

**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

**COMPLAINT COUNSEL’S MOTION TO COMPEL PRODUCTION
OF ADDITIONAL UNPRODUCED RESPONSIVE DOCUMENTS**

On May 13, 2005, the Commission entered an Order¹ granting in part Complaint Counsel’s motion seeking to compel production and to reopen the record to admit certain documents that surfaced in the private litigation between Rambus and Infineon in U.S. District Court in Richmond, Virginia.² Complaint Counsel now have learned that additional plainly relevant but unproduced documents have begun to surface in a second private litigation, currently pending between Rambus and Hynix in the U.S. District Court for the Northern District

¹ Order Granting in Part Complaint Counsel’s Motion to Compel Production Of, and to Reopen the Record to Admit, Documents Relating to Rambus Inc.’s Spoliation of Evidence; and Granting Rambus’s Unopposed Motion for Release of Testimony, (“Spoliation Order”) Docket No. 9302 (May 13, 2005).

² Rambus v. Infineon Technologies, AG, Civil Action No. 3:00cv524 (E.D. Va.) (“*Infineon* litigation”). As the Commission correctly noted, the *Infineon* litigation was settled by the parties by a stipulation entered on March 21, 2005. Spoliation Order at 2, n.4.

of California.³ Complaint Counsel file this motion seeking to extend the provisions of the Commission's May 13, 2005 Order to the relevant but unproduced documents surfacing in both of these private cases, and to adjust the timing of the procedure contemplated by the May 13 Spoliation Order to accommodate the orderly admission of selected documents from the materials that are surfacing belatedly from Rambus.⁴

I. There Are Additional Unproduced Rambus Documents Beyond the Scope of the Commission's May 13 Spoliation Order.

By now it is clear that Rambus destroyed a large quantity of documents prior to filing its patent cases against the DRAM manufacturers. Despite the absence of so many of its documents, Rambus has repeatedly argued that all of the important documents have been produced. For example, there was the following exchange at the oral argument before the Commission in December 2004:

[Commissioner Harbour:] Then it is Rambus' position that it did not destroy any documents pertaining to, for example, the scope of Rambus' patent claims and their relationship to

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* concerning crime-fraud, whether or not such documents were produced to Infineon in that case.

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.

failed to review their contents.⁷ Over a thousand of the devices discovered by Rambus have been erased, are corrupted or are otherwise unreadable.⁸ Rambus has begun to produce documents to Hynix from the remaining devices, including a series of back-up tapes that purport to contain a back-up of some part of Rambus's computer system as of May 19, 1996.⁹ Rambus has characterized these devices as "a reasonably complete backup of the Rambus servers as of May 19, 1996."¹⁰ However, it acknowledges that one of the set (Tape 9 of 20) is missing.¹¹

In addition to these computer backup materials, Rambus recently admitted to the Hynix court (but not to Complaint Counsel) that it discovered an additional set of potentially responsive documents located on a Rambus computer server that should have been produced to Complaint

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 figure prominently in the events at issue in the FTC case. See Letter from Geoffrey Yost to Carolyn Hoecker Luedtke at 1-2 (May 10, 2005) (Attachment 4). It is not clear at this point whether those tapes are among those that have been erased and, if not, whether Rambus has agreed to search them for production to Hynix.

Counsel during the discovery phase of the case here but which were not produced.¹² Rambus has agreed to produce to Hynix any responsive but non-privileged documents from the server. Complaint Counsel have asked Rambus for further information concerning these materials, but has received no response.¹³

Since May 4, 2005, Complaint Counsel have made three requests in writing to Rambus counsel for these previously unproduced responsive documents.¹⁴ Despite the fact that Rambus has apparently already committed to produce many of the documents to Hynix, Complaint Counsel have not yet received any substantive response, orally or in writing, to their written requests.

II. The Recently Discovered Unproduced Documents Are Plainly Relevant to the FTC Case.

Although Complaint Counsel have not seen the documents produced to Hynix, the potential importance of the documents is demonstrated by Rambus's privilege log for that production to date. That privilege log briefly describes thirty-seven documents found on the back-up devices.¹⁵ In the privilege log Rambus designates twenty-one of these documents that it

¹² See Rambus Supplemental Case Management Statement (Attachment 1) at 13, n.11 ("A second set of documents [that it will produce to Hynix by July 29] includes documents from Rambus's server that belong to employees who left Rambus prior to 2002 document collection for the FTC proceedings and whose files on the server were not identified during that collection.").

¹³ Email Message from Patrick Roach to Gregory Stone (May 20, 2005) (Attachment 5).

