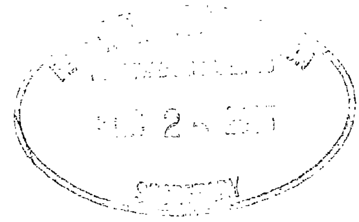

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

ORDER ON COMPLAINT COUNSEL'S MOTIONS FOR DEFAULT JUDGMENT AND FOR ORAL ARGUMENT

PROCEDURAL BACKGROUND

This Order resolves the following pending motions.

First, on December 20, 2002, Complaint Counsel filed a motion for default judgment relating to Respondent Rambus Inc.'s ("Rambus") destruction of material evidence. Rambus filed its opposition on January 14, 2003. Complaint Counsel then filed a reply on January 16, 2003, and a corrected reply on January 27, 2003. Complaint Counsel's motions to file reply briefs are GRANTED. On February 12, 2003, Complaint Counsel filed a motion for leave to file a supplemental memorandum and its supplemental memorandum. Complaint Counsel's motion to file a supplemental memorandum is GRANTED. Rambus filed its opposition to the supplemental memorandum on February 24, 2003. For the reasons set forth below, Complaint Counsel's motion for default judgment is DENIED. However, as set forth below, certain rebuttable adverse presumptions against Rambus will be made.

Second, in its motion for default judgment, Complaint Counsel requested oral argument. Rambus filed a joinder to that request on January 29, 3003. On January 30, 2003, Complaint

Counsel filed a motion to strike Rambus' joinder. Rambus then filed its opposition to Complaint Counsel's motion to strike on January 31, 2003. The motion for oral argument is DENIED. Complaint Counsel's motion to strike Rambus' joinder is DENIED.

INTRODUCTION

Complaint Counsel filed its motion for default judgment relating to Rambus's destruction of material evidence. Complaint Counsel asserts that the drastic remedy of an entry of a default judgment as to liability against Rambus is necessary to counter Rambus's intentional destruction of documents deleterious to Rambus's litigation position.

According to Complaint Counsel, in 1997 Rambus instituted a sham corporate document retention policy that was in fact nothing but an intentional wholesale house-cleaning of corporate documents. Complaint Counsel further asserts that even if Rambus's actions amounted to something less than the intentional destruction of documents, Rambus still must be sanctioned for failing to require its employees to retain documents that could be relevant to reasonably foreseeable litigation.

Rambus asserts that its creation of a corporate document retention program was nothing more than the implementation of a prudent business practice, begun on the advice of counsel. Rambus claims that any destruction of documents was, therefore, not a nefarious attempt to destroy evidence in reasonably anticipated litigation in which Rambus would be a party, but rather an attempt to avoid needless litigation expenses in actions where a non-party Rambus could be subject to subpoena.

For the reasons set forth below, while the motion for the entry of default judgement is DENIED, the undisputed facts of record require sanctions in the form of certain rebuttable

adverse presumptions against Rambus at the trial of this matter based on its spoliation of evidence.

FACTS

Rambus is a technology company that designs, patents and licenses computer memory systems. Rambus does not manufacture such systems, however. Rather, Rambus derives all of its income from royalty fees generated by licensing its technology to others.

Prior to sometime in 1996, Rambus participated in the Joint Electronics Device Engineering Council ("JEDEC"). JEDEC develops standards for technology manufacturers. Of particular concern in this litigation is the development of standards for two types of Random Access Memory ("RAM") used in computers.

Rambus never disclosed to other JEDEC participants that it either held or had applied for patents that would be infringed upon by the proposed JEDEC standards for RAM. While participating in JEDEC's development of RAM standards, Rambus was advised by its counsel that this participation, combined with its failure to disclose the existence of the patents that would be infringed by the proposed JEDEC standard, could create an equitable estoppel that would make it difficult, if not impossible, for Rambus to enforce its patents and, most importantly, to collect royalties or damages from patent infringements resulting from the proposed JEDEC standards. In mid-1996, Rambus ceased participating in JEDEC.

In October 1997, Rambus hired Joel Karp as a vice president. Mr. Karp had significant experience negotiating royalty agreements with patent infringers. Mr. Karp also worked on preparation and strategy concerning RAM-related patent infringement from soon after his employment by Rambus.

In 1997, counsel for Rambus advised Mr. Karp that Rambus should implement a document retention program. Implementation of the program began, according to Rambus, in July 1998 with a series of presentations by Mr. Karp to various Rambus employees. Mr. Karp indicates that the content of his email was based on advice from counsel. The document retention program gave little guidance to employees about what documents they should keep and what documents they could purge. Specifically, no instruction was given to Rambus employees to retain documents relevant to future litigation, nor were employees instructed to create and retain an inventory of all documents purged.

