

PUBLIC

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

COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz



In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**MEMORANDUM BY RESPONDENT RAMBUS INC.
IN OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO REOPEN THE RECORD TO ADMIT
DOCUMENTS FROM RAMBUS'S BACK-UP TAPES**

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Dated: October 11, 2005

Attorneys for Respondent Rambus Inc.

I. INTRODUCTION.

Respondent Rambus Inc. (“Rambus”) respectfully submits this memorandum in opposition to Complaint Counsel’s motion to reopen the record to admit 17 documents produced by Rambus to Complaint Counsel earlier this year. The documents in question were among a large group of documents provided to Complaint Counsel as a result of Rambus’s efforts to determine if certain “backup tapes” might contain documents that had not previously been reviewed or produced in litigation.

Complaint Counsel ask the Commission to admit the 17 documents (and a Rambus privilege log) because, they say, those documents are “illustrative examples” of the many other documents found on the backup tapes and provided to Complaint Counsel. Motion to Reopen, p. 13. Complaint Counsel ask the Commission to find, based upon the 17 purportedly “illustrative examples,” that Rambus destroyed a “much larger number” of relevant documents. *Id.*, p. 7. Complaint Counsel go on to suggest that the Commission should rely on *that* finding to conclude that Judge McGuire erred in holding that the evidence did not show that documents “material to the disposition of the issues in this case were destroyed.” *Id.*, pp. 14-15, *quoting* Initial Decision, p. 244.

Complaint Counsel’s motion has no merit and should be denied, for the following reasons:

- There is no basis on which the Commission can determine the accuracy of the fundamental assumption underlying Complaint Counsel’s motion – that the 17 documents are representative of the 20 *boxes* of documents produced to Complaint Counsel from the backup tapes. Neither the Commission’s

precedents nor due process would allow the Commission to render findings based upon counsel's mere assertion about the contents of the remaining 99.9% of the documents now in their possession.

- There is also no basis for concluding that the 17 documents themselves show Judge McGuire's conclusion, quoted above, to be wrong. Indeed, Complaint Counsel do not assert that any of the 17 documents contradict or undermine any of the 1665 individual findings contained in the Initial Decision. In other words, Complaint Counsel do not assert that any of the 17 documents themselves affect Judge McGuire's "disposition of the issues in this case. . . ." Initial Decision, p. 244.
- Complaint Counsel's motion to reopen the record thus demonstrates that Judge McGuire's conclusion regarding the document destruction issue was entirely correct. Complaint Counsel have undertaken a close scrutiny over an extended period of time of twenty boxes of documents that Rambus supposedly "purged" in anticipation of litigation. After completing that review, they have not identified a single finding on the merits in the Initial Decision that is undermined by those documents.
- The reason is simple. Nothing that might have once existed in Rambus's files could have affected in any way Judge McGuire's findings that Complaint Counsel failed to meet their burden of proof on numerous essential elements

of their claims. Complaint Counsel's motion to reopen the record should be denied.

II. ARGUMENT.

A. The Seventeen Proffered Documents Are Cumulative And In Many Respects Support The Findings Contained In The Initial Decision.

Complaint Counsel appear to acknowledge that the Commission should only address the document destruction issue if Rambus is shown both to have destroyed evidence that would be "material to the disposition of the issues in this case . . ." and to have done so in bad faith in anticipation of litigation. Motion to Reopen, pp. 3, 14, *quoting* Initial Decision, p. 244.¹ The principal question presented by this motion, therefore, is whether the 17 documents in question are "material to the disposition of the issues" that are before the Commission. As demonstrated below, the 17 documents are not material, for they are either cumulative or irrelevant or they *support* the findings and conclusions in the Initial Decision.

¹ Rambus has demonstrated in its Amended Proposed Findings of Fact, filed August 10, 2005, and in its Responses to Complaint Counsel's Supplemental Proposed Findings of Fact, filed August 17, 2005, that Rambus adopted and implemented its document retention policy at the recommendation of and with the assistance of experienced outside counsel and that Rambus was not anticipating litigation at the time. Those issues will not be addressed in this brief. Rambus also notes that a bench trial relating to many of these issues is scheduled to commence on October 17, 2005 in *Hynix Semiconductor Inc. v. Rambus Inc.*, no. CV00-20905 RMW (N.D. Cal.)

