

PUBLIC

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**REPLY IN SUPPORT OF REQUEST FOR OFFICIAL NOTICE OF
VARIOUS UNITED STATES PATENTS**

I. INTRODUCTION

The Court should grant Rambus's request for official notice and admit the patents at issue for three simple reasons. First, there is no reasonable dispute that the entire contents of issued patents are proper for official notice. The federal courts regularly take judicial notice of issued patents, and official notice in this proceeding is at least as broad in scope as judicial notice. Second, official notice is an entirely proper means of adducing evidence. Since the request is for notice of the entire patents, there is no difference between taking official notice and admitting the patents as trial exhibits. Third, each patent is relevant to a central issue in this action. Rambus is not asking the Court to make factual findings as to the import of these patents; it merely asks the Court to recognize that the contents of the patents are not subject to any dispute. If Complaint Counsel wish to argue about the import of the patents, that is for another day. For this motion, the patents speak for themselves.

II. BACKGROUND

Rambus filed a Request for Official Notice of Various United States Patents ("Request") on July 28, 2003, before the close of evidence. Complaint Counsel filed an opposition ("Opposition" or "Opp.") on August 5, 2003. On August 6, 2003, Complaint Counsel stated that they would not oppose the filing of this Reply by noon on Friday, August 8, 2003, if it did not exceed ten pages. On that understanding, Rambus seeks leave to file this Reply in support of the Request.

III. ARGUMENT

A. **There is no reasonable dispute that the Court may properly notice all portions of an issued United States patent.**

There is no serious dispute that the entire contents of issued United States patents are properly noticed by the courts. As demonstrated by the cases cited in the Request, the courts regularly take notice of issued patents.¹ The contents of issued patents, matters of public record, speak for themselves. There can be no dispute as to what the patents at issue say; if Complaint

¹ Not surprisingly, Complaint Counsel identify no authority to the contrary.

Counsel want to argue over what the contents mean, or the import of a patent's contents, then that is a separate matter, and one not raised by the Request.²

Complaint Counsel seem to believe that there *can* be a dispute over what issued patents say, wrongly arguing that judicial notice is somehow limited to a narrow subset of information in an issued patent. The cases contain no such limitations. To the contrary, the courts take notice of whatever relevant information the patents contain, and treat that information as substantive evidence. *E.g., Thomas & Betts Corp. v. Panduit Corp.*, 65 F.3d 654, 664 n. 12 (7th Cir. 1995) (the Seventh Circuit evaluated the contents of a judicially noticed patent to determine that the patent “disclos[ed] a best mode essentially identical” to plaintiff’s product); *Hoganas AB v. Dresser Indus., Inc.*, 9 F.3d 948, 954 (Fed. Cir. 1993) (the Federal Circuit likewise evaluated the contents of a judicially noticed patent to determine that it ‘covered’ the defendant’s product). This is no surprise, since the law is well-settled that the courts may properly notice the contents of administrative records. *See, e.g., Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (taking judicial notice of contract terms and public hearings by the Federal Power Commission).

Matters properly noticed under Federal Rule of Evidence (“FRE”) 201 are *a fortiori* proper subjects of official notice in this proceeding. It is well-settled that official notice, in an administrative proceeding, is broader than judicial notice under FRE 201; it is certainly no narrower.³ The Commission practice under 16 C.F.R. § 3.43(d) is not to the contrary. The cases applying 16 C.F.R. § 3.43(d) demonstrate that the Commission regularly approves reliance on

² To the extent that Complaint Counsel seek to argue that patents cannot be offered for their contents, they ignore the fact that issued patents are admissible under the public records exception to the hearsay rule. *See, e.g., Hay & Forage Indus. v. New Holland N. Am., Inc.*, 25 F. Supp. 2d 1170, 1175 n.2 (D. Kan. 1998) (applying F.R.E. Rule 803(8)(B)).

