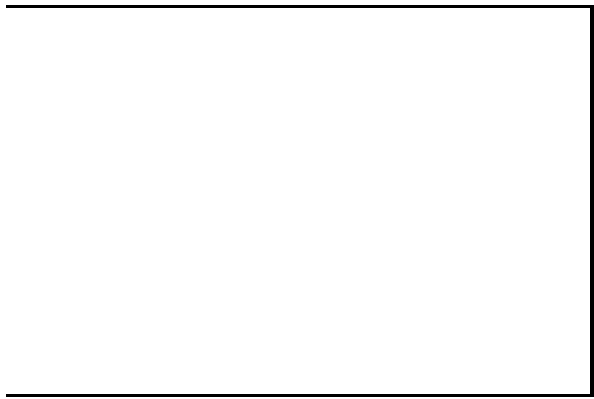


PUBLIC

UNITED STATES OF



I. INTRODUCTION AND SUMMARY ARGUMENT

Respondent Rambus Inc. (“Rambus”) submits this brief in response to Complaint Counsel’s “Motion for Sanctions Due to Rambus’s Spoliation of Documents,” filed on August 10, 2005. Complaint Counsel’s motion has no basis in fact or law and seeks draconian relief whose imposition on this record, in this proceeding, would violate basic principles of due process and administrative law. For the reasons set out in this brief, in Rambus’s Amended Proposed Findings of Fact (“RSF”) and in Rambus’s Responses to Complaint Counsel’s Supplemental Proposed Findings of Fact (“RRSF”), the motion should be denied.

Complaint Counsel’s motion purports to seek a default judgment against Rambus to punish it for its alleged destruction of documents in anticipation of litigation. Motion, pp. 2, 22. But Complaint Counsel do not offer – or even profess to offer – the clear and convincing evidence that the federal courts have held to be necessary for such relief. Complaint Counsel do not, for example, establish that Rambus acted in egregious bad faith when in 1998 it adopted – on the recommendation and with the close guidance of experienced outside counsel – a document retention policy similar to policies in place at many public companies. Nor do Complaint Counsel show that the effect of Rambus’s document retention policy has been to deprive Complaint Counsel of the ability to obtain a full and fair adjudication of their case. In short, Complaint Counsel have failed to demonstrate that Judge Timony’s February 2003 determination that a default judgment was inappropriate, and Judge McGuire’s subsequent determination that these proceedings had not been prejudiced by Rambus’s alleged document destruction, were in any way

(hereinafter “Supplemental Evidence”) undermines those prior determinations or any of Judge McGuire’s findings on the merits. In fact, Complaint Counsel’s brief and their proposed supplemental findings rely in large part on documents that were made available to them *prior* to the trial in this action. Such documents provide no support for the relief sought by this motion, especially given Complaint Counsel’s decision not to appeal either Judge Timony’s holding that a default judgment was inappropriate or Judge McGuire’s determination that no material documents had been shown to have been destroyed. *See* Response of Complaint Counsel to the Commission’s Order Regarding Designation of the Record Pertaining to Spoliation of Evidence by Rambus, Dec. 22, 2004.

Complaint Counsel’s reluctance to rely on the Supplemental Evidence is understandable. In part because the privilege-piercing orders entered by Judge Payne allowed Rambus to explain the role of its counsel in the adoption and implementation of the document retention policy, the Supplemental Evidence demonstrates conclusively that Rambus adopted that policy in good faith and that it did not target either unfavorable documents or documents material to this case for destruction. For example, the Supplemental Evidence demonstrates that:

- Rambus instituted its document retention policy in 1998 on the advice of outside counsel with acknowledged expertise in the preparation and purpose of such policies. *See* Rambus’s Amended Proposed Findings of Fact (“RSF”), ¶¶ 1619-1622; 1623-1632; RRSF ¶¶ 9-32;
- Rambus’s outside counsel explained the new policy to Rambus’s managers and edited and approved the slides used to describe the policy to Rambus’s employees, including many of the slides referenced in

Complaint Counsel's motion, RSF ¶¶ 1636-1645;

- Rambus adopted its document retention policy for the same wholly legitimate reasons that other businesses adopt such policies, RSF ¶¶ 1633-1635;
- Rambus's document retention policy did not, in its preparation or implementation, target particular categories of relevant documents for destruction, RSF ¶¶ 1653-1659;
- Rambus's outside counsel was aware of and assisted i

by Rambus's alleged destruction of documents. Initial Decision, p. 244. In this regard, Complaint Counsel do not even *contend* that Rambus would be expected to have, or should be penalized for destroying, documents relating to numerous dispositive issues on which Complaint Counsel have the burden of proof. As an example, nothing in the Supplemental Evidence suggests that Rambus destroyed evidence that would have been material to Judge McGuire's determination that JEDEC members were not required to disclose their patent applications or intentions to file or amend patent applications. *Id.*, ¶¶ 772-774 and pp. 269-70. That finding rests on what JEDEC's *rules* were – as described in “clear and unambiguous official statements of policy” from JEDEC's files – and could not have been affected by documents that Rambus might have once possessed. *Id.* Complaint Counsel do not contend otherwise. Similarly, nothing in the Supplemental Evidence suggests that Rambus could possibly have destroyed evidence material to the question of whether JEDEC had available to it commercially viable, non-infringing alternatives to the technologies covered by Rambus's patents. Again, Complaint Counsel do not contend otherwise. There are numerous other case-dispositive findings by Judge McGuire that are necessarily unaffected by any decision by Rambus to retain or destroy documents. *See* section III.E, *infra*.

