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

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

PUBLIC

COMPLAINT COUNSEL'S MOTION FOR SANCTIONS DUE TO RAMBUS'S SPOLIATION OF DOCUMENTS

> There is nothing legitimate about devising and implementing a plan to destroy documents as a core part of a patent licensing and litigation strategy. No decision cited by Rambus so holds. And, the Court's independent research has uncovered no authority to that effect.[1]

This quote from Judge Payne's May 2004 ruling is equally applicable in this matter. Rambus's document retention policy was "part and parcel" of its litigation efforts against the DRAM manufacturers,[2] and Rambus knew that its planned litigation against those DRAM manufacturers was imperiled by its own conduct at JEDEC. Rambus adopted the policy and encouraged its employees to destroy enormous quantities of evidence, including documents relevant to JEDEC. Following his *in camera* review that included the same documents recently admitted into the record in this matter, Judge Payne concluded that Rambus's document retention policy "was set up for what, on the record to date, clearly appears to have been an im

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[1] *Rambus, Inc. v. Infineon Tech. AG*, 222 F.R.D. 280, 298 (E.D.Va. 2004).

[2] *Rambus, Inc. v. Infineon Tech. AG*, Memorandum Opinion (Payne, J.) at 18

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purpose – the destruction of relevant, discoverable documents at a time when Rambus anticipated initiation of litigation to enforce its patent rights against already identified adversaries." *Rambus Inc. v. Infineon Technologies AG*, 222 F.R.D. at 298. He continued: "The record shows that the document destruction was on an enormous scale reaching all kinds of documents with potential relevance to this case and that it was voluminous, sweeping up and purging millions of documents under the control of Rambus, both in its own facilities and in the offices of its retained outside patent counsel." *Id*. at 296. He noted, "[t]he policy underlying [the spoliation doctrine] is the need to preserve the integrity of the judicial process in order to retain [society's] confidence that the process works to uncover the truth." *Id*. at 288 (citing *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). In March 1, 2005, following a five-day evidentiary hearing, Judge Payne dismissed Rambus's patent infringement claims against Infineon on grounds of Rambus's spoliation of evidence and unclean hands.

The Commission has an identical interest in protecting the integrity of its administrative litigation process. In this case, there is more than ample evidence that escaped the Rambus's destruction efforts to justify judgement against Rambus on the merits of the case. Nonetheless, the Rambus conduct is sufficiently serious to warrant action by the Commission to enter a default judgment against Rambus, as did Judge Payne, as the appropriate sanction for its spoliation of evidence and related litigation misconduct. Such an action by the Commission would help ensure that future FTC litigants do not think that they, too, can benefit from such tactics.

I. Background

A. Equitable Estoppel and

warned Rambus that equitable estoppel could be a problem if Rambus continued to participate in JEDEC. *Id.* In particular, he advised that Rambus should not "mislead JEDEC into thinking that Rambus will not enforce its patent." CCFF 889.[3]

Over the course of the next three-and-a-half years, Mr. Vincent continued to explain to Rambus the danger that equitable estoppel could pose for the future enforcement of Rambus's patents against JEDEC-compliant products. *See* CCFF 956-957; *see also* CX1958 ("Plaintiff could not remain silent while an entire industry implemented the proposed standard and then when the standards were adopted assert that his patents covered what manufacturers believed to be an open and available standard."). Beginning in the fall of 1995, a new in-house counsel, Anthony Diepenbrock, also voiced his misgivings about the potential for Rambus's conduct at JEDEC to create equitable estoppel problems. CCFF 1059-61.

The crucial importance of equitable estoppel was driven home in December 1995, when Mr. Vincent forwarded the Commission's proposed *Dell* consent order to Rambus. CCFF 1083.[4] Mr. Vincent and his partner Maria Sobrino explained to Rambus CEO Geoff Tate the downside risks for Rambus raised by the *Dell* decision and equitable estoppel. CCFF 1084. In January 1996, outside counsel Lester Vincent met with CEO Geoff Tate, Vice President David Mooring, Richard Crisp and in-house counsel Anthony Diepenbrock. CCFF 1085-87. Again at that meeting, the attorneys stressed to Rambus management the downside risk caused by *Dell* to Rambus's patent enforcement strategy. *Id.*

At this point, Rambus management finally accepted the seriousness of the equitable

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[3] At this point Rambus did not have any patents, but did have patent applications.

