

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
 Thomas B. Leary
 Pamela Jones Harbour
 Jon Lebowitz

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**RESPONSE BY RAMBUS INC. TO
COMPLAINT COUNSEL'S MOTION FOR SANCTIONS**

I. INTRODUCTION AND SUMMARY ARGUMENT

Respondent Rambus Inc. (“Rambus”) submits this brief in response to Complaint Counsel’s “Motion for Sanctions Due to Rambus’s Spoliation of Documents,” filed on August 10, 2005. Complaint Counsel’s motion has no basis in fact or law and seeks draconian relief whose imposition on this record, in this proceeding, would violate basic principles of due process and administrative law. For the reasons set out in this brief, in Rambus’s Amended Proposed Findings of Fact (“RSF”) and in Rambus’s Responses to Complaint Counsel’s Supplemental Proposed Findings of Fact (“RRSF”), the motion should be denied.

Complaint Counsel’s motion purports to seek a default judgment against Rambus to punish it for its alleged destruction of documents in anticipation of litigation. Motion, pp. 2, 22. But Complaint Counsel do not offer – or even profess to offer – the clear and convincing evidence that the federal courts have held to be necessary for such relief. Complaint Counsel do not, for example, establish that Rambus acted in egregious bad faith when in 1998 it adopted – on the recommendation and with the close guidance of experienced outside counsel – a document retention policy similar to policies in place at many public companies. Nor do Complaint Counsel show that the effect of Rambus’s document retention policy has been to deprive Complaint Counsel of the ability to obtain a full and fair adjudication of their case. In short, Complaint Counsel have failed to demonstrate that Judge Timony’s February 2003 determination that a default judgment was inappropriate, and Judge McGuire’s subsequent determination that these proceedings had not been prejudiced by Rambus’s alleged document destruction, were in any way incorrect.

In particular, Complaint Counsel have failed to show that the Supplemental Evidence admitted into this record by virtue of the Commission’s July 20, 2005 Order

(hereinafter “Supplemental Evidence”) undermines those prior determinations or any of Judge McGuire’s findings on the merits. In fact, Complaint Counsel’s brief and their proposed supplemental findings rely in large part on documents that were made available to them *prior* to the trial in this action. Such documents provide no support for the relief sought by this motion, especially given Complaint Counsel’s decision not to appeal either Judge Timony’s holding that a default judgment was inappropriate or Judge McGuire’s determination that no material documents had been shown to have been destroyed. *See* Response of Complaint Counsel to the Commission’s Order Regarding Designation of the Record Pertaining to Spoliation of Evidence by Rambus, Dec. 22, 2004.

Complaint Counsel’s reluctance to rely on the Supplemental Evidence is understandable. In part because the privilege-piercing orders entered by Judge Payne allowed Rambus to explain the role of its counsel in the adoption and implementation of the document retention policy, the Supplemental Evidence demonstrates conclusively that Rambus adopted that policy in good faith and that it did not target either unfavorable documents or documents material to this case for destruction. For example, the Supplemental Evidence demonstrates that:

- Rambus instituted its document retention policy in 1998 on the advice of outside counsel with acknowledged expertise in the preparation and purpose of such policies. *See* Rambus’s Amended Proposed Findings of Fact (“RSF”), ¶¶ 1619-1622; 1623-1632; RRSF ¶¶ 9-32;
- Rambus’s outside counsel explained the new policy to Rambus’s managers and edited and approved the slides used to describe the policy to Rambus’s employees, including many of the slides referenced in

Complaint Counsel's motion, RSF ¶¶ 1636-1645;

- Rambus adopted its document retention policy for the same wholly legitimate reasons that other businesses adopt such policies, RSF ¶¶ 1633-1635;
- Rambus's document retention policy did not, in its preparation or implementation, target particular categories of relevant documents for destruction, RSF ¶¶ 1653-1659;
- Rambus's outside counsel was aware of and assisted in preparing documents relating to the future licensing of patents to DRAM manufacturers and others, including many of the documents referred to in Complaint Counsel's motion, and did not at any time suggest that the *possibility* of litigation mentioned in those documents in any way impaired Rambus's ability to adopt a content-neutral document retention policy, RSF ¶¶ 9-32;
- Rambus did not believe that litigation (much less *this* litigation) was likely at the time that it instituted its document retention policy, and it put in place a "litigation hold" as soon as litigation was reasonably foreseeable, RSF ¶¶ 1671-1682; and
- There is no evidence that any documents or categories of documents that would have been material to the disposition of this case were destroyed by Rambus, RSF ¶¶ 1683-1692.

The Supplemental Evidence thus demonstrates beyond cavil that Judge McGuire was entirely correct in determining that the process in this case had not been prejudiced

by Rambus's alleged destruction of documents. Initial Decision, p. 244. In this regard, Complaint Counsel do not even *contend* that Rambus would be expected to have, or should be penalized for destroying, documents relating to numerous dispositive issues on which Complaint Counsel have the burden of proof. As an example, nothing in the Supplemental Evidence suggests that Rambus destroyed evidence that would have been material to Judge McGuire's determination that JEDEC members were not required to disclose their patent applications or intentions to file or amend patent applications. *Id.*, ¶¶ 772-774 and pp. 269-70. That finding rests on what JEDEC's *rules* were – as described in “clear and unambiguous official statements of policy” from JEDEC's files – and could not have been affected by documents that Rambus might have once possessed. *Id.* Complaint Counsel do not contend otherwise. Similarly, nothing in the Supplemental Evidence suggests that Rambus could possibly have destroyed evidence material to the question of whether JEDEC had available to it commercially viable, non-infringing alternatives to the technologies covered by Rambus's patents. Again, Complaint Counsel do not contend otherwise. There are numerous other case-dispositive findings by Judge McGuire that are necessarily unaffected by any decision by Rambus to retain or destroy documents. *See* section III.E, *infra*.

The proof is in the pudding. The five additional adverse inferences that Complaint Counsel ask the Commission to impose as a result of the Supplemental Evidence *all* go to Rambus's “hopes” and to Rambus's “beliefs.” *See* CCSF 168-172. But Rambus's hopes and beliefs are irrelevant to Judge McGuire's findings that Complaint Counsel failed to meet their burden of proof on the essential elements of their claims. Indeed, Judge McGuire held – as had the Federal Circuit – that even *assuming* that Rambus had believed “that it had pending claims covering the standard,” a JEDEC member's “subjective beliefs, hopes and desires [were] irrelevant” to the question of whether it was

obligated to make any disclosure to JEDEC. Initial Decision, p. 277, quoting *Infineon Technologies AG v. Rambus Inc.*, 318 F.3d 1081, 1104 (Fed. Cir. 2003). See also *id.* at p. 244 (holding that because the evidence showed that because JEDEC disclosure was voluntary, Rambus’s presumed belief that future DRAM standards would require the use of patents applied for by Rambus was irrelevant); *id.* at p. 282 (holding that an intent to broaden patent claims “for the specific purpose of covering technologies features that were adopted” by JEDEC was “entirely legitimate” under the patent laws and JEDEC policy).

In other words, because Judge McGuire did not base any of his findings or conclusions on the proposition that Rambus was *not*, while a JEDEC member, seeking to obtain intellectual property rights covering technologies being considered for standardization, or on the proposition that Rambus officers or employees did *not* at times believe that they had succeeded in these efforts, any allegedly missing evidence that would buttress Complaint Counsel’s showing on these issues would be both irrelevant and merely cumulative. This simple fact distinguishes this case from the very few cases cited by Complaint Counsel where a dismissal was ordered based on the destruction of a “central piece of evidence.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) (affirming dismissal where plaintiff had repaired and sold his car before filing a suit claiming that a defective air bag had injured him). Indeed, as far as the parties can tell, there is no reported case where after a full trial on the merits in which a plaintiff failed to meet its burden of proof on numerous issues, a default judgment is nevertheless entered against the defendant because of pre-suit destruction of documents. When one adds to that mix the failure of the plaintiff to show that the lost documents would have assisted him in meeting his burden of proof and the virtual impossibility that the documents would have ever touched on most of the essential elements of the plaintiff’s

case, it is easy to understand why there is no such precedent.

One further word about the proposed remedy. The cases regularly use the word “draconian” to describe the relief sought by Complaint Counsel here. *See Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003) (noting that dismissal is a “draconian” sanction that will be reviewed with “vigilan[ce]” on appeal). But “draconian” seems like an understatement when one examines the remedy proposed by Complaint Counsel. The remedy sought here is not just a requirement to pay, or a lost chance to win, a money judgment. The requested order would strip Rambus of its fundamental right of free access to the courts to protect numerous valid patents duly issued by the Patent Office, would strip Rambus of its statutory right to license those patents at a reasonable royalty to those who wish to use Rambus’s inventions, and would thus deprive Rambus of its lifeblood and the source of most of its current revenues. Such a result is as unprecedented as it is unwarranted by the record in this case. For these and the reasons set out herein, the motion should be denied.

II. FACTUAL BACKGROUND

A. Rambus’s Document Retention Policy Was Neither Adopted Nor Implemented To Destroy Documents That Might Be Harmful To Rambus In Litigation

1. Rambus Adopted Its Document Retention Policy In Good Faith, Based On The Advice Of Counsel

1. Rambus was advised to adopt a document retention policy by outside counsel, Daniel Johnson, Jr., during his initial meeting with Rambus in early 1998.

RX-2523 at 11-12 (Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson is a highly accomplished and respected member of the legal community and has practiced law in the State of California for more than 30 years. For 17 of those years, including during the

time that he first advised Rambus to adopt a document retention policy, Mr. Johnson was a partner in the law firm of Cooley, Godward, Castro, Huddleson & Tatum. *Id.* at 196. Mr. Johnson left Cooley Godward in March of 1998 to join the law firm of Fenwick & West LLP. *Id.*

2. Mr. Johnson has extensive knowledge about the legal requirements for document retention policies. Mr. Johnson has advised between 20 and 30 companies about document retention policies, *id.* at 204, and has given presentations and lectured about document retention policies and electronic discovery at ABA and PLI seminars. *Id.* at 198.

3. Mr. Johnson testified to three reasons why he advised Rambus to adopt a document retention policy. First, Mr. Johnson advised Rambus to adopt a document retention policy in order to reduce search costs in the event it was someday required to respond to subpoenas or document requests that might possibly be issued in connection with future lawsuits or investigations, including those in which Rambus was not a party. He testified that he told Rambus that “as an IP company, you often are the subject of subpoenas from a variety of organizations. You could be involved in lawsuits. You could be—get government requests. And because of that, and because you’re so document intensive, you need to have a policy. You don’t need to have one part of your organization doing one thing, and another part doing another. . . . [I]t is standard practice, particularly for startups, and although Rambus was not a startup, in effect it was, that [sic] they needed to have an overall company policy.” CX5076 at 34-35.¹

¹ The evidence shows that when the document retention policy was explained to Rambus employees, they were told that Rambus was concerned about the expense of conducting a search for documents and data and how a properly implemented document retention

4. Second, Mr. Johnson advised Rambus to adopt a document retention policy because of expenses that could be incurred from searching backup tapes of computer data. Mr. Johnson testified that, as of the time he advised Rambus to adopt a document retention policy, how to reconcile backup tapes “was a huge problem” in the technology industry, because backup tapes were not always stored well and could have corrupted data, in which case “you’re talking about spending hundreds of thousands of dollars to clean up the tapes so maybe you can get data that maybe is relevant.” *Id.* at 35-36. In addition, because of “the rapid change in database management tools. . . . within a year, 18 months, two years, you’ve got a completely new set of software to handle database management, and if you aren’t recycling your tapes, now you[‘ve] got to keep not only backup tapes, or however you’re storing, but you also have to keep the old tools, and it’s an anathema, particularly for a small company.” *Id.* at 36.

