

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 . . ." ² 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. ³ 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." ⁴ He also found that none of the seven rebuttable adverse

² Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument at 8-9 (Feb. 26, 2003).

³ 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).

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

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.⁵

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

⁵ Id. at 244-45.