1. Documents Relating To Rambus's Desire To Amend Its Patent Claims Are Cumulative And Irrelevant.

Many of the 17 documents at issue here are offered by Complaint Counsel to show that while a JEDEC member, Rambus hoped to amend its pending patent claims, or to file new claims, that would “enhanc[e] claim coverage” and “provide better coverage, if possible,” with respect to features used or considered for use in “competitive memory [interface] technologies.” Motion to Reopen, pp. 10-11.

Such documents are entirely cumulative. Indeed, Complaint Counsel concede as much and claim only that such documents “provide further illumination.” *Id.*, p. 11. This concession is understandable, for Complaint Counsel’s briefs on appeal contained numerous citations to Rambus internal documents describing a desire to file patent claims that, *if* they ultimately issued, would allow Rambus “to request patent licenses (fees and royalties) from any manufacturer” of synchronous DRAMs. Appeal Brief, filed April 26, 2004, p. 11, *quoting* CX543A at 17. A motion to reopen the record is improper and will be denied when the proffered evidence is cumulative of other record evidence. *See In Re Brake Guard Products, Inc.*, 125 F.T.C. 138, 248 n. 38 (1998).

Documents regarding Rambus’s desire to strengthen its patent claims are not just cumulative. They are also irrelevant to this appeal, for the following reasons:

- Complaint Counsel stipulated prior to trial that at the time of the adoption of the JEDEC SDRAM standard in 1993, Rambus had no undisclosed claim in any patent or pending patent application that would have been required for the manufacture or use of any JEDEC-compliant SDRAM. Initial Decision, pp. 139-142 (finding nos. 939, 959). Complaint Counsel do not suggest that any of the 17 documents lead them to doubt the accuracy of that stipulation.

- Judge McGuire did not base any of his findings or conclusions on the proposition that Rambus was *not*, while a JEDEC member, seeking to obtain intellectual property rights covering technologies under consideration by JEDEC.
- As a consequence, the documents at issue would only be relevant to this appeal if they somehow undermined Judge McGuire's finding that the EIA/JEDEC patent policy did not require the disclosure of *intentions* to file patent applications. Initial Decision, pp. 115-116 (findings nos. 772-774) and pp. 269-70. *See also Rambus Inc. v. Infineon Technologies, AG*, 318 F.3d 1081, 1102, 1104 (Fed. Cir. 2003) (holding that the JEDEC policy did not require disclosure of "a manufacturer's plans or intentions" and that "[a] manufacturer's subjective beliefs, hopes, and desires are irrelevant.") Complaint Counsel do not contend that any of the documents at issue undermine Judge McGuire's finding, which was based in large part on "clear and unambiguous official statements" by JEDEC. Initial Decision, p. 269.²

Because the proffered documents are both cumulative and irrelevant to the issues on appeal, they should not be admitted.

2. Documents Relating To Rambus's Understanding Of The JEDEC Patent Policy Are Cumulative, And In Any Event They Support The Findings And Conclusions In The Initial Decision.

The other documents at issue here relate largely to Rambus's understanding of the JEDEC patent policy. *See Motion to Reopen*, pp. 12-13. These documents show that Rambus management and employees had questions about whether JEDEC *required*

² It is also important to recognize that Complaint Counsel have presumed for purposes of this litigation that all of the Rambus patents at issue are valid – that is, that Drs. Farmwald and Horowitz first conceived of and reduced to practice the inventions described in those patents. As Judge McGuire held, the patent laws clearly allow an inventor to amend pending claims to protect the full scope of the inventions described in the specification of an earlier application. *See Initial Decision*, pp. 283-286. Documents reflecting a desire on Rambus's part to claim the full extent of its inventions thus support no inference of wrongdoing.