5. Third, Mr. Johnson advised Rambus that if it did not tell its employees to follow a consistent policy regarding the retention and disposal of documents, then ad hoc decisions by individual employees about what to keep and what to throw away or delete might be used by an opponent in possible future litigation to request an adverse inference or other sanctions based on a charge of “spoliation.”

policy could reduce those costs. RX-2529 at 539-40 (Diepenbrock 10/11/04 *Infineon Dep.*) (“I don’t recall a discussion where they said e-mails would be ultimately harmful. I don’t recall anybody saying something like that. . . . The time it takes for personnel to be diverted from their normal work and finding the e-mails that may be requested, I think that was mentioned as a concern, too. It was just general.”) CX2102 at 348 (Karp 8/7/01 *Micron Dep.*) (“[M]y concern was that if I was ever asked to produce those thousands of back-up tapes, regardless of what they concerned – they did not just contain e-mail, they contained everything – that it would be a task that would be beyond the human endurance to have to try to figure out what was on those things.”).

CX5076 at 36-37, 221.

6. Complaint Counsel have pointed to various memoranda prepared or reviewed by Mr. Johnson or others at the Cooley Godward firm in 1998 about future licensing issues, which documents also refer to the possibility that if future licensing discussions fail, patent infringement litigation was possible. *See, e.g.*, CCSF 19-20. Complaint Counsel suggest that these documents show that Rambus adopted its document retention policy in bad faith, for the purpose of destroying harmful evidence. *Id.*

7. These documents, however, and the preliminary discussions that they reflect, show that litigation was then considered a far-off contingency, to be considered as an option only if *all* of the following occurred: (1) issued patents; (2) infringing products, as determined by reverse engineering or other infringement analyses; and (3) failed licensing negotiations. It is clear that when the document retention policy was adopted, none of these three events had occurred. *Id.*

8. The documents and preliminary discussions that Complaint Counsel rely upon also demonstrate conclusively that Rambus acted in *good* faith in adopting the document retention policy that its outside counsel proposed. It is undisputed that Cooley Godward partner Dan Johnson had, and has, substantial expertise in counseling clients about the legal issues surrounding document retention policies. If Complaint Counsel are correct that the documents they cite refer to discussions in early 1998 with Mr. Johnson and his colleagues about possible future infringement litigation, then it is *also* a fact that Rambus was receiving advice from those very same lawyers at the very same time that Rambus should adopt and implement a document retention policy. Those experienced and reputable lawyers obviously did not feel that their discussion of possible future

lawsuits presented any impediment to Rambus’s subsequent adoption of the document retention policy that counsel themselves had proposed. The documents relied upon by Complaint Counsel are, therefore, the strongest possible evidence of Rambus’s good faith in adopting its document retention policy. *See, e.g., Lucent Information Management, Inc. v. Lucent Technologies, Inc.*, 186 F.3d 311, 318 (3d Cir. 1999) (“courts have found that reliance on the advice of counsel after conducting a trademark search is sufficient to defeat an inference of bad faith”); *State Farm Mutual Automobile Ins. Co. v. Johnson Kinsey Inc.*, 228 Cal.App.3d 721, 725, 279 Cal.Rptr. 116, 118 (1991) (“[i]n response to a plaintiff’s allegations of bad faith and malice, a defendant is entitled to show it acted reasonably and with proper cause based on the advice of its counsel.”).

2. Rambus’s Document Retention Policy Was A Garden Variety Records Retention Policy That Explicitly Told Employees To “Look For Things To Keep”

9. After Mr. Johnson left Cooley Godward in March 1998, one of his partners who remained at that firm, Diane Savage, forwarded to Mr. Karp a detailed memorandum on the subject of document retention policies. RX-2523 at 201 (Johnson 11/23/04 *Infineon* Dep.); CX5069 at 420 (Karp 10/8/04 *Infineon* Dep.); RX-2502.

10. The document retention policy that Mr. Karp subsequently prepared largely tracked the categories set forth in the Cooley Godward memorandum regarding document retention policies. CX5069 at 422 (Karp 10/8/04 *Infineon* Dep.). Compare RX-2502 (DTX 3676) (March 19, 1998 Cooley Godward Memorandum Re: Document Retention Policy Guidance) with RX-2053 (DTX 4028) (Rambus’s Document Retention Policy). The policy lists specific categories of documents that should be preserved, including “[e]ngineering and development documents” RX-2503. *See* RSF

1623-1632.

11. On July 22, 1998, Mr. Johnson made a presentation to Rambus's managers regarding the document retention policy that he had advised Rambus to adopt. RX-2523 at 211 (Johnson 11/23/04 *Infineon* Dep.); RX-2504. Mr. Johnson's July 22, 1998 presentation to the Rambus managers specifically advised Rambus that "[a] formal document retention policy will likely shield a company from any negative inferences or defaults due to destruction of documents, *unless the policy was instituted in bad faith or exercised in order to limit damaging evidence to potential plaintiffs.*" RX-2504 at R401138 (emphasis added).

12. Mr. Johnson also testified that, in explaining the document retention policy to Rambus managers, he had recounted (as he had many times before, including on continuing legal education panels) what he referred to as a "horror story" of a client that had incurred \$100,000 in expenses searching corrupted and obsolete backup tapes in response to a subpoena. RX-2523 at 35-36-220-23 (Johnson 11/23/04 *Infineon* Dep.).

13. The reasons that Mr. Johnson gave Rambus for adopting a document retention policy are the same justifications that courts and commentators have recognized as motivating businesses to adopt document retention policies. *See Arthur Andersen LLP v. U.S.*, ___ U.S. ___, 125 S.Ct. 2129, 2135 (2005); *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (discussed in Johnson slide presentation, RX-2504 at R401147; Jamie S. Gorelick, Stephen Marzen & Lawrence Solum, *Destruction of Evidence* § 10.2, at 310-11 (1989); John M. Fedders & Lauryn H. Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 Notre Dame L. Rev. 5, 13 (1980); Christopher V. Cotton, *Document Retention Programs for*

Electronic Records: Applying a Reasonableness Standard to the Electronic Era, 24 J. Corp. L. 417, 419-20 (1999); Patrick R. Grady, *Discovery of Computer Stored Documents and Computer Based Litigation Support Systems: Why Give Up More Than Necessary*, 14 J. Marshall J. Computer & Info. L. 523, 537-38 (1996); Stephen J. Snyder & Abigail E. Crouse, *Applying Rule 1 in the Information Age*, IV Sedona Conf. J. 165, 168 (2003).

14. In and after July, 1998, Mr. Karp made presentations of the document retention policy to various employees within Rambus. He used a set of overhead slides in making these presentations. CX2069 at 464-73 (Karp 10/8/04 *Infineon Dep.*); RX-2505. Mr. Karp's slides provided specific guidance regarding the importance of retaining various kinds of documents relating to multiple aspects of the company's business:

- **Intellectual Property** ("All Documents Designated As Containing Trade Secret Information Should Be Kept For At Least The Life Of The Trade Secret"). RX-2504 at R124532.
- **Human Resources** ("Most Personnel Records Must Be Kept For 3 Years"). *Id.* at R124541.
- **Tax/Legal** ("Audit Period Is 3 Years;" "Inside Counsel Subject To Same Document Retention Policy As Rest of Company"). *Id.* at R124542.
- **Engineering** ("LOOK FOR REASONS TO KEEP IT"). *Id.* at R124534.
- **Marketing and Sales** ("Generally Kept for 3 Years;" "LOOK FOR THINGS TO KEEP"). *Id.* at R124535.
- **Contracts** ("General Rule" to destroy "drafts" "Upon Execution of Contract," except "If You Feel That A Particular Document Would Aid You In Refreshing Your Recollection – Keep It;" "LOOK FOR THINGS TO KEEP"). *Id.* at R124537.

15. Mr. Johnson testified that he reviewed drafts of Mr. Karp's slides before Mr. Karp presented them to employees in Rambus's operating divisions, and that he told Mr. Karp that in light of the slides, employees were likely "to keep more stuff than they might otherwise," and that Rambus was "going to have a very narrow policy here." RX-2523 at 159 (Johnson 11/23/04 *Infineon* Dep.). He has also testified that the Rambus policy "is the only document retention policy that I'm aware of where there is an explicit directive to the employees to look for things to keep." RX-2523 at 205.

16. Rambus employees who were at the company at the time of Mr. Karp's post-July 22, 1998 presentations testified that they followed Mr. Karp's direction to look for things to keep. *See, e.g.*, CX2082 at 841 (Crisp 4/13/01 *Infineon* Dep.) ("I definitely made an attempt to go through my files and look for things to keep as . . . [Mr. Karp] had directed us to do."). Moreover, when the document retention policy was introduced, Rambus employees were told to make sure they took steps to archive important e-mails. *See* CX5018 at R200431 (e-mail from Joel Karp informing employees "you can no longer depend on the full system backups for archival purposes. Any valuable data, engineering or otherwise, must be archived separately"); RX-2517 at 343-44 (Karp 8/7/01 *Infineon* Dep.).

3. Rambus's Document Retention Policy Is Neither Unusual Nor Untoward Because It Involves Documents Being Shredded Or Placed Into Burlap Sacks

17. Complaint Counsel suggest that because Rambus used shredders and burlap sacks to dispose of unneeded documents, it might be appropriate to infer that Rambus had adopted or implemented its document retention policy for improper purposes. Motion at 7-8. The uncontroverted testimony, however, is that Rambus (like

many companies and federal agencies) uses shredders rather than mere trash cans because of concerns about confidential documents. CX2114 at 124 (Karp 2/5/03 FTC Dep.) (“Engineers were throwing confidential documents in the trash. I would come in the morning and find people going through my dumpster.”). *See also id.* at 135 (“[W]e needed shredders so people . . . could get rid of confidential documents in an easy way rather than taking the chance they would end up in the dumpsters.”).

