

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

**In the Matter of**  
**Polypore International, Inc.**  
**a corporation.**

**Docket No. 9327**

**PUBLIC DOCUMENT**

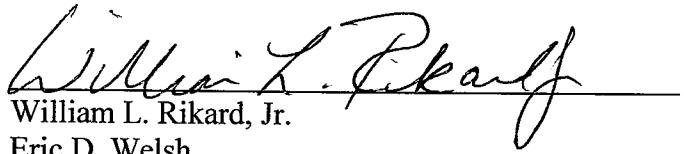
**RESPONDENT'S MOTION TO DISMISS  
COUNTS II AND III OF THE COMPLAINT  
FOR FAILURE TO STATE A CLAIM**

Respondent Polypore International, Inc. ("Polypore"), pursuant to Rule 3.22(e) of the Rules of Practice of the Federal Trade Commission ("Commission" or "FTC"), 16 C.F.R. § 3.22(e), respectfully moves to dismiss for failure to state a claim, Counts II and III of the Complaint with respect to any monopolization and attempted monopolization claims regarding the alleged automotive, uninterruptible power supply stationary ("UPS") and PE separator markets. Polypore also moves to dismiss, for failure to state a claim, Counts II and III to the extent that they purport to apply to the alleged deep-cycle and motive battery separator markets based upon an undefined monopolization or attempted monopolization offense under Section 5 of the FTC Act.

In support, Respondent Polypore respectfully refers the Court to, and incorporates herein, the contemporaneously-filed memorandum.

Dated: October 15, 2008

Respectfully Submitted,



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**PROPOSED ORDER**

Upon consideration of Respondent's Motion to Dismiss Counts II and III of the Complaint for Failure to State a Claim and complaint counsel's response thereto, and the Court being fully informed, it is this \_\_\_\_ day of \_\_\_\_\_, 2008, hereby

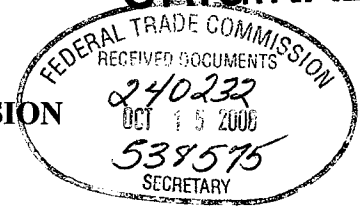
**ORDERED**, that the Motion is **GRANTED**; and it is further

**ORDERED**, that Counts II and III of the complaint are dismissed with prejudice to the extent that they allege monopolization and/or attempted monopolization claims regarding the automotive, uninterruptible power supply stationary ("UPS") and PE separator markets and to the extent that they alleged monopolization and/or attempted monopolization claims regarding the deep-cycle and motive battery separator markets based on Section 5 of the FTC Act.

\_\_\_\_\_  
The Honorable D. Michael Chappell  
Chief Administrative Law Judge

**ORIGINAL**

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



**In the Matter of** )  
)  
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**Polypore International, Inc.** )  
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**Docket No. 9327**

**PUBLIC DOCUMENT**

**RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION  
TO DISMISS COUNTS II AND III  
OF THE COMPLAINT FOR FAILURE TO STATE A CLAIM**

Respondent Polypore International, Inc. ("Polypore" or "Daramic"), pursuant to Rule 3.22(e) of the Rules of Practice of the Federal Trade Commission ("Commission" or "FTC"), 16 C.F.R. § 3.22(e), respectfully moves to dismiss for failure to state a claim, Counts II and III of the Complaint with respect to all monopolization and attempted monopolization claims regarding the alleged automotive, uninterruptible power supply stationary ("UPS") and PE separator markets. Polypore also moves to dismiss, for failure to state a claim, Counts II and III to the extent that they purport to apply to the alleged deep-cycle and motive battery separator markets based upon an undefined monopolization or attempted monopolization claim under Section 5 of the FTC Act.

**INTRODUCTION**

The FTC seeks to assert monopolization and attempted monopolization claims under Section 5 of the FTC Act without making allegations that satisfy the standards for offenses under the Sherman Act. In their response to Polypore's Motion for a More Definite Statement, Complaint Counsel states that "[t]here is no claim under the Sherman Act in this complaint" and that Polypore "faces . . . monopolization and attempted monopolization claims under the FTC

Act.”<sup>1</sup> The Complaint, however, does not plead the elements of monopolization and attempted monopolization claims that are required by Sherman Act authorities.

A comparison of the complaint here with the FTC’s pleading in *In the Matter of Rambus*<sup>2</sup> -- a case in which monopolization and attempted monopolization claims were based on Section 5 -- shows the inadequacy of the pleading here. In *Rambus*, for the “First Violation,” the FTC alleged that Rambus “engaged in a pattern of anticompetitive and exclusionary acts and practices” whereby it “obtained monopoly power.”<sup>3</sup> For the “Second Violation,” the same “pattern” was alleged along with a claim that Rambus had “a specific intent to monopolize” and that there was a “dangerous probability of monopolization.”<sup>4</sup> These are the well-known Sherman Act elements and their use in *Rambus* evidences an understanding by the FTC that it must meet these standards in a Section 5 case.

In this case, however, the Complaint fails to make proper allegations of monopolization with respect to each of the five alleged markets (*see infra* at 14-15), fails to allege maintenance of monopoly power for each of these alleged markets (*see infra* at 15-16), and fails to allege the elements of an attempt to monopolize, including the element of specific intent (*see infra* at 16).

- Complaint Counsel alleges five product markets (*see* Complaint ¶¶ 5, 6). Yet, while the Complaint alleges a monopoly with respect to two of the five alleged markets (*see* Complaint ¶¶ 21, 22, 38 (b), (c)), the FTC fails to allege a monopoly with respect to the remaining three (the alleged automotive, UPS or PE separator markets).
- In paragraphs 39-45, the FTC alleges “market/monopoly power” and maintenance of “market power,” terminology that falls short of the Sherman Act standard, and significantly does not identify the product markets to which it refers.
- Similarly, for the same three alleged markets, the Complaint fails to allege either that Polypore obtained or maintained monopoly power, but claims instead that it

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<sup>1</sup> Complaint Counsel’s Response to Respondent’s Motion for a More Definite Statement at 3 (No. 9327).

<sup>2</sup> File No. 011-0017, Compl. ¶¶ 122-123 (June 18, 2002), a copy of which is attached hereto as Exhibit 1.

<sup>3</sup> *Id.* at ¶ 122.

<sup>4</sup> *Id.* at ¶ 123.

“attempted . . . to maintain monopoly power.” Complaint ¶ 39 (emphasis added). As for attempted monopolization, the complaint contains no allegation of specific intent, and alleges that only one of the alleged product markets (PE separators) has a “dangerous probability [of] lessen[ing] or destroy[ing] competition,” not a “dangerous probability of achieving monopoly power.”

These allegations fall short of widely accepted Sherman Act standards and confirm that the FTC plans to present its “monopolization and attempted monopolization claims under the FTC Act”<sup>5</sup> using uncertain sub-Sherman Act standards. For the reasons stated below, Complaint Counsel’s failure to plead the requisite elements of a Section 5 claim involving claims of monopolization or attempted monopolization renders Counts II and III deficient as a matter of law.

### ARGUMENT

The standard used in Commission proceedings for motions to dismiss under Rule 3.22(e) of the Rules of Practice mirrors the standard used for evaluating motions to dismiss in federal district courts under Rule 12(b)(6) of the Federal Rules of Civil Procedure.<sup>6</sup> Under that standard, a motion to dismiss for failure to state a claim must be granted where the complaint reveals that the allegations, even if proved, are insufficient to establish an antitrust claim.<sup>7</sup> And while well-pled factual allegations of the complaint are to be presumed true and all reasonable inferences are to be made in favor of complaint counsel for purposes of this motion, “conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted.”<sup>8</sup>

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<sup>5</sup> Complaint Counsel, *supra* note 1, at 3.

<sup>6</sup> *In the Matter of Union Oil Co. of Cal.*, File No. 051-0125, Initial Decision 6 (Nov. 25, 2003), a copy of which is attached hereto as Exhibit 2, citing *In re Times Mirror Co.*, 92 F.T.C. 203 (1978) and *In re Fla. Citrus Mutual*, 50 F.T.C. 959 (1954). See also FTC Operating Manual § 10.7 (2004) (“[S]ince many adjudicative rules are derived from the Federal Rules of Civil Procedure, the latter may be consulted for guidance and interpretation of Commission rules where no other authority exists.”).

<sup>7</sup> *Union Oil at 7; Cavalier Telephone, LLC v. Verizon Virginia Inc.*, 330 F.3d 176, 183 (4th Cir. 2003) (“*Cavalier Telephone*”).

<sup>8</sup> *Union Oil at 8* (citations omitted); *TV Comm’ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1024 (10th Cir. 1992) (“[A] plaintiff must do more than cite relevant antitrust language to state a claim for relief . . . . A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws.”).

