UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC

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

COMPLAINT COUNSEL'S RESPONSE TO RAMBUS'S MEMORANDUM IN SUPPORT TO CERTAIN OBJECTIONS TO THE DESIGNATED TESTIMONY OF JOEL KARP

Complaint Counsel files this memorandum in response to Respondent's Memorandum in Support of Certain Objections to the Designated Deposition Testimony of Joel Karp. In this response, we address the issues raised by Respondent relating to the admissibility of (1) Mr. Karp's prior declaration in an ITC proceeding, which has been designated as CX 2957[1] [Exhibit A] and has already been admitted into evidence by Order of this Court on May 21, 2003, and (2) Mr. Karp's prior deposition testimony in an ITC proceeding, which has been designated as CX 2051 [Exhibit B].[2] Rambus's objection to the declaration should be overruled because the declaration is not hearsay

[1] Pages 3 and 4 of CX 2957 are unrelated to pages 1 and 2, and should be viewed as separate documents. For the purposes of our discussion, CX 2957 refers to CX 2957-001 to CX 2957-002.

[2] The final paragraph of Respondent's Memorandum raises an issue regarding testimony about a trial brief filed on behalf of Samsung in the ITC matter. Complaint Counsel does not intend to offer that brief into evidence. Complaint Counsel suggests that any objections to specific portions of Mr. Karp's testimony relating to statements in the brief be ruled on by Your Honor on a case-by-case basis, as necessary, at the same time as other objections are considered. Exhibit CX 2957 was attached to the brief in question and such testimony is offered only for context. This is consistent with Your Honor's plan of action at the June 3, 2003 proceedings. *See* Trial Transcript - Vol. 21 (Page 4085:11-19).

and it contains relevant, material, and reliable evidence. In addition, Rambus has waived its objections by stipulating to its admissibility. Rambus's objections to the ITC transcript also should be overruled because not only is it an exhibit in Mr. Karp's subsequent depositions, its subject matter is directly relevant to the current proceedings. In addition, the ITC testimony concerns the declaration, which is not hearsay, and provides context not only about the declaration but also about Mr. Karp's JEDEC participation.

Prior to his employment at Rambus in 1997, Mr. Karp was employed at Samsung. During the 1991-1996 time frame, Mr. Karp represented Samsung at JEDEC meetings and both Mr. Karp's declaration (CX 2957) and his designated ITC deposition testimony (CX 2051) relate to his experiences as a JEDEC representative. Both Mr. Karp's declaration and testimony occurred in 1996, or relatively contemporaneously with his most recent participation in JEDEC activities. The ITC litigation involved a patent dispute between Texas Instruments and Samsung whereby Samsung asserted an equitable estoppel defense, using in part, Mr. Karp's declaration as supporting evidence.[3] Mr. Karp's position in that proceeding, as stated in his signed, sworn statement, was in support of royalty-free and open standard setting. This position is diametrically opposed to Rambus's position in this proceeding.

Mr. Karp subsequently joined Rambus as Vice President of Intellectual Property in October 1997. He was either in that position, or held a consulting position, during his depositions in the Infineon, Micron and FTC matters.

[3] The ITC proceeding in question was *In the Matter of Certain Electronic Products, Including Semiconductor Products Manufactured by Certain Processes*, Case No. 337-TA-381.

In its supporting Memorandum, Rambus makes two arguments that it believes supports the exclusion of the ITC documents from these proceedings. First, Rambus seeks to exclude the ITC declaration (CX 2957) under Federal Rules of Evidence Rule 801, the "hearsay rule." Second, Rambus contends that the provisions of 16 C.F.R. § 3.33(g)(1)(ii) bar the admissibility of CX 2051, which is Mr. Karp's ITC deposition from August 7, 1996. For the following reasons, Complaint Counsel submits that Rambus's arguments are without merit. As Complaint Counsel details below, CX 2051 and CX 2957 were discussed at length in the Infineon, Micron, and FTC matters when Mr. Karp *was represented* by Respondent. Complaint Counsel seeks to admit only those portions of Mr. Karp's ITC testimony that relate to the same subject matter raised in his declaration and in the later depositions. Further, CX 2957 – a signed, sworn statement that may be contradicted by Mr. Karp's present testimony – was admitted by Order of this Court on May 21, 2003 and such admission should not be reconsidered.

