9. As a result of this conduct, the DRAM suppliers collectively refused to meet
24 Dell's RDRAM price targets. [REDACTED]

25 [REDACTED]

26 [REDACTED]

27

28 ¹ The suggested joint message was that Dell should "get your head out of your xxxx" with
respect to RDRAM. *Id.*

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

RSS-AF, ¶ 73.

10. In late 2000, Intel launched its new Pentium 4 chipset, which was optimized to take advantage of the enormous bandwidth offered by RDRAM. RSS-AF, ¶ 76.

11. The defendants continued in 2001 to share information about their RDRAM pricing and production plans. RSS-AF, ¶¶ 78-79.

[REDACTED]

12. [REDACTED]

[REDACTED]

RSS-AF, ¶ 83.²

13. [REDACTED]

[REDACTED]

[REDACTED] RSS, ¶ 17; Hamilton Decl., ex. 78.

14. In this same time period, the Defendants were working in concert to provide low DDR prices and low DDR price projections to OEMs to create the artificial impression that DDR would be less expensive than RDRAM. As a Micron sales executive explained in a June 5, 2001 email, “[w]e want DDR to explode into the market-place so have actually been requesting Infineon, Samsung and Hynix to lower their DDR pricing to help it become a standard (and drive

² [REDACTED] RSS-AF, ¶ 81.

1 Rambus away completely).” RSS, ¶ 1; Hamilton Decl., ex. 268.

2 15. Hynix Vice President Tabrizi [REDACTED]

3 [REDACTED] RSS, ¶ 14.

4 16. By the end of 2002, DDR, not RDRAM, had won the “standards battle” described
5 in Hynix’s pending motion. Hynix Motion at 1:20. Hynix acknowledges that RDRAM prices
6 were a substantial factor in RDRAM’s failure to become the dominant DRAM standard, although
7 Hynix attributes those high prices to purportedly high RDRAM manufacturing costs. *Id.* at 1:20-
8 21; 4:15-16.

9 **III. ARGUMENT**

10 **A. Hynix Has Not Met Its Initial Burden Under *Aguilar***

11 Under *Aguilar*, a moving defendant must “make a *prima facie* showing of the
12 nonexistence of any triable issue of material fact. . . .” *Aguilar*, 25 Cal.4th at 850, 24 P.3d at 510.
13 If the defendant makes this showing, the burden of production (but not the burden of persuasion)
14 shifts to the plaintiff. *Id.* Unlike federal law, California law requires that in order for a defendant
15 to shift the burden of production, it must do more than simply “point out through argument” that
16 the plaintiff lacks the necessary evidence. *Id.* at 854. Instead, a moving defendant must “present
17 evidence that the plaintiff does not possess and cannot reasonably obtain, [the] needed evidence
18” *Id.* at 855. In addition, in order to make a *prima facie* showing that a plaintiff does not
19 possess the necessary evidence on an essential element of its claim, a defendant “must set forth
20 all the material evidence on point, not just the evidence favorable to it.” Weil & Brown, Cal.
21 Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) (“Weil & Brown”),
22 ¶ 10:245.16 (emphasis in original).

23 Hynix asserts that it has met its initial burden under *Aguilar* by supposedly showing that:
24 (1) the Defendants’ RDRAM output and pricing practices were “not parallel;” (2) Hynix’s
25 witnesses “have denied that Hynix participated in any anti-RDRAM conspiracy;” and (3) Hynix’s
26 witnesses have testified “that Hynix’s pricing and output decisions were made for independent
27 business reasons.” Hynix Mem. at 8:1-9:28. As set out below, Hynix has not met its initial
28

1 burden, and its motion should be denied.

2 **1. Hynix's Cursory Description Of The Defendants' Conduct**
3 **Ignores Numerous Examples Of Parallel Conduct With Respect**
4 **To Output And Price And Thus Does Not Shift The Burden Of**
5 **Production**

6 Under *Aguilar*, Hynix cannot shift the burden of production to Rambus merely by arguing
7 that "[t]he absence of parallel conduct shows that the defendants did not conspire." Hynix Mem.
8 at 8:2-3. Instead, Hynix must address "all" the material evidence of the Defendants' parallel
9 conduct, including the evidence of such conduct described in Rambus's interrogatory responses.
10 Weil & Brown, ¶¶ 10:95.10, 10:242; 10:244-245.