³ *See, e.g., Sykes v. Apfel*, 228 F.3d 259, 272 (3d Cir. 2000) (“Official notice ... is the administrative law counterpart of judicial notice. Both doctrines allow adjudicators to take notice of commonly acknowledged facts, but *official notice is broader than judicial notice insofar as it also allows an administrative agency to take notice of technical or scientific facts that are within the agency’s area of expertise.*”) (emphasis added); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (“The scope of administrative notice, sometimes referred to as official notice, however, is broader than judicial notice.”); *generally* Charles H. Koch, Jr., *2 Administrative Law and Practice* § 5.55[1] (2d ed. West 1997) (official notice has broader scope than judicial notice).

the substantive content of officially noticed administrative records as evidence.⁴ Nothing in this practice supports Complaint Counsel’s artificially cramped view of official notice, or precludes official notice of the entire contents of the patents at issue.

B. Official notice is a proper means for receiving evidence.

Complaint Counsel wrongly claim that “[t]he doctrine of official notice is not a means to admit exhibits into evidence.”⁵ That argument is not well-taken. As discussed below, the entire contents of these patents are relevant to this proceeding. Whether the Court takes official notice of the patents *in toto*, or takes official notice of foundational elements and admits the patents into evidence as requested, the result is that the contents of the patents become part of the record. Since the parties will reference the patents in factual findings and briefs, Rambus submits that it is simpler for the Court to admit them with exhibit numbers.⁶

This is exactly what official notice is for. “It must be emphasized that official notice is one of the processes for building the record upon which the decision will be made.”⁷ As the Court recognized during cross-examination of Brett Williams, official notice is a time-saving means for dealing with foundational matters as to which there can be no dispute.⁸ Likewise, under the Federal Rules, the judicially noticed facts become part of the record.⁹ Since Rambus

⁴ For that reason, in *Ethyl Corp.*, the Commission relied on officially noticed economic information in support of its findings. *In re Ethyl Corp.*, 101 F.T.C. 425, 1983 FTC LEXIS 91, *508 n.12 (1983). *See also In re Beauty-Style Modernizers*, 83 F.T.C. 1761, 1974 FTC LEXIS 227, at *39 n.7 (1974), where the Commission considered and cited the entire contents of a Federal Reserve Board publication, which the Law Judge had administratively noticed, as evidence in support of its findings; *In re Avnet*, 82 F.T.C. 391, 1973 FTC LEXIS 125, *132 (1973), where the Commission approved the Law Judge’s reliance on the contents of officially noticed U.S. census data.

⁵ Opp. at 6.

⁶ Complaint Counsel’s attempt to analogize the Request to their attempt to admit 19 exhibits on the last day of trial is misplaced. Opp. at 5-8. The patents are self-authenticating official records; there can be no dispute about their contents. Further, the Request was made during Rambus’s case-in-chief, not on the last day of trial, and Complaint Counsel were provided ample opportunity to respond or rebut this evidence, including through the testimony of Mr. Lee or Dr. Jacob. It is also well-settled that parties can seek judicial notice at any time.

⁷ Koch, 2 *Admin. Law & Prac.* § 5.55[2]; *id.*, at § 5.55[1] (“official notice involves a method for getting information into the record”).

⁸ *See, e.g.*, 4 Tr. 936 (Brett Williams cross examination), cited in Request at 2 n.2.

⁹ *See, e.g.*, Fed. R. Evid. 201(g) (“In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.”). By definition, judicially noticed facts are matters as to which

asks the Court to take notice of the entire contents of the patents, the effect is the same as admitting them in evidence.

C. The patents at issue are relevant to this proceeding.

Each patent in the Request is relevant to issues in this proceeding. The first two groups identified in the Request, patents relating to Micron's burst EDO technology, and other patents covering products manufactured in compliance with JEDEC standards, are relevant to the question of how JEDEC members actually behaved with respect to patent disclosures at JEDEC. The conduct of members bears directly on the question of what patent disclosures the JEDEC patent policy actually required, and also reveals whether JEDEC's policy was uniformly understood.

The last group, consisting only of Rambus's '353 patent, relates to the rule established in *VISX*. Specifically, the '353 patent illustrates that Rambus has patents, independent of the patents at issue in this proceeding, that cover DDR SDRAM devices built to JEDEC standards.

