

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

Public

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL’S
PENDING MOTION FOR DEFAULT JUDGMENT, RELATING TO
COLLATERAL ESTOPPEL EFFECT OF PRIOR FACTUAL FINDING THAT
RESPONDENT RAMBUS INC. DESTROYED MATERIAL EVIDENCE IN BAD FAITH**

Introduction

Complaint Counsel files this Supplemental Memorandum in support of its pending Motion for Default Judgment in order to bring to Your Honor’s attention an additional ground supporting the motion. As Your Honor knows from the opening pages of Complaint Counsel’s original memorandum in support of the motion, Rambus was previously sanctioned by the trial court in the *Rambus v. Infineon* litigation based in part on Judge Payne’s conclusion that, in mid-1998, Rambus “implemented a ‘document retention policy,’ in part, for the purpose of getting rid of documents that might be harmful” in anticipated future litigation — that is, the litigation Rambus expected would ensue when it began “demand[ing] royalties from semi-conductor manufacturers” based on its previously undisclosed “JEDEC-related patents.” *Rambus Inc. v. Infineon Technologies AG*, 155 F. Supp. 2d 668, 682-83 (E.D. Va. 2001) (emphasis added) (“*Infineon II*”) (Exhibit A); *id.* at 683 (“it should be remembered,” Judge Payne emphasized, that “the document destruction” was done “in anticipation of litigation”). *See*

also Memorandum in Support of Complaint Counsel’s Motion for Default Judgment Relating to Respondent Rambus Inc.’s Willful, Bad-Faith Destruction of Material Evidence at 3-4 (filed Dec. 20, 2002) (“Default Judgment Mem.”). Judge Payne concluded that Rambus’s actions in this regard — *i.e.*, deliberate destruction of documents in anticipation of litigation — constituted “litigation misconduct.” 155 F. Supp. 2d at 682. He further concluded that Rambus’s misconduct materially affected the trial by leaving an evidentiary record that “omitted the documents that revealed, or pointed the way to, the truth.” *Id.* at 683.

As Complaint Counsel has explained to Your Honor, Judge Payne’s finding that Rambus engaged in “litigation misconduct” was only one of the grounds upon which he granted Infineon’s post-trial request for attorneys’ fees. *See* Default Judgment Mem. at 4 n.2. In appealing the attorneys’ fees award to the Federal Circuit, Rambus did not challenge Judge Payne’s litigation misconduct findings. It did challenge the fee award, however, on other grounds. Specifically, Rambus challenged Judge Payne’s finding, rooted in his construction of the relevant patent claims, that Rambus’s patent suit was “frivolous” and “baseless.” Additionally, Rambus challenged Judge Payne’s finding that Rambus had engaged in “inequitable conduct,” by perpetrating a fraud on JEDEC.

As Your Honor is aware, the Federal Circuit, in a split decision, recently ruled on Rambus’s appeal. In so doing, the Federal Circuit agreed with Rambus’s position on the two main points of appeal. As a result, the majority ruled that “neither the claim construction nor the fraud provides a basis” for the award of attorneys fees to Infineon. *Rambus Inc. v. Infineon Technologies AG*, Nos. 01-1449 *et al.*, 2003 WL 187265, at *21 (Fed. Cir., Jan. 29, 2003) (“*Infineon III*”) (Exhibit B). The majority went on to note, however, that “Rambus does not contest the district court’s holding of litigation misconduct,” and “that Rambus’s misconduct alone supported the determination” that a

sanction was warranted, under the relevant legal provision, 35 U.S.C. § 285.

successful”; and

- (3) Rambus’s “document destruction” was therefore done “in anticipation of litigation.”

155 F. Supp. 2d at 682-83.

With the

¹ Together with this Supplemental Memorandum, Complaint Counsel has filed a Motion

of Infineon's motion for attorneys' fees.

