

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

Interim Public Version:

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

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

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

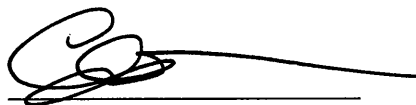
As explained in Complaint Counsel's Memorandum in Support of this motion, Respondent Rambus Inc. ("Rambus") purposefully sought to mitigate the legal risks of its misleading conduct while a member of JEDEC by destroying large volumes of documents, relating to its participation in JEDEC and other issues,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

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

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

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

Respectfully submitted,



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Dated: December 20, 2002

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

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

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

INTRODUCTION

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

A. Discoverable in a lawsuit, yeah.

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

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

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

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

A. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[REDACTED]

³ [REDACTED]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OVERVIEW OF PERTINENT FACTS

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

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

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

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

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

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

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

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

A. Yes, that's what he said.

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

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

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

[REDACTED]

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

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

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

- “Estoppel,” and
- “Antitrust.”

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

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

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

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

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

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

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

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

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

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

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

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

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

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

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

[REDACTED]

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

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

²⁶ [REDACTED]

²⁷ [REDACTED]

[REDACTED]

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

28 [REDACTED]

29 [REDACTED]

30 [REDACTED]

31 [REDACTED]

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

37 [REDACTED]

38 [REDACTED]

[REDACTED]

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

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

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

[REDACTED]

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

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

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

[REDACTED]

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

[REDACTED]

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴¹ [REDACTED]

⁴² [REDACTED]

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

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

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The policy

provided relatively little guidance to employees regarding what documents they should maintain

55 [REDACTED]

56 [REDACTED]

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

[REDACTED]

[REDACTED]

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


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

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

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

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

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



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

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

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

65 [REDACTED]

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

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

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

[REDACTED]

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

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

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

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

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

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

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

F. Rambus [REDACTED] Authorized Karp to Implement the Document Destruction Program, in Part for the Purpose of Destroying Evidence Relating to the Company's December 1991-June 1996 Participation in JEDEC

[REDACTED]

[REDACTED]

[REDACTED]

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belatedly obtained documents, that he knew that Rambus was amending its patent applications to cover the JEDEC SDRAM standard. Rambus seeks to explain these contradictions by arguing that Crisp and Tate suffered a memory lapse at their first depositions. That explanation simply strains credulity.

Id.

70 [REDACTED]

[REDACTED]

■

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[REDACTED]

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷³ [REDACTED]

⁷⁴ [REDACTED]

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

[REDACTED]

⁷⁶ [REDACTED]

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

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

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

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

[REDACTED]

[REDACTED]

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

[REDACTED]

⁷⁸ See Section G, *infra* at p. 61.

⁷⁹ [REDACTED]

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

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

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

To recap some of the evidence discussed above:

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

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

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

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

(11) [REDACTED]

(12) [REDACTED]

(13) [REDACTED]

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

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

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

[REDACTED] When questioned in deposition about his role in Rambus's document destruction activities, Crisp gave the following testimony:

Q. Were you present for the talk that Joel Karp gave to everyone at Rambus about document retention?

A. Yes, I was. . . .

Q. In response to Mr. Karp's directives about cleaning files or discarding documents, did you comply with his directives and discard documents . . . and erase files?

A. I definitely made an attempt to go through my files and look for things to keep as he had – as he had directed us to do. And everything else that I couldn't justify keeping, I put in a burlap bag that they gave us, and then I headed off to Asia for a business trip, and I presume they shredded it.

Crisp Dep. (4/13/01) at 840:11-841:21, *Rambus v. Infineon* [Tab 1]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Considering that Crisp [REDACTED] to what he threw away – [REDACTED]

[REDACTED] it would be surprising if Complaint Counsel could show with any precision which documents Crisp designated for shredding. Yet important proof in this regard does exist. It is clear from Crisp's testimony, for instance, that he destroyed many JEDEC-related documents that were in his possession.

Q. Were – as part of the document retention directives of Joel Karp, were any JEDEC-related documents destroyed by you?

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Though Rambus has asserted attorney-client privilege to block discovery

⁸⁴ As explained in the Commission’s complaint, Rambus’s first patent application – Application No. 07/510,898 (“the ‘898 application”) – which was filed in April 1990 by Rambus’s founders Mark Horowitz and Mike Farmwald, was the first in a long chain of follow-on patent applications, or amendments, all of which “related back” to the original 1990 application, and thereby claimed a “priority date” of April 1990. *See* Complaint, ¶¶ 34-38, 76-80 [Tab 73]. Inasmuch as this suit focuses on Rambus’s failure to disclose relevant patents and patent applications to JEDEC, the ‘898 application and its progeny are a central focus of concern. Hence, work product created by Rambus’s in-house patent counsel relating to these patent applications could be of great significance to this litigation.

