PUBLIC

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

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

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

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2 Geoffrey Hazard, Jr. & W. William Hodes,

INTRODUCTION

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

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

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

After trial, Complaint Counsel lost even the limited remedy it had obtained from Judge Timony. Judge McGuire, who took the case upon Judge Timony's retirement, found after an exhaustive trial and development of a full record that "there is no indication that any documents, relevant and material to the disposition of the issues in this case, were destroyed." *In re Rambus Inc.*, Initial Decision, Docket No. 9302, at 244 (Feb. 23, 2004) ("Initial Decision"). Accordingly,cision,

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

Complaint Counsel's collateral estoppel theory is infected with two other independent errors. When contradictory decisions address the same point, collateral estoppel attaches to neither. Here, both decisions by the District Court squarely c

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

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

BACKGROUND

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

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

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

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

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

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

Id. at 5 n.2.

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

said it might warrant sanctions if the case involved different causes of action. *See id.* Given the

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

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

On January 28, 2004, before the motions were y 26, 20628, 2004, before9150 TD0.0003 Tc Collec9ins4-

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

Moreover, the District Court acknowledged that the record before it was "incomplete about the kinds of documents that were destroyed." *Id.* at 297. It nonetheless noted that "[t]he destroyed documents appear to have included many *of the kinds* of documents usually generated in the course of business" and that they therefore generally would have "contain[ed] information that is useful in ascertaining truth and in testing the validity of positions taken in litigation." *Id.* (emphasis added); *see also id.* (listing "email communications,"

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

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

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

III. Federal Circuit Proceedings

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

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[3] Moreover, claim charts shown to Infineon or third parties as part of licensing negotiations ordinarily would not be found on privilege logs, and indeed those not privileged were produced

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

Judge Gajarsa dissented from the spoliation ruling, criticizing the majority for "avoid[ing] the critical question underlying Rambus's petition: *Whether Fourth Circuit law permits a trial court to waive a party's privilege as a remedy for spoliation of evidence that is*

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

ARGUMENT

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

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

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

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

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

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

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

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

[7] Complaint Counsel filed their motion before the Federal Circuit ruled on 9o0lhe insteIsionDws petition, but agreed that the Commission should defer consideration of it until the court ruled. Complaint Counsel may have hoped for an appellate determination on the merits, but they did not get one.

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

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

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

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

Against the back-drop of this black-letter law on collateral estoppel, Complaint Counsel supports its argument with citation to a lone district court decision, *FTC v. GlaxoSmithKline*, 202 F.R.D. 8 (D.D.C. 2001) ("*GSK*"), which in any event is entirely distinguishable. The district court in that case applied issue preclusion precisely because the earlier privilege-piercing decision had been subject to meaningful appellate review and affirmed. *See id.* at 12. Even ul appellate reinsion

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

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

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

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

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

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

decision as the basis for offensive estoppel while ignoring the other decision raises the specific

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

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

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

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

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

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

It is black-letter law that even in subsequent litigation between the *same* parties, "issue preclusion does not attach to abstract rulings of law." 18 Charles Alan Wright et al., *Federal Practice & Procedure* § 4425, at 644 (2d ed. 2004). This rule has special force when, like here, a non-party to the first action seeks preclusion; in that situation, a finding of preclusion is flatly "inappropriate with respect to a pure question of law." 18A Wright, *supra*, § 4465.2, at 763; *see also Chicago Truck Drivers, Helpers & Warehouse Union (Independent) Pension Fund v. Century Motor Freight, Inc.*

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

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

Because the Commission is not bound by the District Court's "legal rule," it should not adopt it.

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

The District Court cited no case in which a court had pierced the privilege surrounding "spoliation" that was neither a crime nor a fraud, nor did it invoke sound policy reasons for such a dramatic expansion of this privilege exception. *See*

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

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

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

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

privilege – the foundation of which is that legal advice, to be candid and effective, must be confidential. As Judge Gajarsa explained, the District Court's erosion of the privilege in this context "will confuse and likely chill all cor

legal advice that will not be privileged under the District Court's rule. Moreover, courts already have discretion, within proper bounds, to fashion appropriate trial-related measures, such as adverse inferences, to redress any unfairness caused by a litigant's destruction of evidence to the prejudice of another. *See, e.g.*, *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995). Indeed, that is precisely how Judge Timony chose to address his finding (later overturned) that Rambus had engaged in spoliation of relevant evidence. *See supra* p. 6; *see also*

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATION

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

Kenneth A. Bamberger
October 18, 2004