

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

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**RAMBUS’S MOTION FOR AN ORDER LIMITING THE SCOPE
OF REBUTTAL EVIDENCE AND EXCLUDING THE TESTIMONY
OF KEVIN RYAN, TERRY LEE AND BRUCE JACOB**

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Rambus Inc. (“Rambus”) moves the Court for an order excluding certain witnesses and limiting the scope of rebuttal evidence that may be offered by Complaint Counsel in this matter.

Complaint Counsel took nine weeks to present their case-in-chief. Complaint Counsel have now requested leave to present four “rebuttal” witnesses. It is apparent, however, from Complaint Counsel’s Notice of Anticipated Rebuttal Case (hereinafter “Notice”), that Complaint Counsel will try to use the testimony of these witnesses to bolster their case-in-chief rather than to rebut new matter raised in Respondent’s case. Because this would be an improper use of rebuttal

testimony, Rambus requests that the Court enter an order limiting the scope of the rebuttal case.

The Court should entirely exclude the proposed testimony of Professor Bruce Jacob and that of Mr. Terry Lee and Mr. Kevin Ryan, two Micron employees. Mr. Ryan was not listed by Complaint Counsel as a trial witness. The Scheduling Order provides that no witnesses who were not named on a party's Final Witness List will be allowed to testify, absent a showing of good cause. *See* August 6, 2002 Scheduling Order, pp. 3-4. Complaint Counsel have not even attempted to make a showing of good cause with respect to Mr. Ryan, nor could they.¹ *See generally* Order Denying ABSI's Motion to Add Witnesses and Exhibit, *In the Matter of Automotive Breakthrough Sciences, Inc., et al.*, 1996 FTC LEXIS 621 (Nov. 12, 1996) (refusing to permit designation of witnesses after the commencement of trial and more than two months after final witness lists were due).

The proposed rebuttal testimony of Terry Lee and Professor Jacob should also be excluded. Each has already testified at length in Complaint Counsel's case-in-chief. Each is now designated to testify in rebuttal on issues as to which he has already testified and as to which Complaint Counsel bear the burden of proof. The testimony of both witnesses is, therefore, cumulative and an improper

¹ Complaint Counsel had the expert reports and deposition testimony of Rambus's experts long before they prepared their Final Witness List. Complaint Counsel cannot and do not contend that Mr. Ryan is suddenly needed to respond to some new and unexpected testimony by Rambus's experts.

attempt to bolster Complaint Counsel’s case-in-chief rather than to rebut new and unexpected issues introduced by Respondent. *See Lubanski v. Coleco Industries, Inc.*, 929 F.2d 42, 47 (1st Cir. 1991) (affirming exclusion of rebuttal evidence where the evidence had been “available to plaintiff during her case in chief” and the defendant’s evidence to which her rebuttal evidence would respond “was not unexpected.”).

For similar reasons, if Your Honor permits rebuttal testimony by Professor McAfee, that testimony should be limited to matters: (1) that were not addressed by Professor McAfee in his initial testimony; and (2) that were “unexpected.” *Id.*

II. ARGUMENT

A. Complaint Counsel Do Not Have A Right To Put On A Rebuttal Case

Your Honor has broad discretion in deciding whether to allow any rebuttal evidence. *See* 16 C.F.R. § 3.43(b). As the Eighth Circuit has held, “[n]ormally parties are expected to present all of their evidence in their case in chief.

Allowance of a party to present additional evidence on rebuttal depends upon the circumstances of the case and rests within the discretion of . . . the trial judge.”

Clark v. Heidrick, 150 F.3d 912, 915 (8th Cir. 1998) (affirming exclusion of “cumulative” rebuttal evidence).

Given the wide latitude and extraordinary length of time that Complaint Counsel had to present their case-in-chief,² Your Honor would be well within your discretion to decline any further evidence from Complaint Counsel. If Your Honor should decide to allow Complaint Counsel to offer additional evidence, that evidence should be limited to that which is proper rebuttal, as set out below.

B. Complaint Counsel Are Not Allowed To Use A Rebuttal Case To Try To Bolster Their Case-In-Chief

It is well settled that plaintiffs may not use a rebuttal case to try to “bulk up” or rehabilitate their case-in-chief. In *Allen v. Prince George’s County*, 737 F.2d 1299, 1305 (4th Cir. 1984), for example, the court affirmed the exclusion of certain statistical evidence on rebuttal because the proffered evidence was merely “a new interpretation of physical evidence which had always existed during the pendency of these lawsuits.” *Accord, Tramonte v. Fibreboard Corp.*, 947 F.2d 762, 764 (5th Cir. 1991) (affirming exclusion of expert rebuttal testimony and observing that “[w]hen a plaintiff makes its prima facie case . . ., it also must offer evidence on any other issue of potential importance to the outcome in its case in chief”).

