

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**COMPLAINT COUNSEL'S APPLICATION TO PLACE ON THE PUBLIC RECORD
DOCUMENTS ATTACHED AS EXHIBITS TO COMPLAINT COUNSEL'S MOTION
FOR DEFAULT JUDGMENT**

Complaint Counsel hereby makes this Application to place on the public record the Exhibits attached to Complaint Counsel's Motion for Default Judgment and the Memorandum in Support thereof (filed Dec. 20, 2002) (together "Default Judgment Motion"), which contain documents previously designated by Respondent Rambus Inc. ("Rambus") as confidential pursuant to the protective order entered in this matter. Because the Exhibits attached to the Default Judgment Motion form part of a pleading upon which a ruling on the merits of the case is requested, the Commission's presumption favoring full public disclosure applies. Indeed, the public interest militates strongly for full disclosure of the Exhibits, as Rambus has sought to argue its case through the press. The public's ability to assess Rambus's arguments, and the press's ability to report fully and accurately upon them, would be greatly hampered in the absence of disclosure of the Exhibits. Because of the strong Commission policy and public interest favoring full disclosure, Rambus must demonstrate that each of the Exhibits for which it seeks to maintain confidentiality meet the requirements for *in camera* treatment set out in

Commission Rule 3.45.

Complaint Counsel believes that none of the Exhibits for which Rambus continues to seek confidential treatment meets the requirements of Rule 3.45, 16 C.F.R. § 3.45, based upon a careful consideration of those documents and Rambus's justifications offered for continuing confidentiality during the parties' "meet and confer" regarding this issue.¹ Complaint Counsel therefore respectfully requests that Your Honor designate all documents attached to Complaint Counsel Motion for Default Judgment as public.²

There is a strong presumption that the public has access to the record of the Commission's adjudicative proceedings. *In the Matter of Detroit Auto Dealers Ass'n*, D-9189, 1985 FTC Lexis 90, at *3 (June 7, 1985) (there is a "presumption of public access to any document filed in the record of an adjudicative proceeding"). FTC adjudicative proceedings should be open and on the public record. *Id.*, 1985 FTC Lexis 90, at *2 ("The principle of open proceedings and public records in Federal Trade Commission administrative adjudication is beyond dispute."); accord *In the Matter of Intel Corp.*, D-9288, 1999 FTC Lexis 227, at *1 (Feb.

¹ Complaint Counsel and Rambus conducted, on January 17, 2003, a "meet and confer" telephonically, pursuant to Paragraph 11(b) of the Protective Order in this matter, in a good-faith effort to resolve the confidential treatment of the documents attached to the Default Judgment Motion. Counsel were unable to resolve their differences with respect to a substantial number of the Exhibits. The following Exhibits are not at issue, and Rambus does not assert a claim of confidentiality with respect to: Exhibits 1-4, 6-8, 10, 12, 14-16, 22-30, 33-37, 70, 72-78, 85, 94-96, and 110-116. Rambus and Complaint Counsel agreed to place on the public record a redacted version of Exhibit 81, the redacted version of which is attached in Exhibit J. Complaint Counsel have contacted Samsung to determine whether Samsung is willing to waive any claims of confidentiality with respect to Exhibit 93, which is a document authored by a former Samsung employee, and for which Rambus has waived any confidentiality claims of its own.

² The Exhibits are extensively quoted in the Default Judgment Motion. All quotations in the Default Judgment Motion from any Exhibit placed on the public record would also become public in the final public version of that Motion.

23, 1999); *see also In the Matter of H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961) (“There is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.”). Open and public proceedings permit the public to evaluate the “fairness of the Commission’s work,” and it “provide[s] guidance to persons affected by [the Commission’s] actions.” *Intel*, 1999 FTC Lexis 227, at *1 (citing *In the Matter of Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1714-15 (1967)); *accord H.P. Hood*, 58 F.T.C. at 1186; *In the Matter of Volkswagen of America, Inc.*, 103 F.T.C. 536, 538 (1984); *see also In the Matter of RSR Corp.*, 88 F.T.C. 734, 734-35 (1976) (“One reason for the requirement that proceedings of this sort be decided ‘on the record’ is to permit the public to evaluate the fairness and wisdom with which the decisions of public agencies have been made, and to permit affected parties to draw guidance from those decisions in determining their future conduct.”). Therefore, absent strong justification presented by Rambus, all of the Exhibits attached to the Default Judgment Motion should be placed on the public record.

The presumption of public access to evidence applies with equal force to documents filed in support of the Default Judgment Motion as to documents introduced into evidence at trial. *See In the Matter of Trans Union Corp.*, D-9255, 1993 FTC Lexis 310 (Nov. 3, 1993) (Commission Order). As the Commission explained in *Trans Union*, “confidential documents or information included in, or attached to” summary judgment filings are, “[f]or all practical purposes . . . ‘offered in evidence’ at that time.” *Id.*, 1993 FTC Lexis 310, at *3-4 (citing Commission Rule 3.45). In other words, the “use of confidential information or documents in filings related to a ruling on the merits of the case is the same as offering them in evidence, because any documents or information so used may be relied on in deciding the case.” *Id.*, 1993 FTC Lexis 310, at *4. Therefore, as the Commission made clear, “[t]he phrase in Rule 3.45(b) ‘offered into evidence,’

should be read to include similar material that will become part of the adjudicative record in the case.” *Id.*, 1993 FTC Lexis 310, at *4 n.3; *see also Detroit Auto Dealers*, 1985 FTC Lexis 90, at *3 n.5 (“The public record of adjudicative proceedings at the Federal Trade Commission includes not only the evidentiary record of documents admitted in evidence and the trial transcript but also pleadings, motions, orders, prehearing conference transcripts, and briefs.”). Rambus therefore may not avoid publication of these Exhibits by contending that the Default Judgment Motion comes outside of the trial proceedings themselves. Rather, the Motion and the Exhibits thereto are documents that presumptively should be made available to the public.

The standard for keeping documents off of the public record is a high one. As Rule 3.45 makes clear, the party seeking *in camera* treatment must show that disclosure of the document will “likely result in a clearly defined, serious injury to” it. 16 C.F.R. § 3.45(b); *accord Intel*, 1999 FTC Lexis 227, at *2 (citing *H.P. Hood*, 58 F.T.C. at 1188). Accordingly, Rambus must show clearly that “the information concerned is sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury.” *Intel*, 1999 FTC Lexis 227, at *3 (citing *Volkswagen of America*, 103 F.T.C. at 538). Rambus cannot meet this burden.³

It is amply clear that the public has a great interest in the proceedings of this matter. The fact of Complaint Counsel’s filing of its Default Judgment Motion resulted in numerous news-service articles. *See* Jeff Bater (Dow Jones Newswires), “FTC Wants Immediate Judgment in Rambus Antitrust Case” (Jan. 15, 2003) (Exhibit C); Susan Decker (Bloomberg.com), “Rambus

³ A table of the Exhibits for which Rambus seeks to maintain confidentiality, which was supplied to Complaint Counsel by Rambus, along with Rambus’s reason for confidentiality with respect to each Exhibit, is attached hereto as Exhibit A. Exhibits for which Rambus did not assert a claim of confidentiality, or with respect to which it has withdrawn its objection to having the Exhibit placed on the public record subsequent to the conference between counsel, have been deleted from the table.

Should Be Found Liable In Fraud Case, FTC Says” (Jan. 15, 2003) (Exhibit D); Tom Krazit (LDG News Service), “FTC Pushes Penalties for Rambus” (Jan. 16, 2003) (Exhibit E); Peter Kaplan (Reuters), “FTC Asks for Antitrust Ruling Against Rambus” (Jan. 16, 2003) (Exhibit F); Alex Romanelli (Electronic News), “FTC Seeks Immediate Antitrust Ruling Against Rambus” (Jan. 17, 2003) (Exhibit G); Peter Kaplan (Reuters), “Rambus Shredded Potential Evidence, FTC Says” (Jan. 17, 2003) (Exhibit H); Therese Poletti (San Jose Mercury News), “FTC: Rambus Destroyed Evidence” (Jan. 18, 2003) (Exhibit I).

As the news reports demonstrate, Rambus has contributed its views of the case to the press, which frequently quote Rambus’s Vice President and General Counsel, John Danforth. *See, e.g.*, Jeff Bater, “FTC Wants Immediate Judgment in Rambus Antitrust Case” (Exhibit C) (“‘We regard the motion as baseless,’ [Danforth] added.”) Tom Krazit, “FTC Pushes Penalties for Rambus” (Exhibit E) (“‘Unless intended simply as character assassination, this motion likely reflects a growing recognition . . . that there are serious holes in their case,’ Rambus said in a response it released.”); Susan Decker, “Rambus Should Be Found Liable In Fraud Case, FTC Says” (Exhibit D) (“‘FTC attorneys ‘are in no position to make judgments,’ . . . Danforth said.”). Keeping the Exhibits off the public record, however, precludes the press and the public from gaining a *full* understanding of Complaint Counsel’s Motion for Default Judgment. Indeed, Rambus’s efforts to keep these Exhibits off the public record appear to be motivated, at least in part, to hide from the public the evidence against it, while allowing it to present its own case openly and publicly. *See, e.g.*, Peter Kaplan, “FTC Asks for Antitrust Ruling Against Rambus” (Exhibit F) (“‘There’s no basis in law or fact for what they’re seeking,’ Danforth said.”).

Even a cursory review of the interim public version of the Default Judgment Motion makes obvious that Rambus would have only very limited portions of the Motion become public,

while keeping the rest hidden from public view.⁴ See Memorandum in Support of Complaint Counsel's Default Judgment (Interim Public Version) 25-73 (filed Jan. 16, 2003) (Exhibit B). The public is entitled to far more. As explained below, there is no reason that any of the Exhibits attached to the Default Judgment Motion should be withheld from the public record in this matter.

In particular, Rambus seeks to maintain as confidential a large number of Exhibits that it claims contain business strategy or patent strategy, even though all of these Exhibits contain documents that are several years old. The Commission presumes that "information that is three or more years old" is not entitled to *in camera* treatment. *Intel*, 1999 F.T.C. Lexis 227, at *6 (citing *In the Matter of General Foods Corp.*, 95 F.T.C. 352, 353 (1980)). Furthermore, even with respect to business and marketing plans, *in camera* treatment generally extends only for two to five years. *E.g.*, *In the Matter of Hoechst Marion Roussel, Inc.*, D-9293, 2000 F.T.C. Lexis 157, at *7 (Nov. 22, 2000). Nearly every one of the documents Rambus seeks to keep confidential is more than four years old, and some are close to ten years old. Therefore, there is a presumption that they may be placed on the public record.

While the Exhibits are presumptively not entitled to *in camera* treatment because of their age, a closer inspection of the documents confirms that there is no reason why the presumption should not apply in this case. Many of the documents do not relate to business strategy at all. Other documents relate to Rambus's internal operating plans (*i.e.*, its plans for document retention or document destruction), and thus do not relate to other companies or competitors

⁴ The interim public version of the Default Judgment Motion was placed on the public record after Rambus agreed to allow a significantly redacted version of the sealed version to be placed on the record, pending discussions among counsel regarding further disclosures of Exhibits. See Exhibit B.

(other than discussing Rambus's preparations to pursue other companies for patent infringement). Some documents contain assessments of Rambus's then-current strategy in 1993 to 1996, but the need for secrecy of these documents has long passed. In rare instances, documents allude to then-future strategies, but even these relate to strategies that were to be implemented by 1999.

Rambus's contentions belie the public nature of its business model: to the extent these documents reveal Rambus's plans to assert its intellectual-property rights by publicly suing companies for patent infringement, the public, and particularly DRAM manufacturers, are amply aware of its strategy. Nothing of commercial sensitivity could be revealed by these documents. Rambus cannot meet its burden because, regardless of the materials' previously confidential status, they are sufficiently old that they have no possible bearing on Rambus's future strategies. As a result, their disclosure cannot possibly cause competitive injury to Rambus.

Rambus cannot meet the standard for *in camera* treatment because, as explained below with respect to each of the categories of Exhibits for which it seeks continued confidentiality, its potential arguments fail. With respect to the significant majority of the Exhibits, Rambus has claimed that they contain either business strategy or patent strategy, yet Rambus cannot articulate a reason as to why assessments and planning that is many years in the past could possibly reveal any future strategies that would harm its competitive position. With respect to the remainder of the Exhibits, there is no basis for confidentiality in the first place. Rambus's confidentiality designations therefore should fail upon a motion for *in camera* treatment.

A. White Papers Submitted to Commission

Rambus objects to the disclosure of excerpts from white papers it submitted to the Commission prior to the issuance of the Commission's complaint in this matter, which are

Exhibits 117 and 118. Rambus submitted these white papers voluntarily, in an effort to persuade the Commission that it should not issue a complaint. Accordingly, Commission Rule 4.10(a)(9) does not provide a basis for confidentiality. See 16 C.F.R. § 4.10(a)(9) (confidential treatment for documents submitted pursuant to compulsory process). Rambus's contention therefore does not provide a basis for claiming confidentiality of these excerpts, because they were not submitted pursuant to compulsory process. Because there is no basis for confidentiality, let alone a competitive harm that could result from their disclosure, Complaint Counsel believes that Rambus is not entitled to *in camera* treatment of Exhibits 117 and 118.

B. Deposition Transcripts Containing Allegedly Privileged Discussions

Rambus objects to the disclosure of excerpts from deposition transcripts in the *Infineon* trial, Exhibits 9, 13, and 21, on the ground that they contain discussions of legal advice given to Rambus. Rambus also objects to an excerpt from a deposition transcript in the *Micron* trial, Exhibit 80, on the ground that it contains information "about the circumstances surrounding Rambus's engagement of outside counsel." The basis for Rambus's contention regarding Exhibit 80 does not appear to assert that the testimony contains legal advice provided to Rambus. Accordingly, it is not privileged and need not remain confidential. With respect to the *Infineon* deposition transcripts, all claims of privilege by Rambus have been voided by the trial court's ruling in *Infineon*. Moreover, counsel for Rambus informed Complaint Counsel that it would not seek to assert the privilege with respect to that information in this proceeding during the deposition of Mike Farnwald (Jan. 13, 2003). Absent a claim of privilege, Rambus has no basis for maintaining these deposition excerpts in confidence.

Because there is no basis for continuing claims of privilege, any grounds for confidentiality no longer exists. Accordingly, Complaint Counsel believes that Rambus is not

entitled to *in camera* treatment of Exhibits 9, 13, 21, and 80.

C. Exhibits Relating to Rambus's Document-Retention Policy

Rambus objects to the public disclosure of several documents describing its document retention policy or the adoption thereof.⁵ There is no basis for continued confidential treatment of these Exhibits, and they therefore are not entitled to *in camera* status. There is nothing competitively sensitive about a company's document-retention policy or its adoption thereof. Indeed, no competitor could gain an advantage by knowing another company's policies with respect to document retention. Furthermore, the Exhibits are more than four years old, and relate to events in 1998. Accordingly, the documents are presumptively not confidential.

Rambus has specifically made public its own justifications for adopting its document-retention policy, further undermining any justifications for confidentiality. These public statements show both that the policy is not competitively sensitive and that it is properly considered by the public. First, John Danforth, Rambus's General Counsel, called Complaint Counsel's contentions "old news," because they had also been alleged in the *Infinion* trial. Susan Decker, "Rambus Should be Found Liable in Fraud Case, FTC Says" (Exhibit D). Furthermore, Rambus maintains publicly that the document destruction in which it had engaged was part of the company's document-retention policy. See Peter Kaplan, "Rambus Shredded Potential Evidence" (Exhibit C). Rambus's public defense of its document-retention policy shows that it clearly is not confidential in itself. Moreover, its reasons for implementing that policy, which Rambus claims were legitimate, have plainly been put before the public by Rambus. To deny the public the other side of the story, the one advanced by Complaint Counsel,

⁵ Rambus asserts this basis for confidentiality with respect to Exhibits 57, 67, 82-84, 86-91, 97, and 101-102.

would emphatically violate the Commission's policy on conducting its proceedings in public to allow the public to evaluate the Commission's decisionmaking.

Because there is no basis for the confidentiality of Exhibits relating to Rambus's document-retention policy, and no competitive harm from their disclosure, and because Rambus's public statements about its policy have waived any possibly claims of confidentiality, Complaint Counsel believes that Rambus is not entitled to *in camera* treatment of Exhibits 57, 67, 82, 83, 84, 86, 87, 88, 89, 90, 91, 97, 101, and 102.

D. Exhibits Containing Personnel Information

Rambus objects to the disclosure of documents that ostensibly contain personnel information, Exhibits 61 and 64. Even a cursory review of those documents shows that there is no confidential personnel information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. See 16 C.F.R. § 4.10(a)(4). Indeed, neither of the documents is itself a personnel file; rather, each contains statements referring to Rambus personnel. Rambus's position appears to Complaint Counsel to be frivolous. Exhibit 64, excerpts from a deposition of Mr. Karp, appear to be entirely devoid of personnel information. At most, it alludes to the financial benefits Mr. Karp would have lost had Rambus

. Rambus was unable to articulate any "serious" harm that would likely result from disclosure of that information. Similarly, Exhibit 61, an email from Geoff Tate, Rambus's CEO, evaluates whether to hire Mr. Karp. That document shows Tate's assessment of Mr. Karp's , but nothing more. It, too, is devoid of information the disclosure of which would cause "serious harm." In short, any possible injury is neither "clearly defined" nor "likely," as required by Rule 3.45(b).

Because there is no basis for Rambus's claims that some of the Exhibits to the Motion for

Default Judgment contain “personnel” information, Complaint Counsel believes that Rambus is not entitled to *in camera* treatment of Exhibits 61 and 64.

E. Exhibits Containing Business and/or Patent Strategy

Rambus seeks to maintain the confidentiality of a substantial number of Exhibits that purportedly contain business strategies.⁶ Rambus also seeks to maintain the confidentiality of a number of Exhibits that contain patent “strategy” or relate to its patent portfolio.⁷ Every one of these Exhibits is either more than four years old, or relates to events that occurred more than four years ago. That alone provides reason to deny these Exhibits *in camera* treatment. Closer inspection, however, demonstrates clearly that there is no reason whatsoever to disregard the usual presumption that older documents should not be maintained *in camera*. These Exhibits simply do not contain competitively sensitive information.

The number of Exhibits for which Rambus seeks continued confidentiality makes impossible a comprehensive description of why they do not contain competitively sensitive information. Indeed, in many instances it is impossible to locate any information that is competitively sensitive, let alone confidential.⁸ Nevertheless, a few documents highlight the

⁶ Rambus has asserted the confidentiality of the following Exhibits on this ground: 11, 17, 20, 31, 32, 38, 40-41, 44-55, 57-63, 65-66, 69, 92, 98, 100, and 103-109.

⁷ Rambus has asserted the confidentiality of the following Exhibits on this ground: 5, 39, 42-43, 56, 67-68, 71, 79, and 99. In many instances, Rambus has asserted that a document contains both business and patent strategy information, which reflects the interrelationship between Rambus’s patent portfolio and its business strategy. The claims of confidentiality fail whether they are based on the patent contents of the documents or the business content of the documents, and are therefore addressed only with respect to their business contents.

⁸ Complaint Counsel acknowledges that it has had difficulty assessing whether some of the Exhibits may contain some information that is competitively sensitive because, during the conference between counsel, counsel for Rambus were unable to identify information in any of the documents specifically considered that appeared to be competitively sensitive. Complaint Counsel will be in a position to respond to Rambus’s assertions of confidentiality

baselessness of Rambus's claims of confidentiality.

Business Strategy. Exhibit 20, an email from Richard Crisp, sets out his observations about and critique of a JEDEC meeting that took place in December 1995. The document contains no strategy; rather, it describes the treatment Rambus received at that meeting. Exhibit 32 is even more lacking in strategic content: it is a simple three-line email from Geoff Tate requesting information about certain of Rambus's patent claims. Exhibit 39, another email, from August 1997, discusses Rambus's decision not to publicize a certain patent, but notes that since it had been issued, the company should be prepared to respond to inquiries about it. As with the others, there is no strategic information contained in the five-year-old email.

Patent Strategy. Exhibit 68, like the "business strategy" documents, is similarly devoid of any strategic or forward-looking information: it is an email noting the issuance of two patents to Rambus and congratulating the inventors. Exhibit 43 contains only slightly more information: it is an August 1997 email discussing Rambus's public response to news of the issuance of a patent. Rather than containing confidential information, it contains information that is specifically intended for public consumption. Finally, Exhibit 71 is an August 1994 email expressing the author's opinion that it would be desirable to . This email contains the well-known fact that "Rambus is an LP company" -- there is nothing in the fact that ten years ago Rambus that could possibly enable a competitor to compete on unfair terms against Rambus.

In short, Rambus has asserted confidentiality with respect to a very large number of Exhibits, yet appears not to have considered carefully how they are in fact competitively

once Rambus makes those claims with particularity in its motion seeking *in camera* treatment.

sensitive. Complaint Counsel's review of these Exhibits establishes two things clearly: 1) the documents all relate to events or planned undertakings from no later than 1998; 2) there are no obvious trade secrets or intellectual property contained in the documents themselves. Counsel for Rambus has not identified with any particularity how disclosure would cause competitive harm. *In camera* treatment of Exhibits 5, 11, 17, 20, 31, 32, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 71, 79, 92, 93, 99, 100, 103, 104, 105, 106, 107, 108, and 109 is therefore not warranted.

