

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

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**MEMORANDUM BY RESPONDENT RAMBUS. INC
AND BY THIRD-PARTY WITNESS RICHARD CRISP
IN OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO COMPEL AN ADDITIONAL DAY OF
DEPOSITION TESTIMONY OF RICHARD CRISP**

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 deposition questioning. That much is certain, for Complaint Counsel has recently refused to accept Mr. Crisp’s offer to be questioned for an additional three to five hours – an offer conditioned only upon Complaint Counsel’s agreement to take the deposition on a Saturday in light of the demands of Mr. Crisp’s current job with his new employer. *See* Declaration of Steven M. Perry (“Perry Declaration”), ¶ 3. If Complaint Counsel were truly interested in moving this case forward, they would have accepted this offer, especially in light of the undisputed facts that:

- (1) Mr. Crisp has already sat for over *sixty* hours of deposition and trial questioning, including over seven hours in this matter alone;
- (2) Mr. Crisp has *already been questioned* regarding almost all of the documents described in Complaint Counsel’s motion; and
- (3) fact discovery in this proceeding has closed.

Complaint Counsel’s true motivation in pursuing this motion is clear from the very first page of the motion. Aware that their motion papers might be the first documents that Your Honor would review after taking responsibility for this matter, Complaint

Counsel chose on the first page of their motion to:

(1) accuse Rambus’s current counsel in this matter of using “coarse litigation tactics” that have threatened “the integrity of this proceeding;” and

(2) accuse Mr. Crisp of being part of an “overall scheme of deception and concealment. . . .”

Motion to Compel, p. 1.

Complaint Counsel’s decision to resort to mudslinging is a sad departure from prior practice, and an unpleasant harbinger of things to come. Complaint Counsel is well aware that this is the very first motion they have filed in the eight month history of this case that addresses any “litigation tactics” employed in this proceeding by Rambus or its counsel. Complaint Counsel is also well aware that Rambus has produced 450,000 pages of documents and twenty or more Rambus witnesses for deposition in the past few months, *all without any motion practice at all*. The docket sheets of other recent Part III proceedings – and those of most federal civil actions – stand in stark contrast to this record of cooperation. The truth is that Complaint Counsel have been able to conduct an enormous amount of discovery in a very short time *without* the need for judicial intervention or supervision.¹

Complaint Counsel do not simply attack Rambus’s litigation counsel. In language

¹ There has indeed been motion practice in this case. Various third parties have sought to limit discovery by Rambus; Judge Timony has denied most of those motions. And Complaint Counsel have filed several motions relating to document retention policies adopted by Rambus long before this litigation began. But there have been *no* motions by Complaint Counsel addressing litigation tactics – “coarse” or otherwise – undertaken in this proceeding. Rambus will not respond in kind to Complaint Counsel’s mudslinging and will continue to try to resolve discovery issues through the meet-and-confer process.

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.

of numerous passages that show conclusively that Rambus and Mr. Crisp undertook no “fraudulent scheme” and that in fact they sought to and did comply with the JEDEC patent policy as they (and numerous other JEDEC members) understood it at the time.

II. ARGUMENT

A. Complaint Counsel’s Motion Does Not Satisfy Their Burden Of Showing Good Cause To Re-Open Discovery Or Good Cause To Require A Third Party Witness To Undergo Additional Questioning.

1. Complaint Counsel Make No Effort At All To Identify Or Describe The Subject Matters Of The Intended Questioning.

As noted above, Complaint Counsel do *not* contend that they have been unable to question Mr. Crisp about the documents that are described at such length in their motion. Why, then, do they need the extraordinary relief they seek? The reader will search the Motion to Compel in vain for the answer to that question. All that Complaint Counsel will say is that “[b]ecause of the amount of time spent with these newl y-produced documents, Complaint Counsel has not had time to question Mr. Crisp with respect to other topics or to ask follow-up questions regarding aspects of previously-produced documents. . . .” Motion to Compel, p. 8. *See also id.*, p. 17 (same). That is the sum and substance of the explanation given by Complaint Counsel. The “other topics” and “follow-up questions” are not described in any way. *Id.* This showing is a patently insufficient basis for seeking to re-open discovery or to force a witness who has already testified for sixty hours to submit to another day of deposition. *See generally* August 6, 2002 Scheduling Order, p. 3 (requiring showing of good cause or agreement of the parties to take depositions after the cut-off).