The proof is in the pudding. The five additional adverse inferences that Complaint Counsel ask the Commission to impose as a result of the Supplemental Evidence *all* go to Rambus's “hopes” and t

obligated to make any disclosure to JEDEC. Initial Decision, p. 277, *quoting Infineon Technologies AG v. Rambus Inc.*, 318 F.3d 1081, 1104 (Fed. Cir. 2003). *See also id.* at p. 244 (holding that because the evidence showed that because JEDEC disclosure was voluntary, Rambus’s presumed belief that future DRAM standards would require the use of patents applied for by Rambus was irrelevant); *id.* at p. 282 (holding that an intent to broaden patent claims “for the specific purpose of covering technologies features that were adopted” by JEDEC was “entirely legitimate” under the patent laws and JEDEC policy).

In other words, because Judge McGuire did not base any of his findings or conclusions on the proposition that Rambus was

case, it is easy to understand why there is no such precedent.

One further word about the proposed remedy. The cases regularly use the word “draconian” to describe the relief sought by Complaint Counsel here. *See Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003) (noting that dismissal is a “draconian” sanction that will be reviewed with “vigilan[ce]” on appeal). But “draconian” seems like an understatement when one examines the remedy proposed by Complaint Counsel. The remedy sought here is not just a requirement to pay, or a lost chance to win, a money judgment. The requested order would strip Rambus of its fundamental right of free access to the courts to protect numerous valid patents duly issued by the Patent Office, would strip Rambus of its statutory right to license those patents at a reasonable royalty to those who wish to use Rambus’s inventions, and would thus deprive Rambus of its lifeblood and the source of most of its current revenues. Such a result is as unprecedented as it is unwarranted by the record in this case. For these and the reasons set out herein, the motion should be denied.

II. FACTUAL BACKGROUND

A. Rambus’s Document Retention Policy Was Neither Adopted Nor Implemented To Destroy Documents That Might Be Harmful To Rambus In Litigation

1. Rambus Adopted It

time that he first advised Rambus to adopt a document retention policy, Mr. Johnson was a partner in the law firm of Cooley, Godward, Castro, Huddleson & Tatum. *Id.* at 196. Mr. Johnson left Cooley Godward in March of 1998 to join the law firm of Fenwick & West LLP. *Id.*

2. Mr. Johnson has extensive knowledge about the legal requirements for document retention policies. Mr. Johnson has advised between 20 and 30 companies about document retention policies, *id.* at 204, and has given presentations and lectured about document retention policies and electronic discovery at ABA and PLI seminars. *Id.* at 198.

3. Mr. Johnson testified to three reasons why he advised Rambus to adopt a document retention policy. First, Mr. Johnson advised Rambus to adopt a document retention policy in order to reduce search costs in the event it was someday required to respond to subpoenas or document requests that might possibly be issued in connection with future lawsuits or investigations, including those in which Rambus was not a party. He testified that he told Rambus that “as an IP company, you often are the subject of subpoenas from a variety of organizations. You could be involved in lawsuits. You could be—get government requests. And because of that, and because you’re so document intensive, you need to have a policy. You don’t need to have one part of your organization doing one thing, and another part doing another. . . . [I]t is standard practice, particularly for startups, and although Rambus was not a startup, in effect it was, that [sic] they needed to have an overall company policy.” CX5076 at 34-35.¹

¹ The evidence shows that when the document retention policy was explained to Rambus employees, they were told that Rambus was concerned about the expense of conducting a search for documents and data and how a properly implemented document retention

policy could reduce those costs. RX-2529 at 539-40 (Diepenbrock 10/11/04 *Infineon*
Dep.) (“I don’t recall a discussion where they said e-mails would be ultimately wh

CX5076 at 36-37, 221.

6. Complaint Counsel have pointed to various memoranda prepared or reviewed by Mr. Johnson or others at the Cooley Godward firm in 1998 about future licensing issues, which documents also refer to the possibility that if future licensing discussions fail, patent infringement litigation was possible. *See, e.g.*, CCSF 19-20. Complaint Counsel suggest that these documents show that Rambus adopted its document retention policy in bad faith, for the purpose of destroying harmful evidence. *Id.*

7. These documents, however, and the preliminary discussions that they reflect, show that litigation was then considered a far-off contingency, to be considered as an option only if *all* of the following occurred: (1) issued patents; (2) infringing products, as determined by reverse engineering or other infringement analyses; and (3) failed licensing negotiations. It is clear that when the document retention policy was adopted, none of these three events had occurred. *Id.*

8. The documents and preliminary

lawsuits presented any impediment to Rambus’s subsequent adoption of the document retention policy that counsel themselves had proposed. The documents relied upon by Complaint Counsel are, therefore, the strongest possible evidence of Rambus’s good faith in adopting its document retention policy. *See, e.g., Lucent Information Management, Inc. v. Lucent Technologies, Inc.*, 186 F.3d 311, 318 (3d Cir. 1999) (“courts have found that reliance on the advice of counsel after conducting a trademark search is sufficient to defeat an inference of bad faith”); *State Farm Mutual Automobile Ins. Co. v. Johnson Kinsey Inc.*, 228 Cal.App.3d 721, 725, 279 Cal.Rptr. 116, 118 (1991) (“[i]n response to a plaintiff’s allegations of bad faith and malice, a defendant is entitled to show it acted reasonably and with proper cause based on the advice of its counsel.”).

2. Rambus’s Document Retention Policy Was A Garden Variety Records Retention Policy That Explicitly Told Employees That It Was Not To Be Used as Evidence in Litigation

Electronic Records: Applying a Reasonableness Standard to the Electronic Era, 24 J. Corp. L. 417, 419-20 (1999); Patrick R. Grady, *Discovery of Computer Stored Documents and Computer Based Litigation Support Systems: Why Give Up More Than Necessary*, 14 J. Marshall J. Computer & Info. L. 523, 537-38 (1996); Stephen J. Snyder & Abigail E. Crouse, *Applying Rule 1 in the Information Age*, IV Sedona Conf. J. 165, 168 (2003).

