**PUBLIC**

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

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| **COMMISSIONERS:** | **Deborah Platt Majoras, Chairman**<br>**Orson Swindle**<br>**Thomas B. Leary**<br>**Pamela Jones Harbour**<br>**Jon Leibowitz** |

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| **In the Matter of**<br><br>**RAMBUS INCORPORATED,**<br><br>**a corporation.** | ) | **Docket No. 9302** |

**OPPOSITION OF RAMBUS INC. TO COMPLAINT COUNSEL'S MOTION TO COMPEL PRODUCTION OF, AND TO REOPEN THE RECORD TO ADMIT, DOCUMENTS RELATING TO RESPONDENT RAMBUS INC.'S SPOLIATION OF EVIDENCE**

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## INTRODUCTION

Complaint Counsel's motion is both legally flawed and procedurally improper. Specifically, the motion rests on several fundamental misunderstandings of the doctrine of collateral estoppel. Once those misunderstandings are corrected, it becomes clear that the District Court decisions at issue here in no way bind Rambus in this proceeding. Moreover, Complaint Counsel is improperly seeking to use this motion as a way to initiate challenges to ALJ decisions that, by its own admission, it had previously foregone. Regret over the natural consequences of strategic decisions cannot substitute for the showing of diligence required to justify reopening of the record at this late stage of the proceeding.

This motion involves yet another attempt by Complaint Counsel to derive a procedural advantage from mere allegations surrounding Rambus's document retention policy. In late 2002, Complaint Counsel went so far as to seek a default judgment against Rambus based on the identical allegations at issue here, namely that, by means of Rambus's document retention policy, the company had destroyed evidence that was potentially relevant in this proceeding. (These allegations were largely recycled from the 2001 district court trial between Infineon and Rambus.) Complaint Counsel then seized on certain statements made by Rambus in resisting that motion and construed them as a selective waiver of Rambus's attorney-client privilege. Complaint Counsel accordingly contended that Rambus had waived its privilege surrounding its adoption and implementation of its document retention program.

Both efforts failed. Judge Timony, then assigned to the case, denied Complaint Counsel's motion for default judgment. Instead, he imposed several rebuttable adverse inferences on Rambus. *Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument* 2, 8-9 (Feb. 26, 2003) ("Feb. 26, 2003 Order"). He also rejected Complaint

Counsel's request to compel production of Rambus's privileged documents on the ground that it had waived its privilege on the document retention program.

After trial, Complaint Counsel lost even the limited remedy it had obtained from Judge Timony. Judge McGuire, who took the case upon Judge Timony's retirement, found after an exhaustive trial and development of a full record that "there is no indication that any documents, relevant and material to the disposition of the issues in this case, were destroyed." *In re Rambus Inc.*, Initial Decision, Docket No. 9302, at 244 (Feb. 23, 2004) ("Initial Decision"). Accordingly, he found no inferences warranted. Critically, Complaint Counsel did not appeal either determination: Judge Timony's refusal to compel disclosure of Rambus's privileged documents on a waiver theory or Judge McGuire's determination that Rambus had not been shown to have destroyed any relevant documents and therefore should not be sanctioned.

In the meantime, the District Court considering the patent litigation between Rambus and Infineon issued orders compelling Rambus to disclose the privileged documents surrounding its document retention program on the same two bases previously advanced by Complaint Counsel: spoliation and waiver based on Rambus's defenses before the FTC. In making these determinations, the District Court did not follow the procedures established by the Supreme Court for piercing a party's privilege and consequently did not afford Rambus an opportunity to be heard fully on the Court's factual determinations, many of which were demonstrably wrong. Moreover, in reaching its conclusions on spoliation, the District Court relied on Judge Timony's superseded findings (in support of his imposition of adverse inferences) and failed to note that those findings had been replaced by Judge McGuire's findings after trial. *See Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 280, 292, 296 (E.D. Va. 2004). Rambus's efforts to secure a writ of mandamus from the Federal Circuit were unsuccessful: over a strenuous dissent, that

court held only that Rambus had not met the exacting mandamus requirement (much stricter than on direct review) of showing that the challenged orders were "clearly and indisputably incorrect" as to both facts and law. *In re Rambus, Inc.*, Misc. Docket No. 772, at 2 (Fed. Cir. Aug. 18, 2004) ("Fed. Cir. Op.").

Based on the District Court's decisions, Complaint Counsel now seeks what it could not obtain from this Commission's ALJs and what it chose for strategic reasons not to seek from this Commission on appeal: compelled production of Rambus's privileged documents relating to its document retention program. Complaint Counsel does not even purport to make any independent showing as to its entitlement to these privileged documents, instead relying exclusively on a theory of "collateral estoppel" to which it devotes a mere paragraph in its brief. Complaint Counsel contends that because Rambus was forced to divulge these documents in the District Court, it *ipso facto* must be forced to do the same here. This glib argument rests on a serious misunderstanding of collateral estoppel law and should be rejected.

Judicial decisions have preclusive effect only if they are final and therefore had been subject to meaningful judicial review. The law is clear that collateral estoppel does not attach to the myriad pre-trial decisions made by a district court, all of which are subject to change before final judgment and nearly all of which are not subject to interlocutory appellate review. The sole case cited by Complaint Counsel in support of its theory of collateral estoppel well illustrates this principle. Although the decision at issue there was technically interlocutory, the appellate court reviewing it on mandamus chose to reach the merits of the decision, as if on normal appeal, and affirm it. The decision was therefore effectively final and had been subject to meaningful review by a higher court. Here, by contrast, the Federal Circuit explicitly did not review the correctness

of the District Court's ruling as it would have on appeal, instead determining only that Rambus had failed to clear the high hurdle erected by the mandamus standard of review.

Complaint Counsel's collateral estoppel theory is infected with two other independent errors. When contradictory decisions address the same point, collateral estoppel attaches to neither. Here, both decisions by the District Court squarely contradict decisions by FTC ALJs on (i) whether Rambus destroyed any relevant documents and (ii) whether Rambus waived its privilege in these proceedings. As explained herein, there is no reason to have any greater confidence in the District Court's determinations than in the ALJs', and it would be nonsensical and legally erroneous to transport the later decisions back in time to "collaterally estop" the earlier ones. This defect in Complaint Counsel's theory is especially patent in this case, where Complaint Counsel chose not to appeal either determination that it now seeks collaterally to attack.

Further, it is black-letter law that the District Court's purely legal conclusion – that the crime-fraud exception to the attorney-client privilege extends to "spoliation" that is neither criminal nor fraudulent – is not entitled to preclusive effect. This Commission therefore is entitled to make its own decision on this critical legal question, and it should decline Complaint Counsel's invitation to adopt the District Court's ill-advised rule. As explained by Judge Gajarsa of the Federal Circuit, piercing the privilege on this basis will chill the willingness of firms that adopt document retention policies (which are ubiquitous) to seek legal advice on how to do so properly.

In addition to being legally flawed, Complaint Counsel's motion is procedurally irregular. A party is permitted to reopen the record only if it acted diligently in trying to provide the additional evidence through regular means. *See In re Brake Guard Prods., Inc.*, 125 F.T.C.

