UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

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

ORDER DENYING COMPLAINT COUNSEL'S MOTION TO REOPEN THE RECORD TO INCLUDE EVIDENCE THAT CORRECTS MISREPRESENTATION IN ANSWERING BRIEF

Complaint Counsel filed their Motion to Reopen the Record to Include Evidence that Corrects Misrepresentation in Answering Brief (July 2, 2004) ("Motion to Reopen"). The moving papers claim that Rambus "misrepresented that a version of the minutes of JEDEC's February 2000 Board of Directors meeting [RX 1570] . . . had been approved by the JEDEC Chairman of the Board and the General Counsel." Motion to Reopen at 1. Complaint Counsel further claim that RX 1570 is an "unapproved" version of the minutes and seek leave to reopen the record to admit "two documents and relevant pages of three deposition transcripts to correct the misrepresentation in Rambus's answering brief." *Id*. at 1-2. Rambus opposes on the grounds that RX 1570 shows "the necessary leadership approvals *on* [*its*] *face.*" Rambus's Opposition to Complaint Counsel's Motion to Reopen the Record to Include "Evidence that Corrects Misrepresentation in Answering Brief" at 1 (emphasis in original) ("Rambus's Opposition"). Rambus further asserts that Complaint Counsel's claim of surprise at Rambus's reliance on RX 1570 is contradicted by "their own proposed findings" which were offered "without citation to evidence." *Id.* at 2. Rambus also points out that Judge McGuire relied on RX 1570 in the Initial Decision in this matter. *Id.* We find that Complaint Counsel has not met its burden to reopen the record.

This is an instance where the oft-repeated maxim that a document speaks for itself is disproved. Complaint Counsel and Rambus chose to place RX 1570, and its virtually identical twin, JX 50, into evidence, Trial Transcript at 2598-2605, without examining any witnesses concerning the content and meaning of the documents, or, more important to the present inquiry, without asking whether the documents were in fact authentic and approved versions. Not only were the documents entered into evidence, but the Exhibit Lists themselves were entered in

evidence as JX A (FTC Exhibits), JX B (Rambus Exhibits, including RX 1570), and JX C (Joint Exhibits, including JX 50). Trial Transcript at 2604. JX C was jointly moved into evidence by Complaint Counsel and Rambus. *Id.* at 2601-03. JX C contains a description of JX 50 which under the circumstances must be treated as a joint stipulation of the parties. That stipulation reads, "Version of Board of Directors, Minutes of Meeting No. 116 (Orlando, FL), February 7-8, 2000, apparently described as 'uncorrected version' by Ken McGhee." JX C at 4.

Physical examination of RX 1570 and JX 50 shows them to be identical in all material respects. They differ only in litigation marginalia (Bates Nos., etc.) and an apparent copier misalignment or misfeed of the last page of RX 1570. Indeed, they are identical to the extent of non-litigation, hand-written marginalia on page 25 of each exhibit that appear to be someone's notes and corrections of the documents. The approvals, which Rambus claims appear on the faces of the documents, are nothing more than blank signature lines with dates beside them. JX 50 at 13; and RX 1570 at 13. The significance of those blank lines and dates is not self-evident. Complaint Counsel and Rambus have stipulated that JX 50, and by necessary extension RX 1570, is an "uncorrected version" of the February 2000 minutes. Accordingly, the Commission finds that JX 50 and RX 1570 do not possess any probative value in and of themselves.

The standard for granting this Motion to Reopen has four elements: (1) due diligence on the part of the moving party; (2) a showing of the probative value of the proffered evidence; (3) a showing that the proffered evidence is non-cumulative; and (4) the absence of prejudice to the non-moving party. *Brake Guard Products Inc.*, 125 F.T.C. 138, 248 n. 38 (1998). Because we find that Complaint Counsel has failed to establish either of the first two prongs of the test, we need not evaluate the remaining two.

Complaint Counsel's claim of surprise, Motion to Reopen at 5-6, is not supported by the record. By their own admission, Complaint Counsel chose not to examine witnesses at trial on these issues. *Id.* at 4-5. The discovery deposition excerpts being offered into evidence clearly show these issues were contested by the parties. Even if Complaint Counsel's claim of surprise were genuine, it does not explain why RX 1570 was offered into evidence without objection by Complaint Counsel, nor why Complaint Counsel joined in the motion to enter RX 50 into evidence. Two of the witnesses whose depositions Complaint Counsel would now add to the record, Desi Rhoden and John Kelly, were called as witnesses at trial. Complaint Counsel made a deliberate election not to examine them regarding the February 2000 minutes. The third witness, Kenneth McGhee, was on the witness list, but was uncalled by either side. We cannot find due diligence based on the record.

The two additional exhibits, alternative versions of the February 2000 minutes, offered by Complaint Counsel, CX 153 and CX 153g, appear on their faces to be incomplete, unauthenticated and unapproved. Without additional testimony, it is highly unlikely that they could possess any significant probative value.

Two factors argue against the admission of the deposition transcript excerpts proffered by Complaint Counsel. First, the depositions do not seem to focus in any substantial way on

authenticating one version of the minutes as opposed to some other. Second, Complaint Counsel has not shown, as required by Rule 3.33(g)(1)(iii), 16 C.F.R. 3.33(g)(1)(iii), that they should be allowed to have the deposition transcripts of witnesses who were available at the time of trial now entered into evidence. Accordingly,

IT IS HEREBY ORDERED that Complaint Counsel's Motion to Reopen be, and it hereby is, **DENIED**.

By the Commission.

Donald S. Clark
Secretary

ISSUED: August 1, 2006