DISCUSSION & ANALYSIS

The facts recited above make clear that Rambus intentionally destroyed documents, albeit as part of a corporate document retention program. They also establish that Rambus provided little, if any, guidance, to its employees as to what documents they were obliged to retain. Given that this virtually unsupervised destruction of documents took place at a time when Rambus knew or should have known of related litigation, I conclude that Rambus's actions, regardless of its intent, amount to spoliation of evidence. Rambus destroyed or failed to preserve evidence for another's use evidence in reasonably foreseeable litigation. *See Byrnie v. Town of Cromwell*, 243 F.3d 93, 107 (2d Cir. 2001).

Where a party's intentional conduct contributes to the loss or destruction of evidence, there is broad discretion as to the crafting of an appropriate remedy. *Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 267 (2d Cir. 1999); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 156 (4th Cir. 1995). The remedy should serve to: (1) deter parties from destroying evidence; (2) place the risk of an erroneous evaluation of the content of destroyed evidence on the party who

destroyed it; and (3) place the party injured by the loss of evidence helpful to its case to where the party would have been in the absence of spolitation. The substantial majority of the courts that have addressed this issue impose adverse inferences as to the subject matter of the spoliated documents. *Byrnie*, 243 F.3d at 107.

Since Rambus contends that not all JEDEC-related documents were destroyed (Rambus Opposition Memo at 13-14) and Complaint Counsel is "confident that, notwithstanding Rambus's efforts to escape justice by systematically destroying material evidence, the proof that remains is more than sufficient to establish the merits" of its claims (Complaint Counsel Opening Memo at 12, n.13), the drastic sanction of default judgment as to liability requested by Complaint Counsel seems inappropriate and unjustified.

A more appropriate remedy is the creation of certain adverse inferences or rebuttable presumptions from Rambus's destruction of documents. For these to arise, there must be a sufficient foundational showing that the party that destroyed documents had notice of potential litigation and that the documents destroyed were potentially relevant to that litigation. *Byrnie*, 243 F.3d at 107-108; *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177 (1st Cir. 1998); *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1158 (1st Cir. 1996) (inference arose "[w]hen the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry"); *Vodusek*, 71 F.3d at 156. Bad faith in the spoliation is not necessary to give rise to the need for a remedy; gross negligence is sufficient. *Vodusek*, 71 F.3d at 156; *John Street Leasehold, LLC v. Capital Management Resources, L.P.*, 154 F. Supp.2d 527, 541 (S.D.N.Y. 2001).

It is well established that where a party can reasonably anticipate litigation, *i.e.*, it knew or should have known of the potential litigation, it has a duty to preserve evidence that may be relevant to that litigation. *Bynrie*, 243 F.3d at 107; *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). Here, all credible evidence indicates that Rambus knew or should have known that it could reasonably anticipate litigation concerning patent infringements from the proposed JEDEC standards for RAM. Indeed, prior to Rambus's decision to cease participating in JEDEC, its counsel indicated that its participation could hamper its potential claims for patent infringement.[1] Certainly by the time Rambus chose to commence its document retention program in 1998, it knew or reasonably could anticipate RAM-related litigation.[2]

Rambus's document retention policy was drafted by a non-lawyer, Mr. Karp.[3] Even though Mr. Karp may have told Rambus employees to "look for things to keep" and "look for reasons to keep it" (Rambus Opposition Memo at 11-12 and 21), these statements appear to have been made by a non-attorney to other non-attorneys in a vacuum, without reference to Rambus's

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[1] Mar. 14, 2001 Dep. of Anthony Diepenbrock (Rambus's in-house patent attorney) at 141:7-8; 148:16-25; Mar. 13, 2001 Dep. of Richard Crisp, at 804:7-9, 805:19-20; and Apr. 11, 2001 Dep. of Lester Vincent at 320:6-321:4. *See also* materials discussed and cited at pp. 22-29 of Complaint Counsel's Opening Memo.

[2] For example, a listing in a July 7, 2001 privilege log filed by Rambus in its litigation with Micron over alleged patent infringements indicates that Mr. Karp and an outside counsel for Rambus jointly authored a memo, dated, March 2, 1998, entitled, "Rambus Strategic Patent Litigation." Additionally, at his deposition on Aug. 7, 2001 in *Micron v. Rambus* at 339:18-23, Mr. Karp admitted that he knew in the fall of 1997 that there was chance of future litigation over RAM patent infringements if Rambus could not negotiate licensing agreements with alleged infringers. Karp. Dep. at 339:18-23.