138, 248 n.38 (1998). Here, Complaint Counsel cannot make that showing, given its failure to appeal the relevant rulings of the ALJs. Having made this strategic choice, Complaint Counsel should not now be permitted to undo it by means of this motion. This is especially so when Complaint Counsel insists that the documents it seeks are not actually necessary for resolution of the issues on appeal.

Finally, for all the same reasons, no *in camera* review of Rambus's privileged documents is warranted. Complaint Counsel has not even attempted to make the *prima facie* showing that the Supreme Court requires before such a review may be conducted. Moreover, since the crime-fraud exception properly understood does not extend to spoliation, no such *prima facie* showing could be made in this case.

## BACKGROUND

### I. FTC Proceedings on Rambus's Document Retention Policy.

A. The February 26, 2003 Orders. In December 2002, Complaint Counsel asked Judge Timony to impose a default judgment against Rambus based on the identical theory of "spoliation" it invokes here. Specifically, Complaint Counsel contended that "Rambus instituted a sham corporate document retention policy that was in fact nothing but an intentional wholesale house-cleaning of corporate documents." Feb. 26, 2003 Order at 2. (Like Complaint Counsel's present motion, this one was also derivative, as it was based in part on allegations arising out of the district court litigation between Rambus and Infineon.) Then, in January 2003, Complaint Counsel sought the identical relief it seeks here, namely compelled discovery "on the subject matters of [Rambus's] 'document retention' program," on the theory that Rambus had waived its privilege by invoking advice of counsel to defend itself before the FTC. *See* Complaint Counsel's Motion to Compel Discovery Relating to Rambus's Document Destruction 2 (Jan. 31,

2003); *see also* Motion to Compel Production of, and to Reopen the Record to Admit, Documents Relating to Respondent Rambus Inc.'s Spoliation of Evidence 4 n.3 (Jul. 2, 2004) ("Complaint Counsel Mot.") (acknowledging that the January 2003 motion to compel discovery "sought to compel production of the same documents that are now to be produced pursuant to Judge Payne's orders").

Judge Timony denied both motions. First, he found Complaint Counsel's request for a default judgment to be "inappropriate and unjustified," and concluded that they had failed to prove that Rambus's document retention policy was "nothing more than a sham." Feb. 26, 2003 Order at 5, 8. He did, however, conclude that Rambus had "acted with gross negligence concerning and reckless disregard of its obligations to preserve documents relevant to possible litigation" and that "*[w]hat evidence is available* indicates that at least some of the documents destroyed were relevant to RAM-related litigation." *Id.* at 7, 8 (emphasis added). Judge Timony accordingly established seven rebuttable adverse presumptions against Rambus. *See id.* at 9.

On the same day, Judge Timony denied Complaint Counsel's request to compel discovery of privileged documents related to Rambus's document retention policy on the theory of subject matter waiver. He concluded that, given his establishment of adverse inferences, discovery on the topic "would not materially advance the dispositive issues in this case." *Order Denying Complaint Counsel's Motion to Compel Discovery Relating to Rambus's Document Destruction* 1 (Feb. 26, 2003).

The April 15, 2003 Order. After Judge Timony retired and the case was transferred to Judge McGuire, Complaint Counsel moved for imposition of an additional "100 (*not* including subparts) adverse inferences" against Rambus. *Order Denying Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief* 1 (Apr. 15, 2003). Complaint

Counsel based this motion on "the purported discovery of new evidence," namely two e-mails that "confirm that a large volume of documents . . . were destroyed" by Rambus on September 3, 1998, and that indicated the company served refreshments to employees after they completed their shredding that day. *See id.* at 3. Judge McGuire concluded, however, that these e-mails "provide[d] no new insight on the facts of this matter" because they did not "address the motivation for [Rambus's] destruction of these documents." *Id.*

Judge McGuire nonetheless noted that he had "significant and ongoing concerns" about Rambus's implementation of its document retention policy. *Id.* at 4. He remained convinced, however, that "the existing sanctions fit *the current record*." *Id.* (emphasis added). That tentative conclusion was explicitly subject to change: "It is the expectation of the Court . . . that the whole issue of the effect of spoliation will become clearer *with the advantage of a fully developed record*." *Id.* (emphasis added). Specifically,

> [s]hould the record developed at trial indicate: (1) that Respondent specifically intended to destroy documents in an effort to assist in its defense strategies; or (2) that Respondent's intentional spoliation of evidence through an otherwise legitimate document retention policy was of such a significant magnitude that Complaint Counsel cannot make its case due to Respondent's *presumptive* reckless destruction of documents and (due to the lack of any document inventory) it is impossible to determine specifically what was destroyed, then the Court may need to revisit the appropriateness of and necessity for sanctions above and beyond those [previously] provided.

*Id.* at 5 n.2.

The February 23, 2004 Initial Decision. True to his word, Judge McGuire did revisit the question of spoliation once he had "the advantage of a fully developed record," *id.* at 4. That record was based on a 54-day hearing that featured 44 witnesses, a 12,000-page trial transcript, and 1,770 admitted exhibits. Initial Decision at 4. After considering all the evidence, Judge McGuire concluded that Rambus's document destruction "d[id] not warrant the Court's continued attention." *Id.* at 244. To be sure, he still found Rambus's conduct "troublesome" and

said it might warrant sanctions if the case involved different causes of action. *See id.* Given the case that Complaint Counsel had advanced, however, Judge McGuire concluded that "the process here has not been prejudiced as there is *no indication that any documents, relevant and material to the disposition of the issues in this case, were destroyed*." *Id.* (emphasis added). In fact, as the Judge noted, Complaint Counsel had conceded that the record in the case "shows 'an unusual degree of visibility into the precise nature of Rambus's conduct.'" *Id.* He accordingly did not impose any of the adverse inferences Judge Timony had established based on the "evidence . . . available" to him at the earlier stage of the proceedings. Feb. 26, 2003 Order at 7-8; Initial Decision at 244.[1]

As Complaint Counsel acknowledges, it did not appeal Judge McGuire's decision on this point, concluding it was unrelated to the "merits" of the case. Complaint Counsel Mot. at 13. Nor did Complaint Counsel appeal Judge Timony's denial of its motion to compel production of the privileged documents on a waiver theory. *See id.* Moreover, in its current motion, Complaint Counsel makes no showing that the documents it seeks are necessary to disposition of its appeal; to the contrary, it asserts they are unnecessary. *See id.* at 2 n.2.