[4] Around the same time, Dave Mooring, Tony Diepenbrock and Richard Crisp apparently received a newsletter written by Wilson Sonsini lawyer James Otteson titled "Patent Rights and Industry Standards Associations." *See* CX5058. That newsletter described equitable estoppel and the *Dell* decision. *Id.* at 2 ("Although the Dell-FTC settlement is not yet final, its significance for technology companies is clear: failure to disclose proprietary intellectual property rights during standard-setting activities could lead to a loss of those rights through the FTC's enforcement of Section 5 of the Federal Trade Commission Act. But even when the FTC chooses not to enforce Section 5, technology companies should be aware they can also lose patent rights through the doctrine of equitable estoppel.").

estoppel risk they had incurred. CX0858 at 2 (email from Richard Crisp to Tate and others at Rambus: "So, in the future, the current plan is to go to no more JEDEC meetings due to fear that we have exposure in some possible future litigation."); CX0868 ("I think we should have a long hard look at our IP and if there is a problem, I believe that we should tell JEDEC there is a problem. Other opinions?"). In June 1996, Rambus withdrew from JEDEC. CCFF 1109-1114.

B. Rambus Developed its Document Retention Policy as Part of its Litigation and Licensing Strategy Regarding JEDEC.

In October 1997, Rambus hired Joel Karp as Vice President of Intellectual Property to assist Rambus in its goal of enforcing patents against manufacturers of JEDEC-compliant SDRAMs and DDR SDRAMs. CCSF 76. Prior to joining Rambus, Mr. Karp had submitted a sworn declaration in support of Samsung's equitable estoppel defense to a patent infringement suit by Texas Instruments relating to a JEDEC DRAM standard. CCSF 77 ("It is contrary to industry practice and understanding for an intellectual property owner to remain silent during the standard setting process – and after a standard has been adopted and implemented – later attempt to assert that its intellectual property covers the standard and allows it to exclude others from practicing the standard.").

In early 1998, Mr. Karp began planning and preparing for the initiation of litigation against manufacturers of JEDEC-compliant SDRAMs and DDR SDRAMs. He hired litigation counsel. CCSF 79-80. In 1998 and 1999, he and his outside litigation counsel evaluated legal theories, focusing on patent infringement and breach of contract. CX5007 ("Litigation/Licensing Strategy . . . make ourselves battle ready . . . Need to litigate against someone to establish royalty rate and have court declare patent valid. . . . Other approach is breach of contract");[5]

[5] Rambus itself has taken the position that Rambus was anticipating litigation at the time of this meeting. Rambus's counsel instructed outside counsel Daniel Johnson not to answer questions relating to statements in this document partly on grounds of work product in anticipation of litigation. CCSF 13; *see also* CX5079 at 49 (corresponding to transcript pages 573-574) (Judge Payne: "And in every objection where [a] … work product claim, you had to admit in making it it was in anticipation of litigation at the time it was made, and that admits that

CX5005 at 2 ("a tiered litigation strategy has been developed. . . . The first option is to pursue breach of contract remedies. . . . Rambus may [also] elect to file a patent infringement suit."); CX5006 at 3 ("Licensing and Litigation Strategy . . . – Option 1: Breach of Contract Remedy – Option 2: Patent Infringement Suit"); CX5013 at 2, 4-6 (identifying patents that cover SDRAM and DDR SDRAM; "compliants against DRAM companies"); CCSF 9-47.

Rambus and its outside litigation counsel evaluated potential litigation targets, focusing on specific DRAM manufacturers. CX5007 (Outside counsel "will review Micron, Fujitsu, and Samsung and Hyundai contracts and formulate litigation strategy driven by results of the analysis – breach-scope of license, NDA or patent infringement."); CX5013 at 5 ("Picking Litigation Targets"); CCSF 9-47. Rambus and its outside litigation counsel also evaluated possible forums, including the International Trade Commission, the Northern District of California, and the Eastern District of Virginia. CX5006 ("patent suit can be brought in venue of our choice – ITC – Northern California – Eastern District of Virginia (Rocket Docket)"); CX5013 at 6 ("Potential Litigation Forums") CCSF 9-29.

