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ON INFORMATION MATTERS

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For Rambus, Delaware and California Are Suddenly Closer To Each Other

In May 2011, Rambus Inc. ("Rambus") received two separate decisions from the Court of Appeals for the Federal Circuit. Both matters related to Rambus' litigation against other members of the semiconductor industry over patent claims. Both also dealt with the same set of facts regarding Rambus' conduct with respect to alleged spoliation of evidence. In the first decision, *Micron Technology, Inc. v. Rambus Inc.* ("*Micron II*"),[1] the court ruled that the district court must reconsider its decision to dismiss the action as a sanction for Rambus' spoliation. In the other decision, *Hynix Semiconductor Inc. v. Rambus Inc.* ("*Hynix II*"),[2] the court vacated the district court's ruling that Rambus had not engaged in spoliation, remarking that the conclusion of law was based on an inappropriate application of the test of reasonable foreseeability. The appellate court remanded the case for reconsideration of the spoliation issue and for consideration of sanctions if appropriate. A loss for Rambus.

On September 21, 2012, Judge Ronald M. Whyte issued a decision on remand in the matter involving Hynix.[3] This time, Judge Whyte found that Rambus had indeed engaged in spoliation and that a sanction was appropriate (there was no change in the determination that Hynix had infringed on Rambus' patent). Judge Whyte's sanction was a reduction in the original award to Rambus for Hynix's patent infringement. The court has not yet determined the total amount of the sanction, but it will be based on a reduction in the royalty Hynix owes Rambus. Naturally, both sides claimed victory.

But what changed this time around for Judge Whyte? *Hynix II* indicated that Judge Whyte had used an "overly narrow standard in determining whether Rambus reasonably foresaw litigation when it destroyed documents"[4] and that the court "placed an inappropriate gloss on the standard, requiring that litigation be 'imminent, or probable without significant contingencies.'"[5]

The *Hynix II* decision focused on three issues:

- "[T]he district court determined that litigation was not reasonably foreseeable merely because some contingencies were present, which made litigation 'neither clear nor immediate.'"[6] Instead, the district court should have considered the likelihood that the contingencies would be resolved. In its analysis, the *Hynix II* court stated that "Contingencies whose resolutions are reasonably foreseeable do not foreclose a conclusion that litigation is reasonably foreseeable."[7] The *Hynix II* court went on to conclude that "It would be inequitable to allow a party to destroy documents it expects will be relevant in an expected future litigation, solely because contingencies exist, where the party destroying documents fully expects those contingencies to be resolved."[8]
- The district court viewed the fact that Rambus had not received permission from its Board to sue DRAM manufacturers and that Rambus had not budgeted for any such litigation as evidence

that litigation was not reasonably foreseeable.[9] The court dismissed this approach, citing that these facts had not changed when Rambus sued Hitachi in a related matter in January 2000.[10]

- The district court was the only of four district courts to find that Rambus had not engaged in spoliation under the current set of facts, which suggested a too narrow standard of foreseeability.[11] The *Hynix II* court said quite simply that applying the district court's view "vitiates the reasonable foreseeability test, and gives free reign to destroy documents to the party with the most control over, and potentially the most to gain from, their destruction."[12]

In applying the framework outlined in *Hynix II*, Judge Whyte reversed himself on the spoliation issue and determined that litigation was reasonably foreseeable prior to a company "Shred Day" in September 1998.[13]

Another way to look at the outcome is that the district court initially required a series of dominos to fall before there could be any notion of reasonably foreseeability and that the likelihood that the dominos would or would not fall was of no concern. The appellate court took the view that the dominos themselves and the likelihood that they would fall were part of the equation.

Contact Us: For further information or if you have any questions regarding this Alert, please contact your Redgrave LLP attorney or Managing Partner Victoria Redgrave at (202) 681-2599 or vredgrave@redgravellp.com.

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[1] 645 F.3d 1311 (Fed. Cir. 2011).
[2] 645 F.3d 1336 (Fed. Cir. 2011) ("*Hynix II*").
[3] Hynix Semiconductor Inc. v. Rambus Inc., Case No. C-00-20905 RMW (N.D. Cal. Sept. 21, 2012).
[4] *Id.* at 50.
[5] *Id.* at 50 (citing *Hynix II*, 645 F.3d at 1345).
[6] *Hynix II*, 645 F.3d at 1345 (citation omitted).
[7] *Id.* at 1346.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *See id.*
[12] *Id.*
[13] *Hynix Semiconductor*, slip op. at 53.