18. There is no evidence that shredders are an inappropriate method of destroying confidential material. On the contrary, even federal regulations recognize that confidential business information should be disposed of “by a paper shredder, burning, or other approved method.” Department of Agriculture Animal and Plant Inspection Service, Policy Statement on the Protection of Privileged or Confidential Business Information, 50 Fed. Reg. 38561 (Sept. 23, 1985). Indeed, it is well known that many federal agencies use shredders (or “burn bags”) to dispose of internal and confidential materials. In short, the fact that Rambus utilized shredders rather than trash cans or some other form of disposal does not suggest that Rambus adopted or implemented its document retention policy for improper purposes.

B. Nothing In The Supplemental Evidence Ties Any Equitable Estoppel Issues Or So-Called “Dell Concerns” To The Adoption Or Implementation Of Rambus’s Document Retention Policy

19. Complaint Counsel devote two pages of their motion to a discussion of the legal advice that Rambus received between 1992 and 1996 about the doctrine of equitable estoppel and the Commission’s proposed consent order in the *Dell* matter. Complaint Counsel do not pretend that the evidence they describe in those pages is newly available, and they do not contend that anything in the Supplemental Evidence links the

adoption or implementation of the document retention policy to any previous equitable estoppel issues or “*Dell* concerns.” In fact, there is nothing in the Supplemental Evidence that supports such a linkage, and Complaint Counsel apparently want the Commission simply to speculate that Rambus had a “guilty conscience” about its JEDEC participation when adopting the document retention policy.

20. Speculation is, of course, no substitute for evidence and certainly does not rise to the level of the clear and convincing evidence required by the case law. *See Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995) (dismissal reversed for failure to apply clear and convincing standard to allegations of misconduct). Moreover, as the trial record showed and as Judge McGuire found, Rambus’s JEDEC representatives had followed their counsel’s advice at JEDEC meetings and had *avoided* any risk of equitable estoppel. A brief recap of the undisputed evidence on this issue demonstrates that it would be inappropriate to base any order – much less a default sanction – on a speculative assumption that in 1998 Rambus had a guilty conscience about its prior JEDEC conduct.

21. The evidence at trial demonstrated that there is no basis for concluding that Rambus’s conduct at JEDEC meetings should have led it to expect that litigation involving that conduct was likely to arise in the future. It is undisputed that Rambus sought and obtained the advice of counsel regarding its participation in JEDEC shortly after it began attending JEDEC meetings, that its counsel discussed the doctrine of equitable estoppel with Rambus employees, and that counsel *also* provided guidelines as to appropriate conduct. Outside counsel Lester Vincent informed Mr. Crisp and Mr. Roberts that there could be a risk of equitable estoppel if “Rambus creates impression

on JEDEC that it would not enforce” its intellectual property, and he suggested that Rambus might consider abstaining from voting. CX1942.

22. The record evidence showed, and Judge McGuire found, that Rambus heeded the advice of its counsel and took steps to ensure that it did not create any misleading impressions regarding its intellectual property. For example, in May 1992, at Mr. Crisp’s very first JEDEC meeting on behalf of Rambus, the chairman of the JC 42.3 committee asked Mr. Crisp if he cared to comment about whether Rambus had any intellectual property regarding a proposed feature of the SDRAM. CX2089 at 134-36 (Meyer 4/26/01 *Infineon* Trial Tr.); CX0673 (May 6, 1992 Crisp e-mail); Initial Decision at 811-817. As the trip reports and notes prepared by various JEDEC representatives show, Mr. Crisp *declined to comment* in response to the question. *Id.* See also RX-0297 (May 1992 memorandum at 5); CX2307 at 3 (May 7, 1992 handwritten notes by IBM representative Mark Kellogg).

23. Mr. Crisp’s refusal to respond to the question did *nothing* to mislead JEDEC members into believing that they need not be concerned about Rambus’s intellectual property. IBM representative Mark Kellogg testified, for example, that the exchange between the Committee Chairman and Mr. Crisp was “a flag,” in part because of Crisp’s “lack of response.” Trial Tr. at 5322-3 (Kellogg). The Committee Chairman, Gordon Kelley, similarly testified that a “no comment” from a JEDEC member in response to a question about intellectual property was “surprising” and constituted “notification to the committee that there should be a concern.” Trial Tr. at 2579 (Kelley).

24. Mr. Crisp also openly refused to respond to inquiries regarding intellectual property at the September 1995 JEDEC meeting. At that meeting, Mr. Crisp

presented a written statement regarding questions that had been raised at the prior meeting:

“At this time Rambus elects not to make a specific comment on our intellectual property position relative to the Synclink proposal. Our presence or silence at committee meetings does not constitute an endorsement of any proposal under the committee’s consideration nor does it make any statement regarding potential infringement of Rambus intellectual property.”

JX0027 at 26 (Sept. 11, 1995 JC 42.3 Meeting Minutes).

25. Rambus’s open, public refusals to respond to questions about intellectual property, and its statement that its presence at meetings “does not constitute an endorsement of any proposal . . . [or] make any statement regarding potential infringement,” could not have lulled anyone into believing that Rambus did not have or would not obtain intellectual property rights. The Chairman of the relevant JEDEC committee acknowledged this point at trial, testifying that Rambus’s refusal to comment was “notification to the committee that there should be a concern.” Trial Tr. at 2579 (Kelley). In light of this evidence, it is not surprising that Judge McGuire found that Mr. Crisp’s refusals to comment “put members on notice” that Rambus might seek broad patent coverage. Initial Decision, ¶ 281. There is nothing in the Supplemental Evidence that can or does affect this finding, and there is nothing in that evidence that suggests that the adoption or implementation of Rambus’s document retention policy was in any way motivated by or influenced by any concerns regarding Rambus’s prior JEDEC

participation.

C. Rambus's Document Retention Policy Did Not Target Relevant Documents For Destruction

1. There Is No Evidence That In Adopting Or Implementing Its Document Retention Policy, Rambus Targeted For Destruction Documents Related To Its Participation In JEDEC

26. Complaint Counsel have not introduced any evidence showing that any Rambus employee ever destroyed a document pursuant to Rambus's document retention policy in the belief that the document might be harmful in a future lawsuit.

27. Complaint Counsel suggest at various times in their motion that Rambus adopted or implemented its document retention policy with the goal of destroying JEDEC-related evidence that might prove harmful in subsequent lawsuits. Mot. at 10, 19-21. In support of these vague suggestions, Complaint Counsel have not cited to any memorandum, e-mail or testimony showing that Mr. Karp or Mr. Johnson or anyone else directed employees to target the elimination of JEDEC-related materials. None of the PowerPoint presentations shown to Rambus employees in connection with the document retention policy mention the word "JEDEC," and none of the e-mails relating to the adoption and implementation of the policy use the term.

28. Complaint Counsel make much of the (previously known) fact that Rambus representative Richard Crisp discarded most of the publicly available paper materials that he had received from JEDEC, such as unopened envelopes containing paper ballots and official minutes of JEDEC meetings. *See* Trial Tr. at 3570-76 (Crisp). As Complaint Counsel must concede, however, there can be no presumption of bad faith or prejudice arising from the destruction of publicly available JEDEC materials such as

presentation handouts. As Judge Payne himself explained, the destruction of documents that were “merely copies of documents that other parties” maintained is not evidence of bad faith, in part since “it is hard to envision why [the JEDEC representative] would have destroyed such documents in order to prevent their use in litigation.” *See* Memorandum Opinion, *Rambus Inc. v. Infineon Technologies AG*, Civ. No. 3:00CV524 (E.D. Va. Sept. 29, 2004), p. 13.

29. The important question about Rambus’s JEDEC-related documents is whether Rambus’s *internal* documents were made available to Complaint Counsel prior to trial. They were. As Complaint Counsel point out, Mr. Crisp located various JEDEC trip reports and other JEDEC-related e-mails on his home computer system after he had left Rambus and after patent litigation had commenced. Trial Tr. at 3570-76 (Crisp). Upon locating these e-mails, and even though no one else knew that they existed, Mr. Crisp turned them over to Rambus’s General Counsel for production in the litigation. *Id.*; RX-2541 at 357 (Steinberg 10/6/04 *Infineon* Dep.). The General Counsel, Mr. Steinberg, then turned these e-mails over to outside counsel for use in the various lawsuits, including this one. Complaint Counsel refer to these very same e-mails as “form[ing] the core of the case *against* Rambus. . . .” Motion at 19 (emphasis added). These decisions by Mr. Crisp and Mr. Steinberg to produce this significant body of evidence are entirely inconsistent with Complaint Counsel’s argument that Rambus’s employees had targeted this precise category of JEDEC-related documents for destruction in a bad faith effort to prevent their use in litigation.

30. Complaint Counsel deliberately misrepresent one additional piece of evidence relating to Mr. Crisp. On page 19 of their motion for default motion, Complaint

Counsel assert that “Mr. Crisp’s awareness of the effect of the document retention program on Rambus’s JEDEC-related documents can be seen by his odd joke about JEDEC-related documents ‘falling victim to the document retention policy.’ CCF 1754.” The fundamental problem with this statement is that the “joke” has nothing whatsoever to do with any “JEDEC-related documents” and instead refers to Mr. Crisp’s request for a copy of “one of the original DDR datasheets from the 1996/1997 timeframe.” CX1079 at 1. Such datasheets were available from DRAM manufacturers, not JEDEC, and in any event were created *after* Rambus stopped attending JEDEC meetings in late 1995. There is absolutely nothing in the cited exhibit to tie it to JEDEC or to link it to what Complaint Counsel now refer to as “Mr. Crisp’s awareness of the effect of the document retention program on JEDEC-related documents.” Motion, p. 19. It is very telling that in Complaint Counsel’s 2003 post-trial findings, they referred to this *same* exhibit not as “JEDEC-related,” but as involving “DDR-SDRAM-related documents.” CCF 1754. In other words, unable to point to any new contemporaneous evidence suggesting a link between the goals of the document retention policy and JEDEC documents, Complaint Counsel chose to make one up.

31. Complaint Counsel also insinuate that a Rambus employee named Billy Garrett, who attended two or three JEDEC meetings in 1992 and 1993, destroyed internal, non-public JEDEC-related documents. There is no basis, however, to assume that Mr. Garrett still possessed such documents as of 1998, over five years after attending his last JEDEC meeting.² Moreover, as Rambus has previously pointed out, a “missing”

² Complaint Counsel cite the Gray Cary notes of an interview with Billy Garrett for the proposition that Garrett had not been able to locate any JEDEC-related materials when searching for documents in connection with the *Hitachi* case. CX5062 at

trip report by Mr. Garrett that Complaint Counsel had *previously* suggested would have been harmful to Rambus has now become available and reveals that Mr. Garrett witnessed, and reported to Rambus, the March 1993 announcement by Committee Chairman Gordon Kelley that his company, IBM, would not disclose its patents or patent applications and that JEDEC policy did not require such disclosure. *See* Attachment 6 to Complaint Counsel's Petition to Modify the Schedule in the Commission's July 20, 2005 Order.

