

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

**PUBLIC**

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**COMPLAINT COUNSEL’S MOTION FOR ADDITIONAL ADVERSE INFERENCES  
AND OTHER APPROPRIATE RELIEF NECESSARY TO REMEDY RAMBUS INC.’S  
INTENTIONAL SPOILIATION OF EVIDENCE**

As explained in Judge Timony’s Order on Complaint Counsel’s Motions for Default Judgment and for Oral Argument, and detailed 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 embarking on a massive document destruction campaign. New evidence shows that during a time when Rambus anticipated future litigation, including potential antitrust litigation instituted by the FTC, Rambus destroyed millions of pages of material evidence. Rambus’s document destruction was so pervasive, and impacted so many issues in this case, that additional sanctions are necessary to ensure that Rambus’s spoliation of evidence does not interfere with the fair adjudication of this proceeding. These additional necessary sanctions include the imposition of further, comprehensive adverse inferences, a requirement that Rambus rebut these inference by clear and convincing evidence, and ongoing vigilance throughout this proceeding. Only by granting additional sanctions can Your Honor ensure that the outcome of this trial is untainted by Rambus’s spoliation of

evidence, appropriately penalize Rambus for its wrongdoing, and deter similar misconduct by others.

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.

Respectfully submitted,

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Dated: March 27, 2003

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**PROPOSED ORDER**

Upon consideration of Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief Necessary to Remedy Rambus Inc.'s Intentional Spoliation of Evidence, it is hereby ordered that:

- (A) in furtherance of Judge Timony's Order on Complaint Counsel's Motion for Default Judgment and for Oral Argument, and in addition to the adverse presumptions imposed therein upon the Respondent in this case, the additional adverse presumptions identified in Attachment A to this Order will exist for the remainder of the administrative proceeding of this matter;
- (B) Respondent Rambus Inc. may rebut the aforementioned adverse inferences, including the adverse presumptions imposed by Judge Timony, only by clear and convincing evidence; and
- (C) this Order does not preclude this Court from imposing additional spoliation sanctions as deemed appropriate.

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Stephen J. McGuire

Chief Administrative Law Judge

Date: March 27, 2003

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**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION**  
**FOR ADDITIONAL ADVERSE INFERENCES AND OTHER**  
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**TABLE OF CONTENTS**

Introduction and Factual Overview ..... 1

Procedural Background ..... 14

Argument ..... 18

    I.    Remedying Rambus’s Misconduct Requires – at a Minimum – the Imposition  
          of Comprehensive Adverse Inferences, a Clear-and-Convincing Rebuttal  
          Standard, and Vigilance as to the Ongoing Need to Fashion Appropriate  
          Sanctions ..... 19

        A.    Justice Requires the Imposition of Additional Adverse Inferences ..... 20

        B.    Rambus Should Be Required to Rebut All Adverse Inferences by  
              Clear and Convincing Evidence ..... 29

        C.    Justice Requires Vigilance as to the Ongoing Need to Fashion  
              Appropriate Sanctions ..... 31

II.	Your Honor Has the Discretion to Enter a Default Judgment If and When	
	Warranted .....	32
	Conclusion .....	37



## TABLE OF AUTHORITIES

### FEDERAL CASES

*Alexander v. National Farmers Organization,*

687 F.2d 1173 (8th Cir. 1982) ..... 23

*Anderson v. Cryovac, Inc.,*

862 F.2d 910 (1st Cir. 1988) ..... 12, 29

*Breeden v. Weinberger,*

493 F.2d 1002 (4th Cir. 1974) ..... 30

*Byrnie v. Town of Cromwell,*

243 F.3d 93 (2d Cir. 2001) ..... 22

*Cabinetware Inc. v. Sullivan,*

1991 WL 327959 (E.D. Cal. 1991) ..... 12, 29, 31

*Carlucci v. Piper Aircraft Corp.,*

102 F.R.D. 472 (S.D. Fla. 1984) ..... 11, 36

*Chambers v. Nasco, Inc.,*

501 U.S. 32 (1991) ..... 32

<i>Computer Associates International v. American Fundware, Inc.,</i>	
133 F.R.D. 166 (D. Colo. 1990) .....	11, 19, 35
 <i>In the Matter of International Telephone &amp; Telegraph Corp.,</i>	
104 F.T.C. 280 (1984) .....	30
 <i>In the Matter of Market Development Corp.,</i>	
95 F.T.C. 100 (1980) .....	19
 <i>In the Matter of Rush-Hampton Ind., Inc.,</i>	
1983 FTC LEXIS 127 .....	32
 <i>Kronisch v. United States,</i>	
150 F.3d 112 (2d Cir. 1998) .....	22, 23, 26
 <i>National Associate of Radiation Survivors v. Turnage,</i>	
115 F.R.D. 543 (N.D. Cal. 1987) .....	23
 <i>In re Prudential Insurance Co.,</i>	
169 F.R.D. 598 (D. N.J. 1997) .....	20, 23, 31
 <i>In re R.J. Reynolds Tobacco Co., Inc.,</i>	
111 F.T.C. 584 (1989) .....	23

## TABLE OF AUTHORITIES

(continued)

<i>Residential Funding Corp. v. DeGeorge Financial Corp.</i> , 306 F.3d 99 (2nd Cir. 2002) .....	20, 31
<i>Shaffer v. RWP Group, Inc.</i> , 169 F.R.D. 19 (E.D.N.Y. 1996) .....	9, 22
<i>Shepherd v. American Broadcasting Co.</i> , 62 F.3d 1469 (D.C. Cir. 1995) .....	33
<i>Silvestri v. General Motors Corp.</i> , 271 F.3d 583 (4th Cir. 2001) .....	30
<i>Telectron, Inc. v. Overhead Door Corp.</i> , 116 F.R.D. 107 (S.D. Fla. 1987) .....	21, 31, 33, 35
<i>Trigon Ins. Co. v. United States</i> , 204 F.R.D. 277 (E.D. Va. 2001) .....	31
<i>Turner v. Hudson Transit Lines, Inc.</i> , 142 F.R.D. 68 (S.D.N.Y. 1991) .....	2, 9, 12, 30

*In re Wechsler,*

121 F. Supp. 2d 404 (D. Del. 2000) ..... 35, 36

**STATE CASES**

*Linnen v. A.H. Robbins Co., Inc.,*

1999 WL 462015 (Mass. Super. Ct. 1999) ..... 31

**FEDERAL STATUTES**

15 U.S.C. § 50 (West 2003) ..... 32

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**INTRODUCTION AND FACTUAL OVERVIEW**

The concept of an adverse inference as a sanction for spoliation is based on two rationales. The first is remedial: where evidence is destroyed, the court should restore the prejudiced party to the same position with respect to its ability to prove its case that it could have held if there had been no spoliation.

The second rationale is punitive. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. Of course, it also serves as retribution against the immediate wrongdoer. The law, in hatred of the spoliator, baffles the destroyer, and thwarts his iniquitous purposes, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidentially employed to perpetrate the wrong.

The casebooks overflow with statements like these describing the fundamental purposes that adverse inferences are designed to serve when employed as a remedy for intentional spoliation of evidence. This particular statement comes from *Turner v. Hudson Transit Lines, Inc.*,<sup>1</sup> a decision relied upon by the respondent, Rambus Inc., in opposing Complaint Counsel's Motion for Default Judgment. In his recent order imposing adverse inferences against Rambus in this case, Judge Timony outlined a similar statement of purposes. In his words, "The remedy should serve to: (1) deter parties from destroying evidence; (2) place the risk of an erroneous evaluation of the content of destroyed evidence on the party who destroyed it; and (3) place the party injured by the loss of evidence helpful to its case to where the party would have been in the absence of spoliation." Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument ("Adverse Inference Order") at 4-5. In short, Judge Timony said, "Rambus should not be rewarded" for "destruction of documents that it knew or should have known were relevant to reasonably foreseeable litigation" or for its "utter failure to maintain an inventory of the . . . documents destroyed." *Id.* at 7-8.

In requesting spoliation-related sanctions against Rambus, Complaint Counsel did not endorse the approach of imposing adverse inferences, but rather proposed entry of a default judgement as to liability.<sup>2</sup> Nevertheless, Complaint Counsel recognizes that

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<sup>1</sup> 142 F.R.D. 68, 74 (S.D.N.Y. 1991) (citations and internal punctuation omitted).

<sup>2</sup> See Memorandum in Support of Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence ("CC Mem.") at 99-108 (arguing that adverse inferences would not be an adequate sanction in this case).

Judge Timony was entitled to exercise “broad discretion as to the crafting of an appropriate remedy” for Rambus’s spoliation, and we do not by this motion seek to challenge his choice of remedies. *Id.* at 4. On the contrary, the purpose of this motion is to request that Your Honor take all necessary and appropriate steps to ensure that the stated purposes of Judge Timony’s Adverse Inference Order are fully vindicated as this case proceeds.

Although by filing this motion Complaint Counsel does not seek to question Judge Timony’s decision to impose adverse inferences in lieu of a default judgment, we do wish to underscore the difficult challenge that we believe Your Honor has inherited as a consequence of that ruling. The difficulty of that challenge is now apparent in ways that Judge Timony could not have envisioned only one month ago. To start with, newly discovered evidence, not available to Complaint Counsel when the original default judgment papers were filed, shows that the scale of Rambus’s document destruction was truly monumental.

When Complaint Counsel was briefing the default judgment issue, it did not have any concrete understanding of the scale of Rambus’s document destruction. Based on the prior testimony of Rambus witnesses, Complaint Counsel could assert that “a lot of stuff was destroyed . . . a lot of stuff . . . a lot of stuff.” CC Mem. at 48 (quoting deposition testimony of Joel Karp). Yet it was not until very recently, after the default judgment briefing had ended, that Complaint Counsel discovered new Rambus documents shedding light on the true magnitude of the document destruction. This new evidence consists in part of two internal Rambus e-mails addressed to all employees – one sent on September 2, 1998, by Ed Larsen, Rambus’s Vice President of Human Resources, and the other sent the very next day, September 3, by Joel Karp, Rambus’s Vice President of Intellectual Property and the person charged with overseeing the development and

implementation of Rambus's "document retention" policy. Given their short length, we quote the full text of both e-mails here:

From:  
Ed Larsen  
Sent:  
Wednesday, September 02, 1998 8:51 AM  
To:  
[staff@rambus.com](mailto:staff@rambus.com)  
Subject:  
Shred Day 1998. . .

Thursday is Shred Day 1998. If you haven't started reviewing your documents for compliance with our Document Retention Policy, please do so TODAY.

The shredding service will be here Thursday AM to begin the process. Please leave your burlap bags in the hallway outside your cube.

We will have a Shred Day Celebration in the new 1st floor open area at 5:00 on Thursday.

If you have any questions regarding our Document Retention Policy, please see Joel.

Ed.<sup>3</sup>

\* \* \*

From:  
Joel Karp  
Sent:  
Thursday, September 03, 1998 1:46 PM  
To:  
[staff@rambus.com](mailto:staff@rambus.com)  
Cc:  
[exec@rambus.com](mailto:exec@rambus.com)  
Subject:  
Shred Day: Status Report

**It took about 5 hours to completely fill the shredding truck (capacity is 20,000 lbs).** They are now on their way to the recycling plant in San Jose and won't be back today. They feel they can finish the job tomorrow. Worst case is they might have to come back Tuesday to pick up anything that still remains after tomorrow's session. By the way, if anyone needs more bags there's a box-full in the building entrance area.

Thanks to all Rambusers for your cooperation and diligence in performing an unpleasant but necessary task. Next time we do this it should be a lot easier.

Don't forget; pizza, beer, champagne, etc., at 5pm in the Autodesk space. See you there.

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<sup>3</sup> RF0684607 [Tab 1].



jk<sup>4</sup>

As these documents show, in one day alone, in the space of five hours, Rambus destroyed **20,000 pounds** (roughly two million pages)<sup>5</sup> of its own internal business records.<sup>6</sup> This dwarfs the volume of documents that Rambus has produced to Complaint Counsel in this case,<sup>7</sup> and of course represents only a fraction of what Rambus destroyed in the one to two year period during which the company's document destruction program was in full swing.<sup>8</sup>

Complaint Counsel submits that this newly discovered, tangible proof of the scale of Rambus's document destruction, when combined with other, undisputed evidence, and with Judge Timony's prior findings, paints a stark and disturbing picture, which has the potential to cast a pall over this entire proceeding. The broad outlines of that picture are as follows:

(1)

As Judge Timony has now concluded, "Rambus never disclosed to other JEDEC

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<sup>4</sup> RF0684604 (emphasis added) [Tab 2].

<sup>5</sup> Ten thousand pages of copy paper weighs approximately 10 pounds. Thus, 20,000 pounds of documentation is roughly on the order of two million pages.

<sup>6</sup> Whether Rambus's efforts ultimately resulted in the destruction of 50,000 or 500,000 pounds of documents, or even amounts in excess of this, we will never know. If there were records providing these statistics, Rambus either has destroyed them, or otherwise failed to produce them to Complaint Counsel.