disclosure of a member's relevant intellectual property or had merely *requested* such disclosure. *See id.*, p. 12, *citing* CX5105; p. 13, *citing* CX5100-5101. The cited documents are cumulative of other record evidence. *See, e.g.*, CX837. Moreover, as Judge McGuire found, Rambus's questions about whether disclosure was required or voluntary were answered by JEDEC Committee Chairman Gordon Kelley at the March 1993 JEDEC meeting attended by Rambus engineer Billy Garrett. *See* Initial Decision, ¶ 961 (noting that the official JEDEC minutes of the March 1993 meeting had recorded Kelley's position that IBM would not disclose its intellectual property). As Mr. Garrett's newly located trip report from that meeting shows, Chairman Kelley announced at the March 1993 meeting that his company, IBM, would "NOT discuss patents in JEDEC." *See* CX5107 (capitalization in original). Mr. Garrett's trip report shows that Chairman Kelley also stated that:

"[IBM] will not discuss patents that they have, or are in process nor will they acknowledge anything about anyone else's patent. *This is not against JEDEC rules.* The rules ask members to make the committee aware of any patents th[at] may relate to standardization issues, and let everyone else know about them. IT DOES NOT REQUIRE YOU TO DO SO. IBM chooses not to do so."

Id. (italics added; capitalization in original).³

³ Rambus does not object to the inclusion in the record of the copy of Mr. Garrett's trip report proffered by Complaint Counsel, CX5107. Because the copy proffered by Complaint Counsel was not addressed to Rambus's primary JEDEC representative, Richard Crisp, and to avoid any question about whether Mr. Crisp in fact received the trip report, Rambus hereby moves into evidence RX2554 (copy attached), an email by Mr. Garrett sent on March 7, 1993 that is identical in all respects to CX5107, except that it is addressed to Mr. Crisp (with an apology from Mr. Garrett for leaving him off the original distribution list).

As Mr. Garrett's use of capitalization indicates, this announcement by the Chairman of the JEDEC 42.3 Committee was important confirmation for Rambus that disclosure at JEDEC meetings was *voluntary*, not required. *See generally* Initial Decision, p. 265 (finding by Judge McGuire that there is "overwhelming evidence from contemporaneous documents, the conduct of participants, and trial testimony that the disclosure of intellectual property interests was encouraged and voluntary, not required or mandatory"). In sum, the fact that Complaint Counsel can now point to additional documents showing a *question* by Rambus about whether it was obligated to disclose its intellectual property is far outweighed in importance by the new evidence that Rambus heard and understood Chairman Kelley's clear *answer* to that question.

Complaint Counsel also proffer an email by Mr. Crisp that supposedly shows his understanding that, in Complaint Counsel's words, "the JEDEC patent disclosure rule is intended to avoid antitrust problems" Motion to Reopen, p. 12, *citing* CX5113. The email by Mr. Crisp, however, discusses "RAND" licensing rather than disclosure, and it focuses on potential claims against JEDEC, not against a JEDEC member. *See* CX5113. The email is, in any event, virtually identical to an email by Mr. Crisp that was produced long ago and that is already included in the trial record, as this comparison shows:

<u>CX5113 at 1</u>	<u>CX711 at 16</u>
<p>“Really the major reason for the policy they have in place is that if they were to standardize something that has a patent on it and the patent is necessary to build the device and the patent holder decides to not license certain companies, then they potentially have an antitrust situation on their hands.”</p>	<p>“Micron says the policy exists due to anti-trust concerns. That if a group of companies wanted to keep out competition they could agree amongst themselves to standardize something that is patented and not license those that they do not want to compete with.”</p>

The Crisp email (CX 5113) is therefore cumulative and should not be admitted.

B. Complaint Counsel Have Not Met Their Burden With Respect To The Privilege Log (CX 5117), And It Should Not Be Admitted Into The Record.

