PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

RESPONSE BY RAMBUS INC. TO COMPLAINT COUNSEL'S MOTION FOR SANCTIONS

I. INTRODUCTION AND SUMMARY OF 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 S n1i8tcfsic

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 in preparing documents relating to the future licensing of patents to DRAM manufacturers and others, including many of the documents referred to in Complaint Counsel's motion, and did not at any time suggest that the *possibility* of litigation mentioned in those documents in any way impaired Rambus's ability to adopt a content-neutral document retention policy, RSF ¶¶ 9-32;

Rambus did not believe that litigation (much less *this* litigation) was likely at the time that it instituted its document retention policy, and it put in place a "litigation hold" as soon as litigation was reasonably foreseeable, RSF ¶¶ 1671-1682**;** and

There is no evidence that any documents or categories of documents that would have been material to the disposition of this case were destroyed by Rambus, RSF ¶¶ 1683-1692.

The Supplemental Evidence thus demonstrates beyond cavil that Judge McGuire was entirely correct in determining that the process in this case had not been prejudiced by Rambus's alleged dest

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

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 Its Document Retention Policy In Good Faith, Based On The Advice Of Counsel

1. Rambus was advised to adopt a document retention policy by outside counsel, Daniel Johnson, Jr., during his initial meeting with Rambus in early 1998. RX-2523 at 11-12 (Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson is a highly accomplished and respected member of the legal community and has practiced law in the State of California for more than 30 years. For 17 of those years, including during the 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 Coole04 Tc -0.0019 E2 Tc7.143 0TT3 1 Tf-0dow (Godward,001years. sw1u84 0 Tdu9

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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 organiza

not only backup tapes, or however you're storing, but you also have to keep the old tools, and it's an anathema, particularly for a small company." *Id*. at 36.

5. Third, Mr. Johnson advised Rambus that if it did not tell its employees to follow a consistent policy regarding the retention and disposal of documents, then ad hoc decisions by individual employees about what to keep and what to throw away or delete might be used by an opponent in possible future litigation to request an adverse inference or other sanctions based on a charge of "spoliation." CX5076 at 36-37, 221.

6. Complaint Counsel have pointed to various memoranda prepared or reviewed by Mr. Johnson or others at the C

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including "[e]ngineering and development documents . . . ." RX-2503. *See* RSF 1623-1632.

11. On July 22, 1998, Mr. Johnson made a presentation to Rambus's managers regarding the document retention policy that he had advised Rambus to adopt. RX-2523 at 211 (Johnson 11/23/04 *Infineon* Dep.); RX-2504. Mr. Johnson's July 22, 1998 presentation to the Rambus managers specifically advised Rambus that "[a] formal document retention policy will likely shield a company from any negative inferences or defaults due to destruction of documents, *unless the policy was instituted in bad faith or exercised in order to limit damaging evidence to potential plaintiffs*." RX-2504 at R401138 (emphasis added).

12. Mr. Johnson also testified that, in explaining the document retention policy to Rambus managers, he had recounted (as he had many times before, including on

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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*

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here." RX-2523 at 159 (Johnson 11/23/04 *Infineon* Dep.). He has also testified that the Rambus policy "is the only document retention policy that I'm aware of where there is an explicit directive to the employees to look for things to keep." RX-2523 at 205.

16. Rambus employees who were at the company at the time of Mr. Karp's post-July 22, 1998 presentations testified that they followed Mr. Karp's direction to look for things to keep. *See, e.g.*, CX2082 at 841 (Crisp 4/13/01 *Infineon* Dep.) ("I definitely made an attempt to go through my files and look for things to keep as . . . [Mr. Karp] had directed us to do."). Moreover, when the document retention policy was introduced, Rambus employees were told to make sure they took steps to archive important e-mails. *See* CX5018 at R200431 (e-mail from Joel Karp informing employees "you can no longer depend on the full system backups for archival purposes. Any valuable data, engineering or otherwise, must be archived separately"); RX-2517 at 343-44 (Karp 8/7/01 *Infineon* Dep.).

3. Rambus's Document Retention Policy Is Neither Unusual Nor Untoward Because It Involves Documents Being Shredded Or Placed Into Burlap Sacks

17. Complaint Counsel suggest that because Rambus used shredders and burlap sacks to dispose of unneeded documents, it might be appropriate to infer that Rambus had adopted or implemented its document retention policy for improper purposes. Motion at 7-8. The uncontroverted testimony, however, is that Rambus (like many companies and federal agencies) uses shredders rather than mere trash cans because of concerns about confidential documents. CX2114 at 124 (Karp 2/5/03 FTC Dep.) ("Engineers were throwing confidential documents in the trash. I would come in the morning and find people going through my dumpster."). *See also id*. at 135 ("[W]e needed shredders so people . . . could get rid of confidential documents in an easy way rather than taking the chance they would end up in the dumpsters.").

