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It is further ordered that the portion of the AHA motion requesting permission to participate in the oral argument is denied.

By the Commission.

RAMBUS INCORPORATED

Docket No. 9302 Order, February 2, 2006

Order admitting newly found documents into evidence; denying respondent's request to admit into evidence documents that are subject to a protective order in a related federal court proceeding; and granting complaint counsel leave to file a supplemental response to respondent's motion.

ORDER GRANTING IN PART COMPLAINT COUNSEL'S MOTION TO REOPEN THE RECORD TO ADMIT DOCUMENTS FROM RAMBUS'S NEWLY-FOUND BACK-UP TAPES PERTAINING TO RAMBUS'S SPOILIATION OF EVIDENCE; AND DENYING WITHOUT PREJUDICE RAMBUS'S MOTION TO REOPEN THE RECORD TO ADMIT NEWLY OBTAINED EVIDENCE REBUTTING COMPLAINT COUNSEL'S PROPOSED FINDINGS AND UNDERMINING COMPLAINT COUNSEL'S PROPOSED REMEDY

[Formerly In Camera]

[Placed On Public Record By Notice Issued On February 7, 2007]

On July 28, 2005, Complaint Counsel asked the Commission to delay the briefing schedule set forth in the Order entered on July 20, 2005. This delay was requested so Complaint Counsel could move the admission of additional documents they were still receiving from Rambus as part of a rolling production of documents which were "newly-found" on Rambus's back-up tapes in discovery for *Hynix Semiconductor Inc. v. Rambus Inc.*, Dkt. No. CV 00-20905 RMW (N.D. Cal.) ("*Hynix* litigation"). The Commission's Order Denying

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Complaint Counsel's Petition to Modify the Schedule in the Commission's July 20, 2005 Order (August 4, 2005) expressed no view "on whether the record can or should be reopened at a later date to admit materials that are currently being produced by Rambus in discovery in the *Hynix* litigation." *Id.* at 1, n. 1. In September 2005, Complaint Counsel and Rambus each filed a motion to reopen the record in this matter. We address each of these motions separately.

Complaint Counsel's Motion to Reopen

Complaint Counsel's current motion to admit additional evidence from the *Hynix* litigation was filed on September 29, 2005. Complaint Counsel asks the Commission to admit into evidence eighteen (18) documents designated Exhibits CX-5100 - 5117. Complaint Counsel claim they have satisfied the legal standard for reopening as reflected in the Commission's Order of May 13, 2005¹. Rambus opposes reopening on the grounds that Exhibits CX-5100 - 5116 are cumulative and irrelevant and that Complaint Counsel has offered no explanation or justification for offering CX-5117 into evidence.²

"Reopening the record to admit supplemental evidence at this stage of the proceeding should only be . . . countenanced where (1) the party offering the evidence has acted with due diligence; (2) the supplemental evidence is relevant, probative and non-cumulative; and (3) the supplemental evidence can be admitted without undue prejudice to the other party."³ We find those criteria satisfied with

¹ Order Granting In Part Complaint Counsel's Motion to Compel Production of, and to Reopen the Record to Admit, Documents Relating to Rambus Inc.'s Spoliation of Evidence; and Granting Rambus's Unopposed Motion for Release of Testimony (May 13, 2005) at 2 ("Reopen Order I").

² Memorandum by Rambus Inc. in Opposition to Complaint Counsel's Motion to Reopen the Record to Admit Documents from Rambus's Back-Up Tapes (Oct. 11, 2005) ("Rambus Memo in Opposition").

³ Reopen Order I at 2 (citations omitted).

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respect to 17 of the 18 documents that Complaint Counsel has sought to add to the record.

First, the Commission finds that Complaint Counsel has acted with due diligence in offering this evidence. In late 2002, Rambus's in-house counsel was searching for documents in this case and discovered an open box of materials, including tapes, in a cubicle. Without reviewing the tapes, he deemed the materials non-responsive to Complaint Counsel's discovery requests⁴. In March 2005, Rambus revisited that decision in preparation for a hearing in the *Hynix* case and made further searches for other tapes⁵. Thus, long after the close of discovery in this matter, Rambus found additional evidence on approximately 1,400 back-up tapes and other removable electronic media. Rambus completed production to Hynix and to Complaint Counsel late in September 2005⁶. Since Rambus only recently produced these documents and Complaint Counsel promptly brought them to our attention, we find that Complaint Counsel acted with due diligence.

Second, we find that 17 of the 18 proffered documents are relevant and probative of issues in this case. Rambus appears to concede the probative value of CX-5107 – an email reflecting engineer Billy Garrett's understanding of JEDEC's disclosure policy – by stating that the document reflects “an important confirmation for Rambus that disclosure at JEDEC meetings was *voluntary*, not required.”⁷ Rambus does not object to the admission of CX-5107.