11 Hynix did not meet this burden. Citing its expert's conclusions, Hynix asserts that "at
12 times," the defendants charged different prices for RDRAM and that over an eight-year period,
13 their *total* RDRAM output varied. Hynix Mem. at 8:5-12. But that cursory description ignores
14 numerous specific examples of parallel conduct with respect to both RDRAM output and
15 RDRAM pricing. For example, Hynix entirely fails to address Rambus's evidence that in
16 October 1999, Hynix and Micron *reached an agreement* to suspend their efforts to bring RDRAM
17 to market. Hynix's Vice President of Worldwide Sales and Marketing, Farhad Tabrizi, prepared a
18 draft press release in October 1999 announcing Hynix's intention to halt "all production of and
19 investment in" its RDRAM program, in response to a delay in the launch of Intel's Camino
20 chipset. RSS, ¶¶ 14, 17; Hamilton Decl., exs. 34-35; RSS-AF, ¶ 46. Mr. Tabrizi then forwarded
21 the Hynix press release, *in draft form*, to two Micron executives and asked for *Micron's*
22 comments. *Id.* Mr. Tabrizi has testified that he sent the draft press release to Micron because he
23 "wanted to see if they can make the same announcement." *Id.* In fact, that same day, a Micron
24 executive wrote back to Tabrizi with edits to Hynix's draft release, and he confirmed that Micron
25 "will be giving a similar message" about its RDRAM plans. *Id.*

26 This is not just evidence of "parallel conduct"; it is direct evidence of an *agreement* to
27 suspend RDRAM production efforts and to send the same message about that decision to
28

1 customers.³ The coordination of production decisions by putative competitors is classic cartel
2 behavior. *Aguilar*, 25 Cal.4th at 851 (noting that the Cartwright Act “makes a conspiracy among
3 competitors to restrict output and/or raise prices unlawful *per se* without regard to any of its
4 effects. . . .”). Under *Aguilar*, Hynix was required in its opening brief or Separate Statement to
5 address this evidence of parallel conduct by, for example, submitting declarations by
6 knowledgeable Hynix and Micron officers explaining that their October 1999 decision(s) to
7 suspend RDRAM production efforts were made independently, based on legitimate business
8 considerations. *Id.* at 861. Because Hynix did not do so, it has failed to meet its initial burden of
9 production under *Aguilar* with respect to the Defendants’ RDRAM output decisions.

10 Hynix similarly ignores – and offers no pro-competitive explanation for – evidence
11 showing parallel conduct and agreements with respect to RDRAM pricing. Although Hynix
12 points to its experts’ analysis of average prices, Hynix is well aware that this case involves far
13 more than allegations of parallel average prices. Instead, this case involves competition for
14 “design wins” and “roadmap slots” that is driven in large part by the expectations of computer
15 manufacturers and Intel about future DRAM prices. RSS, ¶ 13; Hamilton Decl., exs. 89, 109 and
16 159.⁴ Those expectations are in turn driven by projections provided to OEMs and Intel by the
17 DRAM suppliers. *Id.* By working in concert to present artificially high or low pricing
18 expectations, DRAM suppliers can “tip” the DRAM selection process. *Id.* An expert’s

19
20 ³ As discussed in section IIIB, *infra*, the presence of direct evidence of an agreement is alone
21 sufficient to bar summary judgment in a price fixing case. Moreover, it has been widely
22 recognized that at the summary judgment stage, “[t]he most important evidence will generally be
23 non-economic evidence ‘that there was an actual, manifest agreement not to compete.’” *In re*
24 *Flat Glass Antitrust Litig.*, 385 F.3d 350, 361 (3d Cir. 2004) (“*Flat Glass*”), quoting *In re High*
25 *Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002).

26 ⁴ In this respect, competition is similar to that in the market for baseband chips, as described in a
27 recent opinion by the Court of Appeals for the Federal Circuit:

28 “[t]he market for baseband chips is unlike the typical market for consumer goods
where competitors compete for each consumer sale, and the competition is
instantaneous and on-going Competition for sales is not on a unit-by-unit
basis, but rather competition is characterized by competing for ‘design wins’ for
the development and production of [products] which will embody the proposed
chip. . . .”

Broadcom Corp. v. Qualcomm Inc., 543 F.3d 683, 702 (Fed. Cir. 2008) (quoting unpublished
District Court opinion).

1 calculations of average RDRAM prices paid by a large group of customers says nothing at all
2 about whether price *projections* to particular OEMs were competitively set.