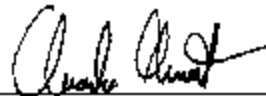
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Complaint Counsel, after its conference with Rambus, determined that it is appropriate to redact from all deposition transcripts any material that is not cited or quoted in the Motion for Default Judgment, nor immediately surrounds quoted material the inclusion of which is necessary for the public to understand the context of the quotation. Complaint Counsel has therefore attached redacted versions of Exhibits 9, 13, 21, 57, 64, 67, 80, 84, 86-88, 90-91, 97-98, and 100-102, which are the Exhibits containing deposition transcripts for which Rambus maintains a claim of confidentiality. See Exhibit J. For the reasons stated above, the material that has not been redacted is not entitled to *in camera* treatment, even to the extent it contains business strategy, patent strategy, personnel information, or information about internal business operations.

Based on the forgoing, Complaint Counsel respectfully requests that the Exhibits attached to the Motion for Default Judgment be placed on the public record and that Rambus be ordered to prepare a motion for *in camera* treatment with respect to each of the Exhibits that it seeks to have withheld from the public record, along with support therefore, so that Complaint Counsel may adequately respond to Rambus's specific claims of competitive harm that would likely result

from disclosure. Because the public interest warrants prompt access to all materials that should be publicly available, Complaint Counsel respectfully requests that Your Honor direct Rambus to file its motion for *in camera* treatment by January 29, 2003.

Respectfully submitted,



M. Sean Royall
Geoffrey D. Oliver
Andrew J. Heimert

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COUNSEL SUPPORTING THE COMPLAINANT

Dated: January 22, 2003

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

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

[PROPOSED] ORDER

Upon consideration of the Complaint Counsel's Application to Place on the Public Record Documents Attached as Exhibits to Complaint Counsel's Motion for Default Judgment, dated January 22, 2003,

IT IS HEREBY ORDERED that Complaint Counsel's Application is Granted.

IT IS FURTHER ORDERED that the Respondent Rambus Inc. shall file no later than January 29, 2003, a motion for *in camera* treatment with respect to any Exhibits to Complaint Counsel's Motion for Default Judgment for which it seeks such treatment.

James P. Timony
Chief Administrative Law Judge

Date: .. .

CERTIFICATE OF SERVICE

I, Beverly A. Dodson, hereby certify that on January 23, 2003, I caused a copy of the public version of Complaint Counsel's Application to Place on the Public Record Documents Attached as Exhibits to Complaint Counsel's Motion for Default Judgment, with Exhibits thereto, and a Proposed Order with respect thereto, to be served upon the following persons:

by hand delivery to:

Hon. James P. Timony
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

and by overnight courier (without exhibits) to:

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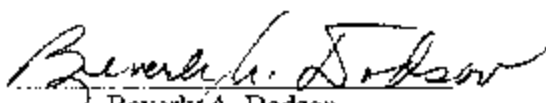

Beverly A. Dodson

Exhibit A redacted from public-record version

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Interim Public Version:

Complaint Counsel contends that none of the Rambus business documents, or testimony of Rambus witnesses, that were cited in its Default Judgment Motion or the Memorandum in Support of that Motion can or should properly, consistent with the Commission's Rule of Practice, be withheld from the public record. Complaint Counsel has given notice to Rambus of this position, and Rambus has sought to contest it. Until such time as these issues can be resolved, Complaint Counsel will continue to withhold from the public record any documents or testimony that Rambus claims to be confidential.

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**COMPLAINT COUNSEL'S MOTION FOR DEFAULT JUDGMENT
RELATING TO RESPONDENT RAMBUS INC.'S
WILLFUL, BAD-FAITH DESTRUCTION OF MATERIAL EVIDENCE**

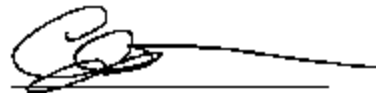
As explained in Complaint Counsel's Memorandum in Support of this motion, Respondent Rambus Inc. ("Rambus") purposefully sought to mitigate the legal risks of its misleading conduct while a member of JEDEC by destroying large volumes of documents, relating to its participation in JEDEC and other issues, that it feared could be used against the company in anticipated future litigation, including potential antitrust litigation instituted by the FTC. Having studied the available evidence, including considerable amounts of prior sworn testimony from Rambus witnesses, Complaint Counsel is persuaded that Rambus's document destruction was so pervasive, and likely impacted so many issues in this case, that the only appropriate sanction is a default judgment as to liability. Furthermore, having carefully reviewed the relevant case law, Complaint Counsel is persuaded that the imposition of a default judgment is not only well justified in this case, but virtually mandated by the circumstances, including the bad-faith nature of Rambus's conduct and the substantial prejudice it has caused. Any relief short of

a default judgment, Complaint Counsel submits, would deprive Complaint Counsel of the right to have its claims decided on the merits.

Because the imposition of this relief would have a significant impact upon the ongoing course of discovery and the scope of the administrative hearing, Complaint Counsel has not delayed in filing this motion, and respectfully requests that the motion be ruled upon as expeditiously as possible. We further request to be heard in oral argument.

Upon considering all relevant factual and legal arguments presented by this motion, Complaint Counsel hereby requests that Your Honor enter an order in the form of the proposed order filed herewith. Only by entering such an order can Your Honor avoid the potential of a substantial injustice in this case, appropriately penalize Rambus for its wrongdoing, and ensure that similar misconduct by others is deterred.

Respectfully submitted,



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Alice W. Detwiler
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COUNSEL SUPPORTING THE COMPLAINT

Dated: December 20, 2002

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Interim Public Version:

Complaint Counsel contends that none of the Rambus business documents, or testimony of Rambus witnesses, that were cited in its Default Judgment Motion or the Memorandum in Support of that Motion can or should properly, consistent with the Commission's Rule of Practice, be withheld from the public record. Complaint Counsel has given notice to Rambus of this position, and Rambus has sought to contest it. Until such time as these issues can be resolved, Complaint Counsel will continue to withhold from the public record any documents or testimony that Rambus claims to be confidential.

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Docket No. 9302

MEMORANDUM IN SUPPORT OF
COMPLAINT COUNSEL'S MOTION FOR DEFAULT JUDGMENT
RELATING TO RESPONDENT RAMBUS INC.'S
WILLFUL, BAD-FAITH DESTRUCTION OF MATERIAL EVIDENCE

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Interim Public Version:

Complaint Counsel contends that none of the Rambus business documents, or testimony of Rambus witnesses, that were cited in its Default Judgment Motion or the Memorandum in Support of that Motion can or should properly, consistent with the Commission's Rule of Practice, be withheld from the public record. Complaint Counsel has given notice to Rambus of this position, and Rambus has sought to contest it. Until such time as these issues can be resolved, Complaint Counsel will continue to withhold from the public record any documents or testimony that Rambus claims to be confidential.

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**MEMORANDUM IN SUPPORT OF
COMPLAINT COUNSEL'S MOTION FOR DEFAULT JUDGMENT
RELATING TO RESPONDENT RAMBUS INC.'S
WILLFUL, BAD-FAITH DESTRUCTION OF MATERIAL EVIDENCE**

As explained herein, Respondent Rambus Inc. ("Rambus") purposefully sought to mitigate the legal risks of its misleading conduct while a member of JEDEC by destroying large volumes of documents, relating to its participation in JEDEC and other issues, that it feared could be used against the company in anticipated future litigation, including potential antitrust litigation instituted by the FTC. Having studied the available evidence, including considerable amounts of prior sworn testimony from Rambus witnesses, Complaint Counsel is persuaded that

Rambus's document destruction was so pervasive, and likely impacted so many issues in this case, that the only appropriate sanction is a default judgment as to liability. Because the imposition of such relief would have a significant impact upon the ongoing course of discovery and the scope of the administrative hearing in this case, Complaint Counsel has not delayed in filing its motion, and respectfully requests that the motion be ruled upon as expeditiously as possible. We further request to be heard in oral argument.

The bases upon which Complaint Counsel requests this relief are stated herein, subject to such further written or oral supplementation as Your Honor may allow. Complaint Counsel has also submitted herewith a proposed order in the form that it requests be entered upon completion of Your Honor's consideration of the merits of the underlying motion.

INTRODUCTION

- Q. In response to Mr. Karp's directives about cleaning files or discarding documents, did you . . . discard documents . . . and erase files? . . .
- A. I definitely made an attempt to go through my files and look for things to keep . . . as he had directed us to do. And everything else that I couldn't justify keeping, I put in a burlap bag that they gave us, and . . . I presume they shredded it. . . .
- Q. Besides the JEDEC meeting minutes, what other JEDEC-related materials did you discard after Joel Karp's directions?
- A. Well, anything that I had on paper, I basically threw away. I just - I really lightened my paper load a lot.
- Richard Crisp, Rambus's Primary JEDEC Representative*
4/13/01 Dep. at 841:8-21, 843:2-7, *Rambus v. Infineon* [Tab 1]
- Q. And when you say you were told Rambus didn't want to keep these documents around because they were discoverable, when you say "discoverable," you are talking about in a subsequent litigation like we are in right here; right? . . .

A. Discoverable in a lawsuit, yeah.

Anthony Diepenbrock, Rambus's In-House Patent Counsel
4/11/01 Dep. at 208:9-20, *Rambus v. Infineon* [Tab 2]

Q. When was the meeting that you had with Joel Karp on purging files?

A. . . . seems to me, that somehow we did that in the spring or summer of '98.

Q. And he told you one of the reasons for doing that was because such materials are discoverable in subsequent litigations; right? . . .

A. Yes.

Allen W. Roberts, Rambus's Vice President of Engineering
4/14/01 Dep. at 338:20-339:6, *Rambus v. Infineon* [Tab 3]

Based upon such sworn testimony and a significant volume of other evidence, Judge Payne concluded that in mid-1998 Rambus "implemented a 'document retention policy,' in part, for the purpose of getting rid of documents that might be harmful" in anticipated future litigation – that is, the litigation Rambus expected would ensue when it began "demand[ing] royalties from semi-conductor manufacturers" based on its previously undisclosed "JEDEC-related patents." *Rambus, Inc. v. Infineon Technologies*, 155 F. Supp. 2d 668, 682-83 (E.D. Va. 2001) [Tab 4] (emphasis added).¹ Judge Payne further concluded that Rambus's actions in this regard constituted "litigation misconduct," and that Rambus's misconduct materially affected the trial by leaving an evidentiary record that "omitted the documents that revealed, or pointed the way to,

¹ Complaint Counsel has compiled and submitted together with this memorandum of law all documents, testimony, and other supporting evidence cited herein. Each discrete item referenced in the memorandum has been assigned a tab number – e.g., [Tab 4] – corresponding to the numbered tab, in the accompanying compilation of supporting evidence, behind which the relevant document, testimony, etc. appears.

In addition, Complaint Counsel has prepared a PowerPoint presentation highlighting selected documents and testimony from the broader universe of supporting evidence, and containing hyperlinks to video clips of certain testimony. The PowerPoint presentation has been submitted in both paper form and in electronic form on a compact disk ("CD"). Written instructions regarding how to view the contents of the CD have also been provided.

the truth." *Id.* at 683 (emphasis added). Partly on this basis, Judge Payne granted Infineon's post-trial request for attorneys fees, imposing a monetary sanction against Rambus in excess of \$7 million. *Id.* at 691-92. Rambus has appealed many of Judge Payne's rulings, yet it has never challenged his conclusion that the company engaged in sanctionable misconduct by destroying documents in anticipation of litigation.²

Is it relevant to this case that Rambus, in the late 1990s, adopted a "document retention" policy and thereafter systematically destroyed documents the company feared would be damaging in future litigation involving the enforceability of JEDEC-related patents? Complaint Counsel submits that this fact not only is relevant, but should have a profound impact on the manner in which this litigation is resolved.

The following passage from *Carlucci v. Piper Aircraft Corp.* aptly demonstrates how seriously courts have responded when corporations – under the guise of so-called "document retention" policies – are found to have intentionally destroyed evidence out of concern that it might potentially be used against them in existing or foreseeable litigation:

I conclude that the defendant engaged in a practice of destroying engineering documents with the intention of preventing them from

² In awarding attorneys fees, Judge Payne found that "Rambus knew, or should have known, that its patents were unenforceable due to its fraudulent and inequitable behavior while it was a member of JEDEC; and . . . Rambus engaged in a series of litigation misconducts directed at masking its fraud." *Id.* at 683 (emphasis added). In addition to document destruction, Judge Payne's ruling was also predicated in part on his conclusions that (1) "Rambus knew, or should have known, that its patent infringement suit was baseless, unjustified, and frivolous"; (2) "Rambus knew that its patents were inextricably tied to its fraudulent conduct at JEDEC," and that its overall scheme to defraud JEDEC constituted "inequitable conduct"; (3) "Rambus failed to list numerous documents on its privilege log, which . . . documented its fraudulent activity at JEDEC"; (4) "Rambus representatives . . . hindered discovery efforts by providing false or misleading testimony," only later to change their testimony when "confronted with documents obtained after the piercing of the attorney-client privilege"; and finally (5) "Rambus also obstructed discovery in its written responses to Infineon's interrogatories and [requests for admission]." *Id.* at 676, 679, 681-82. Rambus has appealed Judge Payne's award of attorneys fees to Infineon, but in doing so, Rambus has not challenged any of these factual findings, other than the finding that its patent suit was "frivolous" and "baseless."

being produced in law suits . . . and that documents relevant to this law suit were intentionally destroyed

I am not holding that the good faith disposal of documents pursuant to a *bona fide*, consistent and reasonable document retention policy can not be a valid justification for a failure to produce documents in discovery. That issue never crystallized in this case because Piper has utterly failed to provide credible evidence that such a policy or practice existed

. . . The policy of resolving lawsuits on their merits must yield when a party has intentionally prevented the fair adjudication of the case. By deliberately destroying documents, the defendant has eliminated plaintiffs' right to have their cases decided on the merits. Accordingly, the entry of a default is the only means of effectively sanctioning the defendant and remedying the wrong.

102 F.R.D. 472, 485-86 (S.D. Fla. 1984) (emphasis added), *aff'd in part, rev'd in part*, 775 F.2d 1440 (11th Cir. 1985) (upholding imposition of default judgment). In that case, Piper suffered a default judgment and subsequently was ordered to pay \$10 million in damages. As discussed herein, many other litigants, guilty of similar abuses, have been subjected to the same fate.

The basis for imposing such severe sanctions is clear: To paraphrase *Carlucci*, the deliberate destruction of pertinent documents – either in advance of anticipated litigation, or during a pending lawsuit – deprives the opposing party of an adjudication on the merits. When a corporation engages in such misconduct, justice demands that the spoliator – not the opposing litigant – should suffer the consequences. See, e.g., *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (1st Cir. 1988) (“As between guilty and innocent parties, the difficulties created by the absence of evidence should fall squarely upon the former.”). Moreover, as many courts have held, when evidence relevant to litigation or potential litigation has been destroyed, “a

corporation cannot . . . expect to be shielded by a seemingly innocuous document retention policy." *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1112 (8th Cir. 1988).

The document destruction issues raised here are no less serious than those involved in *Carlucci* and other cases in which courts have imposed default judgments or the comparable sanction of dismissal. As explained in greater detail below, the existing testimonial and documentary record demonstrates the following:

- (1) Rambus's document destruction program was developed and implemented in mid-1998 by Rambus's Vice President of Intellectual Property, Joel Karp [REDACTED].
- (2) [REDACTED]
- (3) At the time Rambus implemented the document destruction program, the company not only anticipated, but in fact was gearing up for, future patent-related litigation with DRAM manufacturers and others against which it planned to assert these previously undisclosed JEDEC-related patents.
- (4) Rambus, at the same time, was concerned by the prospect that its conduct at JEDEC, and its subsequent efforts to enforce JEDEC-related patents, could result in an antitrust enforcement action instituted by the FTC.
- (5) Based on input and advice from its legal counsel, Rambus was particularly concerned that in any future litigation involving JEDEC-related patents, the company's actions during the period it was involved as a member of JEDEC could, on either equitable estoppel or antitrust grounds, result in a ruling that those patents were legally unenforceable.
- (6) In implementing its document destruction program, Rambus intended to -- and did -- destroy documents it knew or should have known would be relevant to, or at a minimum discoverable in, future litigation of this sort;

- [REDACTED]
- [REDACTED]
- (7) Despite the fact that Rambus adopted a written "document retention" policy, many documents were destroyed within the company in the late 1990s not pursuant to any specific directive set forth in the written policy, but rather pursuant to the general admonitions of Joel Karp and others involved in overseeing Rambus's document destruction efforts, who exhorted Rambus employees to destroy documents that could be discoverable in litigation.
- (8) Among the documents that Rambus knowingly and intentionally destroyed were records relating to the company's participation in JEDEC, from late 1991 to mid-1996, and records relating to the prosecution of Rambus patents and patent applications over the same time period – both categories of documents, of course, being highly relevant to the very sorts of antitrust and equitable estoppel claims that were of concern to Rambus.
- (9) Rambus began destroying documents, including back-up tapes and other computer files, in mid-1998, and thereafter the document destruction continued without interruption into early 2000. [REDACTED]
[REDACTED]
[REDACTED] in June 2000 – Rambus's document destruction activities commenced again.
- (10) Despite the fact that Rambus, throughout the relevant period, was subject to a clear legal duty to preserve evidence that could reasonably be expected to be discoverable in future litigation [REDACTED]
[REDACTED]

Rambus cannot reasonably dispute these factual and legal propositions, all of which are supported by the prior sworn testimony of Rambus witnesses and other binding admissions. The consequences are quite serious. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Nonetheless, the law abhors such conduct and will not allow the wrongdoer to benefit from the absence of evidence that it knowingly and improperly destroyed.⁴ To avoid such an injustice in this case, the law entitles Complaint Counsel to a strong presumption of prejudice, and Rambus should not be heard to deny the existence of such prejudice. *See Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 128 (S.D. Fla. 1987) (“emphatically” rejecting defendant’s efforts to prove, through secondary evidence, “that the numerous documents destroyed . . . were not pertinent . . . and therefore did not prejudice [plaintiff’s] ability to litigate the case,” stating that “the right to a full and fair adjudication . . . would be poorly protected if [defendant], having purposefully, willfully, and in bad faith destroyed an indeterminate number of documents, were subsequently allowed to introduce extraneous evidence for the purpose of showing that no real prejudice had resulted.”) (emphasis added).⁵

Notwithstanding the presumption of prejudice that attaches to Rambus’s willful, bad-faith document destruction, the evidence set forth in this memorandum demonstrates that Rambus’s actions have wrought a serious injustice, as shown, for example, by the following e-mail, authored and sent by Rambus’s principal JEDEC representative, Richard Crisp:

⁴ *See National Ass’n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557 (N.D. Cal. 1987) (“By the very fact of their destruction, . . . the vast majority of the purged documents cannot now be identified. . . . Needless to say, plaintiffs should not suffer because of this. Where one party wrongfully denies another the evidence necessary to establish a fact in dispute, the court must draw the strongest allowable inferences in favor of the aggrieved party.”).

⁵ At a minimum, if Rambus were permitted to make a rebuttal showing, it should be required to prove the absence of prejudice by “clear and convincing” evidence. *See Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (1st Cir. 1988) (“We are keenly aware of the stringency of this [clear and convincing evidence] standard, yet we believe it to be an appropriate antidote for deliberate misconduct. A party who is guilty of, say, intentionally shredding documents in order to stymie the opposition, should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import. Without the imposition of a heavy burden such as the ‘clear and convincing’ standard, spoliators would almost certainly benefit from having destroyed the documents, since the opposing party could probably muster little evidence concerning the value of papers it never saw.”).

10/28/1999
10:48:19
original DDR datasheet anyone?

I'm looking for a copy (paper or electronic) of one of the original DDR datasheets from the 1996/1997 timeframe. Hopefully someone here has one that hasn't fallen victim to the document retention policy :-)
thanks in advance
rdc

October 28, 1999, E-Mail from Crisp (R221422) [Tab 6] (emphasis added).

The fact that Richard Crisp had reason to believe that both paper and electronic versions of these important JEDEC-related materials⁶ might no longer exist invites one of two inferences: Either (1) Rambus's document destruction program was so massive that Crisp could assume that virtually any company document that could not be found had been purged, or otherwise (2) Crisp had reason to know that the policy targeted specific document categories, including the very sorts of JEDEC-related materials that, in this instance, he was unable to locate. Considering that when Rambus launched its document destruction campaign it was under a clear legal duty to preserve evidence that might be discoverable in JEDEC-related litigation -- as the documents Crisp

⁶ The term "DDR datasheets" referenced in this e-mail refers to written specifications defining the technical characteristics and features either of JEDEC's DDR SDRAM standards, or of a given DRAM manufacturer's products built to comply with JEDEC's DDR SDRAM standards. As discussed in detail below (see note 82, *infra*, at p. 65), such JEDEC datasheets served as a critical reference for Rambus in several key pursuits, including drafting new patent claims intended to cover aspects of the JEDEC standards.

Crisp's e-mail refers to the "original" version of the DDR datasheets "from the 1996/1997 timeframe." Because Rambus remained a member of JEDEC until June 1996, this version of the DDR datasheets might demonstrate not only what Rambus knew about the contents of the JEDEC DDR standards (or proposed standards) at that time, but also that Rambus had a duty to disclose patent-related information pertaining to JEDEC's work on the DDR standards. At a minimum, such a document, from this important time period, clearly would be discoverable in this litigation.

referenced plainly would be – either of these inferences would support the imposition of sanctions.⁷

Yet the fact that Crisp found it appropriate to sarcastically joke⁸ about important JEDEC-related documents “fall[ing] victim” to Rambus’s “document retention” policy suggests another, more pointed inference – namely, that the policy was a sham. As discussed herein, a substantial body of other evidence corroborates this conclusion. The truth is that Rambus’s “document retention” policy was not adopted in the ordinary course of business. Nor was it motivated by ordinary business concerns. Rather, it was adopted with one paramount goal in mind: the elimination of documents that were likely to prove damaging to Rambus in anticipated future litigation.

