

**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. *Id.* Thus, the Federal Circuit remanded this issue to the district court, noting that, “On remand, the district court may consider whether Infineon remains a prevailing party, and if so, whether an award is warranted” and in what amount. *Id.*

This is a significant development as relates to the pending Motion for Default Judgment. Given the uncertainty of how the *Infineon* appeal would be resolved, Complaint Counsel did not raise the issue of collateral estoppel in its original default judgment filings. The resolution of this appeal changes two facts of relevance here. First of all, the Federal Circuit has removed two of the three alternative grounds for Judge Payne’s fee award — *i.e.*, claim construction and fraud — leaving litigation misconduct as the sole remaining basis for sanctions. Second, the Federal Circuit has confirmed that “[l]itigation misconduct and unprofessional behavior may suffice, by themselves,” to justify an award of attorneys’ fees under the relevant provision of law, 35 U.S.C. § 285. *Infineon III*, 2003 WL 187265, at \*21.

The consequence of these recent appellate rulings, Complaint Counsel submits, is that it is now abundantly clear that the following findings of fact, reached by Judge Payne after careful consideration of the relevant evidence and after being fully heard by counsel for Rambus, and never appealed by Rambus, should have collateral estoppel effect in this litigation, thereby precluding Rambus from attempting to relitigate the same issues here:

- (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 therefore done “in anticipation of litigation.”

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

With the *Infineon* appeal now resolved, we submit that Your Honor has every reason to accord collateral estoppel effect to these prior fact findings. Moreover, as discussed below, the consequences of doing so are quite significant in terms of the resolution of the pending Motion for Default Judgment. As explained in Complaint Counsel’s reply brief supporting the Motion for Default Judgment, Rambus’s opposition to the motion hinges almost entirely upon its denial that it implemented the 1998 “document retention” policy in bad faith. *See* Complaint Counsel’s Corrected Reply to Rambus Inc.’s Memorandum in Opposition to Motion for Default Judgment at 10-12 (filed Jan. 27, 2003) (“Default Judgment Reply”). That is an issue, however, that has already been fully litigated and resolved against Rambus. Based on the legal precedents set forth in support of Complaint Counsel’s Default Judgment Motion, which Rambus does not contest, the fact findings outlined immediately above conclusively establish that Rambus did implement its “document retention” policy in bad faith, and with the purpose of eliminating evidence “that might be harmful” in future anticipated litigation.

Thus, the first element of the three-part test governing the resolution of Complaint Counsel’s Motion for Default Judgment has already been conclusively established adversely to Rambus. *See* Default Judgment Reply at 9-10 (noting that “Rambus and Complaint Counsel appear to agree that, to grant the motion for default judgment, Your Honor must conclude three things,” the first of which is that “Rambus destroyed documents in bad faith”). The only remaining issues to be resolved in connection with the Default Judgment Motion, therefore, are (1) whether Complaint Counsel has been prejudiced

by Rambus's bad-faith document destruction, and (2) whether sanctions short of default judgment would be adequate to remedy the injustice caused by Rambus's bad-faith document destruction. For reasons Complaint Counsel has already explained in prior filings, we submit that both of these remaining elements have been fully satisfied. Though we also submit that the first element, requiring a showing of bad faith, has been satisfied as well, Your Honor need not reach that issue given the collateral estoppel effect of Judge Payne's prior fact findings.<sup>1</sup>

### **Factual Background**

In awarding attorneys' fees to Infineon, Judge Payne concluded that Rambus engaged in extensive litigation misconduct, by (1) failing to list documents on its privilege log; (2) providing false and misleading testimony; (3) providing false and obfuscatory discovery responses; and (4) destroying documents pursuant to a "document retention" policy in order to prevent their discovery in future litigation. *Infineon II*, 155 F. Supp. 2d at 681. *See also* Default Judgment Mem. at 3-4. In particular, the court found that Rambus had destroyed documents that would have been potentially harmful in future JEDEC-related litigation. *See id.* at 681-82. That misconduct, in combination with findings that Rambus had persisted in bad faith by pursuing its patent claims in light of the court's claim construction and its fraudulent failure to disclose relevant patents to JEDEC, led Judge Payne to conclude that this was an "exceptional" case for which attorneys' fees could properly be awarded pursuant to 35 U.S.C. § 285. *See id.* at 683. Judge Payne thus entered a post-trial order, awarding over \$7 million in fees to Infineon, after extensive consideration of the relevant evidence and the parties' arguments on the merits