Respondent's position with regard to these exhibits is inconsistent with its objections during Mr. Karp's February 5, 2003 FTC deposition. Respondent objected vehemently to Complaint Counsel questioning Mr. Karp *on these specific topics.* Specifically, in response to questions relating to the ITC declaration, Rambus contended "this line of questioning has been conducted with this witness on multiple occasions. It's unfair and inappropriate for you to be retreading ground that has already been well plowed." Karp FTC Dep., Feb. 5, 2003 (Page 54:15-20). Indeed, counsel for Rambus called such questioning "harassing."[4] Having objected to Complaint Counsel seeking to

[4] "[I]t would be appropriate for him [the judge] to hear the extent you are harassing this witness by examining him in areas that have already -- in which he's already been examined." Karp FTC Dep., Feb. 5, 2003 (Page 54:1-4).

question Mr. Karp on this subject matter at the time Mr. Karp was a managing agent of Rambus on the ground that it had been covered in the prior deposition testimony, Respondent now seeks to bar the admission of the very same testimony from the earlier deposition.

1. Mr. Karp's ITC Declaration (CX 2957)

Respondent seeks to exclude the ITC declaration (CX 2957, Bates number SEC00049 to 52) under Federal Rules of Evidence Rule 801.[5] However, by Order of this Court on May 21, 2003, this document is already in evidence. *See* Exhibit JX-A at 4 and Trial Transcript - Vol. 14 (Page 2603:7-12). Counsel for Rambus did not object when this document was offered into evidence. Respondent even stated that it would not raise any issues regarding the admissibility of these exhibits. *See* Trial Transcript - Vol. 14 (Pages 2597:20 to 2604:5). Specifically, at page 2598 of the Trial Transcript, Gregory Stone (Respondent's lead trial counsel and the attorney who defended Mr. Karp's FTC deposition), informed the Court that Rambus "will not contend on the appeal of this matter at *any level* that the exhibits that are the subject of that stipulation were improperly admitted." Trial Transcript - Vol. 14 (Page 2598:2-5). Exhibit CX 2957 – which is subject to the current Memorandum – was one of those exhibits so listed in the stipulation.

Respondent apparently seeks to vitiate not only an Order of this Court but also its prior agreement with Complaint Counsel regarding the admissibility of certain exhibits – an agreement for which Complaint Counsel bargained in good faith and for which it

[5] "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

relinquished many objections, including hearsay, to exhibits on Respondent's list. Having obtained the benefits of this agreement – namely, the admission into evidence of a large number of exhibits as to which Complaint Counsel waived all objections, including the hearsay objection – Respondent *should not* be permitted to reopen this portion of the record and seek reconsideration of the admission into evidence of this particular exhibit when it has stated that it will not raise any issues relating to the documents admitted on May 21, 2003. Reopening the discussion of which exhibits on the stipulated lists – JX-A, JX-B, JX-C – should be admitted does not benefit either party. If Respondent is allowed to withdraw its consent to certain previously agreed upon exhibits, Complaint Counsel would be forced to reconsider its position with respect to possible hearsay objections to certain Rambus exhibits. The end result could invite chaos, with each side continuously challenging previously admitted exhibits.

As an initial matter, the declaration is not hearsay. Under Federal Rules of Evidence of 801(d)(2)(B), "a statement of which the party has manifested an adoption or belief in its truth" is not hearsay and is therefore admissible. In his 2001 Infineon deposition, Mr. Karp (and hence Rambus) unambiguously adopted the ITC declaration. When Mr. Karp was asked about the declaration (a matter in connection with which he was represented by counsel for Rambus and was being paid as a Rambus consultant), he testified as follows: "I believed that statement was true on May 15th, 1996," thus confirming the veracity of his prior, sworn statement. Karp Infineon Dep., Jan. 9, 2001 (Page 129:1-2) [CX 2059].

