PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RAMBUS'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO REOPEN THE RECORD TO INCLUDE "EVIDENCE THAT CORRECTS MISREPRESENTATION IN ANSWERING BRIEF"

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Complaint Counsel ask the Commission to reopen the record because Respondent Rambus Inc. ("Rambus") supposedly made "misrepresentations" in its answering brief regarding the minutes of the February 2000 meeting of the JEDEC Board of Directors. According to Complaint Counsel, Rambus "misrepresented" that the minutes had been approved by JEDEC's Chairman of the Board and the EIA's General Counsel. *See* Complaint Counsel's Motion To Reopen The Record ("Motion To Reopen"), p. 1.

Complaint Counsel's accusations are both inappropriate and wrong. The February 2000 JEDEC Board minutes that Rambus (and Chief Judge McGuire) cited and relied upon show the necessary leadership approvals *on their face*. *See* RX 1570 at 13 (signature blocks in electronic version of minutes showing approval by the JEDEC Chairman on February 24, 2000 and by the EIA General Counsel on March 1, 2000). Moreover, as Complaint Counsel concede, the minutes relied upon by Rambus were approved and adopted by the JEDEC Board of Directors itself. Motion To Reopen, pp. 2-3. It is undisputed that the JEDEC Board of Directors is the official governing body of JEDEC. RX 1535 at 4 (statement in JEDEC Bylaws that "[t]he Board of Directors is the governing body of the Association."). It is thus clear that the minutes cited by Rambus were the approved minutes. There has been no misrepresentation.[1]

Complaint Counsel's additional assertion – that they were surprised by Rambus's reliance upon the minutes – is also wrong. Complaint Counsel have been aware of Rambus's position regarding the February 2000 Board minutes since the outset of trial. In fact, Rambus quoted from the February 2000 Board minutes in its opening

[1] Counsel's charges of "misrepresentation" are particularly unfortunate given that Rambus had pointed out in its answering brief that it was Complaint Counsel's position that the minutes had not been approved by the Chairman and General Counsel. Answering Brief, p. 19 n.11.

statement. Tr. 186:14-25. When Rambus subsequently moved the February 2000 Board minutes into evidence, Complaint Counsel posed no objection and offered no alternative versions of those minutes. Rambus also quoted the February 2000 Board minutes in its proposed findings of fact, in its reply to Complaint Counsel's proposed findings of fact, and in its closing argument. Complaint Counsel were thus very well aware of Rambus's position regarding the minutes. Moreover, Complaint Counsel raised in their own proposed findings the very same argument they raise now – that the minutes were an "unapproved" version, although without citation to evidence. In short, because "[t]here is no question that [Complaint Counsel] were on notice" at trial of the issues raised in their motion to reopen the record, the motion must be denied. *See In Re Brake Guard Products, Inc.*, 1998 FTC LEXIS 184 at *47 (1998) (hereinafter "*Brake Guard*").

The fact that Judge McGuire made explicit findings regarding the February 2000 minutes is another reason why Complaint Counsel's motion should be denied. After considering the parties' respective positions regarding the minutes, Judge McGuire concluded that the February 2000 Board minutes represented "clear and unambiguous official statements of policy" that "cannot be reconciled with Complaint Counsel's contention that JEDEC had a mandatory policy requiring the disclosure of patent applications. . . ." Initial Decision, p. 269. *See also id.* at p. 100 (quoting relevant portions of Board minutes). Complaint Counsel did not in their opening brief assert that Judge McGuire's findings regarding the "official" nature of the February 2000 minutes were in error, although the Rules of Practice required them to do so. Complaint Counsel now belatedly seek to assert error in their reply brief, despite the well-settled proposition that such untimely claims of error are unfair to the appellant and should not be entertained. *See*, *e.g.*, *Carbino v. West*, 168 F.3d 32, 34-5 (Fed. Cir. 1999). These risks are compounded in this case, because Complaint Counsel, recognizing that they have no record evidence on which to rely, have asked the Commission to allow them – in violation of the Rules of Practice and in derogation of the Commission's precedents and

the requirements of due process – to insert into the record several lengthy deposition excerpts from witnesses who were available to testify or who did testify at trial, as well as documents that were available to Complaint Counsel prior to trial. For the reasons set out in this brief, Complaint Counsel's motion to reopen should be denied.

