PUBLIC

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

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

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

Complaint Counsel's motion to strike should be denied. The rationale underlying Complaint Counsel's entire argument is that Rambus should be barred from responding at a hearing to any of Complaint Counsel's many mischaracterizations of the record, and to their inaccurate claim that Rambus has "conceded" various disputed facts, because Rambus did not respond in its opposition to every factual assertion Complaint Counsel made in their 109-page motion for default judgment. There is no support in the Rules of Practice or the case law for such an order.

Complaint Counsel did not bring a motion for summary judgment under Rule 3.24, which would have required them to submit a statement of undisputed facts, to which Rambus would have responded with its own statement. *See* 16 C.F.R. § 3.24(a). Instead, Complaint Counsel filed a motion under Rule 3.22 seeking specified relief, and they bore the burden of proof on all factual issues necessary to demonstrate their entitlement to that relief. As a result, in opposing the motion, it was sufficient for Rambus to point out that Complaint Counsel were not entitled to the relief they sought because they had failed to carry their burden of proof on several essential factual elements, most notably bad faith and prejudice. Under Rule 3.22, Rambus was not obligated to respond to every remaining factual assertion Complaint Counsel made in their unnecessarily bloated 109-page brief. Rambus certainly cannot be barred under the applicable rules from ever disputing Complaint Counsel's allegations.[1]

[1] Any other rule would turn every motion into a minefield and every opposition into a behemoth.

Complaint Counsel's motion to strike and proposed order are inappropriate not just because they represent an attempted end run around Rule 3.22 (and by implication Rule 3.43(a) as well). They are also inappropriate because they are an invitation to decide this case on a basis other than the evidence. Rambus's joinder in the request for oral argument pointed out an instance in which Complaint Counsel's prior use of an ellipsis was quite misleading. Complaint Counsel's response contains neither an apology for, nor an explanation of, this conduct. *Cf. Precision Specialty Metals, Inc. v. United States*, __ F.3d __, 2003 WL 103274 at *9 (Fed. Cir. Jan. 13, 2003) (criticizing government lawyer for using ellipsis in misleading fashion in quoting precedent). Instead, Complaint Counsel seek an order barring Rambus from pointing out *other* misstatements (should they become relevant) at the hearing on this motion. Such an order is unwarranted; it would probably be unprecedented and a violation of due process as well. It certainly would be inconsistent with the duty of Complaint Counsel to see that cases are decided fairly and on their merits. *See Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) (principle that prosecutors are representatives not of ordinary litigants "'but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done'" should apply "with equal force to the government's civil lawyers") (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)) (ellipsis in original).

Complaint Counsel are also badly mistaken about the effect of the Federal Circuit's ruling on Judge Payne's award of attorney's fees to Infineon and his underlying finding of "litigation misconduct." The Federal Circuit has *not* held 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," as Complaint Counsel tell Your Honor. Motion at 4. Judge Payne found alleged litigation misconduct only under 35 U.S.C. § 285, which authorizes an award of attorney's fees to the "prevailing party" in exceptional cases. At present, Infineon is most certainly not the prevailing party on *any* aspect of the case, and it is therefore not entitled to an award of attorney's fees at all. *See Rambus Inc. v. Infineon Technologies AG*, No. 01-1449, at 39 (remanding for the district court to determine "whether Infineon remains a prevailing party, *and if so*, whether an award is warranted") (emphasis added). As Rambus has pointed out (Opp. 16 n.12), it was precisely for this reason that it was unnecessary for Rambus to appeal the factual findings underlying Judge Payne's award, all of which are moot unless and until Infineon prevails on some remaining aspect of the case – and any claim that Rambus committed fraud by breaching a disclosure duty owed to JEDEC is not one of those remaining aspects. The Federal Circuit's holdings on that issue – *e.g.*, its holding on the limited scope of the JEDEC disclosure duty and its holding that Rambus had no applications that read on any JEDEC standard proposed for balloting while it was a member – make it clear that Complaint Counsel's prior unsupported allegation of prejudice cannot provide any legitimate basis for the extreme remedy they seek.

For the reasons cited herein, Rambus respectfully requests that Your Honor enter the attached Order denying Complaint Counsel's motion to strike.

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Respectfully submitted,

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