UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Public Version

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

MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION TO COMPEL AN ADDITIONAL DAY OF DEPOSITION TESTIMONY OF RICHARD CRISP

INTRODUCTION

This Part III litigation, regrettably, has involved more than the usual number of pre-hearing motions. The unfortunate fact is that Rambus has chosen to defend against this and other lawsuits in part through coarse litigation tactics – Rambus's previously adjudicated bad-faith document destruction being only one example – and to protect the integrity of this proceeding, Complaint Counsel has been forced to address Rambus's litigation tactics through motion practice. The present motion is no exception.

This motion relates to Rambus's belated production of key documents, combined with its unjustifiable refusals to allow adequate time for deposition questioning of a key witness. The witness at issue here is none other than Mr. Richard Crisp, Rambus's primary representative to JEDEC for over four years and a central figure in the overall scheme of deception and concealment through which

Rambus consciously subverted the JEDEC standardization process, and thereby captured monopoly control over several important DRAM-related technology markets.

Mr. Crisp not only played a central role in the anticompetitive scheme that is the focus of this lawsuit, but also personally authored a number of provocative and illuminating documents through which many facts exposing the illegitimate nature Rambus's conduct have come to light. A number of these documents, including numerous e-mails, were featured by Infineon in its patent infringement and fraud trial against Rambus in April and May 2001, and were relied upon by Judge Payne in upholding the jury's fraud verdict in that case.[1] It is now evident, however, that Complaint Counsel has received in this case a large volume of additional documents that apparently were never produced to Infineon, and were first produced to Micron in its litigation with Rambus long after the final deposition of Mr. Crisp in that litigation. *See* Affidavit of Avery W. Gardiner, February 19, 2003 **[Tab 1]**; Affidavit of Karma M. Giulianelli, February 20, 2003 **[Tab 2]**. And, as Complaint Counsel has now discovered, among these newly produced documents are many additional, significant documents, [[

]] but about which Mr. Crisp has never been questioned under oath.[2]

---

[1] As Complaint Counsel has previously explained, it is only through fortuitous happenstance that many of Mr. Crisp's e-mails survived Rambus's corporate-wide document destruction campaign. *See* Memorandum in Support of Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence at 66 n.83 [[

]].

[2] The fact is that Rambus is continuing, even today, to produce new documents to Complaint Counsel. Many of these newly produced documents were authored or received by, or otherwise relate to, individuals who have been identified as potential witnesses in this case. In some cases, however, the documents have not been produced by Rambus until after depositions of individuals to which the documents relate have already taken place. As we have advised Rambus, in instances in which documents are belatedly produced, Complaint Counsel reserves the right to request additional

Complaint Counsel has requested that Rambus make Mr. Crisp available for more than one day of deposition testimony in this case, considering that:

(1) Mr. Crisp played a central role in the Rambus conduct at issue here;

(2) this case differs in many respects from the *Infineon* and *Micron* suits in which Mr. Crisp has previously been deposed; and

(3) Rambus has now produced to Complaint Counsel numerous Crisp documents that were never produced to Infineon, were produced to Micron too late to be used in Mr. Crisp's depositions, and were not made available to the Commission during its Part II investigation (and hence were not available to be used in an investigational hearing of Mr. Crisp).

Nevertheless, Rambus's counsel has staunchly refused to accommodate this request.

As a consequence, Mr. Crisp was deposed for a single day on February 14. Despite best efforts to finish the questioning in the limited time available, Complaint Counsel was unable to complete the deposition. In hopes of avoiding further motion practice, at the conclusion of Mr. Crisp's February 14 deposition, Complaint Counsel indicated that we were unable to complete our intended questioning during that time. Yet again, however, Rambus's counsel (serving also for this purpose as counsel for Mr. Crisp) refused to make Mr. Crisp available for any additional deposition time.

---

deposition time with relevant witnesses.

The issue raised here is a different one, however. The belatedly produced Crisp documents addressed by this motion were produced to Complaint Counsel prior to Mr. Crisp's deposition. However, because these documents apparently were never produced to Infineon, and were not produced to Micron on a timely basis, Mr. Crisp's depositions in those two cases were necessarily incomplete. Finally, though the documents have now been produced to Complaint Counsel, they were not produced until after the commencement of this Part III proceeding, even though they clearly were subject to the Commission's Part II subpoena and could have, if produced in Part II, been used to question Mr. Crisp in an investigational hearing.

