PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

REPLY MEMORANDUM BY RESPONDENT RAMBUS INC. IN SUPPORT OF MOTION FOR SUMMARY DECISION

I. INTRODUCTION

Respondent Rambus Inc. ("Rambus") submits this reply memorandum in support of its motion for summary decision. Rambus will address four principal points in this reply: (1) Complaint Counsel's belated efforts to amend the core allegations of the Complaint have no legal effect and must be ignored; (2) even if Complaint Counsel were correct that they need not show a violation of JEDEC's patent policy to prevail, Rambus is still entitled to partial summary decision on the question of whether the JEDEC patent policy was suffi INTRODUCTION(35 0 TD 0 Tc -0.1875 Tw ( ) Tj 3 0 TD 0.1278 Tc -0.11Tw (Nulo

Rambus's conduct was supposedly "unethical" and "exud[ed] bad faith." *Id*., pp. 12, 22.

This new theory of liability would surprise Judge Timony and the Commission, as it did Rambus. In November 2002, in language almost identical to that in Rambus's motion for summary decision, Judge Timony described the Complaint in this way:

> "The Complaint's *core allegation* is that, through omissions, Rambus intentionally misled the members of JEDEC with regard to the possible scope of Rambus's pending or future patent applications, *in violation of the purported JEDEC patent disclosure policy*. Complaint at ¶¶ 2, 47-55, 70-80. According to the Complaint, had Rambus made the allegedly necessary disclosures, JEDEC could have adopted alternative technologies and avoided Rambus's patented technologies. Complaint at ¶¶ 62, 65, 69. These allegations raise *three fundamental issues: (1) whether the JEDEC disclosure duty is as broad and comprehensive as alleged in the Complaint; (2) whether Rambus actually violated any such duty to disclose imposed by JEDEC rules;* and *(3) whether the alleged failure to disclose was material and caused the competitive injury alleged in the Complaint*."

Opinion Supporting Order Denying Motion by Mitsubishi to Quash or Narrow Subpoena, filed November 18, 2002, p. 4 ("Mitsubishi Op.") (emphasis supplied).

Judge Timony thus clearly understood – as did Rambus – that the Complaint's "core allegation" was that Rambus had violated the JEDEC patent policy, and that two "fundamental issues" were: (1) the scope of the JEDEC disclosure policy and (2) whether Rambus had violated that policy. *Id*. Complaint Counsel said nothing at the time to disabuse Judge Timony of what they would now call "an exceedingly narrow and plainly inaccurate" description of the Complaint. They did not "correct" him because his description was entirely accurate, as Commissioner Muris's September 2002 testimony to Congress – on behalf of the Commission – makes clear:

> "Standards Setting. As technology advances, there will be increased efforts to establish industry standards for the development and manufacture of new products. While the adoption of standards is often procompetitive, the standards setting process, which involves competitors meeting to set product specifications, can be an area for antitrust concern. In a complaint filed in June, the Commission has charged that Rambus, Inc., a participant in an electronics industry standards-setting organization, failed to disclose – *in violation of the organization's rules* – that it had a patent and several pending patent applications on technologies that eventually were adopted as part of the industry standard."

Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary, Subcommittee on Antitrust, Competition and Business and Consumer Rights, United States Senate, Concerning an Overview of Federal Trade Commission Antitrust Activities, 2002 FTC LEXIS 53 at *29-30 (September 19, 2002) (emphasis supplied).

It is the Commission, not Complaint Counsel, that has "the authority to frame the charges" in a Part III proceeding. *Capital Records Distributing Corp.*, 58 F.T.C. 1170 (1961). In *Champion Home Builders Co.*, 99 F.T.C. 397 (1982), for example, the Complaint alleged that the respondent had failed to disclose material facts to purchasers of its furnaces. Complaint Counsel tried later to argue that respondent had also failed to disclose certain safety hazards, contending, as here, that the Complaint had only "enumerated . . . examples, not an exhaustive list," of misrepresentations. *Id*. The Commission disagreed and held that "[w]here a proposed amendment alters the 'underlying theory' of the original complaint, . . . the Commission must make the determination whether to amend the complaint because only the Commission is authorized to determine whether there is reason to believe that the law has been violated

listing may be construed as complete," Declaration of Steven M. Perry ("Perry Decl."), ex. 20, or that Hewlett-Packard and Motorola did, or did not, violate the patent policy when they took the position that patent applications were "company confidential" information that need not be disclosed to JEDEC. *Id*., exs. 23-24. Rambus also does not ask Your Honor to hold as a matter of law that the FTC is bound by its own acknowledgment in July 1996 that the EIA's Legal Guides, which governed JEDEC meetings, "*encourage* the early voluntary disclosure of patents, but do not *require* a certification by participating companies regarding potentially conflicting patent interests." *Id*., ex. 29. Similarly, Rambus does not ask Your Honor now to hold that the minutes of the February 2000 meeting of the JEDEC Board of Directors, which state that the disclosure of patent applications goes "one step beyond the patent policy" and that disclosure of patents "cannot be required of members at meetings," *id*., ex. 27, are binding on JEDEC as an official statement of its policy.