3 There is substantial evidence of collusion with respect to the Defendants' RDRAM price
4 projections. As noted above, Dell, the world's largest computer manufacturer, told the
5 Defendants in May 2000 that it would reduce its RDRAM usage, and switch to other types of
6 DRAMs, if the Defendants' RDRAM price *projections* did not reflect substantial future price
7 decreases. RSS, ¶¶ 14, 17; RSS-AF, ¶ 65. Instead of engaging in price competition at Dell,
8 however, the Defendants worked together to ensure that their price projections were inflated.
9 Hynix, Samsung and Micron had a series of meetings and telephone calls in which they discussed
10 Dell's price targets. RSS ¶¶ 14, 17; RSS-AF, ¶¶ 67-72. In June 2000, Hynix Vice President
11 Tabrizi sent emails to executives at Infineon and Micron that made it clear that Hynix would not
12 meet Dell's price targets for RDRAM and proposed that the companies jointly send a message to
13 Dell and Intel to "get your head out of your ****" with respect to RDRAM. RSS, ¶¶ 14, 17;
14 RSS-AF, ¶ 71. Two days later, on June 9, 2000, [REDACTED]

15 [REDACTED]
16 [REDACTED] RSS-AF, ¶ 73.

17 Hynix's failure in its motion and Separate Statement to address this evidence of parallel
18 conduct with respect to Dell's RDRAM price targets is fatal to its motion. This is particularly
19 true given that Hynix suggests in its Statement of Facts that it was "the Camino delays and the
20 lack of any performance advantage" that caused Dell to experience "lower than forecasted sales"
21 of its RDRAM-based systems. Hynix Motion at 3:12-17. Hynix also failed to address other
22 evidence of price collusion cited in Rambus's interrogatory responses. *See, e.g.*, RSS, ¶¶ 14, 17.
23 Hynix has thus failed to satisfy its threshold burden under *Aguilar*.

24 **2. Hynix's Conclusory Denials Of Wrongdoing Do Not Shift The**
25 **Burden Of Production**

26 Despite its failure to address specific examples of collusion, Hynix claims to have met its
27 initial burden of production by citing the purported testimony of six Hynix employees that they
28 did not know of, and had not entered into, agreements to fix RDRAM prices or restrict output.

1 Hynix Motion at 8:1; 8:22-9:3. Conclusory denials of wrongdoing do not, however, satisfy
2 Hynix's initial burden under *Aguilar*, for several reasons. First, as explained in Rambus's
3 response to Hynix's Separate Statement, the questions asked of the Hynix deponents often did not
4 cover *both* price and output. RSS, ¶ 14. Second, conclusory denials are simply insufficient, as
5 the *Aguilar* court made clear in describing why the defendants' declarations in that case *were*
6 sufficient to shift the burden of production:

7 "The declarations in question, it must be emphasized, generally stated
8 on personal knowledge how the companies made their capacity,
9 production, and pricing decisions about CARB gasoline. Hence, *they*
10 *did more than baldly assert that they made them independently, and*
11 *did more than baldly deny that they made them collusively with each*
12 *other."*

13 *Aguilar*, 25 Cal.4th at 861 (emphasis added).

14 The requirement that Hynix's witnesses provide more than just bald denials is particularly
15 acute here given that, as Hynix acknowledges, several of the executives in question pled guilty to
16 DRAM price fixing. Hynix's representation that its executives' guilty pleas "excluded
17 RDRAM," Hynix Motion at 9 n.46, is simply false. The Plea Agreements in question, which
18 Hynix did not provide to the Court, did *not* exclude RDRAM and instead referred to the price
19 fixing of "DRAM," which is defined in a way that *includes*, not *excludes*, RDRAM. RSS, ¶¶ 14-
20 15; Hamilton Decl., exs. 192, 279, 290, 291.⁵

21 3. Mr. Tabrizi's Statement About Profit Maximization Does Not 22 Address The Evidence Of Collusion Or Parallel Conduct

23 Hynix also tells the Court that "Hynix executives" have explained Hynix's pricing and
24 output decisions. Hynix Motion at 9:4. However, Hynix points in its motion and Separate
25 Statement to testimony by only *one* such witness, Farhad Tabrizi. Hynix Mem. at 9:11-15; Hynix

26 ⁵ It is true, as Hynix points out, that Hynix's own corporate plea agreement explicitly excluded
27 RDRAM from the definition of "DRAM." Basileo Decl., ex. 28. That exclusion does not support
28 an inference that Hynix did not engage in price fixing with respect to RDRAM, for the reasons set
out in Mr. Bienert's expert report. RSS, ¶ 15. For example, the Hynix guilty plea required that
Hynix cooperate in the Department of Justice's "ongoing investigation" into RDRAM price fixing.
Id. Moreover, the guilty pleas of Hynix's executives came *after* Hynix itself had pled guilty, and
as noted above, they did not include the same restrictive definition of "DRAM." RSS, ¶¶ 14-15.

1 Separate Statement, ¶ 16. [REDACTED]

2 [REDACTED]

3 [REDACTED] *Id.* The cited testimony thus established nothing about Hynix's
4 production and pricing decisions after 1998, nor does it address the evidence of specific parallel
5 conduct and agreements with respect to RDRAM production and price described above.

