
¹ Order Granting in Part Complaint Counsel's Motion to Compel Production Of,

³ Hynix Semiconductor, Inc. V. Rambus, Inc., Case No. CV 00-20905 RMW (N.D. CA) (“*Hynix* litigation”). Like the *Infineon* litigation, the *Hynix* litigation involves, *inter alia*, patent infringement claims against DRAM manufacturers including Hynix with respect to production of JEDEC-compliant DRAM devices and counterclaims against Rambus based on its conduct within JEDEC.

⁴ By “unproduced document” Complaint Counsel refers to all documents that Rambus has produced or will produce in its litigation with the DRAM manufacturers but which, despite being responsive to a Complaint Counsel document request, were never produced in this action. This category includes responsive documents found in the back-up tapes currently under review by Rambus as well as any responsive documents found on Rambus’s computer system that were not searched during discovery in this case. In addition, the term “unproduced document” includes all documents covered by Judge Payne’s March 7, 2001 Order in *Rambus v. Infineon*

JEDEC's work, Rambus' motivation for its conduct,
Rambus' evaluation of alternative technologies? ...

[Rambus Counsel:] Yes to all....⁵

But it is clear from recent events in the *Hynix* litigation that Rambus has located new and previously unproduced documents that may contradict this assertion. As explained below, these new materials apparently contain never-before-produced documents that likely were responsive to Complaint Counsel's document requests, and that Rambus should have produced in a timely fashion. Complaint Counsel move the Commission to compel Rambus to produce the unproduced documents to Complaint Counsel for two reasons: first, it appears likely that the documents can further illuminate the harm that Rambus's document destruction caused to the Commission's fact-finding process before the ALJ, and second, some of the documents, if they are clear on their face, may be probative on important issues in this case.

This motion is prompted by events in the *Hynix* litigation over the past few months, in which Rambus has discovered a large number of computer back-up storage devices that were apparently never reviewed by Rambus in the nearly five years of discovery and litigation in the FTC case.⁶ Rambus admits that it initially discovered a number of these back-up devices while searching for responsive documents during the discovery period in the FTC case, but that it

⁵ *In the Matter of Rambus, Inc.*, D-9302, Oral Argument Second Session (December 9, 2004) at 161.

⁶ On May 5, 2005, Complaint Counsel informed the Commission that Rambus had discovered 1,397 back-up devices and other electronic storage media in various places throughout the Rambus offices. The number of newly discovered back-up devices has expanded in the last few weeks to 1,414 pieces of "backup media." See Supplemental Case Management Statement of Rambus, Inc. (May 20, 2005) at 3 (Attachment 1). Rambus apparently stored its back-up information on a range of media. For ease of discussion, the term "back-up tape" or "device" will be used to reference all of them.

⁷ See Rambus, Inc.'s Verified Statement Re: Discovery of Backup Tapes (April 27, 2005) at 2-4 (Attachment 2).

⁸ Many of the remaining back-up storage devices are now the subject of a discovery dispute between Rambus and Hynix. Although not a subject of this Motion, Hynix has also challenged Rambus's characterization of the erased devices, and has requested that they be evaluated by an expert. See Hynix Supplemental Case Management Statement (May 20, 2005) at 1-2 (Attachment 3).

⁹ Rambus has apparently produced a portion of the previously unproduced documents from the back-up devices to Hynix once a week since April 15, but has so far refused to review or produce documents from devices created prior to May of 1996 or after February 2000. See Rambus Supplemental Case Management Statement (Attachment 1) at 11-13.

¹⁰ See Rambus Supplemental Case Management Statement (Attachment 1) at 11.