Moreover, the complaint's allegations must "advance a legal theory on which antitrust relief can be granted" to survive dismissal.<sup>9</sup> Here, the Complaint, in Counts II and III, fails to plead the allegations required to effect cognizable claims of monopolization or attempted monopolization.

**1. Counts II and III of the Complaint fail to Meet the Required Pleading Standard as to the Monopolization and Attempt to Monopolize Claims.**

In identical allegations in Counts II and III of its Complaint, Complaint Counsel purports to bring claims under Section 5 of the FTC Act, 15 U.S.C. § 45. According to Complaint Counsel, the Complaint "follows traditional Section 5 and Section 7 law" and is grounded on alleged "monopolization, and attempted monopolization claims . . ."<sup>10</sup> While Complaint Counsel disavows any express or implied attempt to create new law,<sup>11</sup> that is exactly what is attempted here. This Complaint fails to meet the standard long recognized by the Commission for a monopolization or attempted monopolization claim under Section 5. As such, Counts II and III of the Complaint must be dismissed as to claims of monopolization or attempted monopolization.

**(a) There is no respectable authority that supports application of Section 5 of the FTC Act in this case without adherence to Sherman Act requirements.**

The required elements for pleading a proper claim of monopolization or attempted monopolization are well known.<sup>12</sup> Under Section 2 of the Sherman Act<sup>13</sup> a plaintiff must allege (1) "possession of monopoly power in the relevant market" and (2) "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>14</sup> And, "to demonstrate attempted

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<sup>9</sup> *Cavalier Telephone*, 330 F.3d at 183.

<sup>10</sup> Complaint Counsel, *supra* note 1, at 2-3.

<sup>11</sup> Complaint Counsel, *supra* note 1, at 3.

<sup>12</sup> *Cavalier Telephone*, 330 F.3d at 183

<sup>13</sup> 15 U.S.C. § 2.

<sup>14</sup> *Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (*quoting United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.”<sup>15</sup>

In a major decision involving the issue of the standard to be applied under Section 5 of the FTC Act, the Commission, in affirmed the ALJ’s dismissal of the complaint and rejected an attempt by complaint counsel to expand Section 5 to reach conduct that did not violate Section 2 of the Sherman Act. In *In the Matter of General Foods Corp.*,<sup>16</sup> the FTC alleged that General Foods attempted to monopolize the packaged ground coffee market by engaging in predatory pricing and related practices. Affirming the dismissal of the complaint, including the attempted monopolization claim under Section 5, the Commission reviewed the claim under traditional Section 2 standards. After carefully identifying and describing the three elements of the attempted monopolization offense,<sup>17</sup> the Commission followed its earlier practice of looking first to the dangerous probability of success element.<sup>18</sup> Finding that element not supported by the evidence, it agreed with the ALJ’s dismissal of the case and held that no Section 2 Sherman Act violation had been proved.<sup>19</sup>

Having found no violation of Section 2 of the Sherman Act, the Commission then turned to complaint counsel’s argument that even if no violation of Section 2 had been found, General Foods had nevertheless violated Section 5 of the FTC Act through the same conduct.<sup>20</sup> The Commission rejected this argument, refusing “to expand the reach of the prohibition against attempted monopolization in the Sherman Act by condemning less offensive conduct under the

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<sup>15</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1984).

<sup>16</sup> 103 F.T.C. 204 (1984).

<sup>17</sup> *Id.* at 341-46.

<sup>18</sup> *Id.* at 346.

<sup>19</sup> *Id.* at 364.

<sup>20</sup> *Id.* at 364-65.

purview of the [FTC] Act.”<sup>21</sup> The Commission rejected complaint counsel’s attempt to expand Section 5 in an attempted monopolization case beyond Section 2 standards, saying, “[t]he record in this case does not offer a rationale for using the [FTC] Act to grant an extension onto Section 2 of the Sherman Act,” and “[w]e do not believe this [Sherman Act Section 2] standard should be changed when a case is brought under Section 5.”<sup>22</sup> While aware of earlier Supreme Court decisions that allowed it “to supplement the more specific terms of the antitrust laws,”<sup>23</sup> the FTC declined to expand Section 5 to areas proscribed by the Sherman Act, stating “we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed.”<sup>24</sup>

Similarly, three appellate courts, in cases decided roughly contemporaneously with *General Foods*, “rejected Commission decisions challenging conduct as unfair methods of competition under Section 5”<sup>25</sup> where there was no underlying antitrust violation.<sup>26</sup> In both *Boise Cascade v. FTC* and *E.I. duPont Nemours & Co. v. FTC* (“*Ethyl*”) the Commission failed to show that the joint action resulted from actual collusion. In *Boise Cascade*, the court rejected the FTC’s efforts to rely on the incipency doctrine, articulated in *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966), and said that its decision would “blur the distinction between guilty and

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<sup>21</sup> *Id.* at 365-66.

<sup>22</sup> *Id.* at 366.

<sup>23</sup> *Id.* at 353 (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966)).

<sup>24</sup> *General Foods*, 103 F.T.C. at 365.

<sup>25</sup> Commissioner J. Thomas Rosch, *Perspectives on Three Recent Votes: The Closing of the Adelpia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief* (“Rosch Valassis Speech”), Address at the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar (July 6, 2006), a copy of which is attached hereto as Exhibit 3 and available at <http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf>, at 8. The three cases are *Boise Cascade v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airline Guides v. FTC* (“OAG”), 630 F.2d 920 (2d Cir. 1980); *E.I. duPont de Nemours & Co. v. FTC* (the “Ethyl” case), 729 F.2d 128 (2d Cir. 1984).

<sup>26</sup> Referring to these cases in its 1989 report, the ABA Antitrust Section committee to study the FTC pointed out that “recent court decisions have rebuffed the FTC when it interpreted Section 5 expansively.” *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L. J. 43, 115 (1989).

innocent commercial behavior."<sup>27</sup> In *Ethyl*, the court expressed concern about "arbitrary or capricious administration of § 5" by the FTC and said that its standard did not "discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable."<sup>28</sup>

In *Official Airline Guides v. FTC* ("OAG"), the respondent was the monopolist publisher of the "Official Airline Guide," the "bible" of the industry.<sup>29</sup> By not publishing certain commuter airline flight information in the Guide, OAG's action harmed the ability of those commuter airlines to compete; however, OAG's actions were not directed at an OAG competitor and it did not enhance OAG's market position or power.<sup>30</sup> The court there said that "enforcement of the FTC's order here would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."<sup>31</sup>

The circumstances in this case are the same as those found in *General Foods* and in the appellate decisions of *Boise Cascade*, *Ethyl* and *OAG* appellate decisions. According to Complaint Counsel here, the Complaint presents "monopolization and attempted monopolization claims under the FTC Act."<sup>32</sup> For these alleged offenses, however, the Commission's reach, in the words of the Commission itself in *General Foods*, has "been clearly expressed and circumscribed" by Sherman Act law. Having no better or subsequent authority as a guide, the Commission here should follow the sound precedent of its *General Foods* decision and, based on Complaint Counsel's admission of having failed to plead a viable Section 2 claim ("There is no

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<sup>27</sup> 637 F.2d at 581-82.

<sup>28</sup> 739 F.2d at 138-39.

<sup>29</sup> 630 F.2d at 921-22.

<sup>30</sup> *Id.* at 921.

<sup>31</sup> *Id.* at 927.

<sup>32</sup> Complaint Counsel, *supra* note 1, at 3.

claim under the Sherman Act in this complaint”<sup>33</sup>), dismiss the monopolization and attempted monopolization claims that are the subject of this motion.

While it can be expected that Complaint Counsel will try to save Counts II and III by using the *FTC v. Sperry & Hutchinson Co.* and *Brown Shoe* decisions, this effort would be misguided. Neither opinion addresses the specific situation involved here: where Complaint Counsel attempts to bring antitrust claims of monopolization and attempted monopolization (although even that, as discussed below, is not pled) under Section 5 of the FTC Act without pleading the requisite elements of a claim under Section 2 of the Sherman Act. This distinguishing fact was noted by the Commission itself in the *General Foods* case.<sup>34</sup>

Although the Court in *S&H* said, in oft cited language, that the Commission could use Section 5 to challenge conduct that does "not infringe either the letter or the spirit of the antitrust laws,"<sup>35</sup> that statement has no relevance to the pending case since it related to non-antitrust type conduct and ultimately served to refute the Fifth Circuit's holding that Section 5 only covered antitrust violations but not conduct harmful to consumer interests.<sup>36</sup> The Court, nevertheless, affirmed the Fifth Circuit's refusal to enforce the FTC's order on the ground that the FTC did not argue that S&H engaged in any conduct harmful to consumer interests and failed to show that S&H's conduct violated either the letter or the spirit of the antitrust laws.<sup>37</sup> As a result, the *S&H*

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<sup>33</sup> Complaint Counsel, *supra* note 1, at 3.

