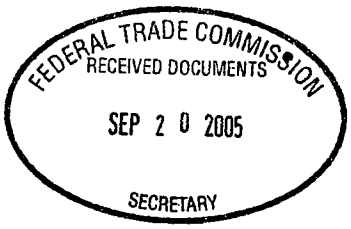
PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

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

MOTION BY RESPONDENT RAMBUS INC. TO REOPEN RECORD TO ADMIT NEWLY OBTAINED EVIDENCE REBUTTING COMPLAINT COUNSEL'S PROPOSED FINDINGS AND UNDERMINING COMPLAINT COUNSEL'S PROPOSED REMEDY

I. INTRODUCTION

Respondent Rambus Inc. ("Rambus") respectfully submits this motion to reopen the record to admit evidence recently obtained by Rambus that substantially undermines Complaint Counsel's proposed remedy and many of the proposed findings advanced in support of that remedy. The evidence in question was recently produced to Rambus in private litigation by two DRAM manufacturers, Micron Technology, Inc. ("Micron") and Hynix Semiconductor, Inc. ("Hynix"). Presumably because Micron and Hynix "stand to lose mightily" if the Initial Decision is upheld, they have so far *refused* to allow Rambus to provide the evidence in question to the Commission. *See* Brief of Amici Curiae Micron Technology, Inc., Hynix Semiconductor, Inc. and Infineon Technologies AG, filed April 16, 2004, p. 5. As a consequence, Rambus will shortly move to amend the Protective Order in the private litigation to allow the parties to discuss relevant evidence with governmental agencies.

An order reopening the record is fully justified here, for many of the reasons set forth in the Commission's prior order reopening the record, at Complaint Counsel's request, to admit evidence from a private lawsuit involving Rambus. See Order Granting In Part Complaint Counsel's Motion To Compel Production Of, And To Reopen The Record To Admit, Documents Relating To Rambus Inc.'s Spoliation Of Evidence, filed May 13, 2005 (hereinafter "Order Reopening Record"). In its order, the Commission stated that the evidence in question would "raise potentially disturbing issues regarding the adequacy, completeness and reliability of the record in this matter."

Id. at 3. The Commission also cited to Complaint Counsel's argument that the materials would "likely contradict evidence and positions taken in this matter previously. . . ." *Id.*

These same concerns arise – and are greatly magnified – with respect to the evidence that is the subject of this motion to reopen. For example:

- the new evidence directly contradicts specific trial testimony solicited by Complaint Counsel from executives who testified on behalf of Micron and Hynix;
- the new evidence directly contradicts numerous specific findings that Complaint Counsel have asked the Commission to adopt on appeal, including findings based explicitly on the testimony of the executives referenced above;
- the new evidence directly contradicts positions taken by Complaint Counsel in their briefs on appeal to this Commission; and
- the new evidence directly undermines Complaint Counsel's rationale for the imposition of the draconian remedy they seek.

For these reasons, as set out more fully below, Rambus respectfully requests that the Commission enter the Proposed Order submitted herewith.

II. PROCEDURAL BACKGROUND

A. The San Francisco Litigation

In May 2004, Rambus brought suit against Micron, Hynix and Infineon Technologies AG ("Infineon") in San Francisco Superior Court, alleging that the defendants had acted in concert to block the successful market introduction of Rambus's

RDRAM technology. *See* Declaration of Steven M. Perry ("Perry Decl."), ¶2. In April 2005, after a lengthy delay caused by the defendants' unsuccessful efforts to move the venue of the action, the judge presiding over the San Francisco case ordered Micron and Hynix to produce to Rambus the documents they had already produced to the U.S. Department of Justice ("DOJ") in connection with the DOJ's investigation of DRAM price fixing. Id., ¶3.[1] The one million pages of documents that were made available to Rambus in May 2005 contain remarkable evidence of direct communications between high-ranking Micron and Hynix executives that contradict the testimony given in this proceeding on behalf of Micron and Hynix and relied upon by Complaint Counsel in many of their findings and arguments. See section II C, *infra*.