¹¹ *Id.* Some of the devices discovered by Rambus are even more intriguing than the 1996 back-up tapes. Rambus has apparently found backup tapes labeled "Crisp," "Tate," "Mooring," and "Deipenbrock," apparently referring to high-level Rambus executives who

concedes would have been covered by Judge Payne’s March 2001 crime-fraud ruling in *Infineon*.¹⁶ Among the withheld documents listed on the privilege log are (1) an October 19, 1992 email from David Mooring to Richard Crisp, Allen Roberts, Geoff Tate, and Mike Farmwald “describing request for legal advice to Rambus counsel regarding JEDEC disclosure policy;” (2) an October 20, 1992, email from Crisp to Mooring, Farmwald, Roberts, and Tate on the same subject; (3) a series of at least seven September 1995 emails between Crisp, Anthony Diepenbrock and others regarding “legal review of draft statement at JEDEC meeting concerning patent position;” and (4) an email at the end of March of 1996 from Crisp to Roberts, Mooring, Deipenbrock and Richard Barth “reflecting legal advice of Lester Vincent, Esq. regarding draft letter to JEDEC.”¹⁷

These previously unproduced documents relate to issues and events that were heavily contested at trial in the FTC case and that were central to the ALJ’s findings and Initial Decision:

¹⁶ *Id.* at 5, fn. *. Rambus has apparently refused to produce these documents to Hynix on the grounds that they were “not reviewed and produced during the Infineon case and thus ... not among the documents subsequently produced to Hynix for which Judge Whyte found a waiver of the privilege claim.” *Id.* However, in the FTC case Rambus has explicitly waived any claim of privilege for documents subject to Judge Payne’s crime-fraud ruling irrespective of whether they were produced to Infineon. *See* Declaration of Gregory P. Stone Supporting Memorandum by Rambus Inc. In Opposition to Complaint Counsel’s Motion to Compel Discovery Relating to Subject Matters as to which Rambus’s Privilege Claims Were Invalidated on Crime-Fraud Grounds and Subsequently Waived at ¶ 3 (Rambus “decided not to assert privilege in this proceeding as to the documents subject to the prior discovery order entered by Judge Payne in the *Infineon* litigation.”) (Attachment 9); *see also id.* at ¶ 4 (“I just want to make clear that we do not contend that documents or testimony regarding conduct or communications during the time period ‘91 through June of ‘96 that were covered by Judge Payne’s ruling that the privilege was vitiated are privileged.”). Consequently, Rambus should be required to produce to Complaint Counsel any documents that would have been covered by Judge Payne’s crime-fraud ruling had Rambus found them in time.

¹⁷ *See* Rambus Privilege Log (Attachment 8), items B8, B9, B26-B32, and B35.

¹⁸ This correspondence regarding the JEDEC patent disclosure policy occurred about 4 months after Rambus CEO Tate, in a five year business plan addressed to Farmwald, Roberts, Mooring, and others described the JEDEC SDRAM standard-setting process and stated that “we believe that Sync DRAMs infringe on some claims in our filed patents; and there are additional claims we can file for our patents that cover features of Sync DRAMs. Then we will be in a position to request patent licensing (fees and royalties) from any manufacturer of Sync DRAMs...” *See* CX543 at 15-17.

¹⁹ This is the request that led to Rambus’s poorly received “non-statement” at the September 1995 JEDEC meeting, the reaction to which caused Richard Crisp to remind JEDEC members that Rambus had previously made a patent disclosure under the JEDEC policy

Nevertheless, Complaint Counsel emphasize that it is not necessary for the Commission to order Rambus to produce the unproduced documents in order to resolve this appeal. The record already contains more than ample evidence to demonstrate the broad effect of Rambus's spoliation and to support a finding that Rambus violated Section 5 of the FTC Act. Should the Commission decide not to compel Rambus to provide Complaint Counsel and the Commission with its unproduced documents, the Commission is entitled to, and should, infer that the contents of such documents are broadly harmful to Rambus's position.²²

IV. Complaint Counsel Request That the May 13 Spoliation Order Be Adjusted to Accommodate the Newly-Discovered Unproduced Rambus Documents.

