

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

COMMISSIONERS: Deborah Platt Majoras, Chairman
 Orson Swindle
 Thomas B. Leary
 Pamela Jones Harbour
 Jon Liebowitz

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

PUBLIC

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL PRODUCTION OF, AND TO REOPEN THE RECORD TO
INCLUDE, DOCUMENTS RELATING TO RESPONDENT RAMBUS INC.'S
SPOILIATION OF EVIDENCE**

Pursuant to the Commission's Order dated October 4, 2004, and in particular in response to the statement in that Order that, "[t]he Commission will review with interest any opinion or other resolution of the issues pending before the Federal Circuit that may be relevant to the Commission's resolution of the Motion to Compel," Complaint Counsel submits this Supplemental Memorandum to inform the Commission of the current status of the issue in

Rambus Inc. v. Infineon Technologies AG.

On August 18, 2004, the U.S. Court of Appeals for the Federal Circuit denied Rambus's Petition for Writ of Mandamus. See Attachment A. On August 31, 2004, the Federal Circuit denied Rambus's Petition for Rehearing. See Attachment B. On September 27, 2004, the Federal Circuit denied Rambus's Petition for Rehearing En Banc.¹ See Attachment C.

It appears that, since September 27, 2004, Rambus has produced to Infineon at least 49 documents that are responsive to Complaint Counsel's Motion (the "Spoliation Documents"). On September 30, 2004, the District Court entered a Stipulated Order providing, *inter alia*, that "the parties agree that Infineon may seek to introduce into evidence [the Spoliation Documents], as well as the depositions related to those documents, subject to any evidentiary objections (which Rambus hereby reserves)." See Attachment D. The Stipulated Order attaches a list of 49 or more specific Spoliation Documents provided by Rambus to Infineon.² As indicated in the sentence quoted above, the Stipulated Order also contemplates that Infineon will conduct deposition discovery of Rambus witnesses with regard to the Spoliation Documents. The trial date in that litigation has been rescheduled for November 15, 2004.

¹ Pursuant to the Commission's Order dated October 4, 2004, Complaint Counsel understands that Rambus has until October 18, 2004, to respond to Complaint Counsel's Motion.

² The list attached to the Stipulated Order contains 49 entries. Two entries on the list (numbers 4652 and 4653) apparently refer to multiple documents, making it impossible to determine the exact number of documents produced by Rambus to Infineon. See Attachment D, footnote **.

Respectfully submitted,

Geoffrey D. Oliver
Patrick J. Roach
Robert P. Davis

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20008
(202) 326-2275
Counsel for the Complaint

October 6, 2004

CERTIFICATE OF SERVICE

I, Lourine K. McDuffie, hereby certify that on October 6, 2004, I caused a copy of the attached, *Supplemental Memorandum In Support of Motion to Compel Production of, and to Reopen the Record to Include, Documents Relating to Respondent Rambus Inc.'s Spoliation of Evidence*, to be served upon the following persons:

by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
Via Office of the Secretary, Room H-159
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

and by electronic transmission and overnight courier to:

A. Douglas Melamed, Esq.
Wilmer Cutler Pickering LLP
2445 M Street, N.W.
Washington, DC 20037-1402

Steven M. Perry, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071

Counsel for Rambus Incorporated

Lourine K. McDuffie