

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

COMMISSIONERS: Timothy J. Muris, Chairman
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

PUBLIC

**MOTION TO COMPEL PRODUCTION OF, AND TO REOPEN THE RECORD TO
ADMIT, DOCUMENTS RELATING TO RESPONDENT RAMBUS INC.'S
SPOILIATION OF EVIDENCE**

Since Complaint Counsel filed its Appeal Brief, two orders have issued in connection with ongoing private litigation between Respondent Rambus Inc. (“Rambus”) and Infineon Technologies AG (“Infineon”) that have potentially significant implications for this matter. The orders compel Rambus to produce to Infineon certain documents heretofore withheld, on grounds of privilege, relating to Rambus’s spoliation of evidence. Unless overturned by the Federal Circuit,¹ these rulings will result in a production of a substantial number of Rambus

¹ Rambus has filed a Petition for Writ of Mandamus with the Court of Appeals for the Federal Circuit seeking to overturn both opinions. *See* Attachment C. Complaint Counsel would stipulate to a stay of Commission action on this motion pending resolution by the Federal Circuit

of Rambus's petition. Rambus's Petition for Writ of Mandamus, as well as both of the attached May 18 opinions were obtained from Rambus's website.

² Complaint Counsel does not seek to delay the resolution of this appeal with the filing of this motion. Complaint Counsel believes that the current record provides more than ample evidence proving that Rambus violated Section 5 of the FTC Act, and Complaint Counsel urges the Commission to decide the merits of this matter promptly. At the same time, it appears that the documents in question are highly relevant to this appeal and would be helpful to the Commission in its deliberation. The documents are likely to become available during the pendency of this appeal, and it appears that inclusion of these documents in the record would not

On May 18, 2004, based on an *in camera* review of over 4,600 documents withheld by Rambus on grounds of privilege, Judge Payne of the Federal District Court of Eastern Virginia found that Rambus's "document retention program," pursuant to which it destroyed an enormous volume of documents, "was a key part of the company's patent litigation strategy from the time that it was implemented until after the initiation of [the *Infineon*] action." *Id.* at 45. He further found that "[t]he destroyed documents appear to have included many of the kinds of documents . . . that [are] useful in ascertaining truth and in testing the validity of positions taken in litigation," and that the "destruction of documents of evidentiary value under those circumstances is wrongful and is fundamentally at odds with the administration of justice." *Id.* at 46, 48. He ruled that privilege did not attach to documents relating to its document retention program, and ordered Rambus to produce such documents in that litigation. *Id.* at 49-51; *see also* Memorandum Opinion, *Rambus, Inc. v. Infineon Technologies AG*, Civil Action No. 3:00cv524 (E.D. Va. May 18, 2004) (Payne, J.) (hereinafter "Waiver Opinion") (Attachment B).

Indeed, the record evidence in this matter establishes that, beginning in 1998, Rambus intentionally destroyed an enormous volume of business records relevant to this proceeding. Rambus further instructed its outside counsel to destroy relevant documents, which he did. This

which Rambus asserted privilege.³ In February 2003, Complaint Counsel filed a third motion seeking collateral estoppel effect of certain factual findings in the *Infineon* litigation relating to document destruction. Rambus opposed these motions, asserting that it adopted and implemented its document retention in good faith, and that it was no different from the document retention programs in effect in other companies.

On February 26, 2003, Judge Timony issued an order finding that Rambus “intentionally destroyed documents . . . at a time when Rambus knew or should have known of related litigation” and “provided little, if any, guidance, to its employees as to what documents they were obliged to retain.” Order (Default Judgment) (February 26, 2003) at 4. Although the available evidence did not “definitively establish that Rambus’s document retention program was nothing more than a sham,” it did “establish that Rambus acted with gross negligence concerning and reckless disregard of its obligations to preserve documents relevant to possible litigation.” *Id.* at 8. He concluded that Rambus’s actions amounted to spoliation of evidence. *Id.* at 4. He also found that “Rambus’s utter failure to maintain an inventory of the documents its employees destroyed makes it impossible to discern the exact nature of the relevance of the documents destroyed to the instant matter.” *Id.* at 7. Although he denied Default Judgment, Judge Timony concluded that sanctions were warranted, and adopted a series of factual presumptions against Rambus with respect to issues, the evidence relating to which likely was affected by Rambus’s intentional destruction of documents. *Id.* at 8-9.