In its May 13, 2005 Spoliation Order, the Commission established a procedure for dealing with the previously unproduced Rambus documents that surfaced on the record of the evidentiary hearing in the *Infineon* litigation. That order directs the parties to select and designate relevant materials by June 14, 2005, and establishes further dates for submitting objections and responses.²³ It further contemplates that at some future time the parties will file

²² In cases like this, where a firm has intentionally destroyed massive quantities of documents in anticipation of litigation, the victims of the spoliation are entitled to a presumption of prejudice that can be overcome only by clear and convincing evidence. *See, e.g., Shaffer v. RWP Group Inc.*, 169 F.R.D. 19, 28 (EDNY 1996); *see also* Memorandum in Support of Complaint Counsel's Motion for Default Judgment at 91-94 (December 20, 2002). This is because the spoliation itself makes it impossible for the victim to prove it was prejudiced when it cannot prove what documents are missing. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (1st Cir. 1988) ("Without the imposition of a heavy burden [on the spoliator] such as the 'clear and convincing' standard, spoliators would almost certainly benefit from having destroyed the documents, since the opposing party could probably muster little evidence concerning the value of papers it never saw.").

²³ Spoliation Order at 4.

and respond to amended proposed filings of fact and possible motions for relief or inferences, as appropriate based on any additions to the record that the Commission may order.²⁴

Complaint Counsel by this motion propose that the procedures established by the May 13, 2005 Spoliation Order be modified to accommodate as well the recently-discovered unproduced documents from the *Hynix* litigation. Complaint Counsel seek prompt production by Rambus of documents in the *Hynix* litigation that are responsive to the long-standing discovery requests made in the FTC case, as well as those that are subject to Judge Payne's crime-fraud ruling, regardless of whether Rambus produced those documents to Infineon.²⁵ From this production, the parties would be permitted to select and designate relevant documents for possible inclusion in the record using the same procedures already established by the Commission for the *Infineon* case documents. Incorporating both the *Infineon* and *Hynix* case documents in the same process will avoid multiple filings.

Rambus has proposed to complete its production to Hynix by July 29, 2005.²⁶ If the Commission grants this Motion, Complaint Counsel request that the schedule set forth in the Commission's Spoliation Order of May 13 be modified as set forth in the proposed Order. The proposed schedule assumes that Rambus supplies the documents to Complaint Counsel on or about the date that Rambus has promised to produce the documents in the *Hynix* litigation.

²⁴ Spoliation Order at 4, n.6.

²⁵ See footnote 16, *supra*. The Rambus privilege log from the *Hynix* litigation indicates that thus far there are a number of newly-discovered responsive documents that would have been be subject to production under the crime-fraud ruling applicable in the FTC case, but which Rambus is withholding from Hynix.

²⁶ See Rambus, Inc.'s Verified Statement (Attachment 2) at 13.

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May 27, 2005

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

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

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

PUBLIC

PROPOSED ORDER

Having considered Complaint Counsel's Motion to Compel Production Of Additional Unproduced Responsive Documents, Complaint Counsel's Motion is hereby granted. Accordingly,

IT IS ORDERED THAT Rambus as soon as possible but by no later than July 29, 2005, shall produce to Complaint Counsel in this matter all documents identified in the *Hynix* litigation that have not been produced previously to Complaint Counsel and that are responsive to any discovery requests made by Complaint Counsel to Rambus in the investigation or litigation of the FTC case, including all documents that would have been subject to Judge Paynes's crime-fraud decision in *Infineon*.

IT IS FURTHER ORDERED THAT the record be reopened for the purpose of admitting documents according to the following schedule:

1. On or before August 15, 2005, Complaint Counsel and Rambus may each file such documents (a) that are parts of the record of the evidentiary hearing in the *Infineon* litigation, or (b) that are required to be produced by Rambus pursuant to this Order, as each party may deem relevant to any issue in this matter; provided, however, that the filing of such materials shall be accompanied by a schedule of exhibits which includes both exhibit numbers for each exhibit and a brief description of each exhibit; and