Based on the totality of evidence and law presented by this motion, Complaint Counsel respectfully submits that the real question before Your Honor is not whether to impose sanctions, but rather what form those sanctions should take. The only appropriate sanction in Complaint Counsel’s view is a default judgment as to liability. Appreciating the obvious severity of such a sanction, we do not suggest it lightly. Nevertheless, careful assessment of the evidence persuades us that:

⁷ Other facts discussed herein plainly show that there is truth in both inferences – i.e., while Rambus’s document destruction effort was massive, it was also specifically targeted at eliminating JEDEC-related documents and other documents that Rambus feared would be damaging in future litigation.

⁸ The symbol Crisp used in closing his e-mail – :-) – is known as an “emoticon.” As Random House’s website explains, “Emoticons are a very clever use of standard punctuation marks to express human emotion.” www.randomhouse.com/features/davebarr/emoticon.html. “The most popular emoticons are the smiling faces . . . that people use to say ‘don’t take what I just wrote too seriously.’” www.muller-godschalk.com/emoticon.html. The specific type of emoticon used by Crisp in this instance is typically used to express satisfaction, or a sarcastic joke. *See id.* (“A :-) emoticon is a standard smiley and means ‘you are joking; satisfied.’”); *see also* www.pb.org/emoticon.html (“:”) or :-) expresses happiness, sarcasm, or [a] joke”). (Tab 7)

- (1) Rambus consciously set out to, and did, eliminate documents it feared would be damaging in anticipated future litigation in which private parties or the FTC would challenge the enforceability (and, in private litigation, the validity) of the company's JEDEC-related patents;
- (2) the company undertook these actions in bad faith while subject to a clear legal duty to preserve the evidence that was destroyed;
- (3) a large volume of documents was destroyed, including many documents that would be discoverable in and relevant to this litigation; and
- (4) the document destruction was so pervasive that it is not possible, consistent with the interests of justice, to fully remedy Rambus's wrongdoing through a lesser form of sanctions.

As discussed below, substantial legal authority supports the proposition that the only way to remedy fully such deliberate misconduct is through a default judgment.⁹ Knowing, however, that courts typically will not impose a default judgment without first considering the adequacy of lesser sanctions,¹⁰ Complaint Counsel will also address potential alternative forms of sanctions.¹¹

⁹ See, e.g., *In re Wechsler*, 121 F. Supp. 2d 404, 415 (D. Del. 2000) ("When [document] destruction is willful or in bad faith and intended to prevent the other side from examining evidence, the court may impose the most severe sanction of all – the outright dismissal of a claim or the entry of a default judgment.").

¹⁰ While courts have required consideration of lesser sanctions before entering a default judgment, it is not necessary to literally exhaust all other potential sanctions. See, e.g., *Webb v. District of Columbia*, 189 F.R.D. 180,187 (D.D.C. 1999) ("Although the Court of Appeals has rightly stated that the sanction of default should be used only when less onerous sanctions would be inadequate, the Court of Appeals has declined to require that a district court exhaust other sanctions before imposing a default judgment. The Court of Appeals requires only that the district court explain its reasons for resorting to default rather than a less severe sanction, such as an award of attorney's fees or adverse evidentiary rulings.") (citations omitted).

¹¹ Your Honor should not infer from the fact that Judge Payne did not enter a default judgment in the *Infinion* case that he found that only lesser sanctions were warranted. Perhaps because of the expedited treatment of the case, Infinion did not fully present evidence on Rambus's document destruction until after the trial, and hence after the jury had returned a verdict against Rambus on fraud claims. Infinion, during the trial, never moved for a default judgment, an adverse inference, or any other form of sanction to address Rambus's document destruction. As discussed above, Infinion's only motion based in whole or part on Rambus's document destruction was a post-trial motion for attorneys fees, which Judge Payne granted. Nonetheless, in Complaint Counsel's view, the detailed fact findings that Judge Payne entered in support of his post-trial sanctions order would have adequately supported the imposition of a default judgment against Rambus, had Infinion requested such relief prior to the jury's adverse verdict. As noted above (see note 2, *infra*, at p. 4), Rambus never challenged these findings. In the *Micron* case, by contrast, Micron has moved for sanctions, including a default judgment, based on Rambus's willful and bad-faith document destruction. Because that case is stayed, Micron's motion has not yet been decided.

To be clear, by this motion we ask Your Honor to entertain the possibility of ordering a default judgment against Rambus as to liability issues only. This would not obviate the need for an administrative hearing in this matter, nor would it obviate the need for further discovery. It would, on the other hand, have the effect of concentrating this case, going forward, solely on the appropriateness of Complaint Counsel's requested relief. Because Your Honor's ruling on this motion could have a significant impact on the focus of future discovery and the progress of the litigation more generally, we request that the motion be ruled upon as expeditiously as possible.¹²

Whereas Complaint Counsel fully comprehends the severity of the proposed sanction, we submit that such a sanction is appropriate under the circumstances, and is proportionate to the harm caused, or otherwise threatened, by Rambus's improper actions. Rambus willfully destroyed evidence it feared could be used against it in future litigation -- specifically including evidence that it feared might render legally unenforceable (on antitrust or equitable estoppel grounds) a collection of patents that the company intended to assert, and subsequently has asserted, against makers of JEDEC-compliant SDRAM, among others. This fear stemmed from the fact that Rambus had engaged in seriously misleading conduct while participating in JEDEC, or at a minimum conduct that its lawyers believed was sufficiently misleading that it created unacceptably high legal risks. Rambus designed its document destruction efforts in large measure to mitigate such legal risks after the fact by eliminating the evidence through which a

¹² Complaint Counsel has made this request for a default judgment at the present time for the reasons explained in text above. In requesting this relief, Complaint Counsel expressly reserves the right, at a later date, to request such additional or alternative relief as may be warranted under the circumstances. Complaint Counsel submits that the issue is ripe for decision on the existing record, and thus urges Your Honor to make a prompt ruling so as to avoid any unnecessary expenditure of resources on issues that could, by effect of the ruling, be rendered no longer relevant. In the event, however, that Your Honor is not prepared to grant a default judgment at this time, Complaint Counsel respectfully requests that, rather than denying the motion, the matter be taken under advisement and ruled upon at such future time as may be deemed appropriate.

private litigant or the FTC might expose the true nature of Rambus's deception.¹³ If, due to the elimination of such evidence, Rambus were to prevail on liability in this action, Rambus not only would be escaping justice, but would be achieving through its wrongdoing precisely what it set out to do. This outcome is not something that Your Honor, exercising the inherent powers of an Administrative Law Judge, should allow.¹⁴

¹³ Complaint Counsel is confident that, notwithstanding Rambus's efforts to escape justice by systematically destroying material evidence, the proof that remains is more than sufficient to establish the merits of Complaint Counsel's claims. Nonetheless, the possibility or even likelihood that surviving evidence is adequate to prove liability is not a basis for denying sanctions in a case such as this, in which there is evidence "of willful document destruction by a corporate defendant, carried out in an unabashed – and successful – attempt to render irretrievable records clearly pertinent to the claims brought against it." *Telectron, Inc. v. Overhead Door Corp.* 116 F.R.D. 107, 127 (S.D. Fla. 1987) (ordering default judgment).

Importantly, in fashioning the appropriate relief in a case such as this, Your Honor should be mindful not only of the chances that the wrongful document destruction could affect the outcome of the case at hand. In addition, one must consider the need to deter similar abuses by others. See *Computer Assocs., Int'l v. American Fundware, Inc.*, 133 F.R.D. 166, 169-70 (D. Colo. 1990) ("I find and conclude that no alternative sanction short of a default judgment would adequately punish AF and deter future like-minded litigants. Any lesser sanction would allow a party possessing evidence that would insure an adverse result to destroy that evidence with impunity, thus assuring defeat for the opponent while risking only a comparatively mild rebuke. One who anticipates that compliance with discovery rules, and the resulting production of damning evidence, will produce an adverse judgment, will not likely be deterred from destroying that decisive evidence by any sanction less than the adverse judgment he (or she) is tempted to thus evade. It follows that the only sanction adequate and appropriate to punish AF and deter future similarly situated litigants is default judgment on liability."):

¹⁴ "When rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap. . . . The inherent power encompasses the power to sanction attorney or party misconduct, and includes the power to enter a default judgment." *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1474-75 (D.C. Cir. 1995). See also *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 550-51 (D. Minn. 1989) ("[T]he Court relies on its inherent power to regulate litigation, preserve and protect the integrity of proceedings before it, and sanction parties for abusive practices. Purposeful impairment of the opposing party's ability to discover information justifies invocation of these powers."). As Your Honor has previously recognized, such powers are necessarily inherent in an administrative law court as well. See *In the Matter of Rush-Hampton Ind., Inc.*, 1983 FTC LEXIS 127, *1 (Dec. 19, 1983) (Timony, J.) ("Such sanctions are within a court's inherent powers. Administrative law judges hear cases in administrative courts.") (citations omitted); see also *In the Matter of International Telephone & Telegraph Corp.*, 104 F.T.C. 280, 447 (1984) (referring to the power to impose discovery-related sanctions, "Most courts have sustained an analogous power on the part of federal administrative agencies . . . and the Commission has adopted that position with respect to its own adjudications").

Nor is this an outcome that the law, properly applied, would allow. Indeed, the Rambus conduct upon which this motion is based presents a textbook example of facts warranting the imposition of a default judgment. As one court recently stated:

A party who has reason to anticipate litigation has an affirmative duty to preserve evidence which might be relevant to the issues in the lawsuit. A party who breaches this duty by destroying relevant evidence or by allowing relevant evidence to be destroyed may be sanctioned by the court. When this destruction is willful or in bad faith and intended to prevent the other side from examining the evidence, the court may impose the most severe sanction of them all – the outright dismissal of a claim or the entry of a default judgment.

In re Wechsler, 121 F. Supp. 2d 404, 415 (D. Del. 2000). In this case, Complaint Counsel submits, a default judgment not only is a permissible sanction, but a mandatory one, for no alternative sanction short of a default judgment would adequately protect Complaint Counsel against the prejudice inherent in Rambus's action, adequately punish Rambus for its wrongdoing, or adequately deter such improper conduct by others.

OVERVIEW OF PERTINENT FACTS

As discussed below,¹⁵ the relief requested by this motion is well supported by the governing case law. Complaint Counsel recognizes, however, that the issuance of a default judgment is a significant step, and one that should not, and likely would not, be entertained absent thorough support from the factual record. That support exists in this case. Yet a comprehensive analysis of the pertinent facts will necessarily require some elaboration. For roughly the next 60 pages, Complaint Counsel will set forth the facts upon which it contends a

¹⁵ See Legal Points and Authorities, *infra* at p. 79.

default judgment should be granted in this case. The discussion of those facts is broken down under the following headings:

- A. **Rambus Feared That Its Conduct at JEDEC Could Render Its Patents Unenforceable on Antitrust or Equitable Estoppel Grounds (p. 15)**
- B. **Rambus Anticipated That It Would Either Institute, or Otherwise Become Enmeshed in, Litigation Once It Began to Assert Its Previously Undisclosed JEDEC-Related Patents (p. 22)**
- C. [REDACTED]
- D. **To Mitigate the Risks of Antitrust Liability, Equitable Estoppel, [REDACTED] Rambus Implemented a Corporate-Wide Document Destruction Campaign (p. 32)**
- E. **Judge Payne Rightly Concluded That Rambus's Document Destruction Program Was Adopted for the "Purpose of Getting Rid of Documents That Might Be Harmful in Litigation" (p. 52)**
- F. **Rambus [REDACTED] Authorized Karp to Implement the Document Destruction Program, in Part for the Purpose of Destroying Evidence Relating to the Company's December 1991-June 1996 Participation in JEDEC (p. 56)**
- G. **Through Joel Karp's Efforts, Rambus Destroyed Massive Numbers of Rambus Documents, Including Documents Directly Relevant to This Litigation (p. 61)**
- H. [REDACTED]
- I. **Throughout the Time That It Developed and Implemented Its Document Destruction Program, Rambus Continued to Anticipate Future Litigation (p. 71)**
- J. **Joel Karp's Efforts, Including His Oversight of Rambus's Document Destruction Campaign, Placed Rambus in a Position to Boldly Assert Patent Rights Over the JEDEC SDRAM Standards (p. 73)**

K. Rambus's Lawyers in This Case Seek to Capitalize on Rambus's Wrongful Document Destruction (p. 76)

A. Rambus Feared That Its Conduct at JEDEC Could Render Its Patents Unenforceable on Antitrust or Equitable Estoppel Grounds

Before the jury in the *Rambus v. Infineon* trial, Richard Crisp, Rambus's principal JEDEC representative, testified as follows:

Q. . . . So what he told you is that even if you go to the JEDEC meetings and stay silent and you don't do anything else, you still have a risk that your patents will be unenforceable if you let the standard go forward and you don't tell them you have patents, right? Isn't that what Lester Vincent told you?

A. Yes, that's what he said.

Testimony of Richard Crisp, May 2, 2001, Trial Tr. at 98:9-15, *Rambus v. Infineon* [Tab 8]. As is apparent from this testimony and other evidence discussed herein, Rambus was well aware that its participation in JEDEC, from December 1991 through June 1996, created significant legal risks. In fact, Rambus's patent attorneys – including Lester Vincent and others from Blakely, Sokoloff, Taylor & Zafman, as well as Rambus's in-house patent counsel, Anthony Diepenbroek – warned the company, repeatedly, that as a consequence of its participation in JEDEC, Rambus could lose the ability to enforce its patents.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Diepenbrock therefore advised Rambus's CEO, Geoffrey Tate, Richard Crisp, and others that Rambus should stop attending JEDEC meetings,¹⁷ but his advice was disregarded.¹⁸

For several years, Rambus also ignored similar advice from its outside legal counsel, Lester Vincent. Vincent first advised Rambus of the risks of equitable estoppel in a face-to-face meeting with Richard Crisp and Allen Roberts, Rambus's Vice President of Engineering, in

¹⁶ [REDACTED] Rambus's failure to disclose to JEDEC that the company possessed various pending patent applications and at least one issued patent that involved the DRAM-related standardization work that JEDEC was conducting during the period that Rambus was a member of the organization. As Richard Crisp himself concluded, JEDEC's rules "required disclosure of patent applications," as well as patents, whenever "a showing or a ballot comes to the floor" that raises "potential patent issues" or as to which "there may be patent activity." Testimony of Richard Crisp, May 2, 2001, Trial Tr. at 57:21-58:1, *Rambus v. Infineon* [Tab 8] ("Q. As of September 1995 . . . did you understand the JEDEC patent policy also required disclosure of patent applications? A. I understood it to apply to applications as well, yes."); December 5, 1995, E-Mail from Crisp to Tate, et al. (R69697 at R69698) [Tab 10] (explaining that Rambus would be fulfilling its patent disclosure duties under the JEDEC rules, "[a]s long as we mention that there are potential patent issues when a showing or a ballot comes to the floor"; "we can say when a showing is made that there may be patent activity in that area, etc.") (emphasis added).

[REDACTED]

¹⁷ See Crisp Dep. (4/13/01) at 804:7-9, 805:19-20, *Rambus v. Infineon* [Tab 1] ("Tony took the position that he thought we shouldn't . . . continue going to any of those meetings" due to the "equitable estoppel . . . concern . . .").

¹⁸ *Id.* at 805:15-16 ("[W]e had to agree to disagree at that point in time.")

March 1992: "I said there could be [an] equitable estoppel problem if Rambus creates impression on JEDEC that it would not enforce its patent[s] or patent appli[cations]."

Handwritten Notes of Vincent, dated March 27, 1992 (R203254) [Tab 12] (emphasis added); *see also id.* ("Cannot mislead JEDEC into thinking that Rambus will not enforce its patent[s]"). ■

[REDACTED]

[REDACTED]

[REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

[REDACTED]

This March 1992 meeting was only the first of several communications between Lester Vincent and Rambus on the subject of equitable estoppel. In May 1993, Vincent forwarded to Richard Crisp a detailed presentation underscoring the legal risks associated with “Patents and Industry Standards.” May 4, 1993, Letter from Vincent to Crisp, Attaching Presentation Entitled “Patents and Industry Standards” (V1231 at V1232) [Tab 14]. Among other things, the presentation explained that, when a participant in a standard-setting process seeks to enforce patents covering the relevant standards, there are not one, but two “possible legal theories for non-enforcement”:

- “Estoppel,” and
- “Antitrust.”

Id. (V1242) (emphasis added). The presentation further explained that affirmatively misleading conduct need not exist in order for such legal theories to apply; “intentionally misleading silence” might be sufficient if, for instance, the patent holder had a “duty to speak.” *Id.* (V1244) (emphasis added).

Vincent again drew Rambus’s attention to the potential for such misleading conduct to create antitrust-related legal risks in December 1995, when he forwarded to Richard Crisp a copy of the Federal Trade Commission’s proposed consent order in *In re Dell Computer Corporation*, which Vincent’s firm previously had obtained from an FTC staff attorney.¹⁹ Vincent was understandably concerned by the *Dell* Consent Order, for several reasons.

¹⁹ See December 19, 1995, Letter from Lester Vincent to Anthony Dicpenbrock (R202778) [Tab 15]; see also December 8, 1995, Facsimile from FTC Staff Attorney Paul Nolan to Stephen Spoonseller, Attaching FTC Proposed Consent Order and Press Release (V1862) [Tab 16].

First of all, the *Dell* Consent Order not only provided tangible proof that conduct of the sort Rambus had been engaging in could be of significant interest to Federal antitrust officials, but it also demonstrated the breadth of potential antitrust-based remedies relating to such conduct -- namely, orders rendering undisclosed patents unenforceable against any affected party. The possibility of such antitrust remedies being imposed against it was a serious concern to Rambus, as well. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

More generally, Lester Vincent -- and his client, Rambus -- had reason to be concerned by the fact that the *Dell* Consent Order was initially interpreted, in publications obtained by Vincent at the time, as creating "at least a minimal duty of acting in good faith when participating in trade association standard setting activities."²⁰ Of course, the manner in which Rambus participated in JEDEC from late 1991 through mid-1996 reflected anything but good faith.

²⁰ Commentary on Draft *Dell* Consent Order, Entitled "FTC Investigates Dell for Patent Duplicity," dated December 1, 1995 (V1861) [Tab 18] (emphasis added). This document indicates that it was "printed" by Vincent's law partner, Steven Sponseller, on December 8, 1995, and the name "Lester Vincent" is written by hand at the top of the page. *Id.* The last line of the document notes that "The FTC attorney primarily responsible for this investigation is Mr. Paul Nolan," and provides a phone number. *Id.* This explains why, as referenced above, Vincent's copy of the draft *Dell* Consent Order was faxed to his partner Steven Sponseller under an FTC cover page signed by Paul Nolan.

Although Vincent previously had advised Rambus to withdraw from JEDEC,²¹ in the wake of *Dell* his calls for Rambus's withdrawal became far more emphatic: "No further participation in any standards body . . . do not even get close!" Handwritten Notes of Vincent, from January 1996 (R203881) [Tab 19] (triple underlining in original). This time, Rambus followed Vincent's advice. [REDACTED]

The facts discussed above square very well with Judge Payne's fact findings in the *Infineon* case. As Judge Payne concluded, in support of his order awarding post-trial sanctions to Infineon, "Rambus knew that its patents were inextricably tied to its fraudulent conduct at JEDEC; and Rambus knew, or should have known that, if its conduct were discovered, it could

²¹ See Diepenbrock Dep. (4/11/01) 262:10-19, *Rambus v. Infineon* [Tab 2] ("He said that Dell had been estopped from enforcing [a] patent" and that this "supported his . . . previous statements to Rambus people that they should not participate" in standard-setting activities); see also *id.* at 263:7-12 ("He told me that he had advised previously advised people, before I had arrived apparently, that they shouldn't attend those meetings" because "there's an equitable estoppel issue").

very well be estopped or enjoined from asserting those patents. Indeed, Rambus' patent counsel told its executives as much." *Infinion*, 155 F. Supp. 2d at 679 [Tab 4] (emphasis added).²²

B. Rambus Anticipated That It Would Either Institute, or Otherwise Become Enmeshed in, Litigation Once It Began to Assert Its Previously Undisclosed JEDEC-Related Patents

Rambus, throughout much of the 1990s, worked to position itself to assert patent claims against the manufacturers of JEDEC-compliant synchronous DRAM devices. In now-familiar language from the company's June 1992 Business Plan, Rambus's CEO – Geoffrey Tate – explained, “For about 2+ years a JEDEC committee has been working on the specifications for a Synchronous DRAM. No standard has yet been approved by JEDEC. Our expectation is a standard will not be reached until end of 1992 at the earliest.” Rambus Inc. 1992-1997 Business Plan, dated June 1992 (R46394 at R46408) [Tab 24]. Two pages later, Tate outlined Rambus's “action plan” with respect to claiming patent rights over synchronous DRAMs:

[W]e believe that Sync DRAMs infringe on some claims in our filed patents; and that there are additional claims we can file for our patents that cover features of Sync DRAMs. Then we will be in position to request patent licensing (fees and royalties) from any manufacturer of Sync DRAMs. Our action plan is to determine the

²² Much of the evidence discussed in the preceding paragraphs relates to the legal advice that Rambus's patent lawyers – Messrs. Vincent and Diepenbrock – gave to the company pertaining to the legal risks associated with Rambus's failure to disclose patent-related information to JEDEC. Not surprisingly, Rambus initially resisted discovery into this area in the *Infinion* case based on assertions of attorney-client privilege. However, in the months leading up to trial in that case, Judge Payne ruled that Rambus's “attorney-client privilege has been forfeited under the crime-fraud exception as to certain topics,” and therefore ordered that Diepenbrock, Vincent, Crisp, Tate, and others could be deposed relating to, among other things, “the legal advice provided about disclosures of patents and patent applications to JEDEC by Rambus, Inc.” March 7, 2001, Order, *Rambus v. Infinion*. [Tab 22] In support of this ruling, Judge Payne expressly concluded, *inter alia*, that *Infinion* had met its burden of showing by *prima facie* evidence (1) that “the legal advice [Rambus] sought from Vincent and Diepenbrock was for the purpose of developing the plan to go forward with patent applications at the same time . . . Rambus was in the JEDEC meetings,” (2) that Rambus's conduct in this regard amounted to “a fraudulent scheme,” and (3) that Vincent's and Diepenbrock's legal advice “bore a close relationship to the fraud.” March 6, 2001, Tr. of Hearing re Motion to Compel at 865-869, *Rambus v. Infinion* [Tab 23].

exact claims and file the additional claims by the end of Q3/92.
Then to advise Sync DRAM manufacturers in Q4/92.