Judge Timony granted Complaint Counsel’s motion relating to collateral estoppel, ruling,

³ Based on the description in Judge Payne’s orders, it appears that this motion sought to compel production of the same documents that are now to be produced pursuant to Judge Payne’s orders.

inter alia, that Rambus instituted its document destruction “in anticipation of litigation” and “in part, for the purpose of getting rid of documents that might be harmful in litigation.” Order (Collateral Estoppel) (February 26, 2003) at 5. Judge Timony denied Complaint Counsel’s motion to compel discovery of allegedly privileged materials relating to Rambus’s document destruction, ruling that, in light of the findings and sanctions imposed in his other two orders, the discovery sought by Complaint Counsel of allegedly privileged documents relating to Rambus’s document destruction “would not materially advance the dispositive issues in this case.” Order (Motion to Compel Discovery) (February 26, 2003).

One year later, in his initial decision, Judge McGuire overturned the substance of Judge Timony’s orders. While noting “significant and ongoing concerns about the Respondent directing its employees to conduct a wholesale destruction of documents and failing to create an inventory of what was destroyed,” and describing Rambus’s conduct as “troublesome,” Judge McGuire nevertheless dismissed Judge Timony’s presumptions as either “moot” or “not relevant to any of the issues,” and announced that the issue of spoliation of evidence “does not warrant the Court’s continued attention.” Initial Decision at 244-45. Specifically, Judge McGuire ruled that “the process here has not been prejudiced as there is no indication that any documents, relevant and material to the disposition of the issues in this case, were destroyed.” *Id.* at 244. Through the combination of these rulings, Rambus has managed to escape without facing any consequences for its intentional destruction of documents and without having to provide any discovery of its allegedly privileged documents that are likely to help establish which documents it in fact destroyed.

In March 2004, in the private lawsuit it filed against Infineon, Rambus was forced to

produce *in camera* over 4,600 documents, all of which Rambus had previously withheld from Infineon, and from Complaint Counsel, on privilege grounds.⁴

On May 18, 2004, after conducting an extensive review of these previously-withheld documents, Judge Payne issued two separate rulings requiring Rambus to produce a subset of these documents, consisting of 27 specifically-identified documents as well as certain documents dated between January 1, 1998 and December 31, 2001 and relating to Rambus's document retention policy (hereinafter referred to as the "Spoliation Documents"). In the first opinion, Judge Payne ruled that, pursuant to the crime/fraud exception to the attorney-client privilege, Rambus shall no longer be entitled to make any assertion of privilege relating to the development or implementation of its document retention program. Crime-Fraud Opinion (Attachment A). This ruling is predicated upon Judge Payne's conclusion that Rambus's

⁴ Complaint Counsel sought, but failed to obtain, access to many of these documents during the course of the Part III litigation. In March 2001, Judge Payne pierced Rambus's attorney-client and work-product privileges pursuant to the crime-fraud exception. Based on the suggestion of the parties, however, he ordered discovery of such materials only through June 1996. The 4,600 items on Rambus's privilege log were documents, the production of which was not compelled by Judge Payne's March 2001 order. Complaint Counsel's motion for access to certain of these documents was granted by Judge Timony pursuant to the crime-fraud doctrine. Order at 3 (February 28, 2003) ("there is no reason why discovery under the crime-fraud exception must be limited only up to June 1996 . . ."). Judge McGuire granted Rambus's motion to reconsider. Order (March 26, 2003). Following another round of briefing, Judge McGuire affirmed Judge Timony's ruling on grounds of waiver. Order (May 13, 2003). After Rambus stated that it would seek interlocutory appeal or a writ of mandamus, Tr. 1735-39, Judge McGuire subsequently reversed both himself and Judge Timony and ruled that Rambus was not required to produce the documents in question. Order (May 29, 2003). Thus, neither Complaint Counsel nor the Commission have access to the 4,600 documents recently reviewed by Judge Payne.

thereof, was devised and implemented with the aid and advice of lawyers, both in-house and outside,” and that the allegedly privileged documents evince Rambus’s plan “to destroy discoverable documents as part of its litigation strategy.” *Id.* at 47. In the second opinion, Judge Payne ruled that Rambus also waived any claim of privilege that it might otherwise assert on this issue, in part because, in this very FTC proceeding, “Rambus selectively disclosed certain privileged communications about the purpose, scope, and implementation of the company’s document retention policy” and selectively “withheld” others. Waiver Opinion at 6 (Attachment B).

