

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

COMMISSIONERS: Timothy J. Muris, Chairman  
Mozelle W. Thompson  
Orson Swindle  
Thomas B. Leary  
Pamela Jones Harbour

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**PUBLIC**

**MOTION TO REOPEN THE RECORD TO INCLUDE EVIDENCE THAT CORRECTS  
MISREPRESENTATION IN ANSWERING BRIEF**

In its answering brief, Respondent Rambus Inc. (“Rambus”) misrepresented that a version of the minutes of JEDEC’s February 2000 Board of Directors meeting, from which Rambus quoted language regarding the scope of JEDEC’s disclosure policy, had been approved by the JEDEC Chairman of the Board and the General Counsel. In fact, as is made clear from two documents and portions of three deposition transcripts which Complaint Counsel seeks leave to submit, Rambus took that language from an a version of the minutes unapproved by the Chairman and the General Counsel. The version of the minutes approved by both the Chairman

and the General Counsel did not contain the language quoted by Rambus, and actually contained language contradicting Rambus's argument. Complaint Counsel respectfully request that the Commission reopen the record to include two documents and relevant pages of three deposition transcripts to correct the misrepresentation in Rambus's answering brief.

## **I. Background**

Rambus's answering brief quoted alleged meeting minutes of the February 2000 JEDEC Board of Directors meeting as stating that the disclosure of patent applications was "not required under JEDEC bylaws." Rambus Answering Brief at 19 (quoting RX1570 at 13). Rambus's brief further stated that, "the copy of the Board minutes that was received into evidence [RX1570] does show approval by Chairman Rhoden, on February 24, 2000, and General Counsel Kelly one week later, on March 1, 2000." *Id.* at 19 fn. 11 (emphasis in original).

These statements are misleading. Rambus knows full well that the version of the minutes quoted in Rambus's brief was never approved by either Chairman Rhoden or General Counsel Kelly. Rather, both Mr. Rhoden and Mr. Kelly approved a different

Chairman or the General Counsel in accordance with JEDEC procedures.

Certain facts, however, are beyond dispute. Both documentary evidence and extensive depositions conducted by counsel for Rambus in this matter confirm that the document quoted by Rambus in its answering brief was a discredited version of the minutes, prepared by Secretary McGhee, that was never approved by the Chairman or the General Counsel. Rhoden Deposition Transcript (not admitted) (Attachment C) at 90 (“This is actually not the final copy of these minutes.”); Kelly Deposition Transcript (not admitted) (Attachment D) at 22-23. The specific statement quoted in Rambus’s answering brief was recognized as being wrong. Rhoden Deposition Transcript (not admitted) at 92-93, 96-97. Contrary to the representation made to the Commission by Rambus, Chairman Desi Rhoden approved a different version of the Board minutes that specifically did not contain the language quoted in Rambus’s answering brief. CX0153g (not admitted) at 1 (“Revised from Desi 2/25/00”), 21-22; Rhoden Deposition Transcript at 90-93 (not admitted). Contrary to the representation made to the Commission by Rambus, General Counsel John Kelly approved the final version of the Board minutes that specifically did not contain the language quoted in Rambus’s answering brief. CX0153 (not admitted) at 1 (“I have approved the minutes of the 02/00 Board meeting . . .”); *id.* at 2 (“Content read and approved as complying with EIA or JEDEC Manual of Organization and Procedure, and the EIA Legal Guides . . . Approval Signature” with signature of John Kelly, dated 3/1/00); *id.* at 27; Kelly Deposition Transcript (not admitted) at 22-23 (“Q. Do you understand that this copy [CX0153, bearing sticker marked “McGhee 23”] had received all the necessary approvals and was in a form, once the handwritten changes on it had been made, to be sent out to JEDEC board members without any further correction or review? A. Yes, sir.”). Both the version of the

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Board minutes; and Complaint Counsel assumed, that in the absence of this evidence, Respondent would not misrepresent the discredited version of the minutes to the Commission.