32. Rambus employee Allen Roberts also testified that he had not discarded the JEDEC-related e-mails he had received from Richard Crisp. CX5084 at 338 (Roberts 4/11/01 *Infineon* Dep.). Finally, Lester Vincent, Rambus's outside patent counsel, also testified that he did not discard documents relating to JEDEC or Rambus's participation in JEDEC:

Q: After receiving instructions from Rambus, Mr. Vincent, in the '97, '98 time frame about retaining documents or discarding documents, did you from any point in time from then forward destroy documents that related to the legal advice you provided to Rambus about the disclosures of patents and patent applications to JEDEC?

A: No.

Q: Did you destroy any documents during that time frame relating to the disclosure policy of JEDEC?

A: No.

CX3126 at 416 (Vincent 4/12/01 *Infineon* Dep.).

33. It is also undisputed that Complaint Counsel have had the close cooperation of several companies who have been JEDEC members for well over a

GCWF03416. The notes go on to say that that material "[w]asn't necessary. Got rid of it." *Id.* The notes do not support any notion that the materials that Garrett "got rid of" were *internal* Rambus documents rather than publicly available JEDEC materials, *id.*, nor do they support any inference that the materials were believed to be harmful.

decade. Those companies well know the categories of documents that a JEDEC member is likely to create as a result of its membership. Nevertheless, Complaint Counsel have never identified any document or category of non-public documents that Rambus should have had in its files but did not produce.

34. In sum, the only evidence in the record of Rambus’s destruction of JEDEC-related materials involves copies of publicly available materials. Rambus’s destruction of publicly-available JEDEC materials cannot support any inference of improper conduct and cannot support the relief sought by Complaint Counsel’s motion.

2. There Is No Evidence That In Adopting Or Implementing Its Document Retention Policy, Rambus Targeted For Destruction Potentially Relevant Documents In Patent Prosecution Files

35. Complaint Counsel assert that Lester Vincent, Rambus’s outside patent prosecution counsel, “cleaned” his prosecution files for issued patents at Mr. Karp’s request. Motion, p. 20. *See generally* RX-2533 at 101-103 (Vincent 10/15/04 *Infineon* Dep.). At the time of the request, however, none of the patents that Rambus later asserted against Infineon or any other DRAM manufacturer had issued. In any event, since Complaint Counsel have assumed throughout this litigation that all of the Rambus patents at issue are valid and that Drs. Farmwald and Horowitz did indeed conceive of and reduce to practice the revolutionary inventions and improvements described in those patents, it is highly unlikely that Mr. Vincent’s *prosecution* files ever contained any documents material to this case.

36. Mr. Vincent testified that he does not recall Mr. Karp specifically telling him what to retain and what to destroy from the prosecution files. *Id.* at 103. Rather, Mr. Vincent believes that he was guided by the “common kind of view of

document retention of patent files.” *Id.* at 106. As Mr. Vincent further testified, “[i]t’s not uncommon for corporations to have document retention policies with respect to issued patent files. So I think I was following kind of the accepted norm.” *Id.* Pursuant to his understanding of the “accepted norm,” in connection with the files of issued patents that he cleaned, Mr. Vincent retained all communications with the PTO, all materials related to conception and reduction to practice of the invention, correspondence related to maintenance fees, notes of any teleconferences with the patent examiner, and any prior art. *Id.* at 104-106, 181.

37. Mr. Karp’s discussions with Mr. Vincent resulted in the retention of those documents most likely to be relevant to this action. Mr. Vincent’s “general” files were, as the name suggests, related to more general matters and were organized by topic. CX5038 (Jan. 31, 2000 Letter from Lester Vincent to Neil Steinberg at BSTZ 00063); CX5073 at 54-55 (Vincent 11/30/04 *Infineon* Dep.). For example, Mr. Vincent maintained Rambus general files dedicated to such topics as “General Services,” “Ramlink Matter,” and “IEEE Standards Activities.” *Id.* Materials relating to JEDEC and Mr. Vincent’s advice to Rambus regarding equitable estoppel were not specific to the prosecution of any particular patent application and were, after privilege-piercing orders were entered, produced in litigation. It thus seems unlikely that Mr. Vincent “cleaned” any of his files that related to the legal advice he had provided to Rambus about the disclosures of patents and patent applications to JEDEC members.

38. Complaint Counsel also assert that Mr. Vincent destroyed additional documents in his patent files after the *Hitachi* case settled in June 2000. Motion at 9. In fact, to the extent that Mr. Vincent did remove any documents in his versions of the

patent files at that time, nothing was destroyed because copies of those files had already been provided to Rambus and its litigation counsel in connection with the Hitachi litigation.³ RX-2530; RX-2531 at 543 (Vincent 10/9/01 *Micron* Dep.); CX5072 at 56-57 (Vincent 11/30/04 *Infineon* Dep.); RX-2508 (Feb. 1, 2000 Letter from Lester Vincent to Neil Steinberg at BSTZ 00060 (enclosing copies of patent files).)

39. Complaint Counsel also complain that Anthony Diepenbrock, an in-house lawyer at Rambus between 1995 and 1999, “had no JEDEC-related documents” when Rambus’s outside counsel interviewed him in connection with the *Hitachi* litigation. Motion at p. 20. What Complaint Counsel fail to mention is that Mr. Diepenbrock had *left* Rambus in May 1999, well before the *Hitachi* suit began. It is not at all surprising that an employee did not take documents (especially privileged documents) with him upon his departure from a company. What is surprising is that Complaint Counsel try to rely on that fact as evidence of wrongdoing.

D. Rambus Instituted A Litigation Hold As Soon As Litigation Was Reasonably Foreseeable

1. Litigation Against A DRAM Manufacturer Was Not Probable Until The Very End Of 1999, When Efforts To License Rambus’s Recently Issued Patents To Hitachi Broke Down

40. Complaint Counsel have not introduced any evidence showing that Rambus had the ability to assert a claim for patent infringement against any DRAM manufacturer at any time in 1998.

41. The earliest issued patent asserted by Rambus in any lawsuit against

³ In addition, as Mr. Vincent testified, simply because it is marked on the chart that he “reviewed” a particular file does not mean that anything in the file was destroyed. RX-2532; RX-2533 at 139-40, 145, 180-82 (Vincent 10/15/04 *Infineon* Dep.).

a DRAM manufacturer issued on June 22, 1999. *See* RX-1472 (U.S. Patent No. 5,915,105 (issued June 22, 1999).)

42. Complaint Counsel contend that Rambus believed that litigation against DRAM manufacturers was reasonably foreseeable at the same time that Rambus was advised to adopt a document retention policy, based on a document entitled “Proposed Strategy for Rambus,” which states, inter alia, “[t]o implement the above [litigation] strategy Rambus has authorized outside counsel to begin organizing documents, and preparing a discovery data base, so that if and when Rambus elects to proceed with litigation, it will not unduly disrupt the company’s activities.” CX5005 at R401101. However, Mr. Karp testified that this was a “trial balloon kind of thing,” and that he did not know whether outside counsel was “ever actually authorized to do – to do what that says.” CX5069 at 391-92 (Karp 10/8/04 *Infineon* Dep.).

43. Complaint Counsel also contend that Rambus believed that litigation against DRAM manufacturers was reasonably foreseeable at the same time that Rambus was advised to adopt a document retention policy, based on a slide presentation entitled “Licensing and Litigation Strategy” that Mr. Karp prepared in or about March of 1998. CX5006. However, Mr. Karp testified that this document was a “first cut” at a possible licensing program. CX5069 at 402 (Karp 10/8/04 *Infineon* Dep.). And David Mooring, who then was Rambus’s Vice President of the Personal Computer Division (and later Rambus’s President), testified that he remembered Mr. Karp “coming forward with his kind of first volley” on a potential licensing program, which Rambus did not adopt. RX-2543 at 33-34 (Mooring 10/14/04 *Infineon* Dep.) (“this proposal fell on deaf ears at that time”).

44. Rambus did not decide to bring litigation against a DRAM manufacturer based on infringement of any of the patents in suit until the November-December 1999 time-frame, when efforts to license its recently issued patents to Hitachi failed. CX5074 at 208-09 (Steinberg 10/6/04 *Infineon* Dep.).

45. Rambus did not begin the process of retaining counsel to represent it in litigation against Hitachi until late November and early December of 1999. CX5074 at 210 (Steinberg 10/6/04 *Infineon* Dep.); RX-2522; RX-2523 at 135-37 (Johnson 11/23/04 *Infineon* Dep.).

2. Once Litigation Against Hitachi Was Probable, Rambus Put In Place A Reasonable “Litigation Hold” To Preserve Potentially Relevant Documents

46. Prior to filing suit against Hitachi, Rambus and its counsel instructed employees with documents potentially relevant to the litigation not to destroy any such documents. RX-2538; RX-2539 at 95, 125-26 (Steinberg 8/1/01 *Micron* Dep.).

47. Mr. Steinberg testified that in late December 1999 and early January 2000, he and Mr. Karp identified “folks that would have documents that were likely to be relevant in any litigation, folks who communicated with the partners or third parties who were responsible for any of the prosecution, things like that[,]” and that he told them to retain any potentially relevant documents and provide them to outside counsel.

RX-2540; RX-2541 (Steinberg 10/6/04 *Infineon* Dep.). Mr. Steinberg testified that such instructions were given to numerous individuals with potentially relevant information, including the inventors (Messrs. Farmwald and Horowitz), Mr. Tate, Mr. Mooring, Mr. Roberts, Mr. Karp and Mr. Crisp. *Id.* at 212. Numerous Rambus witnesses have testified that they were given instructions to hold potentially relevant documents during

this same time frame. CX2114 at 164 (Karp 2/5/03 FTC Dep.) (“once we filed a lawsuit I believe people were told to freeze everything at that point”); CX2109 at 190 (Davidow 1/21/03 FTC Dep.) (Chairman of Rambus’s Board of Directors) (“Personally when these – all these legal questions began to arise, I was instructed to retain Rambus documents.”).

48. Rambus moved its offices from Mountain View to Los Altos, California in December of 2000. RX-2540; RX-2541 at 359-60 (Steinberg 10/6/04 *Infineon* Dep.). Complaint Counsel contend that in connection with this move, Rambus conducted what Complaint Counsel call “the biggest Shred Day of all.” Motion, p. 9. In fact, the December 2000 move was just that: an office move. It was not an annual housecleaning, or “shred day,” and Complaint Counsel cite to no exhibit referring to it as a “shred day.” It was an effort to move from one building to another. An obvious concomitant of that move was that some materials would be left behind or thrown away. But Rambus had already taken steps to institute a litigation hold from employees likely to have relevant documents, and indeed had collected documents from these employees. Complaint Counsel have introduced no evidence suggesting that such instructions were disregarded or that employees discarded potentially relevant information in connection with Rambus’s office move.