<sup>7</sup> Rambus claims to have produced "450,000 pages" of documentation to Complaint Counsel in this case. Memorandum by Respondent Rambus Inc. and by Third Party Witness Richard Crisp in Opposition to Complaint Counsel's Motion to Compel an Additional Day of Deposition Testimony of Richard Crisp (3/7/03) at 3. Assuming this amount is accurate, it still only represents less than one quarter of the volume of documents that Rambus destroyed in just five hours in the early stages of a document destruction program that was in place for the better part of two years.

<sup>8</sup> Prior testimony indicates that Rambus first implemented its document destruction program in August or September 1998 and that it continued in full effect at least through early 2000, at which point it was briefly interrupted (during the short-lived *Hitachi* litigation) and then relaunched. See CC Mem. at 42-49, 63-69.

participants that it either held or had applied for patents that would be infringed upon by the proposed JEDEC standards for RAM.” Adverse Inference Order at 3.

(2)

“While participating in JEDEC’s development of RAM standards, Rambus was advised by its counsel that this participation, combined with its failure to disclose the existence of the patents that would be infringed by the proposed JEDEC standard, could create an equitable estoppel that would make it difficult, if not impossible, for Rambus to enforce its patents and, most importantly, to collect royalties or damages from patent infringements resulting from the proposed JEDEC standards.” *Id.*

(3)

“In mid-1996, Rambus ceased participating in JEDEC,” *id.*, and its decision to do so was precipitated in large measure by the FTC’s issuance of a consent order in *In re Dell Computer Corporation* – an order that signaled to Rambus and its lawyers that the same JEDEC-related conduct that they understood to create risks of adverse equitable estoppel rulings also created risks of antitrust liability, and potential risks of FTC enforcement actions.<sup>9</sup>

(4)

“In October 1997, Rambus hired Joel Karp” as its Vice President of Intellectual Property, and Mr. Karp thereafter “worked on preparation and strategy concerning RAM-related patent infringement,” focusing significant attention on future enforcement of Rambus’s as-yet-undisclosed JEDEC-related patents.

(5)

Virtually simultaneously with his arrival at the company in late 1997, “counsel for Rambus advised Mr. Karp that Rambus should implement a document retention program,” and Mr. Karp – a non-lawyer – then personally oversaw the development and implementation of such a program. *Id.* at 4, 6.

(6)

In implementing this program, starting in July 1998, neither Mr. Karp nor anyone else gave guidance to Rambus employees “about what documents they should keep” – “[s]pecifically, no instruction was given to Rambus employees to retain documents relevant to future litigation, nor were employees instructed to create and retain an inventory of all documents purged.” *Id.* at 4 (emphasis added).

(7)

“[T]his virtually unsupervised destruction of documents took place at a time when Rambus knew or should have known of related litigation” – or at a minimum, “reasonably foreseeable litigation” (including the potential of an FTC enforcement action

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<sup>9</sup> In connection with its Default Judgment Motion, Complaint Counsel made clear allegations to this effect, which Rambus, in opposing the motion, failed to contest. *See* CC Mem. at 15-21. Moreover, one of Rambus’s expert economists – Professor David Teece – recently testified, with reference to Rambus’s participation in JEDEC, that “if it wasn’t for the . . . . FTC *Dell* decision, they might still be there.” Teece Dep. Tr. (3/13/01) at 281:1-5, *FTC v. Rambus* [Tab 3].

akin to the *Dell* proceeding) – involving “the proposed JEDEC standards for RAM.” *Id.* at 4, 6 (emphasis added).

(8)

The volume of business records destroyed by Rambus was massive and clearly encompassed – among other things – millions upon millions of pages of paper documents,<sup>10</sup> as well as thousands of electronic back-up tapes, containing equally massive amounts of e-mail and other documentation.<sup>11</sup>

(9)

Rambus’s document destruction impacted numerous categories of evidence directly relevant to this proceeding, including JEDEC-related documentation, documents pertaining to Rambus’s prosecution of JEDEC-related patents and patent applications, and business files kept by certain key individuals, including Richard Crisp (the company’s primary JEDEC representative), Lester Vincent (Rambus’s outside patent counsel), Anthony Diepenbrock (Rambus’s in-house patent attorney), and Mark Horowitz (Rambus co-founder, board member, and lead inventor).<sup>12</sup>

(10)

Because of “Rambus’s utter failure to maintain an inventory of the documents its employees destroyed,” it is now “impossible to discern the exact nature” of all that was destroyed “or the relevance of the documents destroyed to the instant matter.” Adverse Inference Order at 7 (emphasis added).

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<sup>10</sup> The new evidence presented in this motion directly establishes this fact and invites additional inferences that Rambus destroyed even substantially greater volumes of documents.

<sup>11</sup> Complaint Counsel presented the evidence relating to this contention in connection with its Default Judgment Motion, *see* CC Mem. at 59-60, and again Rambus did not contest it in its opposition to that motion.

<sup>12</sup> Complaint Counsel’s prior default judgment filings set forth in detail the nature of many of the documents and files that we know to have been impacted by Rambus’s document destruction, and again Rambus, in opposing default judgment, made no effort to contest these facts. *See* CC Mem. at 61-69. Of course, given that Rambus kept no inventory of what was destroyed, most of the information that exists in this regard comes from the testimony of Rambus witnesses. In addition to the testimony highlighted in Complaint Counsel’s default judgment filings, we would like to call Your Honor’s attention to additional testimony by Rambus’s co-founder, board member, and lead inventor, Mark Horowitz, who has previously confirmed under oath that much of the Rambus business documentation he possessed was shredded by Rambus employees after he returned to his teaching job at Stanford. *See* Horowitz Dep. (1/20/01) 29:12-19, *Rambus v. Infineon* [Tab 4] (“All of my records from Rambus were left in my office at Rambus. . . . Rambus had a document retention policy implemented, and so people went through my stuff . . . and pulled out the stuff they thought was essential, and shredded the rest.”); *id.* at 160:15-21 (“when I went back to Stanford my stuff was left in my office cube, and at some point, because of the document retention policy, people went through, collected what they thought was of value, and shredded the rest”).

These indisputable facts and prior factual determinations do indeed paint an unsettling picture. The picture becomes all the more disconcerting when one adds to it Judge Timony's separate conclusion, affirmed by Your Honor,<sup>13</sup> that, for purposes of this litigation, Rambus shall not be permitted to contest that it instituted its document destruction program "in part, for the purpose of getting rid of documents that might be harmful in litigation" involving the same "JEDEC-related patents" that Rambus feared could be held unenforceable. Order Granting Complaint Counsel's Motion for Collateral Estoppel ("Collateral Estoppel Order") at 5 (emphasis added). *See also* Adverse Inference Order at 4 ("Rambus destroyed or failed to preserve evidence for another's use in reasonably foreseeable litigation."). And to complete the picture, one additional item must be added – the fact that Rambus's lawyers seek to defend this case by aggressively attacking the adequacy of Complaint Counsel's evidence on the very same categories of proof that we know to have been impacted by their client's "intentional destruction of documents," *id.* at 8, and that one naturally would expect to have been impacted by a document destruction program designed, in part, to "[get] rid of documents that might be harmful" in future "JEDEC-related" litigation. Collateral Estoppel Order at 5. *See also* CC Mem. at 76-79, 91-99.

In a situation such as this, the very decision to proceed to trial, even a trial balanced through the imposition of adverse inferences, carries with it substantial risks of a miscarriage of justice. We respectfully submit that Your Honor, therefore, now bears an equally substantial challenge to ensure that no such injustice is permitted to occur here.

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<sup>13</sup> Order Denying Respondent's Application for Review of February 26, 2003, Order (Granting Complaint Council's Motion for Collateral Estoppel), March 26, 2003.

Indeed, we submit that even the appearance of an injustice must be avoided at all costs. Given the institutional interests of this agency, as well as the interests of potentially affected consumers, it simply would not be tolerable to allow this case to proceed in a manner that might invite the slightest of doubts as to whether the outcome truly reflects an objective determination of the merits, undisturbed by the effects of spoliation.

This level of assurance, however, is not easily achievable in the circumstances of this case. As we will explain in this motion, Complaint Counsel believes strongly that Judge Timony's Adverse Inference Order, though perhaps intended to reach this goal, falls far short of actually attaining it – very likely, we suspect, because Complaint Counsel has not, before now, had the opportunity to brief the question of what adverse inferences would be necessary to fully (or as fully as possible) counteract the harm flowing from Rambus's document destruction.

In our view, this administrative law court can and must do much more if it hopes to effectuate the remedial purposes that adverse inferences are designed to serve – *i.e.*, to “restore the prejudiced party to the same position with respect to its ability to prove its case that it would have held if there had been no spoliation.” *Turner*, 142 F.R.D. at 74. Yet at the same time, one must not forget that adverse inferences, when imposed in cases such as this, are designed to do more than serve merely a remedial purpose. A “second rationale” – namely, deterrence – must be effectuated as well. *See id.* (cautioning courts not to “lose sight of the need to consider both principles,” remediation and deterrence, “in determining the appropriate remedy in any specific case”) (emphasis added). *See also Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19, 25 (E.D.N.Y. 1996) (“An adverse inference charge serves the dual purposes of remediation and punishment.”) (emphasis

added).

Recognizing the importance of deterrence, Judge Timony placed it first among the purposes to be served by the imposition of spoliation sanctions in this case – “The remedy should serve to: (1) deter parties from destroying evidence; . . . .” Adverse Inference Order at 4-5 (emphasis added). What Judge Timony likely did not appreciate is that Rambus, and others, would perceive his Adverse Inference Order as imposing no real punishment and hence accomplishing no meaningful deterrence. This perception is evident, in part, from Rambus’s own public statements commenting on Judge Timony’s ruling. For instance, John Danforth, Rambus’s General Counsel, told one publication that Judge Timony’s Adverse Inference Order “was a ‘positive’ one for the company.”<sup>14</sup> The same day Mr. Danforth told another publication that Rambus was “pleased” by the ruling.<sup>15</sup> Meanwhile, Bob Eulau, Rambus’s Chief Financial Officer, publicly explained that Judge Timony’s ruling was a “favorable” development.<sup>16</sup> Though Rambus has acknowledged that it now must overcome certain adverse inferences, Mr. Danforth has publicly “downplayed” the significance of these inferences, and has professed that the company will have “little trouble” overcoming them.<sup>17</sup>

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<sup>14</sup> Paula Stepankowsky, “Rambus Down 12%; Judge Denies FTC Request in Antitrust Case,” THE WALL STREET JOURNAL ONLINE (Mar. 5, 2003) (emphasis added) [Tab 5].

<sup>15</sup> “Rambus Says Judge Denied FTC Motion for Default Judgment Against Co,” AFX NEWS LIMITED (Mar. 5, 2003) (emphasis added) [Tab 6].

<sup>16</sup> Donna Fuscaldo, “Rambus CFO Says Judge Ruling on FTC Favorable for Co,” THE WALL STREET JOURNAL ONLINE (Mar. 5, 2003) (emphasis added) [Tab 7].

<sup>17</sup> Peter Kaplan, “U.S. Judge Hits Rambus Over Document Destruction,” REUTERS (Mar. 5, 2003) (emphasis added) [Tab 8].

These statements undoubtedly reflect Rambus’s best effort to put a positive spin on the situation. However, the situation, as it currently stands, lends itself to such an interpretation – that is, one could easily be left with the impression that, despite being found to have engaged in intentional spoliation of evidence, Rambus has escaped with little more than a “mild rebuke.” *Computer Assocs. Int’l v. American Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990). Again, we believe that more can, and must, be done, not only to ensure that the adverse inferences in this case properly achieve the remedial purposes for which they have been imposed, but also to ensure that such inferences properly fulfill the punitive and deterrence functions that Judge Timony himself recognized to be paramount.

The fact is that Rambus has now been judged responsible for “spoliation of evidence,” which amounts to an obstruction of justice.<sup>18</sup> Adverse Inference Order at 4. Not only did Rambus engage in “intentional destruction of documents” resulting in the elimination of “evidence for another’s use in reasonably foreseeable litigation,” but its “utter failure to maintain an inventory of the documents its employees destroyed makes it impossible to discern” precisely how much evidence, otherwise helpful to Complaint Counsel’s ability to prove its claims, has been forever lost. *Id.* at 4, 7-8. What we do know is that Rambus destroyed massive amounts of evidence, all Rambus employees were involved, and the destruction extended to “all major categories of documents generated in the ordinary course of Rambus’s business.” Rambus Mem. at 5 (emphasis added). As we explain in more detail below, in these circumstances, there is serious cause for concern that “[b]y

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<sup>18</sup> See Black’s Law Dictionary (5<sup>th</sup> Ed. 1979) (defining “Spoliation” as “destruction of evidence . . . constitut[ing] an obstruction of justice”).

deliberately destroying documents,” Rambus has “prevented the fair adjudication of the case” and “has eliminated” any hope of a decision “on the merits.” *Carlucci v. Piper Aircraft Corp.*, 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 (11<sup>th</sup> Cir. 1985). If there is to be any hope of a just resolution in this case, Complaint Counsel submits that, at the very minimum, the following steps must be taken, over and above the relief already granted by Judge Timony.