Furthermore, Exhibit CX 2957 – a signed, sworn statement – is *highly probative on many of the issues in the case*, and fully satisfies the standard of relevance, materiality,

and reliability under the Commission's rules of practice, 16 C.F.R. § 3.43 (b)(1).[6] Mr. Karp's declaration, CX 2957, was discussed at length in both his ITC deposition, discussed above, and his subsequent depositions in the Infineon ("Exhibit 318"), Micron ("Exhibit 601"), and FTC ("Exhibit 2") matters. Among the *highly probative* observations offered by Mr. Karp in his ITC declaration, which is seemingly inconsistent to Mr. Karp's current testimony, is the following statement, based largely on his experience while a Samsung representative at JEDEC:

> It is contrary to industry practice and understanding for an intellectual property owner to remain silent during the standard-setting process – and then after a standard has been adopted and implemented – later attempt to assert that its intellectual property covers the standard and allows it to exclude others from practicing the standard.

CX 2759 at 2.

Indeed, Rambus had many opportunities to question Mr. Karp about his ITC declaration in at least three prior depositions and can do so at trial in this matter. (Mr. Karp's Infineon, Micron and FTC depositions occurred over five days.) Respondent has represented that "Mr. Karp is available to testify at this proceeding in person" so clearly Respondent will have an opportunity to effectively examine Mr. Karp on these issues (Rambus Mem. at 2).[7] The Court should not reconsider its Order admitting CX 2759 into evidence thereby calling into question the status of all other exhibits on the parties' stipulated lists that were admitted into evidence on May 21, 2003.

[6] Relevant, material, and reliable evidence shall be admitted. 16 C.F.R. § 3.43 (b)(1).
[7] This is in contrast to the last four questions Respondent's counsel posed to Mr. Karp at the conclusion of his February 5, 2003 deposition in this matter. Respondent's counsel elicited testimony suggesting Mr. Karp might not be available to testify in person because of his age and some physical ailments.

2. Mr. Karp's Prior ITC Transcript (CX 2051)

Rambus contends that the provisions of 16 C.F.R. § 3.33(g)(1)(ii) bar the admissibility of Mr. Karp's ITC testimony from August 7, 1996 (CX 2051, Bates number F-SEC 03068 to 112) in its entirety since Mr. Karp was not a "managing agent" at the time of the deposition.[8] On the contrary, Complaint Counsel is not seeking to admit the deposition in its entirety but only those portions of the deposition that directly relate to the subject matter later discussed in the Infineon, Micron and FTC depositions when Mr. Karp was a "managing agent" and represented by Rambus. The designated testimony should be admitted under 16 C.F.R. § 3.33(g)(1)(ii) since Respondent was "present" and in fact "represented" Mr. Karp in subsequent depositions when specific questions relating to the ITC deposition arose. Respondent not only had an opportunity to defend Mr. Karp but actually deferred to, and in fact objected to, repeating any duplication of the prior testimony on this subject matter. This designated ITC testimony taken in August 1996 is much closer in time to Mr. Karp's actual participation at JEDEC and more probative than his subsequent testimony. It is useful not only to understand the ITC declaration (CX 2957), discussed above, but to more fully understand the later Infineon, Micron, and FTC deposition testimony. CX 2051 is "clearly relevant, material, and reliable evidence" under 16 C.F.R. § 3.43 (b)(1), therefore it should be admitted.

