PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Complaint Counsel ask the Commission to reopen the record because Respondent Rambus Inc. ("Rambus") supposedly made "misrepresentations" in its answering brief regarding the minutes of the February 2000 meeting of the JEDEC Board of Directors. According to Complaint Counsel, Rambus "misrepresented" that the minutes had been approved by JEDEC's Chairman of the Board and the EIA's General Counsel. *See* Complaint Counsel's Motion To Reopen The Record ("Motion To Reopen"), p. 1.

Complaint Counsel's accusations are both inappropriate and wrong. The February 2000 JEDEC Board minutes that Rambus (and Chief Judge McGuire) cited and relied upon show the necessary leadership approvals *on their face*. *See* RX 1570 at 13 (signature blocks in electronic version of minutes showing approval by the JEDEC Chairman on February 24, 2000 and by the EIA General Counsel on March 1, 2000). Moreover, as Complaint Counsel concede, the minutes relied upon by Rambus were approved and adopted by the JEDEC Board of Directors itself. Motion To Reopen, pp. 2-3. It is undisputed that the JEDEC Board of Directors is the official governing body of JEDEC. RX 1535 at 4 (statement in JEDEC Bylaws that "[t]he Board of Directors is the ypon bysur(bo

statement. Tr. 186:14-25. When Rambus subsequently moved the February 2000 Board minutes into evidence, Complaint Counsel posed no objection and offered no alternative versions of those minutes. Rambus also quoted the February 2000 Board minutes in its proposed findings of fact, in its reply to Complaint Counsel

the requirements of due process – to insert into the record several lengthy deposition excerpts from witnesses who were available to testify or who did testify at trial, as well as documents that were available to Complaint Counsel prior to trial. For the reasons set out in this brief, Complaint Counsel's motion to reopen should be denied.

II. ARGUMENT

A. The *Brake Guard* Criteria

Complaint Counsel concede that they must demonstrate each of the following in connection with their motion to reopen the record: (1) that they exercised due diligence with respect to the proffered evidence; (2) that the evidence is probative; (3) that the evidence is not cumulative; *and* (4) that Rambus would not be prejudiced by its belated admission. Motion To Reopen, p. 4, *citing Brake Guard*. While the third factor is not implicated here, Complaint Counsel have failed to meet their burden as to each of the other three factors, and their motion must necessarily be denied.

B. Complaint Counsel Cannot Show Due Diligence

Complaint Counsel acknowledge that at trial, they made a *deliberate* decision to avoid any issues surrounding the February 2000 Board minutes. Motion To Reopen, pp. 4-5. Complaint Counsel nevertheless ask the Commission to relieve them of the consequences of their decision because, they say, they were not aware that Rambus would raise issues relating to the February 2000 Board minutes and that it would supposedly "misrepresent" the evidence on those issues. *Id*.

Complaint Counsel's attempted explanation for their failure to offer the proffered evidence at trial has no factual basis. Complaint Counsel were well aware of Rambus's position with respect to the February 2000 Board minutes from the very outset of trial. In his opening statement, Rambus's counsel displayed the relevant passage from the minutes and read portions of the minutes to the Court:

> "This is a meeting of the JEDEC board of directors, February of 2000, the Sheraton Safari Hotel in Orlando, Florida, and

included them in the parties' exhibit stipulation had they chosen to do so. *Id*. Moreover, after Secretary McGhee's email was admitted in evidence as RX1582, Rambus introduced the following depo

In short, because "[t]here is no question that [counsel] were on notice" of the issues in question, *Brake Guard*, 1998 FTC LEXIS 184 at *47, and chose not to offer the evidence at trial, Complaint Counsel's motion to reopen the record should be denied.

C. The Proffered Evidence Is Not Probative

Complaint Counsel have also failed to meet their burden of showing that the proffered evidence is probative. First, the proffered deposition testimony is simply inadmissible. The Rules of Practice explicitly bar the introduction of deposition testimony taken from third party witnesses in the absence of the witness's death or unavailability. 16 C.F.R. 3.33(g)(iii). Messrs. Rhoden, Kelly and McGhee were all available to testify at trial; the first two witnesses *did* testify. The Rules of Practice thus bar the admission into the record of their deposition testimony. *Id.*[3]

The proffered testimony also lacks probative value because it is inconsistent with the contemporaneous documents. Complaint Counsel offer the testimony of Messrs. Rhoden and Kelly to show that the statement in the Board minutes that Rambus and Judge McGuire cite – that the disclosure of patent applications was "not required under JEDEC bylaws" – was simply a drafting error and that the Board had not discussed a disclosure requirement. Motion To Reopen, pp. 2-4. Complaint Counsel's motion nowhere addresses, however, the *contemporaneous* evidence of the JEDEC Board's February 2000 discussion that is in the trial record. As noted above, on

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made in every case to justify a litigant's deliberate choice to withhold evidence until after an adverse Initial Decision issued.