49. In sum, the undisputed facts show that:

- Rambus adopted a content-neutral document retention policy based on the advice of highly regarded, experienced counsel who were well aware of Rambus’s desire to obtain and then license or otherwise enforce patents relating to various technologies used in DRAM;

- The specific terms of Rambus’s document retention policy were recommended by outside counsel, who also reviewed and approved the slides used to describe the policy and its purposes to Rambus’s employees;
- Rambus’s document retention policy did not target harmful documents for destruction, and the Supplemental Evidence contains no contemporaneous email, memorandum or other document suggesting that any document or category of documents was singled out for destruction for any improper purpose; and
- Rambus instituted a reasonable litigation hold once litigation was probable, and in particular there is no evidence that any relevant documents were destroyed after Rambus received notice of the Federal Trade Commission’s investigation.

In light of the foregoing evidence, and as set out in detail below, the draconian sanctions sought by Complaint Counsel are entirely unwarranted.

III. ARGUMENT

A. Complaint Counsel Cite No Case, Statute or Rule Authorizing The Result They Seek

The threshold question that Complaint Counsel fail to address is whether, under the circumstances of this case, the Commission is authorized to enter the relief requested. Complaint Counsel cite to no agency decision (or to any federal court decision reviewing an agency decision) entering a default judgment or other sanctions based on a party’s pre-litigation destruction of documents, and Rambus has located no such case. This is not

an idle inquiry. The Supplemental Evidence does not show, and Complaint Counsel do not contend, that Rambus destroyed any relevant documents out of a concern over their use in *this* proceeding or after receiving notice from the FTC of its investigation in this case, nor is there any allegation that Rambus violated any ALJ order or Commission rule. This motion thus seeks sanctions against Rambus because one alleged *result* of its document retention practices *before* this case began is that documents that might have been harmful to Rambus in this proceeding may have been destroyed. It is highly unlikely that the relief sought by this motion is available as a matter of law under those circumstances. *See generally American Bus Ass'n v. Slater*, 231 F.3d 1 (D.C.Cir. 2000).⁴ But as this brief will show, the Commission need not address that issue, because the relief sought is not warranted under the standards recognized and applied by the federal courts.

B. Complaint Counsel's Heavy Reliance On Documents That Are Not In The Record In This Case Is Improper And Prejudicial

Complaint Counsel previously asked the Commission to delay the filing deadline for its motion for sanctions in order to allow them to address additional documents recently provided to them by Rambus in the *Hynix* litigation pending in Northern California. On August 4, 2005, the Commission denied that request and ordered that the parties submit their briefs and findings “related to documents already admitted into the

⁴ It is clear that Complaint Counsel’s suggestion that the Commission *punish* Rambus for its allegedly improper conduct lacks any legal foundation. *Id. See also Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 805 (D.C. Cir. 1997) (reversing agency award of attorneys fees and holding that “[t]o the extent that the power to shift fees is justified as a deterrent to frivolous litigation, however, the power is punitive and therefore beyond the Board’s delegated authority.”). In addition, Complaint Counsel’s apparent request that the Commission enter the proposed relief without a further hearing is a clear invitation to error. The Supreme Court has observed “that there are constitutional limitations upon the power of courts, even in aid of their own processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.” *Societe Internationale v. Rogers*, 357 U.S. 197, 209, 78 S.Ct. 1087, 1094 (1958).

record” in accordance with the schedule previously set by the Commission.

Despite this clear command, and in clear disregard of the well-settled rule that “Commission decisions are to be founded upon the established record,” *In The Matter of Chester H. Roth*, 55 F.T.C. 1076, 1959 FTC LEXIS 21 at *9 (1959), Complaint Counsel proceeded to rely upon documents *not* admitted into evidence in support of numerous proposed findings and in support of critical arguments in their sanctions motion. In particular, Complaint Counsel repeatedly cite to privilege logs that Rambus has produced to Hynix this summer in connection with its production of documents from back-up tapes. Complaint Counsel’s decision to rely upon the privilege logs and other documents outside the record is not just improper and impertinent; it is highly prejudicial to Rambus, which based its own supplemental findings almost entirely on the Supplemental Evidence. Complaint Counsel’s motion should be denied for this reason alone.⁵

C. A Default Judgment Based On Spoliation Of Evidence Requires Clear And Convincing Evidence Of Bad Faith Or Evidence Of Manifest Prejudice

Only two of the cases cited by Complaint Counsel in support of their motion involve the entry of a default judgment or other terminating sanction. This paucity of case support is attributable to the courts’ long standing recognition that the entry of terminating sanctions is an “extreme,” “severe” and “draconian” sanction that can be utilized only in the most egregious cases and only upon proof that meets the most exacting standard of evidence. The courts have erected such barriers because a dismissal

⁵ Rambus also notes the illogic of an argument that any alleged destruction of *privileged* documents could support a conclusion that documents were destroyed to prevent their use in future litigation. Surely Complaint Counsel are not arguing that Rambus had predicted back in 1998 that its attorney-client privileges would someday be pierced by a federal judge, so that documents ordinarily protected from discovery would be available to its litigation opponents and therefore needed to be destroyed.

is inconsistent with the judicial system’s “strong presumption in favor of adjudications on the merits.” *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995) (dismissal reversed). *See also Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003) (dismissal is a “draconian” sanction that will be reviewed with “vigilance]” on appeal); *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993) (dismissal reversed; recognizing the “strong policy that cases be decided on the merits”); *Wilson v. Volkswagen of Amer., Inc.*, 561 F.2d 494, 503-504 (4th Cir. 1977) (holding that a terminating sanction “runs counter to sound public policy of deciding cases on their merits and against depriving a party of his fair day in court”). The Commission itself recently spoke of these same factors, in refusing to order dismissal of an action despite Complaint Counsel’s failure to comply with an ALJ protective order. *See Order, In Re Basic Research, L.L.C.*, Dkt No. 9318 (June 17, 2005), at p. 5 (referring to “the strong public policy favoring disposition of cases on their merits. . .”).

1. Dismissal Is Warranted Only In Extreme Cases: The Party Seeking Dismissal Must Demonstrate Flagrant Bad Faith Or Extraordinary Prejudice

Dismissal is warranted “only in extreme cases.” *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1977). A federal court may not exercise the power to dismiss absent a showing of *bad faith* or *extraordinary prejudice*:

“At bottom, to justify the harsh sanction of dismissal, the district court *must* consider both the spoliator’s conduct and the prejudice caused and be able to conclude either (1) that the *spoliator’s conduct was so egregious* as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator’s conduct was *so prejudicial* that it substantially denied the defendant- the ability to defend the claim.”

Silvestri, 271 F.3d at 593 (emphasis added). *See also Wilson*, 561 F.2d at 504 (dismissal requires “flagrant bad faith” that prejudices the adversary); *Hartford Ins. Co. of the*

Midwest v. American Automatic Sprinkler Sys., Inc., 201 F.3d 538, 543-44 (4th Cir. 2000) (same).

2. Bad Faith Must Be Shown By Clear And Convincing Evidence

It is also well settled that to justify dismissal based on a charge of flagrant bad faith, the bad faith must be proved by *clear and convincing evidence*. *Shepherd*, 62 F.3d at 1476-1478 (dismissal reversed for failure to establish misconduct by clear and convincing evidence); *Aptix Corp. v. Quickturn Design Systems, Inc.*, 269 F.3d 1369, 1374 (Fed. Cir. 2001) (applying clear and convincing evidence in upholding dismissal); *Maynard*, 332 F.3d at 468, n.3 (“In all circumstances, to justify dismissal as a sanction, there must be clear and convincing evidence.”). *See also Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (in order to obtain dismissal, fraud on the court must be demonstrated “clearly and convincingly”); *Pfizer, Inc. v. Int’l Rectifier Corp.*, 538 F.2d 180, 195 (8th Cir. 1976) (in order to obtain dismissal, fraud on the court “must be supported by clear, unequivocal and convincing evidence”); *Scholastic, Inc. v. Stouffer*, 221 F. Supp.2d 425, 439 (S.D.N.Y. 2002) (applying the clear and convincing evidence standard to dismissal for fraud on the court).

As summarized by the D.C. Circuit: “for those inherent power sanctions that are fundamentally penal – dismissals and default judgments, as well as contempt orders, awards of attorneys’ fees, and the imposition of fines – the district court must find clear and convincing evidence of the predicate misconduct.” *Shepherd*, 62 F.3d at 1478. This standard rests on three compelling rationales. *First*, “[b]ecause of the fundamental importance of trying cases.” *Id.* at 1476.⁶ *Second*, “because most inherent power

⁶ The D.C. Circuit explained that the burden of proof “is a choice about where to place the risk” of error. *Shepherd*, 62 F.3d at 1476. Clear and convincing is the appropriate standard because “it is better to risk permitting a ‘guilty’ [party] to defend [its] case than to risk denying an ‘innocent’ [party] its day in court.” *Id.*

sanctions . . . are fundamentally punitive. Our judicial system has a cherished tradition of using a heightened standard of proof to guard against the erroneous imposition of criminal punishments and analogous deprivations of liberty, property, or reputation.” *Id.* *Third*, “because the predicate misconduct at issue involves allegations of fraud or some other quasi-criminal wrongdoing” (*id.* at 1477), and courts generally require a higher standard of proof for such alleged wrongdoing (*e.g.*, civil fraud or relief from judgment based on alleged fraud under Rule 60(b)(3)). *Id.*

Complaint Counsel nowhere mention the nature of the burden they must meet on this issue and do not claim to have met it. The motion should be denied for that reason alone.

3. Bad Faith Sufficient For Dismissal Requires Destruction, Fabrication Or Alteration Of Evidence For The Purpose Of Obstructing The Opposing Party’s Case

Intentional destruction of evidence alone is not bad faith for dismissal purposes. The courts instead require clear and convincing evidence that a party destroyed evidence in order to suppress the truth and “reduce the strength of [the adversary’s] case.” *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004).

Absent an insidious intent to *suppress* evidence, the failure to maintain evidence is not itself bad faith sufficient to justify dismissal. *Silvestri*, 271 F.3d at 593-594 (although plaintiff failed to preserve the “central piece of evidence in [the] case,” his conduct could not form the basis for dismissal where the plaintiff’s intent was unclear from the record). The destruction of materials pursuant to a corporate retention policy does not rise to that level of bad faith unless the evidence is clear that the destruction was undertaken to obstruct an opponent’s ability to obtain the evidence. *See Morris*, 373 F.3d at 901.

Morris is instructive. In that case, the Union Pacific Railroad, pursuant to a retention policy that required the recycling of audiotapes every 90 days, destroyed an audiotape recording of the communications between a train crew and a dispatcher on the day of the accident at issue in the litigation. The district court found a level of bad faith sufficient to justify an adverse inference (by definition a lesser sanction than dismissal), but the Eighth Circuit reversed. The Eighth Circuit acknowledged that when the tape was destroyed, the railroad had ““general knowledge that such tapes would be important to any litigation over an accident that resulted in serious injury or death, and . . . knowledge that litigation is frequent when there has been an accident involving death or serious injury,”” and had even made efforts to preserve audiotapes in other cases where the audiotape was favorable to the railroad. *Id.* at 902. Nonetheless, given the neutral terms of its retention policy, and the absence of evidence that the railroad had been selective about whether to preserve or destroy evidence related to that case, the Eighth Circuit held that even an adverse inference was not warranted. *Id.* at 902. Hence, bad faith cannot be inferred based on the general knowledge that records destroyed pursuant to a corporate retention policy *may* be useful in future litigation – even if such litigation was foreseeable. Rather, the alleged spoliator must have a specific purpose to destroy evidence known to be helpful to another party’s case.