**II. District Court Proceedings.**

On January 5, 2004 – nearly two months before Judge McGuire's Initial Decision – Infineon moved in the District Court to compel production of Rambus's privileged documents regarding its document retention program on the theory that the documents were integral to a scheme of "spoliation" and were therefore discoverable under the crime-fraud exception to the attorney-client privilege. Memorandum in Support of Infineon's Motion to Compel Production

[1] Additionally, Judge McGuire found the inferences immaterial to his decision in the case. *See* Initial Decision at 244-45.

of Documents and Testimony Relating to Rambus's Document Retention, Collection and Production (Jan. 5, 2004) ("Infineon Mem."). In support of its motion, Infineon relied almost exclusively on two sources: Judge Timony's February 26, 2003 adverse inference order, *see id.* at 7-8 ("The FTC Has Already Sanctioned Rambus For Intentionally Destroying Evidence"), and Complaint Counsel's subsequent motion for imposition of additional adverse inferences, *see id.* at 4; *see also supra* at p. 6.

For example, as support for the proposition that Rambus had destroyed "relevant" documents, Infineon cited Complaint Counsel's brief in support of that motion, supplemented only by citation to two depositions taken *in 2001*. Infineon Mem. at 4. Infineon also placed critical reliance on the same two e-mails discussing a 1998 "Shred Day" at Rambus that Complaint Counsel had used in its failed attempt to impose additional adverse inferences on Infineon. *Compare id.* at 3-4 *with supra* at p. 6. In another motion filed at the same time, Infineon contended that Rambus had waived its privileges because, Infineon alleged, a number of entries on Rambus's privilege log were insufficiently descriptive.

On January 28, 2004, before the motions were argued, the District Court ordered Rambus to deliver *all* of its privileged documents to the Court's chambers within 48 hours for an *in camera* review, even though Infineon had not challenged the status of thousands of those documents. *See* Opposition Exh. A. The asserted purpose of that *in camera* review, at least initially, was to evaluate the adequacy of the descriptions on Rambus's privilege log. After conducting the *in camera* review, the Court declined to rule that Rambus had waived its privileges, but directed Rambus to submit a revised log. *See* Opposition Exh. B (Feb. 26, 2004 order).

At the same time, the Court announced *sua sponte* that it would conduct an *in camera* review of all of Rambus's privileged documents to determine whether to pierce Rambus's privileges based on Infineon's spoliation allegations. *See id*. at 58-59. Infineon had not requested such an *in camera* review to determine whether the crime-fraud exception applied, as required by *United States v. Zolin*, 491 U.S. 554 (1989). The District Court stated, however, that it decided to conduct that *in camera* review based on its examination of "several" privileged documents "as part of the effort to ascertain the adequacy of Rambus' privilege log[.]" Opposition Exh. B at 57-58.

In the two May 2004 decisions relied upon by Complaint Counsel here, the District Court granted Infineon's motion to compel production of privileged documents related to the inception and implementation of Rambus's document retention policy. *See Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 280 (E.D. Va. 2004); *Rambus, Inc. v. Infineon Techs. AG*, No. 3:00cv524 (E.D. Va. May 18, 2004) (Attachment B to Complaint Counsel Mot.). It did so on both a waiver theory and on the view that it could pierce Rambus's privilege as to these documents because they "bear a close relationship to Rambus' scheme to engage in spoliation." 222 F.R.D. at 296.[2] In making its determination, the District Court never afforded Rambus an opportunity (despite Rambus's requests) to correct the Court's erroneous factual assumptions as to individual documents and therefore demonstrate why Rambus's privilege should not be waived with respect to these documents.

[2] Infineon sought the documents in support of its claim under California's unfair competition statute, Cal. Bus. & Prof. Code § 17200, which rests in part on the allegation that Rambus's "spoliation of documents [was] a key ingredient for planned patent litigation." *Rambus*, 222 F.R.D. at 284.

Critically, in reaching its conclusion on "spoliation", the District Court relied heavily on *Judge Timony's superseded findings*, without ever acknowledging Judge McGuire's contrary, post-trial decision based on a full record. *See id.* at 292 (quoting Feb. 26, 2003 Order at 6); *see also id.* at 296 (same). Rambus had informed the District Court that the conclusions of Judge Timony's preliminary decision were no longer valid, but the Court nonetheless persisted in its reliance on the superseded preliminary decision.

Moreover, the District Court acknowledged that the record before it was "incomplete about the kinds of documents that were destroyed." *Id.* at 297. It nonetheless noted that "[t]he destroyed documents appear to have included many *of the kinds* of documents usually generated in the course of business" and that they therefore generally would have "contain[ed] information that is useful in ascertaining truth and in testing the validity of positions taken in litigation." *Id.* (emphasis added); *see also id.* (listing "email communications," "notes of license negotiations," "contract drafts," and "information about activities at JEDEC"). Based on these unremarkable general observations, the Court then made the critical conclusion – without any citation – that the destroyed documents "were relevant to *this case*." *Id.* (emphasis added). Critically, the District Court did not cite anything it saw in its *in camera* review for this conclusion, nor could it have. According to the Court, the *in camera* review merely "confirm[ed]" what it had already concluded based on nonprivileged evidence, *i.e.*, that Rambus destroyed documents "of the type" that might be relevant in patent litigation. *Id.* at 293.

The District Court in part presumed that Rambus destroyed relevant evidence because "reverse engineering documents and claim charts and other infringement related documents" were "conspicuously absent from Rambus's various privilege logs." *Id.* at 297 & n.34. This was demonstrably wrong, however. In fact, Rambus did include these types of documents on its

privilege log. Rambus listed numerous proposals for reverse engineering analyses and actual reverse engineering analyses on its log. *See* Opposition Exh. C at Entries Nos. 341-345, 648, 984, 995, 2781, 3980, 4046, 4533, and 4534. Indeed, in the same opinion in which it stated that these documents were absent from the privilege log, the Court cited an infringement analysis that it claimed was missing. *See Rambus*, 222 F.R.D. at 291. Such documents were included among the privileged materials that the Court reviewed *in camera*.[3]

Additionally, the District Court failed to note that Rambus had placed a "litigation hold" to preserve documents related to its litigation in conjunction with the first of the lawsuits it filed under the patents-in-suit in January 2000, seven months before it filed suit against Infineon. Opposition Exh. E (Aug. 1, 2001 Steinberg Depo. Tr. at 126-33).

On the same day it released its "crime-fraud" decision, the District Court issued a separate decision concluding that Rambus had waived its privilege as to the same documents by making selective disclosures of privileged communications. Complaint Counsel Mot. Exh. B. It relied on the following disclosures: 2001 depositions by Dan Johnson and Joel Karp in the *Micron* litigation; Rambus's opposition to Complaint Counsel's 2002 motion for default judgment in this proceeding; and documents previously disclosed (in some cases, years before) by Rambus in the Infineon litigation. *Id.* at 3-11.

