

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

**Public**

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
COMPLAINT COUNSEL'S PENDING MOTION FOR DEFAULT JUDGMENT**

Complaint Counsel hereby moves for leave to file the attached Supplemental Memorandum in Support of Complaint Counsel's Pending Motion for Default Judgment, Relating to Collateral Estoppel Effect of Prior Factual Finding That Respondent Rambus Inc. Destroyed Material Evidence in Bad Faith. We respectfully submit that Your Honor should grant this Motion for the following reasons:

1. Complaint Counsel has filed a dispositive motion seeking a default judgment against Rambus on the ground that it engaged in willful, bad-faith document destruction in order to eliminate documents that it feared could be used against it in future anticipated litigation. That motion has been briefed by Complaint Counsel and Respondent Rambus Inc., and is now pending before Your Honor.
2. Subsequent to the completion of briefing on the Default Judgment Motion, the Court of Appeals for the Federal Circuit issued a split decision in *Rambus Inc. v. Infineon Technologies AG*, Nos. 01-1449 *et al.*, 2003 WL 187265 (Fed. Cir., Jan. 29, 2003). Because this decision was issued after the close of briefing on the Default Judgment Motion, the parties were not able in their original submissions to comment on the relevance of this decision to the Motion for Default Judgment.

3. The Federal Circuit’s majority opinion in *Infineon* discusses, but does not disturb, the district court’s ruling that Rambus’s litigation misconduct, including the destruction of documents to prevent their discovery in future anticipated litigation, was alone an independent ground for awarding sanctions in favor of Infineon. In so ruling, the court of appeals made clear that the litigation misconduct finding was not challenged, and was not vacated as a result of a broader holding with respect to the award of attorneys’ fees.

4. The issues of Rambus’s litigation misconduct, including the fact that it destroyed documents for the purpose of “getting rid of” evidence relevant to future anticipated litigation, has been fully litigated and resolved by the district court and Rambus has had an opportunity to appeal that ruling. It is therefore now appropriate to consider the extent to which that ruling collaterally estops Rambus from relitigating those issues here.

5. Consideration of whether Rambus is collaterally estopped from recontesting its motivations for the destruction of documents will advance the resolution of the Default Judgment Motion by potentially removing from consideration one of three elements — *i.e.*, the issue of bad faith — that must be established for a default judgment to be granted.<sup>1</sup>

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<sup>1</sup> Complaint Counsel previously explained, in moving to strike Rambus’s “Joinder in Oral Argument” that it would not object to Rambus’s raising new arguments, relevant to the Default Judgment Motion, that were based on the Federal Circuit’s decision, which was issued subsequent to filing of the legal memoranda in connection with the Default Judgment Motion. *See* Complaint Counsel’s Motion to Strike Rambus Inc.’s Joinder in Complaint Counsel’s Request for Oral Argument on the Motion for Default Judgment at 3-4 (filed Jan. 30, 2003) (“Complaint Counsel [would not] object to Rambus submitting a pleading calling to Your Honor’s attention new information, not available when the January 13 opposition was filed, that may bear on the default judgment issue. . . . If Rambus wishes to file a new, revised pleading calling that decision to Your Honor’s attention and briefly explaining, as it already has in the ‘Joinder,’ how it believes this new information may be relevant to the default judgment motion, Complaint Counsel would have no objection to this, provided that it has an opportunity to respond.”).

Based on the forgoing, Complaint Counsel respectfully requests that Your Honor grant the attached Order granting leave to file the Supplemental Memorandum in Support of Complaint Counsel's Pending Motion for Default Judgment and deeming that Supplemental Memorandum to have been filed.

Respectfully submitted,

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COUNSEL SUPPORTING THE COMPLAINT

Dated: February 12, 2003

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

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**[PROPOSED] ORDER**

Upon consideration of the Motion for Leave to File Supplemental Memorandum in Support of Complaint Counsel's Pending Motion for Default Judgment, dated February 12, 2003,

IT IS HEREBY ORDERED that Complaint Counsel's Motion for Leave is Granted.

IT IS FURTHER ORDERED that the Supplemental Memorandum in Support of Complaint Counsel's Pending Motion for Default Judgment, Relating to Collateral Estoppel Effect of Prior Factual Finding That Respondent Rambus Inc. Destroyed Material Evidence in Bad Faith shall be filed forthwith.

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James P. Timony  
Chief Administrative Law Judge

Date: \_\_\_\_\_