1. Micron burst EDO patents.

The first nineteen patents in the Request deal with Micron's burst EDO technology.¹⁰ Every one of these patents was identified, by exhibit number, in DX-6, used in Brett Williams's cross-examination. *See, e.g.*, DX-6; 4 Tr. 924 (discussing DX-6);¹¹ 4 Tr. 933-34 (specifically discussing '320 patent, RX730); 4 Tr. 933-44 (discussing burst EDO disclosures to JEDEC); *generally* 4 Tr. 821-974 (discussing burst EDO).¹² As demonstrated therein, the dates of these patents, their applications, and their parent applications, in relation to various presentations at

there is no dispute. There can be no dispute as to what the patents at issue *say*, and Complaint Counsel do not attempt to identify one. Rather, Complaint Counsel seem to dispute only what the contents may *mean*. Such argument does not go to whether judicial notice is proper, however, but only to the import of the evidence noticed.

¹⁰ *See* Request, Tabs 1-19. For convenience, this Reply will refer to the patents by the exhibit numbers identified in the Request.

¹¹ The demonstrative was not marked as DX-6 until the next day. *See* 5 Tr. 986-987 (marking DX-6 for identification).

¹² Given that Rambus told the Court that it would seek to admit these patents by stipulation or judicial notice, 4 Tr. 936, it is not clear how Complaint Counsel can legitimately argue that they had no notice that these patents were material.

JEDEC, bear on whether Micron in fact understood JEDEC's policy to require, or even encourage disclosure of pending patent applications that might be "related" to discussions on standards ongoing at JEDEC.

2. Patents covering JEDEC standards.

The next eight patents in the Request are assigned to JEDEC member companies. An inventor on each patent attended JEDEC meetings while the patent was pending, and while related subject matter was discussed at JEDEC meetings. Each patent "relates to" the "work of JEDEC" in the manner that Complaint Counsel argue triggers the JEDEC disclosure duty. Yet none of the applications resulting in these patents were ever disclosed to JEDEC. The relevance of these patents to that conduct is established by the allegations in the Complaint and the evidence of record from JEDEC, together with the information on the face of the patents, as follows.

a. Fujitsu

The Complaint in this matter explains that "[p]hase lock loop ('PLL') and delay lock loop ('DLL') are closely related technologies, both or which are used to synchronize the internal clock that governs operations within a memory chip and the system clock that regulates the timing of other system functions." Complaint ¶ 63. The Complaint goes on to allege that Rambus should have disclosed pending patent claims to "on-chip PLL/DLL technology" and that such technology was ultimately incorporated into the DDR SDRAM standard that was adopted in August 1999. *Id.* ¶ 64.

Fujitsu, however, had numerous undisclosed patent applications relating to on-chip PLLs and DLLs that were pending during the time that the DDR SDRAM standard was being discussed and later adopted at JEDEC. For example, the application for Fujitsu's U.S. Patent No. 6,028,816 (RX2312, Tab 25 of the Request) was filed on September 5, 1997 (although the patent claims priority back to a number of Japanese patent applications filed earlier in 1997 and in 1996). The '816 patent has broad claims directed to a semiconductor device, such as a DRAM, with "an input timing adjusting circuit" for receiving an external clock signal and

outputting and adjusting the phase of an internal clock signal. Thus, the ‘816 patent is broad enough to cover either a PLL or DLL.

One of the inventors of the ‘816 patent, Masao Nakano, was present at meetings 81-85 of JC 42.3, spanning December 11, 1996 through December 9, 1997, but did not disclose the pending application.¹³ This evidence suggests that he, like others, did not understand there to be any expectation that patent applications would be disclosed to JEDEC.

b. IBM

IBM owns U.S. Patent No. 6,289,413 (RX1890, Tab 26), which claims priority to an application filed on October 18, 1996. Claim 1 of the ‘413 patent claims a “cached SDRAM” device including means for programming the device to operate in “Write Transfer mode” or “No Write Transfer mode” during a Write cycle. At meeting No. 86 of the JEDEC JC-42.3 Subcommittee on March 3, 1998, a “No Write Transfer mode” for a cached SDRAM known as ESDRAM was balloted. *See* JX42. The “No Write Transfer mode” was ultimately incorporated into the JEDEC standard for ESDRAM – Section 3.11.5.3.5 of standard 21-C provides for a programming such a mode in which write data is not written to the cache. *See* JX58, at 22; *generally* http://www.jedec.org/download/search/3_11_05R12.PDF (JESD21-C, § 3.11.5, at JEDEC website).

