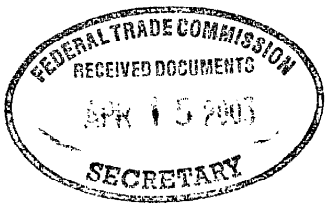

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

PUBLIC

In the Matter of RAMBUS INCORPORATED, a corporation.	Docket No. 9302

REPLY IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR ADDITIONAL ADVERSE INFERENCES AND OTHER APPROPRIATE RELIEF NECESSARY TO REMEDY RAMBUS INC.'S INTENTIONAL SPOLIATION OF EVIDENCE

In opposing Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief Necessary to Remedy Rambus Inc.'s Intentional Spoliation of Evidence, Rambus

- improperly characterizes Complaint Counsel's motion as one for reconsideration of Judge Timony's prior "Adverse Inferences" Order;
- proceeds, in utter disregard of that Order (which it never moved to reconsider), as well as Judge Timony's separate "Collateral Estoppel" Order (on which Rambus's reconsideration motion was denied), to reargue in full its "good faith" defense to spoliation;
- protests that newly produced documents, showing among other things that Rambus destroyed literally millions of pages of documents in a single day, somehow do not qualify as "new evidence";

- challenges Complaint Counsel's purported lack of proof showing a "causal nexus" between the requested adverse inferences and specific spoliated documents, while at the same time manufacturing out of thin air assurances that nothing of material substance relevant to this case was destroyed – all the while ignoring one key detail: the fact that Rambus's own conduct "makes it impossible," in Judge Timony's words, "to discern the exact nature of" what was or was not contained within the millions of pages of destroyed business records;

- yet again invokes the U.S. Constitution as a defense for its conduct, this time citing not one but two provisions of the Bill of Rights; and

- lodges false, personal accusations against one of Complaint Counsel's lead attorneys.

What Rambus's opposition fails to do, however, is provide any response whatsoever to the fundamental issues raised by Complaint Counsel's motion. For instance, Rambus never explains to Your Honor why, in its view, the seven (7) adverse inferences granted by Judge Timony are fully adequate to vindicate the purposes that he (consistent with well-established case law) intended to be served through the imposition of adverse inferences in this case – *i.e.*, evidentiary balance, deterrence, and penalty. Moreover, Rambus never explains why, consistent with basic principles of equity and fairness, it should be left free to attack the adequacy of Complaint Counsel's proof on any and all issues, despite substantial evidence showing that the universe of documentary proof available to Complaint Counsel has been substantially narrowed, and distorted, through massive amounts of spoliation. Likewise, Rambus never explains how – given "Rambus's utter failure to maintain an inventory of the . . . documents destroyed" – Complaint Counsel can be expected to establish a "nexus" between particular adverse inferences, on the one hand, and, on the other hand, specific documents that would have been available to Complaint Counsel absent the wrongful destruction. Order on Complaint Counsel's Motions for

Default Judgment and for Oral Argument ("Adverse Inference Order") at 7. Indeed, Rambus cites irrelevant cases in erroneously suggesting that Complaint Counsel has not met its burden of proof, while ignoring cases cited by Complaint Counsel which establish the appropriate standard, one that Complaint Counsel has fully satisfied. Rambus also never explains how Your Honor can "preserve the integrity" of, and "retain confidence" in, this agency's administrative litigation process if more is not done to remedy the adjudicated spoliation that has thoroughly tainted this case. *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001).

Finally, throughout its opposition, Rambus continues to deny staunchly that any improper document destruction ever occurred. In so doing, of course, Rambus brazenly disregards Judge Timony's determination that "Rambus should be barred from relitigating" in this proceeding both "its motives for its document destruction and the fact that the document destruction was done at a time when the company anticipated future JEDEC-related litigation." Order Granting Complaint Counsel's Motion for Collateral Estoppel ("Collateral Estoppel Order") at 2-3 (emphasis added). Though Rambus may wish to make continued denials of this sort, it is not entitled to do so. It has now been conclusively determined, for purposes of this proceeding, that Rambus's document destruction was undertaken "in part, for the purpose of getting rid of documents that might be harmful in litigation" involving "JEDEC-related patents." *Id.* at 5 (emphasis added). Indeed, this determination is in effect a portion of the "new evidence" that supports Complaint Counsel's request for additional adverse inferences.