Respondent is correct that Mr. Karp's prior ITC deposition transcript, CX 2051, pre-dates his employment at Rambus. Your Honor ruled previously that Mr. Karp's prior testimony be admitted to the extent that he was a "managing agent" at the time of his

[8] The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a public or private corporation, partnership or association which is a party, or of an official or employee (other than a special employee) of the Commission, may be used by an adverse party for any purpose. 16 C.F.R. § 3.33(g)(1)(ii).

prior depositions. (*See* Prehearing Conf., April 28, 2003 (Page 97:1-6).) The ITC transcript at issue, while taken when Mr. Karp was not an employee or managing agent of Rambus, was often referred to in Mr. Karp's subsequent depositions and was an exhibit at both his April 9, 2001 Micron deposition ("August 7th, 1996 deposition" or "1996 deposition") and at his February 5, 2003 FTC deposition ("Exhibit 1"). In Mr. Karp's prior depositions, Respondent never objected to using this transcript. Prior to its recent Memorandum, Respondent never even raised the issue of hearsay. More importantly, Complaint Counsel agreed with Respondent to limit, to the extent possible, the repetition of questions that were previously addressed in prior depositions. Complaint Counsel was even reminded by Respondent during its deposition with Mr. Karp to avoid repeating subjects that were previously addressed and relied on this representation by limiting its questioning accordingly. *See* Karp FTC Dep., Feb. 5, 2003 (Pages 53:3 to 54:23).

Limited use of the ITC transcript is useful to understand the relevant portions of the Micron and Infineon transcripts, and Mr. Karp's testimony in the more recent FTC depositions. For example, at pages 132-134 of his April 9th, 2001 Micron deposition, Mr. Karp was asked about specific portions of his ITC testimony. Having the designated portions of Mr. Karp's ITC testimony in the record is highly relevant to the Court's assessment of the credibility of some of his more recent testimony which, as noted above, is further removed from the time period when Mr. Karp was actively participating in JEDEC.

Allowing this testimony would not prejudice Respondent in this matter, as certain portions of it are highly probative and have been discussed at length in the depositions already admitted and taken while Mr. Karp was an employee or a managing agent at

Rambus. Complaint Counsel limited its designations to approximately ten pages of testimony from the 43-page transcript.[9] These very narrow designations directly relate to the same subject matter subsequently discussed in the later Infineon, Micron, and FTC depositions and more specifically, to CX 2957, as discussed above. Respondent has counter-designated an additional five pages of testimony, assuming its general objection to the admission of this transcript is overruled.[10] For example, some of the highly probative testimony that Respondent seeks to exclude includes the following specific passage about the "price for participating in a standard-setting organization":

> Q. Is it your view, sir, that the price for participating in a standard-setting organization is the requirement that the patent – that any patent that is involved in its standard be royalty-free?
> A. Are you asking for my opinion?
> Q. Yes, sir.
> A. My opinion is that it should be royalty-free.

(CX 2051, Karp ITC Dep., Aug. 7, 1996 (Page 34:18-35:1).) This testimony stands in stark contrast to Mr. Karp's later role at Rambus, where he assumed the title of Vice President of Intellectual Property and instituted Rambus's program of "non-compatible licensing" whereby Rambus sought to obtain royalties from JEDEC-compliant SDRAM and DDR SDRAM products.

[9] Karp ITC Dep., Aug. 7, 1996, Pages 22:16 to 28:7; 29 :23 to 33 :4; 33:25 to 36:4 [Exhibit CX 2051].

[10] Karp ITC Dep., Aug. 7, 1996, Pages 28:13 to 29:4; 33:5-24; 36:5 to 39:12 [Exhibit CX 2051].

3. Conclusion

For the reasons mentioned above, the Court should not reconsider its admission of the ITC declaration, CX 2957, and should not exclude the designated testimony from Mr. Karp's ITC deposition, CX 2051.

DATED: June 5, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charlotte Manning, hereby certify that on June 5, 2003, I caused a true and correct copy of the Public Version of *Complaint Counsel's Response to Rambus's Memorandum in Support to Certain Objections to the Designated Testimony of Joel Karp* to be served upon the following persons by hand delivery:

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