**First**, by this motion we ask Your Honor to impose a number of additional adverse inferences corresponding with specific categories of proof that the direct and circumstantial evidence shows were likely impacted by Rambus’s document destruction. Only by imposing such additional inferences, we submit, can Your Honor even begin to ensure that Complaint Counsel is “restore[d] . . . to the same position with respect to its ability to prove its case that it could have held if there had been no spoliation,” although we maintain that (in the circumstances present here) this goal can never be fully achieved through the issuance of adverse inferences. *Turner*, 142 F.R.D. at 74.

**Second**, by this motion we ask Your Honor to rule that Rambus, in seeking to overcome the applicable adverse inferences, will be held to a “clear and convincing evidence” standard of persuasion. We submit that such a ruling is necessary to ensure that the spoliation remedy imposed in this case is at least “moderately punitive,” as Judge Timony intended it to be and as the law, in these circumstances, essentially mandates. *Cabinetware Inc. v. Sullivan*, 1991 WL 327959, \*4 (E.D. Cal. 1991) (expressing concern that a straightforward adverse inference “would serve no deterrent or punitive function” and suggesting that imposition of a “clear and convincing evidence” standard would be



“moderately punitive” while still being “reasonably tailored to put the plaintiff in the position he would have been in but for defendant’s transgression”) (emphasis added).<sup>19</sup>

**Third**, through this motion we ask that – consistent with established case law – Your Honor undertake a continuing commitment to ensure that Rambus’s spoliation in no way affects the outcome of this proceeding. With this in mind, we ask that Your Honor be attentive to identify any situation going forward in which, through the arguments it seeks to make or the evidence it seeks to present, Rambus may directly or indirectly benefit from the unavailability of evidence that likely would have been encompassed within the scope of what Rambus destroyed. Only through such continued vigilance, and Your Honor’s willingness, as circumstances warrant, to further expand the adverse inferences and entertain other appropriate sanctions, do we believe it would be possible to have any hope of a fair trial in this case.

**Finally**, although Complaint Counsel does not presently request such relief, through this motion we do seek to impress upon Your Honor that you continue to possess “broad discretion as to the crafting of an appropriate remedy” for Rambus’s spoliation, and that such discretion would permit Your Honor – either now or in the future – to grant a default judgment, should you deem such relief to be warranted by the circumstances.

Adverse Inference Order at 4. As we will briefly explain, without rearguing the prior

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<sup>19</sup> See also *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (1<sup>st</sup> Cir. 1988) (“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.”) (emphasis added).

Motion for Default Judgment, Complaint Counsel continues to hold the view (indeed, more strongly than ever, in light of newly produced evidence) that the injustice flowing from Rambus's intentional spoliation can never be adequately remedied absent the issuance of a default judgment.

### **PROCEDURAL BACKGROUND**

As Your Honor knows, in late December of last year Complaint Counsel filed a motion for default judgment on issues of liability in this case. It was an unusual step, motivated by unusual circumstances. Complaint Counsel's motion by no means merely rehashed the same facts that were presented to the district court in the *Infineon* case, leading to the adverse fact findings described above. Complaint Counsel had uncovered – and through its motion presented – additional proof, not made available to Infineon's lawyers, demonstrating both the wrongful nature and damaging effects of Rambus's document destruction. This evidence was reviewed in detail in Complaint Counsel's prior filings and need not be set forth again here. *See generally* CC Mem.

What does bear emphasis here is this: As is evident from review of the parties' filings, in opposing Complaint Counsel's default judgment motion Rambus failed to contest virtually all of the factual and legal contentions relied upon by Complaint Counsel in support of the motion. *See* CC Reply Mem. at 2-7 (cataloguing the various factual contentions that Rambus's opposition did not contest), 7-10 (explaining that Rambus also failed to dispute the vast majority of Complaint Counsel's legal contentions). Rambus's opposition to default judgment hinged almost entirely on one thing: a denial that, in destroying relevant business records, "Rambus acted in bad faith." Rambus Mem. at 1.

As Complaint Counsel pointed out in its reply, while offering a blanket denial of any wrongdoing, Rambus failed to rebut, or even comment on, virtually all of the evidence of bad faith that Complaint Counsel cited in support of the motion. *See* CC Reply Mem. at 10-12. It was only later, however, in the wake of the Federal Circuit’s resolution of the *Infineon* appeal, that Complaint Counsel had clear grounds to argue that the issue of bad faith was already conclusively resolved against Rambus, in a manner that precludes Rambus – through principles of collateral estoppel – from relitigating the same issue here. Thus, Complaint Counsel followed its Default Judgment Motion with a separate motion seeking an order giving collateral estoppel effect to these prior fact findings.

As Your Honor also knows, roughly one month ago Judge Timony issued an order denying Complaint Counsel’s Motion for Default Judgment. In the same order, however, Judge Timony concluded that Rambus has engaged in “intentional destruction of documents that it knew or should have known were relevant to reasonably foreseeable litigation” involving “JEDEC standards” for dynamic random access memory (“DRAM”). Adverse Inference Order at 6, 8. Judge Timony further concluded that Rambus acted with “reckless disregard” of its obligation “to maintain an inventory of the documents its employees destroyed,” and that its “utter failure to maintain [such] an inventory . . . makes it impossible to discern the exact nature of the relevance of the documents destroyed to the instant matter.” *Id.* at 7. Nevertheless, Judge Timony stated, “What evidence is available indicates that at least some of the documents destroyed were relevant” to this case. *Id.* Based on these and other factual determinations, Judge Timony concluded that Rambus has engaged in “spoliation of evidence,” for which it deserved to be sanctioned. *Id.* at 4.

Although different in nature from the relief that Complaint Counsel had requested through its motion for default judgment, Judge Timony did impose sanctions against Rambus, in the form of rebuttable adverse inferences. In imposing such sanctions, Judge Timony noted that remedies for “intentional . . . destruction of evidence,” where imposed, should serve three purposes:

- (1) to “deter parties from destroying evidence”;
- (2) to “place the risk of an erroneous evaluation of the content of destroyed evidence on the party who destroyed it”; and
- (3) to “place the party injured by the loss of evidence helpful to its case to where the party would have been in the absence of spoliation.”

*Id.* at 4-5. Signaling that he intended for these same purposes to be served in this case, Judge Timony stated, “it is clear that Rambus should not be rewarded” for its “intentional destruction of documents” and its “utter failure to maintain an inventory of . . . documents destroyed.” *Id.* at 7-8 (emphasis added).

Judge Timony imposed the following seven rebuttable adverse inferences against Rambus, all of which, he explained, “will exist for the remainder of the administrative proceedings in this matter”:

- (1) Rambus knew or should have known from its pre-1996 participation in JEDEC that developing JEDEC standards would require the use of patents held or applied for by Rambus;
- (2) Rambus never disclosed to other JEDEC participants the existence of these patents;
- (3) Rambus knew that its failure to disclose the existence of these patents to other JEDEC

participants could serve to equitably estop Rambus from enforcing its patents as to other JEDEC participants;

(4)

Rambus knew or should have known from its participation in JEDEC that litigation over the enforcement of its patents was reasonably foreseeable;

(5)

Rambus provided inadequate guidance to its employees as to what documents should be retained and which documents could be purged as part of its corporate document retention program;

(6)

Rambus's corporate document retention program specifically failed to direct its employees to retain documents that could be relevant to any foreseeable litigation; and

(7)

Rambus's corporate document retention program specifically failed to require employees to create and maintain a log of the documents purged pursuant to the program.

Adverse Inference Order at 8-9. In setting forth these rulings, Judge Timony noted that “[b]ad faith in the spoliation is not necessary” to justify imposing adverse inferences; rather, “gross negligence is sufficient.” *Id.* at 5 (citing relevant case law). Judge Timony characterized Rambus's document destruction as “intentional” and as reflecting “gross negligence” and “reckless disregard.” *Id.* at 7-8. Judge Timony also expressly concluded that “Rambus destroyed or failed to preserve evidence for another's use . . . in reasonably foreseeable litigation.” *Id.* at 4. Judge Timony's Adverse Inference Order, however, stopped short of expressly concluding that Rambus's document destruction and related activities were undertaken in “bad faith.”

On the same day that he issued his Adverse Inference Order, Judge Timony separately ruled that Rambus should be barred, by principles of collateral estoppel, from contesting in this case that the company's document destruction activities were undertaken, at least in part, with an intent to eliminate evidence that the company feared could be harmful in

anticipated JEDEC-related litigation. As Judge Timony explained in that order, the fact that Rambus destroyed material evidence and its motivation for doing so were both “carefully and fully” litigated before the trial court in *Rambus Inc. v. Infineon Technologies*, and “Rambus should . . . not be able to escape these fully adjudicated adverse factual determinations” in this case. Collateral Estoppel Order at 3-4 (emphasis added). Thus, Judge Timony ruled that the following fact findings shall be binding upon Rambus for purposes of this litigation:

(1)

When “Rambus instituted its document retention policy in 1998,” it did so, “in part, for the purpose of getting rid of documents that might be harmful in litigation.”

(2)

Rambus, at the time it implemented its “document retention policy,” “[c]learly . . . contemplated that it might be bringing patent infringement suits during this time frame” if its efforts to persuade semi-conductor manufacturers to license “its JEDEC-related patents” “were not successful.”

(3)

Rambus’s “document destruction” was therefore done “in anticipation of litigation.”

*Id.* at 5 (stating that these findings “will be given” “full collateral estoppel effect”). As

Complaint Counsel has previously pointed out, these findings are legally sufficient to establish that Rambus in fact did destroy documents in “bad faith.” Indeed, Rambus itself

has essentially admitted as much. *Compare* Rambus Mem. at 18 (“Bad faith in this context requires . . . show[ing] that Rambus destroyed the documents in question

‘intend[ing] to prevent use of the evidence in litigation.’”) (quoting *Turner v. Hudson*

*Transit Lines, Inc.*, 142 F.R.D. 68, 74 (S.D.N.Y. 1991) (emphasis added)), with Collateral

Estoppel Order at 5 (“When ‘Rambus instituted its document retention policy in 1998,’ it

did so, ‘in part, for the purpose of getting rid of documents that might be harmful in

litigation” – specifically, the future “JEDEC-related” litigation that Rambus anticipated at that time) (emphasis added).

### **ARGUMENT**

In denying the Motion for Default Judgment, Judge Timony placed reliance upon Complaint Counsel’s expression of confidence 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 its claims.” Adverse Inference Order at 5 (quoting CC Mem. at 12, n.13). Complaint Counsel continues to stand by this statement, but it would be a serious mistake to view this statement as some form of tacit admission that further remedial steps to cure the damage caused by Rambus’s spoliation are unnecessary. We believe that additional steps beyond those taken by Judge Timony are necessary to ensure a fair trial, and to quell concerns that Rambus, through its adjudicated misconduct, may succeed in escaping justice for its actions. We spell out below the additional relief now warranted.

No one can predict with certainty the outcome of this suit. What can be predicted safely, however, is that absent substantial additional relief to address the effects of spoliation on this case, any victory by Rambus (be it in part or whole) most assuredly will be clouded by doubts as to whether justice was served here. Nothing could be more damaging to this agency or to the broader interests of the legal system of which this administrative law court is part. As another court aptly noted:

In this . . . era of widely publicized evidence destruction by document shredding, it is well to remind litigants that such conduct will not be tolerated in judicial proceedings. Destruction of evidence cannot be countenanced in a justice system whose goal is to find the truth through honest and orderly production of evidence under established discovery rules.

*Computer Assocs. Int'l*, 133 F.R.D. at 170.



## **I.**

### **Remediating Rambus’s Misconduct Requires – at a Minimum – the Imposition of Comprehensive Adverse Inferences, a Clear-and-Convincing Rebuttal Standard, and Vigilance as to the Ongoing Need to Fashion Appropriate Sanctions**

Judge Timony more than adequately explained why, at a minimum, the “undisputed facts of record require sanctions in the form of certain rebuttable adverse presumptions against Rambus.” Adverse Inference Order at 2-3 (emphasis added). Indeed, “[t]he drawing of an adverse inference . . . has been recognized to be an entirely proper and indeed necessary exercise of an administrative agency’s adjudicative responsibilities. Without such a capability, the express Congressional grant of adjudicative authority to an administrative agency would be profoundly frustrated.” *In the Matter of Market Development Corp.*, 95 F.T.C.100, 1980 FTC LEXIS 162, 243-44 (1980).