Following discussions with outside litigation counsel, and as a part of its litigation preparation, Rambus started planning for the compilation of a document database for use in litigation. CX5006 at 8 ("Licensing and Litigation Strategy Near Term Actions . . . – Need to prepare discovery database"); CX5005 at 2 ("To implement the above strategy Rambus has authorized outside counsel to begin organizing documents, and preparing a discovery data base ..."). Also following consultations with outside litigation counsel, and also as an integral part of its preparations for litigation, Mr. Karp drafted and implemented a document retention policy.[6]

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there's anticipation of litigation in the minds of those who … of 1998 at the time he was doing this.").

[6] At some point, Mr. Karp asked outside counsel Diana Savage for information on how to develop a document retention policy. CCSF 81. Ms. Savage gave Karp a "template agreement" that he could use as a starting point. *Id.* That document made clear that it was intended for information purposes only and could not be considered a Rambus-specific comprehensive document retention policy. CCSF 82-83. Ms. Savage informed Mr. Karp that if Rambus had any litigation-oriented issues that could be affected by a new document retention

CX5006 at 8 ("Licensing and Litigation Strategy Near Term Actions – Need to create document retention policy . . . – Need to organize prosecuting attorney's files for issued patents"); CX5015 ("IP Litigation Activity . . . B. Propose policy for document retention"); CX5014 ("IP Litigation Activity A. Implement document retention action plan – Done"); CX5023 at 7-8 (IP Update 10/04/98: "All Day Shredding Party Held on Sept. 3"); CX5045 ("Licensing/Litigation Readiness . . . G. Organize 1999 shredding party at Rambus"); CCSF 75-92. Contrary to the advice of outside litigation counsel, however, Mr. Karp did not take steps to ensure that documents relevant to anticipated litigation were preserved. CCSF 90-92, 103-108.[7] Instead, Mr. Karp insisted on the wholesale destruction of any and all documents not deemed helpful to Rambus.

Rambus's document retention policy required Rambus employees to search out and maintain evidence that might be useful to Rambus in litigation, such as documents relating to patent disclosures and proof of invention dates that are of "great value to Rambus," as well as material relating to trade secrets. CCSF 100-102; RX-2503. In sharp contrast, however, Rambus's document retention policy never once mentioned any obligation to preserve any other

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policy, he should contact another attorney in her office, David Lisi. *Id.* Mr. Karp did not do so; instead, he himself generated Rambus's two-page document retention policy. CCSF 87.

[7] Although Mr. Johnson apparently evaluated some aspects of Rambus's document retention policy, he never knew when he reviewed that policy that Rambus had been at JEDEC or that its presence there might equitably estop them from enforcing their patents against the JEDEC standard. CCSF 85. ("When I read in the newspaper about the JEDEC issue, I was flabbergasted. It ... never came up when I was involved with any input from the client…. let me make sure I make it clear, I never had a conversation with anybody at Rambus about anything relating to JEDEC, ever.").

Rambus employees to carefully preserve evidence potentially helpful to Rambus in its upcoming litigation, and to engage in the wholesale destruction of everything else. And that is precisely what Rambus employees did.

C. Rambus Implemented its Campaign of Document Destruction in Preparation for Litigation.

In the summer of 1998, Vice President Karp began implementing Rambus's campaign of document destruction. Mr. Karp declined any assistance from outside counsel (CCSF 94-96) and himself presented Rambus's policy to the various divisions within Rambus, and monitored compliance with the policy. CCSF 93. As with the policy itself, Mr. Karp's presentations failed to provide any notice to Rambus employees of their responsibility to maintain documents relevant to Rambus's upcoming litigations. CCSF 104-107. Instead they encouraged wholesale destruction of physical and electronic documents, including those that were not helpful to Rambus. See, e.g., RX2505 at 1 (email is "discoverable in litigation or pursuant to a subpoena"; "Email – throw it away"); CCSF 104.

As partially documented previously, in September 1998 Rambus held "Shred Day 1998," at which 20,000 pounds of documents were shredded in a single day. CCFF 1739-40. Rambus's employees collected 185 burlap bags and 60 boxes full of documents to be destroyed. CCSF 53. It took a professional shredding company 10 hours to shred all the documents presented by Rambus's employees. *Id.* By the end of Shred Day 1998, Rambus's electronically stored documents were either destroyed or in the process of being destroyed. CCSF 51-52.