14. In and after July, 1998, Mr. Karp made presentations of the document retention policy to various employees within Rambus. He used a set of overhead slides in making these presentations. CX2069 at 464-73 (Karp 10/8/04 *Infineon Dep.*); RX-2505. Mr. Karp's slides provided specific guidance regarding the importance of retaining various kinds of documents relating to multiple aspects of the company's business:

- **Intellectual Property** ("All Documents Designated As Containing Trade Secret Information Should Be Kept For At Least The Life Of The Trade Secret"). RX-2504 at R124532.
- **Human Resources** ("Most Personnel Records Must Be Kept For 3 Years"). *Id.* at R124541.
- **Tax/Legal** ("Audit Period Is 3 Years;" "Inside Counsel Subject To Same Document Retention Policy As Rest of Company"). *Id.* at R124542.
- **Engineering** ("LOOK FOR REASONS TO KEEP IT"). *Id.* at R124534.
- **Marketing and Sales** ("Generally Kept for 3 Years;" "LOOK FOR THINGS TO KEEP"). *Id.* at R124535.
- **Contracts** ("General Rule" to destroy "drafts" "Upon Execution of Contract," except "If You Feel That A Particular Document Would Aid You In Refreshing Your Recollection – Keep It;" "LOOK FOR THINGS TO KEEP"). *Id.* at R124537.

15. Mr. Johnson testified that he reviewed drafts of Mr. Karp's slides before Mr. Karp presented them to employees in Rambus's operating divisions, and that he told Mr. Karp that in light of the slides, employees were likely "to keep more stuff than they might ot

many companies and federal agencies) uses shredders rather than mere trash cans because of concerns about confidential documents. CX

adoption or implementation of the document retention policy to any previous equitable estoppel issues or “*Dell* concerns.” In fact, there is nothing in the Supplemental Evidence that supports such a linkage, and Complaint Counsel apparently want the Commission simply to speculate that Rambus had a “guilty conscience” about its JEDEC participation when adopting the document retention policy.

20. Speculation is, of course, no substitute for evidence and certainly does not rise to the level of the clear and convincing evidence required by the case law. *See Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995) (dismissal reversed for failure to apply clear and convincing standard to allegations of misconduct). Moreover, as the trial record showed and as Judge McGuire found, Rambus’s JEDEC representatives had followed their counsel’s advice at JEDEC meetings and had *avoided* any risk of equitable estoppel. A brief recap of the undisputed evidence on this issue demonstrates that it would be inappropriate to base any order – much less a default sanction – on a speculative assumption that in 1998 Rambus had a guilty conscience about its prior JEDEC conduct.

21. The evidence at trial demonstrated that there is no basis for concluding that Rambus’s conduct at JEDEC meetings should have led it to expect that litigation involving that conduct was likely to arise in the future. It is undisputed that Rambus sought and obtained the advice of counsel regarding its participation in JEDEC shortly after it began attending JEDEC meetings, that its counsel discussed the doctrine of equitable estoppel with Rambus employees, and that counsel *also* provided guidelines as to appropriate conduct. Outside counsel Lester Vincent informed Mr. Crisp and Mr. Roberts that there could be a risk of equitable estoppel if “Rambus creates impression

on JEDEC that it would not enforce” its intellectual property, and he suggested that Rambus might consider abstaining from voting. CX1942.

22. The record evidence showed, and Judge McGuire found, that Rambus heeded the advice of its counsel and took steps to ensure that it did not create any misleading impressions regarding its intellectual property. For example, in May 1992, at Mr. Crisp’s very first JEDEC meeting on behalf of Rambus, the chairman of the JC 42.3 committee asked Mr. Crisp if he cared to comment about whether Rambus had any intellectual property regarding a proposed feature of the SDRAM. CX2089 at 134-36 (Meyer 4/26/01 *Infineon* Trial Tr.); CX0673 (May 6, 1992 Crisp e-mail); Initial Decision at 811-817. As the trip reports and notes prepared by various JEDEC representatives show, Mr. Crisp *declined to comment* in response to the question. *Id.* See also RX-0297 (May 199

presented a written statement regarding questions that had been raised at the prior meeting:

“At this time Rambus elects not to make a specific comment on our intellectual property position relative to the Synlink proposal. Our presence or silence at committee meetings does not constitute an endorsement of any proposal under the committee’s consideration nor does it make any statement regarding potential infringement of Rambus intellectual property.”

JX0027 at 26 (Sept. 11, 1995 JC 42.3 Meeting Minutes).

25. Rambus’s open, public refusals to respond to questions about intellectual property, and its statement that its presence at meetings “does not constitute an endorsement of any proposal . . . [or] make any statement regarding potential infringement,” could not have lulled anyone into believing that Rambus did not have or would not obtain intellectual property rights. The Chairman of the relevant JEDEC committee acknowledged this point at trial, testifying that Rambus’s refusal to comment was “notification to the committee that there should be a concern.” Trial Tr. at 2579 (Kelley). In light of this evidence, it is not surprising that Judge McGuire found that Mr. Crisp’s refusals to comment “put members on notice” that Rambus might seek broad patent coverage. Initial Decision, ¶ 281. There is nothing in the Supplemental Evidence that can or does affect this finding, and there is nothing in that evidence that suggests that the adopt01243emc1dppl

presentation handouts. As Judge Payne himself explained, the destruction of documents

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Counsel assert that “Mr. Crisp’s awareness of the effect of the document retention program on Rambus’s JEDEC-related documents can be seen by his odd joke about JEDEC-related documents ‘falling victim to the document retention policy.’ CCF 1754.” The fundamental problem with this statement is that the “joke” has nothing whatsoever to do with any “JEDEC-related documents” and instead refers to Mr. Crisp’s request for a copy of “one of the original DDR datasheets from the 1996/1997 timeframe.” CX1079 at 1. Such datasheets were available from DRAM manufacturers, not JEDEC, and in any event were created *after* Rambus stopped attending JEDEC meetings in late 1995. There is absolutely nothing in the cited exhibit to tie it to JEDEC or to link it to what Complaint Counsel now refer to as “Mr. Crisp’s awareness of the effect of the document retention program on JEDEC-related documents.” Motion, p. 19. It is very telling that in Complaint Counsel’s 2003 post-trial findings, they referred to this *same* exhibit not as “JEDEC-related,” but as involving “DDR-SDRAM-related documents.” CCF 1754. In other words, unable to point to any new contemporaneous evidence suggesting a link between the goals of the document retention policy and JEDEC documents, Complaint Counsel chose to make one up.