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<sup>1</sup> Together with this Supplemental Memorandum, Complaint Counsel has filed a Motion Seeking Recognition of the Collateral Estoppel Effect of Prior Factual Findings That Respondent Rambus Inc. Destroyed Material Evidence in Anticipation of Future Litigation, and a proposed order.

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 misconduct provides a ground for finding that Rambus destroyed documents in bad faith. *See* Default Judgment Mem. at 84-91. Previously, Complaint Counsel submitted that Your Honor should independently reach the same conclusion as the district court. Complaint Counsel maintains that position. It now also submits, however, that the district court’s prior adjudication of these issues is binding here, through principles of collateral estoppel, and that Your Honor should accept these prior fact findings as conclusive proof that Rambus destroyed material documents in bad faith.

A. Judge Payne Conclusively Determined That Rambus Implemented Its 1998 “Document Retention” Policy and Subsequently Destroyed Documents in Order to Eliminate Evidence That Rambus Feared Would Be Harmful in Anticipated Future Litigation.

As discussed above, Judge Payne specifically found that Rambus implemented its document retention policy in order to avoid the discovery of harmful documents in future JEDEC-related litigation that it anticipated. As Judge Payne noted in his attorneys’ fees order, “Rambus implemented a ‘document retention policy,’ in part, for the purpose of getting rid of documents that might be harmful in litigation.” *Infineon II*, 155 F. Supp. at 682. Indeed, as Judge Payne held, Rambus adopted its policy specifically because it “contemplated that it might be bringing patent infringement suits” at the time. *Id.* Rambus thus adopted the policy “in anticipation of litigation.” *Id.* at 683. Moreover, the litigation that Rambus anticipated at this time concerned enforcement of Rambus’s previously undisclosed “JEDEC-

related patents.” *Id.* at 682. These findings were reached based on a careful consideration of the relevant facts and only after Rambus was given a full and fair opportunity to argue the merits. After these issues were fully litigated and resolved, Rambus could have, but chose not to, appeal Judge Payne’s findings to the Federal Circuit. Rambus should not be permitted now to challenge those findings here.

B. These Prior Fact Findings Are Entitled to Collateral Estoppel Effect in This Proceeding, and Rambus Should Therefore Be Precluded from Relitigating These Fact Issues Here.

Collateral estoppel may be used to bar a party from relitigating an issue on which it has been fully heard and lost. “[A] party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merit of that claim a second time.” *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 324-25 (1971). The purpose of the doctrine is to “protect[] adversaries from, the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and, foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Montana v. United States*, 440 U.S. 147, 153 (1979); *accord Blonder-Tongue*, 402 U.S. at 324-25 (“Both orderliness and reasonable time saving in judicial administration require that this be so unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of the particular case.”). Here, all of the bases for collateral estoppel warrant a conclusion that Rambus should be barred from relitigating the question of whether its admitted destruction of very large volumes of business records starting in mid-1998 was done “in part, for the purpose of getting rid of documents that might be harmful” in future anticipated



litigation.<sup>2</sup>

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).<sup>3</sup> Here, each of the elements supporting collateral estoppel weighs in favor of applying it to bar Rambus from relitigating its motives for its document destruction and the fact that the document destruction was done at a time when the company anticipated future JEDEC-related litigation. First, the issue was actually litigated in the *Infineon* case; second, it was actually and necessarily determined in that proceeding; and, third, applying estoppel against Rambus would not “work an unfairness.” *E.g.*, *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986); *Montana*, 440 U.S. at 153; *accord Mother’s Restaurant, Inc. v. Mama’s Pizza, Inc.*, 723 F.2d 1566, 1571 (Fed. Cir. 1983); *United States v. Weems*, 49 F.3d 528, 531-32 (9th Cir. 1995).