## III. Federal Circuit Proceedings

Rambus petitioned the United States Court of Appeals for the Federal Circuit for mandamus, arguing principally that the District Court had erred in extending the crime-fraud

[3] Moreover, claim charts shown to Infineon or third parties as part of licensing negotiations ordinarily would not be found on privilege logs, and indeed those not privileged were produced to, and used by, Infineon prior to the first trial in this case. *See* Opposition Exh. D (Jan. 16, 2001 Steinberg Depo. Tr. at 125-207).

exception to the attorney-client privilege to conduct that was neither a crime nor a fraud. On August 18, 2004, a divided panel of the Federal Circuit denied Rambus's petition on the ground that Rambus had not satisfied "the standards governing petitions for writs of mandamus." Fed. Cir. Op. at 2. As the majority explained, "[a] court may deny mandamus relief even though on normal appeal, a court might find reversible error." *Id.* (internal quotation marks omitted). In order to prevail, according to the majority, Rambus had to, but did not, show that the District Court's "factual and legal" conclusions "were clearly and indisputably incorrect." *Id.* As to the District Court's factual conclusions, the panel majority concluded that Rambus had not identified any "error sufficient to warrant mandamus relief." *Id.* As to the District Court's legal conclusion that "spoliation" justified piercing of the privilege (which would have been subject to a more searching standard of review on direct review, as the Federal Circuit majority explained), the panel majority held that Rambus had not "clearly shown" the court was wrong. *Id.*[4]

Judge Gajarsa dissented from the spoliation ruling, criticizing the majority for "avoid[ing] the critical question underlying Rambus's petition: *Whether Fourth Circuit law permits a trial court to waive a party's privilege as a remedy for spoliation of evidence that is neither fraudulent nor criminal*." *In re Rambus, Inc.*, Misc. Docket No. 772, at 2 (Fed. Cir. Aug. 18, 2004) (Gajarsa, J., concurring in part and dissenting in part) ("Fed. Cir. Dis.") (emphasis added). Noting that no court had *ever* before pierced the privilege on the basis of such "spoliation," Judge Gajarsa stated that the Fourth Circuit would not countenance "[t]he extension of the spoliation rule to pierce privilege protecting all legal documents surrounding a corporate document retention policy that is neither fraudulent nor criminal." *Id.* at 3. Judge Gajarsa

[4] Because the panel majority declined to issue mandamus as to the District Court's spoliation decision, it concluded it "need not reach" the District Court's alternative subject-matter waiver determination. Fed. Cir. Op. at 3.

pointed out that the "dire policy implications" of the District Court's opinion would include "chill[ing]" the seeking of legal advice and "open[ing] all corporations with document retention policies … to the piercing of privilege with respect to those policies." *Id.* at 3-4.[5]

## ARGUMENT

Complaint counsel does not even purport to make their own showing that they are entitled to obtain Rambus's privileged documents under either the crime-fraud exception to the attorney-client privilege or under a waiver theory. Moreover, Complaint Counsel do not argue that the compelled disclosure of Rambus's documents in the Infineon action constitutes a waiver of Rambus's privilege in this proceeding, nor could they. *See, e.g.*, *Transamerica Computer Co. v. IBM Corp.*, 573 F.2d 646, 650-51 (9th Cir. 1978) ("[A] party does not waive the attorney-client privilege for documents which he is compelled to produce."); *Chubb Integrated Sys. Ltd. v. National Bank of Washington*, 103 F.R.D. 52, 63 & n.2 (D.D.C. 1984) (same).[6]

Instead, Complaint Counsel choose only to piggy-back on the District Court's decisions piercing Rambus's privilege, and contend that Rambus is "collaterally estopped" from resisting the loss of its privilege in this proceeding. This argument is based on several fundamental misunderstandings of the doctrine of collateral estoppel and therefore should be rejected.

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[5] Judge Gajarsa concluded, however, that mandamus was not warranted for the District Court's waiver decision, except to the extent it erroneously required disclosure of opinion work product. Fed. Cir. Dis. at 4-5.

[6] The documents the District Court compelled Rambus to disclose are subject to a stipulated protective order that tightly controls access to them. *See* Stipulated Order (Sept. 30, 2004) (Opposition Exh. F). Specifically, Rambus has provided these documents on an "'Outside Counsel Only'" basis, and Infineon cannot disclose them to others (even in response to a subpoena) in the absence of Rambus's consent or an order of the District Court. *See id.* at 1-2. In addition, the stipulation states that nothing therein "waives Rambus's attorney-client privilege and/or work product objections to the production or introduction into evidence of the documents" provided. *Id.* at 2.

Complaint Counsel also fail to establish the due diligence required for a motion to reopen. Counsel have only their own strategic choices to blame for their failure to request that the Commission consider their entitlement to these documents in the normal course. They should not be permitted a "do-over" now through the guise of a motion to reopen. Finally, given Complaint Counsel's lack of diligence and their failure to come forward with any legally sound basis for piercing Rambus's privilege, no *in camera* review of these documents is warranted.

## I. THE DISTRICT COURT'S INTERLOCUTORY ORDERS HAVE NO PRECLUSIVE EFFECT ON RAMBUS IN THIS PROCEEDING.

Complaint Counsel's discussion of collateral estoppel (remarkably limited to only a paragraph, *see* Complaint Counsel Mot. at 12-13) fails entirely to recognize the serious limitations on that doctrine that render it inapplicable here. First, collateral estoppel does not attach to interlocutory orders such as those issued by the District Court here. Preclusion arises only when a party has had a full and fair opportunity to litigate a matter, and the ability to secure meaningful appellate review is an indispensable part of that opportunity. An appellate court's refusal to grant the extraordinary remedy of mandamus does not constitute such review unless the mandamus court actually addresses the merits of the district court's decision. Here, the Federal Circuit most certainly did not do that, instead finding only that Rambus had not met the virtually insurmountable mandamus standard of showing the decisions to be "indisputably" incorrect.[7]

Second, there can be no preclusion where there are contradictory decisions on the same point. In this case, two critical findings by the District Court – that Rambus may have destroyed

[7] Complaint Counsel filed their motion before the Federal Circuit ruled on Rambus's mandamus petition, but agreed that the Commission should defer consideration of it until the court ruled. Complaint Counsel may have hoped for an appellate determination on the merits, but they did not get one.

"relevant" documents and that it waived its privilege – are directly contrary to prior decisions of this Commission's ALJs. As a matter of both collateral estoppel law and common sense, the later decisions by a single District Court judge cannot "collaterally estop" the earlier ones by both Commission ALJ's assigned to the instant case.

Finally, no preclusive effect attaches to the District Court's novel conclusion that the crime-fraud exception to the attorney-client privilege extends to "spoliation" that is neither a crime nor a fraud. It is black-letter collateral estoppel law that such abstract legal determinations cannot provide the basis for issue preclusion. This Commission is therefore in no way bound to accept this conclusion, and it should exercise sound judgment to reject it. As Judge Gajarsa of the Federal Circuit recognized, the District Court's rule would have a detrimental impact on public policy by chilling companies' willingness to secure legal advice on the formulation of document retention policies. The chill would be especially severe if this rule were embraced by the Commission, given its nationwide jurisdiction over commercial entities.