Id. (R46410) (emphasis added). In a September 1992 version of Rambus's Business Plan, Tate added: "Sync DRAMs infringe claims in Rambus' filed patents and other claims that Rambus will file in updates later in 1992." Rambus Inc. 1992-1997 Business Plan, dated September 1992 (R169923 at R169943) [Tab 25] (emphasis added).

In the months, and indeed years, that followed, Lester Vincent -- Rambus's outside patent counsel -- working with Richard Crisp, Allen Roberts, and others, followed through on Tate's plan to "file . . . additional claims" intended to "cover features of Sync DRAMs," so that Rambus would be "in position to request . . . royalties."²³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

At the same time that this process of amending Rambus patent applications to cover aspects of JEDEC-compliant SDRAM was moving forward, Richard Crisp -- Rambus's designated JEDEC representative -- on numerous occasions observed, in e-mails addressed to

²³ See, e.g., June 18, 1993 E-Mail from Ware to Crisp, et al. (R202996) [Tab 26] (reporting on a phone conference "with Lester Vincent" regarding "current status of the additional claims that we want to file," many of which were "directed against SDRAMs" or "against future SDRAMs") (emphasis added); Handwritten Notes of Vincent, dated January 10, 1994 (R203314) [Tab 27] (reporting on conference with Tate and others concerning "Enforcement: Sync DRAMs") (emphasis added); May 5, 1994 Letter from Roberts to Vincent (R202763-64) [Tab 28] (providing a "list of enhancements" that Rambus desired to have covered through amended patent applications, including "[u]se of both edges of the clock"); Handwritten Notes of Tate, dated July 21, 1994 (R33831) [Tab 29] ("SDRAM . . . CLAIMS -- Allen gave Lester a list of claims we need"); Handwritten Note of Roberts to Rick Barth, Fred Ware, et al., attaching August 1, 1994 Correspondence from Lester Vincent (R204436) [Tab 30] ("This is Lester's attempt to work [up] claims for the . . . SDRAM defense. Please comment.") (emphasis added); Handwritten Notes of Barth, dated February 2, 1995 (R203055) [Tab 31] (referring to "claims to prevent Sync DRAM manufacturers") (emphasis added).

Rambus colleagues, that various DRAM-related technologies discussed within JEDEC infringed, appeared to infringe, or otherwise might infringe Rambus's patents or pending patent applications.²⁴ Crisp also commented on one occasion, in an internal e-mail to his Rambus colleagues, that Rambus should seek to "collect big royalty checks" on the SyncLink technology, which was the subject of a May 1995 JEDEC presentation attended by Crisp.²⁵

²⁴ See, e.g., March 14, 1995, E-Mail from Crisp to Tate, et al. (R69562 at R69564) [Tab 33] (referring to Fujitsu presentation on STBUS, "I would say that the proposal may well infringe our work.") (emphasis added); May 27, 1994, E-Mail from Crisp to Johnson (R69535 at R69537) [Tab 34] (referring to externally supplied reference voltage, "I believe we have a claim we added to cover this.") (emphasis added); September 14, 1994, E-Mail from Crisp to Tate, et al. (R157024) [Tab 35] (referring to on-chip PLL, "What is the exact status of the patent with the PLL claim?"); March 15, 1995, E-Mail from Crisp to Tate, et al. (R69566 at R69568) [Tab 36] (referring to Fujitsu's suggestion that it may use source synchronous clocking, "Of course they may get into patent trouble if they do this!") (emphasis added).

²⁵ See August 30, 1996, E-Mail from Crisp to Tate, et al. (R69693 at R69695) [Tab 37] ("I want to again bring up the issue of IP and the importance that we have our issued patents and any pending claims looked at long and hard to do as much as we can to anticipate the [SyncLink] work. If they are successful . . . we can collect royalties from them . . . As long as we collect big royalty checks every quarter, then we should be OK.") (emphasis added)

²⁶

²⁷

[REDACTED]

[REDACTED] Yet Rambus was very much aware that when – as was likely, and as had been planned

28 [REDACTED]

29 [REDACTED]

30 [REDACTED]

31 [REDACTED]

since the early 1990s – it did begin to assert patent claims over JEDEC-compliant SDRAM, litigation was virtually inevitable.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. [REDACTED]

³⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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35 [REDACTED]

36 [REDACTED]

[REDACTED]

[REDACTED]

37 [REDACTED]

38 [REDACTED]

[REDACTED]

D. To Mitigate the Risks of Antitrust Liability, Equitable Estoppel, [REDACTED] [REDACTED] Rambus Implemented a Corporate-Wide Document Destruction Campaign

Rambus is and always has been in the business of licensing its technology. For many other companies in the semiconductor business, royalties obtained through technology licensing reflect a only a small part of overall revenues. For Rambus, on the other hand, royalties are the company's lifeblood, and therefore any legal risk that could potentially impede the company's ability to collect patent-based royalties is an exceedingly serious matter.³⁹ This is especially true

³⁹ As Subodh Toprani, Rambus Vice President of Marketing, once stated, "We are an intellectual property company . . . Royalties are what we need to be successful." Neal Boudette, "Startup Seeks to Be 'Chipless' Chip Company," PC WEEK, Jan. 9, 1995 [Tah 72]. [REDACTED]

with respect to Rambus's JEDEC-related patents, the potential value of which may well exceed one billion dollars.⁴⁰

As discussed above, Rambus's management eventually came around to the view, long held by its patent lawyers, that continued participation in JEDEC created unacceptable legal risks to the enforceability of Rambus patents. Simply withdrawing from JEDEC, however, did not eliminate these legal risks. Rambus had participated in JEDEC for four and a half years, in ways that caused even the company's own lawyers great discomfort, and much of what concerned Rambus's lawyers – namely, the bad-faith and deceptive nature of its conduct – was memorialized in company documents. In light of its past involvement in JEDEC, what could Rambus do to maximize the chances of successfully enforcing patents against DRAMs built in compliance with JEDEC standards? The solution ultimately approved by Rambus's senior management, in mid-1998, was to launch a corporate-wide document destruction campaign, under the guise of a so-called "records retention" policy. [REDACTED]

⁴⁰ As Your Honor is aware, the Commission alleged in its complaint, and Complaint Counsel reiterated during the August 2 Scheduling Hearing, that "Rambus's SDRAM-related patent rights could allow Rambus to extract royalty payments well in excess of a billion dollars from the DRAM industry over the life of the patents." Complaint, ¶ 96 [Tab 73] (emphasis in original). See also August 2, 2002, Tr. at 51:12-18 [Tab 74]. Judging from what others have said in industry trade press and elsewhere, this billion-dollar estimate of the potential value of Rambus's JEDEC-related patents may be quite conservative. See S. Fyffe, "Industry to Attack Rambus Patents," ELECTRONIC NEWS, July 17, 2000 [Tab 75] ("The royalties could add up to \$600 million to \$800 million a year if all the companies were found to be violating Rambus' patents") (emphasis added); K. Rajgopal, "Rambus Grabs Golden DRAM," BUSINESS LINE, Oct. 18, 2000 [Tab 76] ("The math is simple. . . . Estimates [of total SDRAM market size] range from a bottom of \$70 billion to a high of \$120 billion. Assuming an average 2 per cent royalty rate, that gives Rambus royalty revenue of \$1.4 to \$2.4 billion" per year) (emphasis added). See also J. Roberston, "DRAM Makers Rally to Thwart IP Threats," ELECTRONIC BUSINESS NEWS, Jan. 31, 2000 [Tab 77] ("if Rambus' patent claims hold up, . . . 'it could be devastating for the industry'"); W. Wade, "Rambus Wins Royalty Round with Pair of Accords," ELECTRONIC ENGINEERING TIMES, June 26, 2000 [Tab 78] ("SDRAM is one of the cornerstones of the high-tech industry. With billions of chips shipping every year, even a tiny percentage royalty fee could generate huge sums of revenue for Rambus").

[REDACTED]

Yet if Rambus were to destroy documentary evidence relating to, among other things, its obligations to disclose patent-related materials to JEDEC, proving the elements of an equitable estoppel or antitrust claim against Rambus would be far more difficult.

[REDACTED]

Much of the evidence concerning the development, adoption, and implementation of Rambus's document destruction program has either been destroyed or otherwise shielded from discovery through Rambus's extremely broad assertions of attorney-client privilege. From the evidence that is available, however, the following facts are clear:

[REDACTED]

[REDACTED]

⁴¹ [REDACTED]

⁴² [REDACTED]

⁴³ As one court recently stated, "The attorney work-product privilege . . . protects from disclosure materials prepared by attorneys 'in anticipation of litigation.'" *State of Maine v. U.S. Dep't of Interior*, 298 F.3d 60, 66 (1st Cir. 2002) (emphasis added). Thus, work product protection is properly asserted only if "the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Equal Employment Opportunity Commission v. Lutheran Social Services*, 186 F.3d 959, 968 (D.C. Cir. 1999). In fact, "for a document to meet that standard, 'the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable.'" *Id.* (emphasis added); quoting *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998)).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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⁵⁴ As discussed below (*see, infra*, pp. 42-43), it is also evident that when the "document retention" policy was officially "kicked off," Karp explained to Rambus employees that the need to destroy documents was related to the risks of information being "discoverable" in future litigation.

- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The policy provided relatively little guidance to employees regarding what documents they should maintain

⁵⁵ [REDACTED]

⁵⁶ [REDACTED]

versus destroy. As Richard Crisp testified, "It was pretty much left up to the individual's judgment." Crisp Dep. (4/13/01) at 844:11, *Rambus v. Infineon* [Tab 1].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵⁸ Although it is beyond the scope of this motion, Complaint Counsel submits that many of Rambus's assertions of privilege with respect to the company's document destruction activities are improper and should not be sustained. For instance, Rambus should not be permitted to assert blanket claims of privilege relating to discussions that Joel Karp – who is not a lawyer – may have had with other Rambus employees regarding what documents should or should not have been destroyed. Indeed, Complaint Counsel submits that any assertion of privilege by Rambus in this context should not be allowed, given that Rambus used its outside lawyer – Dan Johnson – to assist the company in developing and implementing a policy that was designed to, and did, serve the wrongful and illegitimate purpose of destroying evidence of relevance to anticipated litigation. Just as Judge Payne concluded with respect to Lester Vincent's and Anthony Diepenbrock's advice to Rambus regarding participation in JEDEC, Johnson's work for Rambus "bore a close relationship" to a "fraudulent scheme," and it therefore falls within the scope of the crime-fraud exception to the attorney-client privilege. March 6, 2001, Tr. of Hearing re Motion to Compel at 865-869, *Rambus v. Infineon* [Tab 23]. See note 68, *infra* at p. 54. While Complaint Counsel does not believe that Rambus's improper privilege assertions stand in the way of a favorable ruling on the present motion, for purposes of developing a complete factual record relating to Rambus's misconduct, for Your Honor's benefit, as well as the benefit of the Commission and potentially the federal courts, Complaint Counsel expects to follow this motion with a separate motion addressing these serious, privilege-related concerns.

In a few instances, however, Rambus's lawyers failed to assert privilege objections to deposition questions probing the nature of what Mr. Karp told Rambus employees at the document destruction "kick off" meeting, allowing the truth to come out:

- Q. When was the meeting that you had with Joel Karp on purging files?
- A. I don't recall the specifics, but it would have been after Joel joined, which I believe was late 1997, so, seems to me, that somehow we did that in the spring or summer of '98.
- Q. And he told you one of the reasons for doing that was because such materials are discoverable in subsequent litigations, right? . . .
- A. Yes.

Roberts Dep. (4/14/01) at 338:20-339:6, *Rambus v. Infineon* [Tab 3].

- Q. [A]t the meeting, did they talk about the benefits of having such a document retention policy?
- A. I believe so.
- Q. What did they tell you about the benefits of not keeping e-mails and other documents around?
- A. Well, from the standpoint of Rambus, it would obviously – you know, some of that stuff is discoverable
- Q. And when you say you were told Rambus didn't want to keep these documents around because they were discoverable, when you say, "discoverable," you are talking about in a subsequent litigation like we are in right here, right? . . .
- A. Discoverable in a lawsuit, yeah.

Diepenbrock Dep. (4/11/01) at 207:18-208:20, *Rambus v. Infineon* [Tab 2].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

E. Judge Payne Rightly Concluded That Rambus's Document Destruction Program Was Adopted for the "Purpose of Getting Rid of Documents That Might Be Harmful in Litigation"

From the facts discussed above, it is not difficult to understand why Judge Payne ruled as he did on Infineon's post-trial motion for sanctions. As relates to the true nature of Rambus's "document retention" policy, and the motivations behind it, Judge Payne made the following express findings:

[T]he record in this case shows that Rambus implemented a "document retention policy," in part, for the purpose of getting rid of documents that might be harmful in litigation. Rambus instituted its document retention policy in 1998. Clearly, Rambus contemplated that it might be bringing patent infringement suits during this timeframe if its licensing efforts were not successful – its Business Plan unequivocally states that the issuance of its JEDEC-related patents would put it in a position to demand royalties from semi-conductor manufacturers.

⁶⁵ [REDACTED]

Rambus executive Allen Roberts testified that one of the reasons for the document destruction was that the documents might be discoverable in future litigation

Infincon, 155 F. Supp. 2d at 682 [Tab 4] (emphasis added).

Judge Payne reached these conclusions despite the fact that much of the evidence discussed above was never presented to Judge Payne, nor has it been cited in Micon's pending motion for default judgment. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Not only have Rambus current and former employees sought to put a positive gloss on the "document retention" policy, but some apparently have provided testimony that is flat out untruthful. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

Highly evasive or untruthful testimony such as this plainly serves to obstruct the truth-seeking mission of Rambus's litigation opponents, in this case Complaint Counsel. Moreover, the fact that we can show from contemporaneous records that Rambus employees have given such untruthful testimony speaks volumes. For one thing, the existence of such testimony calls into

question the reliability of any employee testimony that Rambus might cite in opposition to the present motion.⁶⁶ The existence of such testimony also casts further suspicion upon Rambus's actions, and invites inferences of deliberate wrongdoing and bad faith, to the extent such conclusions are not reached based on the direct evidence alone.⁶⁷ In addition, testimony of this sort exemplifies one aspect of the prejudice to which Complaint Counsel has been subjected as a result of Rambus's document destruction.⁶⁸ Finally, this testimony is a prime example of why, in these circumstances, it would be appropriate for Your Honor to overrule – on “crime-fraud” grounds – Rambus's broad assertions of attorney-client privilege, allowing Complaint Counsel to conduct unobstructed discovery into the true nature and purposes behind Rambus's document destruction activities.⁶⁹

⁶⁶ The principal basis on which Rambus unsuccessfully sought to oppose the imposition of sanctions in the *Infinion* litigation, and presently is seeking to avoid a default judgment in the *Micron* case, is the self-serving testimony of the company's own employees and former employees.

⁶⁷ See Section B (explaining why Rambus's conduct satisfies the legal requirement of bad faith, a prerequisite for entry of default judgment), *infra* at p. 84.

⁶⁸ See, e.g., *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 552 (D. Minn. 1989) (rejecting argument that document destruction did not prejudice plaintiffs because the contents of purged documents might be reconstructed; “The suggestion is an insult to the Court. . . . [A]ny validity it has is based upon the testimony of the defendant's witnesses, several of whom the Court has found to be purposefully mendacious.”) (emphasis added).

⁶⁹ As noted above (see note 2, *supra* at p. 4), one of the additional bases – besides document destruction – for Judge Payne's order imposing post-trial sanctions against Rambus in the *Infinion* case was “False Testimony by Rambus Executives.” *Rambus, Inc. v. Infinion Technologies*, 155 F. Supp. 2d 668, 681 (E.D. Va. 2001) [Tab 4] (emphasis in original). The fact that Rambus executives had given false testimony, however, did not come to light until after Judge Payne pierced the attorney-client privilege on crime-fraud grounds. The relevant passage from Judge Payne's sanctions order reads as follows:

Rambus representatives also hindered discovery efforts by providing false or misleading testimony. For example, Richard Crisp (a former executive, now a consultant to Rambus) testified in his first deposition that he “never, ever” participated in Rambus' patent drafting efforts. However, when he was confronted with documents obtained after the piercing of the attorney-client privilege, Crisp was forced to admit that he directed which claims should be filed in response to the technology discussions at JEDEC. Similarly, Rambus' Chief Executive Officer, Geoff Tate, at his first deposition, testified that he did not believe that Rambus drafted claims to cover JEDEC's standard-setting work (indeed, he stated that he did not know that it was possible to amend patent claims), but, at trial he admitted, upon being prodded by reference to the

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

71 [REDACTED]

72 [REDACTED]

[REDACTED]

[REDACTED] These discussions and activities – along with other information – ultimately caused Crisp to conclude that JEDEC’s rules “required disclosure of patent applications,” as well as patents, whenever “a showing or a ballot comes to the floor” that raises “potential patent issues,” or as to which “there may be patent activity.”⁷⁵

[REDACTED]

⁷³ [REDACTED]

⁷⁴ [REDACTED]

⁷⁵ Testimony of Richard Crisp, May 2, 2001, Trial Tr. at 57:21-58:1, *Rambus v. Infineon* [Tab 8] (“Q-. As of September 1995 . . . did you understand the JEDEC patent policy also required disclosure of patent applications? A. I understood it to apply to applications as well, yes.”); December 5, 1995, E-Mail from Crisp to Tate, et al. (R69697 at R69698) [Tab 10] (explaining that Rambus would be fulfilling its patent disclosure duties under the JEDEC rules, “[a]s long as we mention that there are potential patent issues when a showing or a ballot comes to the floor”; “we can say when a showing is made that there may be patent activity in that area, etc.”) (emphasis added).

[REDACTED]

⁷⁶ [REDACTED]

Indeed, Karp not only was active in JEDEC as a Samsung employee, but also authored a sworn declaration commenting upon JEDEC's disclosure requirements, which Samsung used in an effort to counter patent infringement claims filed against it by Wang Corporation. The *Wang* suit, similar to this one, revolved around Wang's failure to disclose patent-related materials to JEDEC, and its subsequent effort to enforce such patents over JEDEC-standardized products. In his declaration, Karp stated:

I am familiar with the EIA (Electronics Industry Association) patent policy and I understand that other standard-setting groups have similar policies. My understanding of the EIA patent policy is that standards promulgated by standard-setting groups are "open" standards, unless the holder of an intellectual property right has previously disclosed during the standard-setting process its property interest and agreed to license its intellectual property rights on reasonable and non-discriminatory terms, or waive them altogether. . . . It is contrary to industry practice and understanding for an intellectual property owner to remain silent during the standard-setting process – and then after a standard has been adopted and implemented – later attempt to assert that its intellectual property covers the standard and allows it to exclude others from practicing the standard.

Declaration of Joel A Karp, *In re Certain Electronic Products* (SEC00049 at SEC00050) [Tab 94] (emphasis added).⁷⁷

⁷⁷ As explained in the Commission's complaint, JEDEC, in the relevant time period, was "one of several standard-setting bodies affiliated with the Electronic Industries Alliance ("EIA"), a trade association representing all segments of the electronics industry." Complaint, ¶ 14 [Tab 73]. JEDEC has since become separately incorporated, but it still maintains a close affiliation with its former parent organization, EIA. See Kelly Dep. (1/9/01) at 8:12-22, *Rambus v. Infineon* [Tab 95] ("JEDEC has been recently incorporated"; "before the first quarter of 2000 . . . JEDEC was an activity within the EIA engineering department").

[REDACTED]

[REDACTED]

[REDACTED] It is also clear that, whatever other concerns may have contributed in causing Rambus to step down the path of improper document destruction, litigation risks loomed large in Rambus's thinking, as did specific concerns about computer files and other records relating to Rambus's four and a half years of participation in JEDEC. The truth of the latter point is evident, in part, from the fact that Rambus did in fact destroy important JEDEC-related materials.⁷⁸ [REDACTED]

[REDACTED]

⁷⁸ See Section G, *infra* at p. 61.