Nor can bad faith sufficient to warrant dismissal be inferred from testimony that turns out to be incorrect, absent proof that such testimony was known to be false at the time and was intended to deceive the decision-maker. *See Israel Aircraft Co. v. Standard Precision*, 559 F.2d 203, 208-09 (2d Cir. 1977) (reversing dismissal sanction for lack of

evidence that misstatements in affidavits and depositions were fraudulent).⁷

In *Stevenson*, the Eighth Circuit upheld a finding of bad faith as sufficient for an adverse inference (*not* dismissal), but did so only reluctantly. Stating that “this case tests the limits of what we are able to uphold as a bad faith determination,” the court reasoned that even though the tape was destroyed pursuant to an evidence retention policy, evidence that the claims representative immediately preserved certain other similar evidence but appeared intentionally to fail to preserve the voice tape in question was deemed sufficient to infer that the tape would not help the railroad’s case. *Id.* at 747-748. Of course, conduct barely sufficient for an adverse inference would never have sustained a dismissal.

4. Prejudice Does Not Justify Dismissal Unless It Is So Extraordinary That It Denies Its Adversary The Ability To Make Its Case

Like bad faith, the required showing of prejudice necessary for dismissal is exacting. Dismissal is only appropriate without bad faith “if the prejudice to the defendant is *extraordinary*, denying it the ability to adequately defend its case.” *Silvestri*, 271 F.3d at 593 (emphasis added). The facts of the *Silvestri* case underscore the level of prejudice necessary before a dismissal sanction is appropriate for spoliation. There the plaintiff brought a products liability suit against General Motors for the failure of a car’s air bag to trigger when the plaintiff was driving drunk and hit a fence and then a utility

⁷ Those rare cases in which bad faith is proved to a level sufficient to dismiss a case involve clear evidence of extraordinary wrongdoing. In *Aptix Corp.*, 269 F.3d at 1375, for example, the defendant proved by clear and convincing evidence that the patent plaintiff submitted forged engineering notebooks in order to establish priority of invention. In *Aoude*, 892 F.2d at 1119, the plaintiff admittedly fabricated the purchase agreement that was at the center of the suit.

pole. Before bringing suit, the plaintiff allowed the car to be repaired and sold so that the defendant could not conduct any tests on the air bag mechanism or any analysis of the damage to the car. The Fourth Circuit found that there was not sufficient evidence of the plaintiff's intent to suppress the truth and obstruct the defendant's case to justify the dismissal. *Id.* at 593-594. However, the court affirmed the district court's dismissal on prejudice grounds. The Fourth Circuit found extraordinary prejudice where the plaintiff's action's destroyed the "central piece of evidence" in the case and "denied General Motors access to the only evidence from which it could develop its defenses adequately." *Id.* Absent proof of extraordinary prejudice, there is no basis for the draconian sanction of dismissal.

D. Complaint Counsel Have Not Introduced Any Evidence, Let Alone Clear And Convincing Evidence, To Establish That Rambus Willfully Destroyed Evidence In Bad Faith

In order to justify *any* sanction for spoliation, Complaint Counsel must show (1) that Rambus deliberately destroyed evidence, (2) that Rambus did so with knowledge that the evidence would be relevant (3) to issues for trial in litigation that was reasonably foreseeable, and (4) that such destruction has caused prejudice to Complaint Counsel. *Hodge*, 360 F.3d at 450 (requiring proof of deliberate destruction); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (spoliation requires finding that "the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction"). In order to justify the extraordinary sanction of *dismissal*, Complaint Counsel must *further* prove by clear and convincing evidence that Rambus deliberately destroyed evidence in bad faith, and that lesser sanctions would not be sufficient to remedy proven spoliation.

1. Complaint Counsel Have Not Shown By Clear And Convincing Evidence That Rambus Deliberately Destroyed Evidence In Bad Faith

Complaint Counsel's theory of bad faith is that Rambus's document retention policy was linked to an alleged scheme to defraud JEDEC. In particular, Complaint Counsel's theory is that because Rambus knew that its JEDEC participation could give rise to an equitable estoppel defense, Rambus adopted and implemented the document retention policy to destroy all evidence of its JEDEC participation. But that theory does not square with the facts, and certainly not to the extent of proving bad faith by clear and convincing evidence.⁸

First, it is now undisputed that Rambus adopted its document retention policy at the suggestion of outside counsel, and the policy itself was prepared in large part by outside counsel. Moreover, those same outside lawyers were aware of and participated in discussions relating to the future licensing of patents to DRAM manufacturers and others and themselves prepared several of the documents that Complaint Counsel rely upon. Rambus's reliance on counsel to understand and advise it on these interrelated issues is compelling evidence that Rambus acted in good faith in adopting and implementing its document retention policy. RRSF ¶¶ 9-32.

Second, the unprecedented discovery that Complaint Counsel have obtained

⁸ Complaint Counsel rely in part on Judge Payne's statement in a 2001 attorneys' fees opinion that Rambus implemented the document retention policy "for the purpose of getting rid of documents that might be harmful in litigation." *Rambus Inc. v. Infineon Technologies AG*, 155 F. Supp. 2d 668, 682 (E.D. Va. 2001). That statement does not provide clear and convincing evidence that Rambus, acting in bad faith, deliberately adopted and executed its document retention policy in order to destroy documents that might help future litigation adversaries. Moreover, as discussed elsewhere, interlocutory orders cannot be given preclusive effect.

pursuant to Judge Payne's May 18, 2004 orders has revealed that there is nothing *behind* the document retention policy or the legal advice surrounding its adoption that says anything about being concerned about potentially damaging JEDEC evidence. Complaint Counsel cite not one word from any of the privileged documents they obtained pursuant to Judge Payne's orders that gives any indication that the document retention policy had anything to do with JEDEC.

Third, the fact that individuals who complied with the document retention policy were the source of what Complaint Counsel deem the most significant JEDEC evidence in the case is powerful evidence that Rambus did not intentionally set out to destroy such documents in order to deprive its adversaries of relevant evidence. Most notably, the evidence shows that when Richard Crisp, after litigation had begun, located a large quantity of JEDEC e-mails on his home computer, he *collected* them and *turned them over to Rambus General Counsel Neil Steinberg*, who turned them over to outside counsel for production. Crisp, Trial Tr. 3572-76, 3588-96; RX-2541 (Steinberg 10/6/04 *Infineon* Dep. at 357).

Whether viewed separately or in combination, this evidence is entirely inconsistent with Complaint Counsel's supposition about the document retention policy being instituted to cover up evidence of alleged JEDEC misconduct.

First, Complaint Counsel insist that "Rambus employees destroyed all of their JEDEC-related paper files." Mot. at 45. What the evidence actually shows is that *publicly available* JEDEC documents (such as official minutes of meetings and unmarked ballots), *i.e.*, information that the JEDEC office retained, were discarded. The disposal of publicly available information does not show bad faith.

Second, Complaint Counsel assert that Gray Cary's interview notes with Lester

Vincent “demonstrate that critical JEDEC-related documents were supposed to be destroyed pursuant to the document retention policy, and survived only by accident.” Mot. at 46. But drawing the inference that JEDEC documents “were supposed to be destroyed” and “survived only by accident” contradicts the record evidence, which shows that Blakely, Sokoloff’s Rambus files include “general” files which, as the name suggests, related to more general matters and were organized by topic. CX5038 (Jan. 31, 2000 Letter from Lester Vincent to Neil Steinberg at BSTZ 00063); CX5072 at 54-55 (Vincent 11/30/04 *Infineon* Dep.). There is no evidence that Mr. Vincent was asked to clean the general files. It is instead likely that the JEDEC-related documents in Mr. Vincent’s files were retained not by “accident,” as Complaint Counsel hypothesize, but rather because they were in general files which Mr. Vincent did not clean out.⁹

Finally, Complaint Counsel point to a hodge-podge of “snippets” culled from e-mails and documents to try to establish a bad faith attempt to undermine the truth-finding process. For example, Complaint Counsel point to Mr. Crisp’s use of a joke in an e-mail regarding “DDR datasheets.” Motion at 19. But DDR datasheets are publicly available information, not “JEDEC-related documents,” as Complaint Counsel assert. *Id.* Hence, the e-mail does not imply that Mr. Crisp or anyone else thought that Rambus adopted its document retention policy in order to deliberately destroy evidence favorable to Rambus’s adversaries.

In sum, neither the evidence that is in the record nor Complaint Counsel’s

⁹ Complaint Counsel’s sole support for its contrary view, Infineon Exh. 67, are Gray Cary notes of an interview with Lester Vincent. But the notes do not say that the “newly found documents” are JEDEC-related documents. In light of the uncontroverted testimony recounted above, the reference could not have been to such materials (which were retained in and produced from) Blakely, Sokoloff’s general files.

mischaracterization of it rise to the level of clear and convincing evidence that Rambus adopted or implemented its document retention policy in a bad faith attempt to deliberately destroy evidence.

2. Complaint Counsel Have Not Shown That Rambus Destroyed Documents Knowing They Would Be Relevant In Litigation

In order to obtain any remedy for spoliation, a party must show that the alleged spoliator knew it was destroying relevant documents. *Vodusek*, 71 F.3d at 156. Complaint Counsel's attempt to meet this requirement is based *solely* on their statement that JEDEC-related documents were "swept into Rambus's 1998 document retention program." Motion, p. 21. For reasons discussed in the foregoing section, Complaint Counsel have not shown that such documents were targeted for destruction or that Rambus destroyed any such documents knowing that they would be relevant. Complaint Counsel thus also fail to meet this requirement to establish spoliation.

