

**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 that were provided to him by lawyers at Cooley Godward. CX 2102 at 342 (Karp Dep.).

The evidence shows that Rambus's policy contained standard features found in the most common types of document retention policies and required Rambus employees to *retain* many different kinds of documents. For example, employees were specifically instructed to keep: (1) documents containing Rambus's trade secret information; (2) documents demonstrating proof of invention dates; and (3) documents that would aid in refreshing recollection regarding contracts. CX 1264 at 5, 7, 10. Rambus's employees were also told emphatically to "LOOK FOR THINGS TO KEEP" and "LOOK FOR REASONS TO KEEP IT." *Id.* (capitalization in original). As Mr. Karp explained, "the idea was not 'destroying,' the idea was, you know, culling out the

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 author, Mr. Karp, explained, his concern was not the *content* of the emails but their *volume* and the time and expense involved in searching them:

"Q. Were you getting – in March of 1998, were you getting worried, or more and more worried about e-mail backups, potentially containing discoverable information?

A. What I was worried about was that there were literally thousands of back-up tapes that – most of which were not even readable. And I discovered that when I tried to read one.

And my concern was that if I was ever asked to produce those thousands of back-up tapes, regardless of what they concerned – they did not just contain e-mail, they contained everything – that it would be a task that would be beyond the human endurance to have to try to figure out what was on those things."

CX 2102 at 347-348.

In sum, the fact that Rambus's document retention policy, as drafted, provided for the deletion of emails after three months does not suggest that the policy was an inappropriate one.²

Complaint Counsel have also argued that Rambus should have suspected that litigation relating to Rambus's participation at JEDEC might result if it ever attempted to license patents covering JEDEC-compliant SDRAM or DDR SDRAM devices. The record shows, however, that Rambus had no such patents until 1999, long after Rambus left JEDEC. IDF 913. In addition, the author of the Rambus document retention policy, Mr. Karp, was a JEDEC representative for Samsung during much of Rambus's tenure as a JEDEC member, and he testified that he "never" thought that there might be a "JEDEC issue" if Rambus were to obtain patents covering JEDEC-compliant devices. CX 2102 at 314 (Karp, Dep.). Mr. Karp testified that "he just couldn't connect Rambus in any way with the issues that surfaced in the TI case or in the Wang case". *Id.* at 315. Mr. Karp also explained that after reviewing the specification in Rambus's '703 patent and the specification in the publicly available European application, it was "clear to [him] from [his] experience" that Rambus would be claiming intellectual property rights to all of the inventions contained in the specification. *Id.* at 321. *See also* IDF 207 (finding by Judge McGuire that a reasonable engineer reviewing the specification in the publicly available European, or "PCT," application would have realized that Rambus

² Mr. Karp and several other witnesses also testified that Rambus employees were instructed *not* to destroy emails and other documents "if there was any sort of litigation going on." CX 2104 at 805 (Crisp, Dep.). *See also* CX 2109 at 190 (Davidow, Dep.) (testimony by Rambus board member that "when these – all these legal questions began to arise, I was instructed to retain Rambus documents"); CX 2114 at 164 (Karp, Dep.) (testimony by Mr. Karp that "once we filed a lawsuit I believe people were told to freeze everything at that point"); CX 2112 at 292-293 (testimony by Rambus CEO David Mooring that "we got a couple of notices over the last few years saying anywhere from save everything on certain subjects to a request to save everything.")

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.

DATED: December __, 2004

Respectfully submitted,

Gregory P. Stone
Steven M. Perry
Peter A. Detre
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
(213) 683-9100

A. Douglas Melamed
Kenneth A. Bamberger
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

John M. Guaragna
GRAY, CARY, WARE & FREIDENRICH LLP
1221 S. MoPac Expressway, Suite 400
Austin, Texas 78746
(512) 457-7125

Attorneys for Respondent Rambus Inc.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
) Docket No. 9302
RAMBUS INCORPORATED,)
)
a corporation.)
_____)

CERTIFICATE OF SERVICE

I, Kenneth A. Bamberger, hereby certify that on December 22, 2004, I caused true and correct copies of the *Designation Of Record By Respondent Rambus Inc. Regarding Alleged Spoliation Of Evidence*, to be served on the following persons by hand delivery:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Geoffrey Oliver, Esq.
Assistant Director
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

Donald S. Clark, Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Malcolm L. Catt, Esq.
Attorney
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

Kenneth A. Bamberger