⁷⁹ [REDACTED]

As Your Honor knows, June 1996 is the month that Rambus formally withdrew from JEDEC.⁸⁰ As Rambus's lawyers have argued, once a company withdraws from JEDEC, it no longer remains subject to the organization's rules, including its patent-disclosure rules.⁸¹ Thus, much of the evidence on which FTC Complaint Counsel, in this action, or private litigants in a patent/equitable estoppel action, would naturally seek to rely in establishing the deceptive nature of Rambus's JEDEC-related conduct, is evidence from the period during which Rambus was a member of JEDEC – that is, precisely the same “pre June 1996” period. [REDACTED]

[REDACTED] And, as discussed below, Karp acted accordingly, by taking steps to ensure that, along with other evidence, JEDEC-related files in Rambus's possession were destroyed.

G. Through Joel Karp's Efforts, Rambus Destroyed Massive Numbers of Rambus Documents, Including Documents Directly Relevant to This Litigation

To recap some of the evidence discussed above:

- (1) Rambus feared that its JEDEC-related patents were at risk of being held unenforceable, due to the company's “misleading conduct” at JEDEC [REDACTED]
- (2) Nonetheless, Rambus planned to forge ahead with its longstanding “action plan” of strategically asserting patent rights over competing “non-compatible” devices, including SDRAM and DDR [REDACTED]

⁸⁰ See Complaint, ¶¶ 81-88 [Tab 73]; see also June 17, 1996, Letter from Crisp to JEDEC/EIA Secretary Ken McGhee (R157080-R157081) [Tab 96].

⁸¹ See August 2, 2002, Tr. at 41:3-5 [Tab 74] (“compliance with JEDEC standards” only requires disclosure of patent-related materials “in existence at the time” company is a JEDEC member).

- (3) Rambus plainly anticipated that, once it began to assert its JEDEC-related patents, they would [REDACTED]
- (4) [REDACTED]
- (5) To eliminate the mounting volume of "discoverable" evidence – including [REDACTED] – that was a source of [REDACTED] "concern" within Rambus from the standpoint of the enforceability of its JEDEC-related patents, in mid-1998 [REDACTED]
- (6) Because the motivating force behind this effort was to destroy evidence that could undermine Joel Karp's mission to extract royalties from DRAM makers, and others, [REDACTED] Tate placed Karp directly in charge of overseeing the document destruction program.
- (7) [REDACTED] the time period during which Rambus was a member of JEDEC and engaged in the most troubling, deceptive conduct.
- (8) Karp developed an "Action Plan" [REDACTED]
- (9) Pursuant to this plan, Karp, who is not a lawyer, worked with outside counsel to develop a [REDACTED] "document retention" policy; he met with "every employee" [REDACTED] to explain what they needed to do [REDACTED]
- (10) Because of Rambus's blanket privilege assertions, we do not know precisely what Karp told Rambus employees to destroy or how he explained the motivations behind the destruction, but we do know that Karp's instructions clearly had something to do with "anticipated litigation," and that Karp told employees that "one of the reasons" for destroying documents "was because such materials are discoverable in subsequent litigations."

(11) [REDACTED]

(12) [REDACTED]

(13) [REDACTED]

(14) But there is [REDACTED] to show what evidence was lost.

As this factual summary shows, Rambus not only set out, as Judge Payne concluded, to destroy documents as a means of "masking its fraud" at JEDEC. *Infincon*, 155 F. Supp. 2d at 683 [Tab 4] (emphasis added). It further sought to cover over its improper document destruction by keeping no (or destroying all) records of what was done, and by seeking to shroud the truth behind overbroad privilege claims. In light of this well-orchestrated scheme, it would hardly be surprising if Complaint Counsel were unable to point to any proof showing that specific evidence relevant to (or at a minimum discoverable in) this case was in fact destroyed. Despite its best efforts, however, Rambus was unsuccessful in erasing all traces of its wrongdoing. Though the evidence described below (and, indeed, throughout this memorandum) surely reflects only a fraction of what existed before [REDACTED], it is nonetheless compelling proof of the unmistakable prejudice that Rambus's willful, bad-faith actions have permanently injected into this case.

The natural place to start in discussing documents that Rambus actually destroyed is with Richard Crisp. [REDACTED]

[REDACTED]

[REDACTED]

A. I think I threw out . . . all of the minutes I had. They were just, you know, a huge stack of papers and just –

Q. Copies of the meeting minutes that you got from JEDEC?

A. That's right, that's right, those meeting minutes. . . .

Crisp Dep. (4/13/01) at 842:13-21, *Rambus v. Infineon* [Tab 1].

In addition to this testimony, we can infer from Crisp's October 28, 1999, e-mail – in which he jokes about documents "fall[ing] victim to the document retention policy :-)" – that important JEDEC-related documents were encompassed within the universe of documents that were destroyed:

10/28/1999
10:48:19
original DDR datasheet anyone?

I'm looking for a copy (paper or electronic) of one of the original DDR datasheets from the 1996/1997 timeframe. Hopefully someone here has one that hasn't fallen victim to the document retention policy :-)
thanks in advance
rdc

October 28, 1999, E-Mail from Crisp (R221422) [Tab 6] (emphasis added).⁸²

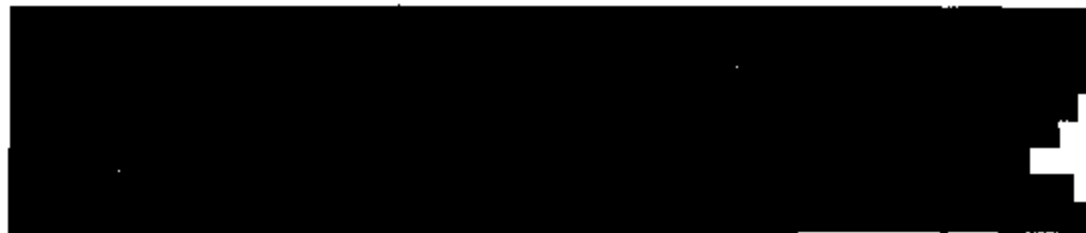
⁸² As introduced in note 6, *supra* at p. 9, the term "DDR datasheets," referenced in Crisp's e-mail, refer to the written specifications defining the technical characteristics and features either of JEDEC's DDR SDRAM standards, or of a given DRAM manufacturer's products built to comply with JEDEC's DDR SDRAM standards. Rambus valued this type of documentation for several reasons. First, sworn testimony indicates that Rambus used it as a reference when drafting new patent claims intended to cover aspects of the JEDEC standards. See, e.g.,

[REDACTED]
Crisp Dep. (4/13/01) at 783:12-784:21, *Rambus v. Infineon* [Tab 1] (Crisp suggested new patent claims to Rambus's outside patent counsel, Lester Vincent, that "would apply to some of the SDRAMs that [he] . . . had seen [in] data sheets").
[REDACTED]

The testimony of Richard Crisp and others also demonstrates that Rambus's document destruction program resulted in the elimination of documents relating to the work that Rambus and its lawyers were doing – in the “pre June 1996” period – to amend pending Rambus's patent applications in order to better cover the JEDEC standards:

- Q. Besides the JEDEC meeting minutes, what other JEDEC-related materials did you discard after Joel Karp's directions?
- A. Well, anything that I had on paper, I basically threw away. I just – I really lightened my paper load a lot.
- Q. And you threw away any of the documents you had relating to the patent prosecution work you were doing with Allen Roberts or Lester Vincent as well?
- A. It's very possible that I did. . . .

Crisp Dep. (4/13/01) at 843:2-11, *Rambus v. Infineon* [Tab 1].⁸³



It is significant that Crisp specifically refers to the “original” version of the DDR datasheets “from the 1996/1997 timeframe.” Rambus was a member of JEDEC until June 1996. Thus, this version of the DDR datasheets might demonstrate not only what Rambus knew about the contents of the JEDEC DDR standards (or proposed standards) at that time, but also that Rambus had a duty to disclose patent-related information related to JEDEC's work on the DDR standards. In any case, such a document from this key time span clearly would be subject to discovery in this litigation.

⁸³ As Your Honor may have noticed, some of the most provocative evidence that has come to light in this case is in the form of e-mails authored and sent by Richard Crisp. The fact is that these e-mails were purged from Crisp's laptops and were thought to have been destroyed. It is only by virtue of an oversight that such evidence nonetheless survived. As Richard Crisp has testified, he had copied these e-mails onto Rambus's main server in order to transfer them from one laptop computer to another. Those e-mails continued to exist on the server (though not on the laptops) solely because Crisp “forgot about the directory that was on there.” Crisp Dep. (4/13/01) at 842:6-12, *Rambus v. Infineon* [Tab 1].

into the actual instructions that Rambus gave to Vincent and others at Blakely, Sokoloff, Vincent was permitted to testify, from recollection, about the nature of what he destroyed.

[REDACTED]

- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Based on this evidence, Judge Payne concluded in the *Infineon* case that “Lester Vincent . . . destroyed some documents, pursuant to instructions from Rambus, just before this litigation began but after Rambus sent a letter to Infineon accusing it of infringement.” *Infineon*, 155 F. Supp. 2d at 682 [Tab 4].³⁶

H. [REDACTED]

³⁶ The foregoing is merely an overview, based on the prior sworn testimony of Rambus witnesses, of some of the proof showing the nature of the materials that various Rambus agents and employees destroyed, acting in accordance with the instructions of Rambus’s senior management. Many additional categories of documents, not addressed by this testimony, were also undoubtedly destroyed. [REDACTED]

Hence, the materials used in negotiating Rambus’s license agreements with manufacturers of SDRAM and DDR SDRAM, including draft terms sheets and notes from such negotiations, presumably were destroyed. Such documents, if they did exist, not only would clearly be discoverable in this case, but could well prove to be highly important to Complaint Counsel’s allegations.

[REDACTED]

[REDACTED]

[REDACTED]

87 [REDACTED]

88 [REDACTED]

[REDACTED]

I. Throughout the Time That It Developed and Implemented Its Document Destruction Program, Rambus Continued to Anticipate Future Litigation

The documents and testimony discussed in Section B above demonstrate, among other things, that Rambus knew, before launching its document destruction program, that the company was likely to find itself in litigation in the future as it executed upon the company's "action plan" to enforce previously undisclosed JEDEC-related patents. Yet it is not as if Rambus's expectations of future litigation dissipated during the period, starting in mid-1998, in which

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

J. Joel Karp's Efforts, Including His Oversight of Rambus's Document Destruction Campaign, Placed Rambus in a Position to Boldly Assert Patent Rights Over the JEDEC SDRAM Standards

Throughout the entire time he was employed by Rambus – i.e., from October 1997 through July 2000 – Joel Karp's principal job responsibilities remained the same. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Whatever [REDACTED] Rambus may have used to explain Karp's role to outsiders, this was his true mission, and he remained chiefly focused on this mission throughout the duration of his employment with Rambus. This fact is evident in part from Geoff Tate's statements on the event of Karp's retirement:

Joel has done a super job for Rambus since joining us in October 1997. At the time of Joel's arrival we had made some great

inventions but we were understaffed and poorly focused on our IP efforts and strategy. In Joel's time here we have moved forward rapidly and now have a world-class IP team and a world-class portfolio, as marked by our first two blockbuster licensing deals.

July 17, 2000, E-Mail from Karp to Betty Prince, attaching E-Mail from Tate to Rambus Staff (BP0321) [Tab 110] (emphasis added).

The "two blockbuster licensing deals" referred to in Tate's e-mail above, for which Tate properly gave Karp significant credit, were the first two license agreements that Rambus obtained covering SDRAM and DDR SDRAM devices. The first was Rambus's license agreement with Toshiba (announced in mid-June 2000), and the second was Rambus's patent litigation settlement and accompanying license agreement with Hitachi (announced roughly a week later).

Without question, these were "blockbuster" license deals. In fact, as is evident from contemporaneous coverage in the trade press, the fact that Rambus was able to secure such licenses from these companies, specifying unusually high royalty rates, based on previously undisclosed JEDEC-related patents, sent shock waves throughout the entire semiconductor industry. As one commentator noted:

Rambus Inc. dropped a couple of smart bombs last week. Not only did the company convince Toshiba to sign a heavy royalty-laden licensing agreement for SDRAM, DDR DRAM, and FCRAM, but it also settled its lawsuit with Hitachi in a similar way. From the company's statements, it looks as though, in order to build SDRAM and the other memory technologies, Hitachi will wind up paying and paying and then paying some more to use Rambus' patents.

P. Brown, "Pay Me Now, or Pay Me Later," ELECTRONIC NEWS, June 26, 2000 [Tab 111]. See also J. Robertson, "Rambus Uses Patent Clout to Cut Better Deals," CMP TECHWEB, June 26, 2000 [Tab 112] (referring to Rambus's settlement with Hitachi).

Karp not only was successful in negotiating early SDRAM-related license deals for Rambus (see, e.g., Karp Dep. (4/9/01) at 29:14-19, *Micron v. Rambus* [Tab 113]) [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. As one industry commentator observed at the time, "In announcing these licensing arrangements, Rambus made a point of noting that its DDR SDRAM royalties are higher than those for RDRAM." P. Glaskowsky, "Toshiba, Hitachi License Rambus Patents," MICROPROCESSOR REPORT, July 1, 2000 [Tab 114]. This practice caused many in the industry to speculate that Rambus was attempting, through its SDRAM- and DDR-related licenses, to strategically "tip the scales in favor of its . . . controversial [RDRAM] technology." J. Robertson, "Rambus Uses Patent Clout to Cut Better Deals," CMP TECHWEB, June 26, 2000 [Tab 112]. But such speculation soon turned to fact, as Rambus's corporate spokesman, Avo Kanadjian, publicly acknowledged that this in reality was Rambus's strategy. See J. Robertson, "Rambus Drops Patent Depth Charge," ELECTRONIC BUYERS' NEWS, June 26, 2000 [Tab 115] ("Asked if the payment plan was designed to head off a potential rival to Direct Rambus, Kanadjian replied, 'I wouldn't argue with that conclusion.'").

As the facts set forth in this memorandum compellingly demonstrate, Joel Karp's contribution to Rambus's early successes in extracting royalties from producers of JEDEC-compliant SDRAM and DDR SDRAM [REDACTED]

[REDACTED] In addition, the large-scale document destruction activities overseen by Joel Karp factored significantly into Rambus's scheme. Had Rambus not engaged in such systematic efforts to purge evidence of its wrongdoing at JEDEC, it is doubtful that the company would have

been so bold as to assert its JEDEC-related patent rights. Emboldened by the document destruction, however, Rambus had far less to fear.

K. Rambus's Lawyers in This Case Seek to Capitalize on Rambus's Wrongful Document Destruction

The prejudice to Complaint Counsel caused by Rambus's improper destruction of large volumes of evidentiary material can be seen not only from testimony and other proof showing that important categories of evidence were destroyed.⁹⁰ In addition, the existence of such prejudice can be seen from the arguments that Rambus's lawyers have made, and can be expected to make, in this case – that is, arguments whereby Rambus challenges the sufficiency of Complaint Counsel's proof. The fact is that, by challenging Complaint Counsel's proof on issues that we know or have reason to believe were impacted by Rambus's intentional spoliation of evidence, Rambus's counsel in this case, intentionally or not, is seeking to capitalize on such spoliation.

The injustice inherent in this state of affairs needs no explanation, but to make our point crystal clear, the situation amounts to this:

- Rambus, in violation of legal duties outlined below, deliberately set out to rid the company of evidence it feared would prove damaging in precisely such a legal action as this.
- And now, Rambus's lawyers are seeking to defend the company by identifying issues upon which they claim Complaint Counsel lacks sufficient evidence.

As discussed below, courts uniformly hold that this kind of untenable situation cannot be allowed, and it is through the imposition of sanctions of the sort proposed by Complaint Counsel's motion that courts have acted to prevent this from occurring.

⁹⁰ See Section G, *supra* at p. 61.

Our legal argument will follow in the sections following immediately below. The point of this section is to draw Your Honor's attention to some of the many ways in which Rambus's lawyers have sought – and will likely continue seeking – to advance their client's interests by capitalizing on the improper document destruction activities described above. Among other things, Rambus's lawyers have effectively done this by contending that there is no evidence, or otherwise inadequate evidence, to support Complaint Counsel's contentions:

- (1) that JEDEC's patent disclosure rules were well understood by the organization's members, including Rambus;⁹¹
- (2) that Rambus itself understood, or had reason to understand, that the JEDEC disclosure rules extended to patent applications, as well as issued patents, and that the obligation to disclose arose whenever a member's patents or patent applications involved the standard-setting work that JEDEC was undertaking;⁹²
- (3) that Rambus had a duty, pursuant to those rules, to disclose certain Rambus patents or patent applications that closely related to JEDEC's work on the SDRAM- and DDR SDRAM-related standardization – a duty with which Rambus deliberately failed to comply;⁹³

⁹¹ See, e.g., Rambus's Answer at 1-2 [Tab 116] (claiming that "the evidence does not and will not offer any substantial support" for Complaint Counsel's contention that JEDEC's disclosure rules were "commonly known" by JEDEC members).

⁹² See August 2, 2002, Tr. at 39:7-8 [Tab 74] (Rambus counsel claimed that "Rambus understood the standard to be much narrower than what complaint counsel argues").

⁹³ See, e.g., Rambus's Answer at 2 [Tab 116] (claiming that "[t]he evidence will show that Rambus did not have, until long after it left JEDEC, any undisclosed patent or patent application" that was subject to disclosure under JEDEC's rules); [REDACTED]

[REDACTED] August 2, 2002, Tr. at 48:2-3 [Tab 74] ("Rambus complied with the duty that was imposed on it").

- (4) that Rambus's JEDEC representatives, including Richard Crisp, were aware that the company possessed patents and patent applications that involved JEDEC's work;⁹⁴ and
- (5) that Rambus's deliberate failure to comply with JEDEC's disclosure rules has caused a variety of anticompetitive effects.⁹⁵

These are each important, if not crucially important, issues in this case. And as just shown, in contesting Complaint Counsel's arguments on such issues, Rambus has claimed, and will likely continue to claim, that the Commission's proof on such important issues is lacking in one respect or another. The problem, of course, is that the very proof that Rambus claims to be lacking is the same proof that Rambus, some four years ago, systematically sought to destroy.

One predictable reaction to this memorandum thus far may be that Complaint Counsel appears to be armed with a substantial amount of evidence showing the illegitimate nature of Rambus's challenged conduct, perhaps calling into question the need for sanctions relating to document destruction. Stated differently, one might be tempted to think that, whatever Rambus may have sought to achieve by destroying documents, it obviously failed to eliminate all of the damaging proof relating to its alleged deception of JEDEC.

Complaint Counsel would certainly agree that there is ample proof of Rambus's wrongdoing. Yet that is not the question that should be asked in determining the appropriateness of a default judgment. Rather the central question raised by Complaint Counsel's motion is whether, absent the issuance of a default judgment, there is the potential for Rambus's improper

⁹⁴ [REDACTED]

⁹⁵ [REDACTED]

document destruction activities to reap a substantial injustice. Complaint Counsel submits that the answer to this question is, quite obviously, yes – for as long as Rambus’s counsel is permitted to challenge the sufficiency of Complaint Counsel’s proof on matters that we know or have reason to believe were impacted by Rambus’s improper destruction of evidence, a substantial injustice has been done. Moreover, Rambus’s document destruction was so pervasive and likely has impacted so many different aspects of this case that any alternative sanction, short of a default judgment, would be inadequate to secure the interests of justice.⁹⁶

LEGAL POINTS AND AUTHORITIES

The relevant legal propositions, which taken together lead to the conclusion that a default judgment should be entered in this case, can be summarized as follows:

- (1) A company that foresees future litigation has a duty to preserve all evidence foreseeably relevant to, or discoverable in, that litigation.
- (2) The duty to preserve relevant evidence exists irrespective of a company’s ordinary document retention policies.
- (3) When the duty to preserve evidence is violated and potentially relevant evidence is destroyed, sanctions are in order.
- (4) The existence of willfulness or bad faith is not a prerequisite to the imposition of sanctions, but may warrant the imposition of more severe sanctions, including a default judgment.
- (5) In determining the appropriate sanction, courts typically consider the extent of prejudice, but the innocent party may be entitled to a presumption of prejudice, rebuttable only by clear and convincing evidence.

⁹⁶ While it may be true that Rambus’s efforts to systematically destroy harmful evidence were less than entirely successful, this likely speaks more to the pervasive nature of the company’s wrongdoing than to the absence of harm resulting from the document destruction. Stated differently, the fact that a great deal of damning proof has survived Rambus’s orchestrated scheme to eliminate bad evidence may only signal how thoroughly corrupt the company’s actions really were. Needless to say, it would be the height of legal ironies if Rambus were to be rewarded for this through the imposition of less severe sanctions than its conduct appropriately warrants.

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- (6) Entry of a default judgment is appropriate where documents were destroyed willfully or in bad faith, the plaintiffs were prejudiced, and lesser sanctions would be inadequate to rectify the injustice caused by such wrongdoing.