Complaint Counsel request that the Commission reopen the record to admit a privilege log provided by Rambus to Complaint Counsel describing certain documents found on the backup tapes that have been withheld from production on privilege grounds. Complaint Counsel offer no explanation in their motion for this request. There is no reason why the privilege log itself is relevant here, and there is no reason to believe that the privileged documents would be harmful to Rambus’s position or helpful to Complaint Counsel’s case. Moreover, Complaint Counsel could not argue that any alleged destruction of *privileged* documents would support an inference that documents were

destroyed to prevent their use in future litigation. Surely Rambus could not have predicted back in 1998 that its attorney-client privileges would someday be pierced by a federal judge, so that documents ordinarily protected from discovery would become available to its litigation opponents and therefore needed to be destroyed. The privilege log (CX 5117) should not be admitted.

C. **Complaint Counsel's Continued Assertions Regarding The Alleged Prejudice To "A Full And Fair Administrative Litigation" Are Unsupported By The Evidence And Wrong.**

Complaint Counsel use their motion to reopen the record, and the largely speculative "timeline" attached to it, as vehicles for restating their argument that Rambus's document retention policy somehow prejudiced the Commission's "efforts to conduct a full and fair administrative litigation." Motion to Reopen, p. 18.

Complaint Counsel's argument is both irrelevant to the Motion to Reopen and entirely false. Complaint Counsel's failure to meet their burden of proof on numerous essential elements of their claims against Rambus could not have been caused in any way by Rambus's alleged destruction of documents. For example:

- Nothing that might have once existed in Rambus's files could have had any effect on Judge McGuire's finding that JEDEC members were not required to disclose patent applications or an intention to file or amend patent applications. Initial Decision, ¶¶ 772-774 and pp. 269-270. This finding was largely based on "clear and unambiguous official statements of policy" from

JEDEC's files and on Judge McGuire's determination that "after-the-fact testimony of interested witnesses" was not credible. *Id.*

- Nothing that might have once existed in Rambus's files could have had any effect on Judge McGuire's finding that "the disclosure of intellectual property interests [by JEDEC members] was encouraged and voluntary, not required or mandatory." Initial Decision, p. 265. This finding was largely based on "the manuals which discuss the patent policy, a March 1994 memorandum by JEDEC's secretary, the EIA's comments to the FTC in connection with the *Dell* consent decree, JEDEC's internal memoranda, the ANSI patent policy guidelines, the actions of other JEDEC members in not disclosing patents and JEDEC's reaction thereto, the ballot for voting on technology, and the patent tracking list," all of which constituted "evidence that disclosure of intellectual property under the EIA/JEDEC patent policy was not mandatory." *Id.*
- Nothing that might have once existed in Rambus's files could have had any effect on Judge McGuire's finding that intellectual property disclosures by JEDEC members were "not expected until formal balloting" or his finding that "many of the presentations relied upon by Complaint Counsel never were balloted at JEDEC. . . ." Initial Decision, pp. 273-274. These findings were largely based on JEDEC's own official minutes and the testimony of JEDEC Council Chairman Gordon Kelley. *Id.*, ¶¶ 783-785 and pp. 273-274.

- Nothing that might have once existed in Rambus’s files could have had any effect on Judge McGuire’s determination that Complaint Counsel had failed to demonstrate that amendments to broaden the claims contained in patent applications were improper, either under patent law or EIA/JEDEC rules. Initial Decision, p. 331.
- Nothing that might have once existed in Rambus’s files could have had any effect on Judge McGuire’s finding that JEDEC standardization is neither necessary nor sufficient to ensure that a technology or feature achieves marketplace success. Initial Decision, ¶¶ 1037-1048 and pp. 302-303.
- Nothing that might have once existed in Rambus’s files could have had any effect on Judge McGuire’s finding that JEDEC would not have adopted alternative, unpatented technologies if Rambus had made the disclosures suggested by Complaint Counsel. Initial Decision, pp. 319-323.
- Nothing that might have once existed in Rambus’s files could have had any effect on Judge McGuire’s finding that Complaint Counsel had not shown that DRAM manufacturers were presently “locked in” to the use of the Rambus technologies. Initial Decision, ¶¶ 1582-1664 and pp. 326-328.