As discussed in detail above, Judge Timony, informed by case law, was very clear in outlining the purposes he sought to achieve by imposing adverse inferences: to deter future wrongdoing, to place the risk of erroneous evaluation of destroyed evidence on Rambus, and to place Complaint Counsel where it “would have been in the absence of spoliation.” *Id.* at 4-5. Unfortunately, however, the seven presumptions he outlined fall far short of being able to accomplish these goals. At risk here is the very real possibility that this case proceeds in a manner that allows the outcome to be skewed in favor of the spoliator, which would not only undermine the purposes outlined by Judge Timony, but would “profoundly frustrate[]” the adjudicative process of this agency. *Market Development Corp.*, 1980 FTC LEXIS at 244.

## **A.**

### **Justice Requires the Imposition of Additional Adverse Inferences**

Rambus’s culpability, even viewed conservatively as “gross negligence” and “reckless disregard,” far exceeds the minimum threshold necessary to impose adverse inferences. Courts have imposed broad adverse inferences even in circumstances far less egregious. In *In re Prudential Insurance Co.*, for example, the court found that an insurance company’s destruction of documents warranted adverse inferences. Unlike in the instant case, however, nothing in the *Prudential* record indicated that the company intended to subvert discovery through intentional document destruction. The court determined that “because documents [had] been destroyed, they [could] never be retrieved and the resultant harm is incalculable.” 169 F.R.D. 598, 616 (D. N.J. 1997). *See also Residential Funding Corp. v. DeGeorge Financial Corp.* 306 F.3d 99, 108 (2nd Cir. 2002) (In remanding the lower court’s failure to impose adverse inferences, the court stated, “It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance.”).

Moreover, as Judge Timony’s findings in the Collateral Estoppel Order establish, Rambus did act in bad faith, by “getting rid of documents that might be harmful in litigation.” Collateral Estoppel Order at 5.<sup>20</sup> Upon finding bad faith, courts actually require the imposition – at a minimum – of adverse inferences. “Where the evidence clearly reveals that an effort to destroy or conceal documents was carried out in bad faith, the drawing of an adverse inference as to the contents of the documents had not merely been permitted: it

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<sup>20</sup> As noted above (*see pp. 17-18, supra*), Rambus itself concedes that such a finding establishes bad faith as a matter of law. *See also* Rambus Mem. at 18 (citing *Turner v. Hudson Transit Lines*, 142 F.R.D. 68, 74 (S.D.N.Y. 1991)).

has in some cases been required.” *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 134 (S.D. Fla. 1987) (emphasis added) (granting plaintiff’s renewed request for a default judgment to remedy document destruction). Thus, regardless of Rambus’s culpability, the imposition of (at a minimum) adverse inferences is necessary to restore evidentiary balance. In fact, given the finding that Rambus acted in bad faith, a failure to impose such sanctions – in a comprehensive manner, proportionate with the scope of the destruction that occurred – would be tantamount to judicial error.

Having established the appropriateness, indeed the critical necessity, of imposing adverse inferences here, the next question is how to fashion them in a way that ensures they accomplish their intended result. Case law provides some clear guideposts in this regard, each of which serves to vindicate Judge Timony’s objectives of deterrence, penalty, and evidentiary equity.

First, for sound policy reasons, the standard for justifying adverse inferences is a lenient one: the inference sought must “bear some relationship” to the lost evidence. *Shaffer*, 169 F.R.D. at 28 (emphasis added). Moreover, the wronged party should be afforded due deference in identifying precisely the content of the destroyed documents, and, accordingly, the adverse inferences to be drawn from them. As the Second Circuit noted in *Kronisch v. U.S.*:

Where, as here, a party loses the opportunity to identify . . . documents likely to contain critical evidence because the voluminous files that might contain the document(s) have all been destroyed, . . . the prejudiced party may be permitted an inference in his favor so long as he has produced **some evidence** suggesting that a document or documents relevant to substantiating his claims would have been among the destroyed files. . . . [H]olding the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence would subvert the prophylactic and punitive purposes of the adverse inference, and would allow parties who have intentionally destroyed evidence to profit from that destruction.

150 F.3d 112, 128 (2d Cir. 1998) (emphasis added). *Kronisch*, a case relied on by Judge Timony in the Adverse Inference Order, involved the CIA's pre-litigation spoliation of documents related to CIA projects involving the administration of LSD to subjects without their knowledge or consent. The Second Circuit permitted an inference that the destroyed files contained evidence substantiating plaintiff's claim that he was one of the unwitting subjects, notwithstanding the fact that he introduced only a "chain of circumstantial evidence [that] may prove to be altogether vulnerable at trial." *Id.* at 129. Similarly, in *Byrnie v. Town of Cromwell*, a case relied on by Judge Timony in his Adverse Inferences Order, the court, relying the reasoning of *Kronisch*, held that "a party seeking adverse inferences may rely on circumstantial evidence to suggest the contents of destroyed evidence." 243 F.3d 93, 110 (2d Cir. 2001) (emphasis added). Second, when – as is plainly true here – the destruction is pervasive, so too should be the scope of the adverse inferences. In other cases involving far-reaching document destruction, courts have held that "[it] was error . . . not to draw factual inferences adverse to the [spoliator] on matters undertaken in or through offices and individuals involved in the destruction of documents." *Alexander v. Nat'l. Farmers Org.*, 687 F.2d 1173, 1205-06 (8<sup>th</sup> Cir. 1982) (emphasis added). *See also Nat'l Assoc. of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557 (N.D. Cal. 1987) (quoting *Alexander*). In this same vein, with respect to the substantive issues in the case, the adverse inferences should be as far-reaching as necessary to equalize the evidentiary playing field. In *Prudential*, for example, that meant establishing an adverse inference that the destroyed evidence – were it still in existence – would have proved the core allegations set out in the complaint, i.e., deceptive sales practices. *In re Prudential Insurance Co.*, 169 F.R.D. 598. Similarly, in

*Kronisch*, the court found that the plaintiff was entitled to an inference that the destroyed documents contained evidence establishing that he indeed had been an unwitting subject in the CIA's drug-testing program. 150 F.3d at 129.

Finally, when appropriate – as it clearly would be here – courts identify comprehensive, detailed adverse inferences tailored so as to remedy fully the scope and severity of the wrongdoing. *See, e.g., In re R.J. Reynolds Tobacco Co., Inc.*, 111 F.T.C. 584 (1989) (administrative law judge fashioned extensive, detailed list of adverse inferences based on complainant's list of interrogatories and subpoena questions).

These guideposts should serve to inform Complaint Counsel's – and Your Honor's – efforts in securing the closest proximity to a fair trial that can be obtained under these circumstances. And this should be done, of course, in a manner that also corresponds with the tripartite set of principles outlined by Judge Timony.

Without question, the adverse inferences outlined by Judge Timony are important to Complaint Counsel's case. However, they leave unaddressed an overwhelming number of dispositive, or otherwise important, issues that – the evidence shows – were very likely impacted by Rambus's spoliation.<sup>21</sup> We know, for instance, that Rambus's document destruction could not have been more far-reaching. It affected every employee, in every office at Rambus. It resulted in the purging of literally millions of documents. Moreover, as Rambus itself admits, the documents that were destroyed encompassed “all the major categories of documents generated in the ordinary course of Rambus's business.” Rambus

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<sup>21</sup> Moreover, as mentioned above, Rambus's recent statements to the press, characterizing Judge Timony's rulings as “positive” and “favorable,” send a clear signal that the adverse inference already ordered by Judge Timony will have no deterrent effect.

Mem. at 5 (emphasis added). On top of this, we know from direct evidence – mostly in the form of sworn testimony by Rambus witnesses – that the company’s document destruction affected certain important categories of documents relevant to this case, including:

- Documents generated by Rambus employees, officers, and directors in the ordinary course of business.<sup>22</sup>
- Documents relating to Rambus’s participation in JEDEC, including JEDEC meeting minutes, files in the possession of Rambus’s JEDEC representative, Richard Crisp, and internal correspondence regarding JEDEC.<sup>23</sup>
  - Documents relating to decision making of Rambus’s Board of Directors regarding Rambus’s intellectual property.<sup>24</sup>
  - Documents relating to Rambus’s negotiations of licensing agreements with manufacturers of SDRAM and DDR SDRAM.<sup>25</sup>
  - Documents relating to Rambus’s efforts to obtain patents for its technologies including efforts to ensure its patents covered technologies in JEDEC standards.<sup>26</sup>

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<sup>22</sup> Rambus Mem. at 5 (noting that the document retention policy “covers all of the major categories of documents generated in the ordinary course of Rambus’s business”).

<sup>23</sup> See Crisp Dep. (4/13/01) at 840:11-842:21, *Rambus v. Infineon* [CC Tab 1]; Crisp Dep. (4/24/01) at 237-238, *Micron v. Rambus* [CC Tab 97].

<sup>24</sup> See Karp Dep. (2/5/03) at 171-173, *FTC v. Rambus* (Joel Karp, President of Intellectual Property, destroyed slide presentations he delivered to Rambus’s Board of Directors in the late 1990’s) [Tab 9].

<sup>25</sup> See Memorandum, to Rambus Employees, dated July 22, 1998, Regarding “Rambus Document Retention Policy” (R33606) [CC Tab 85].

<sup>26</sup> See October 28, 1999, E-mail from Crisp (R221422) (Rambus destroyed DDR datasheets from the 1996-97 timeframe, which it used as a reference when drafting new patent claims intended to cover aspects of the JEDEC standard) [CC Tab 6]; See Crisp Dep. (4/13/01) at 843:2-11, *Rambus v. Infineon* [CC Tab 1], Diepenbrock Dep. (6/26/01) at 66-67, 72:10-15,

- Documents maintained by Rambus’s patent attorneys.<sup>27</sup>
- Documents, files, and records maintained by Rambus’s co-founder, board member, and lead inventor, Mark Horowitz.<sup>28</sup>

*See also* CC Mem. at 61-69 (identifying, based largely on Rambus testimony, specific items that were destroyed pursuant to the company’s document retention policy).<sup>29</sup>

“Rambus’s utter failure to maintain an inventory of the documents its employees destroyed” (Adverse Inference Order at 7 (emphasis added)) handicaps our ability to delineate with precision the full scope and nature of evidentiary loss that Rambus has inflicted on Complaint Counsel. However, this is not a burden we should bear. Our burden – as it should be in such circumstances – is simply to produce “some evidence,” direct or circumstantial, “suggesting that a document or documents relevant to

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*Micron v. Rambus* [CC Tab 86], Vincent Dep. (4/12/01) at 408, *Rambus v. Infineon* [CC Tab 102], Diepenbrock Dep. (1/30/03) at 206-207, *FTC v. Rambus* [Tab 10] (Rambus employees and outside attorneys destroyed documents relating to Rambus’s efforts in the pre-June 1996 period to amend pending patent applications to better cover the JEDEC standards); *See* Vincent Dep. (10/9/01) at 536:4-11, *Micron v. Rambus* (Rambus’s attorneys destroyed correspondence between themselves and Rambus employees, draft patent applications and amendments, draft drawings, meeting notes, and audio tapes of meetings with inventors) [CC Tab 101]; *See* Diepenbrock Dep. (6/26/01) at 66-67; 72:10-15, *Micron v. Rambus* (Rambus destroyed patents and patent applications stemming from the 1990 Farmwald/Horowitz chain) [CC Tab 86]; *See* Hampel Dep. (7/20/01) at 168:18-169:7, *Micron v. Rambus* (Rambus destroyed documents relating to damaging prior art or otherwise suggesting that an idea or concept covered by a Rambus patent or patent application is not patentable for some reason) [CC Tab 87].

<sup>27</sup> *See* note 25, *supra*.

<sup>28</sup> *See* note 12, *supra*.

<sup>29</sup> We note that Complaint Counsel’s knowledge concerning the direct effect that Rambus’s spoliation has had on each of the above categories of documents has been developed largely through happenstance – through the occasional document or computer back-up file that managed to survive the destruction efforts and through the handful of questions luckily phrased in just the right way to just the right deponent.

substantiating [our] claims would have been among the destroyed files.” *Kronisch*, 150 F.3d at 128 (emphasis added).

When viewed from this vantage point, and when one takes stock of the objective record, Complaint Counsel submits that it is entitled to adverse inferences on essentially every issue of fact on which internal Rambus documents, pre-dating roughly mid-2000 (when the document destruction purportedly ceased), might have had some bearing. We submit that these issues include, at least, the following:

- (1) Rambus’s business strategy;
- (2) Rambus’s motives for joining and participating in JEDEC;
- (3) Rambus’s knowledge of JEDEC’s purposes, rules, and procedures;
- (4) Rambus’s knowledge of the activities at JEDEC;
- (5) Rambus’s knowledge as to how its patents or patent applications related to JEDEC work;
- (6) Rambus’s efforts to broaden and expand its patent claims to cover technologies incorporated into JEDEC standards;
- (7) **Rambus’s intent to enforce JEDEC related patents;**
- (8) **Rambus’s intent to mislead JEDEC and JEDEC’s members about the existence or scope of its intellectual property claims;**
- (9) **Rambus’s knowledge that its limited and misleading disclosures did not put JEDEC or its members on notice of the true nature and scope of its patent claims;**
- (10) **Rambus’s knowledge that JEDEC would seek to – and would be able to – work around Rambus’s patented technology, had Rambus made proper patent-related disclosures;**
- (11) **Rambus’s knowledge that technically feasible, commercially viable alternatives to its technology existed;**



- (12) **Rambus's strategic reasons for delaying any disclosure of pertinent patents or patent applications;**
- (13) **Rambus's knowledge that JEDEC members were unlikely to accept Rambus's desired royalty rates;**
- (14) Rambus's knowledge that it faced equitable estoppel and antitrust risks by participating in JEDEC;
- (15) Rambus's knowledge that its actions violated and subverted the purposes, rules, and/or procedures of JEDEC;
- (16) Rambus's reasons for withdrawing from JEDEC; and
- (17) Rambus's knowledge of significant lock-in effects relating to JEDEC.
- (18) Rambus's document destruction.