In the remainder of this memorandum of law, Complaint Counsel will demonstrate that case law well supports these legal propositions and that, as applied to the facts of this case, they strongly counsel in favor of entering a default judgment against Rambus as to liability. This discussion is broken down under the following headings:

- A. Because It Anticipated Litigation, Rambus Had a Legal Duty to Preserve Evidence It Knew or Should Have Known Would Be Discoverable in Such Litigation (p. 80)
 - B. In Implementing Its "Document Retention" Policy and Thereafter Destroying Relevant Evidence, Rambus Clearly Acted in Bad Faith (p. 84)
 - C. Complaint Counsel Has Been Severely and Demonstrably Prejudiced by Rambus's Bad-Faith Document Destruction (p. 91)
 - D. A Default Judgment as to Liability Is the Only Appropriate Sanction for Rambus's Willful and Deliberate Spoliation of Evidence (p. 91)
- A. **Because It Anticipated Litigation, Rambus Had a Legal Duty to Preserve Evidence It Knew or Should Have Known Would Be Discoverable in Such Litigation**

From the facts discussed above, it is clear that Rambus's senior management anticipated for many years that the company ultimately would become enmeshed in litigation relating to, among other things, its future planned assertion of JEDEC-related patents, as well as the validity and enforceability of such patents. In the latter regard, Rambus specifically envisioned that the misleading conduct in which it engaged while participating in JEDEC could form the basis of future equitable estoppel and antitrust claims aimed at precluding Rambus from enforcing such patents. Indeed, Rambus feared that it could become the respondent in precisely a case such as

this, in which the FTC charged that, through deception, it had subverted an important standards-setting process, thereby causing substantial market injury, in violation of Section 5 of the FTC Act. It was with these very litigation risks in mind that Rambus [REDACTED] commissioned a systematic, corporate-wide effort to destroy large volumes of internal company records, focusing on records that might be "discoverable in subsequent litigations."⁹⁷ [REDACTED]

[REDACTED] June 1996

being the month that Rambus withdrew from JEDEC. The litigation-related concerns that motivated Rambus's crusade to destroy documents did not end with the adoption of the company's "document retention" policy. Rather, such concerns persisted and only grew more intense throughout the two-year period (i.e., 1998-2000) during which Rambus's document destruction scheme was planned, implemented, briefly interrupted, and then reinstated.¹⁰⁰

Based on these facts, can it be said with confidence that Rambus was – during this 1998-2000 time period – under a legal duty to preserve evidence of foreseeable relevance to future anticipated litigation, including this case? The unequivocal answer is yes.

The duty to preserve evidence foreseeably relevant to, or discoverable in, anticipated future litigation is a well-established principle of law, recognized across all jurisdictions. It is a duty that arises as soon as the prospective litigant has notice of the potential for litigation, whether

⁹⁷ Roberts Dep. (4/14/01) at 175:20-176:6, *Rambus v. Infineon* [Tab 3].

⁹⁸ [REDACTED]

⁹⁹ [REDACTED]

¹⁰⁰ See Section I, *supra* at p. 71.

it be litigation that the party expects to institute itself or otherwise expects to be instituted against it by others. The duty can arise well before any actual litigation is instituted and, indeed, the duty applies regardless of whether the foreseen litigation ever in fact materializes. The anticipated litigation need not be imminent; it is enough that the party has notice of potential litigation at some point in the future. Likewise, the party need not know for certain that the evidence would be relevant in such future litigation; it is enough that the party knows or should know that such evidence would fall within the ambit of what might be discoverable. When such a duty exists, and the party subject to the duty nonetheless proceeds to destroy material documents, sanctions may be imposed.

Not surprisingly, a wealth of case law supports these basic legal principles. The following are but a few examples:

- “A party who has reason to anticipate litigation has an affirmative duty to preserve evidence which might be relevant to the issues in the lawsuit.” *In re Wechsler*, 121 F. Supp. 2d 404, 415 (D. Del. 2000) (emphasis added).
- “[I]t makes no difference that the documents were shredded prior to the institution of this action. . . . Notice does not have to be of actual litigation, but can concern ‘potential’ litigation. Otherwise, any person could shred documents to their heart’s content before suit is brought without fear of sanction.” *Bayoil S.A. v. Polembros Shipping Ltd.*, 196 F.R.D. 479, 482-83 (S.D. Tex. 2000) (emphasis added) (citation omitted).
- “[T]he obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced.” *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991) (emphasis added).
- “Sanctions are appropriately levied against a party responsible for causing prejudice when the party knew or should have known that the destroyed documents were relevant to pending or potential litigation. This tenet is particularly applicable when a party is on notice that documents in its possession are relevant to existing or future litigation, but still abrogates its

duty of preservation." *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 (D. Minn. 1989) (emphasis added).

- "Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information." *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 126 (S.D. Fla. 1987) (emphasis added) (citations omitted).
- "[I]f the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved." *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1987) (emphasis added).
- "I may impose sanctions against a litigant 'who is on notice that documents and information in its possession are relevant to litigation or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information.'... [P]arties have been deemed to know that documents are relevant to litigation when it is reasonably foreseeable that a lawsuit will ensue and that the evidence will be discoverable in connection with that suit." *McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. 149, 153, 154 n.5 (D. Mass. 1997) (emphasis added) (citations omitted).
- "A party may not subvert the discovery process and the fair administration of justice simply by destroying evidence of an adverse claim. Thus, once a party has notice of a potential claim, that party has a duty to exercise reasonable care to preserve information relevant to that claim. Because of this duty, a party who intentionally or negligently fails to preserve relevant information may be held accountable for the loss of such evidence." *Offshore Pipelines, Inc. v. Schooley*, 984 S.W.2d 654, 666-67 (Tex. Ct. App. 1998) (emphasis added) (citation omitted).
- "[E]ven where an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action. . . . Where a party is on notice of potential litigation, the party is subject to sanctions for actions taken which prejudice the opposing party's discovery efforts. . . . The fact that the complaint was not filed by Fire Insurance Exchange until two years after the fire should not be held against respondents." *Fire Ins. Exchange v. Zenith Radio Corp.*, 747 P.2d 911, 914 (Nev. 1987) (emphasis added).

Consistent with these legal principles, there is no question but that Rambus – in the 1998-2000 time period – had an affirmative legal obligation to preserve evidence that reasonably could be expected to be discoverable in the types of future litigation that the company then anticipated. This duty existed notwithstanding the fact that, in mid-1998, Rambus instituted a corporate “document retention” policy. Courts have held that the existence of such a policy “does not relieve [a corporation] from the burden of preserving documents that are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence.” *Stevenson v. Union Pacific Railroad Co.*, 204 F.R.D. 425, 430 (E.D. Ark. 2001). On the contrary, any corporate record retention program – even a *bona fide* one – must be suspended in order to preserve relevant or discoverable evidence once the corporation is on notice of potential litigation.

[I]f the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.

Lewy, 836 F.2d at 1112 (emphasis added).

As discussed above, Rambus did not suspend its document destruction program in order to preserve records that might be pertinent to anticipated litigation. Indeed, the destruction of such records appears to have been the very purpose for which it adopted the program.

B. In Implementing Its “Document Retention” Policy and Thereafter Destroying Relevant Evidence, Rambus Clearly Acted in Bad Faith

If all that had occurred in this case was that Rambus neglected to suspend a *bona fide* “document retention” policy in order to preserve evidence relevant to anticipated litigation, thus

violating the sorts of legal duties described above, it would still be appropriate to consider imposing sanctions against Rambus.¹⁰¹ That is, sanctions would be appropriate in this case even if there were no reason to believe that Rambus had acted in bad faith.¹⁰² The existence of bad faith is important, however, as it can bear importantly on the nature of relief that is deemed appropriate.¹⁰³ In this case, of course, the evidence of bad faith is unmistakable.

This case presents an egregious fact pattern, involving a deliberate and calculated scheme, hatched during a period of heightened concern about future litigation risks, to eliminate large volumes of potentially harmful, discoverable evidence, under the cover of a so-called "document retention" policy that, in truth, was never more than a patent sham. In short, the conduct at issue here is a textbook example of the very sort of bad-faith spoliation of evidence that, as discussed below, warrants imposition of the severest of sanctions. See *Wechsler*, 121 F. Supp. 2d at 415 ("A party who has reason to anticipate litigation has an affirmative duty to preserve evidence which might be relevant to the issues in the lawsuit. A party who breaches this duty by destroying relevant evidence or by allowing relevant evidence to be destroyed may be sanctioned by the court. When this destruction is willful or in bad faith and intended to prevent the other side from

¹⁰¹ See, e.g., *Computer Assocs. Int'l v. American Fundware, Inc.*, 133 F.R.D. 166, 169 (D. Colo. 1990) ("Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information.") (citation omitted).

¹⁰² See, e.g., *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (holding that a finding of bad faith is not a prerequisite to the imposition of sanctions where a party destroyed evidence after having received notice of their "potential relevance to the litigation"); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (stating, "We reject the argument that bad faith is an essential element of the spoliation rule," and further noting that, "[w]hile a finding of bad faith suffices" to permit sanctions, "it is not always necessary").

¹⁰³ See, e.g., *McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. 149, 154 (D. Mass. 1997) ("the extent of the prejudice bears more on the issue of the scope of the sanction to be imposed rather than the issue of whether any sanction should be imposed at all.").

examining the evidence, the court may impose the most severe sanction of them all – the outright dismissal of a claim or the entry of a default judgment.”) (citation omitted).

Without attempting to retrace all of the facts discussed above, the following facts taken together, clearly portray the image of a company whose actions exude bad faith:

- (1) Rambus implemented its “document retention” policy in mid-1998, at a time during which the company had heightened concerns about the potential risks of anticipated future litigation.
- (2) There is substantial evidence indicating that Rambus adopted the policy in response to [REDACTED] “concern,” within the highest ranks of Rambus’s corporate management, about the potential for certain company files and records [REDACTED] to be “discoverable in subsequent litigations.”
- (3) The greatest litigation-related concern to Rambus’s senior management at the time was the possibility that the company’s SDRAM- and DDR SDRAM-related patents could be held unenforceable, on either antitrust or equitable estoppel grounds, because of the deceptive nature of Rambus’s conduct during the period in which it participated as a member of JEDEC – the standards organization that developed the SDRAM and DDR SDRAM specifications.
- (4) Because these litigation risks stood to undermine Rambus’s plans to enforce [REDACTED] Rambus [REDACTED] made Joel Karp – the person in charge of overseeing this aspect of Rambus’s business strategy – responsible for overseeing the company’s document destruction efforts as well.
- (5) Rambus participated in JEDEC from December 1991 through June 1996; knowing this, and further understanding that documents from that time period posed the greatest potential litigation risk to Rambus [REDACTED]
- (6) The “document retention” policy that Karp hastily developed [REDACTED] gave exceedingly little guidance as to what documents should be purged versus destroyed [REDACTED]

- (7) In the course of implementing this policy, Karp told Rambus employees that it was designed to eliminate "discoverable" evidence [REDACTED]
- (8) Karp also went out of his way to ensure that there would be few if any surviving records exposing the true nature of this document destruction effort [REDACTED]
- (9) [REDACTED]
- (10) Massive amounts of documentation were then destroyed, including many documents that would have been discoverable in and highly relevant to this case.

Even the most generous interpretation of Rambus's conduct – i.e., that it implemented a document destruction policy without bothering to qualify that policy with instructions to preserve evidence relevant to litigation that Rambus was already contemplating – would by itself be sufficient to show that the destruction of relevant documents pursuant to that policy was done in bad faith.¹⁰⁴ Yet the conclusion that Rambus acted in bad faith is far more compelling than this, for it is clear that Rambus did not merely neglect to preserve relevant evidence: Rambus instituted its "document retention" policy for the very purpose of destroying, and thereby depriving opposing litigants of, relevant evidence. Specifically, it sought to destroy (1) evidence

¹⁰⁴ See, e.g., *Stevenson v. Union Pacific Railroad Co.*, 204 F.R.D. 425, 430-31 (E.D. Ark. 2001) (holding, under similar circumstances, that "adherence to the retention policy [without taking steps to preserve relevant evidence] amounts to bad faith"); *Reingold v. Wat 'N Wild Nevada, Inc.*, 113 Nev. 967, 970 (Nev. 1997) (concluding that implementation of a corporate "document retention" policy, leading to the destruction of accident-related documents, relevant to foreseeable types of accidents, but more than two years before the relevant accident complaint was filed, amounted to "willful suppression" of evidence).

that would corroborate the fraudulent nature of Rambus's dealings vis-a-vis JEDEC, thus undermining the enforceability of Rambus's SDRAM-related patents. [REDACTED]

[REDACTED]. Few fact patterns could better exemplify bad faith than this.¹⁰⁵

Indeed, some courts have held that a company can be presumed to have acted in bad faith if, at a time when the company anticipates litigation, it proceeds to destroy documents without making a "particularized inquiry" aimed at preserving documents relevant to such litigation. *See, e.g., Blinzler v. Marriott Intern., Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996) ("When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a fact finder may reasonably infer that the party probably did so because the records would harm its case."). Here, on the other hand, there is every reason to believe that Rambus employees did make a "particularized inquiry," but of the opposite kind. That is, they were directed to seek out and destroy documents that might be harmful to Rambus in future litigation. [REDACTED]

[REDACTED]. Destroying documents because of their content, in anticipation of litigation, is the very essence of bad faith, and it is precisely such conduct that courts regularly condemn through the issuance of severe sanctions, including dismissal and default judgment.¹⁰⁶

¹⁰⁵ *See, e.g., Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (noting the propriety of sanctions "[i]n cases where a document retention policy is instituted in order to limit damaging evidence available to potential plaintiffs").

¹⁰⁶ *See* Section D, *infra* at p. 99.

In words that could hardly come closer to describing the facts of this case, one court said the following about a corporation's deliberate, bad-faith efforts to destroy documents that it feared could be damaging in anticipated litigation:

Defendant's purge was intentionally tailored to make forever unavailable records and documents which defendant knew or should have known would be pertinent to this . . . lawsuit. The Court holds that defendant's senior officials and senior employees were on notice of this potential lawsuit and were acutely aware of its subject. Those individuals reacted by instituting a broad program of document destruction. Given these facts, sanctions are more than appropriate.

Capellupo, 126 F.R.D. at 551.

If there were any doubt as to Rambus's bad faith, Your Honor should not lose sight of several significant facts, and the obvious questions they raise:

First [REDACTED]

Second [REDACTED]

Third [REDACTED]

107 [REDACTED]

108 [REDACTED]

[REDACTED]

Finally, in October 1999 – somewhat over a year after Rambus first implemented the “document retention” policy – Richard Crisp sent the following e-mail, making a joke of the fact that important JEDEC-related materials could not be found:

10/28/1999
10:48:19
original DDR datasheet anyone?

I'm looking for a copy (paper or electronic) of one of the original DDR datasheets from the 1996/1997 timeframe. Hopefully someone here has one that hasn't fallen victim to the document retention policy :-)
thanks in advance
rdc

October 28, 1999, E-Mail from Crisp (R221422) [Tab 6] (emphasis added). Why would someone in Richard Crisp's position, a senior Rambus employee and the company's former JEDEC representative, have made a sarcastic joke¹¹¹ about such important documents¹¹² “falling victim” to the company's document retention policy, unless Rambus employees knew the policy to be a

¹⁰⁹ [REDACTED]
¹¹⁰ [REDACTED]

¹¹¹ See note 8, *supra* at p.10.
¹¹² See, *supra*, notes 6 (at p. 9) and 82 (at p.65).

sham, and unless these very sorts of JEDEC-related documents had been singled out for destruction?

The only conclusion that can be reached on the evidence presented by this memorandum is that Rambus knowingly and deliberately destroyed evidence in bad faith.

C. Complaint Counsel Has Been Severely and Demonstrably Prejudiced by Rambus's Bad-Faith Document Destruction

In weighing the appropriateness of sanctions in cases, like this one, involving the willful, bad-faith destruction of evidence relevant to anticipated litigation, courts typically consider the extent to which the opposing party has been prejudiced by the document destruction. Of course, bad-faith document destruction often entails not only the destruction of records relevant to the potential merits of anticipated future litigation, but also the destruction of (or studious efforts to avoid creating) records showing the nature of what was destroyed. In this sense, opposing litigants are often doubly prejudiced by bad-faith document destruction. They are deprived, first of all, of evidence from which to prove the merits of their underlying claims. Then, in addition, they are deprived of evidence from which to prove both the wrongful nature of the document destruction, and its prejudicial effects.

The present case is no different. As is clear from the facts discussed throughout this memorandum, Rambus deliberately destroyed evidence in an effort to mitigate the legal risks associated with its deceptive conduct at JEDEC. Rambus, in turn, sought to mitigate the legal risks of its improper document destruction by [REDACTED]

[REDACTED]. The result -- as intended by Rambus -- is that Complaint Counsel and other victims of Rambus's spoliation have

been deprived of the ability to demonstrate the full extent to which they have been prejudiced by this improper conduct.

This type of spoliation scheme might be an unusually effective means for a corporation to immunize itself against the legal consequences of wrongful conduct, were it not for the inherent powers of the courts, including this administrative law court,¹¹³ to protect against such abuses. Specifically, courts have held that, in situations involving the deliberate spoliation of corporate records, where the evidence will not permit one to show with precision what documents were destroyed, victims of such wrongful conduct are entitled to a presumption of prejudice. See, e.g., *Shaffer v. RWP Group Inc.*, 169 F.R.D. 19, 28 (E.D. N.Y. 1996). In effect, this shifts the burden of proving the absence of prejudice, by clear and convincing evidence, to the party responsible for such document destruction. As one court explained, in a case in which the plaintiff was guilty of wrongfully destroying evidence:

Accordingly, we think that defendants should enjoy a presumption that they were prejudiced, and that plaintiffs should have the burden of persuading the trial court that they were not, i.e., that there is no reasonable possibility that lack of access to the [destroyed evidence] deprived [defendants] of favorable evidence not otherwise obtainable. . . . It would be manifestly unjust, under such circumstances, to saddle the innocent party with a burden of persuasion that he may have been prevented from satisfying as a result of the other party's wrongdoing.

Bright v. Ford Motor Co., 578 N.E.2d 547, 550 (Ohio Ct. App. 1990) (emphasis added).

Thus, in this case it is Rambus, not Complaint Counsel, that effectively bears the initial burden of proof on the element of prejudice. To avoid a finding of prejudice, Rambus must show that "there is no reasonable possibility that lack of access to the [destroyed evidence] deprived

¹¹³ See note 14, *supra* at p. 13.

[Complaint Counsel] of favorable evidence not otherwise obtainable.” *Id.* (emphasis added).

Moreover, were it to attempt to make such a showing, Rambus’s proof should be scrutinized under a “clear and convincing evidence” standard of proof.¹¹⁴ Regarding the need to apply this heightened standard of proof, one court has explained:

We are keenly aware of the stringency of this standard, yet we believe it to be an appropriate antidote for deliberate misconduct. A party who is guilty of, say, intentionally shredding documents in order to stymie the opposition, should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import. Without the imposition of a heavy burden such as the “clear and convincing” standard, spoliators would almost certainly benefit from having destroyed the documents, since the opposing party could probably muster little evidence concerning the value of papers it never saw. As between guilty and innocent parties, the difficulties created by the absence of evidence should fall squarely upon the former.

Anderson v. Cryovac, Inc., 862 F.2d 910, 925 (1st Cir. 1988) (emphasis added). *Accord Nat’l Ass’n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557 (N.D. Cal. 1987) (“By the very fact of their destruction, . . . the vast majority of the purged documents cannot be identified. . . . Needless to say, plaintiffs should not suffer because of this. Where one party wrongfully denies another the evidence necessary to establish a fact in dispute, the court must draw the strongest allowable inferences in favor of the aggrieved.”).¹¹⁵

¹¹⁴ Because the initial burden of showing the absence of prejudice properly rests with Rambus, in the event Rambus does attempt to rebut the presumption of prejudice attaching to its improper conduct, Complaint Counsel should be given an opportunity to reply.

¹¹⁵ Even if it were only due to the haphazard nature in which documents were destroyed – as opposed to deliberate efforts to conceal the extent and nature of the destruction – that Complaint Counsel’s ability to demonstrate prejudice has been thwarted, it would still be appropriate to presume prejudice, or otherwise shift the burden of proving the absence of such prejudice to Rambus. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 613–16 (D. N.J. 1997) (concluding that, in the absence of a “document destruction index or some other procedure” that would allow Prudential “to specify what documents were taken from files,” or “to identify the files from which documents were taken,” “all concerned [were] forever foreclosed from the receipt of this information”; even though there was “no proof that Prudential, through its employees, engaged in conduct

Courts have further held that the presumption of prejudice in such circumstances should be particularly strong where it can be determined, from the surviving evidence, that categories of proof directly relevant to the claims in issue were impacted, even though it may be impossible to show with precision the volume or precise nature of what was destroyed.

While it is now impossible to determine precisely what the destroyed documents contained or how severely the unavailability of these documents might have prejudiced Plaintiff's ability to prove the claims set forth in its Complaint, we find [Defendant's] contention that no significant prejudice has resulted from this pattern of destruction to be wholly unconvincing. The inescapable fact is that documents falling within a category directly pertinent to Telectron's claims were destroyed, willfully and intentionally

Telectron, 116 F.R.D. at 110 (emphasis added).

As outlined in detail above,¹¹⁶ we know that Rambus's wrongful document destruction did result in the elimination of "documents falling within a category directly pertinent to [Complaint Counsel's] claims." *Id.* Indeed, we know or have strong reason to believe that Rambus's improper document destruction impacted many relevant categories of documents, including:

- documents relating to all aspects of Rambus's participation in JEDEC, specifically including JEDEC minutes and any other paper or electronic files held by Richard Crisp, the company's principal JEDEC representative;¹¹⁷

intended to thwart discovery through the purposeful destruction of documents," the court held that "its haphazard and uncoordinated approach to document retention indisputably denie[d] its party opponents potential evidence to establish facts in dispute," resulting in "incalculable" prejudice); *Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19, 25 (E.D.N.Y. 1996) ("[T]he plaintiffs should not bear the burden of showing when destruction occurred, particularly in light of the haphazard way in which RWP disposed of its documents. . . .").

¹¹⁶ See Section G, *supra* at p. 61.

¹¹⁷ See discussion and citations, *supra* at pp. 63-66.