⁴ Attachment A to Complaint Counsel's Motion to Reopen, at 3.

⁵ Attachment A to Complaint Counsel's Motion to Reopen, at 4.

⁶ Complaint Counsel's Motion to Reopen at 6-7.

⁷ Rambus Memo in Opposition at 7 (emphasis in original).

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To the contrary, Rambus offers an additional copy of virtually the same email, RX-2554, which it requests the Commission to admit into evidence⁸. These two emails differ only in the identity of the addressees and the fact that RX-2554 contains an apology from Garrett, author of both emails, to Rambus's primary JEDEC representative Richard Crisp for not having copied Crisp on his first email, CX-5107.

Like CX-5107, other documents appear to shed some light on Rambus employees' views of JEDEC's disclosure rules and their effects. *See, e.g.*, CX-5105 (email from Crisp stating his understanding of JEDEC disclosure rules); CX-5108 at 3 (email from Crisp reflecting his hope that a firm's offer to license patents "in accordance with JEDEC rules" would "inhibit the standardization" effort); and CX-5113 (email from Crisp stating his understanding of the rationale for the JEDEC policy).

Still other documents reflect on effectuation of Rambus's strategies regarding JEDEC standardization efforts. *See, e.g.*, CX-5100 (email from Rambus CEO Geoff Tate on "advising JEDEC on claim(s) in our filed patents that cover proposals before JEDEC"); CX-5101 (email from Tate asking about patent extensions in connection with JEDEC); CX-5102 at 8 (Rambus board meeting item concerning "goal" of "leverag[ing] the JEDEC committee to our advantage"); CX-5103 at 2 (reflecting Rambus board agenda item regarding "[s]trategy for JEDEC/Sync DRAM"); CX-5104 at 1 (identifying Rambus employee responsible for "work[ing] to add modifications to [Rambus's] patents to provide better coverage" against SDRAMs); CX-5106 (identifying CEO Tate's apparent objective of securing "patents vs. SDRAM"); CX-5110 (Tate email discussing "block[ing]/get[ting] royalties from competitive memory"); CX-5111 (email from Rambus employee Rick Barth offering opinion about whether a list of patents should be provided to JEDEC); CX-5112 (email reporting on "work[]" with Richard Crisp on enhancing claim coverage"); CX-5114 (email stating that in an upcoming meeting, Crisp would discuss IP "litigation tactics"); CX-

⁸ Rambus Memo in Opposition at 6, n. 3.

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5115 (email stating that Crisp was expected to discuss at an upcoming meeting how Rambus's intellectual property blocks "SDRAM-2"); and CX-5116 (email stating that Crisp would discuss in upcoming meeting the "[h]azards" of standards groups). CX-5109 is a Rambus document discussing, *inter alia*, how "cost-sensitive" their industry is, a point that may have some bearing on the question of what JEDEC members might have done had Rambus's patent disclosures come earlier. CX-5109 at 4. Accordingly, Exhibits CX-5100 through CX-5116 appear to be relevant to issues in this case.

However, we find that Complaint Counsel has not offered a persuasive argument regarding the probative value of CX-5117. This exhibit is a log identifying responsive documents on Rambus's back-up media which have not been produced because of privilege claims. Complaint Counsel state that some portion of those documents are no longer privileged because Rambus waived its privilege claims as to them earlier in this matter⁹. Footnotes found in CX-5117 contest Complaint Counsel's position regarding privilege waiver. The Commission has not been asked to rule on, and expresses no opinion regarding, this privilege waiver issue. More importantly, the Commission has not been advised what probative value should be given to this privilege log or for what purposes¹⁰. Thus, with the exception of the privilege log, CX-5117, the Commission finds Exhibits CX-5100 - 5116 and RX-2554 to be probative of the issues that need to be resolved in this proceeding.

In addition, we find these probative exhibits to be non-cumulative¹¹. Rambus argues that CX-5100, CX-5101, and CX-5105

⁹ Complaint Counsel's Motion to Reopen at 5-6.

¹⁰ See Rambus Memo in Opposition at 8-9.

¹¹ For the purpose of this motion, otherwise admissible evidence is cumulative, and thus excludable, when it is *unnecessarily* duplicative of other evidence already in the record. See, Rule 3.43(b), 16 C.F.R. § 3.43(b); FED. R. EVIDENCE 403;

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are cumulative of record evidence such as CX-837¹². We disagree. CX-837 is an email from Crisp reflecting, among other things, his recommendation that Rambus “tell the world what patents have issued . . . to be clean on this.” CX-837 at 2. CX-5105, by contrast, is an email that reflects Crisp’s question about what Rambus should do “if we are required to disclose in order to remain members in good standing.” While both offer some evidence about what Crisp thought about the import of the JEDEC policies, the observations they contain are distinct. The argument that CX-837 and CX-5100-01 are cumulative is weaker. CX-837 contains Crisp’s views on the advisability of coming “clean”; CX-5100 and CX-5101 contain the views of Rambus’s CEO, Geoff Tate, as communicated to Crisp and others, regarding the need for a “strategy” regarding patent disclosure within JEDEC.