<sup>34</sup> See note 17 *supra*.

<sup>35</sup> 405 U.S. at 239.

<sup>36</sup> *Id.* at 245.

<sup>37</sup> The Court was forced to affirm the Fifth Circuit to this extent since the FTC failed to argue the Fifth Circuit erred in ruling that S&H's conduct did not violate the letter or spirit of the antitrust laws. 405 U.S. at 249. As a result, the Supreme Court declared that the Fifth Circuit's ruling on the antitrust point "remains undisturbed here." *S&H*, 405 U.S. at 250. Of the view that Section 5 applied only to antitrust-type conduct (and not conduct merely threatening harm to consumers) the Fifth Circuit made no determination whether the FTC's findings showed consumer harm. The Supreme Court held that the FTC order was not supported by findings relating to consumer harm but remanded the case for further proceedings relating to that issue. *Id.* at 249-50.

case did not uphold an order applying Section 5 to antitrust-type conduct that would not have been reached by the Sherman or Clayton Acts.<sup>38</sup>

In *Brown Shoe*, an opinion written by Justice Black over forty two years ago, the Court articulated the “incipiency doctrine,” a concept that the Commission itself rejected in *General Foods* and that has not fared well in subsequent cases.<sup>39</sup> Justice Black, moreover, appears to have improperly lifted the doctrine from his earlier opinion in *FTC v. Motion Picture Adver. Serv. Co.*<sup>40</sup> -- improperly because the Court in that case did not deal with an incipient violation but found that the exclusive dealing arrangements there ran afoul of Section 5 because they violated the Sherman Act.<sup>41</sup> In any event, the “incipiency” concept is inherently inapplicable in this consummated merger case. And while the Court there rejected Brown's argument that the FTC needed to have found Section 3's substantial lessening of competition or tendency to monopoly, saying that the FTC may “arrest trade restraints in their incipiency,” it proceeded to characterize the facts as showing that a Sherman/Clayton violation had occurred, concluding that the arrangement produced an adverse effect on competition (“anticompetitive practice”) and that it “effectively foreclosed Brown’s competitors from selling to a substantial number of retail shoe

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<sup>38</sup> The Court in *S&H* first dealt with four earlier decisions that had refused to support FTC orders. *FTC v. Gratz*, 253 U.S. 421 (1920); *FTC v. Curtis Publ'g Co.*, 260 U.S. 568 (1923); *FTC v. Sinclair Ref. Co.*, 261 U.S. 463 (1923); and *FTC v. Raladam Co.*, 283 U.S. 643 (1931). *S&H*, 405 U.S. at 241. The Court then turned to *FTC v. R. F. Keppel & Bros., Inc.*, 291 U.S. 304 (1934) and *Brown Shoe*. *S&H*, 405 U.S. at 242. *Keppel*, however, is not relevant here since it was a consumer protection, non-antitrust case.

<sup>39</sup> In rejecting the FTC's claims of a Section 5 violation involving an industry-wide pricing practice but with no evidence of collusion, the Ninth Circuit said: “In this setting at least, where the parties agree that the practice was a natural and competitive development in the emergence of the southern plywood industry, and where there is a complete absence of evidence implying overt conspiracy, to allow a finding of a section 5 violation on the theory that the mere widespread use of the practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior.” *Boise Cascade*, 637 F.2d at 582.

<sup>40</sup> 344 U.S. 392 (1953)

<sup>41</sup> “The vice of the exclusive contract in this particular field is in its tendency to restrain competition and to develop a monopoly in violation of the Sherman Act.” 344 U.S. at 397.

dealers.”<sup>42</sup> In short, *Brown Shoe*, a case from a bygone era with its discredited incipency doctrine, is certainly not persuasive authority here.<sup>43</sup>

Rather than straying from Sherman Act standards, courts generally have affirmed FTC findings of Section 5 violations only after finding Sherman Act violations. *E.g.*, *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *FTC v. Nat'l Lead Co.*, 352 U.S. 419 (1957); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).<sup>44</sup>

As a result, there is no authority authorizing Complaint Counsel to press Section 5 charges while failing to comply with Sherman Act standards, in a case like this where the FTC Complaint brandishes a "monopolization" claim. The proper standards for challenging unilateral conduct are now the subject of great debate, both nationally and internationally.<sup>45</sup> But that debate is keyed at the level of familiar Sherman Act standards and concepts. There has been no suggestion in this debate that sub-Sherman Act standards should apply in this situation. Scholarly comment has strongly supported the proposition that the FTC should not use Section 5 to bring antitrust cases that do not violate the Sherman and Clayton Acts. *E.g.*, 2 Areeda & Hovenkamp ¶ 302(h) (3d ed. 2007) ("Apart from possible historical anachronisms in the application of those statutes, the Sherman and Clayton Acts are broad enough to cover any anti-

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<sup>42</sup> 384 U.S. at 320, 321.

<sup>43</sup> As one commentator has noted, “[t]he real problem with the *Brown Shoe* reasoning [was] that the Supreme Court was willing to condemn exclusive dealing when no injury to competition was apparent.” 2 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* (“Areeda & Hovenkamp”) ¶ 302h3 (3d ed. 2007). Surely it is not a rush of excessive optimism to say that the FTC would never today bring an exclusive dealing case in which it would try to cheat on established Sherman or Clayton standards. Accordingly, *Brown Shoe* is no authority for any attempt by the FTC to use sub-Sherman Act standards in the instant case.

<sup>44</sup> In both *Atlantic Ref. Co v. FTC*, 381 U.S. 357 (1965) and *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968) the Court again effectively applied Sherman Act standards in approving the FTC’s findings of adverse effects on market competition resulting from the arrangements. The Fifth Circuit made a similar decision in *Shell Oil Co. v. FTC*, 360 F.2d 470 (5<sup>th</sup> Cir. 1966).

<sup>45</sup> *E.g.*, U.S. Dep’t of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008), available at [www.usdoj.gov/atr/public/reports/236681.htm](http://www.usdoj.gov/atr/public/reports/236681.htm), and Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice (September 8, 2008), a copy of which is attached hereto as Exhibit 4 and available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>.

competitive agreement or monopolistic situation that ought to be attacked whether 'completely full blown or not.'" Areeda and Hovenkamp also state that: "[A] substantive antitrust rule that governs direct enforcement of the Sherman and Clayton Acts should also govern the Commission under § 5 as well."); Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 Antitrust L.J. 761, 766 (2005) ("It used to be thought that 'unfair methods of competition' swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable. The Sherman and Clayton Acts have been interpreted so broadly that they no longer contain gaps that a broad interpretation of Section 5 of the FTC Act might be needed to fill."); Bob Pitofsky, *More Than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 Antitrust L. J. 773, 847-48 (2005) ("I have never been comfortable with the idea that practices that are legal under the Sherman and Clayton Acts become illegal under Section 5 of the FTC Act because they fall in the 'penumbra' of some competition policy. Among other problems, it means that certain behavior would be legal or illegal depending on whether the suit was brought by the DOJ Antitrust Division under the Sherman Act or the FTC under Section 5. I have therefore believed that the unfairness jurisdiction, especially in antitrust matters, should be used very cautiously.").

In accord with this authority, Commissioner Rosch in July 2006 took the position that Section 5 should not be used to challenge conduct that is "plainly governed by the Sherman Act."<sup>46</sup> Unlike the monopolization and attempted monopolization claims in the instant proceeding, Commissioner Rosch pointed out that the conduct in *Valassis* was not "squarely

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<sup>46</sup> Rosch Valassis Speech, *supra* note 25, at 11.

covered by the Sherman Act,” because it involved an invitation to collude. That statement cannot be made about the conduct in the instant case.<sup>47</sup>

Unilateral conduct cannot and should not be subject to low-grade and uncertain antitrust standards lest vigorous competitive effort be inhibited or penalized. As the Supreme Court said in *Spectrum Sports*:

Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this matter reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.<sup>48</sup>

Several years earlier, the Court had made the same point in its *Copperweld* decision.<sup>49</sup> There the Court observed that the Sherman Act leaves a “gap” since a single firm will not be liable for conduct “in restraint of trade” even though it accomplishes the same effect on competition that two firms acting together could accomplish for which they could be in violation.<sup>50</sup> But the Court said:

Congress left this “gap” for eminently sound reasons. Subjecting a single firm’s every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.<sup>51</sup>

It may be one thing for the FTC to challenge “invitations to collude” under Section 5 where the action is but one small step away from creating serious criminal exposure and efficiency claims are elusive or non-existent.<sup>52</sup> But it is indeed difficult to understand how the

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<sup>47</sup> *Id.*

<sup>48</sup> *Spectrum Sports*, 506 U.S. at 456 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)).