But that was not enough. Concerned that some documents might have escaped the purge, Mr. Karp ensured that part of Rambus's "Licensing/Litigation Readiness" in 1999 was to "Organize 1999 shredding party at Rambus." CX5045; CCSF 58-59. As with the 1998 "Shred Day," Rambus employees were instructed to comply strictly with the document retention policy when deciding what documents to keep and what documents to throw away. CCSF 106. Rambus collected another 150 burlap bags full of documents to be shredded, requiring the professional

shredding company over four hours to complete the job. CCSF 61. At Mr. Karp's instruction, outside counsel Lester Vincent also conducted a "clean-up" of his files that continued through 1999 and into 2000, with plans to do more in 2001. CCSF 56-57; 128-133. The only files he neglected were his "chron" files. *Id.*

In the fall of 1999, immediately after Shred Day 1999, Rambus finalized its plans for litigation and picked its targets. CCSF 37-42. Rambus sent an assertion letter to Hitachi on October 22, 1999, and filed suit against Hitachi in January 2000.[8] CCFF 1953, 1995. In the spring of 2000, Rambus notified four other DRAM manufacturers and at least one video card manufacturer of alleged infringement of its patent claims. CCFF 1954-1958. Rambus settled its lawsuit with Hitachi in June 2000, but starting in August 2000 began litigation with other DRAM manufacturers, some of which continues today. CCFF 2015-2018 (Infineon), 2019 (Hynix), 2020 (Micron).

During this period, after threatening to sue manufacturers of JEDEC-compliant SDRAM and DDR SDRAM for alleged infringement of specific Rambus patents claiming priority back to the time when Rambus was a JEDEC member, Rambus and its agents continued to destroy documents. Vice President Neil Steinberg instructed Rambus executives to destroy all drafts of contracts and negotiation materials on July 17, 2000. CCSF 63. Mr. Vincent, after briefly ceasing his file cleaning when the Hitachi case was filed, began destroying documents once again as soon as the case settled in June 2000. *See* CX5036 (listing patent files cleaned up and "reviewed" by Vincent on June 23, 2000); CCSF 62.

On December 28, 2000, while in active litigation with Infineon, Micron and Hynix, and the day before receiving official notice from FTC staff of the Commission's investigation, Rambus executed the biggest Shred Day of all. *See* Response of Complaint Counsel to the Commission's Order Regarding Designation of the Record Pertaining to Spoliation of Evidence

[8] Rambus also filed a Section 337 complaint against Hitachi before the United States International Trade Commission. CCFF 1997-1998.

by Rambus (filed Dec. 22, 2004), Attachment F.

[9] Complaint Counsel first discovered the 2000 document destruction event from hearings in *Infineon* in December 2004. *See* Response of Complaint Counsel to the Commission's Order Regarding Designation of the Record Pertaining to Spoliation of Evidence by Rambus (filed Dec. 22, 2004) at 4.

[10] *See also Stevenson v. Union Pacific Railroad*, 354 F.3d 739, 746 (8th Cir. 2004) ("there must be a finding of intentional destruction indicating a desire to suppress the truth"); *see generally,* Scheindlin and Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century,* 11 Mich. Telecomm. Tech. L. Rev. 71 (

that the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction." *Id.* at 110.

Here, these elements and more have already been established. Judge Timony's Order on collateral estoppel, which Rambus never appealed to the Commission, establishes conclusively that Rambus intentionally destroyed relevant documents in anticipation of reasonably foreseeable litigation, and that Rambus's document retention policy was instituted in 1998 "in part for the purpose of getting rid of documents that m[illegible]40.8000 0.0000unselRamMt

Infineon, finding that "I have concluded that [Infineon] has proved, by clear and convincing evidence, a spoliation that warrants dismissal of this action as the only appropriate sanction after having – of the patent infringement case after having considered the alternatives." DX0507 at 1139.

The circumstances surrounding Rambus's development and implementation of its document retention program, as described above, fully support this result.

- Rambus designed its program as part of its preparation for litigation against DRAM manufacturers over its patents covering JEDEC standard DRAM. CCSF 9-29.
- Rambus implemented its program of document destruction barely two years after Rambus's attorneys (Vincent and Diepenbrock) had finally convinced Rambus to leave JEDEC because of concerns that its conduct at JEDEC might lead to equitable estoppel problems and also might lead to a *Dell*-type investigation by this Commission. *See, e.g.*, CCFF 821, 849-852.
- Rambus's document retention policy was developed by Vice President Joel Karp, who had been actively involved in litigation over a patent [illegible] JEDEC [illegible] *Dell*

impose.

