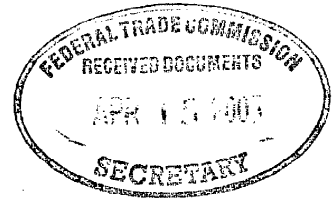


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
In the Matter of )  
 )  
RAMBUS INC., )  
 )  
a corporation. )  
\_\_\_\_\_ )

Docket No. 9302

**ORDER DENYING COMPLAINT COUNSEL'S  
MOTION FOR ADDITIONAL ADVERSE INFERENCES  
AND OTHER APPROPRIATE RELIEF**

Before the Court is Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief Necessary to Remedy Rambus Inc.'s Intentional Spoliation of Evidence ("Adverse Inferences Motion"). Complaint Counsel asserts that new evidence available only since the Court's February 26, 2003 Order on Complaint Counsel's Motion for Default Judgment ("February 26 Adverse Inferences Order") mandate the entry of 100 (*not* including subparts) adverse inferences against Respondent (*See* Exh. A to Complaint Counsel's Memo ("CC Memo")). By Complaint Counsel's own admission, this would effect an "overwhelming number of dispositive, or otherwise important issues" in this matter, (CC Memo at 24), "on essentially *every issue of fact.*" (CC Memo at 26)(emphasis in original). In addition to entry of these adverse inferences, Complaint Counsel requests the Court to apply a "clear and convincing" standard of rebuttal for Respondent to overcome these adverse inferences; requests the Court to vigilantly "undertake a continuing commitment to ensure that Rambus's spoliation in no way affects the outcome of this proceeding;" and, in effect, renews its Motion for Default Judgment. (CC Memo at 12-14).

In opposition, Respondent contends that the instant motion is nothing more than a motion for reconsideration of Complaint Counsel's Motion for Default Judgment. Respondent asserts that the only new evidence cited by Complaint Counsel does not rise to the level of granting a reconsideration motion, much less justify the additional relief sought by Complaint Counsel. Respondent also spends a substantial portion of its memo restating the same arguments it previously put forward in opposition to Complaint Counsel's earlier Motion for Default Judgment.

For the reasons set forth below, Complaint Counsel's Motion for Additional Adverse Inferences is DENIED.

### **BACKGROUND**

This is not the first time that Complaint Counsel has sought relief concerning the destruction of documents by Respondent. Complaint Counsel first raised the issue in its January 16, 2003 Motion for Default Judgment. While the Court declined to enter a default judgment, in the February 26 Adverse Inferences Order the Court entered seven adverse inferences against Respondent. *See* February 26 Adverse Inferences Order at 9. At the heart of this Order, the Court found that while Respondent intentionally destroyed a significant number of documents, it was not apparent whether this destruction was due to a desire to eliminate documents that would be harmful in the event of litigation directly involving Respondent or, rather, that the destruction was done as part of an otherwise legitimate document retention policy implemented "with gross negligence and reckless disregard of [Respondent's] obligations to preserve documents relevant to possible litigation." (February 26 Adverse Inferences Order at 8).

Complaint Counsel subsequently filed a request for "immediate clarification" of the

Order on February 27, 2003,<sup>1</sup> and, on the same day, the Court denied this request. Complaint Counsel now revisits the spoliation issue for a third time. In its latest effort, Complaint Counsel again seeks additional relief beyond what the Court provided in the February 26 Adverse Inferences Order. As the sole basis for this additional relief, Complaint Counsel cites to the purported discovery of new evidence: two emails by high-ranking officers of Respondent. (*See* CC Memo at 3-4).

### DISCUSSION AND ANALYSIS

The two emails that are the basis for Complaint Counsel's instant motion confirm that a large volume of documents (Complaint Counsel asserts approximately two million pages, *see* CC Memo at 5) were destroyed by Respondent on September 3, 1998 and provide the additional information that Respondent provided pizza, beer and champagne to its employees at the end of a long day of shredding. These emails do not, however, address the motivation for Respondent's destruction of these documents. In sum, they provide no new insight on the facts of this matter.