<sup>49</sup> *Copperweld*, 467 U.S. 752 (1984).

<sup>50</sup> *Id.* at 774-75.

<sup>51</sup> *Id.* at 775.

<sup>52</sup> Even so it should be noted that the FTC’s recent consent decree program with “invitations to collude” has yet to be blessed by any reviewing judicial authority. Historical attempts to use Section 5 to challenge “conscious parallelism” were rebuked and caused the FTC to back down. The FTC adventure in *Triangle Conduit & Cable Co. v. FTC* is described in *Boise*

FTC could justify the application of sub-Sherman Act standards in a monopolization claim in a merger case, given the common wisdom that mergers have the capacity to achieve substantial efficiencies. Policy considerations and precedent both demonstrate that the Commission lacks the legal authority to make such expanded Section 5 claims.

**(b) Under the standard set by Section 2 of the Sherman Act, Counts II and III fail to Allege a Valid Claim under Section 5 of the FTC Act.**

Section 2 of the Sherman Act condemns monopolization and attempts to monopolize. 15 U.S.C. § 2. As stated *supra* at pp. 5-6, monopolization requires a showing of (1) "possession of monopoly power in the relevant market" and (2) a "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>53</sup> Moreover, to demonstrate an attempt to monopolize, a plaintiff must prove, among other things, a specific intent to monopolize and a dangerous probability of achieving monopoly power.<sup>54</sup> Here, Counts II and III fail to allege a monopoly in three purported markets, fail to allege acquisition, enhancement or maintenance of a monopoly in those three purported markets, and fail to allege an attempt to monopolize, instead alleging an "attempt to maintain a monopoly." Counts II and III must be dismissed in relevant part.

**(i) Failure to Allege Monopoly**

The Complaint fails to allege a monopoly with respect to the purported automotive, UPS and PE separator markets.<sup>55</sup>

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*Cascade*, where it is also noted that as recently as 1974, the Commission dismissed *In re Crouse-Hinds* where the facts failed to show concerted action. 637 F.2d at 576 citing *Triangle Conduit*, 168 F.2d 175 (7th Cir. 1948) and *Crouse-Hinds*, 46 F.T.C. 1114 (1950). As is described in text, its more recent efforts to mount such cases were rejected in *Boise Cascade* and *Ethyl*.

<sup>53</sup> *Verizon Commc'n*, 540 U.S. at 407 (quoting *Grinnell*, 384 U.S. at 570-71).

<sup>54</sup> *Spectrum Sports*, 506 U.S. at 456.

<sup>55</sup> Polypore disputes the designations of the markets as alleged by the FTC and will assert its defenses to the market claims as necessary at the hearing before the ALJ.

- Paragraph 21 of the Complaint alleges that after the acquisition, Polypore had a monopoly in the alleged deep-cycle market and paragraph 22 alleges that Daramic and Microporous “were the only competitors in motive separators.” However, the Complaint contains no such allegations for the alleged automotive, UPS or PE separator markets. Similarly, paragraphs 38(b) and (c) allege monopolies in the deep-cycle and motive markets but not in automotive, UPS or PE separator markets.
- Paragraph 23 alleges that Daramic and Entek are “direct competitors” in the alleged automotive market but makes no allegation that Daramic had a monopoly.
- Paragraph 24 (and Paragraph 38(b)) allege that Microporous and Daramic were the “only” companies selling separators in the alleged UPS market, but that they were selling “in different segments” of that market. As to this market, the word “monopoly,” or any derivation thereof, does not appear in the Complaint.
- As for the PE separator market, no allegations of monopoly are set forth in paragraph 25, which states instead that Daramic, Microporous and Entek are the “only manufacturers of” the product in North America.
- While paragraph 45 alleges “market/monopoly power” and maintenance of “market power,” (1) the careful distinctions made in paragraphs 21-25 and 38(b) undermine these allegations; (2) the phrase “market/monopoly power” and the reference to maintenance of “market power” fail to allege a monopoly since a monopolist must have not just some market power but *substantial* market power;<sup>56</sup> and (3) the allegations of paragraph 45 are, in any event, of no consequence since they fail to identify any alleged relevant market to which they apply.

In short, the Complaint fails to allege that Polypore has a monopoly in the alleged automotive, UPS and PE separator markets.

**(ii) Failure to Allege Acquisition, Enhancement or Maintenance of Monopoly Power**

Nowhere does the Complaint allege that Polypore “maintained” monopoly power in the automotive, UPS and PE separator markets. This omission is highlighted by paragraph 39 where

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<sup>56</sup> *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 481 (1991) (“Monopoly power under §2 requires, of course, something greater than market power under §1.”); 3B Areeda & Hovenkamp at ¶802(a) (3d ed. 2008) (“The monopolization offense requires both ‘substantial’ market power and exclusionary conduct.”); Phillip Areeda & Louis Kaplow, *Antitrust Analysis: Problems, Text, Cases* 554 (5th ed. 1997) (“Under §2, only substantial market power will be deemed monopoly power”), a copy of which is attached hereto as Exhibit 5.

the Complaint alleges instead that Polypore "*attempted* through anticompetitive means to maintain monopoly power" (emphasis added) in the five alleged markets. Maintenance of monopoly power, however, is the necessary element of monopolization; a mere *attempt* to maintain monopoly power is insufficient. The standard as stated by *Verizon, supra*, is quite clear: monopolization requires "willful acquisition or maintenance of that [monopoly] power," not "willful acquisition or *attempted* maintenance" of monopoly power.<sup>57</sup> Indeed, monopolization requires monopoly power that is durable, not monopoly power that the firm has merely "attempted to maintain" or that has existed only temporarily.<sup>58</sup>

The Complaint attempts to cure this defect by alleging in Paragraph 42 that "[i]n automotive, motive, UPS and all PE markets Daramic has historically maintained monopoly power." This claim, however, is inadequate since it is keyed to some undefined historical period antedating the events of the Complaint and it fails to identify or allege any anticompetitive actions that produced this "historical maintenance."<sup>59</sup>

Moreover, the monopolization allegations are not saved by paragraph 45, because, as discussed above, (1) its broad brush allegation of "maintenance" is inconsistent with paragraph 39's allegation of "attempt to maintain;" (2) it fails to allege, as required, "maintenance of that [monopoly] power" but, instead, alleges maintenance of "market power;" and (3) it fails to allege the markets to which it applies.

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<sup>57</sup> *Verizon*, 540 U.S. at 407. See also *Endsley v. Chicago*, 230 F.3d 276, 283 (7th Cir. 2000) (affirming dismissal of Section 2 claim for failure to allege monopoly power over "the relevant market.").

<sup>58</sup> ABA Section of Antitrust Law, *Antitrust Law Developments* 226, n.8 (6th ed 2007) (citing *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 968 (10th Cir. 1990) ("market power, to be meaningful for antitrust purposes, must be durable").

<sup>59</sup> Even if the Complaint were not so fatally deficient, Count III would still be subject to dismissal since, as set forth above, the Complaint fails to allege a monopoly as to the alleged automotive, UPS and PE separators purported product markets.

**(iii) Failure to Allege Attempt to Monopolize**

The Complaint fails to state an attempt to monopolize claim as to all alleged markets. With respect to the alleged PE separator market, paragraph 44 does allege a "dangerous probability that, if successful, [the conduct alleged] would give Daramic the ability to lessen or destroy competition." "Dangerous probability," of course, is the third element of the attempt to monopolize offense.<sup>60</sup> The paragraph 44 allegations, however, are in conflict with those of paragraph 39, which alleges an "attempt[] to maintain *monopoly* power" (emphasis added) and paragraph 45, which alleges "[maintenance of] *market* power." (emphasis added)

In any event, paragraph 44 fails to make the necessary allegation of a dangerous probability of success in achieving a monopoly. Instead of meeting this standard, the Complaint inadequately contends that a "dangerous probability" exists that the conduct would convey "the ability to lessen or destroy competition." Even if this defect were corrected, the Complaint is still wanting due to the FTC's failure to allege specific intent to monopolize the PE separator market. *Endsley*, 230 F.3d at 283-84 (affirming dismissal of Sherman Act Section 2 claim for failure to allege facts demonstrating alleged anti-competitive use of power to control prices).

**(c) Counts II and III Fail Even if the Claims are not Viewed Under Section 2 Standards.**

Under the weight of judicial authority, and scholarly commentary that consistently cautions against an interpretation of Section 5 in antitrust matters beyond the parameters of Section 2 of the Sherman Act, Counts II and III of this Complaint should be dismissed. Even if this Court were to consider some broader and undefined standard for a claim under Section 5 of the FTC Act than under Section 2 of the Sherman Act, Counts II and III, which it should not, would still be deficient and require dismissal.