### A. RAMBUS CANNOT BE COLLATERALLY ESTOPPED BASED UPON NON-FINAL DECISIONS NOT SUBJECT TO MEANINGFUL APPELLATE REVIEW.

It is axiomatic that offensive collateral estoppel cannot be applied where its use would "'work an unfairness'" to one of the parties. *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 197 (D.C. Cir. 1984). "Fairness" to the defendant "depends on several factors, among them whether . . . *the earlier judgment was final*, and whether [there was] . . . a full and fair opportunity to litigate the issue in the first trial." *McLaughlin v. Bradlee*, 599 F. Supp. 839, 849 (D.D.C. 1984) (emphasis added), *aff'd*, 803 F.2d 1197 (D.C. Cir. 1986). Finality is the "essence of collateral estoppel," *City of Port Arthur, Texas v. United States*, 517 F. Supp. 987, 1004 n.119 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982), because "[r]elitigation of an issue in a second action is precluded only if 'the *judgment* in the prior action was dependent upon the

determination made of the issue.'" *Ashley v. Boehringer Ingelheim Pharms. (In re DES Litig.)*, 7 F.3d 20, 23 (2d Cir. 1993) (emphasis added) (quoting 1B James W. Moore, *et al.*, *Moore's Fed. Prac.* ¶ 0.443[.5-1], at 760 (2d ed. 1993)).

In this case, there is no "judgment" from the District Court, which has not yet held a trial on the matter. Instead, the piercing orders entered by the District Could were interlocutory in nature and could not be appealed to the Federal Circuit. *See Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 643 (Fed. Cir. 1991) (holding that piercing orders are non-appealable under the collateral order doctrine). The District Court has not yet reached final judgment on the underlying claims against Rambus, and its decision to pierce the attorney-client privilege could be reversed at any time. Accordingly, it does not have preclusive effect. *See In re 949 Erie Street*, 824 F.2d 538, 541 (7th Cir. 1987) (interlocutory order does not create collateral estoppel effect because order "may be changed by the district court at any time prior to final judgment"); *National Post Office Mail Handlers v. American Postal Workers Union*, 907 F.2d 190, 192 (D.C. Cir. 1990) (collateral estoppel requires "a final disposition on the merits"); *see also*, *e.g.*, *McRae v. United States*, 420 F.2d 1283, 1286 (D.C. Cir. 1969) (pretrial ruling on suppression issue did not have preclusive effect because collateral estoppel applies only to "final adjudication[s]"); *Southern Pac. Communications Co. v. AT&T Co.*, 567 F. Supp. 326, 328 (D.D.C. 1983) (denial of motion to dismiss did not have preclusive effect), *aff'd*, 740 F.2d 1011 (D.C. Cir. 1984).

Closely related to the issue of finality is the "critical question . . . whether the parties have had a full opportunity to litigate the issue on which they are estopped." *Brightheart v. McKay*, 420 F.2d 242, 245 n.4 (D.C. Cir. 1969); *see also Nasem v. Brown*, 595 F.2d 801, 806 (D.C. Cir. 1979) ("The advantages of finality, however, can only be fairly garnered when the party to be estopped has had an adequate opportunity to litigate his claims."). Here, too, the lack of any

opportunity for Rambus to appeal the order of the District Court is determinative, for "[a] 'full and fair opportunity to litigate' a particular issue includes a party's ability to appeal." *Innovad Inc. v. Microsoft Corp.*, 260 F.3d 1326, 1334 (Fed. Cir. 2001); *see also Kane v. Town of Harpswell (In re Kane)*, 254 F.3d 325, 329 (1st Cir. 2001) ("The purpose of [the] issue preclusion doctrine is to prevent a party from relitigating an issue where there has been full and fair litigation, *including* an opportunity to appeal . . . ."); *Disher v. Information Res., Inc.*, 873 F.2d 136, 139 (7th Cir. 1989) (collateral estoppel does not apply where judgment is not appealable because party "was denied an opportunity to contest it fully in the previous litigation"); *Luben Indus., Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983) ("we are convinced that the Government did not have a 'full and fair opportunity to litigate' its claim because it could not appeal the interlocutory memorandum"); *Restatement (Second) of Judgments* § 28(1) (1982) ("*Restatement*") (preclusion unwarranted where "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action").

As noted above, Rambus has not yet had an opportunity to appeal the District Court's interlocutory order. Until that time comes, any "underlying confidence that the result achieved in the initial litigation was substantially correct . . . is . . . unwarranted." *Standefer v. United States*, 447 U.S. 10, 23 n.18 (1980); *see also Nasem*, 595 F.2d at 806 ("Without such an opportunity [to fully litigate the original action], lack of faith in the reliability of the first proceeding precludes application of the collateral estoppel doctrine.").

Nor does it matter that Rambus sought mandamus relief from the Federal Circuit, for "the general rule is that the denial of a petition for mandamus is not ordinarily entitled to any preclusive effect." *Stauble v. Warrob, Inc.*, 977 F.2d 690, 693 (1st Cir. 1992). Mandamus is not

a substitute for appeal, *Will v. United States*, 389 U.S. 90, 97 (1967), and the extraordinarily strict mandamus standard of review is in no way equivalent to the kind of review that takes place on direct appeal, *see, e.g., United States v. United States Dist. Ct.*, __ F.3d __, No. 04-70709, 2004 WL 2249504, at *1 (9th Cir. Oct. 7, 2004) (contrasting standards of review). *See generally Cheney v. United States Dist. Court*, 124 S. Ct. 2576, 2586-87 (2004) (calling mandamus a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes,'" such as where lower court decision amounts to "'judicial "usurpation of power"'" or "'clear abuse of discretion'").

Against the back-drop of this black-letter law on collateral estoppel, Complaint Counsel supports its argument with citation to a lone district court decision, *FTC v. GlaxoSmithKline*, 202 F.R.D. 8 (D.D.C. 2001) ("*GSK*"), which in any event is entirely distinguishable. The district court in that case applied issue preclusion precisely because the earlier privilege-piercing decision had been subject to meaningful appellate review and affirmed. *See id.* at 12. Even though appellate review in *GSK*, like here, was by mandamus petition, the appellate court there had squarely addressed the privilege question on the merits. "As a result, the Federal [Circuit's] decision was effectively an appeal on the merits of the denial of GSK's privilege objections." *Id.* For all intents and purposes, the privilege decision on which issue preclusion was based in *GSK* was final and had been subject to meaningful appellate review. Here, there was no meaningful review and no effective finality. The Federal Circuit, over a vigorous dissent, concluded only that Rambus had not shown that Judge Payne's decision – factually *and* legally – was "clearly and indisputably incorrect." Fed. Cir. Op. at 2. There was no determination by the Federal Circuit whether the District Court's decision was simply "incorrect," as was the case in *GSK*. In fact, the appellate court here specifically noted that its consideration of Rambus's mandamus

petition was *not* a "'normal appeal'" and that error that would normally be cause for reversal on direct review would not warrant mandamus. *Id.* Given the lack of meaningful appellate review, no preclusive effect attaches to these interlocutory District Court orders.

### B. NO PRECLUSIVE EFFECT ATTACHES TO THE DISTRICT COURT'S DETERMINATIONS THAT RELEVANT DOCUMENTS WERE DESTROYED AND THAT RAMBUS WAIVED ITS PRIVILEGE GIVEN THAT THEY FOLLOWED CONTRARY CONCLUSIONS BY JUDGES MCGUIRE AND TIMONY.