On each of these issues, a number of factual disputes have already arisen, or are likely to arise in the upcoming hearing, such that Complaint Counsel is entitled to additional adverse inferences. In an effort to ensure evidentiary balance going forward, we thus have proposed a series of adverse inferences corresponding with each of the above issues. Attachment A sets out the complete set of additional adverse inferences that Complaint Counsel, by this motion, asks Your Honor to impose.

In light of the legal principles and evidence discussed herein, as well as the proof previously submitted in connection with Complaint Counsel's Motion for Default Judgment (*see* CC Mem.), we respectfully submit that only through imposing a comprehensive set of additional inferences can Your Honor ensure against a miscarriage of justice in this case. This situation is not one in which adverse inferences can or should be limited to a discrete set of issues. Rambus's spoliation, regrettably, was not so targeted. On the contrary, no issue that in any way relates to Rambus's beliefs, intentions,

knowledge, or practices during the critical time frame – that is, the kinds of topics one naturally would expect to be addressed in internal Rambus business records – can be fairly resolved in this case absent the sort of evidentiary balancing that we have proposed. Moreover, only by taking such action will Your Honor be able to ensure that two of the three purposes for adverse inferences identified by Judge Timony are served – i.e., “plac[ing] the risk of an erroneous evaluation of the content of destroyed evidence on the party who destroyed it,” and “plac[ing] the party injured by the loss of evidence helpful to its case to where the party would have been in the absence of spoliation.” Adverse Inference Order at 4-5.

**B. Rambus Should Be Required to Rebut All Adverse Inferences by Clear and Convincing Evidence**

In the interests of equity and deterrence, Rambus also must be held to a clear-and-convincing standard in rebutting Judge Timony’s adverse presumptions and any additional adverse inferences imposed by Your Honor. An adverse presumption stemming from intentional spoliation justifies raising the standard of proof necessary for rebuttal because – as Judge Timony himself noted – spoliators “should not be rewarded” for their destruction of evidence. Adverse Inference Order at 7. *See Cabinetware v. Sullivan*, 1991 WL 327959, \*4 (E.D. Cal. 1991); *see also Anderson v. Cryovac*, 862 F.2d 910, 925 (1st Cir. 1988) (applying the same reasoning to hold that rebutting presumption of prejudice due to spoliation should be overcome only by clear and convincing evidence). In *Cabinetware*, a copyright infringement case in which defendant destroyed computer source code, the magistrate judge sanctioned the defendant by creating a rebuttable presumption that he illegally copied the code. The district court recognized that

“[o]rdinarily, the rebuttable presumption of copying need not be overcome with clear and convincing evidence.” *Cabinetware* at \*4. However, the court considered “imposing a requirement on defendant that he rebut the presumption with clear and convincing evidence” as a more punitive “alternative sanction.” *Id.* The court nevertheless found that even a clear and convincing standard for rebutting the presumptions would be an insufficient remedy and thus ultimately imposed a default judgment, holding that although the magistrate judge’s recommendation would have helped the plaintiff overcome evidentiary difficulties caused by defendant’s misconduct, it would “serve no deterrent or punitive function.” *Id.*

When determining the burden of persuasion necessary to rebut a presumption, courts look for guidance to the rationale behind the presumption. *See Breeden v. Weinberger*, 493 F.2d 1002, 1006 (4th Cir. 1974) (“the policies underlying a particular presumption govern the measure of persuasion required to escape its effect.”). Of course, the rationale behind granting an adverse inference for destruction of evidence could not be more serious.

The policy underlying this inherent power of the courts [to impose sanctions] is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth. . . . because ‘[a]s soon as the process falters . . . the people are then justified in abandoning support for the system.’

*Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (emphasis added; citations omitted); *see also In the Matter of Int’l Telephone & Telegraph Corp.*, 104 F.T.C. 280, 380 (1984) (“The central purpose of these [discovery] sanctions is to ‘maintain the integrity of the hearing process.’”) (citations omitted). As far back as the

19th century, courts have considered attempts to sidestep the judicial process by destroying relevant evidence despicable conduct. *See Turner*, 142 F.R.D. at 74 (quoting *Pomeroy v. Benton*, 77 Mo. 64, 86 (1882) (“the law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidentially employed to perpetrate the wrong.”). To allow a litigant, such as Rambus, found to have engaged in conscious spoliation, to rebut adverse presumptions by a lax standard of proof would run contrary to the centuries-old policy of holding the wrongdoer accountable for its misconduct. In order to “preserve the integrity” of, and to “retain confidence in,” this proceeding – and indeed this agency’s administrative litigation process – Your Honor cannot permit Rambus to escape so easily the consequences of its decision to shred millions of pages of potentially discoverable documents. Rambus must be held to a clear and convincing evidence standard in seeking to rebut any adverse inferences.

**C. Justice Requires Vigilance as to the Ongoing Need to Fashion Appropriate Sanctions**

The process for determining and entering appropriate sanctions must be fluid to ensure against prejudice as new evidence surfaces. Courts routinely modify orders for sanctions in spoliation cases at all stages of the judicial process. In *In re Prudential Insurance Co.*, for example, a case involving sanctions for document destruction far less egregious than Rambus’s conduct, the court noted, “The sanctions contained herein are without prejudice to the subsequent imposition of additional sanctions as may be fair and appropriate to remedy unknown harm . . . caused by document destruction.” 169 F.R.D. 598, 617 (D. N.J. 1997). Similarly, in *Trigon Insurance Co. v. U.S.*, a case involving the

intentional destruction of documents, the judge engaged in an ongoing process of identifying adverse inferences throughout trial, noting, “It is appropriate to draw adverse inferences respecting the substantive testimony and credibility of the experts. That will be done based on the evidence presented at trial.” 204 F.R.D. 277, 291 (E.D. Va. 2001).<sup>30</sup> To ensure that the three purposes underlying the imposition of sanctions in this case are vindicated, given the sweeping volume of potentially relevant evidence destroyed, coupled with the lack of any index as to what Rambus destroyed, it is not simply appropriate, but necessary, that Your Honor monitor vigilantly the need for additional inferences, or other sanctions, as new evidence surfaces throughout the duration of this proceeding.

## **II. Your Honor Has the Discretion to Enter a Default Judgment If and When Warranted**

To reiterate, we do not by this motion mean to challenge or question Judge Timony’s exercise of discretion. We simply wish to bring to Your Honor’s attention this important point: If the evidence and information that has surfaced since his ruling, or if

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<sup>30</sup> See also *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 109 n.1 (S.D. Fla. 1987) (After the initial judge denied a motion for default judgment to remedy evidence spoliation, the case was assigned to a new judge, who “in view of the nature and gravity of Defendant’s alleged discovery abuses,” entered a default judgment); *Cabinetware v. Sullivan*, 1991 WL 327959, \*4 (the district court ordered a default judgment to sanction defendant’s intentional destruction of documents, notwithstanding the magistrate’s recommendation for lesser sanctions); *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 101 (2<sup>nd</sup>2d Cir. 2002) (the Second Circuit vacated district court’s order denying sanctions and remanded with instructions for a renewed hearing on adverse inference instruction); *Linnen v. A.H. Robbins Co., Inc.*, 1999 WL 462015, \*13 (Mass. Super.) (In response to concerns about defendant’s document destruction, the court entered an *ex parte* document preservation order, withdrew it upon a motion by defendants, and later imposed sanctions, noting “The court will not be adverse to revisiting this issue at the time of trial and will be open to any arguments which plaintiffs wish to offer with regard to prejudice that has resulted from [defendant’s] spoliation of evidence.”).

the evidence that surfaces going forward, persuades Your Honor that the extensive and potentially ever-growing list of necessary adverse inferences would render a trial on the merits impracticable, or that justice otherwise so warrants, Your Honor has the discretion to enter a default judgment. Through their inherent powers, courts have broad discretion to craft the proper sanction for spoliation. *E.g., Chambers v. Nasco, Inc.*, 501 U.S. 32, 45-46 (1991). *See also In the Matter of Rush-Hampton Ind., Inc.*, 1983 FTC LEXIS 127, \*1 (acknowledging that such power extends to administrative law courts).<sup>31</sup>

Were Your Honor, exercising such discretion, to grant a default judgment in this case, this would not be the first time in which a motion for default judgment denied by one judge in the last days of his tenure on the case was later granted by a different judge after the case was reassigned. Indeed, this set of events is precisely what unfolded in a case Complaint Counsel relied on heavily in its original default judgment filings:

*Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987). The procedural circumstances of *Telectron* are curiously similar to the instant action. As explained in a footnote in the court’s opinion granting the renewed motion for default judgment, the initial motion was denied “without prejudice” by the earlier judge “[o]n the same date” that “the case was reassigned.” *Id.* at 109 n.1. Nevertheless, “[i]n view of the nature and gravity of Defendant’s alleged discovery abuses,” the assignee judge ordered a “full evidentiary hearing” and ultimately went on to grant the motion. *Id.* Your Honor may

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<sup>31</sup> The Commission’s rules make quite clear the agency’s intolerance for obstruction of justice in connection with Commission proceedings. “Any person who shall . . . willfully mutilate . . . any documentary evidence . . . shall be deemed guilty of an offense against the United States, and shall be subject . . . to a fine, . . . or to imprisonment.” 15 U.S.C. § 50 (West 2003).

conclude, especially in light of the new finding as to Rambus's motivation in destroying the documents, and the new evidence as to the massive scope of that destruction, that the "nature and gravity" of Rambus's intentional spoliation warrants similar action here.

According to relevant case law, three considerations should help to inform this conclusion: the adequacy of lesser sanctions, the deterrent effect of lesser sanctions, and Rambus's culpability in carrying out the spoliation. First, as laid out in detail in Complaint Counsel's default judgment submissions, entering a default judgment is the only appropriate sanction if issue-related sanctions would be impracticable or ineffective. *See* CC Mem. at 99-108. The D.C. Circuit, for example, has deemed it appropriate to grant a default judgment upon finding that "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).

This description bears a striking resemblance to the case at hand. As demonstrated above, Rambus's wholesale destruction of millions of documents that bear on issues at the heart of this case necessitates dozens and dozens of additional adverse inferences. The fact that Complaint Counsel succeeded in fashioning a proposed list of necessary inferences demonstrates that it is possible – at least in theory. The critical questions now are: (1) given the absence of any proof that the issues covered by the adverse inferences exhaust the issues affected by Rambus's spoliation, will this sanction be effective in ensuring a fair trial on the merits; and (2) given the list's necessarily comprehensive nature, will it render such a trial impracticable? Determining how to answer these

questions and what, if any, further action such answers necessitate falls squarely within Your Honor's discretion.<sup>32</sup>

Second, entering a default judgment is also warranted if other sanctions would not adequately deter or punish the wrongdoing – two key goals identified by Judge Timony. In *Cabinetware Inc. v. Sullivan*, the court faced circumstances similar to those here. 1991 WL 327959. The magistrate judge had recommended entering a rebuttable presumption of copying to remedy willful destruction of documents in a copyright infringement case. Even though this sanction would have “put the plaintiff in the same position as if the evidence had not been destroyed,” the court found this remedy insufficient – even if the defendant were required to rebut the presumption with clear and convincing evidence. *Id. at* \*4. The court determined that the adverse inference would “serve no deterrent or punitive function” and would be “inadequate to protect the integrity of the court’s process.” *Id.* Accordingly, it discarded the magistrate’s recommendation and entered a default judgment on liability. *Id.*

Courts have enumerated various reasons in establishing that adverse inferences possess insufficient punitive or deterrent value in spoliation cases. In *In re Wechsler*, the court reasoned that the inadequacy was because adverse inferences “cannot take the place of proof of a fact necessary to the [plaintiff’s] cases.” 121 F. Supp. 2d 404, 428 (D. Del. 2000) (citations omitted). In *Telectron*, the court viewed adverse inferences as inadequate

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<sup>32</sup> We note that, in making the determination that the lesser sanction of adverse inferences was adequate in this case as a remedy for Rambus’s spoliation, Judge Timony did not have the benefit of detailed briefing on what sorts of adverse inferences would be warranted. Your Honor now has the opportunity, should you choose, to reconsider the default judgment question in light of this, and other, additional information.



because the “putative destroyer of discoverable documents might well conclude that an unfavorable inference as to document destruction would be less detrimental than allowing certain evidence to be presented at trial.” 116 F.R.D. at 136. The court in *Computer Assocs. Int’l* similarly found 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.

