UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Public

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

COMPLAINT COUNSEL'S MOTION TO STRIKE RAMBUS INC.'S JOINDER IN COMPLAINT COUNSEL'S REQUEST FOR ORAL ARGUMENT ON THE MOTION FOR DEFAULT JUDGMENT

On December 20, 2002, Complaint Counsel filed a Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence, in which it explicitly requested to be heard in oral argument. Shortly thereafter, Rambus filed a motion seeking leave for a two-week extension of time within which to file an opposition to the motion for default judgment. Complaint Counsel did not oppose this motion for leave, which Your Honor subsequently granted. Thereafter, on January 13, 2003, Rambus filed its opposition. In that opposition, Rambus said nothing regarding Complaint Counsel's request for oral argument. On January 16, 2003, after conferring and reaching agreement with counsel for Rambus, Complaint Counsel filed an unopposed motion seeking leave to file a reply brief, not to exceed 15 pages, in support of the default judgment motion. Your Honor granted that motion, and – consistent with Your Honor's ruling – Complaint Counsel's 15-page

reply was filed last Friday, January 24. In its reply, Complaint Counsel renewed its request for oral argument, but deferred to Your Honor as to whether oral argument would be helpful in resolving the motion.

Without conferring with Complaint Counsel, yesterday, January 29, 2003, Rambus filed a pleading styled as "Rambus Inc.'s Joinder in Complaint Counsel's Request for Oral Argument on the Motion for Default Judgment." In this pleading, which was filed without leave or even a request for leave, Rambus does much more than simply join in Complaint Counsel's request for oral argument on the default judgment motion. Indeed, it would appear that the primary purpose served by Rambus's "Joinder" is to belatedly supplement the arguments contained in Rambus's January 13 opposition to the motion.

Complaint Counsel is pleased that Rambus now concurs in the request for oral argument on this important dispositive motion. On the other hand, Complaint Counsel objects to the fact that Rambus, without conferring with Complaint Counsel or seeking leave from Your Honor, has taken the liberty to supplement its opposition to Complaint Counsel's motion fully 16 days after its opposition was due to be filed. Complaint Counsel finds this particularly inappropriate considering that Complaint Counsel, in late December, agreed not to oppose Rambus's request for an additional two weeks (beyond what the Commission's rules would normally allow) within which to file its opposition. Further, Complaint Counsel would note that the memorandum supporting its original motion was 109 pages in length, yet Rambus's opposition, filed January 13, consumed only 27 pages. Virtually all of the points made in Rambus's January 29 "Joinder" could have been made in Rambus's January 13 opposition to the default judgment motion, but were not. For instance, in a bullet-point paragraph on page 3 of the

wishes to file a new, revised pleading calling that decision to Your Honor's attention and briefly explaining, as it already has in the "Joinder," how it believes this new information may be relevant to the default judgment motion, Complaint Counsel would have no objection to this, provided that it has an opportunity to respond. (The proposed order contemplates that both sides would be permitted to file pleadings, not to exceed five pages, addressing the relevance, if any, of the Federal Circuit's decision to the pending motion for default judgment.)

Complaint Counsel does, however, strongly disagree that the Federal Circuit's decision favors Rambus's opposition to default judgment, or for that matter that the decision has any direct bearing on the issues presented in the default judgment motion. In fact, the only thing contained in the Federal Circuit decision that relates to the default judgment issue is this: The Federal Circuit acknowledges, at pages 38-40 of the majority decision, that Rambus never appealed Judge Payne's finding that in mid-1998 Rambus "implemented a 'document retention policy,' in part, for the purpose of getting rid of documents that might be harmful" in anticipated future litigation – that is, the litigation Rambus expected would ensue when it began "demand[ing] royalties from semi-conductor manufacturers" based on its previously undisclosed "JEDEC-related patents." *Rambus, Inc. v. Infineon Technologies*, 155 F. Supp. 2d 668, 682-83 (E.D. Va. 2001) (emphasis added). Nor did Rambus ever appeal Judge Payne's conclusion that this willful, bad-faith document destruction constituted "litigation misconduct," which materially affected the trial in that case by leaving an evidentiary record that "omitted the documents that revealed, or pointed the way to, the truth." *Id.* at 683 (emphasis added). *See* Memorandum in Support of Complaint Counsel's Motion for Default Judgment Relating to Respondent

Respectfully submitted,

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