

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

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

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**DESIGNATION OF RECORD BY RESPONDENT RAMBUS INC.
REGARDING ALLEGED SPOILIATION OF EVIDENCE**

I. INTRODUCTION

In July 2004, Complaint Counsel filed a motion to compel the production by Respondent Rambus Inc. (“Rambus”) of certain privileged documents that Rambus had been required to produce in an action pending in federal court. Rambus filed its brief opposing the motion in October 2004.

On December 6, 2004, the Commission entered an order that provided in part that:

“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. . . . These documents do not appear likely to provide the Commission with any information regarding the actual content of the documents destroyed by Rambus.”

Order, p. 2.

In an effort to assist it in resolving this question, the Commission ordered Complaint Counsel and Rambus to file “a detailed designation of the portions of the record below which each deems relevant to determining whether Rambus engaged in spoliation of evidence.” *Id.*, p. 3. Rambus respectfully submits this response to the Commission’s request.¹

¹ The following abbreviations are used in this memorandum:

- IDF - Initial Decision, Findings of Fact
- IDC - Initial Decision, Conclusions of Law
- RPF - Rambus’s Proposed Findings of Fact
- RRPF - Rambus’s Responses to Complaint Counsel’s Proposed Findings
- CCPF - Complaint Counsel’s Proposed Findings of Fact
- CCRPF - Complaint Counsel’s Responses to Rambus Inc.’s Proposed Findings

II. DISCUSSION

The record evidence regarding Rambus's alleged spoliation of documents was summarized and interpreted by the parties in their proposed findings of fact and/or in their responses to the other party's proposed findings. *See generally* CCPF 1718-1758 and RRPf 1718-1758. After reviewing the parties' submissions and the cited evidence, Judge McGuire concluded in his Initial Decision that Rambus's adoption and implementation of a document retention program had not prejudiced these proceedings because there was "no indication that any documents, relevant and material to the disposition of the issues in this case, were destroyed." IDC 244. The record evidence that is described below offers substantial support for Judge McGuire's conclusion.

A. The Evidence As To Whether Rambus Adopted And Implemented Its Document Retention Policy For Legitimate Business Purposes.

Rambus adopted a formal document retention policy in 1998. *See* RX 1220 at 1-2; CX 2114 at 155-6 (Karp Dep.). The policy was drafted by Joel Karp, Rambus's Vice President of Intellectual Property, with the advice and assistance of the Cooley Godward law firm. Mr. Karp used as templates some sample document retention policies 013 T318 T3() sumu TD6()dic4(Tts)at any do027 Tsyw firm. Mr. Karp w)T-0.c20(t)"gd

things that needed to be kept and then the stuff that did not need to be kept could be thrown away.” CX 2102 at 369 (Karp, Dep.).

Complaint Counsel have implied that because Rambus used “shredders” to dispose of unneeded documents, it might be appropriate to infer that Rambus had adopted or implemented its document retention policy for improper purposes. *See, e.g.*, CCPF 1719, *citing* CX 1744A at 92. As Mr. Karp testified, however, Rambus employed shredders for confidentiality reasons:

“[T]he idea was to put shredders at more convenient locations. Engineers were throwing confidential documents in the trash. I would come in the morning and find people going through my dumpster.”

CX 2114 at 124 (Karp, Dep.). *See also id.* at 135 (“[W]e needed shredders so people . . . could get rid of confidential documents in an easy way rather than taking the chance they would end up in the dumpsters.”).

There is no evidence in the record that shredders are an inappropriate method of destroying confidential material. Instead, as Rambus pointed out in its proposed findings, government regulations recognize that confidential business information should be disposed of “by a paper shredder, burning, or other approved method.” RPPF 1719, *quoting* Department of Agriculture Animal and Plant Inspection Service, Policy Statement on the Protection of Privileged or Confidential Business Information, 50 Fed. Reg. 38561 (Sept. 23, 1985). In short, the fact that Rambus utilized shredders rather than incineration or some other form of disposal does not suggest that Rambus adopted or implemented its document retention policy for improper purposes.

Complaint Counsel have also implied that Rambus’s treatment of emails under its document retention policy might support an inference that the policy was utilized to destroy relevant evidence. As originally promulgated, the document retention policy provided for the deletion of emails from Rambus’s servers after three months.