In this reply memorandum, Complaint Counsel seeks to place in perspective the baseless arguments that Rambus has made in opposition to this motion, and the core arguments supporting the motion to which Rambus has failed to respond.

ARGUMENT

I. Rambus's Opposition Demonstrates That It Lacks Principled Grounds on Which to Oppose the Additional Spoliation Relief Sought by Complaint Counsel

A. Complaint Counsel Has Not Moved for Reconsideration

Signaling the weakness of its substantive points, Rambus's opposition leads with a technical argument[1] – *i.e.*, that Complaint Counsel's motion actually seeks reconsideration of Judge Timony's Adverse Inference Order, and thus should be scrutinized by the standards applicable to motions for reconsideration. Far from seeking reconsideration, however, Complaint Counsel's motion merely argues – in part based on new evidence – that additional relief is warranted to ensure that the core purposes underlying Judge Timony's Adverse Inference Order are fully vindicated as this case proceeds to trial. Although Complaint Counsel does take the opportunity in its motion to emphasize the scope of Your Honor's continuing discretion in addressing the effects of spoliation on this case – which would permit Your Honor, among other things, to impose a default judgment, should you deem such relief to be warranted – the actual relief sought by Complaint Counsel's motion is designed to build upon, not call into question, the nature of the relief that Judge Timony has already granted.

Even assuming *arguendo* that the present motion could properly be characterized as one seeking reconsideration of a prior order, Complaint Counsel submits that it has more than amply satisfied the standards applicable to such motions. As Complaint Counsel demonstrated through

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[1] The same observation could be made about Rambus's Summary Decision Reply Memorandum, the first four (of less than sixteen) pages of which is devoted to baseless accusations that Complaint Counsel has sought to amend its core allegations.

its memorandum in support of this motion ("CC Mem."),[2] unless augmented in the ways that Complaint Counsel has proposed, Judge Timony's Adverse Inference Order is not adequate to avert the manifest injustice that has been caused by Rambus's "intentional destruction of documents." Adverse Inference Order at 8. The failure, at this juncture, to impose additional inferences would have the effect of placing "the risk of an erroneous evaluation of the content of destroyed evidence" not "on the party who destroyed" such evidence, as Judge Timony intended (*id.* at 4-5), but rather upon Complaint Counsel, the victim of Rambus's spoliation. Accordingly, absent further relief, there is a very real risk of Rambus's spoliation unjustly skewing the outcome of this case.

Moreover, although Rambus works mightily to deny this, the fact is that Complaint Counsel's motion presents substantial new evidence that was not before Judge Timony when he issued his Adverse Inference Order. That evidence consists in part of newly produced documentation providing, for the first time, concrete proof of the truly monumental scale of Rambus's spoliation.[3] In addition, Complaint Counsel's motion presents new evidence – not previously presented to Judge Timony – concerning the destruction of documents maintained by Rambus's co-founder, board member, and lead inventor, Mark Horowitz.[4] Complaint Counsel's motion also presented new evidence in the form of public statements by Rambus executives commenting upon Judge Timony's ruling itself. The statements diminish the significance of that

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[2] *See* CC Mem. at 9, 13, 14, 19, 20, 28, and 37.

[3] *See* CC Mem. at 3-5.

[4] *See* CC Mem. at 7, n.12.

ruling,[5] in a way that seriously calls into question whether the adverse inferences that Judge Timony imposed are sufficient to achieve his intended purposes – including a desire to "deter" similar abuses by others. Adverse Inference Order at 4. Finally, Judge Timony's collateral estoppel ruling, which does not appear to have been taken into account in his separate ruling on the issue of adverse inferences, and as to which Rambus's motion for reconsideration has now been denied, is itself a form of "new evidence" supporting the additional relief requested by Complaint Counsel. Thus, even if Complaint Counsel's motion could properly be construed as seeking reconsideration, the applicable standards have been fully satisfied.