B. The Protective Order

The Protective Order that the parties in the San Francisco litigation agreed to prior to the defendants' production of the documents described above provided in part that a party could designate a document "Highly Confidential" if it believed that the document contained "competitively sensitive trade secrets, or other confidential research

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[1] As the Commission is probably aware, Hynix pled guilty in May 2005 to participating in a criminal conspiracy to suppress and eliminate competition in the DRAM market between 1999 and 2002, and it agreed to pay a fine of $185,000,000. Perry Decl., ex. B. As part of its plea agreement, Hynix also agreed to cooperate "fully and truthfully" with the DOJ's ongoing investigation, including its investigation of possible collusion by DRAM manufacturers involving RDRAM. *Id.*, p. 10. Micron has claimed that it is not a target of the DOJ's investigation, apparently because it has entered the DOJ's "amnesty" program. Micron has admitted, however, that the DOJ has "evidence of price fixing by Micron employees and its competitors on DRAM. . . ." *Id.*, ex. C. Infineon Technologies AG ("Infineon") also pled guilty to criminal antitrust violation and agreed to pay a substantial fine. In March 2005, Rambus dismissed Infineon as a defendant in the San Francisco case as a result of a settlement between the parties. In June 2005, after reviewing the documents produced by Micron and Hynix, Rambus added three Samsung entities as defendants.

and development or proprietary business information, the disclosure of which to other parties or third parties would competitively disadvantage the producing party. . . ." Perry Decl., ex. E, at p. 2. In July 2005, after reviewing the documents produced by Micron and Hynix, and after determining that virtually all of the documents had been designated "Highly Confidential," Rambus requested that the defendants in the San Francisco action agree to amend the Protective Order to allow the parties to discuss such documents with representatives of governmental agencies. *Id.*, exs. C-D. In August 2005, each of the defendants refused to amend the Protective Order. *Id.* The DOJ, however, has stated that it will support an order allowing the parties to discuss the evidence with it. *Id.*, ¶ 8. Rambus has requested that Complaint Counsel join the DOJ in supporting the proposed amendment to the Protective Order. *Id.*

At a hearing held on September 13, 2005, the judge in the San Francisco action ordered the parties to meet and confer on the issue in an effort to resolve it without court order. *Id.*, ¶ 7. That process is underway. If the meet and confer process is unsuccessful, the Court has set a hearing date for further motions in the case on October 31, 2005, and Rambus will at that time move the Court to amend the Protective Order. If the Protective Order is amended, Rambus will promptly provide to Complaint Counsel and the Commission a subset of the documents in question – likely comprised of no more than 250 pages – that pertain directly to the issues raised on appeal and in this motion.

III. ARGUMENT

A. The Applicable Standard

The Commission is authorized by 16 C.F.R. § 354(a) to reopen the record after oral argument where:

> "(1) the party offering the evidence has acted with due diligence; (2) the supplemental evidence is relevant, probative and non-cumulative; and (3) the supplemental evidence can be admitted without undue prejudice to the other party."

Order Reopening Record, p. 2, *citing Chrysler Corp. v. Federal Trade Commission*, 561 F.2d 357, 362-63 (D.C. Cir. 1977); *Brake Guard Products, Inc.*, 125 F.T.C. 138, 248 n.38 (1998).

In its May 2005 Order, the Commission reopened the record, over Rambus's objections, to allow the admission of approximately 1000 pages of evidence relating to Rambus's alleged spoliation of evidence. *Id.* In explaining its decision, the Commission applied the factors set out in *Brake Guard* and held that: (1) Complaint Counsel had been diligent, especially given that much of the evidence in question had been made available after the record closed; (2) the motion papers showed the evidence to be "probative and relevant to issues in this matter"; (3) the materials were not likely to be cumulative "because some of these materials likely contradict evidence and positions taken in this matter previously . . . ."; and (4) it did not appear that Rambus would be "unduly" prejudiced by the new evidence. *Id.* at 3.

Each of these factors, when applied to this motion, overwhelmingly favors the reopening of the record to allow in the evidence described herein.

B. Rambus Has Been Diligent

As described above, Rambus did not receive the documents in question until mid-May of this year, when they were included in the production by Micron and Hynix of approximately one million pages of documents in the San Francisco litigation. Perry Decl., ¶ 4. Upon reviewing the documents, Rambus requested that the defendants agree to amend the Protective Order in the case to allow the parties to discuss the evidence with representatives of governmental agencies. *Id,* ¶¶ *5-7.* After each of the defendants refused, Rambus raised the issue with the Court, which recently ordered the parties to meet and confer further. *Id.* If this additional meet and confer process is unsuccessful, the Court will decide the issue at a hearing on October 31, 2005. *Id.* These facts more than satisfy the requirement that a party demonstrate diligence when moving to reopen the record. Order Reopening Record at 3.

