PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RAMBUS INC.'S REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO MOTION TO STAY

In its Motion To Stay, Rambus explained how issues central to the pending appeal in *Rambus Inc. v. Infineon Technologies AG* ("*Infineon*")[1] are "almost identical" to issues central to the Complaint here. The two matters undisputedly arise from the same 1992-95 JEDEC facts. The significant overlap is clear not only to Rambus but also to Complaint Counsel -- who occupied almost a full row of seats at the Federal Circuit's June 3, 2002, oral argument on the *Infineon* appeal – and to Infineon's counsel, who provided the Federal Circuit with a copy of the Complaint in this case.

Rambus requested a brief stay pending the Federal Circuit's decision because it will surely illuminate – and perhaps even resolve – most of the important common issues. A stay will enable both the parties and Your Honor to avoid taking very significant discovery and spending other resources on matters that might prove to be misfocused or entirely irrelevant in light of the Federal Circuit's decision. A stay is appropriate, not just because there is other litigation pending (*see* Opp. at 13), but because a federal appeals court has already heard argument on and will soon decide issues that are raised in this case.

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[1] United States Circuit Court for the Federal Circuit Case Nos. 01-1449, 01-1583, 01-1604, 01-1641, 02-1174, 02-1192

Complaint Counsel's Opposition does not dispute any of those points. Complaint Counsel does, however, repeatedly accuse Rambus of making "false" (Opp. at 2, 6), "seriously misleading" (*id.* at 6), and "untrue" (*id.*) statements. But Complaint Counsel seriously mischaracterize Rambus's position, and they ignore publicly available facts – some of them filed with the SEC by Rambus, others made in two recent Rambus investor conference calls – to significantly misstate the short-term impact of a brief stay.

I. Complaint Counsel Ignore The Significant Overlap Of Issues Between This Case And *Infineon*

In its Motion, Rambus explained that there is a significant overlap between the issues raised in the *Infineon* appeal and the issues raised by the Complaint in this case. Those common issues include the following:

- Whether JEDEC, the standard setting organization, required its members to disclose patent *applications* or only issued patents;
- Whether JEDEC required members to disclose an intent to file related applications in the future;
- Whether JEDEC required members to disclose intellectual property that broadly "relates to" (or is "involved in") a JEDEC standard or only intellectual property that reads on such a standard;
- Whether Rambus violated JEDEC's disclosure obligations;
- Whether it was improper for Rambus to file patent applications in order to cover standards as they developed at JEDEC;
- Whether JEDEC would have adopted a different standard had Rambus disclosed its patents, pending patents, and plans for future patents;
- Whether incorporation of Rambus's technology into the JEDEC standards had any actual effect on DRAM manufacturers;
- Whether Rambus had any patent applications pending while it was a JEDEC member that would be infringed by products built to a JEDEC standard;

- Whether Rambus obtained any non-public information by virtue of being a JEDEC member; and
- Whether Rambus violated any JEDEC disclosure rule with respect to the DDR SDRAM standard.

(*See* Mem. Supp. Mot. Stay at 7-8.) Complaint Counsel do not dispute that these issues are common to the *Infineon* appeal and the Complaint in this case. Indeed, the eighteen-page Opposition does not even mention these issues. The Opposition does attempt to organize the issues on appeal in *Infineon* differently, by grouping them into six categories (*see* Opp. at 7); but four of even those six categories involve issues that are central to the Complaint here.[2]

Given the substantial overlap of issues, it seems beyond dispute that the Federal Circuit decision will be cited by one or both parties in this case; that Complaint Counsel will aggressively seek to assert against Rambus any issues decided against Rambus by the Federal Circuit; that the decision is very likely to be an important precedent for this case; and that, if the parties embark on discovery without awaiting that decision, they will almost surely spend substantial efforts that will prove to be misfocused or irrelevant. There are, therefore, good reasons to stay these proceedings until the *Infineon* appeal is decided.

One core issue illustrates this point: What disclosures were required by JEDEC? Complaint Counsel rely on JEDEC "practice" and what was "understood by all" at JEDEC to support their contentions (which are contrary to written JEDEC materials) as to (a) when a disclosure to JEDEC had to be made, (b) whether that disclosure had to include applications, and (c) whether that disclosure had to cover all patents (and perhaps applications) that "might be involved in" a proposed JEDEC standard, or only those that would be infringed by such a

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[2] These are (1), construction of Rambus's patents; (2), whether Rambus engaged in fraud; (3), the jury instruction issue concerning the propriety of Rambus filing amended patent applications in light of developments at JEDEC; and (6), whether Rambus engaged in wrongful conduct with respect to DDR SDRAM.

standard. Obviously, Rambus needs significant discovery on these issues from the JEDEC participants about their "understandings" and "practices". Just as obviously, however, if the Federal Circuit rules against Rambus on any of these points, then much of that discovery can perhaps be either avoided or limited. Conversely, if the Federal Circuit supports Rambus on any of these points, Complaint Counsel may concede the point or, at the very least, both parties' discovery can be more efficiently focused on the real issue.