Complaint Counsel has always contended that the probative evidence in this matter consists of the operative EIA and JEDEC documents in force while Rambus was a member (the EIA Legal Guides, the EIA Manuals and the JEDEC 21-I Manual), the means used to communicate the disclosure obligation to JEDEC members while Rambus was a member (the 21-I Manual, the Townsend presentations, the Townsend memoranda, the sign-in sheets, etc.), and the resulting understanding of JEDEC members at that time. To the extent that Rambus sought to introduce evidence concerning a discredited draft of February 2000 Board minutes as evidence of Rambus's obligation to disclose between 1991 and 1996, Complaint Counsel believed such evidence to lack probative value, but nevertheless included CX0153 and CX0153g on its exhibit list in order to permit witnesses Desi Rhoden, John Kelly and/or Kenneth McGhee to tell the full story, if necessary. Rambus questioned Messrs. Rhoden and Kelly at length without once mentioning the February 2000 Board minutes, and chose not to call Mr. McGhee as a witness. Complaint Counsel assumed that Rambus had decided not to pursue arguments based on the discredited version of minutes outside the relevant time period since the key language was contradicted by the approved version. At a minimum, Complaint Counsel assumed that, if Rambus nevertheless attempted to rely on this document, it would accurately represent that the document was not approved and the language in question was contradicted by that of the approved version. Unfortunately, Complaint Counsel did not anticipate that Rambus would imply – contrary to the facts – that Chairman Rhoden and General Counsel Kelly had approved the language in question. Under such circumstances, it is hardly lack of due diligence of

Complaint Counsel to rely on the responsibility of Rambus to accurately represent and describe evidence to the Commission.<sup>2</sup>

The evidence also satisfies the key factor in determining whether to reopen the record – it has probative value to the issue at hand. *See In re Chrysler Corp.*, 87 F.T.C. 719, 750 n.38 (1976) (admitting as probative certain television commercials “relevant to the issue of Chrysler’s use of the term ‘small car’ in advertising,”), *affirmed, Chrysler Corp. v. FTC*, 561 F.2d 357, 362-363 (D.C. Cir. 1977). Had Rambus properly described RX1570, the evidence proffered in this motion would not have been necessary. But because Rambus did not explain the background to RX1570, the evidence proffered in this motion is not only highly probative, but necessary, to correct the false impression created by Rambus about the nature and importance of this evidence.

Finally, Rambus, having both injected the February 2000 Board minutes into the briefing and – through its mischaracterization of RX1570 – created the need to reopen the record to correct the misimpressions it caused, is in no position to argue that it would be prejudiced by the introduction of the proffered evidence.

### **CONCLUSION**

For the forgoing reasons, Complaint Counsel respectfully requests that the Commission reopen the record to include CX0153, CX0153g, and Deposition Transcripts of John Kelly (2/26/03), pages 20-28 and 84-87, Desi Rhoden (1/24/03), pages 89-117, and Kenneth McGhee (2/23/03), (Attachment E) pages 82-139.

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<sup>2</sup> A ruling to the contrary would invite abuse. Because it would effectively require a litigant to anticipate, and rebut in advance, any possible misrepresentation or misuse of exhibits by its opponents, it would result in lengthier and more complex trials.

Respectfully submitted,

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July 2, 2004

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**PROPOSED ORDER**

Having considered Complaint Counsel's Motion to Reopen the Record to Include Evidence That Corrects Misrepresentation in Answering Brief, Complaint Counsel's Motion is hereby granted. Accordingly,

IT IS ORDERED THAT the record in this case be reopened and that the following be included in the record: Exhibits CX0153 and CX0153g, and the Deposition Transcripts of John Kelly (2/26/03), pages 20-28 and 84-87, Desi Rhoden (1/24/03), pages 89-117, and Kenneth McGhee (2/23/03), pages 82-139.

By the Commission.

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Donald S. Clark  
Secretary

ISSUED:



## CERTIFICATE OF SERVICE

I, Jessica Rash, hereby certify that on July 2, 2004, I caused a copy of the attached, *Motion to Reopen the Record to Include Evidence That Corrects Misrepresentation in Answering Brief w/attachments*, to be served upon the following persons:

by hand delivery to:

The Commissioners  
U.S. Federal Trade Commission  
Via Office of the Secretary, Room H-159  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

and by electronic transmission and overnight courier to:

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Jessica Rash