A. Rambus Acted in Bad Faith to Deprive Opposing Litigants of Relevant Evidence.

The document destruction here occurred not despite Rambus's anticipation of litigation, but because of it. A firm that destroys evidence, with the intention of keeping that evidence away from litigation opponents, acts in bad faith. *See, e.g., Telectron, Inc. v. Overhead Door Corp.*, 116 FRD 107, 127 (S.D. Fl. 1987); *Rambus v. Infineon,* 222 F.R.D. at 298 (Destroying relevant, discoverable documents at a time when the firm anticipated initiating litigation against already identified adversaries is "wrongful and is fundamentally at odds with the administration of justice.").[11]

Courts have found bad faith document destruction when firms, in anticipation of litigation, selectively preserve documents favorable to them, but allow other relevant evidence to be destroyed pursuant to established document retention programs. *See Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004); *E*Trade Securities v. Deutsche Bank AG*, 2005 U.S. Dist Lexis 3021 at *14 (D.Minn 2005). In *Stevenson*, a railroad facing suit from an accident destroyed a tape that the railroad knew would be relevant in any litigation involving the accident. The Eighth Circuit affirmed the district court's finding of bad faith, even though the tape was destroyed as part of a routine tape retention policy, because the railroad "had general knowledge that such tapes would be important to any litigation over an accident that resulted in serious injury or death, and its knowledge that litigation is frequent when there has been an accident involving death or serious injury." 354 F.3d at 748. The railroad's failure to preserve the tape in

[11] In *Telectron*, an in-house counsel ordered employees of the company to destroy documents after receiving a complaint and document request as a defendant in an antitrust action. 116 FRD at 109-126. The court ordered a default judgment against that firm finding that "there is … evidence of willful document destruction by a corporate defendant, carried out in an unabashed – and successful – attempt to render irretrievable records clearly pertinent to the claims brought against it." *Id.* at 127.

that context was in bad faith in part because the railroad company made an "immediate effort to preserve other types of evidence but not the voice tape." *Id; see also E*Trade Securities,* 2005 U.S. Dist. Lexis 3021 at *18 ("Here, as in *Stevenson,* [the defendant] chose to retain certain documents prior to the destruction of the hard drives. This gives rise to an implication of bad faith on the part of the … defendants.").

Here, the circumstances go far beyond these other cases. Unlike in *Stevenson,* where a tape was disposed of in compliance with a routine and long-established company document retention policy, the Rambus selective document policy was designed as part of the litigation strategy itself. *See, e.g.,* CCSF 10-15; RX-2503 at 1 ("The documents, notebooks, computer files, etc., relating to patent disclosures and proof of invention dates are of great value to Rambus and should be kept permanently."). Rambus's document retention policy explicitly incorporates a strategy to maintain only favorable evidence, which the court had to infer in *Stevenson. See Stevenson,* 354 F.3d at 748 ("The prelitigation destruction of the voice tape in this combination of circumstances, though done pursuant to a routine retention policy, creates a sufficiently strong inference of an intent to destroy it for the purpose of suppressing evidence of the facts surrounding the operation of the train at the time of the accident."); *see also Lewy v. Remington Arms,* 836 F.2d 1104, 1112 (8th Cir. 1988) (A document retention policy is instituted in bad faith "in cases where [it] is instituted in order to limit damaging evidence available to potential plaintiffs").

Also unlike in *Stevenson,* where only a single tape was destroyed in bad faith, here Rambus committed a massive document destruction in an attempt to eliminate evidence of its misconduct while it was a member of JEDEC. In effect, Rambus's litigation preparations consisted of a highly selective document retention program keeping intact and assembling a database of corporate records "of great value to Rambus" because they would help Rambus enforce its patents and licenses, while at the same time trying to eliminate most other documents.