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<sup>60</sup> See *supra* *Spectrum Sports*, 506 U.S. at 456.

In a departure from the principles set out in *General Foods*, the Commission in a 3-2 vote announced in the *Negotiated Data Solutions* case (“*N-Data*”) that it considers itself authorized to bring antitrust-type cases under Section 5 as unfair methods of competition where the conduct does not violate either the Sherman or Clayton Acts.<sup>61</sup> In its *N-Data* commentary, the Commission, while evidencing an intent to avoid Sherman Act standards, at the same time acknowledged that some “limiting principles” should be in place under Section 5. Yet, the FTC provides no clear and concise articulation of those “limiting principles,” and the Complaint lacks any meaningful allegations in this regard.

Of course, problematic for Complaint Counsel in attempting to avoid dismissal through some reliance on *N-Data* is the fact that the Commission has not defined such “limiting principles” and the general comments in *N-Data* lack precision. For example, the Analysis to Aid Public Comment in *N-Data* referred to the first of two limiting principles that supposedly could be derived from the *OAG* and *Ethyl* cases, discussed above. It noted that the court in *OAG* said that a free-standing Section 5 violation could not be found where the respondent “does not act coercively,”<sup>62</sup> and *Ethyl* said there must be “at least some indicia of oppressiveness.”<sup>63</sup> In his concurring opinion in *Rambus*, Commissioner Leibowitz provided a slightly fuller statement of this limiting principle when he said that conduct must be “collusive, coercive, predatory, restrictive, or deceitful, or otherwise oppressive.”<sup>64</sup> And, in his July 2006 speech, Commissioner Rosch also quoted *Ethyl* and *OAG* as requiring “some indicia of oppressiveness, such as

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<sup>61</sup> *In the Matter of Negotiated Data Solutions LLC*, File No. 051-0094, Analysis of Proposed Consent Order to Aid Public Comment (“Analysis to Aid Public Comment”) 3-4 (January 23, 2008), a copy of which is attached hereto as Exhibit 6, and Statement of the Federal Trade Commission 1-2, n. 5 (January 23, 2008), a copy of which is attached hereto as Exhibit 7.

<sup>62</sup> 630 F.2d at 927.

<sup>63</sup> 729 F.2d at 139-40. However, Chairman Majoras, in her dissenting statement, noted that “[t]he majority has not identified a meaningful limiting principle that indicates when an action . . . will be considered an ‘unfair method of competition.’” *N-Data*, File No. 051-0094, Dissenting Statement of Chairman Majoras 4 (January 23, 2008), a copy of which is attached hereto as Exhibit 8.

<sup>64</sup> *Rambus*, File No. 011-0017, Concurring Opinion of Commissioner Jon Liebowitz 15-16 (August 2, 2006), a copy of which is attached hereto as Exhibit 9.

evidence of anticompetitive intent or purpose on the part of the producer charged or the absence of an independent legitimate business reason for its conduct” (*Ethyl*) and “no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively” (*OAG*).<sup>65</sup> The conclusion of these recent “articulations” of a “limiting” “standard”, is that there is no standard to apply in this or similar cases. As no standard exists against which conduct can be judged, all claims under Counts II and III as related to monopolization and attempt to monopolize the five alleged markets must be dismissed.

Even applying the broad constructs of Commissioners Leibowitz and Rosch to the Complaint here, Counts II and III fail. While the word "coercive" appears in paragraph 44 of the Complaint, it is not addressed to Polypore’s conduct generally, but instead is limited specifically to “bargaining tactics.” Moreover, nowhere in the Complaint is the alleged offensive conduct, as it relates to all five alleged relevant product markets, described as "collusive, coercive, predatory, restrictive or deceitful."

The second limiting principle of *N-Data* is that the conduct must have an adverse effect on competition.<sup>66</sup> Commissioner Leibowitz had listed a second, similar but diluted limiting principle in *Rambus* when he said the conduct "must bear a realistic potential for causing competitive harm."<sup>67</sup> Commissioner Rosch would also appear to require “some evidence, direct

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<sup>65</sup> Rosch Valassis Speech , *supra* note 25, at 10. It should be noted that as recently as October 2, 2008, Commissioner Rosch gave a speech in which he added a third limiting principle to the two he had presented in July 2006. Commissioner J. Thomas Rosch, *Section 2 and Standard Setting: Rambus, N-Data & the Role of Causation*, Address at 13 LSI 4<sup>th</sup> Antitrust Conference on Standard Setting & Patent Pools (October 2, 2008), a copy of which is attached hereto as Exhibit 10 and available at <http://www.ftc.gov/speeches/rosch/081002section2rambusndata.pdf>. This limiting principle would weigh in favor of permitting FTC action the greater the extent to which those harmed by the conduct were limited in their ability to defend themselves. As such, that limiting principle would not operate in favor of the FTC’s action in the instant case.

<sup>66</sup> Analysis to Aid Public Comment at 5.

<sup>67</sup> *Rambus*, Concurring Opinion of Commissioner Jon Leibowitz at 15-16.

or circumstantial, of actual or incipient anticompetitive effect; otherwise, the claim would arguably be too unbounded.”<sup>68</sup>

These “standards” are not true “limiting principles.” In particular, they raise grave concerns to the extent they are suggested for use in a single-firm, monopolization/attempt to monopolize context. Of course, the antitrust laws aren’t even activated unless there is an actual or threatened adverse effect on competition. But terminology such as that used by Commissioners Leibowitz and Rosch, i.e., “*realistic potential* for causing competitive harm” and “*circumstantial* [evidence] of *incipient* anticompetitive effect,” does not serve as a “limiting principle” but, rather, as a “liberating principle.” These concepts would trigger liability at an unacceptably low level of activity. They would flout the history of the development of rational Section 2 Sherman Act standards, which have been designed so as not to discourage or impair the competitive zeal upon which the economy depends.<sup>69</sup>

The only rational “limiting principles” that have emerged from the Commission for application in a single-firm, monopolization context were those articulated by the Commission itself in *General Foods*. That decision is particularly relevant because, unlike almost all the other cases that arise in this context, it was a single-firm case, involving an alleged attempt to monopolize, where the FTC refused to let its own complaint counsel “cheat on” established Sherman Act standards. By holding complaint counsel to Sherman Act standards in *General Foods*, the Commission adopted the only appropriate “limiting principle” to be applied in a case like that – and like this one: “we do not believe that [Section 5] ... should be used to reshape

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<sup>68</sup> Rosch Valassis Speech, *supra* note 25, at 11. (emphasis in original).

<sup>69</sup> See discussion and cases cited above at pp. 5-13. The court in *Ethyl* pointed out that the inadequacy of “adverse impact on competition” as a limiting principle. It observed that such a rule would prevent “the admittedly lawful unilateral closing of a plant or refusal to expand capacity” and it would also prevent a patentee from “exercising its lawful monopoly to charge whatever the traffic would bear.” 729 F.2d at 138.

those [antitrust] policies when they have been clearly expressed and circumscribed.”<sup>70</sup> Indeed, the allegations in the pending Complaint (e.g., of “attempt to maintain monopoly power”) echo the position of complaint counsel in *General Foods* where the argument was that even if there had not been an attempt to monopolize, there was “an incipient attempt on the basis of potential market power.”<sup>71</sup> The Commission rightly said that to distinguish between these two concepts was “to engage in such fine distinctions as to challenge the legal philosopher, let alone the competitor trying to conform its conduct to the law.”<sup>72</sup> The “limiting principles” that have been more recently referred to by certain Commissioners either are not referenced in the complaint in this matter or are of no consequence since they fail in any meaningful way to prevent the FTC’s enforcement discretion from being wholly “unbounded.”

### CONCLUSION

For the foregoing reasons, Respondent Polypore respectfully moves to dismiss for failure to state a claim, Counts II and III of the Complaint with respect to any monopolization claims regarding the alleged automotive, UPS and PE separator markets and to dismiss, for failure to state a claim, Counts II and III to the extent that they purport to apply to the alleged deep-cycle and motive battery separator markets based upon an undefined monopolization offense under Section 5 of the FTC Act.