31. Complaint Counsel also insinuate that a Rambus employee named Billy Garrett, who attended two or three JEDEC meetings in 1992 and 1993, destroyed internal, non-public JEDEC-related documents. There is no basis, however, to assume that Mr. Garrett still possessed such documents as of 1998, over five years after attending his last JEDEC meeting.² Moreover, as Rambus has previously pointed out, a “missing”

² Complaint Counsel cite the Gray Cary notes of an interview with Billy Garrett for the proposition that Garrett had not been able to locate any JEDEC-related materials when searching for documents in connection with the *Hitachi* case. CX5062 at

trip report by Mr. Garrett that Complaint Counsel had *previously* suggested would have been harmful to Rambus has now become available and reveals that Mr. Garrett witnessed, and reported to Rambus, the March 1993 announcement by Committee Chairman Gordon Kelley that his company, IBM, would not disclose its patents or patent applications and that JEDEC policy did not require such disclosure. *See* Attachment 6 to Complaint Counsel's Petition to Modify the Schedule in the Commission's July 20, 2005 Order.

32. Rambus employee Allen Roberts also testified that he had not discarded the JEDEC-related e-mails he had received from Richard Crisp. CX5084 at 338 (Roberts 4/11/01 *Infineon* Dep.). Finally, Lester Vincent, Rambus's outside patent counsel, also testified that he did not discard documents relating to JEDEC or Rambus's participation in JEDEC:

Q: After receiving instructions from Rambus, Mr. Vincent, in the '97, '98 time frame about retaining documents or discarding documents, did you from any point in time from then forward destroy documents that related to the legal advice you provided to Rambus about the disclosures of patents and patent applications to JEDEC?

A: No.

Q: Did you destroy any documents during that time frame relating to the disclosure policy of JEDEC?

A: No.

CX3126 at 416 (Vincent 4/12/01 *Infineon* Dep.).

33. It is also undisputed that Complaint Counsel have had the close cooperation of several companies who have been JEDEC members for well over a

GCWF03416. The notes go on to say that that material "[w]asn't necessary. Got rid of it." *Id.* The notes do not support any notion that the materials that Garrett "got rid of" were *internal* Rambus documents rather than publicly available JEDEC materials, *id.*, nor do they support any inference that the materials were believed to be harmful.

decade. Those companies well know the categories of documents that a JEDEC member is likely to create as a result of its membership. Nevertheless, Complaint Counsel have never identified any document or category of non-public documents that Rambus should have had in its files but did not produce.

34. In sum, the only evidence in the record of Rambus's destruction of JEDEC-related materials involves copies of publicly available materials. Rambus's destruction of publicly-available JEDEC materials cannot support any inference of improper conduct and cannot support the relief sought by Complaint Counsel's motion.

2. There Is No Evidence That In Adopting Or Implementing Its Document Retention Policy, Rambus Targeted For Destruction Potentially Relevant Documents In Patent Prosecution Files

35. Complaint Counsel assert that Lester Vincent, Rambus's outside patent prosecution counsel, "cleaned" his prosecution files for issued patents at Mr. Karp's request. Motion, p. 20. *See generally* RX-2533 at 101-103 (Vincent 10/15/04 *Infineon* Dep.). At the time of the request, however, none of the patents that Rambus later asserted against Infineon or any other DRA00 cm0.00 0.09able JEDEnvailinst Inf

document retention of patent files.” *Id.* at 106. As Mr. Vincent further testified, “[i]t’s not uncommon for corporations to have document retention policies with respect to issued patent files. So I think I was following kind of the accepted norm.” *Id.* Pursuant to his understanding of the “accepted norm,” in connection with the files of issued patents that he cleaned, Mr. Vincent retained all communications with the PTO, all materials related to conception and reduction to practice of the invention, correspondence related to maintenance fees, notes of any teleconferences with the patent examiner, and any prior art. *Id.* at 104-106, 181.

37. Mr. Karp’s discussions with Mr. Vincent resulted in the retention of those documents most likely to be relevant to this action. Mr. Vincent’s “general” files were, as the name suggests, related to more general matters and were organized by topic. CX5038 (Jan. 31, 2000 Letter from Lester Vincent to Neil Steinberg at BSTZ 00063); CX5073 at 54-55 (Vincent 11/30/04 *Infineon* Dep.). For example, Mr. Vincent maintained Rambus general files dedicated to such topics as “General Services,” “Ramlink Matter,” and “IEEE Standards Activities.” *Id.* Materials relating to JEDEC and Mr. Vincent’s advice to Rambus regarding equitable estoppel were not specific to the prosecution of any particular patent application and were, after privilege-piercing orders were entered, produced in litigation. It thus seems unlikely that Mr. Vincent “cleaned” any of his files that related to the legal advice he had provided to Rambus about the disclosures of patents and patent applications to JEDEC members.

38. Complaint Counsel also assert that Mr. Vincent destroyed additional documents in his patent files after the *Hitachi* case settled in June 2000. Motion at 9. In fact, to the extent that Mr. Vincent did remove any documents in his versions of the

patent files at that time, nothing was destroyed because copies of those files had already been provided to Rambus and its litigation counsel in connection with the Hitachi litigation.³ RX-2530; RX-2531 at 543 (Vincent 10/9/01 *Micron* Dep.); CX5072 at 56-57 (Vincent 11/30/04 *Infineon* Dep.); RX-2508 (Feb. 1, 2000 Letter from Lester Vincent to Neil Steinberg at BSTZ 00060 (enclosing copies of patent files).)