C. The Evidence Is Relevant, Probative And Not Cumulative

While Rambus cannot, under the current terms of the Protective Order in the San Francisco case, discuss the specific contents of any of the evidence produced by Micron and Hynix in that case, Rambus believes that the evidence, if admitted into this record, would show the following:

- DRAM manufacturers acted in concert between 1999 and 2002 to keep RDRAM prices high in order to block industry adoption of the RDRAM device;
- In particular, in the spring and summer of 2000, after Dell, the world's largest manufacturer of personal computers, told DRAM manufacturers that

if RDRAM prices remained high, it would abandon its plans to adopt RDRAM throughout its product line, the DRAM manufacturers reached agreements regarding the prices to be charged to Dell, in a successful effort to force Dell to drop RDRAM;

- By the spring and summer of 2001, when DRAM manufacturers had begun to offer DDR SDRAM devices in competition with RDRAM, the manufacturers agreed to fix DDR prices *below* market levels in the short run, in order to block remaining competition from RDRAM;
- Computer manufacturers such as Dell would have adopted the RDRAM device in many or most of their product offerings but for the DRAM manufacturers' concerted action to block competition from RDRAM;
- In 2001 and 2002, because the DRAM manufacturers had succeeded in precluding substantial competition for the RDRAM device, they were able to raise SDRAM and DDR SDRAM prices, in concert and through a carefully coordinated series of price increases, by hundreds of percent;
- This coordinated market manipulation took place at the very same time that the manufacturers in question were representing to the Commission and its staff that the DRAM market was characterized by fierce price competition; and
- The communications and agreements described above involved high-ranking executives and managers from Micron and Hynix, including one or more witnesses called by Complaint Counsel to testify at trial on the

allegedly competitive nature of the DRAM market and other issues relevant to this appeal.

For the reasons set out below, this evidence is clearly relevant, probative and not cumulative.

1. The Evidence Is Probative On Numerous Issues Raised By Complaint Counsel Below And Pursued By Them On Appeal

a. The Evidence Rebuts Complaint Counsel's Arguments that The DRAM Market Was Highly Competitive In The Relevant Time Period

As part of its case-in-chief, Complaint Counsel contended that the DRAM market was highly competitive, and they proposed numerous findings in support of their position. These proposed findings include:

- Complaint Counsel's Proposed Finding Of Fact ("CCFF") No. 117 ("Customers benefit from the presence of multiple DRAM suppliers because competition between the suppliers ensures customers will receive lower prices for DRAM");
- CCFF 126 ("In order for a new memory technology to achieve high volume, it must be price competitive with the previous technology already in high volume");
- CCFF 2442 ("The DRAM business is a commodity business which is characterized by a high degree of competition and low profit margins");
- CCFF 2616 and 2635 (both referring to purported "price competition" between DRAM manufacturers); and

- CCFF 2627 ("Multiple sourcing reduces risk and ensures price competition among DRAM suppliers").

In support of these and similar findings, Complaint Counsel relied primarily on testimony that they had solicited at trial from Micron and Hynix executives. *See, e.g.*, CCFF 100 (referring to DRAM manufacturers' desire to reduce costs and citing a former Hynix executive's testimony that "the competition is very severe"); CCFF 81 (referring to consolidation among DRAM manufacturers and relying solely on testimony by Micron's CEO that "it's been a very competitive business over time"); CCFF 1574 (claiming that DRAM manufacturers allowed customers to decide which device they wanted to use, relying both on a Hynix executive's statement that "essentially it's the customer's decision" and on testimony by Micron's CEO that "[t]he customer is going to decide what they want to buy. . . ."); *and* CCFF 2442 (claiming that the DRAM business is "characterized by a high degree of competition . . ." and relying solely on testimony by Micron's CEO and a former Hynix executive).

The large number of proposed findings by Complaint Counsel that are directed to the proposition that the DRAM market is "highly competitive" amply establishes the relevance of evidence that would directly contradict both the findings and the testimony that supports them. As Complaint Counsel are keenly aware, if they cannot establish that the DRAM manufacturers engaged in price competition and that the market allegedly impacted by Rambus's conduct was a competitive one, they are unlikely to have met their burden of showing injury to competition, nor could they assert (as they do repeatedly in their opening brief on appeal) that Rambus's royalties are "likely to be

passed on to customers." Appeal Brief of Counsel Supporting The Complaint, filed April 16, 2004, p. 61. *See also id.*, pp. 2, 26, 28.