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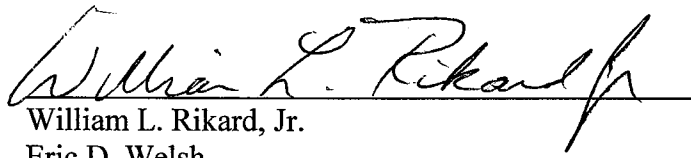
<sup>70</sup> 103 F.T.C. at 365-66.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

Dated: October 15, 2008

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on October 15, 2008, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing *Respondent's Memorandum in Support of Motion to Dismiss Counts II and III of the Complaint for Failure to State a Claim*, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed on the same day by other means with:

Donald S. Clark, Secretary  
Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Rm. H-135  
Washington, DC 20580  
[secretary@ftc.gov](mailto:secretary@ftc.gov)

I hereby certify that on October 15, 2008, I served one copy via hand delivery and two copies via overnight mail delivery of the foregoing *Respondent's Memorandum in Support of Motion to Dismiss Counts II and III of the Complaint for Failure to State a Claim* with:

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

I hereby certify that on October 15, 2008, I served via first-class mail delivery and electronic mail delivery a copy of the foregoing *Respondent's Memorandum in Support of Motion to Dismiss Counts II and III of the Complaint for Failure to State a Claim* with:

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## **EXHIBIT 1**

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

Commissioners: Timothy J. Muris, Chairman  
Sheila F. Anthony  
Mozelle W. Thompson  
Orson Swindle  
Thomas B. Leary

\_\_\_\_\_)  
In the Matter of )  
RAMBUS INCORPORATED, ) DOCKET NO. 9302  
a corporation. )  
\_\_\_\_\_)

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Rambus Incorporated (hereinafter, “Rambus” or “Respondent”) has violated Section 5 of the Federal Trade Commission (“FTC”) Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Nature of the Case

1. Through this action, the Commission challenges a pattern of anticompetitive acts and practices, undertaken by Rambus over the course of the past decade, and continuing even today, whereby Rambus, through deliberate and intentional means, has illegally monopolized, attempted to monopolize, or otherwise engaged in unfair methods of competition in certain markets relating to technological features necessary for the design and manufacture of a common form of digital computer memory, known as dynamic random access memory, or “DRAM.”

2. Rambus's anticompetitive scheme involved participating in the work of an industry standard-setting organization, known as JEDEC, without making it known to JEDEC or to its members that Rambus was actively working to develop, and did in fact possess, a patent and several pending patent applications that involved specific technologies proposed for and ultimately adopted in the relevant standards. By concealing this information – in violation of JEDEC's own operating rules and procedures – and through other bad-faith, deceptive conduct, Rambus purposefully sought to and did convey to JEDEC the materially false and misleading impression that it possessed no relevant intellectual property rights. Rambus's anticompetitive scheme further entailed perfecting its patent rights over these same technologies and then, once the standards had become widely adopted within the DRAM industry, enforcing such patents worldwide against companies manufacturing memory products in compliance with the standards.
3. The pattern of anticompetitive conduct by Rambus that is at issue in this action has materially caused or threatened to cause substantial harm to competition, and will in the future materially cause or threaten to cause further substantial injury to competition and to consumers, absent the issuance of appropriate relief in the manner set forth below.

#### **The Respondent**

4. Rambus is a public corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 9440 El Camino Real, Los Altos, California 94022.
5. Rambus designs, develops, licenses, and markets high-speed chip-connection technology to enhance the performance of computers, consumer electronics, and communications systems. The company licenses semiconductor companies to manufacture and sell memory and logic integrated circuits incorporating Rambus chip-connection technology and markets its solutions to systems companies to encourage them to design this technology into their products. For the fiscal year that ended on September 30, 2001, Rambus reported revenues of approximately \$117 million.
6. Rambus is, and at all relevant times has been, a corporation as "corporation" is defined by Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44; and at all times relevant herein, Rambus has been, and is now, engaged in commerce as "commerce" is defined in the same provision.

#### **Background on the DRAM Industry**

7. Within the array of components that together comprise a typical computer, the computer's "memory" functions to store digitally recorded information such that it is available to be

accessed when needed by the central processing unit (“CPU”). Computer memory is produced in the form of semiconductor “chips,” which are connected with other computer components – such as the CPU and the chipset – via a collection of circuit lines, or a “bus,” that routes electronic signals and, in this way, communicates commands and transports data.

8. DRAM is the most common form of computer memory in use today. Another form of memory is known as static random access memory, or “SRAM.” DRAM and SRAM differ principally in the following ways: SRAM, unlike DRAM, is able to continuously hold information while power is being supplied to memory. With DRAM, on the other hand, the electronic charges that serve to hold the stored information in place dissipate over time, causing information to “leak” out of memory. To counteract this phenomenon, DRAM memory chips must be constantly “refreshed” with new electronic pulses. DRAM and SRAM also differ in that the latter generally is both faster and more expensive.
9. DRAM is an essential input into a variety of downstream products, including a wide variety of computers, such as personal computers, work stations, and servers, as well as various other types of electronic devices, such as fax machines, printers, digital video recorders, video game equipment, and personal digital assistants. Total sales of DRAM in the United States exceeded \$12 billion in 2000, and for the same year worldwide DRAM sales exceeded \$28 billion.
10. Over the years, a series of different architectures for designing DRAM chips has been introduced. As in most other aspects of the computer industry, over time older-generation designs have given way to newer-generation designs or to improvements on existing architectures. A driving force behind this continual process of evolution in DRAM design is the quest for improved computer performance. In particular, as the performance of other computer components and subsystems is enhanced, the marketplace demands equivalent improvements in the speed and other performance characteristics of computer memory.
11. During the late 1980s and early 1990s, developments and improvements in the performance of CPUs and other computer components were moving forward at a rapid clip. It was perceived, however, that developments in DRAM technology had not kept pace, and that performance constraints inherent in the available DRAM architectures were hindering technological progress in the computer industry, creating a virtual “memory bottleneck.”
12. It was in this environment that “synchronous” DRAM was developed. The essential innovation underlying synchronous DRAM – as compared to the prior generation of DRAM, also known as “asynchronous” DRAM – was to link memory functions to a “system clock,” allowing for more rapid sequencing of communications between the CPU and memory, thereby improving overall system performance. The system clock, in effect, consists of a continuous series of evenly spaced electronic pulses. The period of time (measured in nanoseconds) elapsing between the initiation of two succeeding pulses is referred to as a single “clock cycle.”

13. The introduction of synchronous DRAM offered a potentially promising solution to the memory bottleneck. Yet the success of synchronous DRAM depended importantly upon the ability of the computer industry to adopt standards governing the design and implementation of synchronous DRAM.

### **JEDEC**

14. The JEDEC Solid State Technology Association (“JEDEC”) – originally known as the Joint Electron Device Engineering Council, from which the acronym JEDEC derives – is one of several standard-setting bodies affiliated with the Electronic Industries Alliance (“EIA”), a trade association representing all segments of the electronics industry. As explained in JEDEC’s Manual of Organization and Procedure (hereinafter, the “JEDEC Manual”), the organization’s primary purpose and function is to “promote the development and standardization of terms, definitions, product characterization, test methods, manufacturing support functions and mechanical standards for solid state products.”
15. According to the JEDEC Manual, membership in JEDEC is freely available to “[a]ny company, organization, or individual conducting business in the USA that . . . manufactures electronic equipment or electronics-related products, or provides electronics or electronics-related services.” To become a JEDEC member, an eligible company need only submit an application, pay membership fees, and agree to abide by JEDEC’s rules. JEDEC members, currently numbering in excess of 200, include many of the world’s top designers and manufacturers of semiconductors and related products, as well as many of the largest purchasers of such products.
16. JEDEC’s internal structure consists of a Board of Directors (formerly known as the JEDEC “Council”) and numerous operational committees, subcommittees, and task groups. Standards typically are proposed, evaluated, and formalized at the committee or subcommittee level and then presented for approval to the Board of Directors, which has final authority to approve or disapprove all proposed standards.

### **JEDEC Policies and Procedures**

17. At all times relevant herein, JEDEC has steadfastly maintained a commitment to promoting free competition within the semiconductor industry. Thus, JEDEC has insisted that its members abide by all applicable laws, including but not limited to laws prohibiting anticompetitive conduct.