II. ARGUMENT

A. The *Brake Guard* Criteria

Complaint Counsel concede that they must demonstrate each of the following in connection with their motion to reopen the record: (1) that they exercised due diligence with respect to the proffered evidence; (2) that the evidence is probative; (3) that the evidence is not cumulative; *and* (4) that Rambus would not be prejudiced by its belated admission. Motion To Reopen, p. 4, *citing Brake Guard*. While the third factor is not implicated here, Complaint Counsel have failed to meet their burden as to each of the other three factors, and their motion must necessarily be denied.

B. Complaint Counsel Cannot Show Due Diligence

Complaint Counsel acknowledge that at trial, they made a *deliberate* decision to avoid any issues surrounding the February 2000 Board minutes. Motion To Reopen, pp. 4-5. Complaint Counsel nevertheless ask the Commission to relieve them of the consequences of their decision because, they say, they were not aware that Rambus would raise issues relating to the February 2000 Board minutes and that it would supposedly "misrepresent" the evidence on those issues. *Id*.

Complaint Counsel's attempted explanation for their failure to offer the proffered evidence at trial has no factual basis. Complaint Counsel were well aware of Rambus's position with respect to the February 2000 Board minutes from the very outset of trial. In his opening statement, Rambus's counsel displayed the relevant passage from the minutes and read portions of the minutes to the Court:

> "This is a meeting of the JEDEC board of directors, February of 2000, the Sheraton Safari Hotel in Orlando, Florida, and

> they talk about this issue on page 13 of this document, and bring up, if you would, their discussion. 'Disclosure on Patents Pending.'
>
> If we go to the second sentence, the first part just refers to the letter I showed you. The issue is whether companies should make public that a patent is pending. The board of directors discussed it and noted that they encourage companies to make this kind of disclosure even though they were not required by JEDEC bylaws. That's what they said at the board meeting."

Tr., 186:14-25.

Rambus's counsel then explained that JEDEC Secretary McGhee, who had attended the Board meeting, had sent out a contemporaneous email to numerous JEDEC members describing the Board's discussion:

> "Then after the board meeting, Ken McGhee sent out a memo summarizing this, and if we bring that up, it's 1582, and I think I have it on a board, Your Honor, so maybe I can show it to you that way. I do. Ken McGhee sends out this note, and he sends it out and he says, 'The JEDEC patent policy concerns items that are known to be patented that are included in JEDEC standards. Disclosure of patents is a very big issue for Committee members and cannot be required of members at meetings.' This is 2000.
>
> 'Therefore,' he says, 'in Micron's letter, by giving early disclosure, they have gone one step beyond the patent policy and have complied with the spirit of the law.' It's a great thing, we encourage it, but it's beyond the patent policy."

Tr., 187:1-15.

Complaint Counsel was thus clearly on notice, at the very moment that they began their case-in-chief, of Rambus's reliance upon the February 2000 JEDEC Board minutes and Secretary McGhee's confirmatory email. Shortly thereafter, Rambus successfully moved the February 2000 Board minutes and Secretary McGhee's February 11, 2000 email into evidence. Tr. 2600-2604; Stipulation and Order Regarding Admission of Certain Exhibits, ex. B (marked as JX-B), p. 24. Complaint Counsel raised no objections to the Board minutes and offered no alternative versions of those minutes, although they were well aware of the documents that they now proffer and could have

included them in the parties' exhibit stipulation had they chosen to do so. *Id*. Moreover, after Secretary McGhee's email was admitted in evidence as RX1582, Rambus introduced the following deposition testimony from Mitsubishi's JEDEC representative, Sam Chen, who was shown Secretary McGhee's email and who testified about his understanding of it:

> "Q Is it consistent with your understanding of the JEDEC patent policy that the disclosure of a patent application that relates to a standard goes one step beyond the requirements of the policy?
>
> A Yes, that's my understanding."