Complaint Counsel's effort to collaterally estop Rambus based on the District Court's conclusions fails for a second independent reason: those conclusions rest on findings that are contrary to the prior findings of both Judges Timony and McGuire. When there are two contradictory decisions on a point, neither is entitled to preclusive effect. Here, in fact, it is the ALJs' decisions, not the District Court's, that must be conclusively deemed correct because of Complaint Counsel's choice not to appeal them.

Based on the entire record developed at trial, Judge McGuire found that there was "no indication that any documents, relevant and material to the disposition of the issues in this case, were destroyed," Initial Decision at 244. This was a square factual finding that one of the indispensable elements of spoliation – destruction of *relevant* documents, *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) – was absent, and Complaint Counsel has not appealed this finding. Based in large measure on a mere subset of the information before Judge McGuire – and explicitly relying on Judge Timony's finding that was superceded by Judge McGuire – the District Court later came to an arguably contrary conclusion. *See Rambus,* 222 F.R.D. at 293 (concluding that Rambus destroyed documents "of the type" that might be relevant in patent litigation).

It is basic to the law of collateral estoppel that Complaint Counsel cannot transport the District Court's finding back in time to collaterally estop the very position that Judge McGuire

had already adopted. In fact, Complaint Counsel has waived any challenge to Judge McGuire's finding due to their choice not to appeal, and its conclusive effect is in no way undermined by the District Court's *later* finding. *Cf.* 18A Charles Alan Wright et al., *Federal Practice & Procedure* § 4465.2, at 772 (2d ed. 2002) ("[A] party who has lost a judgment should not be able to defeat the claim-preclusion effects of the judgment by relying on inconsistent findings made in subsequent litigation between another party and a common adversary."); 18B Charles Alan Wright et al., *Federal Practice & Procedure* § 4478.6, at 819 (2d ed. 2002) ("If no one appeals on any issue, the judgment of the trial court moves into the realm of res judicata."). Likewise, Complaint Counsel's failure to appeal Judge Timony's denial of its motion to compel production of documents related to Rambus's document retention policy on a waiver theory conclusively lays that issue to rest in this proceeding. Judge Timony's decision can no more be "estopped" by the District Court's later determination than can Judge McGuire's.

Above and beyond the timing of the determinations and Complaint Counsel's failure to appeal, the mere existence of an inconsistency (as to both spoliation and waiver) would bar use of collateral estoppel in this case. The Supreme Court has made clear that offensive collateral estoppel of the kind sought by Complaint Counsel here is "unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979); *accord Restatement* § 29(4) (preclusion not warranted when "[t]he determination relied on as preclusive was itself inconsistent with another determination of the same issue"). Following *Parklane Hosiery*, the D.C. Circuit found that a district court erred when it accorded preclusive effect to a decision of the Second Circuit notwithstanding a contrary prior determination by a district court. *See Jack Faucett Assocs., Inc. v. AT&T Co.*, 744 F.2d 118, 131 (D.C. Cir. 1984) ("To use one

decision as the basis for offensive estoppel while ignoring the other decision raises the specific concerns about fairness to the defendant that the Supreme Court articulated in *Parklane Hosiery*.").

The *Restatement of Judgments* explains the common-sense rationale for this rule, which is based on the lack of "confidence" in a prior determination that is inconsistent with others:

> Giving a prior determination of an issue conclusive effect in subsequent litigation is justified not merely as avoiding further costs of litigation but also by underlying confidence that the result reached is substantially correct. Where a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted. The inference, rather, is that the outcomes may have been based on equally reasonable resolutions of doubt as to the probative strength of the evidence or the appropriate application of a legal rule to the evidence. That such a doubtful determination has been given effect in the action in which it was reached does not require that it be given effect against the party in litigation against another adversary.

*Restatement* § 29 cmt. f.; *see also Jack Faucett*, 744 F.2d at 129 ("Underlying the inconsistent determination exception to the doctrine of offensive estoppel is a notion of confidence.").[8]

It is irrelevant that the determinations that contradict the District Court's, *i.e.*, Judge McGuire's on spoliation and Judge Timony's on waiver, are not themselves embodied in a final judgment. The D.C. Circuit has squarely rejected any such requirement. *See id.* at 130 ("*Parklane Hosiery* does not hold that only inconsistent *judgments* can preclude offensive estoppel. . . . The rationale for the inconsistency rule is equally pertinent wherever the inconsistency occurs."). Additionally, as discussed above, the District Court's decisions are themselves non-final. This makes them inappropriate bases for collateral estoppel in the first place, *see supra* Section I.A. This also negates any theoretical requirement Complaint Counsel

[8] The Supreme Court illustrated the reasons for the rule barring issue preclusion based on an inconsistent prior determination by means of a hypothetical involving a railroad accident that injures 50 passengers, all of whom bring separate suits. *Parklane Hosiery*, 439 U.S. at 330 n.14. The railroad wins the first 25 but loses the 26th. Under these circumstances, it would clearly be unfair "to allow plaintiffs 27 through 50 automatically to recover." *Id.*

might propose that their preclusive effect may be undermined only by contradictory determinations embodied in final judgments.

Finally, the District Court did not possess any superior information that would justify permitting its decisions to trump those of this Commission's ALJs. The District Court did state that it thought that Rambus might have destroyed "relevant" documents. But this was not based on anything it learned in its *in camera* review. *See supra* p. 11. Rather, it was based on two sources, neither of which supports the application of collateral estoppel here. First, the District Court surmised that it had not found in its *in camera* review certain documents that it would have expected to find, namely infringement analyses. As explained above, that conclusion was simply wrong: infringement analyses were among Rambus's privileged documents. *See supra* p. 11. Second, the District Court based that statement on the same record that was before Judge McGuire (or, more precisely, the limited record before Judge Timony). But this does not derive from any "new evidence," and instead merely embodies a different "resolution[] of doubt as to the probative strength of the evidence" that was before Judge McGuire. *Restatement* § 29 cmt. f. Accordingly, it is not entitled to any preclusive effect. Similarly, the District Court's waiver finding – based principally on arguments made by Rambus *in this proceeding*, *see* Complaint Counsel Mot. at 7 (conceding that this is basis of District Court's waiver decision); *see also supra* p. 12 – is self-evidently not based on information unavailable to Judge McGuire.

### C. NO PRECLUSIVE EFFECT ATTACHES TO THE DISTRICT COURT'S PURELY LEGAL DETERMINATION THAT "SPOLIATION" PROVIDES A BASIS FOR PIERCING THE ATTORNEY-CLIENT PRIVILEGE, AND THE COMMISSION SHOULD NOT ADOPT IT.

Complaint Counsel's motion to compel based on the District Court's "spoliation" decision fails for a third independent reason: rulings on pure questions of law, like the District Court's novel determination that the crime-fraud exception extends to "spoliation," have no

preclusive effect. This would be the case even if, contrary to fact, *see supra* Section I.A, the determination were final. Given that the Commission is not bound by the District Court's purely legal determination, it should reject this ill-advised extension of the crime-fraud exception.