6 In sum, Hynix has not met its initial burden of production under *Aguilar* to make a "*prima*
7 *facie* showing of the nonexistence of any triable issue of material fact" regarding the existence of
8 an unlawful agreement involving Hynix. *Aguilar*, 25 Cal.4th at 850. Hynix has failed to address
9 all of the material evidence, and the assertions it does make about the evidence are not supported
10 by the documents and testimony it cites. Under *Aguilar*, therefore, Hynix's motion must be
11 denied. Even if, however, Hynix had met its burden, Rambus could readily meet its own burden
12 of production, for the reasons set out below.

13 **B. Even If Hynix Has Met Its Threshold Burden, Rambus Has Made The**
14 **Necessary Showing Under *Aguilar* To Preclude Summary Judgment**

15 **1. Rambus's Direct Evidence Of Conspiracy Is Sufficient To**
16 **Defeat An *Aguilar* Motion**

17 As Hynix (at least implicitly) acknowledges, the presence of direct evidence of conspiracy
18 will defeat a motion for summary judgment, for such evidence requires that a jury determine
19 whether the conspiracy existed. Put differently, a plaintiff's proffer of *direct* evidence of an
20 agreement renders irrelevant *Aguilar's* restrictions on the inferences that can be drawn from
21 *circumstantial* evidence.⁶ As used in this context, "[d]irect evidence of concerted action 'is that

22 ⁶ While Rambus has located no California cases directly on point, the Federal cases uniformly
23 hold that "[t]he *Matsushita* standards do not apply when the plaintiff has offered direct evidence
24 of conspiracy." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*,
25 906 F.2d 432, 441 (9th Cir. 1990). See also *Toledo Mack Sales & Service, Inc. v. Mack Trucks,*
26 *Inc.*, 530 F.3d 204, 220 (3d Cir. 2008) ("Because we conclude that Toledo's direct evidence is
27 sufficient to allow a jury to conclude that a conspiracy not to compete existed among Mack
28 dealers, we need not apply the rules restricting inferences drawn from circumstantial evidence");
Tunica Web Adver. v. Tunica Casino Operators Ass'n, Inc., 496 F.3d 403, 411 (5th Cir. 2007)
(summary judgment unavailable where direct evidence of conspiracy is presented by the
plaintiff); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998) ("[I]n direct evidence
cases, the plaintiff need not adduce circumstantial evidence that tends to exclude the possibility
that the alleged conspirators acted independently, and there need not be an inquiry into the
plausibility of the defendants' claim or the rationality of defendants' economic motives")
(internal quotations and citations omitted).

1 which explicitly refer[s] to an understanding between the alleged conspirators. . . ." *Tunica Web*
2 *Adver.*, 496 F.3d at 409 (citations omitted). In *Tunica Web Advertising*, the plaintiff had
3 proffered testimony by the plaintiff's CEO that one of the defendant's marketing directors had
4 told him that the defendants had a "gentleman's agreement" not to deal with the plaintiff. *Id.* at
5 407, 410. The Fifth Circuit reversed and remanded the trial court's entry of summary judgment
6 on the ground that this evidence, if admitted, was direct rather than circumstantial evidence of an
7 agreement and was thus sufficient to bar summary judgment. *Id.* at 410-411.

8 Rambus has unearthed a far more substantial array of direct evidence than the plaintiff in
9 *Tunica Web Advertising* or the plaintiffs in any of the cases cited in fn. 7, *supra*. Examples of
10 direct evidence that "explicitly refer[s] to an understanding," *Tunica Web Advertising*, 496 F.3d at
11 409, between DRAM suppliers include:

12 (1)

13 [REDACTED]
14 [REDACTED] and Micron's written response that it
15 would give "a similar message" about its RDRAM efforts, RSS, ¶ 14; Hamilton
16 Decl., exs. 34-35; RSS-AF, ¶ 46;

17 (2)

18 [REDACTED] RSS, ¶ 14; Hamilton Decl., ex. 265;

19 (3)

20 the report by Hynix account manager Charles Byrd that in February 2000, NEC
21 had "checked with" Samsung before offering RDRAM prices to Dell and was "in
22 line with [Samsung's] pricing," RSS, ¶ 14; Hamilton Decl., ex. 47;

23 (4)

24 the April 2000 report by Hynix's Byrd that Samsung had established a "reference
25 price" for RDRAM that Samsung "does not want anyone to go below," RSS, ¶ 14;
26 Hamilton Decl., ex. 53;

27 (5)

28 the acknowledgment in March 2002 by Hynix sales executive C.K. Chung that
Hynix's DDR prices to HP were "from Micron," RSS, ¶ 14; Hamilton Decl., ex.
140; and

(6)

the concern stated by a Micron manager in April 1999 that Samsung may have

1 "broken ranks with the other suppliers" and decided to support RDRAM, RSS, ¶ 1;
2 Hamilton Decl., ex. 22.