Tr. 8739; CX 3135 (Chen Tr., 1/16/03).

In light of this record, Complaint Counsel's argument that they were surprised by Rambus's reliance on the February 2000 Board minutes has no factual basis and cannot support a finding of "due diligence" on the part of Complaint Counsel.

Complaint Counsel's fallback argument is that they chose not to raise issues regarding the February 2000 Board minutes with their JEDEC witnesses, Desi Rhoden and John Kelly, "out of respect for judicial economy" and because they did not want to add to "an already lengthy trial record." Motion To Reopen, pp. 4-5. This argument cannot withstand even the most minimal scrutiny, for JEDEC Chairman Rhoden was Complaint Counsel's *very first* trial witness, and EIA General Counsel Kelly was also among the first group of witnesses. The record also reflects that on May 15, 2003, when Mr. Kelly testified, Complaint Counsel concluded their questioning of Mr. Kelly at 1:30 p.m. and called no other witnesses that day. Tr., 2176. It could not have been a concern for "judicial economy" that led Complaint Counsel not to address the February 2000 Board minutes with Mr. Kelly.[2]

[2] Complaint Counsel also cite no case where a concern about "judicial economy" was used to justify a motion to reopen. Such an argument, if ever adopted, would substantially lower the due diligence requirement under *Brake Guard,* for it could be

In short, because "[t]here is no question that [counsel] were on notice" of the issues in question, *Brake Guard*, 1998 FTC LEXIS 184 at *47, and chose not to offer the evidence at trial, Complaint Counsel's motion to reopen the record should be denied.

C. The Proffered Evidence Is Not Probative

Complaint Counsel have also failed to meet their burden of showing that the proffered evidence is probative. First, the proffered deposition testimony is simply inadmissible. The Rules of Practice explicitly bar the introduction of deposition testimony taken from third party witnesses in the absence of the witness's death or unavailability. 16 C.F.R. 3.33(g)(iii). Messrs. Rhoden, Kelly and McGhee were all available to testify at trial; the first two witnesses *did* testify. The Rules of Practice thus bar the admission into the record of their deposition testimony. *Id.*[3]

The proffered testimony also lacks probative value because it is inconsistent with the contemporaneous documents. Complaint Counsel offer the testimony of Messrs. Rhoden and Kelly to show that the statement in the Board minutes that Rambus and Judge McGuire cite – that the disclosure of patent applications was "not required under JEDEC bylaws" – was simply a drafting error and that the Board had not discussed a disclosure requirement. Motion To Reopen, pp. 2-4. Complaint Counsel's motion nowhere addresses, however, the *contemporaneous* evidence of the JEDEC Board's February 2000 discussion that is in the trial record. As noted above, on

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made in every case to justify a litigant's deliberate choice to withhold evidence until after an adverse Initial Decision issued.

[3] Although the Rules of Practice do allow the introduction of third party deposition testimony in "exceptional circumstances," *see* C.F.R. 3.33(g)(iii)(E), Complaint Counsel have not attempted to argue that such circumstances exist, nor could they. In interpreting the identical language in Rule 32(a)(3)(E) of the Federal Rules of Civil Procedure, the courts have held that the phrase "exceptional circumstances" must refer to a reason why the deponent cannot appear at trial, rather than to the prejudice that would supposedly result if the testimony were not admitted. *Angelo v. Armstrong World Industries, Inc.*, 11 F.3d 957, 963 (10th Cir. 1993).

February 11, 2000, only a few days after the Board meeting, JEDEC Secretary and Board meeting participant Ken McGhee sent an email to numerous JEDEC committee members that stated that the "BoD" had discussed the disclosure issue at its February meeting and that a member that had disclosed a patent application had gone "one step beyond" the patent policy. RX 1582 at 1. The record also contains a draft of the February 2000 Board minutes that bears the handwritten notations of longtime JEDEC consultant Dr. Frank Stein, who was present at the Board meeting. Dr. Stein's notes show that he reviewed the passage at issue and suggested *only* that the word "that" be changed to "this." RX 1576 at 18.