Rambus has filed a Petition for Writ of Mandamus with the Federal Circuit, challenging both of Judge Payne’s opinions. Unless the Federal Circuit grants Rambus’s petition and issues a writ of mandamus overturning both of Judge Payne’s rulings, Rambus will be compelled to produce the Spoliation Documents.

II. Relevance to This Proceeding

The Spoliation Documents appear to be directly relevant to issues now pending before the Commission. From Judge Payne’s opinions, it appears that these documents supply the evidence that Judge Timony thought was missing, and which establishes that Rambus’s document retention policy was in fact a “sham.” Order (Default Judgment.) (February 26, 2003) at 8. Based on his review of the documents, Judge Payne concluded that:

[T]he program was set up for what . . . rather clearly appears to have been an impermissible purpose – the destruction of relevant, discoverable documents at a time when Rambus anticipated initiating litigation to enforce its patent rights against already identified adversaries. . . . Simply put, destruction of documents of evidentiary value under those circumstances is wrongful and is fundamentally at odds with the administration of justice.

McGuire’s finding that “the document destruction issue in this case . . . does not warrant the [Commission’s] continued attention” because “the process here has not been prejudiced as there is no indication that any documents, relevant and material to the disposition of the issues in this case, were destroyed.” Initial Decision at 244. The Spoliation Documents appear to show otherwise. According to Judge Payne:

The destroyed documents appear to have included many of the kinds of documents usually generated in the course of business that contain information that is useful in ascertaining truth and in testing the validity of positions taken in litigation . . .

Crime-Fraud Opinion at 46 (Attachment A). Judge Payne described the destroyed evidence as including:

. . . email communications, notes of license negotiations, contract drafts, as well as information about activities at JEDEC. So sweeping was the Rambus destruction that the destroyed documents may also include reverse engineering documents and claim charts and other infringement related documents.

*Id.*⁵

⁵ See also *id.* at 43 (“The record shows that the document destruction was on an enormous scale reaching all kinds of documents with potential relevance to this case and that it was voluminous, sweeping up and purging millions of documents under the control of Rambus, both in its own facilities and in the offices of its retained outside patent counsel.”).

The Spoliation Documents also appear to reveal details about Rambus’s document retention program that were not previously known to Complaint Counsel or to Judge McGuire. For instance, it was previously known that Rambus sponsored a “Shred Day” in September 1998 during which Rambus employees destroyed over 20,000 pounds of documents. However, the Spoliation Documents apparently show that Rambus also conducted Shred Days in 1999 and 2000. Crime-Fraud Opinion at 15; see also *id.* at 31-32 (citing a document referring to a “1999 shredding party at Rambus” among a list of action items relating to “Licensing/Litigation Readiness”).

Thus, the Spoliation Documents appear to confirm not only that evidence “relevant and material to the disposition of the issues in this case” were destroyed, Initial Decision at 244, but that the administration of justice in this matter has been prejudiced on at least two levels. First, at the general level, the Commission appears to be lacking certain of Rambus’s routine internal business documents of the type that would permit it to test the veracity and accuracy of certain of Rambus’s arguments in this litigation. As stated by Judge Payne:

Such activities . . . frustrate the fair adjudication of controversies by depriving the finder of fact of evidence from which the truth may be discerned.

Crime-Fraud Opinion at 48 (Attachment A). Second, it appears that Rambus may have destroyed evidence relating to central issues in this litigation. While substantial evidence remains, it appears that Rambus could have destroyed evidence relating to such issues as:

- the identity of the individuals at Rambus who routinely followed JEDEC work

- Rambus’s understanding of the relationship between its pending patent applications and the ongoing work at JEDEC (including any claims analyses performed internally or by outside patent counsel);

district court's order that a party's documents are not privileged is entitled to collateral estoppel effect and is determinative in Commission proceedings, so long as the matter was actually litigated and determined by a court of competent jurisdiction. *See F.T.C. v. GlaxoSmithKline*, 202 F.R.D. 8, 11 (D.D.C. 2001). In this litigation, Rambus has conceded that "case law in the District for the District of Columbia arguably supports the principle that a determination of the applicability of privilege in a civil lawsuit may have preclusive effect in an action pending before the Commission." Opposition to Complaint Counsel's Motion to Compel Discovery (January 21, 2003) at 17-18.