- any other documents in the possession of Richard Crisp relating to Rambus's JEDEC participation or to Rambus's efforts to secure patent rights over aspects of the JEDEC standards;¹¹⁸
- any similar records in the possession of Rambus's in-house patent counsel, Anthony Diepenbrock [REDACTED]
- any similar documents in the possession of Lester Vincent or others working for Rambus's outside patent counsel, Blakely, Sokoloff [REDACTED]
- any documents relating to contract or license agreements, negotiations, terms, or proposed terms – other than [REDACTED]
- any documents [REDACTED] relating to Rambus's JEDEC participation or to Rambus's efforts to secure patent rights over aspects of the JEDEC standards;

¹¹⁸ See discussion and citations, *supra* at pp. 63-66.

¹¹⁹ See discussion and citations, *supra* at pp. 66-67.

¹²⁰ See discussion and citations, *supra* at pp. 67-69.

¹²¹ [REDACTED]

¹²² [REDACTED]

[REDACTED] and, finally,
[REDACTED]

These categories of documents – all of which we know or have strong reason to believe were impacted by Rambus’s bad-faith document destruction – are broad enough to encompass virtually every issue in this case, certainly as pertains to Rambus’s liability, as opposed to the Commission’s requested relief. It is plainly the case, for instance, that these impacted categories of Rambus business records would have included evidence, now presumably destroyed, bearing directly on each of the disputed contentions as to which Rambus’s lawyers have claimed Complaint Counsel lacks adequate proof,¹²⁶ including our contentions:

- (1) that JEDEC members, including Rambus, well understood JEDEC’s patent disclosure rules;¹²⁷
- (2) that Rambus itself understood, or had reason to understand, that the JEDEC disclosure rules extended to patent applications, as well as issued patents, and that the obligation to disclose arose whenever a member’s patents or patent applications involved the standard-setting work undertaken by JEDEC;¹²⁸

¹²³ [REDACTED]

¹²⁴ [REDACTED]

¹²⁵ [REDACTED]

¹²⁶ See Section K, *supra* at p. 76.

¹²⁷ See, e.g., Rambus’s Answer at 1-2 [Tab 116] (claiming that “the evidence does not and will not offer any substantial support” for Complaint Counsel’s contention that JEDEC’s disclosure rules were “commonly known” by JEDEC members).

¹²⁸ See August 2, 2002, Tr. at 39:7-8 [Tab 74] (Rambus counsel claimed that “Rambus understood the standard to be much narrower than what complaint counsel argues”).

(3) that Rambus had a duty, pursuant to those rules, to disclose certain Rambus patents or patent applications that closely related to JEDEC's work on the SDRAM- and DDR SDRAM-related standardization – a duty with which Rambus deliberately failed to comply;¹²⁹

(4)

[REDACTED]

(5)

[REDACTED]

In other words, the evidence shows that the very factual areas that Rambus has seized upon as key targets for its defense to liability are among the same areas as to which Complaint Counsel's ability to muster supporting proof has been irrevocably harmed due to Rambus's willful, bad-faith document destruction. Under these circumstances, Complaint Counsel need not rely on presumptions of prejudice. The prejudice to Complaint Counsel is palpable and substantial. The facts presented in this memorandum simply leave no doubt that immeasurable

¹²⁹ See, e.g., Rambus's Answer at 2 [Tab 116] (claiming that "[t]he evidence will show that Rambus did not have, until long after it left JEDEC, any undisclosed patent or patent application" that was subject to disclosure under JEDEC's rules);

[REDACTED] August 2, 2002, Tr. at 48:2-3 [Tab 74] ("Rambus complied with the duty that was imposed on it.")

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

prejudice has been done.¹³² Moreover, Rambus should not be heard to deny this. As the court in

Telectron stated:

Plaintiff's right to a full and fair adjudication of its claims on the merits would be poorly protected if [defendant], having purposefully, willfully, and in bad faith destroyed an indeterminate number of documents, were subsequently allowed to introduce extraneous evidence for the purpose of showing that no real prejudice had resulted.

Telectron, 116 F.R.D. at 128.¹³³ At a minimum, any such denials on Rambus's part should be subjected to an exacting level of scrutiny, as befits one who has deliberately sought to escape justice by depriving its litigation opponents of the proof needed to establish their claims.

Finally, to the extent Rambus is permitted to argue the absence of prejudice, Rambus may point to the fact that it has, in this litigation, produced a large volume of documents to Complaint Counsel, including a number of very damaging documents, which directly support the Commission's theories of liability. Though Complaint Counsel would not deny the truth in such assertions, they would hardly suffice to demonstrate the absence of prejudice. The fact is that neither the volume nor the value of what was destroyed can be measured by looking at what remains. In the *Prudential* case, for instance, the court awarded sanctions for document destruction despite the fact that Prudential actually produced over one million pages of

¹³² As noted above, in the *Infinicon* case, after reviewing Rambus's document destruction activities, Judge Payne concluded, "Because of the document destruction (made, it should be remembered, in anticipation of litigation) . . . , the documents [that Rambus in fact] produced omitted the documents that revealed, or pointed the way, to the truth." *Infinicon Technologies*, 155 F. Supp. 2d at 683 [Tab 4]. Judge Payne based this finding on the evidence alone, unaided by any presumption of prejudice to *Infinicon*. Moreover, as also noted above, Rambus never appealed Judge Payne's finding that the company had engaged in wrongful document destruction, resulting in the elimination of material evidence. See, *supra*, note 2 at p. 3.

¹³³ See also *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 550-51 (D. Minn. 1989) ("Having destroyed a significant quantity of documents, the exact extent of which is now indeterminable, defendant cannot now claim that the information contained is irrelevant or unimportant.").

documents, 160 computer diskettes and cartridges, and over 500 audio and video tapes. *See In re Prudential Insurance Company of American Sales Practices Litigation*, 962 F. Supp. 450, 486 (D. N.J. 1997). *See also Compagnie Franciase d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 32 (S.D.N.Y. 1984) (“[I]t is the content not the quantity of discovered material that may indicate the existence or absence of good faith. . . . [S]heer volume alone cannot give rise to a presumption of good faith. . . .”). In any event, whatever volume of documents Rambus produces here, we know that massive amounts of evidence were destroyed in the 1998-2000 time period, and that evidence has forever been lost, causing incalculable prejudice to Complaint Counsel. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D. A Default Judgment as to Liability Is the Only Appropriate Sanction for Rambus's Willful and Deliberate Spoliation of Evidence

Rambus's wholesale destruction of documents warrants nothing less than the imposition of a default judgment. In assessing the appropriateness of a default judgment, courts typically consider three factors:

- (1) whether the defendant acted willfully or in bad faith;
- (2) whether the plaintiff was prejudiced by defendant's actions; and
- (3) whether alternative sanctions would adequately punish the wrongdoer, deter future violations, and avoid unfairness.

In Re Wechsler, 121 F. Supp. 2d 404, 415 (D. Del. 2000).¹³⁴

Having just established (above) that two of these three elements are satisfied here (bad faith and prejudice), this final section of the memorandum of law will focus on the third element – i.e., the inadequacy of a lesser sanction. As explained below, anything less than a default judgment essentially would reward Rambus for its unabashed obstruction of the litigation process. Such a remedy is not unduly harsh given Rambus's egregious conduct and the need for deterrence. Finally, even setting aside Rambus's culpability, the sheer volume of evidence destroyed leaves the court with no other sanction options that would allow for a fair trial on the merits. In any case, issue-related sanctions on every issue affected by Rambus's spoliation would encompass all issues as to liability, and would be tantamount to a default judgment.

I. Lesser Sanctions Would Reward Rambus Rather Than Punish or Deter Its Misconduct

The severity of the injustice caused by Rambus's conduct merits a severe sanction. See *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1456 (C.D. Cal. 1984) ("Imposition of severe sanctions is required in this case by the severity of the abuses that took place. The record shows that [the defendant] deliberately and purposefully undertook a program to impede and obstruct the litigation process, presumably because it believed that the case would be lost if all of the evidence ever came to light. Imposition of a lesser sanction would only reward

¹³⁴ See also *Computer Assocs. Int'l v. American Fundware, Inc.*, 133 F.R.D. 166, 170-171 (D. Colo. 1990); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 131 (S.D. Fla. 1987); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1456 (C.D. Cal. 1984). Other courts have followed a similar approach in evaluating the merits of entering a default judgment in response to claims of bad-faith document destruction. See, e.g., *Shepherd v. American Broadcasting Co.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995) (a court may respond to document destruction by awarding a default judgment "if it finds, first, by clear and convincing evidence . . . that the abusive behavior occurred; and second, that a lesser sanction would not sufficiently punish and deter the abusive conduct"); *Shea v. Donohoe Constr.*, 795 F.2d 107, 1074 (D.C. Cir. 1986) (articulating three justifications for the use of dismissal or default judgment as a sanction for misconduct: (1) prejudice to the opposing party; (2) potential prejudice to the judicial system; and (3) deterrence of future misconduct).

[the defendant] for its misconduct in this litigation.”). In another case, upon finding that the defendant – like Rambus here – had intentionally destroyed evidence it had an obligation to preserve, the court held, as we submit Your Honor should conclude here, that nothing short of a default judgment would be an adequate sanction:

I find and conclude that no alternative sanction short of a default judgment would adequately punish [the defendant] and deter future like-minded litigants. Any lesser sanction would allow a party possessing evidence that would insure an adverse result to destroy that evidence with impunity, thus assuring defeat for the opponent while risking only a comparatively mild rebuke. One who anticipates that compliance with discovery rules, and the resulting production of damning evidence, will produce an adverse judgment, will not likely be deterred from destroying that decisive evidence by any sanction less than the adverse judgment he (or she) is tempted to thus evade. It follows that the only sanction adequate and appropriate to punish [the defendant] and deter future similarly situated litigants is default judgment on liability.

Computer Associates International, Inc. v. American Fundware, Inc., 133 F.R.D. 166, 170 (D. Colo. 1990) (emphasis added).

As in *Computer Associates*, Rambus engaged in document destruction specifically for the purpose of preventing potentially harmful evidence from being available to its opponents in anticipated, future litigation. Rambus was aware that, if the true nature of its fraudulent conduct came to light, the company's JEDEC-related patents could well be held unenforceable on equitable estoppel grounds. Moreover, Rambus knew that the FTC had pursued an antitrust action against another company relating to precisely the sort of deceptive subversion of a standard-setting process in which Rambus had engaged, and that the result in that case was that the respondent, Dell Computer Corporation, forfeited the ability to enforce relevant patents. Rambus determined that – given that its fraudulent conduct had already taken place and there was

nothing the company could do to alter this fact – the only realistic way it could minimize the known legal risks associated with such conduct was to engage in a massive campaign of document destruction, with the hope of erasing any record of its past fraud, and thereby escaping justice for its wrongdoing. Only by entering a default judgment can Your Honor ensure that Rambus does not achieve this illicit goal.

Complaint Counsel acknowledges that default judgment is a severe sanction. However, we submit that such a sanction is fully appropriate here, given the bad-faith nature of Rambus's conduct and the substantial injustice it has caused, or threatens to cause, absent the relief Complaint Counsel seeks. As the court in *Webb v. District of Columbia* stated,

[We] recognizes that the [D.C.] Court of Appeals has found sanctions of dismissal or default to be unduly harsh in a number of cases. However, the lesson of those cases appears to be that dismissal or default is not an appropriate sanction for a single instance of misconduct or for conduct that does not evidence any bad faith, willful misconduct, or tactical delay. Consequently, those cases are distinguishable from the instant case, in which the defendant's illegal document destruction was widespread and willful and Corporations Counsel's recalcitrance and silence were both ongoing and knowing.

Webb v. District of Columbia, 189 F.R.D. 180, 186 (D. D.C. 1999) (emphasis added) (citations omitted). See also *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 127, 130 (S.D. Fla. 1987) (Where there was "evidence of willful document destruction by a corporate defendant, carried out in an unabashed . . . attempt to render irretrievable records clearly pertinent to the claims brought against it . . . default judgment [was] . . . the only appropriate sanction.") (emphasis added); *Cartucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 486 (S.D. Fla. 1984) ("By deliberately destroying documents, the defendant has eliminated the plaintiffs' right to have their

cases decided on the merits. Accordingly, the entry of a default is the only means of effectively sanctioning the defendant and remedying the wrong.” (emphasis added).

Rambus’s conduct is no less egregious than that of the spoliators in *Webb*, *Telectron*, and *Cartucci*. Far from a single instance of wrongdoing, Rambus’s conduct was systematic, corporate-wide, and long-lasting. A lesser sanction than default judgment not only would be an inadequate punishment, but would send a clear message to similarly situated corporate entities that this type of willful obstruction of justice carries only a minimal penalty. Thus, in weighing the appropriateness of a default judgment, Your Honor should give serious consideration to the need to deter this type of blatant spoliation in the future.

2. The Sheer Scope of Evidence Rambus Destroyed Makes It Impossible to Fashion Any Lesser Sanction That Would Still Allow an Equitable Trying of the Facts

Your Honor has a broad canvas on which to fashion an appropriate remedy for Rambus’s wrongful document destruction. *See, e.g., Stevenson v. Union Pacific Railroad Co.*, 204 F.R.D. 425, 429 (E.D. Ark. 2001) (“Sanctions [for document destruction] have included, among others, fines; award of reasonable attorneys’ fees and expenses; disqualification of counsel; preclusion of claims or defenses or evidence; a spoliation instruction; dismissal of the action; and entry of default judgment.”). Yet the sheer scope of Rambus’s document destruction and the impossibility of reconstructing what was destroyed means that no combination of lesser sanctions could be fully effective in redressing the injury and restoring the factual record to what it would have been absent the wrongful spoliation.

Of the panoply of sanctions, other than a default judgment, that Your Honor could consider, the only type of sanctions that could even come close to achieving an equitable outcome

here would be so-called "issue-related sanctions," including the imposition of "adverse inferences," or an order precluding Rambus from admitting evidence, on all issues possibly impacted by the document destruction. Given the volume and breadth of the evidence destroyed by Rambus, however, imposing issue-related sanctions here would not fully remedy the injustice caused by Rambus's actions, and in any event would simply be tantamount to entering a default judgment.

As the D.C. Circuit has explained, two circumstances warrant a sanction as severe as a default judgment: "[1] where the destroyed document is dispositive of the case, so that an issue-related sanction effectively disposes of the merits anyway; and [2] where the guilty party has engaged in such wholesale destruction of primary evidence regarding a number of issues that the district court cannot fashion an effective issue-related sanction." *Shepherd v. American Broadcasting Co.*, 62 F.3d 1469, 1479 (D.C. Cir. 1995) (citations omitted). In the instant case, both of these circumstances apply. With respect to the first, the documentary and testimonial evidence discussed herein establishes that Rambus's document destruction program intentionally targeted evidence that Rambus feared would be "dispositive" of future equitable estoppel and antitrust claims seeking to render Rambus's JEDEC-related patents unenforceable. With respect to the second circumstance, Rambus's conduct plainly did involve "wholesale destruction of primary evidence regarding a number of issues" pertinent to liability in this case. [REDACTED]

[REDACTED] we cannot be certain that any issue was left unaffected. Because the number of issues affected is so great, it

would be impossible to fashion issue-based sanctions. Even if it could be done, the imposition of such sanctions would fall far short of fully addressing the injustice wrought by Rambus's conduct.

Consider first the possibility of entering "adverse inferences" as a sanction to address Rambus's wrongful document destruction. An adverse inference is an evidentiary tool to account for the impact of missing evidence, and to restore the integrity of fact-finding in the case, when evidence has been improperly destroyed. *See, e.g., Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). In essence, an adverse inference would allow Your Honor to conclude that the substance of the destroyed documents here would have supported Complaint Counsel's positions, and would have undercut the positions taken by Rambus, on any given factual contention or issue that may have been impacted by the bad-faith document destruction. As Justice (then appellate judge) Breyer explained in *Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc.*:

When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party which has prevented production did so out of the well-founded fear that the contents would harm him. Wigmore has asserted that nonproduction is not merely "some" evidence, but is sufficient by itself to support an adverse inference even if no other evidence for the inference exists. . . .

The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position to who does not destroy the document. . . .

The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. The inference also serves as a penalty,

placing the risk of an erroneous judgment on the party that wrongfully created the risk. In McCormick's words, "the real underpinning of the rule of admissibility [may be] a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof."

Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc., 692 F.2d 214, 218 (1st Cir. 1982) (Breyer, J.) (quoting *McCormick on Evidence* § 273, at 661 (1972)).

Your Honor could draw a number of adverse inferences based on Rambus's intentional spoliation of evidence. For example, Your Honor could infer (1) that Rambus fully understood JEDEC's disclosure rules; (2) that Rambus knew it had a duty to disclose patents or patent applications because they sufficiently related to the work of JEDEC; (3) that Rambus knew or believed that several pending patent applications, and at least one patent, covered aspects of the standards-related work conduct by JEDEC while Rambus was a member; and (4) that Rambus knew that, were it to disclose its patents/applications to JEDEC (as required by JEDEC's rules), its claimed intellectual property would not have been used in the JEDEC standards, or would have been used only subject to assurances that Rambus would make it available on royalty-free terms, or at a minimum terms far more modest than what Rambus was later able to command. Yet, given the pervasive nature of Rambus's document destruction and the exceedingly wide range of issues that have been impacted, in order to erase the injustice caused by Rambus's actions – or to even attempt that – Your Honor would have to make so many adverse factual inferences that it would be tantamount to entering a default judgment in any event.

The other possible issue-related sanction – an order barring Rambus from admitting evidence on issues affected by the document destruction – would suffer from the same problem,

as explained by court in *Telectron*, a case in which the defendant engaged in similarly comprehensive efforts to destroy relevant documents:

Another sanction available to this Court would be to foreclose [defendant] from offering evidence on issues related to the subject matter of the destroyed documents. This sanction's key weakness, as applied to the present case, derives from the fact that we do not know the precise contours of the destroyed materials. What we do know is that the subject matter of these materials . . . cuts to the heart of [plaintiff's] claims. . . . To bar the defense from proffering evidence as to [defendant's] communications with its distributors might effectively compel a directed verdict for [plaintiff] on all four counts. Under these circumstances, the parties would incur substantial litigation expenses and the adjudication would consume valuable judicial resources, only to arrive at the same substantive outcome as the entry of default will achieve with much greater efficiency and at substantially lower cost. If the evidence now available to [plaintiff] falls short of establishing *prima facie* support for its claims, the argument against evidence preclusion as a sanction is even more compelling: the plaintiff would walk away from trial with nothing, having been compelled to pursue its claims without the benefit of the probative evidence contained in the destroyed documents.

Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 135-36 (S.D. Fla. 1987) (cited with approval by the D.C. Circuit in *Shepherd*, 62 F.3d at 1479) (emphasis added) (citations omitted). The reasoning in *Telectron* applies equally here. We do not know the "contours of the destroyed materials" [REDACTED]. What we do know is that Rambus's document destruction efforts have placed out of reach of Complaint Counsel, and Your Honor, a significant volume of information directly relevant to many, if not all, of the issues upon which determinations of liability must be made in this litigation. Hence, any issue-related sanction would have to be so broad as to "arrive at the same substantive outcome as the entry of default." *Id.*

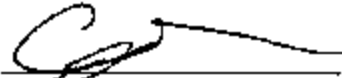
Thus, this truly is a case in which “the guilty party has engaged in such wholesale destruction” that “effective issue-related sanction[s]” cannot be fashioned or would “effectively dispose[] of the merits anyway.” *Shepherd*, 62 F.3d at 1479. In other words, this truly is a case in which “the entry of a default judgement is the only means of effectively sanctioning the defendant and remedying the wrong.” *Carlucci*, 102 F.R.D. at 486 (emphasis added).

CONCLUSION

Complaint Counsel recognizes that this case provides the Commission with an opportunity to develop and further clarify the application of antitrust law to an important area of economic activity – namely, collaborative industry standard setting. Yet this case also presents the Commission with a potentially even more important opportunity to inform the public that it will not tolerate efforts by market participants to destroy evidence demonstrating violations of the laws it enforces. As discussed in detail throughout this memorandum, Rambus’s willful, bad-faith spoliation of evidence was done with the very goal of depriving the FTC, and others, from litigating to a finding of liability precisely a case such as this. The Commission cannot allow even the possibility that Rambus might succeed in such a corrupt undertaking. Nor need Your Honor permit such a possibility. The facts and law presented in this memorandum do not merely permit, but indeed compel, the imposition of severe sanctions. Moreover, the only type of sanction that can protect the interests of justice in this case is the relief that Complaint Counsel seeks: a default judgment.

For all the reasons stated above, Complaint Counsel therefore requests that Your Honor grant the motion for default judgment and enter the proposed order filed herewith.

Respectfully submitted,



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COUNSEL SUPPORTING THE
COMPLAINT

Dated: December 20, 2002

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

ORDER

Upon consideration of Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence, dated December 19, 2002,

IT IS HEREBY ORDERED that Complaint Counsel's Motion for Default Judgment is GRANTED.

IT IS FURTHERED ORDERED that Complaint Counsel and Counsel for Respondent shall, at the earliest possible date, meet and confer with the goal of identifying what remaining issues must be resolved in this matter, and shall thereafter submit to this Administrative Law Court, no later than _____, 2003, statements outlining, in this regard, all areas of agreement, as well as any points of disagreement. Promptly after receipt of such statements, a Status Conference shall be scheduled for the purpose of, among other things, resolving any disputes between the parties.