The result, Rambus hoped, would be that Rambus could deny any wrongdoing in JEDEC

and even argue that it made no efforts at all to seek to patent the JEDEC standards while a JEDEC member. Indeed, this was the argument that Rambus made clearly, explicitly, and spectacularly falsely, in its whitepaper to FTC staff at the investigative stage of this case:

> Rambus ... was not seeking any patents that covered the SDRAM standard during the time that the standard was being considered by JEDEC.

CX1883 at 11; *see also id*. at 12 ("Rambus never even sought [a patent covering the SDRAM standard] while it was a member of JEDEC."); CX2054 at 165-66 (Mooring: "The pending applications related to RDRAM."); CX2053 at 404 (Crisp: "I wasn't thinking in terms of SDRAM.").[12] Rambus's scheme failed because, despite its destruction efforts, some relevant documents were discovered – on a hard drive in Richard Crisp's attic, in Lester Vincent's chron file (which he neglected to clean out) and on a forgotten file on one of Rambus's servers – that showed Rambus's assertions to be false. And more such documents have continued to surface since the close of the record below.

B. The Circumstances Demonstrate that Relevant Evidence was Destroyed.

1. Why the Relevance of the Destroyed Evidence Is Important.

To establish an appropriate sanction for spoliation, the degree of relevance of the destroyed evidence must be considered. *Kronish v. United States.*, 150 F.3d 112, 127 (2d Cir. 1998). The relevance of the destroyed evidence allows the tribunal to assess the harm to its procedures caused by the destruction of evidence. *Id.* This task "is unavoidably imperfect, inasmuch as, in the absence of the destroyed evidence, we can only venture guesses with varying

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[12] Rambus's bad faith is underscored by the deliberate misrepresentations of witnesses, and the company itself, trying to cover up the nature and effect of its campaign of document destruction. CCSF 145-148 (Rambus did not anticipate litigation when it destroyed documents); CCSF 149-151 (Vice President Karp was concerned about a third-party document request); CCSF 152-154 (Mr. Karp was not concerned with the substance of the destroyed documents); CCSF 157-159 (designated witness Mr. Steinberg was only aware of one instance when Rambus collected documents for shredding); CCSF 160-163 (Richard Crisp took affirmative steps to preserve his emails); CCSF 166-167 (Rambus produced all pertinent and relevant documents).

degrees of confidence as to what that missing evidence may have revealed." *Id.* Care should be taken not to "hold the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed or unavailable evidence because doing so would subvert the purposes of the adverse inference, and would allow the parties who have destroyed evidence to profit from that destruction." *Residential Funding Corporation,* 306 F.3d at 109.[13]

When it is difficult to identify a particular relevant document or documents because voluminous files that might contain that evidence 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 claim would have been included among the destroyed files." *Kronish,* 150 F.3d at 128. Moreover, the state of mind of the party that caused the destruction determines the amount of proof necessary to show the relevance of the destroyed evidence. *See e.g., Thompson v. U.S. Department of Housing and Urban Development,* 219 F.R.D. 93, 101 (D.MD 2003). The more culpable that party is, the easier it is for the other party to establish relevance. *Id.*

Where a party destroys evidence in bad faith, "that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party." *Residential Funding,* 306 F.3d at 109. Even a finding of "gross negligence" in the destruction of evidence can support a finding that the destroyed evidence was unfavorable to the negligent party. *Id.*[14] "Accordingly, where a party seeking an

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[13] That is important here because Rambus's document retention program was implemented in a way to make it hard to identify what was destroyed. ALJ Timony instituted a rebutable presumption that Rambus failed to maintain a log of the documents that it destroyed. CCSF 70. Needless to say, that presumption has not been rebutted. CCSF 109 ("[O]ther than interviewing every employee in the company and asking for each one what – what – if they remember what they destroyed, that would be the only way. I can't think of any other way.").

[14] *See also Blinzler v. Marriott Intern. Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996) ("When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a fact finder may reasonably infer that the party probably did so because the records would harm its case.").

adverse inference adduces evidence that its opponent destroyed potential evidence … in bad faith *or through gross negligence*,… that same evidence of the opponent's state of mind will frequently also be sufficient to permit a jury to conclude that the missing evidence [is relevant]." *Id.*

to conclude that the missing evidence [is relevant]."

confirms that, prior to Shred Day 1998, he stored large numbers of documents in his office. CCSF 123. In addition, many of his most-important JEDEC-related emails were purged from Rambus's business files. CCSF 115. The JEDEC-related emails that form the core of the case against Rambus were not found in Rambus's working files, but instead were found by Mr. Crisp himself on an unused computer hard drive in his attic at home.[15] CCSF 115, 122. Mr. Crisp's awareness of the effec

[15] Some of these emails were also found 2½ years later in a forgotten file in a Rambus server. CCSF. 122.