Complaint Counsel have not withdrawn the findings referenced above and have instead asked the Commission to adopt them on appeal. Given the number of their own findings at issue, given the fact that Complaint Counsel themselves solicited the now-discredited testimony of Micron and Hynix executives as part of their case-in-chief, and given the fundamental importance of the underlying issue, Complaint Counsel simply cannot contend that the evidence proffered by Rambus is irrelevant. This direct evidence of what the Commission recently referred to as "hardcore cartel conduct" is in fact clearly probative on numerous issues raised by Complaint Counsel in this case. See Brief For The United States as Amicus Curiae in Texaco, Inc. v. Dagher, available at http://www.ftc.gov/os/2005/09/050913texacobrief.pdf, at p. 30. *See generally In re Ferrosilicon From Brazil, etc.*, 1999 ITC LEXIS 471 at 5, USITC Publication 3218 (Int'l Tr. Comm., August 1999) (reopening record and reconsidering order imposing "antidumping" duties on foreign producers, where guilty pleas by domestic producers showed that the Commission's prior order was based in part on "the erroneous belief that the U.S. ferrosilicon market was competitive and price sensitive").

b. The Evidence Rebuts Complaint Counsel's Argument That The RDRAM Device Failed Because Of Technical Or Other Problems Within Rambus's Control

The evidence in question is also relevant because it rebuts Complaint Counsel's argument that Rambus' RDRAM device failed on its merits. Complaint Counsel devote an entire section of their proposed findings – totaling over 100 individual

findings – to the proposition that Rambus's RDRAM failed to win substantial market share because of technical issues or inherently high manufacturing or royalty costs. See CCFF ¶¶ 1800-1924.[2] Complaint Counsel apparently hope to have the Commission find that Rambus' RDRAM device failed to succeed in a "highly competitive" marketplace on its own merits, at which point Rambus launched an allegedly *anti*-competitive campaign to burden SDRAM and DDR devices with patent royalties.

Complaint Counsel's vigorous efforts to have Judge McGuire and the Commission adopt findings about the factors that led to "the decline of the Rambus RDRAM architecture" make it impossible for Complaint Counsel to contend that the newly available evidence on that question now offered by Rambus is irrelevant. As discussed above, the new evidence would show *beyond doubt* that the "decline of the Rambus RDRAM architecture" was caused primarily, if not entirely, by the concerted efforts of DRAM manufacturers, including Hynix and Micron, to keep RDRAM prices high and (in the short run) DDR prices low, at critical times during the introduction of these competing devices. Considerations of due process and fundamental fairness require that this highly probative evidence, long withheld by Micron and Hynix, be included in this record and considered by the Commission.

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[2] The section in question, is entitled "High Royalty Rates, High Manufacturing Costs and Technical Problems Led to the Decline of the Rambus RDRAM Architecture.". *Id.*

c. The Evidence Contradicts Complaint Counsel's Causation Theories.

The evidence at issue also contradicts Complaint Counsel's other theories of causation in this case. Complaint Counsel argue repeatedly that the DRAM market is competitive, in part because their case depends on theories about how optimal standards might be selected in a competitive market. These theories in turn depend on the premise that members of standard setting organizations are interested in selecting the best technologies. Complaint Counsel also undertook to prove, as they were required to, that JEDEC would have selected other allegedly viable technologies if Rambus had made certain disclosures and/or would have negotiated *ex ante* for low royalties from Rambus. Appeal Brief, pp 89-102; Reply Brief, pp 72-80. For these propositions, Complaint Counsel rely heavily on the testimony by representatives of the DRAM manufacturers to the effect that they needed more information from Rambus in order to make the kind of procompetitive choice among alternative technologies posited by Complaint Counsel. But the evidence at issue on this motion shows that those firms had a very different, *anticompetitive* objective—to prevent the Rambus RDRAM device from being used in the marketplace *even if* it was superior and preferred by their customers. The evidence thus discredits Complaint Counsel's fundamental notion of how standard setting works or, at a minimum, demonstrates that that notion is not applicable to this case. Of course, the evidence also fully establishes an ulterior motive for the testimony by Hynix and Micron executives about allegedly viable alternatives to Rambus' technology that should serve to discredit any such testimony.

d. The Evidence Rebuts Complaint Counsel's Argument That The Proposed Remedy Is An Appropriate One