Jim Rogers, one of the inventors of the ‘413 patent, was present during meeting No. 86, but did not disclose his pending application. Again, this evidence supports the proposition that Mr. Rogers, like many others, did not understand there to be any policy that encouraged or required disclosure of patent applications.

c. Mitsubishi

Mitsubishi filed U.S. Patent Application Serial No. 07/869,917 on April 15, 1992. The specification of that application is over 250 pages long and, through various continuations and divisionals, has spawned numerous issued patents many of which relate to SDRAM or DDR SDRAM devices. For example, U.S. Patent No. 6,356,484 (RX2313, Tab 27) issued on March

¹³ *See* JX35 through JX41. Two other inventors on the ‘816 patent were present at various earlier meetings.

12, 2002, and has claims directed to the use of both clock edges in synchronous memory devices, as in DDR SDRAMs. The specification of the '917 application states that "the present invention relates to a structure of a semiconductor memory device containing a cache, in which a dynamic random access memory (DRAM) having a large storage capacity serving as a main memory, and a static random access memory (SRAM) having small storage capacity serving as a cache memory are integrated on the same semiconductor chip." Col. 1, lns. 18-24.

One of the inventors of the '917 application, Hisashi Iwamoto, attended meeting no. 90 of JC-42.3 on March 2, 1999, at which a proposal concerning Enhanced SDRAM (ESDRAM) was discussed. JX46. Similar to the invention discussed in the '917 application, ESDRAM includes an SRAM cache integrated on the same semiconductor chip as a DRAM. Nevertheless, Mr. Iwamoto did not disclose the application.

d. Samsung

On October 4, 1993, Samsung filed U.S. Patent Application Serial No. 08/130,138. The application claimed priority to Korean applications dating to October 2, 1992. Through continuations and divisionals, Samsung has since obtained a number of patents stemming from the '138 application that relate to SDRAMs. For example, U.S. Patent No. 5,631,871 (RX925, Tab 20) has claims relating to auto-precharge; U.S. Patent No. 5,835,956 (RX1308, admitted on June 24, 2003) has claims relating to programmable latency; and U.S. Patent No. 5,838,990 (RX1309, Tab 22) has claims relating to a mode register for storing latency and burst length information. One of the inventors of the '138 application, Yun Ho Choi, attended several JEDEC meetings at which SDRAMs were discussed, including several after the parent Korean applications were filed and at least one after the U.S. application was filed. Yet Mr. Choi did not disclose the existence of any of these patent applications.

e. Texas Instruments

On April 23, 1991, Texas Instruments filed U.S. Patent Application Serial No. 07/690,207. Through the filing of various continuation and divisional applications, Texas Instruments has obtained numerous patents with claims related to JEDEC standards. For example, U.S. Patent No. 5,808,958 (RX2309, Tab 21) issued on September 15, 1998, with

broad claims directed to synchronous DRAMs with burst output. On November 9, 1999, U.S. Patent No. 5,982,694 (RX2310, Tab 23) issued with claims directed to synchronous DRAMs that output data on both edges of a clock. Five of the inventors of the '207 application and its progeny, Wilbur Vogley, Anthony Balistreri, Duy-Loan Le, Joseph Hartigan, and Roger Norwood, were regular attendees of JEDEC's 42.3 Subcommittee meetings, but not even one of them disclosed the pending applications.

f. Toshiba

Toshiba's U.S. Patent Application Serial No. 08/031,831 was filed on March 16, 1993, but claims priority to a Japanese application filed on March 19, 1992. A number of issued patents claim priority to these applications, including patents containing claims closely related to the programmable CAS latency feature of SDRAMs. For example, claim 42 of U.S. Patent No. 5,986,968 (RX2311, Tab 24) broadly claims a semiconductor device comprising a "memory array," "control means" for outputting data N clock cycles ("latency N") after receiving a read command, and "programming means for variably programming the latency N." One of the inventors on the '831 application, Hitoshi Kuyama, attended meeting 62 of JC-42.3 on May 7, 1992, at which presentations relating to programmable CAS latency were made, but he did not disclose his pending application. *See* CX34 (JC-42.3 #62 meeting minutes).

