UNITED STATES OF AMERICA

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Rambus Inc. ("Rambus") and third-party witness Richard Crisp respectfully submit this memorandum in opposition to Complaint Counsel's Motion to Compel an Additional Day of Deposition Testimony of Richard Crisp (hereinafter "Motion To Compel").

Complaint Counsel's Motion To Compel has virtually nothing to do with the issue of whether Mr. Crisp should be forced to sit for another day of de Respo025 0estiouIncsel's

ordinarily reserved for closing arguments in jury trials, Complaint Counsel also call Mr. Crisp "a central figure in the overall scheme of deception and concealment through which Rambus consciously subverted the JEDEC standardization process. . . ." Motion To Compel, p. 1. Complaint Counsel then devote a dozen or more pages to a description of various documents authored or received by Mr. Crisp that supposedly "illuminat[e]" the "illegitimate nature" of Mr. Crisp's conduct, even though Complaint Counsel (eventually) concede *that they have already questioned Mr. Crisp about these documents*. Motion To Compel, p. 17.[2]

Why do Complaint Counsel spend so much time describing documents that they have already used with Mr. Crisp? Two reasons: (1) a motion to re-open discovery that sought simply "to question Mr. Crisp with respect to other [unidentified] topics," *see* Motion To Compel, p. 8, would likely be summarily denied; and (2) such a motion would present little opportunity to paint Mr. Crisp and Rambus as "illegitimate."

As discussed in more detail below, Complaint Counsel's motion to compel should be denied, for it does not make the substantial showing required to re-open discovery or to force a third party witness to undergo an additional day of questioning. In addition, and as also set out in more detail below, Complaint Counsel's descriptions of the so-called "newly produced" documents are highly misleading and depend upon the omission

[2] It was an unfortunate oversight by Complaint Counsel when on page 2 of their motion, at the first mention of the "newly produced [and] significant documents. . . authored by Mr. Crisp," they asserted that "Mr. Crisp has never been questioned" about those documents, using the present tense. Motion To Compel, p. 2. Not until page 8 does the reader learn that Complaint Counsel in fact *did* question Mr. Crisp for hours on end about the documents described in the motion. *Id.*, p. 8.

2. Complaint Counsel's Unspecified Need To Ask Questions About "Other Topics" Does Not Outweigh The Burden That An Additional Day Of Questioning Would Impose On Mr. Crisp.

Complaint Counsel tell Your Honor several times that the *only* reason stated by Rambus's counsel for not agr

new job, and in light of the fact that [he] previously has been deposed for eight days and also testified in the *Infineon* trial, Mr. Crisp will agree to appear for only one day of deposition." *Id*., ¶ 6, ex. A. Complaint Counsel offer no explanation for their failure to depose Mr. Crisp regarding these documents last fall or for their failure to bring this motion promptly upon learning of the one-day limitation.[4]

B. Complaint Counsel's Motion Inaccurately Describes The Contents And Meaning Of The Documents Described Therein.

As noted above, Complaint Counsel devote the bulk of their motion to a description of documents produced last summer by Rambus to Micron, Hynix and the FTC. Complaint Counsel's apparent purpose in describing these documents is to convince Your Honor that Rambus had, until recently, hidden this evidence of purported wrongdoing. The problem is that the documents contain *no* evidence of wrongdoing. In particular, the documents offer no support for Complaint Counsel's contention that Rambus deliberately chose to violate JEDEC's patent policy or engaged in any other misconduct.

As an example, Complaint Counsel describe a September 23, 1995 e-mail as "add[ing] important new information" regarding Rambus's decisions about what to

[4] It is true that Mr.

disclose at JEDEC meetings. Motion to Compel, p. 9. Complaint Counsel then quote a passage from that September 23, 1995 e-mail that states that when Rambus first joined JEDEC, [redacted] Motion to Compel, p. 10. The ellipsis was placed in the quote by Complaint Counsel. The full passage is set out below:

[redacted]

Motion to Compel, Tab 8 (omitted language in italics).[5]

There is absolutely nothing anticompetitive about the motivations expressed in this passage from Mr. Crisp's e-mail. Indeed, they are the *very same* motivations that caused other JEDEC members, such as IBM and Hewlett-Packard, to make the same decision regarding disclosure. Hewlett-Packard's long-time JEDEC representative (and committee chair), Hans Wiggers, explained in his deposition that *both* companies had taken the position that they would not disclose patent applications:

> "Q. Do you remember anything that Gordon Kelley ever said about IBM's position with respect to the JEDEC patent policy?
>
> * * *
>
> A. . . . Jim Townsend had invited a lawyer from a firm that I don't remember to give us a presentation after the

[5] This brief contains some portions of documents designated by one or more parties as "Confidential" or "Restricted Confidential" under the Protective Order in this case. A copy of said Protective Order is attached hereto.

> regular session to talk about patents. Okay. That is – and I'm – I'm not sure whether this all happened the same meeting or not, but there – the following discussions came up there. Gordon Kelley said 'Look. I cannot disclose – my company would not let me disclose all the patents that IBM is working on because, you know, I just can't do that. The only thing we will do is we will follow the JEDEC guidelines and – or rules on whatever and we will make them available.'
>
> And I piped up at that point and said 'The same is true for HP.'
>
> * * *
>
> Q. Okay. Did Mr. Townsend [the JC 42 committee chairman] have any response when you and Mr. Kelley talked about what your company's positions were?
>
> A. I think he just took it as – I don't know that he had a particular response to that. I think everybody – my impression was that everybody thought that that was a reasonable position to take. We could not even know all the patents that people in our companies were working on. And if we did know it, we certainly were not in a position to divulge that to anybody.

Perry Decl., Ex. C (Wiggers 12/18/02 Dep. at 57-58, 60).

In other words, Mr. Crisp's September 1995 e-mail and its reference to patent applications as [redacted] are entirely consistent with the approach taken by IBM and Hewlett-Packard. These prominent JEDEC members believed that disclosure of patent applications was voluntary rather than mandatory, and "everybody thought that that was a reasonable position to take," for the very reasons described in Mr. Crisp's September 1995 e-mail. *Id*.

Complaint Counsel take the same "redact the parts we don't like" approach to a December 1995 e-mail that they describe as a "follow-up" to Mr. Crisp's September 1995

e-mail. Complaint Counsel quote a portion of the December e-mail that says [redacted] Motion to Compel, pp. 10-11; Tab 13 at p. R69698. The full passage, however, shows that Mr. Crisp was (as he has testified) talking about the obligations of a company that is *presenting* its technology for JEDEC standardization – something Rambus was *considering* but never did:

[redacted]

(Fed Cir. 2002). As one treatise recently explained, this is "standard practice:"

DATED: March __, 2003 Respectfully submitted,

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