Rambus counsel's stated reason for not agreeing to any additional time for Complaint Counsel to complete the Crisp deposition relates to the fact that Mr. Crisp was deposed extensively in the *Infineon* and *Micron* cases. However, this position utterly ignores the circumstances that give rise to the request in the first place – namely, that there are a number of significant differences in this suit and Rambus's private patent-related suits against Infineon and Micron, and Rambus has only recently provided to Complaint Counsel a significant number of new, previously unproduced documents about which Mr. Crisp has never before been questioned.

In light of the circumstances presented here, and considering that – as explained below – an additional day of deposition will not cause undue burden either to Rambus or to Mr. Crisp, Complaint Counsel respectfully requests that Your Honor grant the present motion and enter an order in the form attached hereto.[3]

ARGUMENT

A. Additional Deposition Time With Mr. Crisp Is Warranted Because of Mr. Crisp's Central Role in the Events at Issue In This Litigation

There is no question that Richard Crisp is a centrally important figure in this case. Mr. Crisp

[3] As Your Honor is aware, Rambus has sought to draw attention to the Federal Circuit's recent split decision in *Rambus Inc. v. Infineon Technologies AG*, Nos. 01-1449 *et al.* (slip op.) (Fed. Cir., January 29, 2003), suggesting that the two-judge majority's resolution of Rambus's fraud appeal is somehow determinative of issues in this case. Complaint Counsel has not yet had an opportunity to fully address Rambus's contentions in this regard, but will welcome the opportunity when the appropriate time comes. Complaint Counsel does wish to note here, however, that Rambus's failure to produce to Infineon literally hundreds of thousands of pages of documents which it has now chosen to produce in this litigation, some of which it also chose to produce (albeit in an untimely fashion) in the *Micron* litigation, is highly suspicious and should call into serious question the integrity of the record in the *Infineon* case.

attended his first JEDEC meeting on behalf of Rambus in April 1992, and in May 1992 became Rambus's primary representative in the JEDEC JC-42.3 subcommittee, the subcommittee responsible for establishing the DRAM-related standards at issue in this litigation. Mr. Crisp remained Rambus's primary representative to the JC-42.3 subcommittee until Rambus withdrew from JEDEC in June 1996. He attended almost every single meeting of the JC-42.3 subcommittee from May 1992 through December 1995, and he reported back to Rambus management and other Rambus engineers on what he observed at all, or virtually all, of these JEDEC meetings. Mr. Crisp was also responsible for Rambus's input into JEDEC. When Rambus voted on four ballots in 1992, it was Mr. Crisp himself who cast the votes. Likewise, when JEDEC asked Rambus to clarify whether Rambus had patent interests relevant to a particular DRAM-related presentation, it was Mr. Crisp (albeit [[

]]) who delivered Rambus's response to JEDEC. Mr. Crisp prepared the first draft of Rambus's JEDEC withdrawal letter, and [[ ]] Mr. Crisp signed the final version that was submitted to JEDEC.[4]

Simultaneously, Mr. Crisp was deeply involved in Rambus's efforts to broaden its patents to cover technologies that he personally observed being presented at JEDEC meetings. Mr. Crisp held a series of meetings and conferences with Rambus's outside patent counsel[5] for the specific purpose of

---

[4] *See generally* Testimony of Richard Crisp, *Infineon* Trial, May 2-3, 2001.

[5] DTX 1541, Lester Vincent, notes, May 2, 1992, R 202989 **[Tab 3]**; DTX 1542, Lester Vincent, notes, May 29, 1992, R 202990 **[Tab 4]**; DTX 1546, Lester Vincent, notes, September 25, 1992, R 203940 **[Tab 5]**.

drafting additional patent claims directed at covering SDRAMs and "Future SDRAMs"[6] (which later became known as DDR SDRAMs), which were the subject of the work that Mr. Crisp observed at JEDEC.[7] Later, when Rambus appointed others to be responsible for working with Rambus's outside patent attorneys and overseeing the development of new patent claims, Mr. Crisp continued to identify for them particular uses of technologies, based on work he observed in JEDEC and elsewhere, over which he thought Rambus should seek to obtain patent claims.

Although Mr. Crisp was not alone within Rambus in understanding the JEDEC disclosure policy, he more than anyone else was directly confronted with the fundamental fact that Rambus, by concealing patent-related information from JEDEC, was acting in violation and subversion of JEDEC's rules and procedures. Indeed, recently produced documents indicate that, [[

]]

B. Additional Deposition Time With Mr. Crisp Is Made Necessary by Rambus's Late Production of Large Volumes of Relevant Documents

Rambus's counsel refuses to make Mr. Crisp available for any additional deposition time for the stated reason that Mr. Crisp was subject to prior extensive questioning in both the *Infineon* and *Micron* litigations. As we have already pointed out, the principal flaw in this argument is that the factual

---

[6] *See, e.g.*, DTX 1556, Fred Ware, e-mail, June 18, 1993, R 202996 **[Tab 6]**.