3. Complaint Counsel Have Not Shown That Rambus Destroyed Potentially Relevant Documents At A Time When Litigation Was Reasonably Foreseeable

To obtain any sanction based on a claim of spoliation for the pre-complaint destruction of documents, Complaint Counsel must show that Rambus knowingly destroyed evidence at a time that litigation against Complaint Counsel was "reasonably foreseeable." *Silvestri*, 271 F.3d at 590. Courts applying the reasonable foreseeability standard to precomplaint destruction of evidence have adopted the following test: "The proper inquiry here is whether defendant, *with knowledge that this lawsuit would be filed*, willfully destroyed documents which it knew or should have known would constitute evidence relevant to this case.'" *Struthers Patent Corp. v. Nestle Co.*, 558 F. Supp. 747, 765-66 (D.N.J. 1981) (emphasis added) (quoting *Bowmar Instrument Corp. v. Texas*

Instruments, Inc., 25 Fed. R. Serv. 2d 423, 427 (N.D. Ind. 1977)). *See also* Gorelick, *supra*, § 3.12, at 104 (quoting standard and noting that “[o]ther courts have adopted similar standards”). “[T]he duty to preserve evidence prior to the filing of a lawsuit typically arises when the party is on notice that the litigation is ‘likely to be commenced,’” and “[t]here appear to be no cases extending the foreseeability requirement to a remote possibility of future litigation.” Jeffrey S. Kinsler & Anne R. Keyes MacIver, *Demystifying Spoliation of Evidence*, 34 Tort & Ins. L.J. 761, 764 (1999). *See also* American Bar Association, Section of Litigation, Civil Discovery Standards, August 1999, Standard No. 10 (“For the duty [to preserve evidence] to attach *before* a suit has been filed . . . the litigation must be *probable, not merely possible.*”) (emphasis added).

As applied in the patent context, the requirement that litigation be probable, rather than merely possible, means that a patentee has no duty to take affirmative steps to preserve evidence for another party’s use unless (at a minimum) the patentee has (1) an issued patent (without which the patentee has no cause of action), (2) a basis for concluding that it may assert that patent against an infringer of that patent, and (3) the knowledge that it will pursue litigation against the infringer rather than negotiate a license. Any broader rule would be too amorphous to understand and administer and would create incentives (as it has here) for the accused infringer to avoid questions relating to the patent’s validity, application and enforceability with charges of deliberate spoliation.

Here, litigation against a DRAM manufacturer was not reasonably foreseeable until the November-December 1999 time-frame. The first of the patents that Rambus has asserted against any DRAM manufacturers did not issue until June of 1999. Rambus started to approach DRAM manufacturers to assert its patent rights and to determine if

they would take a license. It was not until negotiations with Hitachi broke down around the late November 1999 time-frame that Rambus decided it would institute litigation – indeed, it was only then that Rambus started to interview counsel to represent it in litigation. Once litigation against Hitachi was reasonably foreseeable, Rambus instituted a litigation hold and told employees with potentially relevant information to preserve any such documents.

Complaint Counsel contend that litigation was actually foreseeable to Rambus as early as February or March of 1998, because Mr. Karp presented slides to Rambus’s Board that referred to a “licensing and litigation strategy.” *See Mot.* at 9-10. But Complaint Counsel’s evidence does not show that Rambus actually adopted a litigation strategy (or even a licensing and litigation strategy) at that time, and in fact the testimony in the record is that such a strategy was not adopted. *See Rambus Responses to Complaint Counsel’s Statement of Undisputed Facts* at 12-13. In any event, documents showing that Mr. Karp, and later Mr. Steinberg (who joined the company as an employee in April of 1999), considered litigation contingencies in the context of thinking about how to assert patents that *might* issue at some point in the future does not establish that litigation was “reasonably foreseeable.” It shows, at most, that litigation was a *possibility* – as it is for any entity that applies for and obtains patents – but one that was contingent. It depended upon such uncertain factors as whether patents would issue, whether they would cover SDRAM and DDR SDRAM devices, and whether manufacturers of those devices would agree to take a license for the right to use Rambus’s patented inventions. As discussed above, however, the *possibility* of litigation does not suffice to create a duty to institute a litigation hold; it is the *probability* of litigation that does, and in Rambus’s case that probability did not materialize until late 1999.

Complaint Counsel contend that, regardless of whether litigation was reasonably foreseeable in September 1998 or August 1999, Rambus committed spoliation in December 2000 when its employees were given burlap sacks to use for disposing of materials that they did not need to take with them when Rambus moved to a different building. Nearly a year before the office move, however, Rambus had taken steps to put in place a litigation hold, telling personnel likely to possess potentially relevant material to retain that material and not discard it. *See* Factual Summary ¶¶ 45-49, *supra*.¹⁰ As this Court explained in its opinion denying Rambus discovery of Complaint Counsel’s document retention practices, a corporation is not obligated to stop throwing away documents simply because it is in litigation. A party has a duty “to ensure the preservation of all *relevant* documents – not to preserve every document irrespective of relevancy.” *See* Memorandum Opinion, *Rambus Inc. v. Infineon Technologies AG*, Civ. No. 3:00CV524 (E.D. Va. Sept. 29, 2004), p. 8 n.6. There is no evidence that Rambus’s

¹⁰ Complaint Counsel’s assertion that Rambus’s 30(b)(6) witness testified that employees were not given instructions about what to retain prior to the office move, *see* Mot. at 14, is misleading. The questions that Infineon’s counsel asked at the deposition related to instructions that were provided to employees at the time of the move. Infineon’s counsel carefully refrained from asking questions about the litigation hold that had been communicated nearly a year before the office move (and not lifted), even though Infineon’s counsel was in possession of the August 2001 deposition of Rambus in the *Micron v. Rambus* case, where the litigation hold was the subject of extensive testimony. Infineon’s assertion that there is no contemporaneous written evidence indicating that a hold was in place in the 1999-2001 time frame, *see* Mot. at 14, is likewise misleading. In the first place, a hold need not be communicated in writing. Moreover, there is contemporaneous documentary evidence referring to Rambus being under a litigation hold. *See* RX-2506 (Jan. 5, 2001 e-mail regarding notice of FTC investigation and that Rambus had been “ordered to CEASE ALL DOCUMENT DESTRUCTION of any relevant documents”; “since antitrust/jedec is an issue in our active court cases we should not be destroying any relevant documents anyways so this shouldn’t be a change in situation”).

office move in 2000 violated this requirement.

For these reasons, Complaint Counsel has failed to demonstrate that Rambus knowingly destroyed relevant documents at a time when litigation was reasonably foreseeable.

E. Complaint Counsel Cannot Show Prejudice Because Rambus's Alleged Destruction Of Documents Is Entirely Irrelevant To Complaint Counsel's Claims In This Case

After many months of considering the testimony and documentary evidence on these issues, and after preparing over 1,650 individual findings of fact. Judge McGuire concluded that Complaint Counsel had failed to meet their burden of proof on each essential element of their claims. Judge McGuire found, for example, that:

- Complaint Counsel failed to prove that JEDEC's patent policy required disclosure of a member's intellectual property interests; the evidence, including JEDEC's board minutes and the Commission's own records, conclusively showed instead that disclosure was voluntary (Initial Decision at ¶¶ 766-771);
- Complaint Counsel failed to prove that the disclosure duty they posited arose *prior* to JEDEC balloting (a showing they needed to make because virtually none of the presentations they point to were ever balloted); indeed, their own witnesses testified to the contrary (Initial Decision at ¶¶ 783-785);
- Complaint Counsel failed to prove that Rambus possessed patents or patent applications that covered the presentations they rely upon; the expert testimony and the Court of Appeals for the Federal Circuit demonstrated

that there were no such patents or applications (Initial Decision at ¶¶ 939-967);

- Complaint Counsel failed to prove that Rambus had led other JEDEC members to believe it would disclose any relevant intellectual property; the evidence instead showed beyond a doubt that Rambus had put JEDEC on notice that it would *not* disclose, and that it reserved *all* rights to, its intellectual property (Initial Decision at ¶¶ 786-901);
- Complaint Counsel failed to prove that JEDEC would have adopted different standards if Rambus had disclosed its intentions, failed to prove that there were acceptable alternatives, and failed to prove that any equal or superior technologies were excluded by Rambus’s alleged conduct (Initial Decision at ¶¶ 1403-1485, 1128-1402, 1064-1127); and
- Complaint Counsel failed to prove that the DRAM industry was now “locked in” and could not avoid the use of Rambus’s technologies. Indeed, the evidence showed quite the opposite – and even included emails by JEDEC members that used the phrase “I am *not* locked in.” (Initial Decision at ¶¶ 1582-1665).

Complaint Counsel bore the burden of proof on all of these issues, and more; a failure to meet their burden on any of them required dismissal. Judge McGuire found that Complaint Counsel failed to meet their burden as to *all* of them. *Id.*

Complaint Counsel’s failure to meet their burden on these essential elements could not have been caused in any way by Rambus’s alleged destruction of documents, and

Complaint Counsel do not contend otherwise. Complaint Counsel suggest only that the destroyed documents might provide additional evidence about Rambus's subjective beliefs about its potential intellectual property rights. But none of the above-cited findings are in any way dependent on evidence regarding Rambus's state of mind on that issue. It is thus clear that neither Complaint Counsel's ability to pursue their claims nor the adjudicative process here was materially affected by the alleged spoliation of evidence.

F. Judge Payne's Intermediate Rulings Have No Collateral Estoppel Or Preclusive Effect

Unable to satisfy the burden of proof necessary to obtain a default judgment, Complaint Counsel repeatedly rely upon selected excerpts from various rulings by Judge Payne in the *Infineon* case. *See, e.g.*, Motion at 1, 2, 5, 10, 11, 12, 13, 14, 24. Although Complaint Counsel nowhere use the phrase "collateral estoppel," it is clear that they are asking the Commission to afford preclusive effect to Judge Payne's statements. As Judge Whyte has already found in the pending *Hynix v. Rambus* case, Order Denying Hynix's Motion to Dismiss Patent Claims for Unclean Hands on the Basis of Collateral Estoppel (Apr. 25, 2005) ("*Hynix* Collateral Estoppel Order"), there is no legal or equitable basis for such a determination, for the reasons set forth below:

1. There Was No Final Judgment In The Infineon Case.

Collateral estoppel does not apply when there is no "final judgment." *Luben Indus., Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983) (adopting *Restatement (Second) of Judgments* ("*Restatement*") § 13 (1982)). The "final judgment" does not have to be the formal type required for appellate jurisdiction, *see* 28 U.S.C. § 1291, but it does have to be the "last word" of the rendering court" on the subject. *Restatement* § 13 cmt.

a.; *Luben* 707 F.2d at 1040 (decision must be “sufficiently firm” to warrant preclusive effect (quoting *Restatement* § 13)). Further, the court must have “supported its decision with a reasoned opinion.” *Robi v. Five Platters, Inc.*, 838 F.2d 318, 326 (9th Cir. 1988).

In addition, where, as here, a bench trial was conducted, the decision must comport with Rule 52(a), which requires that “the court *shall find the facts specially* and state *separately* its conclusions of law thereon.” Fed. R. Civ. P. 52(a) (emphasis added). A decision that does not meet the Rule’s requirements cannot qualify as the “last word” of the prior court, *Restatement* § 13 cmt. a, such that collateral estoppel may apply. Indeed, the Rule’s drafters recognized that special findings and conclusions were essential to a later court’s application of collateral estoppel:

Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issue and the determination thereon. Thus, they not only aid the appellate court on review, but *they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment.*

Fed. R. Civ. P. 52 adv. comm. note (citations omitted; emphasis added); *see also Colorado Coal Furnace Distribs, Inc. v. Prill Mfg. Co.*, 605 F.2d 499, 507 (10th Cir. 1979) (among purposes of Rule is “to make definite just what is decided by the case to enable the application of Res judicata and estoppel principles to subsequent decisions”). Given this purpose, it is not surprising that research has failed to unearth any case in which a decision after a bench trial that did not meet Rule 52(a)’s requirements was nonetheless given preclusive effect.

