## UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:	Deborah Platt Majoras, Chairman Orson Swindle Thomas B. Leary Pamela Jones Harbour Jon Leibowitz
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In the Matter of

RAMBUS INCORPORATED, a corporation.

Docket No. 9302

## ORDER DIRECTING DESIGNATION OF THE RECORD REGARDING COMPLAINT COUNSEL'S MOTION TO COMPEL PRODUCTION OF, AND TO REOPEN THE RECORD TO ADMIT, DOCUMENTS RELATING TO RAMBUS INC.'S SPOLIATION OF EVIDENCE

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On July 2, 2004, Complaint Counsel filed a Motion to Compel Production of, and to Reopen the Record to Admit, Documents Relating to Respondent Rambus Inc.'s Spoliation of Evidence ("Motion to Compel"). On July 8, 2004, Complaint Counsel and Rambus filed a Joint Stipulation and a Proposed Order that would postpone briefing and stay Commission action on the Motion to Compel until the Court of Appeals for the Federal Circuit resolved Rambus's pending Petition for Writ of Mandamus ("Petition") seeking to overturn the disclosure of documents ordered by the United States District Court for the Eastern District of Virginia. On August 18, 2004, the Court of Appeals for the Federal Circuit denied Rambus's Petition.

On August 25, 2004, Rambus filed a petition for rehearing and rehearing *en banc*. On September 1, 2004, the original Federal Circuit panel denied the petition for rehearing, but the Federal Circuit thereafter directed Infineon to respond to the petition for rehearing *en banc* by September 15, 2004. On September 3, 2004, Complaint Counsel and Rambus filed with the Commission a Revised Stipulation Postponing Briefing and Staying Commission Action on the Motion to Compel, and an accompanying Proposed Order. The Federal Circuit denied Rambus's request for a rehearing *en banc* on September 27, 2004.<sup>1</sup> Rambus filed its response to the Motion to Compel on October 18, 2004 in accordance with the Commission's Order of October 4, 2004.

<sup>&</sup>lt;sup>1</sup> Complaint Counsel filed a Supplemental Memorandum on October 6, 2004 addressing the status of proceedings in the Court of Appeals on Rambus's Petition, including a copy of the Order denying the rehearing *en banc*.

As both Rambus and Complaint Counsel recognize, the standard for reopening the record is stated by the Commission's decision in *Brake Guard Products, Inc.*, 125 F.T.C. 138, 248 n.38 (1998). In that case, the Commission stated:

In deciding whether to reopen the record to receive supplemental evidence, the Commission considers: (1) whether the moving party can demonstrate due diligence (that is, whether there is a bona fide explanation for the failure to introduce the evidence at trial); (2) the extent to which the proffered evidence is probative; (3) whether the proffered evidence is cumulative; and (4) whether reopening the record would prejudice the non-moving party.

The Motion to Compel seeks to supplement the record of these proceedings with documents which appear to address only the process by which Rambus developed and implemented its document retention program. *See* Attachment A to Motion to Compel. These documents do not appear likely to provide the Commission with any information regarding the actual content of the documents destroyed by Rambus. Even if Complaint Counsel have been diligent, and the admission of the requested documents to the record would be both probative and non-prejudicial, we must consider whether the records sought by Complaint Counsel are cumulative in light of the evidence regarding the issue of spoliation developed in earlier proceedings in this matter.

Complaint Counsel filed a motion on December 20, 2002 for default judgment by reason of alleged spoliation of evidence on the part of Rambus. On February 26, 2003, then-Chief Administrative Law Judge Timony issued an Order denying that motion but creating seven "rebuttable adverse presumptions" based upon Rambus's "intentional destruction of documents that it knew or should have known were relevant to reasonably foreseeable litigation . . ."<sup>2</sup> On that same date, Judge Timony entered another Order granting Complaint Counsel's motion for collateral estoppel, by giving "full collateral estoppel effect" to certain findings of fact by the District Court in *Rambus Inc. v. Infineon Technologies AG* concerning Rambus's alleged spoliation of evidence.<sup>3</sup> In his later Initial Decision, Chief Administrative Law Judge McGuire characterized Rambus's conduct with respect to the document destruction issue as "at best, troublesome," but concluded that the proceedings had not been prejudiced because, in his view, there was "no indication that any documents, relevant and material to the disposition of the issues in this case, were destroyed."<sup>4</sup> He also found that none of the seven rebuttable adverse

<sup>3</sup> Order Granting Complaint Counsel's Motion for Collateral Estoppel at 5 (Feb. 26, 2003), *citing* Rambus Inc. v. Infineon Technologies AG, 155 F. Supp. 2d 668 (E.D. Va. 2001), *aff'd in part and rev'd in part*, Nos. 01-1449 et al., 2003 WL 187265 (Fed. Cir. Jan. 29, 2003).

<sup>4</sup> Initial Decision of Chief Administrative Law Judge McGuire (Public Version) at 244 (Feb. 23, 2004).

<sup>&</sup>lt;sup>2</sup> Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument at 8-9 (Feb. 26, 2003).

presumptions was "material to the disposition of the case" because, in his view, two were moot and five were not relevant to any material issues.<sup>5</sup>

The above listing of events related to spoliation of evidence is illustrative rather than exhaustive of the proceedings below regarding this issue. Based on the history of proceedings here, it is not clear whether the additional materials requested by Complaint Counsel are in fact cumulative for purposes of the Motion to Compel. Accordingly,

**IT IS ORDERED THAT**, on or before December 22, 2004, Rambus and Complaint Counsel shall each file with the Commission a detailed designation of the portions of the record below which each deems relevant to determining whether Rambus engaged in spoliation of evidence. If such designation includes, for example, a brief, a transcript, or proposed findings of fact, the designation will identify the relevant portions of such materials with particularity rather than a mere general designation.

By the Commission.

Donald S. Clark Secretary

ISSUED: December 6, 2004

<sup>&</sup>lt;sup>5</sup> Id. at 244-45.