[7] Testimony of Richard Crisp, *Infineon* Trial, May 2, 2001 at 132-134 **[Tab 7]**.

records in those cases were incomplete – that is, a large volume of Crisp-related documents were never produced to Infineon, and were only produced to Micron long after Mr. Crisp's depositions had taken place. The documents to which we are referring were only recently produced by Rambus to Micron and Complaint Counsel (but apparently not Infineon), yet they are not recent, or newly generated business records. On the contrary, many of these recently produced documents were generated [[ ]] long before the *Infineon* and *Micron* suits were initiated, and long before the FTC commenced its Part II investigation of Rambus. There is simply no good justification for Rambus's failure to produce these documents to Infineon, or for its delay in producing such documents to Micron and to Complaint Counsel. Whatever justification Rambus might attempt to make for its non-production or belated production of these materials, the fact remains that the private litigants in the *Infineon* and *Micron* cases were denied access to these important documents, and Complaint Counsel likewise was denied access to the documents during its Part II investigation. In other words, because of Rambus's failure to produce these documents on a timely basis, Mr. Crisp has never before been questioned about these documents. Complaint Counsel, in this case, is the first to have this opportunity. Rambus's improper failure to produce these highly relevant documents sooner – which, at minimum, amounts to inexcusable negligence[8] – has tainted the record in both the *Infineon*

[8] Rambus's inexcusable failure to produce a large volume of highly relevant documents until very late in the *Micron* litigation, and not at all in the *Infineon* litigation, is highly suspicious, particularly in light of Rambus's destruction of documents and other litigation misconduct, for which it was sanctioned in the *Infineon* litigation. Rambus could have – but chose not to – appeal these findings of deliberate litigation misconduct. *See* Supplemental Memorandum in Support of Complaint Counsel's Motion for Default Judgment, Relating to Collateral Estoppel Effect of Prior Factual Finding That Respondent Rambus Inc. Destroyed Material Evidence in Bad Faith at 1-4. *See also* Memorandum in Support of Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus Inc.'s

and *Micron* cases, and threatens to have a similar effect here. Complaint Counsel's efforts to develop a complete record should not be stymied by unreasonable limits on the deposition time of Mr. Crisp. Limiting Complaint Counsel's deposition time of Mr. Crisp

would, in effect, reward Rambus for its inexcusable failure to produce large volumes of highly relevant evidence.

A substantial number of the late-produced documents at issue here, about which counsel in the related private suits has had no opportunity to question Mr. Crisp, are central to the allegations in the Commission's complaint. As a result, Complaint Counsel [[[9]

]]

A number of the late-produced documents relate directly to the substance of JEDEC's patent disclosure policy and [[

]] For example, in

Willful, Bad-Faith Destruction of Material Evidence at 3-4 & n.2.

[9] This motion discusses only a very small subset of the late-produced documents, in particular those that [[ ]] In addition to the documents discussed herein, Rambus also failed to produce until after conclusion of the *Infineon* trial a large volume of documents written by or distributed among Rambus executives, including [[

]]

[[

]] In a separate document on the same topic [[

]]

A number of additional documents also add important new information regarding [[

]] the JEDEC disclosure policy, as well as [[

]] In a newly produced [[

]]

In a separate newly produced [[

]]

In December 1995, apparently as [[

]] a previously produced document confirms that Mr. Crisp sought clarification of the JEDEC disclosure policy from three long-time JEDEC members and chairmen of different subcommittees. Based on these conversations, Crisp concluded that, "As long as we mention that there are potential patent issues when a showing or a ballot comes to floor, we have not engaged [i]n 'inequitable behavior['']." DTX 6A, Richard Crisp, e-mail, December 5, 1995, R 69511 at R 69698 **[Tab 13]**.

Rambus management, [[

]] Another late-produced document indicates that, [[

]] Again, because Rambus did not produce most of these documents until long after the final deposition of Mr. Crisp in the *Micron* litigation (and, indeed, apparently not at all in the *Infineon* litigation), Mr. Crisp had never been questioned about the late-produced documents identified above until last week, and has never been questioned about any possible relationship between those

documents and other documents that Rambus previously produced on a timely basis.