3 The existence of this direct evidence of agreements with respect to RDRAM output and
4 RDRAM prices bars the entry of summary judgment and eliminates the need for a further
5 consideration of Rambus's circumstantial evidence of conspiracy. See *Tunica Web Adver.*, 496
6 F.3d at 411; *Rossi*, 156 F.3d at 466.

7 **2. Many Of The Issues Of Fact That Hynix Designated As Material**
8 **To The Existence Of An Illegal Agreement Are The Subject Of**
9 **Genuine Dispute.**

10 Even if Hynix had met its threshold burden of production, and even if Rambus's direct
11 evidence of conspiracy were insufficient to bar the entry of summary judgment, Hynix's motion
12 would still fail, for many of the "material" facts that Hynix sets out in support of its motion are
13 the subject of deep and genuine dispute.

14 Under California law, Hynix's motion must be denied if there is a genuine dispute as to
15 just *one* of the numerous facts that Hynix has designated as material to its motion. See *Weil &*
16 *Brown*, ¶ 10:95:1 (advising counsel to "[i]nclude only those facts which are *truly material* to the
17 claims or defenses because the separate statement effectively *concedes* the materiality of
18 whatever facts are included. Thus, if a triable issue is raised as to any of the facts in your separate
19 statement, the motion must be denied!") (emphasis and punctuation in original). As a
20 consequence, Rambus will not in this brief describe each of the factual disputes that surround
21 Hynix's material facts, for those disputes are outlined in detail in Rambus's Opposition to
22 Hynix's Separate Statement. This brief will instead address two examples of those disputes: (1)
23 the parties' dispute over Micron's "general business strategy" and whether that strategy explains
24 Micron's "fail[ure] to market RDRAM in commercial volumes . . ." Hynix Mem. at 5:5-7; Hynix
25 Separate Statement, ¶ 2; and (2) the parties' dispute over whether Intel CEO Craig Barrett
26 "publicly characterized Intel's relationship with Rambus as a 'mistake.'" Hynix Mem. at 4:6-7;
27 Hynix Separate Statement, ¶ 25. As these citations suggest, both of these "facts" were
28 sufficiently important to Hynix's motion to merit mention *both* in Hynix's Separate Statement
and in Hynix's supporting brief. Neither is true; certainly both are disputed.

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



RSS, ¶ 2; Hamilton Decl., Exh. 214.



RSS, ¶ 5;
Hamilton Decl., Exs. 79, 52, 276. There is thus a genuine dispute about whether it was Micron's "general business strategy" in 2000-2001 to be late to market with new DRAM technologies.

b. Craig Barrett's Purported Statement Regarding Intel's Relationship With Rambus

Hynix also asserts as a material fact that "[i]n October 2000, Intel's chief executive, Craig Barrett, publicly characterized Intel's relationship with Rambus as a 'mistake.'" Hynix Mem. at 4:6-7; Hynix Separate Statement, ¶ 25. The only support proffered by Hynix is an inadmissible news article that cites a second inadmissible news article (which Hynix did not provide to the Court). But even if the cited articles were admissible, the underlying facts would still be in dispute, for one week later, Mr. Barrett explained that his prior comments had referred "specifica[ally]" to Intel's decision to incorporate RDRAM "into one particular processor called "Timna," which was planned to be used in "low-cost PC's. RSS, ¶ 25; Hamilton Decl., ex. 107. Mr. Barrett further explained that when Intel had selected RDRAM for the Timna project, it was expecting that RDRAM prices would have dropped by the time the processor was ready to ship. *Id.* Because of high RDRAM prices, however, Intel was forced to change its plans. *Id.*

In other words, not only is there a genuine dispute about what Mr. Barrett actually said in

1 October 2000, the evidence shows that the Intel roadmap changes that Mr. Barrett was describing
2 were caused by the Defendants' efforts to manipulate RDRAM prices and price projections.

3 In light of the many disputes over Hynix's material facts described in Rambus's
4 Opposition To Hynix's Separate Statement, Rambus has more than met any burden of production
5 it may have had in response to Hynix's motion. Weil & Brown, ¶ 10.95:1.