Instead, Rambus's motion relies upon the overwhelming evidence that the disclosure obligations that are described in the Complaint are not to be found anywhere in writing, were not communicated to JEDEC members at meetings, and were not consistently enforced by JEDEC nor clearly understood by many of its members. Rambus's motion relies upon that evidence – little of which is disputed by Complaint Counsel – I1

Rambus Inc. v. Infineon Technologies AG, 318 F.3d 1081, 1102 (Fed. Cir. 2003) ("[T]here is a staggering lack of defining details in the EIA/JEDEC patent policy. . . . A policy that does not define clearly what, when, how, and to whom the members must disclose does not provide a firm basis for the disclosure duty necessary for a fraud verdict.").

They rely on pages 851-853 of Crisp's 8/10/01 deposition in the *Micron* case, where Mr. Crisp testified that he believes that he saw JEDEC Manual 21-I, and its reference to "pending patents," in 1995. *Id*., pp. 81-82. Complaint Counsel *leave out the very next page* in the transcript, where Crisp describes that he *also* received the *Members' Manual* at the same time and that he concluded, after reviewing *both* manuals, that as the *Members' Manual* expressly stated, only *presenters* were obligated to disclose patent applications. The missing page is attached as Attachment A.

Rambus could have affected "JEDEC's determination" only if it affected the perceptions and understandings on the basis of which JEDEC made its determination. There is no other mechanism by which the alleged lack of disclosure could have affected that determination. Reliance on the alleged lack of disclosure is thus a necessary step in the chain of causation that Complaint Counsel must prove, as Judge Timony recognized in a prior ruling: "[i]f JEDEC participants were aware that Rambus might obtain patent claims covering technologies being incorporated into the JEDEC standard, Rambus's alleged failure to disclose would be immaterial." Mitsubishi Op., p. 4. *See generally Hardee's of Maumelle v. Hardee's Food Systems, Inc*., 31 F.3d 573 (7th Cir. 1994) (reliance supplies "the causal link" between defendant's omission and plaintiff's harm).

Complaint Counsel attempt to confuse this straightforward issue with quotations from inapplicable cases. Complaint Counsel argue that they need show only that the lack of disclosure was a "material cause" of JEDEC's decision, Opp., p. 95, and that they "need not exhaust all possible alternative" causes. *Id*. But the cases they cite are addressed to the very different issue that arises when a plaintiff proves that the defendant's conduct in fact contributed to the outcome at issue and the defendant defends on the ground that other factors (what Complaint Counsel and the cases they cite call "alternative sources of injury") also contributed to that outcome or injury. Under those circumstances, the cited cases say that it is enough that the defendant's conduct in fact made a "material" contribution to the injury, even if other factors might also have contributed to it. *See Zenith Radio Corp v Hazeltine Research, Inc.*, 395 U.S. 100 (1969) (Zenith can obtain relief under antitrust laws if illegal restraints in patent pool excluded it

from Canadian market even though other factors might also have impaired its success there); *Law v. NCAA*, 5 F. Supp. 2d 921, 927 (D. Kan. 1998) (once plaintiffs prove defendant's illegal conduct was a material cause of "some" of their injury, the fact that there might also have been other causes goes to remedy).

In sum, none of the cases cited by Complaint Counsel stands for the proposition that they can *dispense* with proving an essential step in the causal connection between the conduct they complain of and the injury they allege; to the contrary, the case law requires Complaint Counsel to prove all such steps in order to establish that the alleged "lack of disclosure" was in fact "a material cause" of "JEDEC's determination." *See generally Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1070-71 (Fed. Cir.1998) (antitrust claim based on fraudulent omission or misrepresentation must include a "clear showing of reliance").

