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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HYNIX SEMICONDUCTOR INC., HYNIX
SEMICONDUCTOR AMERICA INC.,
HYNIX SEMICONDUCTOR U.K. LTD., and
HYNIX SEMICONDUCTOR
DEUTSCHLAND GmbH,

Plaintiffs,

v.

RAMBUS INC.

Defendant.

No. C-00-20905 RMW

ORDER GRANTING RAMBUS'S MOTION
IN LIMINE REGARDING WEINSTEIN'S
SUPPLEMENTAL REPORT

[No Docket No.]

Weinstein is Hynix's damages expert. He served his initial report on January 24, 2005. To derive his figure for Scenario A, where Rambus was not willing to exercise its market power, he took two steps. First, he reviewed license agreements that Rambus formed with other companies around 2000. Most of these included a royalty rate of 0.75 percent for SDRAM and 3.5 percent for DDR SDRAM. Then he considered Rambus's and Hynix's actual negotiations in 2000. Based on his discussions with Hynix's vice president of intellectual property rights, he concluded that Hynix would have been willing to pay royalty rates of 0.25 percent for SDRAM and 0.5 percent for DDR SDRAM. He then averaged these two figures and determined that a reasonable royalty would have

1 been 0.50 percent for SDRAM and 2.0 percent for DDR SDRAM. *See* Weinstein Report at ¶¶ 9, 45-
2 57.

3 On January 30, 2006 Weinstein served a supplemental expert report. This report
4 incorporates Rambus's Royalty Summary and the March 2005 settlement between Rambus and
5 Infineon. Instead of employing the two-step methodology outlined above to determine a reasonable
6 royalty rate, he now bases his theory on the Infineon license. He notes that the Infineon license ties
7 rates to the number of companies that license Rambus technology after January 2005. *See* Weinstein
8 Supp. Report at ¶ 3. If Infineon is the only company to do so, the effective royalty rate is 0.21 to
9 0.27 percent on all memory sales; if two manufactures do so, the rate rises to 0.31 to 0.52 percent;
10 and if three manufacturers do so, then the rate rises to 0.37 to 0.76 percent. Weinstein also
11 calculates the "effective royalty rate" paid by five Rambus licensees and uses them to determine a
12 "weighted average effective royalty rate" of 0.43 percent. *Id.* at ¶ 6. Ultimately, Weinstein
13 concludes that Rambus's royalty should be between 0.21 percent and 0.76 percent of infringing
14 memory sales. *Id.* at ¶ 34.

15 Rambus moves to exclude Weinstein's supplemental report. The court grants the motion for
16 several reasons. First, the court has determined that Infineon and Rambus negotiated their license
17 under circumstances so far removed from the case at bar that it has virtually no probative value.
18 Although Weinstein can rely on inadmissible evidence to formulate his opinion, his heavy reliance
19 upon the Infineon license undermines the reliability of his calculations.

20 Second, Weinstein's supplemental report relates entirely to Scenario A: a hypothetical
21 situation where Rambus did not exercise its market power. *See* Weinstein Supp. Report at ¶¶ 6 ("I
22 have also calculated the weighted average effective royalty rate received by Rambus This rate
23 is 0.43 percent, a figure which reflects the real value of the patents in the absence of market power);
24 13 ("These data indicate that, in the absence of market power, the real value of Rambus technology
25 . . . do[es] not exceed 0.43 percent"). The court has ruled that this scenario is unrealistic because it
26 fails to account for the fact that Rambus could reasonably exercise its market power. Weinstein
27 cannot testify to the contrary.

1 Third, Weinstein's supplemental report is untimely. Hynix correctly notes that parties have a
2 duty to supplement disclosures made pursuant to Rule 26(a), and the deadline for doing so is "the
3 time the party's disclosures under Rule 26(a)(3) are due." Fed. R. Civ. P. 26(e)(1). Hynix argues
4 that because Rule 26(a)(3) disclosures were due on February 2, 2006, Weinstein's supplemental
5 report, served on January 30, 2006, is timely. However, Rule 26(e)(1) only permits supplementation
6 of information that "is incomplete or incorrect." Weinstein's new report contains a new
7 methodology: the use of "effective royalty rates." Although he calculated an "effective royalty rate"
8 for Samsung in his initial report, he chose not to incorporate this calculation into his opinion.
9 Weinstein Report at ¶¶ 54, 58. Courts are generally reluctant to construe substantive changes to an
10 expert's theories or methodologies as an appropriate form of "supplementation." *See, e.g., Carter v.*
11 *Finely Hosp.*, 2003 WL 22232844, *2 (N.D. Ill. 2003) ("[i]t is disingenuous to argue that the duty to
12 supplement under Rule 26(e)(1) can be used as a vehicle to disclose entirely new expert opinions
13 after the deadline established by the court under Rule 26(a)(2)(C)"); *Keener v. U.S.*, 181 F.R.D. 639,
14 640 (D. Mont. 1998) (precluding expert from introducing supplemental report where "[t]he opinions
15 contained [therein] are different from, rather than supplemental to, the information contained in the
16 [initial] disclosure" because "[s]upplementation under the Rules means correcting inaccuracies, or
17 filling the interstices of an incomplete report based on information that was not available at the time
18 of the initial disclosure"); *Dag Enterprises, Inc. v. Exxon Mobil Corp.*, 226 F.R.D. 95, 109-10 (D.
19 D.C. 2005) (plaintiffs' attempt to "rework their damages analyses and change the substance of their
20 contentions — i.e., basically 'substituting another report' for the ones that they already have
21 submitted . . . fundamentally misconstrue[s] the idea of 'supplementation' under Rule 26").

22 Here, Rambus served its Royalty Summary on Hynix over a year ago: on January 13, 2005.
23 Ransom Decl. Supp. Mot. ("Ransom Decl.") ¶ 4. Thus, Hynix possessed this information for eleven
24 days before Weinstein served his *initial* report. When questioned at oral argument, Hynix could not
25 explain why Weinstein waited until the eve of trial to alter his method. Similarly, to the extent that
26 Weinstein bases his new calculations on the Infineon license, Hynix obtained this license on June
27 30, 2005, *id.* at ¶ 5, and Weinstein had ample time to place Rambus on notice about his new
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1 opinions. The court hereby precludes Weinstein from relying on the new information contained in
2 his supplemental report.

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DATED: 3/9/06

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

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