[3] Although the Rules of Practice do allow the introduction of third party deposition testimony in "exceptional circumstances," *see* C.F.R. 3.33(g)(iii)(E), Complaint Counsel have not attempted to argue that such circumstances exist, nor could they. In interpreting the identical language in Rule 32(a)(3)(E) of the Federal Rules of Civil Procedure, the courts have held that the phrase "exceptional circumstances" must refer to a reason why the deponent cannot appear at trial, rather than to the prejudice that would supposedly result if the testimony were not admitted. *Angelo v. Armstrong World Industries, Inc.*, 11 F.3d 957, 963 (10th Cir. 1993).

February 11, 2000, only a few days after the Board meeting, JEDEC Secretary and Board meeting participant Ken McGhee sent an email to numerous JEDEC committee members that stated that the "BoD" had discussed the disclosure issue at its February meeting and that a member that had disclosed a patent application had gone "one step beyond" the patent policy. RX 1582 at 1. The record also contains a draft of the February 2000 Board minutes that bears the handwritten notations of longtime JEDEC consultant Dr. Frank Stein, who was present at the Board meeting. Dr. Stein's notes show that he reviewed the passage at issue and suggested *only* that the word "that" be changed to "this." RX 1576 at 18.

This contemporaneous written evidence of the Board's discussion, prepared by meeting participants in their official capacity at the time of the Board meeting, is far more probative than the after-the-fact deposition testimony now belatedly offered by Complaint Counsel. *See*

the minutes *accurately reflected* the Board's discussion, as the contemporaneous email by Secretary McGhee shows. The statement in the Board minutes that disclosure of patent applications was "encourage[d]" but not "required" is also consistent with, and corroborated by, other record evidence, including:

- General Counsel Kelly's January 1996 letter to the Commission, which states that the EIA "encourages" the "voluntary" disclosure of relevant patents (RX 669 at 3);
- Secretary Clark's July 1996 response to Kelly's letter, which acknowledges both that the EIA encourages "voluntary" patent disclosure and that it does *not* "require a certification by participating companies regarding a potentially conflicting patent interest" (RX 740 at 1);
- JEDEC Manual 21-H, which was in effect when Rambus joined JEDEC *and* when the SDRAM standard was adopted, which states that "JEDEC standards are adopted without regard to whether or not their adoption may involve patents on articles, materials or processes" (CX 205A at 11); and
- the December 1993 JEDEC DRAM committee meeting minutes, which reflect the statement by the Committee Chairman that his company, IBM, "will not come to the Committee with a list of applicable patents on standards proposals. It is up to the user of the standard to discover which patents apply." JX 18 at 8.

In sum, Complaint Counsel have not met their burden of establishing that the proffered evidence is probative.

D. Rambus Would Be Prejudiced By The Untimely Admission Of The Proffered Evidence

Complaint Counsel also cannot satisfy their burden of showing that Rambus would not be prejudiced by the untimely admission of the evidence in question. Complaint Counsel would have the Commission reverse Judge McGuire's findings regarding the meaning and official nature of the February 2000 minutes by relying on the *deposition* testimony of witnesses who were available at trial to testify about those minutes. Such an approach would be fundamentally unfair to Rambus. It is well settled that "[w]hen a witness' credibility is a central issue, a deposition is an inadequate substitute for the presence of that witness." *Loinaz v. EG&G, Inc.*, 910 F.2d 1, 8 (1st Cir. 1990). Here, there is no question that a decision to accept the proffered deposition

that the first time he had been aware of any issue with respect to the language in the minutes was in early 2002, when Complaint Counsel raised the issue. Motion to Reopen, Attachment E, p. 110 (McGhee Tr., not in evidence). Mr. McGhee further contradicted Mr. Rhoden by testifying that he had *not* sent the Board-approved version of the minutes

Dated: July ___, 2004

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CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on July 12, 2004, I caused a true and correct copy of *Rambus's Opposition to Complaint Counsel's Motion to Reopen the Record to Include "Evidence That Corrects Misrepresentation in Answering Brief"* to be served on the following persons by hand delivery:

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