UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Public

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

COMPLAINT COUNSEL'S MOTION TO STRIKE RAMBUS INC.'S JOINDER IN COMPLAINT COUNSEL'S REQUEST FOR ORAL ARGUMENT ON THE MOTION FOR DEFAULT JUDGMENT

On December 20, 2002, Complaint Counsel filed a Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence, in which it explicitly requested to be heard in oral argument. Shortly thereafter, Rambus filed a motion seeking leave for a two-week extension of time within which to file an opposition to the motion for default judgment. Complaint Counsel did not oppose this motion for leave, which Your Honor subsequently granted. Thereafter, on January 13, 2003, Rambus filed its opposition. In that opposition, Rambus said nothing regarding Complaint Counsel's request for oral argument. On January 16, 2003, after conferring and reaching agreement with counsel for Rambus, Complaint Counsel filed an unopposed motion seeking leave to file a reply brief, not to exceed 15 pages, in support of the default judgment motion. Your Honor granted that motion, and – consistent with Your Honor's ruling – Complaint Counsel's 15-page

reply was filed last Friday, January 24. In its reply, Complaint Counsel renewed its request for oral argument, but deferred to Your Honor as to whether oral argument would be helpful in resolving the motion.

Without conferring with Complaint Counsel, yesterday, January 29, 2003, Rambus filed a pleading styled as "Rambus Inc.'s Joinder in Complaint Counsel's Request for Oral Argument on the Motion for Default Judgment." In this pleading, which was filed without leave or even a request for leave, Rambus does much more than simply join in Complaint Counsel's request for oral argument on the default judgment motion. Indeed, it would appear that the primary purpose served by Rambus's "Joinder" is to belatedly supplement the arguments contained in Rambus's January 13 opposition to the motion.

Complaint Counsel is pleased that Rambus now concurs in the request for oral argument on this important dispositive motion. On the other hand, Complaint Counsel objects to the fact that Rambus, without conferring with Complaint Counsel or seeking leave from Your Honor, has taken the liberty to supplement its opposition to Complaint Counsel's motion fully 16 days after its opposition was due to be filed. Complaint Counsel finds this particularly inappropriate considering that Complaint Counsel, in late December, agreed not to oppose Rambus's request for an additional two weeks (beyond what the Commission's rules would normally allow) within which to file its opposition. Further, Complaint Counsel would note that the memorandum supporting its original motion was 109 pages in length, yet Rambus's opposition, filed January 13, consumed only 27 pages. Virtually all of the points made in Rambus's January 29 "Joinder" could have been made in Rambus's January 13 opposition to the default judgment motion, but were not. For instance, in a bullet-point paragraph on page 3 of the

"Joinder," Rambus argues that citations contained in the original memorandum Complaint Counsel filed in support of its default judgment motion, on December 20, 2002, are in some way misleading. If Rambus thought this were true, it had every opportunity to make the argument in its January 13 opposition.

In a footnote on page 2 of its "Joinder," Rambus openly acknowledges that it "did not attempt in its opposition to engage in a point-by-point refutation" of the points made by Complaint Counsel in support of the motion for default judgment. This plainly is true. As noted in Complaint Counsel's reply, despite having two extra weeks in which to prepare it, Rambus's opposition failed to respond to many, if not most, of the legal arguments and factual assertions contained in the original default judgment filings. As underscored in Complaint Counsel's reply brief, this is a matter of considerable significance. Yet it is not an excuse for Rambus belatedly, and without leave, adding new arguments now.

For these reasons, Complaint Counsel requests that Your Honor enter the proposed order attached hereto, striking Rambus's "Joinder" and directing that Rambus shall not be permitted, in opposing the default judgment motion, to make new arguments and contentions that could have been made – yet were not made – in the opposition brief filed by Rambus on January 13, 2003.

To be clear, Complaint Counsel has no objection to Rambus calling to Your Honor's attention that it does now support the request for oral argument. Nor would Complaint Counsel object to Rambus submitting a pleading calling to Your Honor's attention new information, not available when the January 13 opposition was filed, that may bear on the default judgment issue. However, the only such "new information" contained in Rambus's "Joinder" relates to the Federal Circuit's recent split decision in *Rambus Inc. v. Infineon Technologies AG*, which Rambus attaches to the "Joinder." If Rambus

wishes to file a new, revised pleading calling that decision to Your Honor's attention and briefly explaining, as it already has in the "Joinder," how it believes this new information may be relevant to the default judgment motion, Complaint Counsel would have no objection to this, provided that it has an opportunity to respond. (The proposed order contemplates that both sides would be permitted to file pleadings, not to exceed five pages, addressing the relevance, if any, of the Federal Circuit's decision to the pending motion for default judgment.)

Complaint Counsel does, however, strongly disagree that the Federal Circuit's decision favors Rambus's opposition to default judgment, or for that matter that the decision has any direct bearing on the issues presented in the default judgment motion. In fact, the only thing contained in the Federal Circuit decision that relates to the default judgment issue is this: The Federal Circuit acknowledges, at pages 38-40 of the majority decision, that Rambus never appealed Judge Payne's finding that in mid-1998 Rambus "implemented a 'document retention policy,' in part, for the purpose of getting rid of documents that might be harmful" in anticipated future litigation – that is, the litigation Rambus expected would ensue when it began "demand[ing] royalties from semi-conductor manufacturers" based on its previously undisclosed "JEDEC-related patents." *Rambus, Inc. v. Infineon Technologies*, 155 F. Supp. 2d 668, 682-83 (E.D. Va. 2001) (emphasis added). Nor did Rambus ever appeal Judge Payne's conclusion that this willful, bad-faith document destruction constituted "litigation misconduct," which materially affected the trial in that case by leaving an evidentiary record that "omitted the documents that revealed, or pointed the way to, the truth." *Id.* at 683 (emphasis added). *See* Memorandum in Support of Complaint Counsel's Motion for Default Judgment Relating to Respondent

Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence at 3-4 & n.2 (explaining Judge Payne's prior rulings in this regard and noting Rambus's failure to appeal them).

Because Rambus never appealed these prior findings and conclusions by Judge Payne, the Federal Circuit held yesterday, at pages 38-40 of the majority decision, that the $7-plus million sanction imposed against Rambus by Judge Payne may be supported by the independent ground of "litigation misconduct." The Federal Court therefore has remanded this issue to the district court in order to allow Judge Payne "the opportunity to set the amount of the [sanctions] award to redress the litigation misconduct" that was previously found to exist by the *Infineon* trial judge and the existence of which Rambus no longer contests. In other words, the Federal Circuit yesterday ruled that Infineon is still entitled – notwithstanding anything else in the court's majority decision – to an award of sanctions against Rambus for litigation misconduct, including document destruction, in an amount to be determined by Judge Payne on remand. Complaint Counsel would submit that this ruling by the Federal Circuit, far from undermining the pending default judgment motion in this case, merely underscores the need to impose sanctions against Rambus for willful, bad-faith destruction of documents. Just as Infineon has been victimized by Rambus's wrongful document destruction, and is entitled to a remedy, so too has the Commission been harmed, and it is likewise entitled to a remedy. For reasons we have already stated, and that Rambus has largely failed to contest, the only appropriate remedy in this case is a default judgment.

Complaint Counsel continues to request oral argument on the default judgment motion, subject to Your Honor's views as to whether oral argument will assist Your Honor in resolving this important dispositive issue.

Respectfully submitted,

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Dated: January 30, 2003