Complaint Counsel make two arguments in response to the substantial overlap between issues in this case and issues in the *Infineon* appeal. Both are, in effect, misdirection. First, Complaint Counsel argue that the Federal Circuit decision will not collaterally estop the Commission in this case. (*See* Opp. at 8-11.) But Complaint Counsel assert in footnote that *they* "could assert collateral estoppel on issues" that the Federal Circuit decides against Rambus (*id.* at 11 n.18), and they do not deny the likely precedential effect of the Federal Circuit's decision. Thus, even if Complaint Counsel's argument about Rambus being unable to estop them were correct – a matter that Rambus did not raise in its Motion to Stay[3] and that need not be decided now – it is no answer to the general point, on which the Motion To Stay is based, that resources will be wasted if a stay is not granted.

Second, on the basis of selective quotations from the Background section of the Memorandum in Support of Rambus's Motion, Complaint Counsel argue that the "heart of Rambus's motion" is a "misleading, if not patently false" suggestion that both the *Infineon*

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[3] Rambus stated only that the Federal Circuit may "resolve, on grounds of precedent or collateral estoppel, many of this issues in this case." It is Complaint Counsel, not Rambus, that has asserted this to mean that there may be collateral estoppel *against the Commission*.

appeal and the Complaint here concern issues of "market power." (Opp. at 5-6.)[4] There are three fallacies in this argument.

For starters, it rests on a mischaracterization of Rambus's position here. The "heart" of Rambus's Motion are the overlap issues listed above and in the Argument section of the Memorandum in Support, which do not refer to "market power." The snippets taken by Complaint Counsel from the Background section are not the heart of the Motion.

In addition, even if (as is not the case) there were no overlap involving market power, those other overlaps listed by Rambus in its opening brief (and not challenged by Complaint Counsel) provide ample reason for a stay.

Finally, Complaint Counsel's assertion that the *Infineon* appeal does not involve the issue of market power (*see id.* at 6-8) is a semantic point of no consequence. Although Complaint Counsel may be correct that the words "market power" did not appear in the briefs and were not used at oral argument in *Infineon*, the substance of that issue is plainly raised in that appeal. As noted above, the *Infineon* appeal concerns, among other things, whether Rambus's allegedly wrongful conduct caused JEDEC to adopt different standards and whether JEDEC's standards had any effect in the marketplace. Thus, for example, Judge Bryson asked at oral argument whether "there [is] enough in the record to show that JEDEC would not have adopted the

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[4] In yet another effort to emphasize the supposed differences between this case and *Infineon*, Complaint Counsel assert at length that Rambus General Counsel John Danforth distinguished *Infineon*, "a patent case," from this case concerned with "market power." (Opposition at 8.). The full quotation from Mr. Danforth, however, shows that he actually said that, although Rambus *initially* thought that *Infineon* was a patent case, it turned out to be a case that focused primarily on Rambus's business practices and involvement with JEDEC (*see* Opp., Attachment C at 15), issues that led to the fraud verdict against Rambus in *Infineon*, that are currently on appeal to the Federal Circuit and that are, as Mr. Danforth stressed, also central to this case.

SDRAM standards if it had known of Rambus's patents?"[5] In this case, Complaint Counsel must address the very same issues – did Rambus's allegedly wrongful conduct affect the JEDEC standards and did the standards matter in the marketplace – in order to show, as they must, that Rambus gained market power as a result of its conduct, rather than simply and lawfully as a result of its superior technology.

II. Complaint Counsel's Other Arguments Are Flawed

Complaint Counsel make two other principal arguments in opposition to Rambus's Motion. Both are flawed.

First, Complaint Counsel assert that Rule 3.51(a) authorizes issuance of a stay only "where the Commission itself has instituted a [collateral] federal court action . . . that involves both the same subject matter and the same parties." (Opp. at 2 (emphasis in original).) But that is not what the rule says, and Complaint Counsel cite no legal authority for their assertion. Rule 3.51(a) states that an Administrative Law Judge may stay an action whenever a "collateral federal court proceeding" is pending. 16 C.F.R. § 3.51(a). The apparent purpose is to allow stays in proceedings that raise issues of federal law and could result in precedent binding on to the Commission. Neither that section nor any other says that the federal court proceeding must have been commenced by the Commission. It would at the very least be a strained construction of the general language of Rule 3.51(a) to limit it to cases instituted by the Commission when the drafters of the Commission's rules could so easily have said that if they had intended the limitation urged by Complaint Counsel.

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[5] Transcript of Oral Argument, *Rambus, Inc. v. Infineon Technologies AG*, No. 01-1449 at p. 26 (Fed. Cir. June 3, 2002) (Mem. Supp. Rambus's Mot. Stay, Attachment E).