6 **3. Rambus Has Also Proffered Substantial Evidence Of What *Eddins*
7 Calls "Plus Factors," Including "Evidence Implying A Traditional
8 Conspiracy."**

8 Hynix cites *Eddins v. Redstone*, 134 Cal.App.4th 290, 304-305 (2006), for the proposition
9 that a plaintiff relying solely on "conscious parallelism" must make a showing of various factors,
10 including parallel conduct, actions against self-interest or other plus factors that imply the
11 existence of a traditional conspiracy. Hynix Mem. at 13:9-18. As explained in detail above and
12 in Rambus's Opposition to Hynix's Separate Statement, Rambus is not relying solely on parallel
13 conduct, although it has certainly demonstrated that the Defendants coordinated their RDRAM
14 pricing and output decisions at various times. The additional *Eddins* factors are thus unnecessary.
15 Nevertheless, Rambus has also submitted evidence showing Hynix's acts against self-interest and
16 many of the other "plus factors" identified in *Eddins*. Indeed, Hynix concedes that Rambus's
17 economic expert, Prof. Kenneth Elzinga, has submitted a report explaining the irrationality of
18 Hynix's decision not to compete for RDRAM sales or market share. Hynix Mem. at 14:22-25,
19 citing Basileo Decl., ex. 29. While Hynix asks the Court to disregard Prof. Elzinga's conclusions
20 "because it is improper to second-guess a business decision of this type. . . ." *id.* at 15:1-2, citing
21 *In re Citric Acid Litig.*, 191 F.3d 1090, 1101 (9th Cir. 1999), the *Citric Acid* case provides no
22 support for Hynix's position. In that case, the defendant had submitted a contemporaneous
23 internal report that explained its "business reasons for the slower expansion." *In re Citric Acid*
24 *Litig.*, 996 F. Supp. 951, 960 (N.D. Cal. 1998). Hynix points to no such document and, as noted
25 above, has not proffered any deposition testimony or declaration by a Hynix executive explaining
26 either its October 1999 decision to suspend RDRAM production efforts or *any* of its subsequent

1 output and pricing decisions.⁷ Instead, Hynix asks the Court simply to assume that Hynix's
2 "business decisions" were legitimate by citing evidence that others in the industry had "hedged
3 their bets" about RDRAM for various reasons. Hynix Mem. at 15:10. This is pure argument,
4 however, for Hynix offers no evidence of any kind that its own decisions were based on the cited
5 reasons of others, and in any event virtually all of the "evidence" cited by Hynix is itself the
6 subject of genuine dispute. See RSS, ¶¶ 20-38.

7 Rambus has also proffered substantial evidence with respect to the other issues identified
8 by Hynix at pp. 16-18 of its motion, including: (1) DRAM manufacturers believed that they
9 could control JEDEC's DRAM technology choices, compare Hynix Separate Statement, ¶ 40,
10 with RSS, ¶ 40 (citing email circulated among DRAM manufacturers stating that "JEDEC is
11 OUR organization and will approve whatever we decide to approve;"); (2) the Defendants by
12 their own admission had market power in the late 1990's and early part of this decade, compare
13 Hynix Separate Statement, ¶ 41, with RSS, ¶ 41 (citing Hynix internal documents calling Hynix,
14 Micron and Samsung the "big three," who enjoyed "market dominance and control"); (3) the
15 Defendants planned [REDACTED]

16 [REDACTED]
17 [REDACTED] RSS-AF, ¶ 91; Hamilton Decl., exs. 52, 85; and (4) Samsung's motivation to
18 participate in the alleged conspiracy was quite plausible and understandable given Samsung's
19 leadership position with respect to both RDRAM and DDR and given that "[u]nder a successful
20 cartel to impede RDRAM and support DDR, Samsung would end up being both the predominant
21 supplier of a high-profit niche product (RDRAM) as well as the dominant supplier of the new
22 mainstream memory product (DDR)." RSS, ¶ 43; Hamilton Decl., ex. 89 (Supplemental Report
23

24 ⁷ For example, Hynix nowhere explains why it deliberately chose in June 2000 to keep its
25 RDRAM prices to Dell "at least \$20 higher" than Samsung's prices despite knowing that that
26 decision "insure[d]" that Dell would not purchase RDRAM from Hynix. RSS, ¶ 14, Hamilton
27 Decl., exs. 65, 281. It is clearly irrational for a manufacturer to (1) check with its competitor to
28 determine its future pricing intentions to a customer and then (2) deliberately price above the
competitor, knowing that the higher price "insured" that the manufacturer would achieve no sales.
Id. Here, as in *Flat Glass*, "[i]t would take no stretch of the imagination for a fact finder to infer
from this evidence . . . that [Hynix] engaged in concerted action to fix prices." *Flat Glass*, 385
F.3d at 369.