Rambus appealed Judge Payne's award of attorneys' fees in conjunction with its appeal of Judge Payne's substantive liability holdings. Rambus did not, however, appeal Judge Payne's conclusion that Rambus had engaged in litigation misconduct. *See Infineon III*, 2003 WL 187625, at *21 ("Rambus does not contest the district court's holding of litigation misconduct."). Rather, Rambus appealed the award of attorneys' fees only on the grounds that its pursuit of its patent claims was not frivolous and that it had not engaged in fraud under Virginia law. *See id.* Because the Federal Circuit reversed Judge Payne's rulings with respect to both patent claim construction and fraud, it held that those two grounds did not provide a basis for the award of attorneys' fees. *See id.* The Federal Circuit, however, did not disturb Judge Payne's conclusions that Rambus had engaged in litigation misconduct, and that such misconduct, standing alone, would support an award of attorneys' fees under Section 285. *See id.* (remanding for determination of whether Infineon was prevailing party and amount of award). Rambus's litigation misconduct therefore has been conclusively determined, after a full opportunity for briefing at the district-court level and a full opportunity for appeal, to provide an independent basis for the award of attorneys' fees against Rambus.

Argument

The Federal Circuit's conclusive determination that Rambus's litigation conduct alone provides a basis for sanctions makes it now abundantly clear that the district court's litigation misconduct-related findings collaterally estop Rambus from relitigating the same factual issues here, specifically Judge Payne's findings that:

- (1) when "Rambus instituted its document retention policy in 1998," it did so, "in part, for the purpose of getting rid of documents that might be harmful in litigation";

- (2) Rambus at that time “[c]learly . . . contemplated that it might be bringing patent infringement suits during this timeframe” if its efforts to persuade semi-conductor manufacturers to license “its JEDEC-related patents” “were not successful”; and
- (3) Rambus’s “document destruction” was done “in anticipation of litigation.”

See Infineon II, 155 F. Supp. 2d at 682-83.

Complaint Counsel explained in its Default Judgment Memorandum that Rambus’s adjudicated

related patents.” *Id.*

litigation.²

In order to advance the efficient administration of justice, “once a court has decided an issue of fact or law necessary to its judgments, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (emphasis omitted); *accord Montana v. United States*, 440 U.S. 147, 153 (1979).³ Here, each of the elements supporting collateral estoppel weighs in favor of applying it to bar Rambus from

² A trial court has broad discretion to determine whether collateral estoppel applies. *E.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

³ The availability of “offensive non-mutual collateral estoppel,” as Complaint Counsel is asserting here, is well recognized. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

Infineon III, 2003 WL 187625, at *21. The question resolved by the district court, and not appealed by Rambus — whether Rambus destroyed documents to prevent their discovery in future anticipated litigation — is precisely the one pending before Your Honor in resolving the the issue of “bad faith” arising in connection with Complaint Counsel’s pending Motion for Default Judgment.

The motivation for Rambus’s document destruction was carefully considered by the district court and therefore also meets the second part of the test: the question was actually and necessarily determined. The purpose of this general rule “is to prevent the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation.” *Mother’s Restaurant Inc.*, 723 F.2d at 1571. This means that a court need determine only that “the disposition in the first suit was the basis for the holding with respect to the issue and not ‘mere dictum’ . . . [or] merely incidental to the first judgment.” *McLaughlin*, 803 F.2d at 1204 (internal citations omitted). Put differently, although “[d]iscussion of the necessity prong of collateral estoppel analysis is usually framed in terms of determinations that were necessary to the ‘judgment’ or the ‘verdict,’” “[t]he primary purpose of the rule . . . is to ensure that the finder of fact in the first case took sufficient care in determining the issue.” *Pettaway v. Plummer*, 943 F.2d 1041, 1044 (9th Cir. 1991) (internal citations omitted), *cert. denied*, 506 U.S. 904 (1992), *overruled on other grounds Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir.) (en banc), *modified*, 138 F.3d 1280 (9th Cir.), *cert. denied*, 525 U.S. 823 (1998); *see also Weems*, 49 F.3d at 534 (because party had fully litigated issue and had opportunity to challenge ruling on appeal, case warranted an “exception to general rule that preclusive effect should be given only to determinations that are . . . necessary to a previous judgment”) (Norris, J., concurring).