39. Complaint Counsel also complain that Anthony Diepenbrock, an in-house lawyer at Rambus between 1995 and 1999, “had no JEDEC-related documents” when Rambus’s outside counsel interviewed him in connection with the *Hitachi* litigation. Motion at p. 20. What Complaint Counsel fail to mention is that Mr. Diepenbrock had *left* Rambus in May 1999, well before the *Hitachi* suit began. It is not at all surprising that an employee did not take documents (especially privileged documents) with him upon his departure from a company. What is surprising is that Complaint Counsel try to rely on that fact as evidence of wrongdoing.

D. Rambu

³ In addition, as Mr. Vincent testified, simply because it is marked on the chart that he “reviewed” a particular file does not mean that anything in the file was destroyed. RX-2532; RX-2533 at 139-40, 145, 180-82 (Vincent 10/15/04 *Infineon* Dep.).

a DRAM manufacturer issued on June 22, 1999. *See* RX-1472 (U.S. Patent No. 5,915,105 (issued June 22, 1999).)

42. Complaint Counsel contend that Rambus00 673.8000 TD/ntend t

44. Rambus did not decide to bring litigation against a DRAM manufacturer based on infringement of any of the patents in suit until the November-December 1999 time-frame, when efforts to license its recently issued patents to Hitachi failed. CX5074 at 208-09 (Steinberg 10/6/04 *Infineon* Dep.).

45. Rambus did not begin the process of retaining counsel to represent it in litigation against Hitachi until late November and early December of 1999. CX5074 at 210 (Steinberg 10/6/04 *Infineon* Dep.); RX-2522; RX-2523 at 135-37 (Johnson 11/23/04 *Infineon* Dep.).

2. Once Litigation Against Hitachi Was Probable, Rambus Put In Place A Reasonable “Litigation Hold” To Preserve Potentially Relevant Documents

46. Prior to filing suit against Hitachi, Rambus and its counsel instructed employees with documents potentially relevant to the litigation not to destroy any such documents. RX-2538; RX-2539 at 95, 125-26 (Steinberg 8/1/01 *Micron* Dep.).

47. Mr. Steinberg testified that in late December 1999 and early January 2000, he and Mr. Karp identified “folks that would have documents that were likely to be relevant in any litigation, folks who communic8

this same time frame. CX2114 at 164 (Karp 2/5/03 FTC Dep.) (“once we filed a lawsuit I believe people were told to freeze everything at that point”); CX2109 at 190 (Davidow 1/21/03 FTC Dep.) (Chairman of Ram

- The specific terms of Rambus's document retention policy were recommended by outside counsel, who also reviewed and approved the slides used to describe the policy and its purposes to Rambus's employees;
- Rambus's document retention policy did not target harmful documents for destruction, and the Supplemental Evidence contains no contemporaneous email, memorandum or other document suggesting that any document or category of documents was singled out for destruction for any improper purpose; and
- Rambus instituted a reasonable litigation hold once litigation was probable, and in particular there is no evidence that any relevant documents were destroyed after Rambus received notice of the Federal Trade Commission's investigation.

In light of the foregoing evidence, and as set out in detail below, the draconian sanctions sought by Complaint Counsel are entirely unwarranted.

III. ARGUMENT

A. Complaint Counsel Cite No Case, Statute or Rule Authorizing The Result They Seek

The threshold question that Complaint Counsel fail to address is whether, under the circumstances of this case, the Comm v75.0400 T cma00 TD(0.00 0.00 0.00 ss3 cma0uc26.4000 0.p4.

an idle inquiry. The Supplemental Evidence does not show, and Complaint Counsel do not contend, that Rambus destroyed any relevant documents out of a concern over their use in *this* proceeding or after receiving notice from the FTC of its investigation in this case, nor is there any allegation that Rambus violated any ALJ order or Commission rule. This motion thus seeks sanctions against Rambus because one alleged *result* of its document retention practices *before* this case began is that documents that might have been harmful to Rambus in this proceeding may have been destroyed. It is highly unlikely that the relief sought by this motion is available as a matter of law under those circumstances. *See generally American Bus Ass'n v. Slater*, 231 F.3d 1 (D.C.Cir. 2000).⁴ But as this brief will show, the Commission need not address that issue, because the relief sought is not warranted under the standards recognized and applied by the federal courts.

B. Complaint Counsel's Heavy Reliance On Documents That Are Not In The Record In This Case Is Improper And Prejudicial

Complaint Counsel previously asked the Commission to delay the filing deadline for its motion for sanctions in order to allow them to address additional documents recently provided to them by Rambus in the *Hynix* litigation pending in Northern California. On August 4, 2005, the Commission denied that request and ordered that the parties submit their briefs and findings “related to documents already admitted into the

⁴ It is clear that Complaint Counsel’s suggestion that the Commission *punish* Rambus for its allegedly improper conduct lacks any legal foundation. *Id. See also Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 805 (D.C. Cir. 1997) (reversing agency award of attorneys fees and holding that “[t]o the extent that the power to shift fees is justified as a deterrent to frivolous litigation, however, the power is punitive and therefore beyond the Board’s delegated authority.”). In addition, Complaint Counsel’s apparent request that the Commission enter the proposed relief without a further hearing is a clear invitation to error. The Supreme Court has observed “that there are constitutional limitations upon the power of courts, even in aid of their own processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.” *Societe Internationale v. Rogers*, 357 U.S. 197, 209, 78 S.Ct. 1087, 1094 (1958).

is inconsistent with the judicial system's "strong presumption in favor of adjudications on the merits." *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995) (dismissal reversed). *See also Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003) (dismissal is a "draconian" sanction that will be reviewed with "vigilance" on appeal); *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993) (dismissal reversed; recognizing the "strong policy that cases be decided on the merits"); *Wilson v. Volkswagen of Amer., Inc.*, 561 F.2d 494, 503-504 (4th Cir. 1977) (holding that a terminating sanction "runs counter to sound public policy of deciding cases on their merits and against depriving a party of his fair day in court"). The Commission itself recently spoke of these same factors, in refusing to order dismissal of an action despite Complaint Counsel's failure to comply with an ALJ protective order. *See Order, In Re Basic Research, L.L.C.*, Dkt No. 9318 (June 17, 2005), at p. 5 (referring to "the strong public policy favoring disposition of cases on their merits. . . .").