In *Lubanski*, 929 F.2d at 47, the plaintiff alleged that her son was hit by a car because of defects in a tricycle manufactured by defendant, including a noisemaker that concealed the sound of approaching cars and a low profile that

² The court reporter informed both parties last week that the number of transcript pages in this case appears to exceed that in any prior FTC administrative hearing.

made the tricycle less visible. The trial court denied plaintiff's request to offer two pieces of rebuttal evidence: (1) measurements to prove that two neighbors who were talking in a nearby driveway at the time of the accident, and who said that they had not heard the tricycle's noisemaker prior to impact, were standing too far from the plaintiff's driveway to have heard any such noise, and (2) a videotape showing a driver's line of vision when driving on plaintiff's street. *Id.* The court of appeals affirmed the exclusion of this evidence, reasoning that the evidence had been "available to plaintiff during her case in chief" and that the expert testimony to which plaintiff contended her new evidence responded "was not unexpected." *Id. Accord, Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1515 (10th Cir. 1990); *Emerick v. Suzuki Motor Corp.*, 750 F.2d 19, 22 (3d Cir. 1984).³

This case law, as applied here, means that if Complaint Counsel could have presented the proposed rebuttal evidence during its case-in-chief and should have foreseen its relevance, or if Complaint Counsel did in fact foresee its relevance

³ The legitimate scope of rebuttal evidence is no broader in administrative proceedings than it is in the federal courts. *See, e.g., Union Pacific Corp.*, 1994 ICC LEXIS 168 (Interstate Commerce Commission 1994) (excluding rebuttal evidence that was "an attempt to bolster [the plaintiff's] case-in-chief and contain[ed] material which should have been submitted at that time."); *Rowell Laboratories, Inc. v. Canada Packers Inc.*, 215 U.S.P.Q. 523, 1982 WL 52063 at p. 6, n.2 (Trademark Trial and Appeal Board 1982) (refusing to consider rebuttal evidence that "consisted of material intended to buttress petitioner's case-in-chief"). The FTC Operating Manual contains a similar admonition with respect to trial exhibits. *See* Operating Manual, section 10.17 ("Each document which will be used and which pertains directly to an issue on which counsel has the burden of proof should be introduced into the case-in-chief and not reserved for rebuttal.").

and did in fact offer evidence on the same issue in their case-in-chief, the proposed rebuttal evidence should be excluded. As one court recently explained,

“There is no abuse of discretion in excluding rebuttal evidence that is cumulative or repetitive of issues raised in the plaintiff’s case-in-chief, . . . nor is there an abuse of discretion in excluding rebuttal evidence available to the plaintiffs during their case-in-chief when there is no indication that the evidence introduced in the defendants’ case-in-chief was unexpected. In short, rebuttal is not an opportunity for the plaintiffs to simply get in the last word.”

Koch v. Koch Industries, Inc., 37 F.Supp. 2d 1231, 1245-6 (D. Kansas 1998)

(emphasis added).⁴ These general principles are particularly applicable where the plaintiff “already has presented evidence on the same issue as part of its case.”

Tramonte, 947 F.2d at 766.

C. Complaint Counsel’s Proposed Rebuttal Testimony Is Improper Because It Is Cumulative And Because The Testimony It Purports To Rebut Was Not Unexpected

As ordered by Your Honor, Complaint Counsel have identified the particular testimony by Rambus’s witnesses that they would like to address in a rebuttal case. After considering the listed testimony, Rambus has prepared four

⁴ On appeal, the Tenth Circuit reversed and remanded the District Court’s decision in *Koch* on other grounds, but it affirmed the trial court’s exclusion of the proposed rebuttal evidence. *See Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1225 (10th Cir. 2000) (observing that the plaintiffs “should not have been surprised” by the defense witnesses’ testimony that they had sought permission to rebut.)

charts that, taken together, demonstrate that Complaint Counsel in their case-in-chief could have and should have addressed, and in most instances did address, the identified issues. Rambus's four charts are attached to the Declaration of Steven M. Perry in Support of Rambus's Motion for an Order Limiting the Scope of Rebuttal Evidence and Excluding the Testimony of Kevin Ryan, Terry Lee and Bruce Jacob ("Perry Declaration").