A number of late-produced documents shed new light on [[ ]] its patent claims [[ ]] while Rambus was a member. A series of newly produced [[ ]] various communications among Richard Crisp, Rambus Vice President Allen Roberts and Rambus's outside patent counsel Lester Vincent in May and September 1992, in which Mr. Crisp proposed a series of additional claims for Lester Vincent to add to Rambus's pending patent applications based at least in part on work he had observed in JEDEC,[10] and Fred Ware's work with Lester Vincent in mid-1993 resulting in new claims filed in amendments to Rambus's pending patent applications.[11] [[ ]] one

---

[10] *See, e.g.*, DTX 1541, Lester Vincent, notes, May 2, 1992, R 202989 **[Tab 3]** ("Richard Crisp wants to add claims to original application => Add claims to mode register to control latency."); DTX 1542, Lester Vincent, notes, May 29, 1992, R 202990 **[Tab 4]** ("Richard has claims for cases we have filed plus claims for divisionals."); DTX 1546, Lester Vincent, notes, September 25, 1992, R 203940 **[Tab 5]** ("w/ Richard Crisp . . . – what to include in divisional applications: . . . DRAM – programmable latency via control reg . . . => so cause problems w/ synch DRAM & Ram link . . . using phase lock loops on DRAM to control delays inside & outside DRAM") ; Testimony of Richard Crisp, *Infineon* Trial, May 2, 2001 at 132-134 **[Tab 7]**:

> Q And the ideas that you had to add claims to the Rambus patent applications for the mode register and for programmable CAS latency, those were ideas that were spurred on by your attendance at the JEDEC meeting in April and May and participating in this SDRAM standardization effort, right?
>
> A Yeah. Those were our inventions. We had invented those for the RDRAM.
>
> . . .
>
> THE COURT: I think the question, Mr. Crisp, is was it your objective in meeting with the lawyer to add those claims if they weren't already there?
>
> THE WITNESS: That's correct.

[11] *See, e.g.*, DTX 1556, Fred Ware, e-mail, June 18, 1993, R 202996 **[Tab 6]** ("Writable configuration register permitting programmable CAS latency. This claim has been written up and filed. This is directed against SDRAMs. . . . DRAM with PLL clock generation. This claim is partially

document [[

]] two additional documents [[

]]

Similarly, [[ ]] after having been requested at the JEDEC JC-42.3 subcommittee meeting in May 1995 to report back at the next meeting as to "whether or not Rambus knows of any

---

written up. . . . This is directed against future SDRAMs and Ramlink."); Amendment to Application No. [[ ]] **[Tab 15]**; DTX 1584, Allen Roberts, handwritten note attached to draft amendment to Application 08/222,646, R 204436 **[Tab 16]** ("This is Lester's attempt to work the claims for the MOST/SDRAM defense.").

patents especially ones we have that may read on Synchlink," DTX 6A, Richard Crisp, e-mail, May 24, 1995, R 69511 at 69583 **[Tab 13]**, [[ ]] In a separate [[

]] Of course, at the JEDEC meeting in September 1995, Rambus did not inform the JC-42.3 subcommittee of this. *See* DTX 7, JC-42.3 Subcommittee Minutes, September 11, 1995, R 66450 at R 66462 **[Tab 12]** ("At this time, Rambus elects to not make a specific comment on our intellectual property position relative to the Synclink proposal.").

In a separate document [[ ]], the same newly-produced [[

]]

Late-produced documents from Rambus also identify at least one entirely separate and new

technology as to which Rambus also failed to inform JEDEC of its relevant pending patent applications. This technology, known as [[ ]] was discussed during Rambus's presence at JEDEC and was voted on and adopted in the SDRAM standard in 1993 while Rambus was still a member. *See* [[

]] This document permits an understanding of certain hitherto overlooked claims – [[ ]] – contained in Rambus's preliminary amendment to patent application no. [[ ]] filed in [[ ]][12] Because [[ ]] was not

[12] Indeed, the importance of this evidence is highlighted by the probability that, even in the event that Your Honor were to find that the appropriate duty arising under the antitrust laws were the

produced until long after the last of Mr. Crisp's depositions in the *Micron* litigation, and not at all in the *Infineon* litigation, those parties had no opportunity to question Mr. Crisp about it. While Complaint Counsel has now had the opportunity to [[

]] about [[ ]] in Rambus's pending patent application.[13]

A number of newly produced documents highlight not only [[

]] but also [[

]] Mr. Crisp's report from the September 1994 JEDEC JC-42.3 subcommittee meeting that "NEC PROPOSES PLL ON SDRAM!!!", DTX 6A, Richard Crisp, e-mail, September 14, 1994, R 69511 at R 69546 **[Tab 13]**, [[

---

same as that articulated by the Federal Circuit as applying under the Virginia common law of fraud, this preliminary amendment adding claims [[ ]] likely satisfies the standard of a "patent or application with claims that a competitor or other JEDEC member reasonably would construe to cover the standardized technology," which even under the Federal Circuit's restrictive standard for a duty to disclose under the Virginia common law of fraud, would give rise to a clear duty to disclose.