⁸⁵ [REDACTED]

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

[REDACTED]

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

[REDACTED]

[REDACTED]

[REDACTED] Based on this evidence, Judge Payne concluded in the *Infineon* case that “Lester Vincent . . . destroyed some documents, pursuant to instructions from Rambus, just before this litigation began but after Rambus sent a letter to Infineon accusing it of infringement.” *Infineon*, 155 F. Supp. 2d at 682 [Tab 4].⁸⁶

H. [REDACTED]

⁸⁶ The foregoing is merely an overview, based on the prior sworn testimony of Rambus witnesses, of some of the proof showing the nature of the materials that various Rambus agents and employees destroyed, acting in accordance with the instructions of Rambus’s senior management. Many additional categories of documents, not addressed by this testimony, were also undoubtedly destroyed.

[REDACTED]

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

87 [REDACTED]

88 [REDACTED]

[REDACTED]

[REDACTED]

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

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

[REDACTED]

Rambus began to destroy its corporate records systematically. On the contrary, during the same time period in which its massive document purging program was in full swing, Rambus simultaneously was gearing up for a potentially large-scale litigation effort.

[REDACTED]

89 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

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

[REDACTED]

[REDACTED]

[REDACTED] Whatever [REDACTED] Rambus may have used

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

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

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

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

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

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

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

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

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

[REDACTED]

[REDACTED]

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

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

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

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

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

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

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

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

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

⁹⁰ See Section G, *supra* at p. 61.

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

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

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

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

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

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

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

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

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

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

⁹⁴ [REDACTED]

⁹⁵ [REDACTED]

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

LEGAL POINTS AND AUTHORITIES

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

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

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

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

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

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

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

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

[REDACTED]
[REDACTED] June 1996

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

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

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

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

⁹⁸ [REDACTED]

⁹⁹ [REDACTED]

¹⁰⁰ See Section I, *supra* at p. 71.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

First

[REDACTED]

Second

[REDACTED]

Third

[REDACTED]

107

108

[REDACTED]

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

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

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

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

109 [REDACTED]

110 [REDACTED]

111 See note 8, *supra* at p.10.

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

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

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

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

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

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

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

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

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

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

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

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

¹¹³ See note 14, *supra* at p. 13.

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

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

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

Anderson v. Cryovac, Inc., 862 F.2d 910, 925 (1st Cir. 1988) (emphasis added). *Accord Nat’l*

Ass’n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 557 (N.D. Cal. 1987) (“By the very fact of their destruction, . . . the vast majority of the purged documents cannot be identified. . . .

Needless to say, plaintiffs should not suffer because of this. Where one party wrongfully denies another the evidence necessary to establish a fact in dispute, the court must draw the strongest allowable inferences in favor of the aggrieved.”).¹¹⁵

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

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

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

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

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

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

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

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

¹¹⁶ See Section G, *supra* at p. 61.

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

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

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

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

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

¹²¹ [REDACTED]

¹²² [REDACTED]

- [REDACTED] and, finally,
- [REDACTED]

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

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

¹²³ [REDACTED]

¹²⁴ [REDACTED]

¹²⁵ [REDACTED]

¹²⁶ See Section K, *supra* at p. 76.

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

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

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

(4) [REDACTED]

(5) [REDACTED]

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

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

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

130 [REDACTED]

131 [REDACTED]

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

Telectron stated:

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

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

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

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

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

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 135-36 (S.D. Fla. 1987) (cited with approval by the D.C. Circuit in *Shepherd*, 62 F.3d at 1479) (emphasis added) (citations omitted).

The reasoning in *Telectron* applies equally here. We do not know the "contours of the destroyed materials" [REDACTED]. What we do know is that Rambus's document destruction efforts have placed out of reach of Complaint Counsel, and Your Honor, a significant volume of information directly relevant to many, if not all, of the issues upon which determinations of liability must be made in this litigation. Hence, any issue-related sanction would have to be so broad as to "arrive at the same substantive outcome as the entry of default." *Id.*

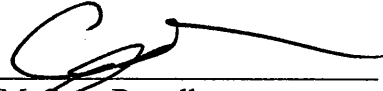
Thus, this truly is a case in which “the guilty party has engaged in such wholesale destruction” that “effective issue-related sanction[s]” cannot be fashioned or would “effectively dispose[] of the merits anyway.” *Shepherd*, 62 F.3d at 1479. In other words, this truly is a case in which “the entry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

CONCLUSION

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

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

Respectfully submitted,



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COUNSEL SUPPORTING THE
COMPLAINT

Dated: December 20, 2002

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

ORDER

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

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

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

James P. Timony
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

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

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

to be served upon the following persons:

by hand delivery to:

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

and by electronic mail and overnight courier to:

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