1. Dismissal Is Warranted Only In Extreme Cases: The Party Seeking Dismissal Must Demonstrate Flagrant Bad Faith Or Extraordinary Prejudice

Dismissal is warranted "only in extreme cases." *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1977). A federal court may not exercise the power to dismiss absent a showing of *bad faith* or *extraordinary prejudice*:

"At bottom, to justify the harsh sanction of dismissal, the district court *must* consider both the spoliator's conduct and the prejudice caused and be able to conclude either (1) that the *spoliator's conduct was so egregious* as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was *so prejudicial* that it substantially denied the defendant- the ability to defend the claim."

Silvestri, 271 F.3d at 593 (emphasis added). *See also Wilson*, 561 F.2d at 504 (dismissal requires "flagrant bad faith" that prejudices the adversary); *Hartford Ins. Co. of the*

⁶ The D.C. Circuit explained that the burden of proof “is a choice about where to place the risk” of error. *Shepherd*, 62 F.3d at 1476. Clear and convincing is the appropriate standard because “it is better to risk permitting a ‘guilty’ [party] to defend [its] case than to risk denying an ‘innocent’ [party] its day in court.” *Id.*

sanctions . . . are fundamentally punitive. Our judicial system has a cherished tradition of using a heightened standard of proof to guard against the erroneous imposition of criminal punishments and analogous deprivations of liberty, property, or reputation.” *Id.* *Third*, “because the predicate misconduct at issue involves allegations of fraud or some other quasi-criminal wrongdoing” (*id.* at 1477), and courts generally require a higher standard of proof for such alleged wrongdoing (*e.g.*, civil fraud or relief from judgment based on alleged fraud under Rule 60(b)(3)). *Id.*

Complaint Counsel nowhere mention the nature of the burden they must meet on this issue and do not claim to have met it. The motion should be denied for that reason alone.

3. Bad Faith Sufficient For Dismissal Requires Destruction, Fabrication Or Alteration Of Evidence For The Purpose Of Obstructing The Opposing Party’s Case

Intentional destruction of evidence alone is not bad faith for dismissal purposes. The courts instead require clear and convincing evidence that a party destroyed evidence in order to suppress the truth and “reduce the strength of [the adversary’s] case.” *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004).

Absent an insidious intent to *suppress* evidence, the failure to maintain evidence is not itself bad faith sufficient to justify dismiss

Morris is instructive. In that case, the Union Pacific Railroad, pursuant to a retention policy that required the recycling of audiotapes every 90 days, destroyed an audiotape recording of the communications between a train crew and a dispatcher on the day of the acc

evidence that misstatements in affidavits and depositions were fraudulent).⁷

In *Stevenson*, the Eighth Circuit upheld a finding of bad faith as sufficient for an adverse inference (*not* dismissal), but did so only reluctantly. Stating that “this case tests the limits of what we are able to uphold as a bad faith determination,” the court reasoned that even though the tape was destroyed pursuant to an evidence retention policy, evidence that the claims representative immediately preserved certain other similar evidence but appeared intentionally to fail to preserve the voice tape in question was
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⁷ Those rare cases in which bad faith is proved to a level sufficient to dismiss a case involve clear evidence of extraordinary wrongdoing. In *Aptix Corp.*, 269 F.3d at 1375, for example, the defendant proved by clear and convincing evidence that the patent plaintiff submitted forged engineering notebooks in order to establish priority of invention. In *Aoude*, 892 F.2d at 1119, the plaintiff admittedly fabricated the purchase agreement that was at the center of the suit.

pole. Before bringing suit, the plaintiff allowed the car to be repaired and sold so that the defendant could not conduct any tests on the air bag mechanism or any analysis of the damage to the car. The Fourth Circuit found that there was not sufficient evidence of the plaintiff's intent to suppress the truth and obstruct the defendant's case to justify the dismissal. *Id.* at 593-594. However, the court affirmed the district court's dismissal on prejudice grounds. The Fourth Circuit found extraordinary prejudice where the plaintiff's action's destroyed the "central piece of evidence" in the case and "denied General Motors access to the only evidence from which it could develop its defenses adequately." *Id.* Absent proof of extraordinary prejudice, there is no basis for the draconian sanction of dismissal.

D. Complaint Counsel Have Not Introduced Any Evidence, Let Alone Clear And Convincing Evidence, To Establish That Rambus Willfully Destroyed Evidence In Bad Faith

In order to justify *any* sanction for spoliation, Complaint Counsel must show (1) that Rambus deliberately destroyed evidence, (2) that Rambus did so with knowledge that the evidence would be relevant (3) to issues for trial in litigation that was reasonably foreseeable, and (4) that such destruction has caused prejudice to Complaint Counsel. *Hodge*, 360 F.3d at 450 (requiring proof of deliberate destruction); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (spoliation requires finding that "the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction"). In order to justify the extraordinary sanction of *dismissal*, Complaint Counsel must *further* prove by clear and convincing evidence that Rambus deliberately destroyed evidence in bad faith, and that lesser sanctions would not be sufficient to remedy proven spoliation.

⁸ Complaint Counsel rely in part on Judge Payne’s statement in a 2001 attorneys’ fees opinion that Rambus implemented the document retention policy “for the purpose of getting rid of documents that might be harmful in litigation.”

pursuant to Judge Payne's May 18, 2004 orders has revealed that there is nothing *behind* the document retention policy or the legal advice surrounding its adoption that says anything about being concerned about potentially damaging JEDEC evidence. Complaint Counsel cite not one word from any of the privileged documents they obtained pursuant to Judge Payne's orders that gives any indication that the document retention policy had anythin

⁹ Complaint Counsel's sole support for its contrary view, Infi

mischaracterization of it rise to the level of clear and convincing evidence that Rambus adopted or implemented its document retention policy in a bad faith attempt to deliberately destroy evidence.