The issues relating to Rambus’s document destruction were fully litigated in the district court. That court issued a comprehensive opinion in conjunction with its order awarding attorneys’ fees to Infineon — indeed, the question was a principal subject of an order separate from the merits of the patent case. Rambus had the opportunity to appeal the court’s ruling, but chose not to. Instead, it appealed only the other two alternative bases upon which the court awarded attorneys’ fees. *See*

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<sup>2</sup> 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).

<sup>3</sup> 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 PROCEDURE: JURISDICTION § 4421, at 556 (2002) (“Preclusion could be made available so long as it can be made to appear that real care was in fact taken in litigating and deciding the unnecessary issue.”). It is thus irrelevant that the trial court might, on remand, conclude that Infineon is not entitled to attorneys’ fees because it was not a prevailing party as required for the award of fees pursuant to 35 U.S.C. § 285.<sup>4</sup> Here the trial court, and, as importantly, Rambus, both treated the issue carefully and fully. Rambus should therefore not be able to escape these fully adjudicated adverse factual determinations on the ground that a subsequent

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<sup>4</sup> 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); *see Stevenson v. Union Pacific R.R. Co.*, 204 F.R.D. 425, 430-31 (E.D. Ark. 2001) ("[A]dherence to the retention policy [without taking steps to preserve relevant evidence] amounts to bad faith."); *see also Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (sanctions are appropriate in "cases where a document retention policy is instituted in order to limit damaging evidence available to potential plaintiffs"). Bad-faith conduct of this type warrants sanctions. *See, e.g., In re Wechsler*, 121 F. Supp.

2d 404, 415 (D. Del. 2000); *Computer Associates Int'l v. American Fundware, Inc.*, 133 F.R.D. 166, 166 (D. Colo. 1990); *Stevenson*, 204 F.R.D. at 430-31. *See generally* Default Judgment Mem. at 84-91. Because Rambus has already been found to have instituted its “document retention” policy with the purpose of destroying documents that could be harmful in anticipated future litigation, collateral estoppel bars it from contesting this prior fact finding in this proceeding. The fact that Rambus did destroy documents “in part[] for the purposed of getting rid of documents that might be harmful” in future anticipated litigation has already been established conclusively, and the relevant authorities cited above establish that destruction of this sort constitutes bad faith.

Bad faith is one of the three elements Complaint Counsel must show in order to be granted a default judgment. *See Wechsler*, 121 F. Supp. 2d at 415. *See generally* Default Judgment Mem. at 99-100; Default Judgment Reply at 10-12. Document destruction for purposes of frustrating future litigation establishes bad faith under the authorities cited above — authority Rambus did not contest in its opposition to the Default Judgment Motion. Because Rambus has already argued that it had not improperly destroyed documents, and lost that argument, it is collaterally estopped from denying this fact in this proceeding. All that remains for Your Honor to determine in order to issue a default judgment against Rambus is (1) that Complaint Counsel has been subjected to prejudice by Rambus’s document destruction and (2) that lesser sanctions would not be adequate to remedy the injustice flowing from Rambus’s wrongful conduct.

D. The Timing of This Supplemental Memorandum Is Proper.\_\_\_\_\_

One other point, about the timing of this Supplemental Memorandum, bears mention. Complaint Counsel raise this argument now, subsequent to its initial filing of the Default Judgment Motion, because at the time of filing the applicability of collateral estoppel was clouded by the pending

*Infinion* 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.<sup>5</sup>

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<sup>5</sup> 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.").

Based on the forgoing, Complaint Counsel respectfully requests that Your Honor collaterally estop Rambus from denying (or otherwise attempting to relitigate) that it destroyed documents in order to prevent their discovery in anticipated future litigation in connection, and that Your Honor recognize that these adjudicated facts conclusively establish that Rambus destroyed material documents in bad faith.

Respectfully submitted,

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Dated: February 12, 2003