133 F.R.D. at 170 (emphasis added).<sup>33</sup>

Rambus’s public statements since the issuance of the Adverse Inference Order, discussed above, demonstrate that adverse inferences may not serve to deter Rambus or other similarly tempted parties from engaging in this type of wrongdoing. Rambus’s conduct demonstrates that it views the current sanctions, at most, as a “mild rebuke.” If Your Honor intends to send a message to Rambus and others who may find themselves involved in Commission proceedings that such misconduct will not be tolerated, the granting of adverse inferences may be insufficient.

Finally, Judge Timony’s conclusive finding that Rambus intentionally sought to “[get] rid of documents that might be harmful in litigation” (Collateral Estoppel Order at 5) bears heavily on the appropriateness of entering a default judgment.<sup>34</sup> Indeed, upon

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<sup>33</sup> These same rationales serve to reinforce the need for, at a minimum, imposing additional adverse inferences and requiring Rambus to rebut them only by clear-and-convincing evidence.

<sup>34</sup> We note that there is no indication that Judge Timony, in ruling upon Complaint Counsel’s Default Judgment Motion, took account of the fact that, on the same day, in a separate

finding that a defendant, by “deliberately destroying documents,” “has intentionally prevented the fair adjudication of the case,” courts have held that “the entry of a default judgment is the only means of effectively sanctioning the defendant.” *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 486 (S.D. Fla. 1984) (emphasis added). *See also 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.”).

Accordingly, case law would support the imposition of a default judgment under these circumstances if Your Honor concludes it would be appropriate. Our concern is that, even with ongoing vigilance, the granting of additional issue-based sanctions now, and as may be warranted going forward, likely will never prove fully adequate. This concern stems in part from the pervasiveness of the destruction and in part from the aggressive manner in which Respondent’s counsel seeks to challenge the adequacy of our evidence on issues as to which the relevant evidence may have “fallen victim to the document retention policy.” October 28, 1999, E-Mail from Crisp (R221422) [Tab 11].<sup>35</sup> Complaint Counsel respectfully submits that the ability to ensure a fair trial on the merits by imposing issue-related sanctions under these circumstances is beyond the capacity of

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order, he entered findings (based on collateral estoppel) that were determinative of the issue of bad faith – which, as discussed above, was the pivotal issue in dispute based on the parties’ briefing of that motion.

<sup>35</sup> *See id.* (“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”) (emphasis added).

any tribunal. Knowing that you have continued discretion to grant a default judgment at any time during this process, we ask that Your Honor make your own assessment as the case proceeds to ensure that justice is served.

**CONCLUSION**

For all the reasons stated herein, we respectfully request that Your Honor grant this motion and enter an order in the form suggested in Attachment A.

Respectfully submitted,

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M. Sean Royall  
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COUNSEL SUPPORTING THE COMPLAINT

Dated: March 27, 2003

## CERTIFICATE OF SERVICE

I, Melissa Kassier, hereby certify that on April 4, 2003, I caused a copy of the following materials:

1. Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief Necessary to Remedy Rambus Inc.'s Intentional Spoliation of Evidence;
2. Memorandum in Support of Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief Necessary to Remedy Rambus Inc.'s Intentional Spoliation of Evidence; and
3. [Proposed] Order,

to be served upon the following persons:

by hand delivery to:

Hon. Stephen J. McGuire  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

and by electronic mail and overnight courier to:

A. Douglas Melamed, Esq.  
Wilmer, Cutler & Pickering  
2445 M Street, NW  
Washington, DC 20037-1402

Steven M. Perry, Esq.  
Munger, Tolles & Olson LLP  
355 South Grand Avenue  
35<sup>th</sup> Floor  
Los Angeles, CA 90071

*Counsel for Rambus Incorporated*

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Melissa Kassier

## **ATTACHMENT A**

### **Proposed Adverse Inferences**

#### **Rambus's Business Strategy**

1. From its inception, Rambus's business strategy has been to obtain high royalties through licensing its technology for use in a widely adopted DRAM industry standard.
2. From its inception, Rambus knew that industry standards play a critically important role in the DRAM marketplace.
3. From its inception, Rambus knew that at any given time there is likely to be only one dominant industry standard for commodity (as opposed to specialized) DRAMs, and that all commodity DRAM producers are forced by market forces to produce products complying with the dominant industry standard.
4. From its inception, Rambus knew that the most valuable DRAM-related patents are ones that cover technologies that must be used to be in compliance with the dominant industry standard.
5. Through most of the 1990s, Rambus's primary business strategy was to establish its proprietary RDRAM architecture as the dominant industry standard for modern DRAM devices, and then to charge high royalties for the use of RDRAM technology.
6. In or around early 1992, Rambus developed an alternative plan for obtaining high royalties associated with DRAM industry standards – namely, a plan to secure patent rights over alternative standards that were emerging to compete with RDRAM, including but not limited to JEDEC's work on SDRAM standards.
7. From roughly mid-1992 through late 1999 or early 2000, Rambus simultaneously pursued two alternative strategies for obtaining patent rights over widely adopted DRAM industry standards: (1) its public strategy of achieving market success with its RDRAM proprietary technology; and (2) its private and secretive strategy of securing patent rights over JEDEC's RAM standards.
8. Rambus referred to the second strategy as "playing the IP card" against DRAM markers.
9. Rambus's central business objective throughout the 1990s was to work aggressively toward achieving market success for RDRAM, with the understanding that if failed to succeed with RDRAM, it would "play the IP card" – i.e., assert patent claims

over competing standards, principally including JEDEC's SDRAM and DDR SDRAM standards.

10. From roughly late 1996 through sometime in 1999, Rambus placed great hope and confidence in the potential for RDRAM – with the strong backing of Intel – to succeed as the dominant DRAM industry standard.

11. Rambus's strategy was to conceal its JEDEC-related patents and patent applications unless or until its relationship with Intel "blew up."

12. Rambus's relationship with Intel did "blow up" in 1999, and the same month that this occurred Rambus shifted aggressively to its alternative business strategy of "playing the IP card" – i.e., enforcing JEDEC-related patents – DRAM makers, and others whose products interoperate with DRAMs (e.g., chipsets).

13. In enforcing its JEDEC-related patents against DRAM makers, Rambus was determined to charge royalties higher than the royalties that it charged for its proprietary RDRAM technology.

14. Rambus set its royalties for SDRAM and DDR SDRAM devices at levels (.75% and 3.5%, respectively) that it believed would cause these products to be less competitive vis-a-vis RDRAM.

15. Thus, in asserting JEDEC-related patents, Rambus sought to achieve two primary goals: (1) collecting massive revenues off of the production of DRAMs complying with the industry-dominant JEDEC standards, and (2) reducing competition for its proprietary DRAM architecture.

16. Through its assertion of JEDEC-related patents, Rambus also has sought to reduce or eliminate JEDEC's continuing influence over DRAM-related industry standards.

### **Rambus's Motives for Joining and Participating in JEDEC**

17. Rambus joined JEDEC as part of its business strategy of obtaining high royalties for use of its technology in widely adopted DRAM industry standards.

18. Very early on in its JEDEC membership, Rambus considered the possibility of presenting its RDRAM technology to JEDEC as a proposed standard, but later concluded that this approach would be inconsistent with Rambus's licensing-based business model, inasmuch as having RDRAM standardized by JEDEC would restrict Rambus's flexibility in licensing to whomever it wished on whatever terms it wished.

19. Shortly after joining JEDEC, Rambus concluded that the organization's ongoing efforts to develop specifications for a new synchronous DRAM standard would involve use of technologies that Rambus believed to be covered by its existing patent applications, or which could be covered through amendments to such pending applications.

20. From mid-1992 through the present, Rambus has engaged in efforts, in conjunction with its patent attorneys, to amend existing patent applications to cover technology features that were being discussed within JEDEC for potential use in JEDEC's RAM standards.

21. Rambus chose to remain in JEDEC for over four years in part because of the benefits it derived from being present to observe JEDEC presentations, witness technology-related debates among JEDEC members, and glean information about the future direction of JEDEC's standardization efforts – such information helped Rambus in its efforts to write new and amended patent claims designed to cover technologies that it knew to be, or expected would be, encompassed by JEDEC's RAM standards.

22. Rambus also remained in JEDEC because it knew that its presence and participation, combined with its pattern of misleading conduct, substantially increased the likelihood that JEDEC would proceed to develop DRAM-related standards incorporating technologies over which Rambus could later assert patent rights.

### **Rambus's Knowledge of JEDEC's Purposes, Rules, and Procedures**

23. Rambus knew that JEDEC was firmly committed to the principle of developing "open" standards, free to be used by anyone, and unencumbered – wherever possible – by proprietary patent claims.

24. Rambus knew that JEDEC and its members maintained a commitment to avoid the incorporation of patented technologies into its published standards.

25. Rambus knew that JEDEC's rules and procedures imposed upon all participants a duty to participate in good faith.

26. Rambus knew that JEDEC prohibited the incorporation of patented or patent-pending technology into a standard unless the patent owner, or applicant, committed in advance to license the technology on royalty-free or otherwise reasonable and non-discriminatory terms.

27. Rambus also knew that when such assurances were provided, this alone did not guarantee that the patented or patent-pending technology would be used in JEDEC's standards.



28. Rambus knew that JEDEC would not use any patented or patent-pending technology in its standards (even after securing such assurances) unless, after careful review and consideration, it was determined that use of the patented or patent-pending technology was well justified.

29. Rambus knew that, throughout its membership in JEDEC, the organizations rules and procedures required members to disclose any patents or patent applications that related to, or that might be involved in, the standard-setting work being undertaken by JEDEC.

30. Rambus knew that, throughout its membership in JEDEC, these patent disclosure rules were construed broadly so as to result in disclosure as early as possible in the JEDEC process.

31. Rambus knew that, throughout its membership in JEDEC, these patent disclosure rules were also construed consistently with the overriding duty of all members to participate in good faith, and thus not to take any action that was at odds with the fundamental purposes and principles of JEDEC, including the principle of developing “open” standards that avoid the use of proprietary patents wherever possible.

32. Rambus knew, throughout its membership in JEDEC, that JEDEC’s patent disclosure rules included the duty to disclose both issued patents and patent applications.

33. Rambus knew, throughout its membership in JEDEC, that the failure to disclose pertinent patents and patent applications violated the integrity of JEDEC rules and procedures and subverted the standard-setting process at JEDEC.

34. Rambus knew, throughout its membership in JEDEC, that JEDEC’s patent disclosure rules were mandatory (not voluntary) and that they applied to all members (not only those who made presentations).

35. Rambus knew, throughout its membership in JEDEC, that JEDEC’s patent disclosure rules required disclosure of patents and applications whenever the holder of the patent, or patent applicant, believed that the patent (or application, if and when issued as a patent) might be infringed by products built in compliance with JEDEC’s standards.

36. Rambus knew, throughout its membership in JEDEC, that JEDEC’s patent disclosure rules required disclosure of patent applications whenever the applicant believed that the underlying content of the application was such that, even without adding any new technical matter to the application, the application’s claims could be amended such that (if and when a patent issued containing such amended claims) they might be infringed by products built in compliance with JEDEC’s standards.

37. Rambus knew, throughout its membership in JEDEC, that a JEDEC member's duty patents or patent applications could not be avoided simply by withdrawing from the organization in lieu of disclosure.

38. Rambus knew, throughout its membership in JEDEC, that by voluntarily choosing to participate as a member of JEDEC it was impliedly committing itself to be legally bound by JEDEC's rules and procedures and all other duties and expectations normally incumbent upon JEDEC members.