2. Complaint Counsel Have Not Shown That Rambus Destroyed Documents Knowing They Would Be Relevant In Litigation

In order to obtain any remedy for spoliation, a party must show that the alleged spoliator knew it was destroying relevant documents. *Vodusek*, 71 F.3d at 156.

Complaint Counsel's attempt to meet this requirement is based *solely* on their statement that JEDEC-related documents were "swept into Rambus's 1998 document retention program." Motion, p. 21. For reasons discussed in the foregoing section, Complaint Counsel have not shown that such documents were targeted for destruction or that

they would take a license. It was not until negotiations with Hitachi broke down around the late November 1999 time-frame that Rambus decided it would institute litigation – indeed, it was only then that Rambus started to interview counsel to represent it in litigation. Once litigation against Hitachi was reasonably foreseeable, Rambus instituted a litigation hold and told employees with potentially relevant information to preserve any such documents.

Complaint Counsel contend that litigation was actually foreseeable to Rambus as early as February or March of 1998, because Mr. Karp presented slides to Rambus’s Board that referred to a “licensing and litigation strategy.” *See Mot.* at 9-10. But Complaint Counsel’s evidence does not show that Rambus actually adopted a litigation strategy (or even a licensing and litigation strategy) at that time, and in fact the testimony in the record is that they coun

¹⁰ Complaint Counsel's assertion that Rambus's 30(b)(6) witness testified that employees were not given instructions about what to retain prior to the office move, *see* Mot. at 14, is misleading. The questions that Infineon's counsel asked at the deposition related to instructions that were provided to employees at the time of the move. Infineon's counsel carefully refrained from asking questions about the litigation hold that had been communicated nearly a year before the office move (and not lifted), even though Infineon's counsel was in possession of the August 2001 deposition of Rambus in the *Micron v. Rambus* case, where the litigation hold was the subject of extensive testimony. Infineon's assertion that there is no contemporaneous written evidence indicating that a hold was in place in the 1999-2001 time frame, *see* Mot. at 14, is likewise misleading. In the first place, a hold need not be in place in August 2001. (FTC000v00 0.00007.00000 1.00000 0.00000 rgaD(mp)T4en

that there were no such patents or applications (Initial Decision at ¶¶ 939-967);

- Complaint Counsel failed to prove that Rambus had led other JEDEC members to believe it would disclose any relevant intellectual property; the evidence instead showed beyond a doubt that Rambus had put JEDEC on notice that it would *not* disclose, and that it reserved *all* rights to, its intellectual property (Initial Decision at ¶¶ 786-901);
- Complaint Counsel failed to prove that JEDEC would have adopted different standards if Rambus had disclosed its intentions, failed to prove that there were acceptable alternatives, and failed to prove that any equal or superior technologies were excluded by Rambus’s alleged conduct (Initial Decision at ¶¶ 1403-1485, 1128-1402, 1064-1127); and
- Complaint Counsel failed to prove that the DRAM industry was now “locked in” and could not avoid the use of Rambus’s technologies. Indeed, the evidence showed quite the opposite – and even included emails by JEDEC members that used the phrase “I am *not* locked in.” (Initial Decision at ¶¶ 1582-1665).

Complaint Counsel bore the burden of proof on all of these issues, and more; a failure to meet their burden on any of them required dismissal. Judge McGuire found that Complaint Counsel failed to meet their burden as to *all* of them. *Id.*

Complaint Counsel’s failure to meet their burden on these essential elements could not have been caused in any way by Rambus’s alleged destruction of documents, and

Complaint Counsel do not contend otherwise. Complaint Counsel suggest only that the destroyed documents might provide additional evidence about Rambus's subjective beliefs about its potential intellectual property rights. But none of the above-cited findings are in any way dependent on evidence regarding Rambus's state of mind on that issue. It is thus clear that neither Complaint Counsel's ability to pursue their claims nor the adjudicative process here was materially affected by the alleged spoliation of evidence.

F. Judge Payne's Intermediate Rulings Have No Collateral Estoppel Or Preclusive Effect

Unable to satisfy the burden of proof necessary to obtain a default judgment, Complaint Counsel repeatedly rely upon selected excerpts from various rulings by Judge Payne in the *Infineon* case. *See, e.g.*, Motion at 1, 2, 5, 10, 11, 12, 13, 14, 24. Although Complaint Counsel nowhere use the phrase "collateral estoppel," it is clear that they are asking the Commission to afford preclusive effect to Judge Payne's statements. As Judge Whyte has already found in the pending *Hynix v. Rambus* case, Order Denying Hynix's Motion to Dismiss Patent Claims for Unclean Hands on the Basis of Collateral Estoppel (Apr. 25, 2005) ("*Hynix* Collateral Estoppel Order"), there is no legal or equitable basis for such a determination, for the reasons set forth below:

1. There Was No Final Judgment In The Infineon Case.

Collateral estoppel does not apply when there is no "final judgment." *Luben Indus., Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983) (adopting *Restatement (Second) of Judgments* ("*Restatement*") § 13 (1982)). The "final judgment" does not have to be the formal type required for appellate jurisdiction, *see* 28 U.S.C. § 1291, but it does have to be the "last word" of the rendering court" on the subject. *Restatement* § 13 cmt.

a.; *Luben* 707 F.2d at 1040 (decision must be “sufficiently firm” to warrant preclusive effect (quoting *Restatement* § 13)). Further, the court must have “supported its decision with a reasoned opinion.” *Robi v. Five Platt*

“absent Judge Payne’s findings of fact and conclusions of law or some other more detailed order setting forth the basis for his ruling on spoliation, the court cannot find that Judge Payne’s judgment is ‘supported with a reasoned decision.’” *Hynix Collateral Estoppel Order* at 6. It followed that the judgment was not “sufficiently firm” and, consequently, the court “decline[d] to apply collateral estoppel to either the issue of Rambus’s spoliation of evidence or dismissal of its claims on the basis of unclean hands.”