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was Fujitsu's December 1996 "first showing" on DDR SDRAM, which occurred more than a year after Rambus had attended its last JEDEC meeting. Complaint Counsel do not contend that Rambus owed any disclosure obligations to JEDEC after it had withdrawn as a JEDEC member. Thus, to avoid summary decision as to DDR SDRAM, Complaint Counsel were required to produce admissible evidence showing either that the JEDEC disclosure duty was triggered at some point prior to formal proposal of a standard, or that features of the DDR SDRAM standard that were covered by Rambus's patents were formally proposed for standardization before Rambus left JEDEC. Complaint Counsel fall far short of establishing a triable issue of fact on either point.

On the issue of when the JEDEC disclosure duty was triggered, Rambus relied on the testimony of the Chairman of JEDEC 42.3, Gordon Kelley, who stated without qualification that the duty to disclose was triggered only during the formal balloting of a proposed standard. Perry Decl., ex. 16. Complaint Counsel cite exactly *one* piece of evidence in an attempt to show that the duty to disclose was triggered at some earlier point in time: additional testimony from Mr. Kelley himself explaining what his *own* practice was, as IBM's JEDEC representative. Mr. Kelley testified that "Usually what happened – and *I'm thinking of my own instances that happened when I recognized* that a new proposal was going to be impacted by a patent that IBM held that I was aware of, and *I* would then make the committee aware of that as soon as I knew that." *Id.* (emphasis added). Complaint Counsel falsely portray this testimony as a general comment on the "usual practice" at JEDEC (Opp., p. 109), but Mr. Kelley clearly distinguished in his testimony between what his own *personal* practice was as a JEDEC

motion with respect to the DDR SDRAM standard, Complaint Counsel hope to persuade Your Honor that the rulings are "only marginally relevant to the issues here." Opp., p. 116. The three bases Complaint Counsel offer to support this argument reveal just how little remains of Complaint Counsel's case in the wake of the *Infineon* decision.

First, Complaint Counsel contend that "the ruling involved a different issue of law" – namely, whether the elements of a fraud claim rather than an antitrust claim had been established. Opp., p. 116. However, this motion turns on whether there is any triable issue of *fact* as to when the JEDEC disclosure duty *was triggered* with respect to the DDR SDRAM standard. Both the district court and the Federal Circuit ruled decisively that any such disclosure duty was not triggered until December 1996, long after Rambus had left JEDEC. That factual issue is an essential predicate of both the fraud claim in *Infineon* and the antitrust violations Complaint Counsel have alleged here.[6]

Second, Complaint Counsel assert that the *Infineon* courts' rulings were rendered on "a more limited factual record" than is available here. Opp., p. 116. But Complaint Counsel do not point to any new evidence that calls into question the soundness of those rulings. Judge Payne considered many of the same pre-December 1996 presentations Complaint Counsel rely on (Opp., pp. 111-14) and concluded that they either "took place in relation to the *SDRAM* standardization effort, not to the *DDR SDRAM* standard," or

[6] Complaint Counsel attempt to escape the *Infineon* holding by again asserting (erroneously) that their case does not hinge on proof that Rambus violated JEDEC's disclosure rules. Opp., p. 116 & n.95. Even if that assertion were timely and did not impinge on the Commission's authority to frame the Complaint, Rambus would still be entitled to partial summary decision on the issue framed by its motion: whether Rambus violated any JEDEC disclosure duty with respect to the DDR SDRAM standard. At a minimum, the Court should remove *that* issue from this case.

evidence introduced at trial in *Infineon*, and the evidence produced here, demonstrates unequivocally that JEDEC's disclosure duty was not triggered with respect to the DDR SDRAM standard until December 1996 at the earliest, and that Rambus had left JEDEC well before then. Thus, regardless of whether the applicable burden of proof is a preponderance of the evidence or a "clear and convincing" standard, Complaint Counsel have not shown that a triable issue of fact exists on the issue whether Rambus violated JEDEC's disclosure rules with respect to the DDR SDRAM standard. Accordingly, the Court should grant partial summary decision for Rambus on this issue.

III. CONCLUSION

For all of the foregoing reasons, Rambus's Motion for Summary Decision should be granted.

DATED: April __, 2003 Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on April 7, 2003, I caused a true and correct copy of the *Reply Memorandum by Respondent Rambus Inc. in Support of Motion for Summary Decision* to be served on the following persons by hand delivery:

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	)	

CERTIFICATION

I, Jacqueline M. Haberer, hereby certify that the electronic copy of the *Reply Memorandum by Respondent Rambus Inc. in Support of Motion for Summary Decision* accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on April 7, 2003 by other means:

Jacqueline M. Haberer
April 7, 2003