In an effort to find support for their construction of the Rule, Complaint Counsel cite two Commission cases that were stayed because of collateral actions filed by the Commission in federal court. (*See* Opp. at 3.) Neither, however, says that that is the only circumstance in which a stay can be issued. Both are broadly consistent with the many federal court cases, some of which were cited by Rambus (*see* Memorandum at 5-6), that hold that stays are appropriate and perhaps mandatory where, as here, a separate but related proceeding might impact the case before the court. Indeed, in the first order cited by Complaint Counsel, *In the Matter of H.J. Heinz Co.*, FTC Docket No. 9295 (Jan. 17, 2001), Judge Chappell granted a stay until fourteen days after a collateral D.C. Circuit case was decided on the ground that "the D.C. Circuit's opinion would shape any continued litigation in this forum . . . . For that reason, proceeding with discovery at this time, such as the exchange of witness lists and expert reports, is premature and would result in the unnecessary expenditure of resources by the parties and the Commission." *Id.* at *4.[6] Those very considerations apply here as well. *See also Ontario, Inc. v. World Imports U.S.A., Inc.*, 145 F. Supp. 2d 288, 291 (W.D.N.Y. 2001) (holding that parties and issues need not be identical to warrant a stay, so long as a stay "will more than likely narrow the issues before this Court and ultimately save the parties and this Court from a needless or duplicative expenditure of resources").

Complaint Counsel also quote a definition from *Black's Law Dictionary* of the term "collateral action." (Opp. at 3-4.) But Rule 3.51(a), which was drafted long after publication of the definition quoted by Complaint Counsel, does not use the term "collateral action." Instead, it uses the general term "collateral" to modify the broad category "federal court proceeding."

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[6] The second order cited by Complaint Counsel, *In the Matter of Tenet Healthcare*, FTC Docket No. 9298 (Sept. 15, 1998), appears not to be available on either Lexis or the FTC's webpage.

Second, Complaint Counsel argue without supporting facts or evidence that issuing a stay could have the effect of prolonging "[s]erious [c]onsumer [h]arm." (Opp. at 11.) The possibility of such an effect can of course be weighed against the efficiency benefits from a stay in determining whether a stay should be issued. The problem, however, is that Complaint Counsel have greatly exaggerated the possible harms, even assuming that they prevail in this case.

Complaint Counsel overstate in two respects. (1) Complaint Counsel state without explanation or support that Rambus has signed license agreements that entitle it to $50-$100 million in annual royalties, evidently in order to create the impression that that sum describes the royalties relevant to this case. But, as is apparent even from the documents attached to Complaint Counsel's Opposition, the relevant royalties, which concern only the SDRAM and DDR SDRAM products, are approximately $27 million, or about one-quarter of the higher sum suggested by Complaint Counsel.[7] A stay of one to three months would thus involve royalties of only $2.25 to $6.75 million, even if Complaint Counsel ultimately prevail. These royalties are being paid by a handful of large DRAM manufacturers – including Samsung, Mitsubishi and Matsushita – that have ample resources to protect their interests.

(2) Although Complaint Counsel allege harm to both "manufacturers and consumers" (Opp. at 12), there is in fact very little reason to think that consumers will be harmed by a brief stay. Rambus's royalties add approximately *20 -30 cents* to the cost of an average computer (which retails for more than $1,000) – hardly a material sum. And because three of the largest DRAM manufacturers (Micron, Infineon, and Hynix) are using Rambus's technology without paying for it and the DRAM business is intensely competitive, it is unlikely that the other DRAM manufacturers are passing their modest royalty costs on to consumers.

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[7] *See* Transcript of Rambus Webcast at 23 (June 20, 2002) (Opp. Attachment C).

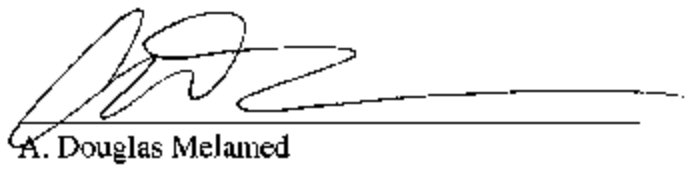
On the other side of the balance, of course, is the harm to Rambus from denying a stay. Rambus is a small company whose primary business is licensing technology. Its business has been substantially harmed by the mere issuance of the Commission's complaint. This harm to Rambus is in areas unrelated to the patents at issue here.[8] The harm might be ameliorated by the issuance of a stay and the implicit acknowledgement that this case might be affected by the decision in the *Infineon* appeal.

[8] The business harm to Rambus has been explained in detail to Complaint Counsel. If Your Honor wishes, Rambus could elaborate the matter in a subsequent, confidential filing.

CONCLUSION

For the foregoing reasons, Rambus's Motion for Stay pending the decision by the Federal Circuit in the *Infineon* case should be granted.

Respectfully submitted,



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July 17, 2002

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CERTIFICATE OF SERVICE

I, Ilay Palansky, hereby certify that on July 17, 2002, I caused a true and correct copy of *Rambus Inc.'s Reply To Complaint Counsel's Opposition To Motion To Stay* to be served on the following persons by hand delivery:

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