B. Rambus's Bad Faith Has Been Definitively Adjudicated

Ironically, though Rambus chastises Complaint Counsel for supposedly seeking reconsideration of Judge Timony's Adverse Inference Order, it is Rambus itself that seeks to have Your Honor reconsider a prior ruling. Indeed, Rambus would have Your Honor reconsider not one, but two prior rulings – namely, (1) Judge Timony's ruling that Rambus "should be barred from relitigating," among other things, the "motives for its document destruction," Collateral Estoppel Order at 2; and (2) Your Honor's subsequent ruling denying Rambus's request for reconsideration. That is, through its opposition to Complaint Counsel's motion, Rambus once again seeks to overturn Judge Timony's determination – rooted in principles of collateral estoppel – that Rambus instituted its document destruction program "in part, for the purpose of getting rid of documents that might be harmful in litigation." *Id.* at 5 (emphasis added); *see also* Adverse Inference Order at 4 ("Rambus destroyed or failed to preserve evidence for another's use in reasonably foreseeable litigation.").

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[5] *See* CC Mem. at 10-11.

Notwithstanding the fact that this Administrative Law Court has ruled that the "motives for its document destruction" cannot now be relitigated, Rambus devotes nine full pages of its opposition to arguments defending its motives, most of which Rambus appears to have been cut and pasted from earlier submissions.[6] The one thing that Rambus has conveniently excised from the otherwise verbatim repetition of its prior arguments is its earlier concession that "bad faith" in this context can be established conclusively by proof "that Rambus destroyed the documents in question 'intend[ing] to prevent use of the evidence in litigation.'" Rambus's Opposition to Complaint Counsel's Motion for a Default Judgment ("Rambus DJ Opp.") at 18 (citations omitted). Rambus omits that point for an obvious reason – *i.e.*, because Judge Timony has since determined that this, at least in part, is what Rambus intended, and it is now "barred from relitigating the question." Collateral Estoppel Order at 2 (emphasis added).

C. By Challenging the Sufficiency of Complaint Counsel's Proof and the Relevancy of Destroyed Documents, Rambus Demonstrates the Very Evil That Additional Adverse Inferences Are Meant to Avoid

Insofar as its opposition introduces substantive arguments, Rambus relies heavily on the contention that Complaint Counsel has failed to substantiate the link between the proposed adverse inferences and "specific evidence [that] was not preserved." Opposition of Respondent Rambus Inc. to Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief Necessary to Remedy Rambus Inc.'s Intentional Spoliation of Evidence

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[6] It bears repeating that these arguments remain fraught with the same mischaracterizations as when Rambus initially posed them. For example, the very sources that Rambus cites to suggest that its policy was legitimate and typical counsel strongly in favor of two practices that Rambus plainly did not follow: (1) the preservation of documents relevant to foreseeable litigation, and (2) the maintenance of an inventory of destroyed documents. *See* Complaint Counsel's Reply to Respondent Rambus Inc.'s Memorandum in Opposition to Motion for Default Judgment (filed January 27, 2003) at 9, n.3.

("Rambus Opp.") at 19.[7] As demonstrated below, this line of reasoning merely serves to underscore the need for additional adverse inferences. That is, it exemplifies the very sort of argument that Rambus, having engaged in "intentional destruction of documents" (Adverse Inference Order at 8) should not be permitted to make, for it is an argument that derives its strength from the very nature of Rambus's wrongdoing. There is every reason to fear that Rambus's spoliation has deprived Complaint Counsel of material evidence. Under such circumstances, only by granting additional sanctions can Your Honor minimize Rambus's ability to advance its litigation interests through precisely this kind of illegitimate challenge to the adequacy of Complaint Counsel's proof.