18. The JEDEC Manual provides that all JEDEC meetings “shall comply with the current edition of EIA Legal Guides.” These Legal Guides – which are explicitly “incorporated ... by reference” into JEDEC’s own governing rules, and currently are posted on JEDEC’s own website under the heading “Manuals” – provide that standardization programs must be “conducted under strict policies designed to promote and stimulate our free enterprise system and to make sure that laws for maintaining and preserving this system are vigorously followed.”
  19. The EIA/JEDEC Legal Guides establish a “basic rule” that standardization programs conducted by the organization “shall not be proposed for or indirectly result in ... restricting competition, giving a competitive advantage to any manufacturer, [or] excluding competitors from the market.”
  20. Consistent with its commitment to promoting unfettered competition, at all times relevant herein JEDEC also has maintained a commitment to avoid, where possible, the incorporation of patented technologies into its published standards, or at a minimum to ensure that such technologies, if incorporated, will be available to be licensed on royalty-free or otherwise reasonable and non-discriminatory terms. Toward this end, JEDEC has implemented procedures designed to ensure that members disclose any patents, or pending patent applications, involving the standard-setting work being undertaken by the organization.
  21. At all times relevant herein, meetings of the pertinent JEDEC subcommittee routinely were opened with a statement by the chairperson underscoring the existence of such disclosure obligations. This practice is in conformity with requirements set forth in the JEDEC Manual, the current edition of which provides:

“The chairperson of any JEDEC committee [expressly defined to include, among other things, subcommittees] must call to the attention of all those present the requirements contained in EIA Legal Guides, and the obligation of all participants to inform the meeting of any knowledge they may have of any patents, or pending patents, that might be involved in the work they are undertaking.”
- Although the above provision was first added to the JEDEC Manual in October 1993, the existence and scope of these disclosure obligations were commonly known within JEDEC before that time, and indeed throughout the entirety of Rambus’s involvement in the organization, from late 1991 through mid-1996.
22. While JEDEC does not altogether prohibit the use of patented items in the standards that it promulgates, the JEDEC Manual does mandate that the use of such items “be considered with great care.” Indeed, consistent with procedures and practices followed within JEDEC throughout the relevant time period, the JEDEC Manual, at least since October 1993, has

required that no standard be drafted to include “patented items” – or “items and processes for which a patent has been applied” – absent both

- (1) a well-supported technical justification for inclusion of the patented item; and
- (2) express written assurance from the patent holder that a license to the patented technology will be made available either “without compensation” or under “reasonable terms and conditions that are demonstrably free of any unfair discrimination.”

23. The JEDEC Manual, at least since October 1993, has expressly provided that the disclosure and licensing obligations discussed above apply “with equal force” when JEDEC members, subsequent to the adoption of a standard, discover new information about existing patent rights – or otherwise obtain new patent rights – involving that standard. In such situations, the JEDEC member must make the same disclosures and provide the same assurances as would be required if the member knew of such patent rights prior to adoption of the relevant standard.

24. Fairly interpreted, the policies, procedures, and practices existing within JEDEC throughout all times relevant herein imposed upon JEDEC members certain basic duties with regard to the disclosure of relevant patent-related information and the licensing of relevant patent rights:

- a. First, to the extent any JEDEC member knew or believed that it possessed patents or pending patent applications that might involve the standard-setting work that JEDEC was undertaking, the member was required to disclose the existence of the relevant patents or patent applications and to identify the aspect of JEDEC’s work to which they related.
- b. Second, in the event that technologies covered by a member’s known patents or patent applications were proposed for inclusion in a JEDEC standard, the member was required to state whether the technology would be made available either “without compensation” or under “reasonable terms and conditions that are demonstrably free of any unfair discrimination.” Absent the member’s agreement to one of these two conditions, the JEDEC rules would not allow the technology to be incorporated into a proposed standard.

#### **JEDEC Work Involving SDRAM Standards**

25. The JEDEC committee responsible for overseeing the development of standards relating to memory devices is known as the JC-42 Committee on Solid State Memories (“JC-42”), which has several subcommittees, one of which is particularly relevant for purposes of the instant

complaint: the JC-42.3 Subcommittee on RAM Devices (“JC-42.3”).

26. Beginning in or around 1990, JC-42.3 commenced work on standards relating to the design and architecture of synchronous DRAM, referred to within JC-42.3 as “SDRAM.” JEDEC members involved in the SDRAM-related work of JC-42.3 have over time included virtually all leading memory designers, manufacturers, and users, whether based in the U.S. or abroad.
27. During the 1990s, JEDEC issued several SDRAM-related standards, the first of which was published in November 1993 and was identified as Release 4 of the 21-C Standard. Subsequent releases of the 21-C Standard followed after that, only small portions of which related to SDRAM, as opposed to other memory-related technologies. In August 1999, however, JEDEC published a substantially augmented SDRAM standard – Release 9 of the 21-C Standard – which introduced a second generation of SDRAM. This second-generation standard became known as “double data rate,” or “DDR,” SDRAM.
28. Although the second-generation SDRAM standard was not issued until 1999, the work that culminated in that standard commenced, at the very latest, shortly after the first-generation SDRAM standard was adopted in 1993. Indeed, it may have commenced even earlier than that, inasmuch as at least one of the technological features initially considered (but ultimately rejected) for the first-generation SDRAM standard was later adopted in the second-generation standard. In addition, most, if not all, of the technologies encompassed in the first SDRAM standard were carried forward in the second-generation standard as well.
29. The process through which JEDEC adopted and published these standards proceeded essentially as follows:
  - a. At regularly scheduled meetings of the JC-42.3 Subcommittee, which typically occurred on a quarterly basis – as well as affiliated committee and task group meetings, which were scheduled as needed – members were allowed to make presentations concerning specific concepts or technologies they proposed for inclusion in a standard under development.
  - b. Such presentations generally were accompanied by written materials, which, in addition to being shared with all members present at the meeting, were reproduced and attached to the official meeting minutes.
  - c. Before any proposal could be considered for adoption, it was necessary that it be presented a second time at a later subcommittee meeting.
  - d. At that point, a member could move that the proposal be presented to the

subcommittee membership for approval through a formal balloting process, pursuant to which written ballots were distributed and received by mail.

- e. Votes were then tabulated at the subsequent meeting of the subcommittee, at which time members voting “No” were required to explain their reasons for opposing the proposal.
  - f. Technically, a two-thirds majority was required, but in practice proposals rarely passed without a consensus of all voting members.
  - g. Individual proposals, once approved by JC-42.3, were often held at the subcommittee level until a complete package of related proposals was ready to be forwarded to the Council for final ratification.
30. JEDEC’s – specifically, the JC-42.3 Subcommittee’s – work on SDRAM standards continues today, and a third-generation SDRAM standard, known as “DDR II,” is expected to be completed later this year.

#### **Rambus and Its Proprietary RDRAM Technology**

31. Rambus was founded in 1990 by two electrical engineers, Mark Horowitz and Michael Farmwald, who together developed their own, proprietary synchronous DRAM architecture. They named the new architecture Rambus DRAM, or simply “RDRAM,” and contributed the technology to the new corporation upon its formation.
32. RDRAM, as originally designed, differed from traditional DRAM architectures in several ways, including but not limited to the following:
- a. First, the RDRAM architecture specified the use of many fewer bus lines than was common in traditional DRAM designs. Thus, RDRAM was said to be a “narrow-bus” architecture. By comparison to RDRAM, traditional DRAM incorporated what was referred to as a “wide-bus” or “broad-bus” design.
  - b. Second, in the RDRAM architecture, each bus line was capable of carrying three types of information essential to memory functionality: (1) data; (2) “address” information, specifying the location where needed data could be found, or should be placed, in memory; and (3) “control” information, specifying, among other things, the relevant command (*e.g.*, whether the computer should “read” data from memory or “write” new data to memory). By comparison, in traditional DRAM architectures, each bus line was generally dedicated to carrying only one of these three types of information. Thus,

the RDRAM bus was sometimes said to be “multiplexed” or “triply multiplexed.”

c. Third, rather than transmitting data, address, and control information separately, as was common in a traditional DRAM architecture, RDRAM transmitted such information together in groupings, called “packets.” For this reason, RDRAM is also sometimes referred to as a “packetized” system.

33. Though Rambus has designed, and obtained patents on, various DRAM-related technological concepts or features, Rambus does not itself manufacture such technologies, choosing instead to license its designs for a fee to downstream memory manufacturers. Beginning in the early 1990s and continuing through the present, Rambus has sought to market and license its proprietary RDRAM technology to manufacturers of computer memory and related products, including a number of companies holding membership in JEDEC.

#### **Rambus’s ‘898 Patent Application and Its Progeny**

34. On April 18, 1990, Rambus filed its first DRAM-related patent application with the United States Patent and Trademark Office (“PTO”) – Application No. 07/510,898 (hereinafter, “the ‘898 application”). The application contained a 62-page specification and 15 drawings, all purporting to describe Rambus’s DRAM-related inventions. In addition, the ‘898 application contained 150 separate claims, each of which was limited to a narrow-bus, multiplexed, packetized DRAM design.

35. Patents and patent applications consist of two principal parts. The first part is a written description, whereby the patent applicant (or, if the application issues as a patent, the patent holder) describes the invention, through technical specifications and drawings, in a manner that would allow a person skilled in the art to which the invention applies to understand and practice the invention without undue experimentation. The second part of the patent or patent application consists of one or more “claims” defining, or delineating, the scope – or outer bounds – of the patent holder’s exclusive rights (or, in the case of an application, the exclusive rights the applicant seeks to obtain).

36. Because all 150 claims contained in Rambus’s ‘898 patent application were limited to a narrow-bus, multiplexed, packetized DRAM design, through this application Rambus was not seeking – nor, absent amendment to the application, could it obtain – any patent rights exceeding those limitations.