Here, the objectives of the “necessity” rule have been fully met. Rambus had a full opportunity

to litigate the finding that its document destruction was intended to avoid discovery in anticipated litigation, and had an opportunity to appeal the adverse finding. *See Weems*, 49 F.3d at 533 (rejecting argument that lack of appealability precluded application of collateral estoppel because ruling could have been appealed). In other words, this “is not a case where the court reached out to make determinations as to issues which were not before it.” *Mother’s Restaurant*, 723 F.2d at 1571; *see Home Owners Federal Savings & Loan Ass’n v. Northwestern Fire & Marine Insurance Co.*, 238 N.E.2d 55, 59 (Mass. 1968) (“Such findings may be relied upon if it is clear that the issues underlying them were treated as essential to the prior case by the court and the party to be bound. Stated another way, it is necessary that such findings be the product of full litigation and careful decision.”); *see also* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND P

⁴ Rambus alluded to this possibility in its Opposition to Complaint Counsel’s Motion to Strike Rambus Inc.’s Joinder in Complaint Counsel’s Request for Oral Argument at 3 (filed Jan. 31, 2003). Despite Rambus’s entreaties that Infineon is not a prevailing party, Rambus still must show infringement under the new claim construction set out by the court of appeals. *See Infineon III*, 2003 WL 187265, at *21. Indeed, the court of appeals specifically held that the district court “may” consider whether Infineon was a prevailing party, and whether a fee award is appropriate, and, if so, in what amount. *Id.* The question of Rambus’s litigation misconduct has therefore already been conclusively resolved and all that remains is for the trial court to determine the *other* reasons whether an award of fees is appropriate.

remand may provide a different reason to vacate the fees awarded to Infineon for Rambus's litigation misconduct.

Finally, there is no unfairness here to estopping Rambus from relitigating the fact issues in question. "Preclusion is sometimes unfair if the party to be bound lacks an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial." *Otherson v. Department of Justice, Immigration & Naturalization Service*, 711 F.2d 267, 273 (D.C. Cir. 1983). No such unfairness exists here, as Rambus had full incentive to litigate its position. The \$7 million award of fees amply confirms that Rambus had a full incentive to litigate. Moreover, its pending litigation with Micron and Hynix, as well as the pre-complaint investigation by the Federal Trade Commission, made Rambus fully aware that the outcome of the *Infineon* case could have significant repercussions in subsequent litigation.

C. Judge Payne's Prior Fact Findings Conclusively Establish That Rambus Destroyed Material Documents in "Bad Faith," as That Term Has Been Defined for Purposes of Assessing Motions for Default Judgment.

"When 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, a fact finder may reasonably infer that the party probably did so because the records would harm its case."

Blinzler v. Marriott International, Inc., 81 F.3d 1148, 1159 (1st Cir. 1996);

Infineon appeal. Rambus had appealed two of the three bases underlying the award of attorneys' fees to the Federal Circuit. At the time Complaint Counsel filed the Default Judgment Motion, it was unclear how the Federal Circuit would resolve these issues, and whether it might vacate the fee award on some ground that could potentially call into question the unappealed ruling on litigation misconduct. Now that the Federal Circuit has ruled, it is clear that Judge Payne's findings regarding Rambus's document destruction have not been disturbed, and, indeed, have been specifically approved as a ground for the award of attorneys' fees. Complaint Counsel's timing in calling this issue to Your Honor's attention at this point is therefore entirely appropriate.⁵

* * *

⁵ Complaint Counsel previously explained, in moving to strike Rambus's "Joinder in Oral Argument" that it would not object to Rambus's raising new arguments, relevant to the Default Judgment Motion, that were based on the Federal Circuit's decision, which was issued subsequent to filing of the legal memoranda in connection with the Default Judgment Motion. *See* Complaint Counsel's Motion to Strike Rambus Inc.'s Joinder in Complaint Counsel's Request for Oral Argument on the Motion for Default Judgment at 3-4 (filed Jan. 30, 2003) ("Complaint Counsel [would not] object to Rambus submitting a pleading calling to Your Honor's attention new information, not available when the January 13 opposition was filed, that may bear on the default judgment issue. . . . If Rambus wishes to file a new, revised pleading calling that decision to Your Honor's attention and briefly explaining, as it already has in the 'Joinder,' how it believes this new information may be relevant to the default judgment motion, Complaint Counsel would have no objection to this, provided that it has an opportunity to respond.").