Complaint Counsel have asked the Commission to enter an extraordinary and unprecedented remedy in this matter that would bar Rambus from seeking access to the courts to enforce dozens of valid U.S. patents against admitted infringers, including Micron and Hynix (who between them control a substantial portion of the DRAM market). This draconian remedy is unsupported by the case law and is out of proportion to the facts of this case (which show an inconsistently applied and deliberately vague JEDEC patent policy and the conceded absence on Rambus's part of patents or patent applications that read on JEDEC standards voted on while Rambus was a member). In support of the extraordinary remedy they propose, Complaint Counsel argue that compulsory, royalty-free licensing:

> "has been specifically recognized as an appropriate antitrust remedy in industries like the DRAM industry, where price competition and narrow profit margins prevail (*see* CCFF 96-100, 107-11)."

Reply Brief of Counsel Supporting The Complaint, filed July 7, 2004, p. 97, *citing U.S. v. General Electric Co.*, 115 F.Supp. 835, 844 (D.N.J. 1953).

The testimony on which Complaint Counsel rely for this important proposition came almost entirely from Micron and Hynix (and Infineon) executives. The testimony in question is entirely discredited by the evidence that Micron and Hynix have so far withheld from the Commission. The Commission should therefore reopen the record and admit evidence that will show both that the DRAM market is *not* an

"industr[y] where price competition" prevails, Reply Brief at 97, and that the remedy proposed by Complaint Counsel is thus wholly unwarranted.

The evidence is important to the remedy issue in other ways as well. Complaint Counsel's proposed remedy rests on the premise that Rambus is not entitled to enforce its patents because the technologies they cover could not have achieved acceptance in the market on their merits. But the evidence that is the subject of this motion shows that Rambus' technologies would have become widely accepted in the market but for a criminal conspiracy by certain DRAM manufacturers, that there is thus no inequity in Rambus' current market position, and that the proposed remedy is thus unwarranted even if Complaint Counsel could ever show (and they have not) that Rambus had some type of obligation to disclose its potential patent interests at JEDEC.

D. The Admission Of The Evidence In Question Will Not Unduly Prejudice Complaint Counsel

The Commission's previous Order Reopening The Record to admit evidence relating to Rambus's alleged spoliation resulted in the addition of over 1000 pages of evidence to the record in this case. Rambus represents that the number of pages it seeks to have admitted in connection with this motion is *far* less than one thousand and is unlikely to exceed 250 pages. Moreover, there can be no argument that Rambus has been hiding this evidence. Instead, it is the DRAM manufacturers who represented to the Commission staff and testified under oath that the DRAM market was highly competitive who have withheld this damaging evidence from Complaint Counsel

and from Rambus for many years and who, even today, are resisting its disclosure to the Commission and its staff.

The Commission should not countenance such an abuse of its investigatory and adjudicatory functions. Any prejudice resulting to Complaint Counsel from the need to review this limited amount of evidence and (possibly) submit additional findings or argument is far outweighed by the Commission's responsibility to see that any findings or orders it makes are based on a complete record rather than on misleading testimony and erroneous statements in briefs and proposed findings.

CONCLUSION

For all of the foregoing reasons, the Commission should grant this motion and enter the order submitted herewith.

DATED: September 19, 2005

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
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PROPOSED ORDER

Having reviewed Respondent's Motion to Reopen The Record to Admit Newly Obtained Evidence Rebutting Complaint Counsel's Proposed Findings and Undermining Complaint Counsel's Proposed Remedy, the Commission hereby grants said motion and orders that to the extent permitted by the Protective Order in the action entitled Rambus, Inc. v. Micron Technology, Inc., et al., San Francisco Superior Court Case No. 04-431105, Rambus shall be entitled to submit up to 250 pages of documents produced in discovery in that action by the defendants. It is further ordered that the record be reopened for the purpose of admitting such documents.

By the Commission.

Donald S. Clark
Secretary

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COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

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

CERTIFICATE OF SERVICE

I, Helena T. Doerr, hereby certify that on September 19, 2005, I caused a true and correct copy of the *MOTION BY RESPONDENT RAMBUS INC. TO REOPEN RECORD TO ADMIT NEWLY OBTAINED EVIDENCE REBUTTING COMPLAINT COUNSEL'S PROPOSED FINDINGS AND UNDERMINING COMPLAINT COUNSEL'S PROPOSED REMEDY* to be served on the following persons by hand delivery:

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