[3] Karp. Dep. in *Micron v. Rambus* at 342:12-14.

legal obligations to retain documents relevant to reasonably foreseeable litigation. Indeed, in a deposition, Mr. Karp admitted:

> Q: At the time this document retention policy was instituted, to your knowledge, did anyone at Rambus ever say anything to the effect of, gee, it's possible there might documents that would be relevant to future litigation, we ought to keep them?
>
> A: I don't recall anybody saying anything like that.[4]

Rambus's utter failure to maintain an inventory of the documents its employees destroyed makes it impossible to discern the exact nature of the relevance of the documents destroyed to the instant matter. However, it is clear that Rambus should not be rewarded for its gross negligence concerning or reckless disregard of its obligation to maintain documents potentially relevant to litigation and inventory those documents destroyed. Even if the documents were destroyed as part of legitimate corporate records retention program, the mere introduction of evidence of the program is material to, but not dispositive of, the need for a remedy. *See Testa*, 144 F.3d at 177. As indicated in *Washington Gas Light Co. v. Biancello*, 183 F.2d 982, 985 (D.C. Cir. 1950), it is more reasonable for a party to preserve evidence, in view of the possibility of litigation, than to dispose of it.

What evidence is available indicates that at least some of the documents destroyed were relevant to RAM-related litigation. In a matter involving Rambus that was fully tried and appealed, *Rambus, Inc. v. Infineon Technologies AG*, 155 F. Supp.2d 668 (E.D. Va. 2001); *aff'd*

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[4] Aug, 7, 2001 Dep. of Joel Karp in *Micron v. Rambus* at 354:16-22. *See also* Jul. 20, 2001 Dep. of Hampel in *Micron v. Rambus* at 184:18-23, where it was stated that Mr. Karp's policy was silent about saving documents that may be relevant to litigation.

in part, rev'd in part, vacated in part and remanded, 2003 WL 187625 (Fed. Cir. 2003), the district court found that the following admissions were made on behalf of Rambus:

> Rambus executive Allen Roberts testified that one of the reasons for the document destruction was that the documents might be discoverable in future litigation, although he also stated that the policy was basically just a "house-keeping thing." Additionally, [Rambus patent attorney] Lester Vincent testified that, although he did not destroy any documents relating to the present litigation after this action was filed, he admitted that he destroyed some documents, pursuant to instructions from Rambus, just before this litigation began. . . .

155 F. Supp.2d at 682.[5]

Similarly, at his deposition in *Micron v. Rambus*, Richard Crisp, who was Rambus's representative to JEDEC, admitted that "It was pretty much left up to the individual's judgment" as to what documents to retain; no one told him specifically what to keep and what to throw out. Dep. of Richard Crisp in *Micron v. Rambus* at 844.

While these findings do not, as Complaint Counsel suggests, definitively establish that Rambus's document retention program was nothing more than a sham, they do establish that Rambus acted with gross negligence concerning and reckless disregard of its obligations to preserve documents relevant to possible litigation.

Based upon Rambus's intentional destruction of documents that it knew or should have known were relevant to reasonably foreseeable litigation, the following rebuttable adverse presumptions will exist for the remainder of the administrative proceedings of this matter:

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[5] On appeal, Rambus did not contest the district court's litigation misconduct findings. 2003 WL 187265 at *21. In the *Infineon* matter, the district court found that spoliation of documents was just one of several types of litigation misconduct by Rambus.

1. Rambus knew or should have known from its pre-1996 participation in JEDEC that developing JEDEC standards would require the use of patents held or applied for by Rambus;

2. Rambus never disclosed to other JEDEC participants the existence of these patents;

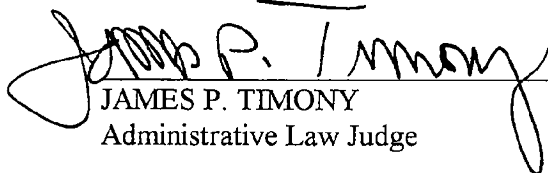
3. Rambus knew that its failure to disclose the existence of these patents to other JEDEC participants could serve to equitably estop Rambus from enforcing its patents as to other JEDEC participants;

4. Rambus knew or should have known from its participation in JEDEC that litigation over the enforcement of its patents was reasonably foreseeable;

5. Rambus provided inadequate guidance to its employees as to what documents should be retained and which documents could be purged as part of its corporate document retention program;

6. Rambus's corporate document retention program specifically failed to direct its employees to retain documents that could be relevant to any foreseeable litigation; and

7. Rambus's corporate document retention program specifically failed to require employees to create and maintain a log of the documents purged pursuant to the program.



JAMES P. TIMONY
Administrative Law Judge

Dated: February 26, 2003