Rambus further argues that CX-5113 is “virtually identical” to an email by Mr. Crisp that is already in the record, CX-711¹³. We again disagree. CX-5113 gives Mr. Crisp’s view of the point of the JEDEC policy: “the major reason for the policy [JEDEC has] in place is that if they were to standardize something that has a patent on it and the patent is necessary to build the device and the patent holder decides to not license certain companies, then they potentially have an antitrust situation on their hands.” CX711 is an email stating that “Micron says the policy exists due to antitrust concerns. That if a group of companies wanted to keep out competition they could agree amongst themselves to standardize something that is patented and not license those that they do not want to compete with.” These seem to be distinct antitrust concerns attributed to different people. The probative documents, CX-5100 - 5116, are not cumulative.

Third, the Commission finds that these exhibits can be admitted into evidence without undue prejudice to any party. Indeed, Rambus

and Joseph W. Cotchett, *FEDERAL COURTROOM EVIDENCE* § 403.5 (G. Richard Poehner ed., 5th ed. 2004).

¹² Rambus Memo in Opposition at 5-6.

¹³ Rambus Memo in Opposition at 7-8.

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does not argue that it would be prejudiced by the admission of these documents.

Rambus's Motion to Reopen

Rambus has moved to reopen the record to admit up to 250 pages of the one million pages of documents that it received in May 2005 in private litigation¹⁴. Rambus asserts that the documents will show a price-fixing conspiracy among DRAM manufacturers directed against Rambus's RDRAM architecture. This, Rambus states, will undercut Complaint Counsel's contentions that the DRAM market was highly competitive; that technical problems, high royalty rates, and high manufacturing costs led to RDRAM's decline; that DRAM manufacturers would have chosen other technologies for their standard if Rambus had made certain disclosures; and that compulsory royalty-free licensing is appropriate here¹⁵.

However, Rambus states that a protective order in that private action prevents it from providing that evidence to Complaint Counsel or the Commission, or from discussing the "specific contents" of that evidence¹⁶ and that a hearing on its motion to amend the protective order is scheduled by the trial judge in that matter for February 23, 2006. In light of this, Rambus requests that the Commission either grant its motion to reopen the record "on a conditional basis, pending the ruling on Rambus's motion to amend the protective order," or "defer ruling on this motion to reopen until [the judge presiding over the private action] determines whether to allow the documents to be

¹⁴ Rambus's Motion to Reopen the Record to Admit Newly Obtained Evidence Rebutting Complaint Counsel's Proposed Findings and Undermining Complaint Counsel's Proposed Remedy ("Rambus's Motion to Reopen") at 4-5.

¹⁵ Rambus's Motion to Reopen at 9-15.

¹⁶ Rambus's Motion to Reopen at 7.

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submitted to the Commission.”¹⁷ Complaint Counsel argue that the evidence is likely to be irrelevant and that the case should not be delayed for its entry.¹⁸

Rambus’s alternative request is the most appropriate course at this time. The protective order makes the documents unavailable for our review. The Commission cannot easily evaluate the propriety of admitting evidence which is not available to it. Similarly, Complaint Counsel are correct in claiming that it would be prejudicial to admit documents into evidence without providing them a meaningful opportunity for opposition based on actual knowledge of the contents of the proffered evidence¹⁹. Therefore, we will deny Rambus’s motion to reopen without prejudice²⁰.

Accordingly,

It is ordered that Complaint Counsel’s Motion to Reopen the Record to Admit Documents from Rambus’s Newly-Found Back-Up Tapes Pertaining to Rambus’s Spoliation of the Evidence shall be, and

¹⁷ Supplemental Brief in Support of Motion by Rambus to Reopen Record to Admit Newly Obtained Evidence Rebutting Complaint Counsel’s Proposed Findings and Undermining Complaint Counsel’s Proposed Remedy at 1.

¹⁸ Complaint Counsel’s Opposition to Rambus’s Motion to Reopen the Record at 2; Complaint Counsel’s Response to Rambus’s Supplemental Brief in Support of Motion to Reopen Record at 2-3.

¹⁹ Complaint Counsel’s Opposition to Rambus’s Motion to Reopen the Record at 3.

²⁰ Rambus may refile its motion to reopen when and if the documents become available to it for use in this matter. This disposition should not be construed as expressing any view on the merits of Rambus’s motion to reopen the record to admit these documents.