### **Rambus's Knowledge of the Activities at JEDEC**

39. Between December 1991 and June 1996, Rambus knew that various members of the JC-42.3 Subcommittee made presentations proposing to incorporate the following technologies or features into JEDEC's DRAM standards:

- programmable latency via a control register;
- programmable access latency;
- a writable configuration register permitting programmable CAS latency;
- the use of control registers to contain values which control RAS and CAS access timing;
- the use of control registers to contain values;
- auto precharge;
- auto precharge options available during the column portion of any cycle;
- a proposal permitting the user to specify that the bank currently being accessed precharge itself as soon as the burst is completed;
- internally precharging a bank without first receiving a separate precharge command;
- data output occurring on both edges of an external clock;
- output of a first portion of data in response to a rising edge of a clock signal and a second portion of data in response to a falling edge of a clock signal;
- input of a first portion of data in response to a rising edge of a data strobe and a second portion of data in response to a falling edge of a data strobe;

- output of a first portion of data synchronously with respect to a rising edge of an external clock signal and a second portion of data synchronously with respect to a falling edge of the external clock signal;
- input of a first portion of data synchronously with respect to a first external data strobe and a second portion of data synchronously with respect to a second external data strobe;
- output a first portion of data synchronously with respect to a first external clock signal and a second portion of data synchronously with respect to a second external clock signal;
- use of a dual edge clocking scheme which inputs and outputs data synchronously with the rising and falling edge of an external clock;
- sampling of data occurring on both edges of an external clock;
- data output occurring on the rising edge of an external clock and the falling edge of the external clock;
- clocking data on both edges of the clock;
- use of both edges of the clock for transmission of address, commands, or data;
- a receiver circuit for latching information in response to a rising edge of the clock signal to the falling edge of the clock signal;
- on-chip PLL or on-chip DLL circuitry;
- phase locked loop circuitry or delay locked loop circuitry to generate an internal clock signal using an external clock signal;
- having phase lock loop on DRAM to control delays inside and outside DRAM;
- using a PLL/DLL circuit on a DRAM to reduce input buffer skews;
- DRAM with PLL clock generation;
- using PLL on an SDRAM; and
- using a DLL to compensate for the output delay.

40. Even after withdrawing from JEDEC, Rambus closely monitored JEDEC's ongoing work on SDRAM standards, including work involving specific technologies on which Rambus sought to perfect patent rights.

### **Rambus's Knowledge as to How its Patents or Patent Applications Related to JEDEC Work**

41. From late 1991 to mid 1996, while participating in JEDEC's development of RAM standards, Rambus reasonably believed that the JEDEC RAM standards being developed at that time would require the use of patents held or applied for by Rambus.

42. From late 1991 to mid 1996, Rambus reasonably believed that the following technologies or ideas, proposed for inclusion in the JEDEC RAM standards during the period of Rambus's participation in JEDEC, were covered by Rambus's then-pending patent applications or could be covered through amendments to such applications:

- programmable burst length;
- programmable CAS latency;
- on-chip PLL or on-chip DLL circuitry;
- dual-edge clock;
- use of a programmable register operative to store information specifying a manner in which the semiconductor device is to respond to a read request or a write request;
- use of a register to store a value to determine CAS latency, where that value can be changed by programming the mode register;
- use of a programmable register to store a value that is representative of a delay time after which the device responds to a read request;
- use of a programmable register to store a value which is representative of a delay time, that value being a number of clock cycles of an external clock, after which the SDRAM responds to a read request;
- use of a programmable access-time register operative to store information specifying a value indicative of an access time for the device, such that the device waits for the access time before responding to a read request;
- use of a register to store a value to determine burst length, where that value can be changed by programming the mode register;

- use of a register to store a value to determine block size, where that value can be changed by programming the mode register;
- **use of a programmable** register that receives information that defines an amount of data to be output by the memory device in response to a read request;
- programmable block size;
- use of a register to store a value that defines an amount of data to be output by the memory device in response to a read request, where that value can be changed by programming the mode register;
- use of a programmable register that receives information that defines an amount of data to be input by the memory device in response to a write request;
- use of a programmable register to store a value that defines an amount of data to be input by the memory device in response to a write request;
- outputting data on the rising and the falling edge of a clock signal;
- outputting a first portion of data in response to a rising edge of a clock signal and a second portion of data in response to a falling edge of a clock signal;
- inputting of a first portion of data in response to a rising edge of a clock signal and a second portion of data in response to a falling edge of a clock signal;
- output of a first portion of data synchronously with respect to a rising edge of an external clock signal and a second portion of data synchronously with respect to a falling edge of the external clock signal;
- data output occurring synchronously with respect to both the rising edge of the external clock signal and the falling edge of the external clock signal;
- data input occurring synchronously with respect to both the rising edge of the external clock signal and the falling edge of the external clock signal;
- output of a first portion of data synchronously with respect to a first external clock signal and a second portion of data synchronously with respect to a second external clock signal;

- data output occurring synchronously with respect to both a first external clock signal and a second external clock signal;
- input of a first portion of data synchronously with respect to a first external clock signal and a second portion of data synchronously with respect to a second external clock signal;
- data input occurring synchronously with respect to both a first and a second external clock signal;
- data input and output occurring synchronously with the rising and falling edge of an external clock, according to a dual edge clocking scheme;
- inputting a first portion of data in response to a rising edge of a clock signal and a second portion of data in response to a falling edge of a clock signal;
- outputting a first portion of data synchronously with respect to a rising edge of an external clock signal and a second portion of data synchronously with respect to a falling edge of the external clock signal;
- inputting a first portion of data synchronously with respect to a rising edge of an external clock signal and a second portion of data synchronously with respect to a falling edge of the external clock signal;
- data input occurs synchronously with respect to both the rising edge of the external clock and the falling edge of the external clock signal;
- outputting a first portion of data synchronously with respect to a first external clock signal and a second portion of data synchronously with respect to a second external clock signal;
- inputting a first portion of data synchronously with respect to a first external clock signal and a second portion of data synchronously with respect to a second external clock signal;
- use of phase locked loop circuitry or delay locked loop circuitry to generate an internal clock signal using an external clock signal;
- having a phase lock loop on DRAM to control delays;
- using a PLL/DLL circuit on a DRAM to reduce input buffer skews;
- using a PLL clock generation;

- using a PLL on an SDRAM;
- using a DLL to compensate for the output delay in a DRAM; and
- using an on-chip PLL or DLL to ensure that the data strobe and data coming off of a DRAM chip are sufficiently synchronized to the system clock so that the memory controller can capture that data.

### **Rambus's Efforts to Broaden and Expand Its Patent Claims to Cover Technologies Incorporated into JEDEC Standards**

43. During its participation at JEDEC, Rambus reasonably believed it could perfect its patent rights by amending pending claims of its '898 patent application and later-filed progeny to cover technologies proposed to be incorporated into JEDEC's DRAM-related standards.

44. Between December 1991 and June 1996, Rambus attempted to amend its patent claims to cover JEDEC work relating to the following technologies, so that if included in a JEDEC standard, use of such technologies in JEDEC-compliant devices would infringe Rambus patents:

- programmable CAS latency;
- programable burst length;
- dual edge clock;
- on-chip DLL or on-chip PLL circuitry;
- using a programmable register operative to store information specifying a manner in which the semiconductor device is to respond to a read request or a write request;
- use of a register to store a value to determine CAS latency, where that value can be changed by programming the mode register;
- use of a programmable register to store a value that is representative of a delay time after which the device responds to a read request;
- use of a register to store a value to determine CAS latency;
- use of a programmable register to store a value which is representative of a delay time, that value being a number of clock cycles of an external clock, after which the SDRAM responds to a read request;

- use of a programmable access-time register operative to store information specifying a value indicative of an access time for the device, such that the device waits for the access time before responding to a read request;
- use of a register to store a value to determine burst length, where that value can be changed by programming the mode register;
- use of a register to store a value to determine block size, where that value can be changed by programming the mode register;
- **use of a programmable** register that receives information that defines an amount of data to be output by the memory device in response to **a read request;**
- **programmable block size;**
- **use of a register to store a value that defines an amount of data to be output by the memory** device in response to a read request, where that value can be changed by programming the mode register;
- use of a programmable register that receives information that defines an amount of data to be input by the memory device in response to a write request;
- use of a programmable register to store a value that defines an amount of data to be input by the memory device in response to a write request;
- outputting a first portion of data in response to a rising edge of a clock signal and a second portion of data in response to a falling edge of a clock signal;
- inputting of a first portion of data in response to a rising edge of a clock signal and a second portion of data in response to a falling edge of a clock signal;
- output of a first portion of data synchronously with respect to a rising edge of an external clock signal and a second portion of data synchronously with respect to a falling edge of the external clock signal;
- data output occurring synchronously with respect to both the rising edge of the external clock signal and the falling edge of the external clock signal;



- data input occurring synchronously with respect to both the rising edge of the external clock signal and the falling edge of the external clock signal;
- output of a first portion of data synchronously with respect to a first external clock signal and a second portion of data synchronously with respect to a second external clock signal;
- data output occurring synchronously with respect to both a first external clock signal and a second external clock signal;
- input of a first portion of data synchronously with respect to a first external clock signal and a second portion of data synchronously with respect to a second external clock signal;
- data input occurring synchronously with respect to both a first and a second external clock signal;
- use of a dual edge clocking scheme which inputs and outputs data synchronously with the rising and falling edge of an external clock;
- data input and output occurring synchronously with the rising and falling edge of an external clock, according to a dual edge clocking scheme;
- outputting a first portion of data in response to a rising edge of a clock signal and a second portion of data in response to a falling edge of a clock signal;
- inputting a first portion of data in response to a rising edge of a clock signal and a second portion of data in response to a falling edge of a clock signal;
- outputting a first portion of data synchronously with respect to a rising edge of an external clock signal and a second portion of data synchronously with respect to a falling edge of the external clock signal;
- data output occurring synchronously with respect to both the rising edge of the external clock signal and the falling edge of the external clock signal;
- inputting a first portion of data synchronously with respect to a rising edge of an external clock signal and a second portion of data synchronously with respect to a falling edge of the external clock signal;
- data input occurring synchronously with respect to both the rising edge of the external clock and the falling edge of the external clock signal;

- outputting a first portion of data synchronously with respect to a first external clock signal and a second portion of data synchronously with respect to a second external clock signal;
- data output occurring synchronously with respect to both a first external clock signal and a second external clock signal;
- inputting a first portion of data synchronously with respect to a first external clock signal and a second portion of data synchronously with respect to a second external clock signal;
- using a dual edge clocking scheme which inputs and outputs synchronously with the rising and falling of an external clock;
- use of phase locked loop circuitry or delay locked loop circuitry to generate an internal clock signal using an external clock signal;
- having a phase lock loop on DRAM to control delays;
- using a PLL/DLL circuit on a DRAM to reduce input buffer skews;
- using a PLL clock generation;
- using a PLL on an SDRAM;
- using a DLL to compensate for the output delay in a DRAM; and
- using an on-chip PLL or DLL to ensure that the data strobe and data coming off of a DRAM chip are sufficiently synchronized to the system clock so that the memory controller can capture that data.

### **Rambus's Intent to Enforce JEDEC-Related Patents**

45. While a member of JEDEC, Rambus intended to enforce **its JEDEC-related patents (and, once issued as patents, its JEDEC-related patent applications) against memory manufacturers who produced products compliant with the JEDEC RAM standards.**

46. **In enforcing such JEDEC-related patents, rambus also intended to charge high royalties.**

### **Rambus's Intent to Mislead JEDEC and JEDEC's Members about the Existence or Scope of Its Intellectual Property Claims**

47. Rambus knew that its very participation in JEDEC, coupled with its failure to make required patent-related disclosures, conveyed a materially false and misleading impression that JEDEC was not at risk of adopting standards that Rambus could later claim to infringe upon its patents.

48. Rambus also knew that by engaging in various affirmatively misleading conduct, it was reinforcing the materially false and misleading impression that JEDEC was not at risk of adopting standards that Rambus could later claim to infringe upon its patents.

49. Rambus intended through its conduct – both its actions and omissions – to convey the materially false and misleading impression that JEDEC was not at risk of adopting standards that Rambus could later claim to infringe upon its patents.

50. Rambus's pattern of misleading conduct – both its actions and omissions – continued for a number of years after it withdrew from JEDEC.

51. During the time it was a JEDEC member and for a number of years thereafter, Rambus sought to conceal from JEDEC and its members both (1) the fact that it possessed patents and pending patents that would (or might) be infringed by devices built in accordance with JEDEC standards, and (2) the fact that Rambus in the future intended (or at a minimum, reserved the right) to enforce such patents and to demand high royalties.

### **Rambus's Knowledge That Its Limited and Misleading Disclosures Did Not Put JEDEC or its Members on Notice of the True Nature and Scope of its Patent Claims**

52. Rambus knew that, before and during its membership in JEDEC, it never disclosed either to JEDEC or to individual JEDEC members information sufficient to place them (individually or collectively) on notice of the fact that Rambus possessed (or reasonably believed it possessed) patents and pending patents that would (or might) be infringed by devices built in accordance with JEDEC standards.

53. Rambus knew that, after withdrawing from JEDEC – up until the time it began to enforce its JEDEC-related patents – it never disclosed either to JEDEC or to individual JEDEC members information sufficient to place them (individually or collectively) on notice of the fact that Rambus possessed (or reasonably believed it possessed) patents and pending patents that would (or might) be infringed by devices built in accordance with JEDEC standards.

54. Rambus knew that, through disclosures made to DRAM makers and others in the context of licensing-related discussions involving Rambus's RDRAM architecture, it never disclosed either to JEDEC or to individual JEDEC members information sufficient to place them (individually or collectively) on notice of the fact that Rambus possessed

(or reasonably believed it possessed) patents and pending patents that would (or might) be infringed by devices built in accordance with JEDEC standards.