The first chart, which is attached to the Perry Declaration as exhibit A, shows that each of the items of testimony that Complaint Counsel hope to ask Terry Lee, Kevin Ryan and/or Professor Jacob to address was raised in the expert reports and/or depositions of Rambus's experts. As a result, Complaint Counsel cannot assert that the trial testimony by Rambus's experts was "unexpected." *Lubanski*, 929 F.2d at 47.

The second chart, which is attached to the Perry Declaration as exhibit B, shows that Terry Lee and other fact witnesses have already addressed each of the issues that Complaint Counsel propose to have Mr. Lee and Professor Jacob address in rebuttal. This chart demonstrates both that the testimony of Rambus's experts "was not unexpected," *Lubanski*, 929 F.2d at 47, and that the proposed rebuttal testimony is cumulative. *See Tramonte*, 947 F.2d at 766 (affirming exclusion of rebuttal evidence where the plaintiff "already has presented evidence on the same issue as part of its case.").

The third chart, which is attached to the Perry Declaration as exhibit C, shows that Professor Jacob has already addressed most of the issues identified in

Complaint Counsel's Notice of Anticipated Rebuttal. His proposed testimony is therefore cumulative in most respects. Complaint Counsel may argue that Professor Jacob should be allowed to address those few topics that he has not already addressed. No such leeway is appropriate, however. As noted above, the second chart (exhibit B) shows that Complaint Counsel's fact witnesses did address each of the issues in question, which proves that Complaint Counsel and Professor Jacob were not at all surprised by the testimony of Rambus's experts. *See Koch*, 203 F.3d at 1225 (affirming exclusion of rebuttal evidence where plaintiffs "should not have been surprised" by the testimony of defense witnesses).⁵

The fourth chart, which is attached to the Perry Declaration as Exhibit D, addresses the proposed rebuttal testimony of Professor R. Preston McAfee. Because Complaint Counsel's notice regarding the issues that they desire to cover with Professor McAfee is so broad and vague as to be meaningless, Rambus is unable to identify more than just a few passages in Professor McAfee's trial testimony where he specifically addressed the issues in question. As to those few, an order excluding further testimony is appropriate. As to the remaining issues, Your Honor should limit Professor McAfee's rebuttal testimony to matters:

⁵ Rambus does not, of course, concede that the testimony by Complaint Counsel's witnesses is sufficient to meet Complaint Counsel's burden on the issues in question. Rambus cites to the testimony simply to show that the subject matters have been addressed, so that additional testimony would be inappropriate rebuttal under *Koch*, *Lubanski* and the other cases cited here.

(1) within the scope of his expertise and within the scope of his expert reports; (2) that were not addressed in his initial testimony; and (3) that were unexpected.

Lubanski, 929 F.2d at 47.

III. CONCLUSION

For the foregoing reasons, Rambus respectfully requests that the Court enter an order:

1. Excluding the proposed testimony of Micron employee Kevin Ryan on the ground that he was not named on Complaint Counsel's Final Witness List and on the other grounds set out below;

2. Excluding the proposed testimony of Micron employee Terry Lee and Professor Bruce Jacob on the ground that it is cumulative and on the ground that the defense evidence to which Mr. Lee and Professor Jacob would respond was not unexpected; and

3. Excluding the proposed testimony of Professor R. Preston McAfee that relates to the subjects set out in exhibit D to the Perry Declaration on the ground that it is cumulative, and limiting Professor McAfee's other testimony to issues that were not addressed in his prior trial testimony and that were unexpected.

DATED: July 28, 2003

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CERTIFICATE OF SERVICE

I, James M. Berry, hereby certify that on July 28, 2003, I caused a true and correct copy of *Rambus's Motion For An Order Limiting The Scope Of Rebuttal Evidence And Excluding The Testimony Of Kevin Ryan, Terry Lee and Bruce Jacob* to be served on the following persons by hand delivery:

Hon. Stephen J. McGuire Chief Administrative Law Judge Federal Trade Commission, Room H-112 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580	M. Sean Royall, Esq. Deputy Director, Bureau of Competition Federal Trade Commission, Room H-372 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580
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James M. Berry

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CERTIFICATION

I, James M. Berry, hereby certify that the electronic copy of *Rambus's Motion for an Order Limiting the Scope of Rebuttal Evidence and Excluding the Testimony of Kevin Ryan, Terry Lee and Bruce Jacob* accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on July 28, 2003 by other means.

James M. Berry
July 28, 2003