[13] Rambus's late-produced documents also identify another technology, the [[ ]], with respect to which a competitor, [[ ]] might have believed it needed a license [[ ]] Because this issue was not identified prior to Rambus's late production of this document, the parties in the *Infineon* and *Micron* litigations never had the opportunity to question Mr. Crisp regarding, and the Federal Circuit never had the opportunity to consider, whether this technology was the subject of JEDEC work and whether Rambus potentially violated any duty to disclose with respect to this technology.

]]

In another series of documents [[

[14]]]

Finally, of course, a number of Rambus's late-produced documents cast light on its destruction

[14] In a separate series of documents [[

]]

of documents. For example, Rambus first produced long after the last of Mr. Crisp's depositions in the private litigation [[

]] Mr. Crisp still has not been questioned about this document.

Naturally, given the central importance of many of these newly-produced documents to the on-going litigation, Complaint Counsel [[

]] As a result, Complaint Counsel lacked sufficient time to question Mr. Crisp about other topics [[

]] as to which Mr. Crisp has not previously been questioned. Complaint Counsel should not be deprived of its ability to question Mr. Crisp about such topics because it spent the vast majority of its day of deposition time dealing with the consequences of Rambus's failure to produce documents on a timely basis in the private litigation or the Commission's Part II investigation.

C. Because of [[ ]] an Additional Day of Deposition Testimony Will Not Pose an Undue Burden on Mr. Crisp

Complaint Counsel, of course, seek to minimize the burden on any witness to the extent possible, consistent with the needs for full and open discovery of the facts of this case. Complaint Counsel are not unmindful of the fact that Mr. Crisp has already sat for eight partial or full days of testimony in the private litigation.

Mr. Crisp cannot be considered to have been unreasonably burdened, however, by his

deposition testimony in the private litigation. After leaving his formal employment at Rambus, Rambus and Mr. Crisp [[

]][15]

[15] Rambus's counsel is likely to try to compare the situation of Mr.Crisp with that of witnesses from JEDEC or other third parties who have been deposed in the private litigation. The comparison does not stand up, for a number of reasons. First, unlike the situation of Mr. Crisp when he was deposed in the private litigation, these third-party witnesses worked for other employers at the time of their depositions in the private litigation, and had to take time away from their regular responsibilities in order to testify. Complaint Counsel is not aware of any individual other than Mr. Crisp deposed in connection with the private litigation [[

]] Second, none of these other individuals had Mr. Crisp's central role in this drama. Finally, although certain third parties have produced additional documents in response to new subpoenas, Complaint Counsel is not aware of

Complaint Counsel nevertheless seek to minimize the burden on Mr. Crisp to the extent possible consistent with the needs of discovery in this important matter. Complaint Counsel does not intend to repeat lines of questioning already covered in previous depositions. Rather, Complaint Counsel seeks the opportunity to question Mr. Crisp with respect to Rambus's late-produced documents as well as to topics or portions of earlier-produced documents as to which Mr. Crisp has not previously been questioned. In order to minimize any inconvenience to Mr. Crisp, Complaint Counsel is willing to make every effort to complete its deposition of Mr. Crisp in less than one day of questioning.

---

any other third party having failed to produce documents responsive to earlier subpoenas on a timely basis (as did Rambus), that would have rendered their prior depositions incomplete. In short, any attempt to compare the situation of Mr. Crisp with that of third-party witnesses is misplaced.

CONCLUSION

For the reasons set forth more fully above, Complaint Counsel respectfully request that Mr. Crisp be ordered to sit for an additional day of deposition questioning.

Respectfully submitted,

_____

M. Sean Royall
Geoffrey D. Oliver

Of Counsel:

Malcolm L. Catt
Robert P. Davis
Andrew J. Heimert
Suzanne T. Michel
Jerome Swindell
John C. Weber
Cary E. Zuk

BUREAU OF COMPETITION
FEDERAL TRADE COMMISSION
Washington, D.C. 20580
(202) 326-3663
(202) 326-3496 (facsimile)

COUNSEL SUPPORTING THE COMPLAINT

Dated: February 21, 2003