Judge Payne’s two-sentence conclusion at the close of the bench trial cannot satisfy the test for finality, not because it was spoken rather than written, but rather because it was expressly incomplete and preliminary. As Judge Whyte ruled in *Hynix*,

“absent Judge Payne’s findings of fact and conclusions of law or some other more detailed order setting forth the basis for his ruling on spoliation, the court cannot find that Judge Payne’s judgment is ‘supported with a reasoned decision.’” *Hynix Collateral Estoppel Order* at 6. It followed that the judgment was not “sufficiently firm” and, consequently, the court “decline[d] to apply collateral estoppel to either the issue of Rambus’s spoliation of evidence or dismissal of its claims on the basis of unclean hands.” *Id.*

Moreover, Judge Payne’s ruling did not “find the facts specially and state separately . . . conclusions of law thereon” as required by Fed. R. Civ. P. 52(a). The two sentence ruling was simply the court’s ultimate conclusions following the evidentiary hearing. A court’s statement of its ultimate conclusion on defenses tried (one sentence per issue) does not come close to satisfying Rule 52.

First, in order to satisfy Rule 52(a)’s requirement that facts be found “specially,” the court must set forth findings of “subsidiary facts” that “are sufficient to indicate the factual basis for the ultimate conclusion.” *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 419-22 (1943). No such “subsidiary facts,” *id.*, appear in the *Infineon* court’s two-sentence statement: Which particular documents were destroyed? Under what circumstances? How did those documents relate to Infineon’s claims and defenses and, specifically, how might they conceivably bear on any JEDEC-related claim or defense after the Federal Circuit’s decision? What, if anything, did Rambus know about their relevance to potential litigation with Infineon? None of these questions was answered, and Complaint Counsel may not estop Rambus from litigating similar questions here based on how Complaint Counsel think the Infineon court might have answered them.

Second, the *Infineon* court’s decision did not satisfy Rule 52(a)’s requirement of a

separate statement of legal conclusions. The two-sentence ruling did not separate the facts that may have been found from the law applied to them, and those sentences said nothing to resolve the numerous contested legal issues, including who bears the burden of proving prejudice when documents are destroyed, whether prejudice is required for a finding of unclean hands, how to determine when litigation is foreseeable such that documents must be retained, and what alternatives (if any) the court considered and deemed inadequate to cure whatever prejudice (also unstated) the court may have found. *See Commissioner v. Duberstein*, 368 U.S. 278, 292 (1960) (plurality) (“Such conclusory, general findings do not constitute compliance with Rule 52’s direction to ‘find the facts specially and state separately * * * conclusions of law thereon.’... It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task.”); *see also Hynix Collateral Estoppel Order*, at 6 (“[A]s Rambus correctly points out, Judge Payne’s judgment does not meet the Rule 52 standard for appeal.”)¹¹

2. Complaint Counsel Cannot Show That The Infineon Court Actually And Necessarily Decided The Identical Issues Presented Here.

Complaint Counsel have not attempted to show, and could not show, that the

¹¹ The purported “findings” of spoliation in Judge Payne’s 2001 and 2004 discovery orders are also not final and cannot be afforded preclusive effect. Certainly, Judge Payne did not treat them as such, for he retried the issue of spoliation in the unclean hands trial. Those orders were thus not the “last word” of the Virginia court on spoliation, and cannot be considered final judgments on the issue of spoliation. Restatement § 13 cmt. a; 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4427 (2002) (“Tentative or incomplete action, avowedly subject to further consideration,” is not given preclusive effect); *In Re 949 Erie Street*, 824 F.2d 538, 541 (7th Cir. 1987) (collateral estoppel does not apply “to an interlocutory order, which may be changed by the district court at any time prior to final judgment”).

identical issues that they would preclude Rambus from litigating here were “actually and necessarily decided” by the Infineon court. *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979). It is insufficient simply to argue that there was evidence in the Infineon record from which the trial court could have found facts in common with the allegations that Complaint Counsel make. In fact, the rule for collateral estoppel is exactly the opposite: “If the decision could have been rationally grounded upon an issue other than that which the [party] seeks to foreclose from consideration, collateral estoppel does not preclude relitigation of the asserted issue.” *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1518 (9th Cir. 1985); *see also Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 912 (9th Cir. 1997). Infineon’s necessarily case-specific arguments for finding unclean hands and spoliation involved numerous allegations that Complaint Counsel do not and cannot make here. Because the law precludes subsequent courts and parties from guessing about which facts the Infineon court might (and might not) have credited, there can be no preclusive effect here. As Judge Whyte ruled in the *Hynix* matter, “[i]t is simply not possible to determine what findings Judge Payne made and how he applied those findings to determine Rambus had committed spoliation warranting dismissal of its patent claims in the *Infineon* litigation, thus this court cannot evaluate those findings to determine the impact on this litigation.” *Hynix Collateral Estoppel Order* at 4-5.

Complaint Counsel have pointed to Judge Payne’s that Infineon “has proved . . . a spoliation that warrants dismissal.” Motion, p. 13. But the test for spoliation by its very terms virtually forecloses an identity of interests across multiple cases. Spoliation is a legal conclusion, not an evidentiary fact. *United States v. Hernandez*, 572 F.2d 218, 221 n.3 (9th Cir. 1978) (distinguishing between ultimate and evidentiary facts). To find spoliation, the Virginia court had to find that there was (1) deliberate and prejudicial

destruction of documents (2) known (3) to be relevant to an issue at trial (4) at a time when the litigation was reasonably foreseeable. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). Thus, here Complaint Counsel must prove that litigation by the Federal Trade Commission involving Rambus's assertion of its patents was reasonably foreseeable at the time of the document destruction, that relevant documents were destroyed, that Rambus knew that such documents were relevant to the trial of those claims, and that Complaint Counsel have has been significantly prejudiced. It is plain that such issues were not conclusively decided in the Virginia litigation, which, by its close, was focused on (disputed) allegations about the loss or destruction of patent-specific and case-specific documents, such as claim charts, prior art, and early licensing discussions. *See* DX 509 (Infineon Trial Tr. at 869-876).

G. Complaint Counsel Fail To Show That Sanctions Less Harsh Than Dismissal Would Be Inadequate To Remedy Any Alleged Litigation Misconduct And Indeed Fail To Show That They Are Entitled To The Adverse Inferences They Seeks

1. Complaint Counsel Fail To Show, As They Are Required To Do, That Lesser Sanctions Are An Inadequate Alternative To Dismissal

Complaint Counsel's failure to establish flagrant bad faith by clear and convincing evidence, or in the alternative to show extraordinary prejudice, requires the denial of their motion for default judgment. But Complaint Counsel's motion fails for a third and separate reason: Complaint Counsel have failed to show, as they must, that lesser sanctions would be inadequate. *Shaffer Equipment Co.*, 11 F.3d at 462-463 (dismissal reversed for failure to consider lesser sanctions); *McCargo*, 545 F.2d at 396 (district court required to consider lesser sanctions). Complaint Counsel do not even *attempt* to show why adverse inferences would be inadequate to address the evidentiary prejudice they

supposedly suffered, and instead resort to the impermissible argument that Rambus should be punished. Motion, pp. 2, 22. Complaint Counsel's motion should be denied for this reason alone.

2. Complaint Counsel Provide No Support For The Adverse Inferences That They Seek In Their Proposed Findings

Complaint Counsel's contention that nothing short of dismissal will suffice as a remedy does not stop Complaint Counsel from requesting that the Court adopt various adverse inferences. Mot. at 54-58. Like dismissal, adverse inferences are severe sanctions that cannot "be given lightly." See *Thompson v. U.S. Dept. of Housing and Urban Dev.*, 219 F.R.D. 93, 100-101 (D. Md. 2003). Adverse inferences cannot be justified here on the basis of Rambus's conduct. Where a party had notice that a document or other evidence was relevant to litigation but destroyed or withheld the specific evidence, inferences are used to allow the fact-finder to infer that the evidence was destroyed because of the "fear that the contents would harm him." *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 217 (1st Cir. 1982). It follows then that an "adverse inference about a party's consciousness of the weakness of his case. . . cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and his willful conduct resulted in its loss or destruction." *Vodusek*, 71 F.3d at 156. As explained in detail above, there has been no showing that Rambus destroyed documents with the intent to suppress the truth. No adverse inferences suggesting Rambus destroyed documents to avoid any weakness of its case are warranted.

In addition, the cases in which inferences are issued illustrate the level of the required connections necessary for adverse inferences. These cases involve key pieces of

evidence destroyed that were directly linked to the specific inferences given. *E.g.*, *Vodusek*, 71 F.3d at 155 (destruction of boat at the center of products liability case gave rise to an inference that the condition of the boat would have been “unfavorable to the plaintiff’s theory in the case”); *Stevenson*, 354 F.3d at 746 (destroyed voice tape of the accident at issue in the case gave rise to inference that “the contents of the voice tape. . . would have been adverse, or detrimental, to the defendant”).

IV. CONCLUSION

Prosecutorial persistence can be a virtue. Or it can be a symptom of a system that generates a desire to prevail by any means, on any grounds, and at any cost. Whichever applies here, one thing is clear: the pending motion seeks an extraordinarily draconian sanction – not on anything approaching the merits of the Complaint and, indeed, in the face of multiple independent reasons on the merits that render the present motion moot. The purported basis for this revived effort to avoid the merits is the existence of the Supplemental Evidence. But that Supplemental Evidence undercuts rather than supports the relief now sought. It shows that Rambus acted in good faith, implementing its document retention program in reliance on experienced counsel who had themselves participated in Rambus’s preliminary considerations of the possible need for future litigation.

This case should be decided on the merits. The outcome of this case ought to be a final and complete dismissal on the merits for the host of the reasons found by Judge McGuire – reasons that have nothing to do with (and, by their nature, can have nothing to do with) anything that might have been in Rambus’ documents. For these and all of the other reasons set out in this brief, Complaint Counsel’s motion should be denied.

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

COMMISSIONERS: DEBORAH PLATT MAJORAS, CHAIRMAN
THOMAS B. LEARY
PAMELA JONES HARBOUR
JON LEBOWITZ

IN THE MATTER OF

RAMBUS INC.,

A CORPORATION.

DOCKET No. 9302

CERTIFICATE OF SERVICE

I, HELENA T. DOERR, HEREBY CERTIFY THAT ON AUGUST 17, 2005, I CAUSED A TRUE AND CORRECT COPY OF *RESPONSE BY RAMBUS INC. TO COMPLAINT COUNSEL'S MOTION FOR SANCTIONS* TO BE SERVED ON THE FOLLOWING PERSONS BY HAND DELIVERY:

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