37. In March 1992, Rambus broke out portions of its ‘898 application into 10 divisional patent applications, each of which “claimed priority back” to the ‘898 application and to its April 1990 filing date. The original ‘898 application and these 10 divisional applications, in turn, gave rise

to numerous other amended, divisional, or continuation patent applications – all technically the “progeny” of the ‘898 application – and eventually resulted in the issuance of numerous Rambus patents.

- a. The process of obtaining patents or “perfecting” patent claims, otherwise known as patent prosecution, often involves amending, dividing, or continuing patent applications on file with the PTO.
- b. Through an “amendment” to a pending patent application, a patent applicant may delete or alter certain claims contained in the pending application, or may add new claims, while at the same time retaining the same specification, drawings, and (to the extent not amended or deleted) claims of the previously pending application.
- c. A “divisional” application is one that carves out one of multiple distinct inventions from a prior application and seeks to obtain patent rights over that distinct invention, without adding any new matter to the written description of the invention described in the earlier application.
- d. A “continuation” application is a second application, covering the same invention described in a prior application, that is filed before the earlier application either issues as a patent or is abandoned and, again, adds no new matter to the written description of the invention described in the earlier application.
- e. Before issuing any patent, the PTO first seeks to determine whether the invention claimed in the relevant patent application is preceded by “prior art” – that is, by preexisting inventions or other publicly known facts or information that demonstrates the lack of novelty in the invention for which a patent is sought.
- f. Generally speaking, determinations of whether prior art exists in a given case are made by reference to the date on which the patent application is filed, otherwise known as the “priority date.”
- g. When a patent application is amended, divided, or continued in the manner described above, the patent applicant may “claim priority back” to an earlier-filed application – thus benefitting from the earlier filing date – but only if the amended, divisional, or continuation application “adds no new matter” to the written description of the invention described in the earlier application. As noted above, divisional and continuation applications, by definition, include no new matter not contained within the earlier-referenced application.
- h. Subsequent amendments, divisionals, or continuations claiming priority back to an

earlier-filed patent application are sometimes said to be within the same “family” as the earlier-filed application, or otherwise are said to be the prior application’s “progeny.”

- i. Thus, the fact that, as stated above, each Rambus patent application in the ‘898 “family” – or each of the ‘898 application’s “progeny” – claimed priority back to the ‘898 application, means that all of the patent applications in the ‘898 family contained the same specification and drawings as were contained in the ‘898 application itself. In fact, in each amended, divisional, and continuation patent application Rambus filed claiming priority back to the ‘898 application’s April 1990 filing date, Rambus was required to – and did – expressly warrant to the PTO that the application added “no new matter” beyond what was contained in the ‘898 application’s 62-page specification and 15 drawings.

38. Though all of the Rambus patent applications in the ‘898 family contained the same specification and drawings as the ‘898 application itself, over time Rambus sought to expand the claims contained within these applications in order to obtain patent rights extending beyond the narrow-bus, multiplexed, packetized design inherent in the RDRAM design. In other words, in the course of prosecuting the ‘898 family of patent applications, Rambus made a conscious effort to withdraw the narrow-bus limitations contained in the original application’s claims, and thereby sought to significantly expand the scope of its potential patent rights, while still clinging to the ‘898 application’s April 1990 priority date.

#### **Rambus’s Initial Involvement in JEDEC**

39. Even before Rambus was formally incorporated in early 1990, its founders outlined a strategy whereby, in an effort to obtain high royalties for RDRAM, they would seek to establish RDRAM as the actual or *de facto* industry standard.
40. Partly with this goal in mind, Rambus attended its first JEDEC meeting in December 1991, and it officially joined the organization shortly thereafter. Although JEDEC was conducting other potentially relevant work at that time, of particular relevance to Rambus was the work then underway within the JC-42.3 Subcommittee, which was in the process of developing a first generation of standards for SDRAM. From December 1991 through December 1995, Rambus representatives regularly attended JC-42.3 meetings.
41. Though Rambus attended its last JC-42.3 meeting in December 1995, it remained a member of JEDEC, and continued to receive official mailings and other information from JEDEC, until June 1996, when it formally withdrew from the organization.

#### **Rambus’s Scheme to Capture the SDRAM Standards**

42. Shortly after becoming involved in JEDEC, it became apparent to Rambus that JC-42.3 was committed to developing SDRAM standards based on the traditional wide-bus, non-packetized DRAM architecture, relying to the extent possible on non-proprietary technologies. In other words, it was highly unlikely JC-42.3 would be interested in standardizing RDRAM, an architecture that was both proprietary and distinctly non-traditional.
43. Rambus, of course, would have preferred that its own RDRAM technology be adopted as the industry standard. Failing that, Rambus might have preferred to see any efforts at adopting an industry-wide SDRAM standard fail, inasmuch as industry adoption of such a standard would make it more difficult for Rambus to market its proprietary RDRAM technology. By mid-1992, however, Rambus had seized upon an alternative business plan – one that, if successful, might allow Rambus to achieve the goal of charging high royalties even if the DRAM industry were to adopt as its standard something other than RDRAM. Rambus’s CEO, Geoff Tate, laid out this scheme in a June 18, 1992 draft of the Rambus 1992-1997 Business Plan:

“For about 2+ years a JEDEC committee has been working on the specifications for a Synchronous DRAM. No standard has yet been approved by JEDEC. Our expectation is a standard will not be reached until end of 1992 at the earliest.

\* \* \*

[W]e believe that Sync DRAMs infringe on some claims in our filed patents; and that there are additional claims we can file for our patents that cover features of Sync DRAMs. Then we will be in position to request patent licensing (fees and royalties) from any manufacturer of Sync DRAMs. Our action plan is to determine the exact claims and file the additional claims by the end of Q3/92. Then to advise Sync DRAM manufacturers in Q4/92.”

44. In what appears to be the final draft of the same Rambus Business Plan, dated September 1992, Tate further elaborated on the scheme:

“Rambus expects the patents will be issued largely as filed and that companies will not be able to develop Rambus-compatible or Rambus-like technology without infringing on multiple fundamental claims of the patents .... Rambus’ patents are likely to have significant applications other than for the Rambus Interface.”

In the same document, Tate also wrote: “Sync DRAMs infringe claims in Rambus’s filed patents and other claims that Rambus will file in updates later in 1992.”

45. In actuality, events unfolded somewhat differently than Rambus’s CEO envisioned in these

statements, in a manner that affected the timing, but not the core substance, of Rambus's scheme. For instance, although Rambus's '898 application was pending at the time these statements were written, not until 1996 was Rambus – through a separate application claiming priority back to the '898 application – able to obtain its first patent broad enough to arguably cover aspects of the wide-bus DRAM architecture incorporated into the JEDEC standards. In addition, Rambus ultimately elected to wait until late 1999, after DRAM manufacturers and their customers had become “locked in” to the JEDEC standards, before seeking to enforce its patents against memory manufacturers producing JEDEC-compliant SDRAM.

46. Aside from such timing issues, the Rambus business plans quoted in Paragraphs 43 and 44 set forth quite accurately the basic scheme upon which the company would embark – that is, a scheme whereby Rambus would actively seek to perfect patent rights covering technologies that were the subject of an ongoing, industry-wide standardization process, in which Rambus itself was a regular participant, without disclosing the existence of such patent rights (or the pertinent patent applications) to other participants, many of whom, by producing products compliant with the standards, would later be charged with infringing Rambus's patents.

#### **Implementation of Rambus's Scheme**

47. During the course of its participation in JEDEC, from late 1991 through mid-1996, Rambus observed multiple presentations regarding technologies, proposed for (and later included in) JEDEC's SDRAM standards, that Rambus either (1) knew or believed to be covered by claims contained in its then-pending patent applications, or (2) believed could be covered through amendments to those applications expanding the scope of the patent claims while adding no new matter to the underlying technical specification.
48. That is, at all times relevant herein, Rambus believed that a number of the specific technologies that were proposed for, and later incorporated in, the relevant JEDEC standards were encompassed by the 62-page technical specification and 15 related drawings common to Rambus's '898 application (filed in 1990) and the numerous amended, divisional, and continuation applications that stemmed from the '898 application. Rambus further believed that, to the extent the pending claims of the '898 application and its later-filed progeny failed to cover these technologies as proposed to be used in JEDEC's SDRAM standards, such claims could be amended to cover these technologies, while still claiming priority back to the '898 application's April 1990 filing date.
49. As Rambus's CEO described in the company's internal planning documents in mid-1992 (*see* Paragraphs 43-44 above), the initial phase of Rambus's “action plan” required that it first “determine the exact claims” in its pending applications that covered technologies being incorporated into the JEDEC standards, and then, as needed, “file ... additional claims” to