This contemporaneous written evidence of the Board's discussion, prepared by meeting participants in their official capacity at the time of the Board meeting, is far more probative than the after-the-fact deposition testimony now belatedly offered by Complaint Counsel. *See In the Matter of Timken Roller Bearing Company*, 58 F.T.C. 98, 1961 FTC LEXIS 354 at *18 (1961) ("Where, as here, oral testimony given several years later is not consistent with contemporaneous written statements, such oral testimony can be given little weight.").

Finally, the absence of any record evidence that the JEDEC Board had revisited and revoked its decision to approve and adopt the minutes that Rambus and Judge McGuire relied upon is an additional reason why the proffered testimony and documents have no value. Logic dictates that only the JEDEC Board – the official "governing body" of JEDEC – can rescind a previous Board action. RX 1535 at 4 (JEDEC bylaws).

Complaint Counsel argue that "there is no adequate explanation for why the version of the minutes quoted by Rambus apparently received routine Board approval at the next Board of Directors meeting. . . ." Motion To Reopen, pp. 2-3. While there is no adequate explanation for the Board's approval that is consistent with *Complaint Counsel's position*, there is one quite obvious explanation for the Board's approval: that

the minutes *accurately reflected* the Board's discussion, as the contemporaneous email by Secretary McGhee shows. The statement in the Board minutes that disclosure of patent applications was "encourage[d]" but not "required" is also consistent with, and corroborated by, other record evidence, including:

- General Counsel Kelly's January 1996 letter to the Commission, which states that the EIA "encourages" the "voluntary" disclosure of relevant patents (RX 669 at 3);
- Secretary Clark's July 1996 response to Kelly's letter, which acknowledges both that the EIA encourages "voluntary" patent disclosure and that it does *not* "require a certification by participating companies regarding a potentially conflicting patent interest" (RX 740 at 1);
- JEDEC Manual 21-H, which was in effect when Rambus joined JEDEC *and* when the SDRAM standard was adopted, which states that "JEDEC standards are adopted without regard to whether or not their adoption may involve patents on articles, materials or processes" (CX 205A at 11); and
- the December 1993 JEDEC DRAM committee meeting minutes, which reflect the statement by the Committee Chairman that his company, IBM, "will not come to the Committee with a list of applicable patents on standards proposals. It is up to the user of the standard to discover which patents apply." JX 18 at 8.

In sum, Complaint Counsel have not met their burden of establishing that the proffered evidence is probative.

D. Rambus Would Be Prejudiced By The Untimely Admission Of The Proffered Evidence

Complaint Counsel also cannot satisfy their burden of showing that Rambus would not be prejudiced by the untimely admission of the evidence in question. Complaint Counsel would have the Commission reverse Judge McGuire's findings regarding the meaning and official nature of the February 2000 minutes by relying on the *deposition* testimony of witnesses who were available at trial to testify about those minutes. Such an approach would be fundamentally unfair to Rambus. It is well settled that "[w]hen a witness' credibility is a central issue, a deposition is an inadequate substitute for the presence of that witness." *Loinaz v. EG&G, Inc.*, 910 F.2d 1, 8 (1st Cir. 1990). Here, there is no question that a decision to accept the proffered deposition

testimony as truthful would require credibility determinations. No such result could withstand review. *Id*. Indeed, Complaint Counsel cite no case where deposition testimony was introduced into evidence after a trial as a result of a motion to reopen the record.[4]

The need for live testimony on the issues belatedly raised by Complaint Counsel is all the more pressing here, for the proffered testimony of the three witnesses differs in important respects *from witness to witness*. For example, JEDEC Chairman Rhoden testified that he had seen the passage in question in February 2000 in a draft set of minutes and that he had "corrected" it at the time:

> "Q. When was the first time this passage, in what you've referred to as the draft minutes, came to your attention?
>
> A. When I reviewed the minutes that were sent to me by Ken McGhee and I corrected it."