Id.

Moreover, Judge P

separate statement of legal conclusions. The two-sentence ruling did not separate the facts that may have been found from the law applied to them, and those sentences said nothing to resolve the numerous contested legal issues, including who bears the burden of proving prejudice when documents are destroyed, whether prejudice is required for a finding of unclean hands, how to determine when litigation is foreseeable such that documents must be retained, and what alternatives (if any) the court considered and deemed inadequate to cure whatever prejudice (also unstated) the court may have found. *See Commissioner v. Duberstein*, 368 U.S. 278, 292 (1960) (plurality) (“Such conclusory, general findings do not constitute compliance with Rule 52’s direction to ‘find the facts specially and state separately * * * conclusions of law thereon.’... It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task.”); *see also Hynix Collateral Estoppel Order*, at 6 (“[A]s Rambus correctly points out, Judge Payne’s judgment does not meet the Rule 52 standard for appeal.”)¹¹

2. Complaint Counsel Cannot Show That The Infin3.2724.4800 0.0000 TD(rasSs

¹¹ The purported “findings” of spoliation in Judge Payne’s 2001 and 2004 discovery orders are also not final and cannot be afforded preclusive effect. Certainly, Judge Payne did not treat them as such, for he retried the issue of spoliation in the unclean hands trial. Those orders were thus not the “last word” of the Virginia court on spoliation, and cannot be considered final judgments on the issue of spoliation. Restatement § 13 cmt. a; 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4427 (2002) (“Tentative or incomplete action, avowedly subject to further consideration,” is not given preclusive effect); *In Re 949 Erie Street*, 824 F.2d 538, 541 (7th Cir. 1987) (collateral estoppel does not apply “to an interlocutory order, which may be changed by the district court at any time prior to final judgment”).

identical issues that they would preclude Rambus from litigating here were “actually and
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destruction of documents (2) known (3) to be relevant to an issue at trial (4) at a time when the litigation was reasonably foreseeable. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). Thus, here Complaint Counsel must prove that litigation by the Federal Trade Commission involving Rambus's assertion of its patents was reasonably foreseeable at the time of the document destruction, that relevant documents were destroyed, that Rambus knew that such documents were relevant to the trial of those claims, and that Complaint Counsel have has been significantly prejudiced. It is plain that such issues were not conclusively decided in the Virginia litigation, which, by its close, was focused on (disputed) allegations about the loss or destruction of patent-specific and case-specific documents, such as claim charts, prior art, and early licensing discussions. *See* DX 509 (Infineon Trial Tr. at 869-876).

G. Complaint Counsel Fail To Show That Sanctions Less Harsh

supposedly suffered, and instead resort to the impermissible argument that Rambus should be punished. Motion, pp. 2, 22. Complaint Counsel's motion should be denied for this reason alone.

2. Complaint Counsel Provide No Support For The Adverse Inferences That They Seek In Their Proposed Findings

Complaint Counsel's contention that nothing short of dismissal will suffice as a remedy does not stop Complaint Counsel from requesting that the Court adopt various adverse inferences. Mot. at 54-58. Like dismissal, adverse inferences are severe sanctions that cannot "be given lightly." *See Thompson v. U.S. Dept. of Housing and Urban Dev.*, 219 F.R.D. 93, 100-101 (D. Md. 2003). Adverse inferences cannot be justified here on the basis of Rambus's conduct. Where a party had notice that a document or other evidence was relevant to litigation but destroyed or withheld the specific evidence, inferences are used to allow the fact-finder to infer that the evidence was destroyed because of the "fear that the contents would harm him." *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214,

evidence destroyed that were directly linked to the specific inferences given. *E.g.*, *Vodusek*, 71 F.3d at 155 (destruction of boat at the center of products liability case gave rise to an inference that the condition of the boat would have been “unfavorable to the plaintiff’s theory in the case”); *Stevenson*, 354 F.3d at 746 (destroyed voice tape of the accident at issue in the case gave rise to inference that “the contents of the voice tape. . . would have been adverse, or detrimental, to the defendant”).

IV. CONCLUSION

Prosecutorial persistence can be a virtue. Or it can be a symptom of a system that generates a desire to prevail by any means, on any grounds, and at any cost. Whichever applies here, one thing is clear: the pending motion seeks an extraordinarily draconian sanction – not on anything approaching the merits of the Complaint and, indeed, in the face of multiple independent reasons on the merits that render the present motion moot. The purported basis for this revived effort to avoid the merits is the existence of the Supplemental Evidence. But that Supplemental Evidence undercuts rather than supports the relief now sought. It shows that Rambus acted in good faith, implementing its document retention program in reliance on experienced counsel who had themselves participated in Rambus’s preliminary considerations of the possible need for future litigation.

This case should be decided on the merits. The outcome of this case ought to be a final and complete dismissal on the merits for the host of the reasons found by Judge McGuire – reasons that have nothing to do w

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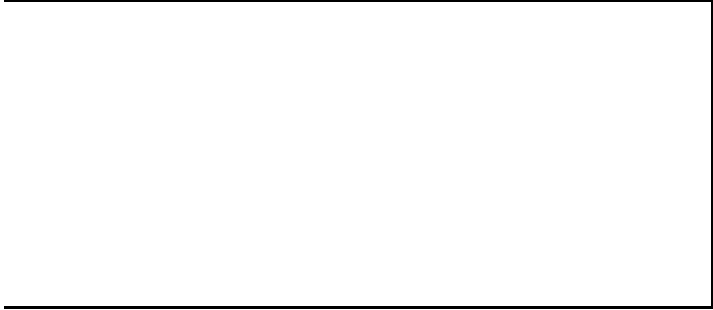
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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMIS**



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