1. The Evidence Supporting the Proposed Inferences Amply Satisfies Complaint Counsel's Burden

Rambus predicates its causation argument on a series of inapposite cases – cases in which the evidence that had been destroyed was readily apparent. *See, e.g., Dillon v. Nisson Motor Co.*, 986 F.2d 263 (8th Cir. 1993) (one car destroyed); *Applied Telematics, Inc. v. Sprint Communications*, 1996 U.S. Dist. LEXIS 14053 (E.D. Pa. 1996) (specific routing plans destroyed); *Donais v. United States*, 1997 U.S. Dist. LEXIS 14509 (N.D. Ill. 1997) (medical records for one patient destroyed). The situation here is far from comparable. As Judge Timony stated, Rambus's "utter failure to maintain an inventory of the documents its employees destroyed makes it impossible to discern the exact nature of the relevance of the documents

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[7] *See also* Rambus Opp. at 15; Rambus Opp., Attachment A, Rambus's Response to Complaint Counsel's Proposed Adverse Inference Number ("Resp. to Inf. No.") 2 ("There is no reason to think that documents not preserved contained information that would shed light on this issue."); Resp. to Inf. No. 16 ("There is no evidence that all of Rambus's JEDEC-related documents have not been produced."); Resp. to Inf. No. 99.

destroyed to the instant matter." Adverse Inference Order at 7 (emphasis added).

As we have previously explained, this is not the first case in which the party adversely affected by its opponent's wrongful document destruction has – by virtue of the spoliation – been deprived not only of evidence upon which to predicate its claims, but also evidence showing what was destroyed. In dealing with such situations, the courts have been very clear in holding that the wronged party should be afforded due deference in crafting appropriate inferences. To restate the relevant holding of *Kronisch v. U.S.*:

> Where, as here, a party loses the opportunity to identify . . . documents likely to contain critical evidence because the voluminous files that might contain the document(s) have all been destroyed, . . . the prejudiced party may be permitted an inference in his favor so long as he has produced **some evidence** suggesting that a document or documents relevant to substantiating his claims would have been included among the destroyed files.

150 F.3d 112, 128 (2d Cir. 1998) (emphasis added). *See also* CC Mem. at 22-24.

Complaint Counsel's showing far exceeds what is required. The proof as to the nature and scope of Rambus's document destruction and the specific categories of evidence it impacted amply demonstrates the need generally for substantially more adverse inferences broadly extending across all affected categories of evidence, and specifically for the inferences proposed. Through painstaking efforts to piece together bits of sworn testimony by Rambus officials and scattered references in Rambus documents that somehow survived the destruction efforts, Complaint Counsel has not merely met, but far exceeded, any reasonable standard of proof for sustaining the proposed inferences. *See* CC Mem. at 24-29. Though the scope of the requested inferences is broad, those inferences are designed to address the equally pervasive scope of

Rambus's spoliation.[8]

2. Rambus Seeks to Have Complaint Counsel Prove the Impossible

Obviously, in justifying the imposition of additional adverse inferences, Complaint Counsel cannot be required to prove the impossible. Yet that is precisely the requirement Rambus is seeking. Rambus would have Your Honor require Complaint Counsel to supply direct evidence proving that specific documents, material to this case, were destroyed, and that the substance of the destroyed documents was not reflected in other evidence that survived Rambus's document "retention" policy.

Indeed, Rambus threads this line of flawed reasoning throughout its responses to the proposed adverse inferences. *See, e.g.,* Resp. to Inf. No. 2 ("There is no reason to think that documents not preserved contained information that would shed light on this issue.");[9] *see also* Resp. to Inf. Nos. 1, 3, 8, 9, 10, 13, 15-17, 19, 20, 39, 41-45, 72-89, 96, 99-100 (essentially asserting that all relevant evidence on various topics has been produced); Resp. to Inf. No. 16 ("There is no evidence that all of Rambus's JEDEC-related documents have not been produced.").[10] This kind of argument demonstrates the fundamental dilemma that now confronts