Motion to Reopen, Attachment C, p. 96 (Rhoden Tr., not in evidence). Mr. Rhoden also testified that he had discussed the issue with General Counsel Kelly at the time. *Id*., pp. 94, 100-101 (not in evidence).

Mr. Kelly contradicted Mr. Rhoden's testimony on this point and swore that he had *first* become aware of issues involving the February 2000 minutes when he was contacted in early 2002 by Complaint Counsel. Motion to Reopen, Attachment D, pp. 25-6 (Kelly Tr., not in evidence). *See also id.* at p. 21 ("the issue first was brought to our attention by, I think, [Geoff] Oliver of the FTC."[5] Mr. McGhee similarly testified

[4] In the *Chrysler* case cited by Complaint Counsel, the D.C. Circuit took pains to point out that in that case, "[o]nly documentary evidence produced by the petitioner itself" was admitted pursuant to a motion to reopen. *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977).

[5] According to Mr. Kelly, Mr. Oliver called him and said that there was a statement in the February 2000 minutes "that troubled him." *Id*., p. 26. Mr. Kelly also testified that although the minutes had been posted on JEDEC's Internet website, no JEDEC member had raised any question about the language before Complaint Counsel's call. *Id.*, pp. 26-27 (Kelly Tr., not in evidence).

that the first time he had been aware of any issue with respect to the language in the minutes was in early 2002, when Complaint Counsel raised the issue. Motion to Reopen, Attachment E, p. 110 (McGhee Tr., not in evidence). Mr. McGhee further contradicted Mr. Rhoden by testifying that he had *not* sent the Board-approved version of the minutes to Mr. Rhoden in draft form. *Id*., pp. 99-101 (not in evidence).

The witnesses' disputes over when and how issues surrounding the February 2000 Board minutes first surfaced are not the only areas of disagreement. For example, while Chairman Rhoden testified that after the issues surfaced, he ordered Secretary McGhee to send out a newly revised version of the February 2000 Board minutes, and while Secretary McGhee testified that he had indeed done so, General Counsel Kelly testified "with virtual certainty" that no such revised version was circulated. *Compare* Motion To Reopen, Attachment C, p. 102 (Rhoden Tr., not in evidence), *with* Attachment D, pp. 21-22 (Kelly Tr., not in evidence).

While it is not clear *which* witness' deposition testimony Complaint Counsel would have the Commission believe and adopt, it is clear that if such testimony were adopted, in derogation of the Commission's rules and without giving Rambus the opportunity to test the witnesses' credibility and explore their many contradictions in open court, Rambus would be prejudiced. *Loniaz*, 910 F.2d at 8. Under *Brake Guard*, therefore, Complaint Counsel's motion should be denied.

III. CONCLUSION

If Complaint Counsel had wished to preserve their arguments regarding the official approved status of the minutes of the JEDEC Board's February 2000 minutes, they had numerous opportunities to do so during trial. Their deliberate choice not to offer the evidence in question bars the relief they seek, as does their failure to meet the other *Brake Guard* criteria addressed here. For these and all of the other reasons set out above, Complaint Counsel's motion to reopen the record should be denied.

Dated: July ___, 2004

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	)	

CERTIFICATION

I, Jacqueline M. Haberer, hereby certify that the electronic copy of *Rambus's Opposition to Complaint Counsel's Motion to Reopen the Record to Include "Evidence That Corrects Misrepresentation in Answering Brief"* accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on July 12, 2004 by other means.

Jacqueline M. Haberer
July 12, 2004

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BEFORE THE FEDERAL TRADE COMMISSION

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CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on July 12, 2004, I caused a true and correct copy of *Rambus's Opposition to Complaint Counsel's Motion to Reopen the Record to Include "Evidence That Corrects Misrepresentation in Answering Brief"* to be served on the following persons by hand delivery:

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