CX 1264 at 1; CX 2102 at 343-345 (Karp, Dep.). There is no evidence, however, that such a policy is unusual. Mitsubishi's JEDEC representative testified, for example, that his company "recycled" emails after six months. Chen 1/16/03 Depo. Tr. 81-82 (read into record on 7/14/03). Moreover, when the document retention policy was introduced, Rambus employees were told to make sure they took steps to archive important emails. *See* CX 1031 at 1 (email from Joel Karp informing employees "you can no longer depend on the full system backups for archival purposes. Any valuable data, engineering or otherwise, must be archived separately"); CX 2102 at 343-344 (Karp, Dep.) (same).

The evidence in the record does suggest that when it adopted its document retention policy, Rambus was generally concerned about the fact that electronic communications such as emails might have to be searched and produced in response to subpoenas or document requests in any future litigation. CX 1264 at 1. As the policy's

might seek claims covering various technologies). There is thus no reason to suspect that Rambus adopted or implemented its document retention policy in anticipation of JEDEC-related litigation.

B. The Evidence As To Whether Documents Material To This Litigation Were Destroyed By Rambus.

The record shows that Rambus disposed of a large volume of documents after adopting its document retention policy in 1998. CCPF 1740. The record also shows, however, that a large volume of documents was retained and that the documents retained included those that were pertinent to this litigation. RRPf 1728-29, 1737-38, 1742-47. For example, Rambus JEDEC representative Richard Crisp testified that he took affirmative steps to, and did, archive and preserve his JEDEC-related emails, sheparding them through several changes to Rambus computer equipment. Crisp, Tr. 3571-76, 3588-96. Mr. Crisp also testified that after litigation commenced, he located his JEDEC-related emails in his home computer and turned them over to Rambus's general counsel. Crisp, Tr. 3574. These emails were produced to Complaint Counsel, and many were admitted at trial. *See, e.g.*, CX-673 (trip report from May 1992 JEDEC meeting); CX-700 (trip report from May 1993 JEDEC meeting); CX 711 (trip reports from numerous 1993-1995 JEDEC meetings). Finally, Mr. Crisp testified that the JEDEC-related materials that he *did* dispose of were the "official" JEDEC meeting minutes and unmarked paper ballots that had been sent out from the JEDEC office. Crisp, Tr. 3571. These types of "official" documents were available from the JEDEC office, and many were admitted at trial. *See, e.g.*, JX 10-JX 29. *See also* IDF 235 and Kelley, Tr. 2622-3 (JEDEC meeting minutes were available to the public).

Mr. Crisp also testified that he made every attempt to "try to keep the documents that I'd been advised that I should keep." Crisp, Tr. 3427. He explained that most of the documents he needed to retain were in the form of computer files and that he

“gave a great deal of thought to what I needed to keep that was on my computer.” *Id.* at 3428. Mr. Crisp noted that the paper documents that he discarded included such items as “data books” and “brochures from marketing conferences” that he had attended. *Id.* Mr. Crisp understood that we did not need to retain these materials, *id.*, and Complaint Counsel have not contended that they are or were relevant to this litigation.

Other witnesses similarly testified that pursuant to the Rambus policy, “documents were not removed if there was any reason to save them.” Diepenbrock, Tr. 6236. *See also* CX 2114 at 174 (Karp Dep.); CX 2102 at 378 (Karp Dep.). Rambus’s outside patent counsel, Lester Vincent, testified that he had not discarded any documents related either to the JEDEC patent policy or to his legal advice to Rambus about its disclosure of patents or patent applications to JEDEC. CX 3126 at 416 (Vincent Dep.). At least a dozen different sets of handwritten notes authored by Mr. Vincent were introduced at trial, along with other relevant documents prepared by Mr. Vincent. *See, e.g.*, CX 1941-1942 (handwritten notes from March 1992 discussions with Rambus); CX 1931 (time entries).

III. CONCLUSION

In light of the evidentiary record, it is understandable that Complaint Counsel conceded below that there exists in this case “an unusual degree of visibility into the precise nature of Rambus’ conduct, as well as the underlying motivations for what Rambus did,” Opening Statement, Tr. 15, and it is understandable that Complaint Counsel chose not to appeal Judge McGuire’s conclusion that no material documents were destroyed by Rambus pursuant to its document retention policy. IDC 244.