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[8] Significantly, courts have found that it constitutes "error . . . not to draw factual inferences adverse to the [spoliator] on matters undertaken in or through offices and individuals involved in the destruction of documents." *Alexander v. Nat'l. Farmers Org.*, 687 F.2d 1173, 1205-06 (8th Cir. 1982) (emphasis added). *See also Nat'l Assoc. of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557 (N.D. Cal. 1987) (quoting *Alexander*). Rambus has already admitted that each of its employees, officers, and directors generally destroyed documents generated in the ordinary course of business. *See* Rambus DJ Opp. at 5. Accordingly, broad-based inferences are not merely appropriate, but required.

[9] S*ee also* Resp. to Inf. Nos. 18, 20, 21, 25, 31, 33-36, 38, 40, 45, 99-100.

[10] We note, however, that in addition to the fact that Complaint Counsel has produced

(continued...)

Complaint Counsel, and indirectly Your Honor as well. As Judge Timony found, it is "impossible" to know with absolute certainty or precision what Rambus destroyed, or to assure ourselves that the destroyed files did not contain documents supporting our claims. On the other hand, such uncertainties are a direct function of Rambus's wrongdoing, and the consequences of such uncertainties should not – indeed cannot – be held against Complaint Counsel. Paraphrasing the holding in *Kronisch*, requiring Complaint Counsel to meet "too strict a standard of proof regarding the contents of the documents" would allow Rambus "who [has] intentionally destroyed evidence to profit from that destruction." *Kronisch*, 150 F.3d at 128.

3. Rambus Should Not Be Permitted to Concoct Exculpatory Claims Regarding the Destroyed Documents

Finally, we would note that Rambus is trying to have its cake and eat it too. At the same time it bandies about accusations as to Complaint Counsel's inability to identify with precision specific documents that may have fallen victim to Rambus's document destruction campaign, Rambus takes the liberty to fabricate out of thin air assurances that nothing of material significance to the issues in this case was destroyed. For example, Rambus now posits – based on no proof – that the documents it destroyed amounted to nothing more than "irrelevant and unneeded paper" (Rambus Opp. at 3), such as "simulation results" and "old telephone books" (*id.* at 18). Not only does Rambus lack any support for these speculative assurances, but in making such claims, it ignores the fact that Judge Timony has already imposed a contrary inference –

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[10](...continued)
sufficient evidence to support each proposed inference, Complaint Counsel has produced particularly compelling evidence demonstrating that Rambus did destroy JEDEC-related documents. *See, e.g.*, the repeated admissions by Richard Crisp, Rambus's JEDEC representative, that he destroyed "anything [he] had on paper," including JEDEC material. Crisp Dep. (4/13/01) at 841:8-843:7, *Rambus v. Infineon.* **[Tab 1]**

namely, that Rambus destroyed documents "relevant to possible litigation." Adverse Inference Order at 8. Rambus will be required to produce something more than mere speculation if it hopes to overcome this inference, especially in light of the substantial, direct evidence showing that Rambus's spoliation did result in the elimination of pertinent evidence.[11]

Similarly, Rambus is trying to exploit the absence of evidence it destroyed by simply denying assertions as to its motivations and strategies. Indeed, its standard response to Complaint Counsel's proposed adverse inferences concerning Rambus's subjective beliefs is: "This is not true." *See* Resp. to Inf. Nos. 6, 7, 9, 11, 14, 22-24, 26-31, 33-36, 38, 47-71, 76-83, 90, 93-95, 98-100.[12] Again, Rambus's response typifies the unjust challenge facing Complaint Counsel – how can we be expected to rebut such denials when Rambus likely destroyed all evidence to the contrary?