**1. Collateral Estoppel Does Not Attach to Purely Legal Determinations.**

It is black-letter law that even in subsequent litigation between the *same* parties, "issue preclusion does not attach to abstract rulings of law." 18 Charles Alan Wright et al., *Federal Practice & Procedure* § 4425, at 644 (2d ed. 2004). This rule has special force when, like here, a non-party to the first action seeks preclusion; in that situation, a finding of preclusion is flatly "inappropriate with respect to a pure question of law." 18A Wright, *supra*, § 4465.2, at 763; *see also Chicago Truck Drivers, Helpers & Warehouse Union (Independent) Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 532 (7th Cir. 1997) (finding estoppel inappropriate "where a new plaintiff invokes the doctrine [of collateral estoppel] to preclude litigation over a purely legal question"); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 719 (2d Cir. 1993).

This longstanding rule is based on the entitlement of subsequent decisionmakers to reach their own determinations on important and generally applicable legal principles. As the *Restatement of Judgments* explains, issue preclusion is not warranted when affording a prior decision preclusive effect would "inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based." *Restatement* § 29(7); *see also id.* cmt. i (concern "especially pertinent when there is a difference in the forums in which the two actions are to be determined").

Application of these principles here makes it clear that the District Court's decision to pierce Rambus's privilege on "spoliation" grounds is entitled to no preclusive effect. An indispensable component of that decision was a purely legal one, namely the question whether

"documents created to provide a plan for or to effectuate spoliation would fall under the crime/fraud exception" to the attorney-client privilege, given that "spoliation is neither a crime nor a fraud." *Rambus*, 222 F.R.D. at 288. The portion of the District Court's decision devoted to this question is titled "Applicable Legal Principles," *id.* at 287, and includes an entirely abstract discussion about the scope of the crime-fraud exception, *see id.* at 287-90. As the authorities noted above make clear, the District Court's resolution of this purely legal question is not entitled to preclusive effect. Accordingly, even if the District Court's finding that Rambus might have spoliated relevant documents were entitled to collateral estoppel effect, *but see supra* Sections I.A, I.B, its conclusion that Rambus's privilege could be pierced on this basis would not warrant such effect.

**2. As Judge Gajarsa Explained, The District Court's Dramatic Expansion Of the Crime-Fraud Exception Is Dangerous.**

Because the Commission is not bound by the District Court's "legal rule," it should not adopt it.[9] *Restatement* § 29(7). Given the Commission's nationwide jurisdiction, it should be especially reluctant to adopt the District Court's literally unprecedented limitation on the attorney-client privilege and thereby disrupt commercial entities' settled expectations about the contours of this privilege. As the Supreme Court has explained,

> if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the court, is little better than no privilege at all.

*Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). Moreover, the Commission should be aware that any broadened duties with respect to "spoliation" will likely apply to government, as well as private, entities. *See, e.g., Kronisch v. United States*, 150 F.3d 112, 126-30 (2d Cir.

1998) (discussing adverse inferences imposed on United States in litigation because of destruction of relevant documents).

The District Court cited no case in which a court had pierced the privilege surrounding "spoliation" that was neither a crime nor a fraud, nor did it invoke sound policy reasons for such a dramatic expansion of this privilege exception. *See* Fed. Cir. Dis. at 3 (District Court failed to "point[] to a single instance of a trial court waiving a party's privilege as a remedy for spoliation"). In fact, sound policy reasons militate against extending the crime-fraud exception to the disposal of documents, pursuant to a document retention policy, that is neither a crime nor a fraud. Document retention policies are ubiquitous in today's business world. *See id.* (discussing "severe impact on public policy" flowing from District Court's rule). They are necessary to manage the tremendous volume of articles, papers, reports, e-mails, drafts, and notes that companies receive, gather, and generate on a daily basis. Litigation, of course, is also a commonplace occurrence and foreseeable risk for any large business – including especially firms with inventories of intellectual property that are often engaged in complex, and sometimes contentious, licensing negotiations. It cannot be the case that a corporation is precluded from instituting and implementing a reasonable document retention policy merely because it is foreseeable that the company may some day obtain valuable patents, fail in licensing those patents, and then become involved in litigation.[10] Nor can it be the case that litigants may gain

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[9] Given the fundamental flaws in Complaint Counsel's collateral estoppel argument and the procedural impropriety of its motion, the Commission need not even reach this issue.

[10] *See* Jamie Gorelick et al., *Destruction of Evidence* § 10.2, at 310 (1989 & 2004 Supp.) (noting the "reasons for . . . routine destruction [of documents]" and that the "inundation of paper may overwhelm even the most orderly document control systems"); *see also Stevenson v. Union Pac. Ry. Co.*, 354 F.3d 739, 746 (8th Cir. 2004) (noting "routine" document retention policies); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or

*(Footnote continued)*

access to each other's privileged documents merely by demonstrating that both a document retention policy and the possibility of litigation co-existed in time. Such a rule would severely restrict patent-holding companies' ability to secure legal advice.

Thus, neither logic nor practical reality supports the extraordinarily low threshold adopted by the District Court for the loss of the attorney-client privilege. At the same time, there are significant reasons to encourage companies to seek the advice and assistance of counsel in developing and implementing properly tailored document retention policies. As the prospect of litigation changes from being merely foreseeable to imminent, a company may well become subject to heightened obligations to retain documents, and many companies do institute "litigation holds" – as Rambus did in this case, *see supra* p. 12. The exact point at which such obligations come into play, however, may be unclear. Indeed, as it relates to pre-litigation disposal of documents (which is largely what is alleged here), courts have not settled on any consistent definition of what is and is not spoliation. Jamie Gorelick et al., *Destruction of Evidence* § 2.9, at 43 (1989 & 2004 Supp.). Moreover, "[t]he time at which the duty to preserve documents arises and the scope of that duty are both unclear," and prelitigation duties are a notorious "gray area." *Id.* §§ 9.3, at 299; 13.5, at 338; 2 Geoffrey Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 30.4 (3d ed. 2004).

For these reasons, corporations should be encouraged to seek legal advice in fashioning and implementing appropriate document retention policies. Indeed, it is precisely that policy of encouraging clients to consult with lawyers, especially about complex areas of law where the precise contours of legal obligations may be uncertain, that is served by the attorney-client

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electronic document, and every backup tape? The answer is clearly 'no.' Such a rule would cripple large corporations . . . .").

privilege – the foundation of which is that legal advice, to be candid and effective, must be confidential. As Judge Gajarsa explained, the District Court's erosion of the privilege in this context "will confuse and likely chill all corporate efforts to develop reasonable document retention policies." Fed. Cir. Dis. at 3-4. Specifically, that court's "inability to define a clear separation, short of common-law fraud, differentiating permissible polices from impermissible policies, will open all corporations with document retention policies – likely meaning all corporations – to the piercing of privilege with respect to those policies." *Id.* at 4.