The Commission is authorized to reopen the record at this time. 16 C.F.R. § 3.54(a). Reopening the record to receive supplemental evidence is appropriate if: (1) the moving party can demonstrate due diligence; (2) the proffered evidence is probative; (3) the proffered evidence is not cumulative; and (4) the non-moving party would not be prejudiced. *In re Brake Guard Products Inc.*, 125 F.T.C. 138, 248 n.38 (1998) citing *Chrysler Corp. v. FTC*, 561 F.2d 357, 361-63 (D.C. Cir. 1977) (affirming the admission of new evidence by the Commission). Those criteria are satisfied here.

Complaint Counsel acted diligently to attempt to compel production of the Spoliation Documents during Part III litigation. *See* Motion to Compel Discovery Relating to Rambus's Document Destruction (January 31, 2003); Order Denying Complaint Counsel's Motion Relating to Rambus's Document Destruction (February 26, 2003). Complaint Counsel have not sought to relitigate this issue on appeal, choosing instead to focus on the merits. Upon learning of Judge Payne's order, however, and the prospect that Rambus will definitively lose any privilege claims regarding, and be forced to turn over to litigation opponents, the Spoliation Documents,

Complaint Counsel moved promptly to seek to ensure that any such documents produced by Rambus in the private litigation it initiated in District Court are also made available to the Commission in this matter.

The Spoliation Documents are probative, and non-cumulative, for all the reasons set forth in Section II above. While the record contains ample evidence proving that Rambus violated Section 5 of the FTC Act, the Spoliation Documents appear to provide important information about additional evidence that may no longer exist.

Nor can Rambus assert any good-faith claim of prejudice. Rambus has been on notice since the initiation of this Part III litigation that its destruction of relevant documents is an issue in this case. *See* Complaint ¶ 121. This motion does not seek to pierce or destroy any privilege that Rambus otherwise might maintain against Infineon. As stated above, Complaint Counsel is willing to stipulate to a stay of Commission action on this motion pending determination by the Federal Circuit of Rambus's petition for a writ of mandamus. Thus, this motion will not determine any of Rambus's rights. Rather, it simply seeks to ensure that documents as to which Rambus no longer can assert privilege, and that are produced to another litigation opponent (in litigation that Rambus itself commenced), are not excluded from the record in this matter because of an accident of timing.

Additionally, it appears that Rambus may have used its claims of privilege improperly in this matter in order to promote false arguments while sheltering from discovery the documents that would have revealed the truth. Waiver Opinion at 8-9, 18 (Attachment B). Having destroyed relevant evidence, Rambus now argues on appeal that Complaint Counsel have failed to produce sufficient evidence of certain elements of its case. Admission into the record of the

Spoliation Documents would not prejudice Rambus in any way, but would only serve to offset in part the effects of Rambus's past litigation misconduct.

CONCLUSION

For the forgoing reasons, Complaint Counsel respectfully requests that the Commission compel production of, and reopen the record to admit, all documents produced in the *Infineon* litigation pursuant to the attached orders, if either order becomes final.

Respectfully submitted,

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July 2, 2004

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PROPOSED ORDER

Having considered Complaint Counsel's Motion to Compel Production of, and to Reopen the Record to Admit, Documents Relating to Respondent Rambus, Inc.'s Spoliation of Evidence, Complaint Counsel's Motion is hereby granted. Accordingly,

IT IS ORDERED THAT Rambus shall produce in this matter all documents it must produce pursuant to either of the Memorandum Opinions.

IT IS FURTHER ORDERED THAT the record be reopened for the purpose of admitting such documents.

By the Commission.

Donald S. Clark

Secretary

ISSUED:

CERTIFICATE OF SERVICE

I, Jessica Rash, hereby certify that on July 2, 2004, I caused a copy of the attached, *Motion to Compel Production of, and to Reopen the Record to Admit Documents Relating to Respondent Rambus Inc.'s Spoliation of Evidence* w/attachments, 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

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