Only Rambus had control over what was destroyed and whether it was inventoried. As Mark Horowitz, Rambus's co-founder, board member, and lead inventor, stated, Rambus "pulled out the stuff that they thought was essential, and shredded the rest." Horowitz Dep. (1/20/01) at

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[11] *See, e.g.,* ********** ********** ********** **[Tab 2]** October 28, 1999, E-Mail from Crisp (R221422) **[Tab 3]** (Rambus destroyed DDR datasheets which it used as a reference when drafting new patent claims intended to cover aspects of the JEDEC standards); Roberts Dep. (2/25/03) at 252:10-253:9, *FTC v. Rambus* **[Tab 4]** (Rambus destroyed discoverable material); *see generally* Memorandum in Support of Complaint Counsel's Motion for Default Judgment at 63-69 (detailing relevant categories of documents that Rambus destroyed).

[12] Another equally inappropriate set of responses argues that evidence produced by third parties obviates the need for certain inferences. *See, e.g.,* Resp. to Inf. Nos. 39, 65-69, 71, 91, 96, 99-100. However, each of the inferences proposed by Complaint Counsel goes only to Rambus's state of mind and strategy. Such third-party evidence would be insufficient to support a proposition that may have been easily proved through the documents Rambus destroyed. Accordingly, these inferences are warranted.

29:16-18, *Rambus v. Infineon*. **[Tab 5]** Thus, not only did Rambus destroy massive amounts of potentially harmful evidence, but it kept the documents that it deemed to be helpful.[13] It should come as no surprise, then, that John Danforth, Rambus's General Counsel, in a statement to the media shortly after Judge Timony's adverse inferences ruling, boasted that Rambus has "got the evidence" to support its case.[14]

After "getting rid of" evidence it feared would be "harmful in litigation" and strategically keeping no inventory of what was destroyed, for Rambus to challenge Complaint Counsel's proof of the contents of the destroyed documents, assert that nothing harmful to its case was destroyed, and then boast of exculpatory evidence it intentionally saved is fundamentally offensive to basic principles of justice and simply should not be allowed. Only through, at a minimum, additional relief of the sort that Complaint Counsel has requested can Your Honor bring a semblance of order and fairness to this proceeding.

D. Rambus Ignores the Sound Law and Policy Reasons Mandating That It Rebut the Adverse Inferences by Clear and Convincing Evidence

Case law and common sense dictate that Rambus may rebut adverse presumptions only by clear and convincing evidence. As explained in the memorandum supporting Complaint Counsel's present motion,"the policies underlying a particular presumption govern the measure of persuasion required to escape its effect." *Breeden v. Weinberger*, 493 F.2d 1002, 1006 (4th Cir. 1974); *see* CC Mem. at 30-31. Of course, the policy rationale for imposing adverse

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[13] *See* Memorandum in Support of Complaint Counsel's Motion for Default Judgment at 69-71 (explaining that, while Rambus destroyed evidence it feared would be potentially harmful in litigation, it sought to preserve self-serving evidence).

[14] *See* CC Mem. Tab 8, Peter Kaplan, "U.S. Judge Hits Rambus Over Document Destruction," REUTERS (Mar. 5, 2003).

presumptions as a spoliation sanction – quite literally, preservation of the rule of law – could not be more critical. Accordingly, adverse presumptions imposed to remedy spoliation warrant a high burden of proof. Indeed, in numerous spoliation cases, the imposition of adverse presumptions even with the strictest rebuttal standard has been deemed an inadequate sanction, leading courts to impose default judgments. *E.g.*, *Computer Associates International, Inc. v. American Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 131-137 (S.D. Fla. 1987); *Wm. T. Thompson v. General Nutrition Corp.*, 593 F. Supp. 1443, 1456 (C.D. Cal. 1984); *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 488-89 (S.D. Fla. 1984); *In re Wechsler*, 121 F. Supp. 2d 404, 429 (D. Del. 2000); *Webb v. District of Columbia*, 189 F.R.D. 180, 191-92 (D.D.C. 1999); *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593-94 (4th Cir. 2001); *Cabinetware Inc. v. Sullivan*, 1991 WL 327959 (E.D. Cal. 1991).[15] Thus, the appropriateness of Your Honor sanctioning Rambus for its spoliation of evidence with something more than easily rebuttable adverse presumptions is well-rooted in case law. It is also, of course, well justified in light of the facts at issue here. In these circumstances, allowing Rambus to rebut the adverse presumptions with anything less than clear-and-convincing evidence would seriously undermine the purposes for which adverse inferences have been imposed.