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 agreeing to more than one day of questioning was the fact that “Mr. Crisp was subject to extensive prior questioning in both the *Infineon* and *Micron* litigations.” Motion to Compel, p. 6. *See also, id.*, pp. 3-4 (referring to “Rambus counsel’s stated reason for not agreeing to any additional time. . .”). This is false. Both in correspondence prior to the depositions, and at the deposition itself, Rambus’s counsel explained that Mr. Crisp had a new job with a small company that required him to travel constantly, and that he was only available for a single day. *See Perry Decl.*, exs. A-B.³ Complaint Counsel’s repeated omission of any reference to this additional “stated reason” for Mr. Crisp’s position is puzzling.

Complaint Counsel do seem to suggest that Your Honor should simply ignore any burden that Mr. Crisp might incur from an additional deposition day because he was under a consulting contract with Rambus when he was deposed in the private cases. *See Motion to Compel*, p. 18. The relevance of the consulting contract to *this* case is a mystery. If, as seems likely, Complaint Counsel were simply trying to draw attention to the existence of the contract and the size of the payments made under it, their motivation is still unclear, since such agreements are commonplace for former employees and

³ Indeed, Mr. Crisp is out of the country at this time and unable to assist in the preparation of this opposition brief. It is undisputed, however, that Complaint Counsel was repeatedly told of Mr. Crisp’s business commitments in his new job.

officers involved in litigation, as Complaint Counsel must know. In any event, Mr. Crisp has not had a consulting agreement with Rambus since the summer of 2001 and is currently employed by a small company that has no ties to Rambus. He thus falls into the category of witnesses identified by Complaint Counsel in their footnote 15: “third-party witnesses [who] work[] for other employers” and who must “take time away from their regular responsibilities in order to testify.” Motion to Compel, p. 19, n.15. As such, Complaint Counsel needs to, and has failed to, make a particularized showing of need to outweigh the burdens that would be imposed on Mr. Crisp from the relief sought.

3. Complaint Counsel Have Had All Of The “Late-Produced” Documents Attached To The Motion Since August 2002, Which Cuts Against Their Purported Need To Re-Open Discovery.

A reader of Complaint Counsel’s motion might be left with the impression that the documents described in and attached to the motion were produced only very recently to Complaint Counsel. Those documents, which the motion to compel consistently refers to as “late-produced” documents, were in fact produced to Complaint Counsel prior to and in August 2002, over six months ago, at the very outset of discovery in this matter. Perry Decl., ¶ 2 n.1. If Complaint Counsel believed that multiple deposition sessions were necessary because of these documents, they could have scheduled a deposition session with Mr. Crisp last fall, spent a full day on the documents in question, and *then* filed this motion, all long before the discovery cut-off. Complaint Counsel also could have – and should have – filed this motion in late December 2002 or early January 2003, when they learned from Rambus’s counsel that “because of the press of commitments related to his

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. Crisp’s deposition was originally scheduled for January 31, 2003 and was rescheduled by two weeks as a result of the back problems of Rambus’s counsel. The point here, however, is that the day of questioning that occurred in February 2003 *could have* occurred in September or October or November or December, long before the Court-approved discovery cut-off. Complaint Counsel cannot reasonably contend that they did not know they would want two days until they took Mr. Crisp’s deposition, given that they have had the so-called “late-produced” documents since August of last year. The burden is clearly on Complaint Counsel to explain their failure to file this motion timely, and they have just as clearly failed to meet that burden.

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]

[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]

[REDACTED]

[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]

Id. (emphasis added).