55. Rambus knew that, through availability of Rambus's foreign patents and patent applications, neither JEDEC nor individual JEDEC members could gather sufficient information to place them (individually or collectively) on notice of the fact that Rambus possessed (or reasonably believed it possessed) patents and pending patents that would (or might) be infringed by devices built in accordance with JEDEC standards.

56. Rambus knew that, through its disclosure of the '703 patent to JEDEC, it did not provide JEDEC or individual JEDEC members with sufficient information to place them (individually or collectively) on notice of the fact that Rambus possessed (or reasonably believed it possessed) patents and pending patents that would (or might) be infringed by devices built in accordance with JEDEC standards.

57. Rambus knew that, through its participation in JEDEC, it did nothing that would have served to place JEDEC or its members (individually or collectively) on notice of the fact that Rambus possessed (or reasonably believed it possessed) patents and pending patents that would (or might) be infringed by devices built in accordance with JEDEC standards.

58. Rambus knew that the limited disclosures it made to IEEE or the SynkLink Consortium, relating to Rambus patents, would not have served to place JEDEC or its members (individually or collectively) on notice of the fact that Rambus possessed (or reasonably believed it possessed) patents and pending patents that would (or might) be infringed by devices built in accordance with JEDEC standards.

59. Rambus knew that the limited disclosures it made to JEDEC in a letter concerning the SynkLink technology would not have served to place JEDEC or its members (individually or collectively) on notice of the fact that Rambus possessed (or reasonably believed it possessed) patents and pending patents that would (or might) be infringed by devices built in accordance with JEDEC standards.

60. Rambus knew that nothing contained in its June 1996 JEDEC withdrawal letter would have served to place JEDEC or its members (individually or collectively) on notice of the fact that Rambus possessed (or reasonably believed it possessed) patents and pending patents that would (or might) be infringed by devices built in accordance with JEDEC standards.

**Rambus's Knowledge That JEDEC Would Seek to – and Would Be Able to – Work Around Rambus's Patented Technology, Had Rambus Made Proper Patent-Related Disclosures**

61. Rambus knew that, if it had made proper patent-related disclosures to JEDEC (including but not limited to disclosures relating to CAS latency, programmable burst

length, on-chip PLL/DLL, and dual-edge clock), JEDEC and its members would seek to work around Rambus's patented or patent-pending technologies.

62. Rambus knew that, if it had made proper patent-related disclosures to JEDEC (including but not limited to disclosures relating to CAS latency, programable burst length, on-chip PLL/DLL, and dual-edge clock), JEDEC and its members would have been able to revise JEDEC's DRAM-related standards to work around or avoid Rambus's patented or patent-pending technologies.

63. Rambus knew that, if it had made proper patent-related disclosures to JEDEC (including but not limited to disclosures relating to CAS latency, programable burst length, on-chip PLL/DLL, and dual-edge clock), the most likely result is that JEDEC's DRAM-related standards would have excluded or omitted any technologies covered by Rambus's patented or patent-pending technologies.

64. Rambus knew that, if it had made proper patent-related disclosures to JEDEC (including but not limited to disclosures relating to CAS latency, programable burst length, on-chip PLL/DLL, and dual-edge clock), Rambus's patents in the future would derive no value by virtue of any association with the contents of JEDEC's DRAM standards.

### **Rambus's Knowledge That Commercially Viable Alternatives to Its Technology Existed**

65. During its participation at JEDEC, Rambus knew that there were a variety of commercially viable alternatives to use of its proprietary technologies in JEDEC's DRAM-related standards.

66. Rambus knew that the design objectives served by inclusion of programmable CAS latency, programmable burst length, on-chip PLL/DLL, and dual-edge clock technologies in JEDEC standards likely could have been accomplished through use of alternative DRAM-related technologies available at the time these standards were being developed.

67. During its participation at JEDEC, Rambus knew that that JEDEC and its members would be capable of developing commercially viable alternative standards that avoided Rambus's patents and patent applications.

68. Rambus knew that the following technologies, among others, were commercially viable alternatives to various Rambus patented or patent-pending technologies:

- **permanently** fixing the CAS latency at a single value;
- having the memory controller signal the CAS latency through separate pins on each DRAM device;

- setting the CAS latency through the command structure of the read command;
- using fixed latency parts;
- explicitly identifying the CAS latency in the read or write command;
- programming CAS latency by blowing fuses on the DRAM;
- scaling CAS latency with clock frequency;
- using an existing pin or a new, dedicated pin to identify the latency via two or more different voltage levels asserted by the memory controller;
- using asynchronous DRAM;
- fixing the burst length at a single value;
- having the memory controller signal the burst length through separate pins on each DRAM device;
- setting the burst length through the command structure of the read command;
- setting the burst length through the use of a burst interrupt feature;
- using a short fixed burst length;
- explicitly identifying the burst length in the read or write command;
- using a long fixed burst length coupled with the burst-terminate command;
- using a burst-EDO style protocol where each CAS pulse toggles out a single column of data;
- using an existing pin or a new, dedicated pin to identify the burst length via multiple voltage levels;
- moving the PLL/DLL circuitry to the memory controller;
- moving the PLL/DLL circuitry to each DIMM;
- using a periodic calibration technique;

- using a vernier method to measure and account for dynamic changes in skew;
- putting the DLL on the memory controller;
- use of off-chip (on-module) DLLs;
- increasing the speed at which DRAM's could operate;
- interleaving data between different DIMM's onto the same data bus;
- interleaving data between different banks on each DRAM onto the same data bus;
- increasing the width of the data bus;
- use of two or more interleaving memory banks on-chip and assigning a different clock signal to each bank;
- keeping each DRAM single data rate and interleaving banks on the module;
- increasing the number of pins per DRAM;
- increasing the number of pins per module;
- doubling the clock frequency;
- use of simultaneous bidirectional I/O drivers; and
- use of toggle mode.

### **Rambus's Strategic Reasons for Delaying Any Disclosure of Pertinent Patents or Patent Applications**

69. Rambus consciously chose not to disclose to JEDEC or to JEDEC's members the fact that Rambus possessed (or reasonably believed it possessed) patents and pending patents that would (or might) be infringed by devices built in accordance with JEDEC standards, for a variety of strategic reasons, including

- a desire to avoid JEDEC developing alternative standards that worked around Rambus's technology;

- a desire to place Rambus in a position to charge high royalties in the future based on use of Rambus technologies in JEDEC-compliant devices;
- a desire to avoid any limitation on its freedom to license its patents to whomever it wished on whatever terms it wished; and
- a desire to use its patent leverage over the JEDEC standards to limit competition between RDRAM and JEDEC-compliant DRAM.

### **Rambus's Knowledge That JEDEC Members Were Unlikely to Accept Rambus's Desired Royalty Rates**

70. Rambus knew that, were it to disclose patents or patent applications to JEDEC, its claimed intellectual property would be used by JEDEC only subject to advance commitments by Rambus that it would license such intellectual property either on royalty-free or other terms unfavorable to Rambus.

71. Rambus knew that the DRAM industry, including JEDEC member companies, would not consider the royalty rates it intended to and later did charge for SDRAM and DDR SDRAM licenses (.75% and 3.5%, respectively) to be fair and reasonable.

### **Rambus's Knowledge That It Faced Equitable Estoppel and Antitrust Risks by Participating in JEDEC**

72. Throughout most of the time it participated in JEDEC, Rambus knew that the misleading nature of its participation created significant legal risks to the enforceability of Rambus's JEDEC-related patents.

73. Throughout most of the time it participated in JEDEC, Rambus knew that the misleading nature of its participation created significant risks that Rambus's JEDEC-related patents could be held unenforceable on grounds of equitable estoppel.

74. Throughout most of the time it participated in JEDEC, Rambus knew that the misleading nature of its participation created significant risks that Rambus's JEDEC-related patents also could be held unenforceable on antitrust grounds.

75. At least as of December 1995, when Rambus learned of the FTC's proposed consent order in *In re Dell Computer Corporation*, Rambus knew that its involvement in JEDEC conduct at JEDEC violated antitrust laws.

76. Throughout most of the time it participated in JEDEC, Rambus's attorneys encouraged the company to withdraw from JEDEC, because of the legal risks associated with participation.



77. Until early 1996, Rambus consciously chose to ignore legal advice to withdraw from JEDEC.

**Rambus's Knowledge That Its Actions Violated and Subverted the Purposes, Rules, and/or Procedures of JEDEC**

78. Rambus knew that the joining JEDEC as part of its business strategy of obtaining high royalties for use of its technology in widely adopted DRAM industry standards violated and subverted the purposes, rules, and/or procedures of JEDEC.

79. Rambus knew that its efforts to amend existing patent applications to cover technology features that were being discussed within JEDEC for potential use within JEDEC RAM standards violated and subverted the purposes, rules, and/or procedures of JEDEC.

80. Rambus knew that its intentions, while a member of JEDEC, to enforce **its JEDEC-related patents in the future against memory manufacturers who produced products compliant with JEDEC RAM standards violated and subverted the purposes, rules, and/or procedures of JEDEC.**

81. Rambus knew that its plans to license its intellectual property on terms it knew the industry would not consider to be fair and reasonable violated and subverted the purposes, rules, and/or procedures of JEDEC.

82. **Rambus knew that, by conveying a materially false and misleading impression that JEDEC was not at risk of adopting standards that Rambus could later claim to infringe upon its patents,** it was violating and subverting the purposes, rules, and/or procedures of JEDEC.

83. **Rambus knew** that its failure to make sufficient disclosures to JEDEC that would have alerted JEDEC and its members to the true nature and scope of its patent claims **violated and subverted the purposes, rules, and/or procedures of JEDEC.**

84. Rambus knew that its purpose to substantially enhance the value of its patents by not making proper patent-related disclosures violated and subverted the purposes, rules, and/or procedures of JEDEC.

85. Rambus knew that, by remaining in JEDEC for over four years in order to glean information that would enable it to write new and amended patent claims designed to cover technologies that it knew to be, or expected would be, encompassed by JEDEC's RAM standards, it was violating and subverting the purposes, rules, and/or procedures of JEDEC.

86. Rambus knew that, by remaining in JEDEC for over four years in order to glean information that would enable it to write new and amended patent claims designed to cover technologies that it knew to be, or expected would be, encompassed by JEDEC's RAM standards, it was violating and subverting the purposes, rules, and/or procedures of JEDEC.

87. Rambus knew that, by withdrawing from JEDEC without revealing its relevant patents and patent applications, it was violating and subverting the purposes, rules, and/or procedures of JEDEC.

### **Rambus's Reasons for Withdrawing from JEDEC**

88. Rambus ultimately withdrew from JEDEC in part because it feared its conduct at JEDEC could render its patents unenforceable on antitrust and/or equitable estoppel grounds.

89. Rambus ultimately withdrew from JEDEC in part because it feared its conduct at JEDEC could lead to an FTC antitrust enforcement action.

90. Rambus ultimately withdrew from JEDEC in part because it feared that continued participation could result in limitations being imposed on Rambus's freedom to license its patents to whomever it wished on whatever terms it wished.

### **Rambus's Knowledge of Significant Lock-in Effects Relating to JEDEC**

91. Rambus knew that once the DRAM industry (and related industries) had adopted the JEDEC DRAM standards, the industry would become locked into those standards, rendering it economically infeasible for the industry to attempt to alter or work around the standards in order to avoid paying royalties to Rambus.

92. Rambus knew that manufacturers who might attempt to work around the JEDEC RAM standards could be forced to absorb potentially massive revenue losses if, as a result of modifying the JEDEC standards, their introduction of new products were delayed.

93. Rambus knew that purchasers and other users of JEDEC-compliant DRAM technology – including manufacturers of computers, chipsets, graphics cards, and motherboards – would themselves become locked into the JEDEC standards.

94. Rambus knew that any effort to work around the JEDEC standard would face innumerable practical and economic impediments, including but not limited to the out-of-pocket costs associated with redesigning, validating, and qualifying DRAM products to conform with a revised set of standards.

95. Rambus knew that it was unclear whether downstream purchasers and other users of SDRAM technology would tolerate the delay in the introduction of new products that likely would result from the process of changing the standard.

96. Rambus knew that, by late 1999 or early 2000, when it first began to enforce its patents against memory manufacturers producing JEDEC-compliant DRAM, the DRAM manufacturers and their customers had become “locked in” to the JEDEC standards.

97. Rambus knew that due to the lock-in effect, it could succeed in extracting exorbitant royalty rates from DRAM makers.

98. Rambus knew that, once industry lock-in occurred, it had the power to exclude DRAM makers from the commodity memory marketplace by refusing to grant them a license.

### **Rambus’s Document Destruction**

99. Rambus knew that, by destroying massive amounts of internal business records, it could substantially increase the chances of its success in future JEDEC-related patent litigation.

100. Rambus knew that, by destroying massive amounts of internal business records, it could substantially increase the chances of its success in future JEDEC-related antitrust litigation.

101. Rambus knew that, by destroying massive amounts of internal business records, it could substantially increase the chances of its success in any future JEDEC-related FTC enforcement action.

**Tabs 1-11 are not included in public version**