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[15] Rambus cites no authority discussing the appropriate standard for rebutting adverse presumptions imposed as a sanction for obstruction of justice. The cases and authorities that Rambus does cite involve non-analogous, and easily distinguishable facts. *See e.g. A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020 (Fed. Cir. 1992) (presumption of laches unrelated to document destruction); *In the Matter of Novartis Corp.*, 1999 FTC LEXIS 63 (1999) (presumption of materiality unrelated to document destruction); *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990) (presumption of anticompetitive effects unrelated to document destruction).

E. The Constitution Does Not Protect Spoliators from Appropriate Sanctions

Once again, Rambus has resorted to feeble constitutional arguments in an effort to defend its wrongful misconduct,[16] ignoring that a court of law has found conclusively that its practices amounted to an obstruction of justice, a punishable offense.

Rambus starts by making a vague allegation that Complaint Counsel's request for additional adverse inferences somehow "run[s] afoul of the Fifth Amendment." Rambus Opp. at 20. Although it is unclear, given that Rambus fails to offer the slightest explanation or argument, we presume that Rambus is contending that Complaint Counsel's request for additional sanctions somehow violates due process. Yet, assuming this indeed is what Rambus means to contend, any such assertion is baseless for two reasons. First, each of the Fifth Amendment cases cited by Rambus involves the dismissal of a claim. The imposition of additional adverse inferences to remedy Rambus's obstruction of justice, which is all that Complaint Counsel presently seeks, is hardly akin to complete dismissal. Second, even a dismissal would not violate Rambus's due process rights. Several Supreme Court cases, including one cited by Rambus, hold that dismissal as a spoliation or discovery sanction does not offend due process. *See, e.g., Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

Rambus's second constitutional argument, that Complaint Counsel "seek[s] to punish" Rambus for speaking to the media about this case, is equally unfounded. Rambus Opp. at 20.

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[16] *See* Memorandum in Support of Respondent Rambus's Motion for Summary Decision at 13, 36 (reserving First Amendment defense).

Complaint Counsel accurately quoted Rambus's public comments to illustrate that Rambus viewed Judge Timony's Adverse Inference Order as a mere slap on the wrist. Rambus now attempts to disown the public statements of its corporate officers by arguing that press reports are "unreliable" and "hearsay." Rambus Opp. at 21, n.16. However, several of the news articles cited by Complaint Counsel quoted directly from Rambus's own press release, which stated that Rambus was "pleased" by Judge Timony's sanctions ruling. Rambus Press Release, *FTC Judge Issues Rulings, Denies Motion for Default Judgment*, March 5, 2003 (emphasis added). **[Tab 6]** Complaint Counsel does not seek to "punish" Rambus for its public statements, but rather to ensure that Your Honor is aware of how favorably Rambus views the adverse inferences imposed by Judge Timony. Indeed, as important as how Rambus views these sanctions is how others view them. If the existing sanctions are so mild as to warrant Rambus making dismissive public statements of the sort we have highlighted, it is difficult to imagine that such sanctions will serve Judge Timony's purpose to "deter [other] parties from destroying evidence." Adverse Inference Order at 4. In short, Rambus's attempt to use the Constitution to shield its misconduct from appropriate sanctions is an insult to our judicial system, which favors fair proceedings untainted by the spoliation of evidence.

F. Rambus's Personal Attacks Against Complaint Counsel Are Wholly Unwarranted and Inappropriate

Finally, Rambus presents as a prong of its defense an assertion that one of Complaint Counsel's lead attorneys, Mr. Royall, made false and "misleading" statements to the press regarding Judge Timony's Adverse Inference Order. Rambus Opp. at 22. Rambus also appears to accuse Mr. Royall of having some responsibility for an ensuing drop in Rambus's stock price.