In sum, Rambus’s allegedly improper document destruction did not affect and could not have affected Complaint Counsel’s ability to meet their burden of proof on numerous essential elements of their claims. The Initial Decision was entirely correct in

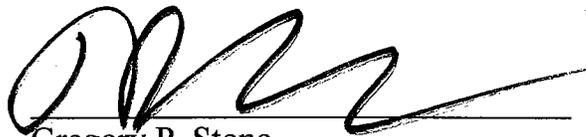
its holding that “the process here has not been prejudiced” by Rambus’s alleged destruction of documents. *Id.*, p. 244.

III. CONCLUSION.

For all of the foregoing reasons, Complaint Counsel’s motion should be denied.

DATED: October 11, 2005

Respectfully submitted,



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Attorneys for Respondent Rambus Inc.

From: garrett (Billy Garrett)
Sent: Friday, March 05, 1993 11:15 AM
To: crisp (Richard Crisp)
Subject: Jedec Notes (forgot to put you on the original dis. list sorry!)

Trip report from JEDEC 3/3 and 3/4

Probably the most interesting thing I heard was from two people from Mosel/Vitellic (John Fulton, Senior Director of Sales and Rajit Shah, director of Marketing). They are doing a 4M SDRAM with "graphics features". It will likely run at 75MHz, but they want to get to 100MHz. It will be by 16. As for graphics features, I assume many of the VRAM features, without the SAM port (or silicon). [Write per bit, block-writes, etc.]

This part will likely have good performance and be very good for graphics. A 4M VRAM has 50MB/Sec on the Parallel port and 100MB/Sec on the Serial port. Users only need about 50MB/Sec on the serial port. The SDRAM would likely cost less and provide about the same functionality as VRAM without the serial port. Unless they get above 100MHz, performance will be about the same.

JEDEC is not currently working on this part, users are asking for it and companies like Vitelic are going to supply it. I overheard a conversation where Vitelic was making a sweep next week talking to DEC, Number 9, Tseng Labs, ATI, Matrox, etc. It will be interesting to see if we can get a copy of their presentation to one of the above the following week.

What will help us most with customers to counter this part will be
1) to have parts running at full speed in a demonstrated system and
2) established market pricing in line with what we have been saying.

Another interesting thing came from IBM re:patent policy. They will NOT discuss patents in JEDEC. If they were to notify the committee about some patents, then people could argue that other patents may not apply (since IBM did not submit that patent). If they bring up someone else's patent, then someone could argue that IBM gave validity to the claims in that patent since they brought it up. Therefore, they will not discuss patents that they have, or are in process nor will they acknowledge anything about anyone else's patent. This is not against JEDEC rules. The rules ask members to make the committee aware of any patents they may relate to standardization issues, and let everyone else know about them.

IT DOES NOT REQUIRE YOU TO DO SO. IBM chooses not to do so.

Howard Susman did not attend, but Desi was there and now with VTI (VLSI technology). Howard voted, and sent in comments.

Most SDRAM issues have been settled and are being forwarded to council for approval (only one issue: the state diagram, remains).

It is felt that council will have substantial editorial comments, but they feel that by getting it to council in May, they will have time to resolve the issues and get it passed by September.

The committee will also prepare a press release on the finalization of the Sync DRAM standard. I think we should make some public comments on it as soon as it becomes public.

Discussions have started on Sync VRAMs (proposal from Toshiba for a 8M part, 120 pins!). They are starting on 64Mb SDRAM proposals, pin count, number of banks (54 pins, 4 banks).

The current SDRAM "specification" exists as a collection of 15 or more "ballots", each

standardizing one item at a time. There is a standard on package type (44 pin TSOP II) for the x8,x9 device and one for the x4 (note that there is not one for the x16). Anyway, it is hard for me to tell what this will become, since I do not have copies of all the existing ballots (I did not attend all the meetings). JEDEC does not, as of yet, have a single specification that can be handed out. It does cover a wide variety of possible implementations (like one or more banks).

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CERTIFICATE OF SERVICE

I, Helena T. Doerr, hereby certify that on October 11, 2005, I caused a true and correct copy of the *MEMORANDUM BY RESPONDENT RAMBUS INC. IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO REOPEN THE RECORD TO ADMIT DOCUMENTS FROM RAMBUS'S BACK-UP TAPES* to be served on the following persons by hand delivery:

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