¹⁴ See Letter from Geoffrey Oliver to Gregory Stone (May 17, 2005) (Attachment 6); Letter from Geoffrey Oliver to Gregory Stone (May 4, 2005) (Attachment 7); Email Message from Patrick Roach to Gregory Stone (May 20, 2005) (Attachment 5).

¹⁵ See Rambus Privilege Log Hynix v. Rambus: Covering Removable Media Productions in April - May 6, 2005 (Attachment 8).

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.

- The first two documents described above appear to provide additional evidence that the JEDEC patent disclosure policy was an early – October 1992 – subject of discussion between Rambus’s JEDEC representative (Crisp), its CEO (Tate), one of its founders (Farmwald), its executives in charge of engineering and IP (Mooring and Roberts), and its lawyers.¹⁸
- The third item described above is a series of emails apparently describing Rambus’s strategy for dealing with JEDEC’s request that Rambus report back regarding the relevance, if any, of Rambus’s patents to the IEEE’s Synclink architecture being discussed at the May 1995 JEDEC meeting.¹⁹
- The final item described above relates to Rambus’s exit from JEDEC in 1996 and what Rambus chose to disclose or conceal in its withdrawal letter.

Notwithstanding what these documents end up saying, their very existence contradicts Rambus’s most basic contention regarding its spoliation – that all of the relevant documents already have been produced. For example, arguing that Complaint Counsel “misstates the evidence on the document retention issue,” Rambus asserted in its initial brief to the Commission that Richard Crisp “deliberately preserved the JEDEC-related electronic materials that he had created (such as his trip reports for each of the meetings he attended).”²⁰ Yet in the five-page privilege log that Rambus thus far has produced to Hynix, Rambus identifies at least twenty-two previously unproduced emails to or from Richard Crisp. Rambus itself describes ten

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 (regarding the ‘703 patent which was irrelevant to the work then being done at JEDEC).

²⁰ Brief of Appellee and Cross-Appellant Rambus Inc. at 35-36.

of those emails as relating to JEDEC. Others, like those relating to “patent issues” or “possible patent amendments,” or “possible additional patent claims” also appear to relate to JEDEC because Rambus listed them as being subject to Judge Payne’s crime-fraud ruling.

The fact is that Rambus’s five-page privilege log shows, directly contrary to Rambus’s recent contentions, that Rambus did destroy “JEDEC-related electronic materials” of Richard Crisp. This demonstrates the importance of allowing Complaint Counsel the opportunity to review the other unproduced responsive documents.

III. Inclusion in the Record of Selected Relevant Unproduced Documents May Assist the Commission in its Fact-Finding.

Rambus failed to produce these documents earlier because it apparently destroyed other copies of the documents in anticipation of litigation. Rambus may have benefitted greatly from their absence. Both at trial and in discovery in this case and the related cases, Rambus employees were able to testify about the events in the case unencumbered by the missing documents. Requiring Rambus to produce these documents would allow Complaint Counsel to establish more precisely where Rambus’s document destruction most harmed the fact-finding process before the ALJ.²¹ Furthermore, where the meaning of a document is clear from its face, and the document is relevant to an important issue in the case, requiring Rambus to produce these documents would allow Complaint Counsel to select and submit to the Commission a limited number of documents going to the merits.

²¹ That harm is already clear in some areas from Rambus’s brief descriptions in its privilege log. For example, the existence of multiple unproduced emails from and to Richard Crisp regarding the JEDEC disclosure policy, the September 1995 JEDEC SyncLink meeting, Rambus’s 1996 exit letter, and Rambus’s patent applications in 1992 demonstrates that documents regarding these issues were destroyed. As a result there should be a presumption that Complaint Counsel’s case was harmed on these issues due to Rambus’s spoliation.

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.

Respectfully submitted,

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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
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 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

2. On or before August 25, 2005, either party may file any objections to the exhibits filed by the other party, stating with particularity each exhibit to which each objection is made and the nature of and legal basis for the objection; and
3. On or before September 6, 2005, Rambus and Complaint Counsel shall file their responses, if any, to the filings required or permitted by 2., above.¹

By the Commission.

Donald S. Clark
Secretary

ISSUED:

¹ If significant additional evidence remains in the record after the Commission rules on any objections filed pursuant to Paragraph 2, above, the parties should anticipate being ordered to file, and respond to each other's filing of, amended proposed findings of fact and conclusions of law cross-referenced to previously filed proposed findings and to the related provisions in the Initial Decision. Such order will also likely request the identification of any prior misstatements or misrepresentations of fact by any person in this matter which can now be identified by reason of the admission of any supplemental evidence and the filing of any motions seeking additional relief or inferences arising by reason of any alleged spoliation of evidence.