The District Court's ground for abrogating the privilege in this case – that attorney-client communications furthered disposal of documents that might have been relevant to possible litigation – is insufficient in light of strong policy reasons in favor of the privilege and against relaxing the demanding standards for application of the crime-fraud exception. It is no response to say that Infineon sought to pierce Rambus's privileges in order to obtain information that might be relevant to the appropriateness of litigation sanctions for loss of evidence on an issue to be tried. The attorney-client privilege, like others, is designed to block access to evidence that is assumed to be relevant, based on the public interest in encouraging the seeking of legal advice and hence greater levels of compliance with legal standards. That the evidence sought here might be relevant to a potential basis for litigation sanctions does not distinguish this case from any case where privilege is invoked to prevent discovery of potentially relevant evidence. Moreover, the District Court did not even consider that Infineon could take, and has taken, discovery into the scope of Rambus's document disposal through entirely *non*-privileged sources.

Nor is abrogation of the attorney-client privilege necessary to deter destruction of evidence. Indeed, there may be *more* document destruction if firms are deterred from seeking

legal advice that will not be privileged under the District Court's rule. Moreover, courts already have discretion, within proper bounds, to fashion appropriate trial-related measures, such as adverse inferences, to redress any unfairness caused by a litigant's destruction of evidence to the prejudice of another. *See, e.g.*, *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995). Indeed, that is precisely how Judge Timony chose to address his finding (later overturned) that Rambus had engaged in spoliation of relevant evidence. *See supra* p. 6; *see also* Fed. Cir. Dis. at 3 (*Infineon* District Court should have used adverse inferences, not privilege-piercing). That approach allows for tailoring based on, among other factors, intent, relevance to the litigation, and prejudice to the opposing party. *See Vodusek*, 71 F.3d at 156. The District Court's novel categorical "spoliation" privilege exception, however, would impose excessive costs in comparison to its dubious benefits. The Commission therefore should not embrace this unwarranted erosion of the privilege.

## II. COMPLAINT COUNSEL HAVE NOT EXERCISED DUE DILIGENCE, AND RAMBUS WOULD SUFFER PREJUDICE IF THE RECORD IS REOPENED.

Complaint Counsel's motion not only rests upon a fatally flawed theory of collateral estoppel, but it also is procedurally improper. As Complaint Counsel acknowledge, they are entitled to reopen the record at this late stage of the proceeding only if they can demonstrate "due diligence." Complaint Counsel Mot. at 13. In other words, they must offer a "bona fide explanation for the failure to introduce the evidence at trial." *In re Brake Guard Prods., Inc.*, 125 F.T.C. 138, 248 n.38 (1998). Complaint Counsel fall seriously short of making this showing.

The "explanation" for Complaint Counsel's failure to "introduce the evidence at trial" is their own strategic litigation decisions, rather than anything outside their control. *See* Complaint Counsel Mot. at 13 ("Complaint Counsel have not sought to relitigate this issue on appeal,

choosing instead to focus on the merits."). They *never* (until this motion) sought to pierce Rambus's privilege on the theory that Rambus had engaged in spoliation. Instead, they decided to use this theory as the basis for an effort to obtain a default judgment or, failing that, adverse evidentiary inferences. They obtained the latter on a tentative basis from Judge Timony, only to have them properly revoked by Judge McGuire based on his review of the entire record. Complaint Counsel's failure to seek piercing of Rambus's privilege on this basis continued even after Infineon asked the District Court to do so in January 2004, nearly two months before Judge McGuire's Initial Decision.

Likewise, the "explanation" for Complaint Counsel's failure to secure Rambus's privileged documents on a waiver theory is their own strategic decision to forego that effort. Once Judge Timony denied Complaint Counsel's motion to compel production of these documents on the theory that Rambus had selectively disclosed privileged documents in this proceeding, Complaint Counsel simply let the matter die. Complaint Counsel may now regret their decisions given Infineon's success to date pursuing alternative strategies in the District Court, but such regret does not constitute diligence, and a motion to reopen the record should not be allowed to serve as an untimely appeal.

For the same reason, Rambus would suffer prejudice if Complaint Counsel's motion were granted. Rambus had indeed been "on notice [that] . . . its destruction of relevant documents is an issue in this case," Complaint Counsel Mot. at 14, but given Complaint Counsel's strategic decisions not to pursue this "issue," Rambus had absolutely no reason to believe that this "issue" would result in loss of its privilege. There is no good reason to unsettle those expectations now,

especially given that Complaint Counsel says the documents are not necessary for the Commission's consideration of this appeal. *Id.* at 2 n.2.[11]

## III. *IN CAMERA* REVIEW IS NOT WARRANTED.

For all of these reasons, there would be no justification for the Commission to direct an *in camera* review of Rambus's privileged documents. *See Order Denying Joint Application to Postpone Briefing and Stay Commission Action on Complaint Counsel's Motion to Compel, and Establishing Briefing Schedule for that Motion* (F.T.C. Oct. 4, 2004) (directing Rambus to address this possibility). Tellingly, Complaint Counsel has not sought such a review. Instead, they stake their entitlement to Rambus's privileged documents solely on their flawed theory of collateral estoppel. Accordingly, Complaint Counsel have not even tried to make out the *prima facie* case of a crime or fraud necessary to secure an *in camera* review. *See United States v. Zolin*, 491 U.S. 554, 572 (1989); *see also id.* at 571 (*in camera* review without such a showing "would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk"). Nor could they; for this case involves (at most) spoliation, which is neither a crime nor a fraud and therefore provides no basis for application of the crime-fraud exception to the attorney-client privilege. *See supra* Section I.C.2.

[11] Although Complaint Counsel have advised the Commission that it "does not seek to delay the resolution of this appeal with the filing of this motion," Complaint Counsel Mot. at 2 n.2, delay almost certainly will result if the motion is granted, given the strong possibility of an interlocutory appeal of such a decision by Rambus and the need to brief the significance, if any, of the documents in the event their disclosure is ultimately compelled.

## CONCLUSION

For these reasons, Rambus respectfully requests that Complaint Counsel's Motion be denied in its entirety and that no *in camera* review of Rambus's privileged documents be ordered.

DATED: October 18, 2004

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**CERTIFICATE OF SERVICE**

I, Kenneth A. Bamberger, hereby certify that on October 18, 2004, I caused a true and correct copy of the *Opposition of Rambus Inc. to Complaint Counsel's Motion to Compel Production of, and to Reopen the Record to Admit, Documents Relating to Respondent Rambus Inc.'s Spoliation of Evidence*, and accompanying appendices, to be served on the following persons by hand delivery:

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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| In the Matter of | ) | |
| | ) | Docket No. 9302 |
| RAMBUS INC., | ) | |
| a corporation, | ) | |
| | ) | |

**CERTIFICATION**

I, Kenneth A. Bamberger, hereby certify that the electronic copy of *Opposition of Rambus Inc. to Complaint Counsel's Motion to Compel Production of, and to Reopen the Record to Admit, Documents Relating to Respondent Rambus Inc.'s Spoliation of Evidence* accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on October 18, 2004 by other means.

**Kenneth A. Bamberger**
**October 18, 2004**