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relating to the JEDEC standard. Prior evidence established that, in response to a request from Rambus Vice President Joel Karp, Mr. Vincent systematically "cleaned" out his Rambus files. CCSF 56-57, 62, 117; CCFF 1744-1752. New evidence confirms that Mr. Vincent cleaned out his files relating to the '327 patent and the '651, '961,'490, '692, 'and '646 applications, all of direct relevance to this case. CCSF 127-133. He also cleaned out his email system in response to Vice President Karp's request. CCSF 128. Mr. Vincent found some handwritten notes and correspondence with Ramb

1. A Default Judgment Is Justified Here.

A default judgment is justified either in circumstances of bad faith or when there is extraordinary prejudice to the opposing litigant. *Silvestri*, 271 F.3d at 593. In *Silvestri*, the Fourth Circuit affirmed dismissal of a product liability suit against a car manufacturer arising out of an auto accident, based on the conduct of the plaintiff's attorney and experts, who were in a position to prevent the elimination of crucial evidence in the case but failed to do so. The court found that the level of culpability of the plaintiff for the destruction of the evidence was "at least negligent and may have been deliberate." *Id.* at 594. The court found that the missing evidence was highly prejudicial to the defendant's case, based largely on the testimony of the defendant's expert (*id.* at 594-5), even though the dissenting judge believed the defendant did not need the information it would have gotten from inspecting the car "in order to support its position," and the defendant's expert had "sufficient information in order to form the opinions that he had expressed." *Id.*

The *Silvestri* case demonstrates that a default judgment is appropriate when justified by a combination of two factors – the nature of the spoliator's conduct and the prejudicial effect of the spoliation – even if the victim of the spoliation is still able to support its case. In this case, Rambus destroyed its documents in bad faith – the destruction was undertaken solely because of anticipated litigation, it was part and parcel of Rambus's offensive litigation strategy, and it served to prevent litigation opponents from obtaining potentially unfavorable evidence. And although Complaint Counsel have ample evidence in the record to establish Rambus's liability, that destruction was prejudicial to Complaint Counsels' case.

As described above, the evidence destroyed relates to every major contested issue in this case. The absence of that evidence during discovery impeded Complaint Counsel's ability to develop further evidence and prevented Complaint Counsel from evaluating the testimony of Rambus witnesses against contemporaneous documents. Rambus's JEDEC representative Richard Crisp, outside patent counsel Lester Vincent, and founders Mark Horowitz and Mike

Farmwald testified at trial, but Complaint Counsel lacked many of their documents. Complaint Counsel's decisions regarding whether to call other Rambus executives, such as CEO Geoff Tate, Vice President Allen Roberts, Vice President Dave Mooring, or JEDEC representative Billy Garrett could have been changed by either the content of documents that were never produced or by their testimony at deposition in light of those documents.

Judge Payne saw Rambus's conduct as a threat to the integrity of the judicial process:

> Simply put, destruction of documents of evidentiary value under those circumstances is wrongful and is fundamentally at odds with the administration of justice. Such activities are not worthy of protection by privileges that are designed to advance the interests

[16] *Rambus, Inc. v. Infineon Tech. AG*, 222 F.R.D. at 298.

documents were destroyed in bad faith. *Id.* This inference applies even if the documents were destroyed pursuant to a regular document retention program prior to the onset of litigation. *Id.* ("When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a fact finder may reasonably infer tha

judgment against Rambus, for the spoliation of evidence that Rambus engaged in over many years. Granting such relief will protect the integrity of the Commission's administrative process.

Respectfully submitted,

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Counsel for the Complaint

August 10, 2005

UNITED STATES OF AMERICA
BEFORE F

CERTIFICATE OF SERVICE

I, Beverly A. Dodson, hereby certify that on August 10, 2005, I caused a copy of the attached, *Complaint Counsel's Motion For Sanctions Due to Rambus's Spoliation of Documents*, to be served upon the following persons:

by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
via Office of the Secretary, Room H-135
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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