1 by Prof. Elzinga).⁸

2 Rambus has also come forward with evidence of the “plus factors” that, under *Eddins*,
3 support the existence of conspiracy:

4 “In addition to acts against self-interest, another ‘plus factor’ is
5 evidence implying a traditional conspiracy- ‘conspiratorial
6 opportunity, unexplained meetings, furtive behavior, discussions
7 and information exchanges, ambiguous participant admissions,
8 solicitations of agreement, sham bids, threats of common action
9 directed against a potential victim, identical bids, refusals to bid,
10 proved conspiracy or competition in other markets or times, or
11 other parallelism that is too close for coincidence and beyond
12 explanation by mere recognized interdependence.”

9 *Eddins*, 134 Cal.App.4th at 305 n.11 (citation omitted). As set out in the RSS, RSS-AF and in
10 Rambus’s interrogatory responses (submitted by Hynix as exhibit 27 to the Basileo Declaration),
11 Hynix participated in numerous “unexplained meetings” with its putative competitors between
12 1998 and 2002, including two-party meetings in Asia, Austin and Boise, as well as multi-
13 defendant meetings of groups such as “M11,” “M14,” “MX,” “AM12” and “The Council on
14 Competing Power.” The evidence shows that “information exchanges” routinely occurred both in
15 the private meetings and in group settings. *See* RSS, ¶ 1 (citing, for example, Hamilton Decl., ex.
16 37, an October 1999 exchange of emails between Hynix and Micron executives regarding
17 RDRAM production); RSS, ¶ 9 (citing, for example, ex. 92, an October 1998 report by an
18 Infineon employee that a Hynix executive had urged other DRAM manufacturers to provide
19 inflated RDRAM production estimates to Intel in order to prevent Intel from “generat[ing] a
20 Rambus oversupply”); RSS, ¶ 14 (citing, for example, ex. 66, a Hynix document describing an
21 August 2000 meeting between Hynix’s CEO and Micron’s CEO to “decide what to do with
22 Rambus”); RSS-AF, ¶ 40 (testimony [REDACTED])

23
24 ⁸ Hynix’s argument that concerted action to limit RDRAM’s market penetration is “implausible”
25 is belied by [REDACTED] RSS, ¶ 16, and by the many other examples of communications between the
26 Defendants about their common desire to see RDRAM fail. As the Court of Appeals observed in
27 *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1087 (10th Cir. 2006), it is a “highly
28 plausible economic theory” that “a group of established firms [would] attempt to keep an
aggressive competitor out of the market, whether they are doing so to protect profits or simply to
guard market share.”

1 [REDACTED] RSS-AF, ¶ 62 (citing ex. 166, a Hynix
2 report of a March 30, 2000 meeting with Samsung to discuss the companies' respective "Rambus
3 status and production plan."). As the Court explained in the course of denying summary
4 judgment in *In Re Vitamins Antitrust Litig.*, 320 F.Supp.2d 1, 21 (D.D.C. 2004), "[t]hese are two
5 competitors meeting about 'sharing plans' and 'complementing' their business – not the types of
6 discussions that should take place between competitors."

7 The evidence also shows that the participants often discussed "threats of common action
8 directed against a potential victim," *i.e.*, Rambus. *See, e.g.*, RSS, ¶ 16 [REDACTED]

9 [REDACTED]
10 [REDACTED]; RSS, ¶ 1 (describing Hamilton Decl., ex. 22,
11 regarding Micron's discussions with Samsung about "what the Rambus/Intel biz model will do to
12 our autonomy" if RDRAM prevailed); RSS, ¶ 1 (describing Hamilton Decl., exs. 9 and 13
13 (Micron emails to Infineon and Hynix referring to Rambus as "the dark side"). In addition, it is
14 undisputed that Hynix has admitted to participating in a "proved conspiracy" in the *same* market
15 at the *same* time as the alleged conspiracy. RSS, ¶ 15. *See generally Eddins*, 134 Cal.App.4th at
16 305 n.11. The undisputed presence of these "plus factors" thus militates strongly against the
17 entry of summary judgment in this case.

18 C. **Hynix's Argument Regarding Antitrust Injury Provides No Basis For**
19 **The Dismissal Of Any Claim.**

20 Hynix argues that unless Rambus can establish the exact impact on pricing and output
21 from the Defendants' conduct, it cannot show that it suffered antitrust injury. None of the cases
22 cited by Hynix so hold. It is well settled that in an antitrust case, "[i]t is not necessary to show
23 with total certainty the amount of damages sustained, just that the antitrust violation caused the
24 antitrust injury suffered by the plaintiff." *Rossi*, 156 F.3d at 483. It is black letter law that
25 agreements to restrain production and keep prices high are "inherently destructive of competitive
26 conditions and may be condemned even without proof of [their] actual market effect." *Amarel v.*
27 *Connell*, 102 F.3d 1494, 1509 (9th Cir. 1996) (citation omitted). Here, the question of whether
28 the Defendants' conduct had the "actual market effect" alleged by Rambus (the relegation of