This is not evidence of fraud or of a breach of a duty to disclose. Once the portions left out by Complaint Counsel are restored, the e-mail shows that Rambus understood the JEDEC disclosure policy to requiring *presenters* to mention potential

patent issues,⁶ and it shows that Mr. Crisp knew of no basis for thinking that Rambus had violated any part of that policy.

Complaint Counsel also suggest that Rambus and Mr. Crisp engaged in wrongdoing because of what Complaint Counsel refer to as “Rambus’s ongoing efforts to broaden its patent claims to cover JEDEC work while Rambus was a member.” Motion to Compel, p. 11. The motion describes a number of e-mails that supposedly relate to this general subject. *Id.*, pp. 11-14. Complaint Counsel apparently would have Your Honor believe that a patent application is fixed in stone once it is filed, and that it is inappropriate to amend its claims in an effort to capture the full scope of the inventions described in the specification set out in the original application. *If* Complaint Counsel intend to so argue, they will run up against contrary and controlling case law from the Federal Circuit. In *Kingsdown Med. Consultants, Ltd. v. Hollister*, 863 F.2d 867, 874 (Fed. Cir. 1988) and its progeny, the Federal Circuit held squarely that it is appropriate to amend or add claims to a patent application in an effort to encompass products or processes developed by one’s competitors, as long as the original specification supports the amended claims. *See generally PIN/NIP v. Platte Chemical*, 304 F.3d 1235, 1247

⁶ As discussed in Rambus’s pending motion for summary judgment, the JEDEC 42.3 “Members Manual” provided to Mr. Crisp stated that a member who was *presenting* a technology to JEDEC for standardization needed to reveal “known or expected patents . . . on the material presented.” Perry Decl., ex. D. The Members’ Manual contains no reference, however, to disclosures of patents or patent applications by *non-presenters* like Rambus. *Id.* It may be reasonable to expect that presenters – who are actively proposing that a technology developed by their company be adopted by the industry as a standard – might be required to make a broader disclosure than companies that are not seeking such standardization. *See, e.g., Wang Labs v. Mitsubishi Elec. Am., Inc.*, 29 U.S.P.Q.2d 1481 (C.D. Cal. 1993).

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

“Consider a common example: a firm competing with an inventor may introduce a product containing a variant of the inventor’s brainstorm. When the language in the patent application allows, the inventor’s patent lawyer adds a claim to the application embracing the new variant. In this manner the competitor’s product will infringe the patent if and when it issues. *This is a standard practice and has been for a long time.*”

Merges, Menell & Lemley, *Intellectual Property in the New Technological Age* 225 (2d ed. 2000) (emphasis added).

In short, Rambus’s efforts fully to protect its inventions by amending its patent applications are not the sinister acts of a thief, as Complaint Counsel suggest.⁷

III. CONCLUSION

While there are many other examples of Complaint Counsel’s misinterpretation of the documentary fragments described in the brief, Rambus will not belabor the point further. For purposes of this motion, it is enough to point out that Complaint Counsel have had more than a full and fair opportunity to question Mr. Crisp about these documents, and that they have not offered any satisfactory explanation for why they need to question him further about “other topics.” Good cause not having been shown, Complaint Counsel’s motion to compel should be denied.

⁷ In any event, it is undisputed that regardless of what Mr. Crisp *suggested* by way of amendments, Rambus had no undisclosed patent application on file at the time it left JEDEC that, if issued, would have necessarily been infringed by the manufacture or sale of a memory device built in compliance with any JEDEC standard. *See generally, Rambus Inc. v. Infineon Technologies AG*, 318 F.3d 1081, 1103-4 (Fed. Cir. 2003).

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Respectfully submitted,

Gregory P. Stone
Steven M. Perry
Sean P. Gates
Peter A. Detre
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071
(213) 683-9100

A. Douglas Melamed
IJay Palansky
Kenneth A. Bamberger
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Sean C. Cunningham
John M. Guaragna
GRAY, CARY, WARE & FREIDENRICH LLP
401 "B" Street, Suite 2000
San Diego, California 92101
(619) 699-2700