James P. Timony
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I, Melissa Kassier, hereby certify that on January 16, 2003, I caused a copy of the Interim Public Versions of the following materials:

1. Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence;
2. Memorandum in Support of Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence; and
3. [Proposed] Order,

to be served upon the following persons:

by hand delivery to:

Hon. James P. Timony
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

and by electronic mail and overnight courier to:

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FTC Wants Immediate Judgment in Rambus Antitrust Case

January 15, 2003: 11:10 a.m. EST

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Dow Jones Newswires

WASHINGTON -- The Federal Trade Commission has asked a judge to enter a liability judgment against Rambus Inc. (RMBS) and move directly to the punishment phase of an antitrust case involving the memory-chip firm.

An FTC lawyer noted the agency filed a motion for default judgment late last month relating to allegations of willful, bad-faith document destruction. The motion asks an administrative law judge to skip a trial scheduled for March and enter the judgment, according to the lawyer, who asked not be identified.

John Danforth, general counsel for Rambus, said the motion relates to a 1998 document-retention policy put in place long before any litigation or FTC inquiry.

"We regard the motion as baseless," he added.

Last June, the FTC charged the Los Altos, Calif.-based company with violating federal antitrust laws. The FTC accuses Rambus of deliberately engaging in a pattern of anticompetitive acts and practices that served to deceive an industrywide standard-setting organization, resulting in adverse effects on competition and consumers.

According to the FTC's complaint, Rambus worked with the group for more than four years without informing peers that it owned and actively worked to develop patents that involved specific technologies proposed for -- and ultimately adopted in -- synchronous dynamic random access memory standards.

The FTC said that after Rambus's technology was widely adopted, the company demanded steep royalty payments. The agency alleges a number of chip manufacturers acquiesced to Rambus' royalty demands. Under existing license agreements, Rambus is entitled to collect royalties in the range of \$50 million to \$100

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million a year, according to the complaint.

Also In June, the FTC alleged Rambus engaged in "systematic effort, blessed if not orchestrated by its most senior executives, to destroy documents and other information" on the case. The company has denied the charges.

-By Jeff Bater, Dow Jones Newswires; 202-862-6616;
Jeff.Bater@dowjones.com

Dow Jones Newswires 01-15-03 1618ET

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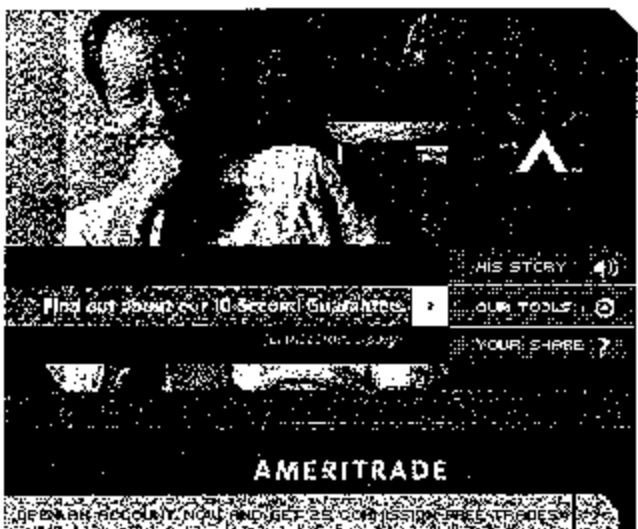
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01/15 17:28
Rambus Should Be Found Liable in Fraud Case, FTC Says (Update3)
 By Susan Decker



Washington, Jan. 15 (Bloomberg) -- Rambus Inc. has forfeited its right to trial and should be declared at fault in a patent-related civil fraud case because the computer-chip designer destroyed documents, the Federal Trade Commission said.

The FTC asked an administrative law judge to move directly to the punishment phase of the case. The agency charged in June that Rambus used information obtained at industry standard-setting meetings to amend patent applications so its designs would meet the standard. Rambus destroyed company papers related to those meetings, the FTC said at the time.

At stake is as much as \$100 million in annual royalties the FTC said it may try to force Rambus to give up, as well as Rambus's right to pursue other royalty agreements. Disputes over the patents have spawned at least six lawsuits in the U.S. and Europe, contributing to a 94 percent plunge in Rambus shares since June 2000.

"The market is not expecting Rambus to win (the FTC case) and that has been priced into the stock," said Michael Crawford, an analyst with B. Hiley & Co., who owns the shares and has a "buy" rating on them. "If they do win, it could be a huge windfall."

'Highly Unusual'

Los Altos, California-based Rambus, which denies any wrongdoing, says it acted properly during the industry meetings in the early 1990s and amended patent applications to protect its inventions from theft. The company says it destroyed the papers under its "document retention" policy.

Rambus shares fell 53 cents, or 6.2 percent, to \$7.99 in Nasdaq Stock Market

trading. They reached a high of \$127 in June 2000.

In a Dec. 20 filing, the FTC asked that Rambus be found liable without a trial because of its "willful, bad-faith destruction" of notes and other information on the standard-setting meetings. The trial is scheduled for March.

Such requests to bypass a trial are rare, an FTC expert said. "I cannot personally remember such a motion being filed," said Stephen Calkins, a former FTC general counsel, now a law professor at Wayne State University in Detroit.

A public version of FTC documents further explaining its request are to be filed this month, according to the FTC's Web site. Rambus spokeswoman Linda Ashmore said the company's response will be filed today.

Royalty Payments

"This is old news," said Rambus General Counsel John Danforth, citing a failed attempt more than two years ago by Micron Technology Inc. to use the same grounds to dismiss Rambus's patent-infringement suit against it.

FTC attorneys "are in no position to make judgments" until they read up to 500,000 additional documents Rambus is sending the FTC, Danforth said.

Rambus, which doesn't make or sell its own chips, collects patent royalties from semiconductor makers such as Intel Corp. that use its designs. The company specializes in high-speed chips designed to speed up computer programs for databases, games and digital photography.

If the FTC wins, the agency may try to keep Rambus from collecting payments from chipmakers such as Samsung Corp., Toshiba Corp. and NEC Corp. The FTC says the companies signed the agreements, worth \$50 million to \$100 million annually, with Rambus under threat of legal action.

Royalties from these and other patents accounted for 92 percent of the company's \$96.6 million in revenue in the fiscal year ended Sept. 30.

Infringeon Suit

The government also may seek to keep Rambus from collecting royalties from companies that didn't sign agreements, such as Micron, Hynix Semiconductor Inc. and Infineon Technologies AG. Rambus sued those companies after they refused to pay royalties.

Chief Executive Officer Geoff Tate, who has run Rambus since shortly after its founding in 1990, is increasing the company's efforts to develop chip designs for new markets, such as high-definition televisions and Sony Corp.'s PlayStation video-game machines.

In August 2001, U.S. District Judge Robert Payne cited document destruction in ordering Rambus to pay Infineon more than \$7 million in legal fees. A jury had found Rambus liable for fraud in obtaining its patents. Rambus has appealed.

For its defense in the FTC case, Rambus is seeking information about a federal grand jury investigation into alleged price-fixing in the chip industry. The Justice

Department opposes that effort, saying the information isn't relevant.

Chipmakers including Micron, Samsung and Hynix also have refused to turn over documents Rambus wants for its defense.

Rambus says it is the victim of an industry effort to boycott its products while using Rambus innovations to develop the chip standards.

Any evidence of a conspiracy "would cast further doubt on the credibility of those firms and their representatives, whose complaints to the commission instigated this case," Rambus said in papers filed with the FTC Monday.

Rambus on Monday reported that net income for the fiscal first quarter ended Dec. 31 fell 10 percent to \$5.53 million, or 6 cents a share, on a 3.4 percent rise in sales to \$25.7 million.

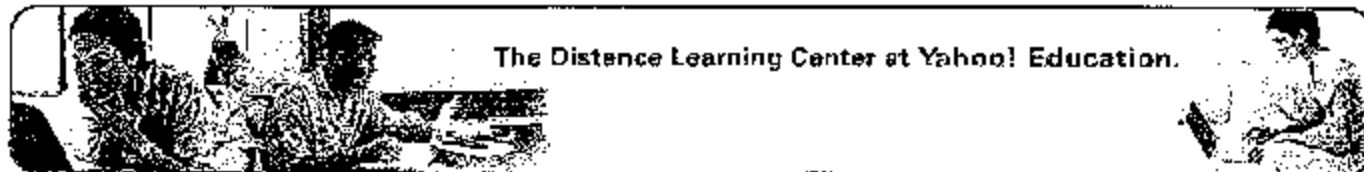
Litigation expenses rose to \$4.5 million from \$2.8 million in the previous quarter and will increase to about \$6 million in the current quarter, the company said.



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FTC Pushes Penalties for Rambus

Thu Jan 16, 3:00 PM ET

Tom Krazit, IDG News Service

The Federal Trade Commission has asked an administrative law judge to issue a default judgment against memory chipmaker Rambus and go straight to the punishment phase in the FTC's anticompetition case against the company because Rambus allegedly destroyed documents related to the matter.

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Rambus has filed a strenuous objection to the motion for default judgment, contending the FTC has not and cannot prove that the company acted in bad faith when it adopted its "document retention" policy in 1998, which is a requirement of a default judgment. Rambus argues that its policy is no different from that of "most" public companies.

Motives Challenged

"Unless intended simply as character assassination, this motion likely reflects a growing recognition... that there are serious holes in their case," Rambus said in a response it released. The FTC motion has not been made publicly available.

The FTC filed a complaint against Rambus last June, alleging Rambus did not tell the Joint Electron Device Engineering Council Solid State Technology Association (JEDEC) that it held patents on SDRAM technology during standard-setting discussions for that technology.

Rambus has also been involved in several private lawsuits over the past few years with DRAM vendors such as Infineon Technologies, Hynix Semiconductor, and Micron Technology. Rambus claims the DRAM vendors are infringing on its memory technology patents and not paying licensing fees.

The latest turn in the legal battle with the FTC stems from the Commission's misinterpretation of Rambus' internal document policy, said John Danforth, Rambus' general counsel. Like most companies, Rambus backs up its e-mail servers as a hedge against a catastrophic system breakdown. The company erases those tapes every three months under the document policy, instituted years before the FTC filed its formal complaint, Danforth said.

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Business Front

In its motion for summary judgment, the FTC accuses Rambus of "willful and bad-faith destruction of evidence," according to an FTC spokesperson. She declined to comment further regarding specific documents or e-mail until the FTC's motion has been made public.

Danforth denied the claims of document destruction. "It's a way to make the company look bad and to make executives look bad," he said, referring to the public sentiment after a year of high-profile fraud and corruption cases among U.S. companies.


Case Background

The proceeding—which is similar to a trial—before Administrative Law Judge James P. Timony is scheduled for April 9. Both the FTC and Rambus have asked the judge to rule on the motion for default judgment as soon as possible, Danforth said.


The FTC is an independent federal agency created to deal with "unfair methods of competition" and "unfair or deceptive acts or practices." The commission is meant to act on behalf of consumers, and since its creation in 1914 has received authority to enforce a range of consumer protection laws.

In the case of Rambus, the FTC filed an administrative complaint with Judge Timony. FTC administrative law judges are independent, but work for the commission. Decisions by the administrative law judge may be appealed by either side to the full Commission, and the Commission's decision can then be appealed to federal court.

Rambus's RDRAM is mainly used for high-performance, computing-intensive applications, while most PC vendors use the less expensive DDR SDRAM in systems. RDRAM has won more acceptance among gamers, and is used in the extremely popular Sony Playstation 2 (news - web sites).

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FTC Asks for Antitrust Ruling Against Rambus

Thu Jan 16, 6:22 PM ET

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By Peter Kaplan

WASHINGTON (Reuters) - The U.S. Federal Trade Commission is asking a federal judge for an immediate antitrust ruling against Rambus Inc. (NasdaqNM:RMBS - news), accusing the technology company of destroying evidence.

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The FTC told administrative law judge James Timony, in a Dec. 20 filing, that Rambus had forfeited its right to a trial, citing the company for "willful, bad-faith destruction of material evidence," according to documents filed with the court.

The FTC asked Timony to begin considering possible sanctions against the company and the agency is expected to release further details of the allegations in coming days.

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At issue are antitrust charges the FTC filed against Rambus in August in which the agency charged the firm with improperly patenting key computer chip technologies.

The FTC contends Rambus participated for more than four years in an industry standard-setting group without disclosing it had a patent and several pending patent applications for specific technologies ultimately adopted by the group.

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The FTC's complaint could force Rambus to walk away from enforcing patent claims worth over a billion dollars in royalties from memory-chip makers.

Los Altos-based Rambus, whose technology is used in memory chips found in high-end PCs and servers, insists it did nothing wrong.

Business Front

Rambus general counsel John Danforth on Thursday dismissed the FTC's latest allegations as bogus claims recycled from past private lawsuits against the company.

"There's no basis in law or fact for what they're seeking," Danforth said.

Danforth attributed the FTC's legal maneuver to "a growing awareness that they cannot support the allegations on the merits."

Danforth said the tactic was designed "to distract attention from their failure of proof" or "to make us look bad in the eyes of the public."

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FTC Seeks Immediate Antitrust Ruling Against Rambus

By Alex Romanelli -- 1/17/2003
Electronic News

The U.S. Federal Trade Commission (FTC) is asking a federal judge for an immediate antitrust ruling against Rambus Inc. The Los Altos, Calif.-based memory company denies any wrong doings and believes this is a last ditch attempt by the FTC before the case falls apart.

"The discovery we've undertaken the last month has blasted huge holes in their allegation," said John Danforth, Rambus' general counsel. "That is the timing of this. We're on the eve, I think, of a court of appeals decision in a related case that should also deal fatal damage to their claims. [The FTC's] motion relies on a case that was litigated in 2001 in Virginia against Infineon. In the Infineon case there were some very damaging findings against Rambus, including that we somehow committed fraud in JEDEC and also that we destroyed documents."

The FTC could not be reached for comment, but its court filing reads in part, "Not only have Rambus current and former employees sought to put a positive gloss on the 'document retention' policy, but some have apparently provided testimony that is flat out untruthful."

Danforth is convinced an appeal ruling in Rambus' favor is imminent, and that such a ruling would seriously undermine the FTC's case against Rambus. The discovery period includes Rambus releasing 500,000 documents to the FTC, Danforth said.

The FTC is arguing that Rambus had forfeited its right to a trial, citing the company for willful, bad-faith destruction of material evidence, including shredding of valuable documents.

"That is total lunacy," said John Danforth, Rambus' legal counsel. "The document retention destruction policy we had was the same every company has. It was back in 1998, two years before the FTC investigation even started. We've put in proof that we didn't target documents relevant to this case. By making this motion, particularly now before the half-million documents we're producing, they are admitting they are in desperate shape. They're chucking the ball down the field, hoping someone is there to catch it."

The FTC's ongoing investigation of Rambus began in 2000 and is centered around the question of whether Rambus fully disclosed its SDRAM patents while it was participating in JEDEC discussions aimed at establishing an industry standard. If the FTC's complaint is successful, it could force Rambus to walk away from enforcing patent claims worth over a billion dollars in royalties from memory-chip makers.

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Rambus Shredded Potential Evidence, FTC Says

Fri Jan 17, 6:58 PM ET

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By Peter Kaplan

WASHINGTON (Reuters) - Employees at Rambus Inc. (NasdaqNM:RMBS - news) were given burlap bags to help gather and destroy potentially incriminating documents in the late 1990s, the U.S. Federal Trade Commission alleged in court filings on Friday.

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Rambus engaged in a campaign of "massive" document destruction at least partly out of concern that some internal documents could be used to press antitrust charges against the company and invalidate its valuable patents, the FTC charged in a motion filed before administrative law judge James Timony.

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"I definitely made an attempt to go through my files and look for things to keep ... as he had directed us to do," Rambus employee Richard Crisp said in a deposition excerpted by the FTC. "And everything else that I couldn't justify keeping, I put in a burlap bag that they gave us, and ... I presume they shredded it."

Rambus maintains the document destruction was part of the company's regular document retention policy. The document shredding cited by the FTC, the company notes, took place two years before the agency even began investigating the company.

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The FTC told Timony that Rambus had forfeited its right to a trial. It asked the judge to issue an immediate judgment against the company and move straight to the penalty phase of the case.

"We believe that the nature of Rambus's conduct seriously undermines the FTC's ability to have a fair trial," said M. Sean Royall, deputy director of the FTC's competition bureau. "The unfairness here is so serious that we believe a default judgment is appropriate."

Rambus "intended to -- and did -- destroy documents it knew or should have known would be relevant to, or at a minimum discoverable in, future litigation of this sort," the FTC told Timony in Friday's filing.

The company has dismissed the FTC's motion as a legal maneuver designed to compensate for the weakness of its main case. In an interview on Thursday, Rambus general counsel John Danforth said the move showed "a growing awareness that (FTC) cannot support the allegations on the merits."

At issue are antitrust charges the FTC filed against Rambus in August in which the agency charged the firm with improperly patenting key computer chip technologies.

The FTC contends Rambus participated for more than four years in an industry standard-setting group without disclosing it had

a patent and several pending patent applications for specific technologies ultimately adopted by the group.

Among the documents targeted for destruction, the FTC said, were records of Rambus's participation in the standard-setting group, called JEDEC, between 1991 and 1996.

The FTC's complaint could force Rambus to walk away from enforcing patent claims worth over a billion dollars in royalties from memory-chip makers.

Los Altos-based Rambus, whose technology is used in memory chips found in high-end PCs and servers, insists it did nothing wrong. Danforth said on Friday that Rambus had given the court evidence demonstrating that it had never targeted the JEDEC documents for destruction.

On Thursday, Danforth dismissed the FTC's latest allegations as bogus claims recycled from past private lawsuits against the company. He said the tactic was designed "to distract attention from their failure of proof" or "to make us look bad in the eyes of the public."

In the motion made public on Friday, the FTC called Rambus's document retention policy a "sham." It cited an internal memo in which Crisp joked sarcastically about looking for a document "that hasn't fallen victim to the document retention policy :-)"

Two other employees cited by the FTC indicated the documents should be destroyed because they might be "discoverable" in future lawsuits against Rambus.

"The truth is that Rambus's document retention policy was not adopted in the ordinary course of business," the FTC said in its motion. "Rather, it was adopted with one paramount goal in mind: The elimination of documents that were likely to prove damaging to Rambus in anticipated future litigation."

The comments first emerged in litigation between Rambus and Infineon Technologies.

But Rambus's Danforth countered the FTC had misconstrued the previous testimony of the two company employees.

They were worried that the huge volume of documents could become a major legal headache if Rambus were ever dragged into a lawsuit against a third party such as Intel Corp., Danforth said.

"We just didn't want to get killed if some third-party subpoena hit us," Danforth said.

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Posted on Sat, Jan. 18, 2003

The Mercury News

FTC: Rambus destroyed papers

CHIP-DESIGN FIRM GOT RID OF EVIDENCE, REGULATORS CONTEND

By Therese Poletti
Mercury News

In the late 1990s, Rambus executives gave Richard Crisp, a former engineer at the memory-chip design firm, and other Rambus employees burlap bags to get rid of documents that could be relevant to any future litigation, the Federal Trade Commission alleged in documents made available Friday.

"I definitely made an attempt to go through my files and look for things to keep . . . as he had directed us to do. And everything else I couldn't justify keeping, I put in a burlap bag that they gave us," Crisp said in a deposition taken for another lawsuit last year and cited by the FTC. "I presume they shredded it."

In its 109-page filing Friday, made as part of an antitrust case the government has brought against the Los Altos company, the FTC contends that Rambus engaged in massive document destruction in 1998 in anticipation of future lawsuits. The filing supports the FTC's motion this week asking an administrative law judge to move immediately to the punishment phase of the FTC lawsuit.

"We believe the nature of Rambus' conduct seriously undermines the FTC's ability to have a fair trial," said M. Sean Royall, deputy director of the FTC's bureau of competition. "The unfairness here is so serious, we believe a default judgment is appropriate."

John Danforth, Rambus' general counsel, said Friday that the company destroyed documents as part of a major "house cleaning" in 1998 which also purged e-mail from the company's hard drives. He also said documents were destroyed in anticipation of possible litigation -- but Rambus was worried about litigation involving a partner, Intel, not suits against itself.

"We had a close relationship with Intel," Danforth said. "We could be a third-party witness in a lawsuit. They were all thinking about the volume and the expense of document discovery."

The FTC filed suit against Rambus in June 2002, alleging that the company violated antitrust laws through its participation in industry-standards meetings. The FTC, along with some Rambus customers, contend that the company enhanced its patent portfolio based on knowledge it gleaned from the meetings on which technologies would be endorsed as industry standards.

The FTC also alleges that Rambus did not inform the participating companies of its patents on many technologies that were selected as standards for memory-chip design.

Rambus later sought royalties from most of the world's makers of dynamic random access memory (DRAM) chips based on those patents. Some DRAM makers, including Infineon Technologies, refused to pay, and Rambus quickly became embroiled in a complex series of lawsuits.

Danforth said Rambus' customers knew about the company's patent claims. "Discovery is showing that there was extensive knowledge and study by the DRAM manufacturers of our patents and efforts to

design around them," he said.

The FTC contends that at the time of the document destruction, Rambus anticipated and was in fact "gearing up for future patent-related litigation with DRAM manufacturers and others."

Danforth said the FTC motion to go straight to the penalty phase is the agency's "Hail Mary pass" because it has a weak case.

The FTC's Royall responded, "We are confident that we can win our case based on the evidence that still exists."

Danforth insisted that Rambus did not target any bad documents in its purging. "There are thousands of documents that people used against us," he said. "The whole Infineon case is made up of our e-mails."

The FTC noted that in the Infineon case, Rambus was sanctioned for wrongful document destruction, but the issue was not addressed until after the trial was over. Rambus has appealed a verdict of fraud against it in that case.

Contact Therese Poletti at tpoletti@sjmercury.com or at (415) 477-2510.

Exhibit J redacted from public-record version