1 RDRAM to a niche status) is neither speculative, nor fanciful, nor unsupported by the evidence.
2 Hynix's arguments to the contrary do not satisfy its threshold burden under *Aguilar* on this issue.
3 Even if Hynix had met that burden, all that the Court need examine is the evidence involving the
4 Defendants' coordinated efforts to elevate RDRAM prices and price projections to Dell above the
5 levels that Dell had requested, in the face of unambiguous statements by Dell that if its target
6 prices were not met, it would revise its roadmaps and "architect next generation systems around
7 DDR" rather than RDRAM. RSS-AF, ¶¶ 52-72. [REDACTED]

8 [REDACTED]
9 [REDACTED] *Id.*, ¶ 73.

10 As explained in Section III.A(1), *infra*, this case involves competition for "design wins"
11 and "roadmap shots," not individual DRAM sales. That competition is driven largely by the
12 expectations of Intel and computer manufacturers such as Dell about future DRAM prices and
13 availability. RSS, ¶ 13, Hamilton Decl., exs. 89, 109 and 159. Well aware of that fact, the
14 Defendants conspired to elevate prices and project projections in order to block a competitive
15 entrant that threatened their "oligopoly" control over DRAM technology transitions. This is a
16 classic example of antitrust injury. *See, e.g., Atlantic Richfield Co. v. USA Petroleum Co.*, 495
17 U.S. 328, 334 (1990) (holding that to show antitrust injury, the plaintiff's injury must be "of the
18 type that the antitrust laws were intended to prevent"); *Brunswick Corp. v. Pueblo Bowl-O-Mat*,
19 429 U.S. 477, 489 (1977). *See also Champagne Metals*, 458 F.3d at 1087; *Knevelbaard Dairies*
20 *v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000).⁹

21 **D. Summary Judgment Should Be Denied As To Rambus's Other Claims**
22 **Against Hynix.**

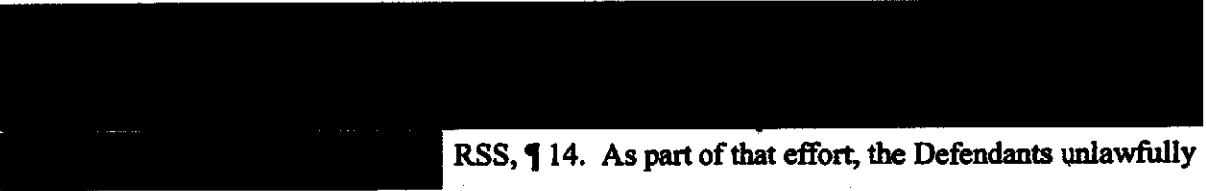
23 Hynix makes no separate argument in support of its motion for summary judgment with
24 respect to Rambus's other claims against Hynix. *See* Hynix Mem. at 20 n.80. Hynix's motion as
25 to those claims should be denied for the reasons set out in this brief.

26
27 ⁹ Rambus further notes that it has thoroughly analyzed the antitrust injury question in response to
28 the Defendants' Motion for Summary Adjudication Dismissing Rambus's Pure Price Fixing
Cause of Action, at pp. 10-20.

1 **IV. CONCLUSION**

2 As the U.S. Supreme Court recently observed, cartels are "the supreme evil of antitrust."
3 *Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).
4 Because the fixing of prices, output and markets by cartels has no plausible efficiency
5 justification, the Courts have long regarded cartel behavior as *per se* unlawful. *See, e.g., NCAA v.*
6 *Board of Regents*, 468 U.S. 85, 107-08 (1984) ("Restrictions on price and output are the
7 paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.");
8 *United States v. Alston*, 974 F.2d 1206, 1208 (9th Cir. 1992) ("Price fixing is illegal regardless of
9 pro-competitive justifications offered therefor.").

10 This case well demonstrates the wisdom of these rules. As Hynix Vice President Tabrizi



11
12
13 RSS, ¶ 14. As part of that effort, the Defendants unlawfully
14 coordinated their pricing and production decisions at critical moments in order to influence the
15 design choices and product roadmaps of OEMs and chipset manufacturers. The expected and
16 intended result of their efforts was RDRAM's failure to become the dominant memory standard.
17 The Defendants disagree. The jury must decide. Hynix's motion should be denied.

18
19 DATED: January 26, 2009

COTCHETT, PITRE & McCARTHY
MUNGER, TOLLES & OLSON LLP

20
21
22 By: _____

A handwritten signature in black ink, appearing to be "Lee S. Taylor", written over a horizontal line.

Lee S. Taylor

23
24 Attorneys for Plaintiff
RAMBUS INC.