Id. These assertions are outrageous and merely expose the lengths to which Rambus will go in an effort to evade just sanctions for its misconduct.

In reality, the only statement by Mr. Royall quoted in the article Rambus draws attention to was a fully accurate one – namely, that Judge Timony's adverse inferences ruling sends "an appropriate signal that spoliation of evidence will not be tolerated in an FTC administrative proceeding any more than it is in state or federal court litigation." Rambus Opp., Tab 10. As for the overall accuracy of the article itself, obviously this is not something for which Mr. Royall can be held accountable, any more than Rambus's officers can be assumed to agree with (or be responsible for) every word in the dozens of similar articles in which they were quoted. Finally, we note that Rambus's inappropriate and baseless attack on Mr. Royall is itself misleading. According to Rambus, the article it attaches as Tab 10 to its opposition memorandum was published "[w]ithin minutes of Judge Timony's ruling being issued." Rambus Opp. at 22. In truth, that article – dated March 5 – post-dated by a full week the issuance of Judge Timony's February 26th Adverse Inference Order.

II. Rambus Did Not, and Cannot, Rebut Complaint Counsel's Core Arguments

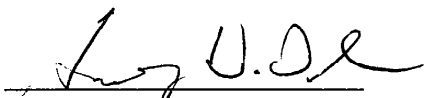
Rambus's opposition memorandum reiterates verbatim arguments that Judge Timony rejected, raises frivolous constitutional defenses, cites irrelevant cases, and launches a personal attack on an FTC attorney. More telling than what Rambus does say, however, is what Rambus does not say – in particular, the fact that Rambus says nothing to rebut Complaint Counsel's core arguments. Rambus, for instance, has made no attempt to rebut Complaint Counsel's showing that the limited adverse inferences imposed by Judge Timony are inadequate to punish Rambus's intentional "spoliation of evidence," deter others from similar wrongdoing, or achieve a more

equitable evidentiary balance in this case. Rambus does not even attempt to address the real concern, as set out in Complaint Counsel's memorandum, that this case simply cannot be allowed to proceed in a manner that might permit the outcome to be skewed in favor of the spoliator, thereby rewarding Rambus for its destruction of massive amounts of discoverable material. Finally, Rambus simply ignores Complaint Counsel's argument that allowing Rambus to escape with a mild rebuke would send the wrong message to future spoliators and would profoundly frustrate the adjudicatory process of this agency, creating the impression that obstruction of justice, through intentional destruction of evidence, will be tolerated by the FTC. Rambus's failure, and apparent inability, to respond to these core arguments is tantamount to a concession that the facts and the law mandate the imposition of further sanctions, of the very sort that Complaint Counsel has requested.

CONCLUSION

For the reasons stated herein and in Complaint Counsel's earlier submissions supporting its Motion for Additional Adverse Inferences and Other Appropriate Relief Necessary to Remedy Rambus Inc.'s Intentional Spoliation of Evidence, we respectfully request that Your Honor grant the Motion and enter an order in the form that Complaint Counsel has proposed.

Respectfully submitted,



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Dated: April 10, 2003

CERTIFICATE OF SERVICE

I, Beverly A. Dodson, hereby certify that on April 15, 2003, I caused a copy of the attached, *Reply In Support Of Complaint Counsel's Motion For Additional Adverse Inferences And Other Appropriate Relief Necessary To Remedy Rambus Inc.'s Intentional Spoliation Of Evidence* (public version), to be served upon the following persons:

by hand delivery to:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

and by electronic transmission and overnight courier to:

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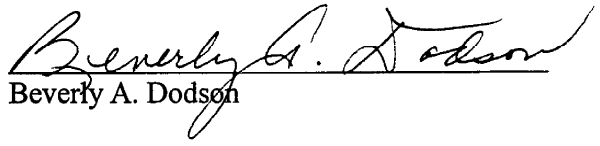

Beverly A. Dodson