UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

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

MOTION TO REOPEN THE RECORD TO INCLUDE EVIDENCE THAT CORRECTS MISREPRESENTATION IN ANSWERING BRIEF

In its answering brief, Respondent Rambus Inc. ("Rambus") misrepresented that a version of the minutes of JEDEC's February 2000 Board of Directors meeting, from which Rambus quoted language regarding the scope of JEDEC's disclosure policy, had been approved by the JEDEC Chairman of the Board and the General Counsel. In fact, as is made clear from two documents and portions of three deposition transcripts which Complaint Counsel seeks leave to submit, Rambus took that language from an a version of the minutes unapproved by the Chairman and the General Counsel. The version of the minutes approved by both the Chairman

and the General Counsel did not contain the language quoted by Rambus, and actually contained language contradicting Rambus's argument. Complaint Counsel respectfully request that the Commission reopen the record to include two documents and relevant pages of three deposition transcripts to correct the misrepresentation in Rambus's answering brief.

I. Background

Rambus's answering brief quoted alleged meeting minutes of the February 2000 JEDEC Board of Directors meeting as stating that the disclosure of patent applications was "not required under JEDEC bylaws." Rambus Answering Brief at 19 (quoting RX1570 at 13). Rambus's brief further stated that, "the copy of the Board minutes that was received into evidence [RX1570] does show approval by Chairman Rhoden, on February 24, 2000, and General Counsel Kelly one week later, on March 1, 2000." *Id*. at 19 fn. 11 (emphasis in original).

These statements are misleading. Rambus knows full well that the version of the minutes quoted in Rambus's brief was never approved by either Chairman Rhoden or General Counsel Kelly. Rather, both Mr. Rhoden and Mr. Kelly approved a different version of the minutes, and the version of the minutes they approved did not contain the language quoted in Rambus's brief, but rather stated: "The issue was whether companies should make public that a patent is pending which is traditionally done by all companies." CX0153 (not admitted) (Attachment A) at 27; CX0153g (not admitted) (Attachment B) at 21-22.

The precise sequence of events surrounding the February 2000 Board minutes is unclear. In particular, there is no adequate explanation for why the version of the minutes quoted by Rambus apparently received routine approval at the next Board of Directors meeting even though it had never received the necessary substantive review by and approval of either the

Chairman or the General Counsel in accordance with JEDEC procedures.

Certain facts, however, are beyond dispute. Both documentary evidence and extensive depositions conducted by counsel for Rambus in this matter confirm that the document quoted by Rambus in its answering brief was a discredited version of the minutes, prepared by Secretary McGhee, that was never approved by the Chairman or the General Counsel. Rhoden Deposition Transcript (not admitted) (Attachment C) at 90 ("This is actually not the final copy of these minutes."); Kelly Deposition Transcript (not admitted) (Attachment D) at 22-23. The specific statement quoted in Rambus's answering brief was recognized as being wrong. Rhoden Deposition Transcript (not admitted) at 92-93, 96-97. Contrary to the representation made to the Commission by Rambus, Chairman Desi Rhoden approved a different version of the Board minutes that specifically did not contain the language quoted in Rambus's answering brief. CX0153g (not admitted) at 1 ("Revised from Desi 2/25/00"), 21-22; Rhoden Deposition Transcript at 90-93 (not admitted). Contrary to the representation made to the Commission by Rambus, General Counsel John Kelly approved the final version of the Board minutes that specifically did not contain the language quoted in Rambus's answering brief. CX0153 (not admitted) at 1 ("I have approved the minutes of the 02/00 Board meeting . . ."); *id.* at 2 ("Content read and approved as complying with EIA or JEDEC Manual of Organization and Procedure, and the EIA Legal Guides . . . Approval Signature" with signature of John Kelly, dated 3/1/00); *id.* at 27; Kelly Deposition Transcript (not admitted) at 22-23 ("Q. Do you understand that this copy [CX0153, bearing sticker marked "McGhee 23"] had received all the necessary approvals and was in a form, once the handwritten changes on it had been made, to be sent out to JEDEC board members without any further correction or review? A. Yes, sir."). Both the version of the

Board minutes approved by Chairman Rhoden and the final version approved by General Counsel Kelly stated, "The issue was whether companies should make public that a patent is pending which is traditionally done by all companies." CX0153 (not admitted) at 27; CX0153g (not admitted) at 21-22.

II. The Evidence to Correct Rambus's Misrepresentation about JEDEC Minutes Should Be Admitted Into the Record

The evidence Complaint Counsel seeks to introduce satisfies the criteria for reopening the record. The Commission is authorized to reopen the record at any time. 16 C.F.R. § 3.54(a).[1] Reopening the record to admit supplemental evidence is appropriate if: (1) the moving party can demonstrate due diligence; (2) the proffered evidence is probative; (3) the proffered evidence is not cumulative; and (4) the non-moving party would not be prejudiced. *In re Brake Guard Products Inc.*, 125 F.T.C. 138, 248 n.38 (1998) *citing Chrysler Corp. v. FTC*, 561 F.2d 357, 361-63 (D.C. Cir. 1977) (affirming the admission of new evidence by the Commission). The supplemental evidence proposed here easily satisfy these criteria.