As the cases cited in the February 26 Adverse Inferences Order indicate, the Court has wide discretion in crafting a remedy in response to the spoliation of evidence. (*See* February 26 Adverse Inference Order at 3). The Court believes that the seven adverse inferences set out in the February 26 Adverse Inferences Order, particularly in combination with the separate February 26, 2003 Order creating three findings of fact binding upon Respondent under the principle of collateral estoppel ("February 26 Collateral Estoppel Order"), are appropriate relief in the current situation. The fact of the matter remains that Complaint Counsel contends that, "notwithstanding

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<sup>1</sup> The immediacy behind the February 27 clarification request was Judge Timony's imminent retirement on February 28.

Rambus's efforts to escape justice by systematically destroying evidence, the proof that remains is more than sufficient to establish the merits of its claims." (CC Memo at 19). This statement strongly suggests that the damage caused by Respondent's spoliation is not inherently "incalculable" (see CC Memo at 21) nor does it render trial completely "impracticable". (See CC Memo at 34). Nevertheless, Complaint Counsel seeks to have the Court fashion a pre-hearing remedy that would essentially turn the traditional burden of proof standard on its head. Its proposed 100+ adverse inferences however, would be wholly inappropriate at this stage of the proceedings. The Court, therefore, will not revisit nor does it have any basis for reconsidering the February 26 Adverse Inferences Order.

As noted in both the February 26 Adverse Inferences and the February 26 Collateral Estoppel Orders, the Court does have significant and ongoing concerns about the Respondent directing its employees to conduct a wholesale destruction of documents and failing to create an inventory of what was destroyed. The Court's sanction should not however, as Complaint Counsel suggests, be viewed as a reward to Respondent for successfully destroying documents. Rather, the Court simply believes the existing sanctions fit the current record. It is the expectation of the Court however, that the whole issue of the effect of spoliation will become clearer with the advantage of a fully developed record.<sup>2</sup>

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<sup>2</sup> The Court's ruling in this matter should not be construed as holding that the spoliation issue is forever closed to future reconsideration *after trial*. The Court appreciates that Respondent's spoliation places Complaint Counsel in a most difficult situation. Complaint Counsel's strongest argument for sanctions would be if it believed (which it expressly claims it does not) that the level of Respondent's spoliation was such that it could not make its case. Further, even if Complaint Counsel did believe that it could not make its case, without the benefit of a fully developed record from trial, Complaint Counsel would still have the unenviable duty of attempting to prove a negative: that Complaint Counsel could not make its case as a result of the Respondent's destruction of un-inventoried documents, that, by their very nature are

The Court therefore denies as premature, Complaint Counsel's request to establish the Respondent's burden of proof for rebutting the adverse inferences arising from the February 26 Adverse Inferences Order. Respondent might rebut these inferences at trial with evidence that exceeds even the heightened "clear and convincing" standard proposed by the case law cited by Complaint Counsel. Alternatively, Respondent's evidence might not even meet the lower rebuttal standard that Respondent advocates. In either situation, the resolution of this issue may be unnecessary. As a result, the Court will not resolve this issue until and unless it is necessary to do so.

#### ORDER

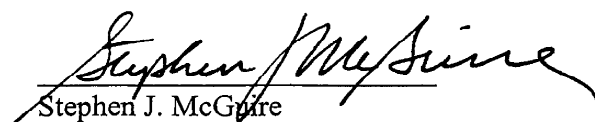
For the reasons set forth above, Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief Necessary to Remedy Rambus Inc.'s Intentional Spoliation of Evidence is DENIED.

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not and cannot ever be known to Complaint Counsel and the Court due solely to the actions of Respondent.

Should the record developed at trial indicate: (1) that Respondent specifically intended to destroy documents in an effort to assist in its defense strategies; or (2) that Respondent's intentional spoliation of evidence through an otherwise legitimate document retention policy was of such a significant magnitude that Complaint Counsel cannot make its case due to Respondent's *presumptive* reckless destruction of documents and (due to the lack of any document inventory) it is impossible to determine specifically what was destroyed, then the Court may need to revisit the appropriateness of and necessity for sanctions above and beyond those provided in the February 26 Adverse Inferences and February 26 Collateral Estoppel Orders. For the moment, however, the parties are directed to move forward and place on the record whatever evidence on the issue of spoliation they believe is appropriate, subject to any evidentiary rulings of the Court.

ORDERED:

  
Stephen J. McGuire  
Chief Administrative Law Judge

Dated: April 15, 2003