* * * * *

The import of these patents, in relation to discussions at JEDEC and the fact that the underlying applications were then pending and were not disclosed, will be spelled out in more detail in the proposed findings of fact. For this Request, it should be sufficient to show that the patents are relevant to important issues and therefore should be admitted.

3. Rambus's '353 patent.

Finally, Rambus's '353 patent (RX 2314, Tab 28) reads on JEDEC-compliant DDR SDRAM devices. The '353 patent, which continues from the same application as the '405 patent (U.S. Patent No. 6,470,405) (RX2122-15), shares – in all material respects – the same specification as the '405 patent, about which Martin Fliesler (Rambus's patent law expert), testified at some length. 42 Tr. 8876-80, 8949-52. By inspection, claim 1 of the '353 patent

resembles claim 1 of the '405 patent, but is broader in many ways, including the fact that it lacks a limitation associated with a precharge operation. As a result, it is readily apparent that claim 1 of the '353 patent also reads on JEDEC-compliant DDR SDRAM. As stated, that makes the '353 patent relevant to this action, and it should be admitted.

IV. CONCLUSION

For the foregoing reasons, the Court should take official notice of the entire contents of the patents at issue. By means of official notice, the patents themselves should be admitted and made part of the record of this proceeding.

DATED: August 7, 2003

Respectfully submitted,

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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**ORDER GRANTING RESPONDENT RAMBUS INC.'S
REQUEST FOR OFFICIAL NOTICE OF VARIOUS UNITED STATES
PATENTS**

Rambus's Request For Official Notice of Various United States Patents is hereby GRANTED. The Court takes official notice, under Commission Rule of Practice 3.43(d), 16 C.F.R. § 3.43(d), and Federal Rule of Evidence 201(b)(2), of the following issued U.S. patents, which are hereby admitted as trial exhibits:

<i>U.S. Patent number</i>	<i>Exhibit</i>
5,526,320	RX730
5,598,376	RX861
5,610,864	RX886
5,640,364	RX947
5,652,724	RX974
5,661,695	RX987
5,668,773	RX999
5,675,549	RX566
5,696,732	RX1071
5,706,247	RX1085
5,717,654	RX1098
5,721,859	RX1107
5,729,503	RX1124
5,757,703	RX2308
5,802,010	RX1241
5,812,488	RX1272
5,831,932	RX1305
5,850,368	RX1354
5,963,504	RX1514
5,631,871	RX925

<i>U.S. Patent number</i>	<i>Exhibit</i>
5,808,958	RX2309
5,838,990	RX1309
5,982,694	RX2310
5,986,968	RX2311
6,028,816	RX2312
6,289,413	RX1890
6,356,484	RX2313
6,591,353	RX2314

IT IS SO ORDERED.

Date: _____

Stephen J. McGuire
Chief Administrative Law Judge

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

CERTIFICATE OF SERVICE

I, Adam R. Wichman, hereby certify that on August 7, 2003, I caused a true and correct copy of *Reply In Support of Request for Official Notice of Various United States Patents; Order Granting Respondent Rambus Inc. 's Request For Official Notice Of Various United States Patents* to be served on the following persons by Federal Express:

Hon. Stephen J. McGuire Chief Administrative Law Judge Federal Trade Commission, Room H-112 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580	M. Sean Royall, Esq. Deputy Director, Bureau of Competition Federal Trade Commission, Room H-372 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580
Donald S. Clark, Secretary Federal Trade Commission, Room H-159 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580	Malcolm L. Catt, Esq. Attorney Federal Trade Commission 601 New Jersey Avenue, N.W. Washington, D.C. 20001
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Adam R. Wichman

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

CERTIFICATION

I, Adam Randal Wichman, hereby certify that the electronic copy of *Reply in Support of Request For Official Notice of Various United States Patents* and *Order Granting Respondent Rambus Inc.'s Request For Official Notice of Various United States Patents* accompanying this certification are true and correct copies of the paper originals and that a paper copy with an original signature is being filed with the Secretary of the Commission on August 8, 2003, by other means.

Adam Randal Wichman
August 8, 2003