In terms of diligence, Complaint Counsel, out of respect for judicial economy, did not seek to introduce the evidence at trial: the discredited version of minutes from a meeting almost four years after Rambus withdrew from JEDEC appeared to have little, if any, probative value; there seemed to be little reason to spend additional time, on top of an already lengthy trial record, explaining the series of errors that led to the mistaken version of the February 2000

---

[1] 16 C.F.R. § 3.54(a) states, in relevant part: "Upon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision."

Board minutes; and Complaint Counsel assumed, that in the absence of this evidence, Respondent would not misrepresent the discredited version of the minutes to the Commission.

Complaint Counsel has always contended that the probative evidence in this matter consists of the operative EIA and JEDEC documents in force while Rambus was a member (the EIA Legal Guides, the EIA Manuals and the JEDEC 21-I Manual), the means used to communicate the disclosure obligation to JEDEC members while Rambus was a member (the 21-I Manual, the Townsend presentations, the Townsend memoranda, the sign-in sheets, etc.), and the resulting understanding of JEDEC members at that time. To the extent that Rambus sought to introduce evidence concerning a discredited draft of February 2000 Board minutes as evidence of Rambus's obligation to disclose between 1991 and 1996, Complaint Counsel believed such evidence to lack probative value, but nevertheless included CX0153 and CX0153g on its exhibit list in order to permit witnesses Desi Rhoden, John Kelly and/or Kenneth McGhee to tell the full story, if necessary. Rambus questioned Messrs. Rhoden and Kelly at length without once mentioning the February 2000 Board minutes, and chose not to call Mr. McGhee as a witness. Complaint Counsel assumed that Rambus had decided not to pursue arguments based on the discredited version of minutes outside the relevant time period since the key language was contradicted by the approved version. At a minimum, Complaint Counsel assumed that, if Rambus nevertheless attempted to rely on this document, it would accurately represent that the document was not approved and the language in question was contradicted by that of the approved version. Unfortunately, Complaint Counsel did not anticipate that Rambus would imply – contrary to the facts – that Chairman Rhoden and General Counsel Kelly had approved the language in question. Under such circumstances, it is hardly lack of due diligence of

Complaint Counsel to rely on the responsibility of Rambus to accurately represent and describe evidence to the Commission.[2]

The evidence also satisfies the key factor in determining whether to reopen the record – it has probative value to the issue at hand. *See In re Chrysler Corp.*, 87 F.T.C. 719, 750 n.38 (1976) (admitting as probative certain television commercials "relevant to the issue of Chrysler's use of the term 'small car' in advertising,"), *affirmed, Chrysler Corp. v. FTC*, 561 F.2d 357, 362-363 (D.C. Cir. 1977). Had Rambus properly described RX1570, the evidence proffered in this motion would not have been necessary. But because Rambus did not explain the background to RX1570, the evidence proffered in this motion is not only highly probative, but necessary, to correct the false impression created by Rambus about the nature and importance of this evidence.

Finally, Rambus, having both injected the February 2000 Board minutes into the briefing and – through its mischaracterization of RX1570 – created the need to reopen the record to correct the misimpressions it caused, is in no position to argue that it would be prejudiced by the introduction of the proffered evidence.

CONCLUSION

For the forgoing reasons, Complaint Counsel respectfully requests that the Commission reopen the record to include CX0153, CX0153g, and Deposition Transcripts of John Kelly (2/26/03), pages 20-28 and 84-87, Desi Rhoden (1/24/03), pages 89-117, and Kenneth McGhee (2/23/03), (Attachment E) pages 82-139.

---

[2] A ruling to the contrary would invite abuse. Because it would effectively require a litigant to anticipate, and rebut in advance, any possible misrepresentation or misuse of exhibits by its opponents, it would result in lengthier and more complex trials.

Respectfully submitted,

_____

Geoffrey D. Oliver
Patrick J. Roach
Robert P. Davis
Lisa D. Rosenthal

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20008
(202) 326-2275
Counsel for the Complaint

July 2, 2004

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

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

PROPOSED ORDER

Having considered Complaint Counsel's Motion to Reopen the Record to Include Evidence That Corrects Misrepresentation in Answering Brief, Complaint Counsel's Motion is hereby granted. Accordingly,

IT IS ORDERED THAT the record in this case be reopened and that the following be included in the record: Exhibits CX0153 and CX0153g, and the Deposition Transcripts of John Kelly (2/26/03), pages 20-28 and 84-87, Desi Rhoden (1/24/03), pages 89-117, and Kenneth McGhee (2/23/03), pages 82-139.

By the Commission.

_____
Donald S. Clark
Secretary

ISSUED:

CERTIFICATE OF SERVICE

I, Jessica Rash, hereby certify that on July 2, 2004, I caused a copy of the attached, *Motion to Reopen the Record to Include Evidence That Corrects Misrepresentation in Answering Brief* w/attachments, to be served upon the following persons:

by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
Via Office of the Secretary, Room H-159
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

and by electronic transmission and overnight courier to:

A. Douglas Melamed, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
2445 M Street, N.W.
Washington, DC 20037-1402

Steven M. Perry, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071

Counsel for Rambus Incorporated

_____
Jessica Rash