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B.

23. Mr. Crisp's refusal to respond to the question did *nothing* to mislead JEDEC members into believing that they need not be concerned about Rambus's intellectual property. IBM representative Mark Kellogg testified, for example, that the exchange between the Committee Chairman and Mr. Crisp was "a flag," in part because of Crisp's "lack of response." Trial Tr. at 5322-3 (Kellogg). The Committee Chairman, Gordon Kelley, similarly testified that a "no comment" from a JEDEC member in response to a question about intellectual property was "surprising" and constituted "notification to the committee that there should be a concern." Trial Tr. at 2579 (Kelley).

24. Mr. Crisp also openly refused to respond to inquiries regarding intellectual property at the September 1995 JEDEC meeting. At that meeting, Mr. Crisp 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 Synclink 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 adoption or implementation of Rambus's document retention policy was in any way motivated by or influenced by any concerns regarding Rambus's prior JEDEC participation.

C. Rambus's Document Retention Policy Did Not Target Relevant Documents For Destruction

1. There Is No Evidence That In Adopting Or Implementing Its Document Retention Policy, Rambus Targeted For Destruction Documents Related To Its Participation In JEDEC

26. Complaint Counsel have not introduced any evidence showing that any Rambus employee ever destroyed a document pursuant to Rambus's document retention policy in the belief that the document might be harmful in a future lawsuit.

27. Complaint Counsel suggest at various times in their motion that Rambus adopted or implemented its document retention policy with the goal of destroying JEDEC-related evidence that might prove harmful in subsequent lawsuits. that o tted F goalf cou-0.0006 Tc70.97 0Tw 18.07 1.5Td(rmfuEC)]Tated evidm evrDec

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paper ballots and official minutes of JEDEC meetings. *See* Trial Tr. at 3570-76 (Crisp). As Complaint Counsel must concede, however, there can be no presumption of bad faith or prejudice arising from the destruction of publicly available JEDEC materials such as presentation handouts. As Judge Payne himself explained, the destruction of documents that were "merely copies of documents that other parties" maintained is not evidence of bad faith, in part since "it is hard to envision why [the JEDEC representative] would have destroyed such documents in order to prevent their use in litigation." *See* Memorandum Opinion, *Rambus Inc. v. Infineon Technologies AG,* Civ. No. 3:00CV524 (E.D. Va. Sept. 29, 2004), p. 13.

29. The important question about Rambus's JEDEC-related documents is whether Rambus's *internal*

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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.' CCFF 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

"missing" 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 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 DRAM manufacturer had issued. In any event, since Complaint Counsel have assumed throughout this litigation that all of the Rambus patents at issue are valid and that Drs. Farmwald and Horowitz did indeed conceive of and reduce to practice the revolutionary inventions and improvements described in those patents, it is highly unlikely that Mr. Vincent's *prosecution* files ever contained any documents material to this case.

36. Mr. Vincent testified that he does not recall Mr. Karp specifically telling him what to retain and what to destroy from the prosecution files. *Id*. at 103. Rather, Mr. Vincent believes that he was guided by the "common kind of view of 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

39. Complaint Counsel also complain that Anthony Diepenbrock, an in-house lawyer at Rambus between 1995 and 1999, "had no JEDE

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47. Mr. Steinberg testified that in late December 1999 and early January

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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 record" in accordance with the schedule previously set by the Commission.

Despite this clear command, and in clear disregard of the well-settled rule that "Commission decisions are to be founded upon the established record," *In The Matter of Chester H. Roth*, 55 F.T.C. 1076, 1959 FTC LEXIS 21 at *9 (1959), Complaint Counsel proceeded to rely upon documents *not* admitted into evidence in support of numerous proposed findings and in support of critical arguments in their sanctions motion. In particular, Complaint Counsel repeatedly cite to privilege logs that Rambus has produced to Hynix this summer in connection with its production of documents from back-up tapes. Complaint Counsel's decision to rely upon the privilege logs and other documents outside the record is not just improper and impertinent; it is highly prejudicial to Rambus, which based its own supplemental findings almost entirely on the Supplemental Evidence. Complaint Counsel's motion should be denied for this reason alone.[5]

A Default Judgment Based On Spoliation Of Evidence Requires Clear And Convincing Evidence Of Bad Faith Or Evidence Of Manifest PrejudiceehtC1plain

Midwest v. American Automatic Sprinkler Sys., Inc., 201 F.3d 538, 543-44 (4th Cir. 2000) (same).

2. Bad Faith Must Be Shown By Clear And Convinci

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 dismissal. *Silvestri*, 271 F.3d at 593-594 (although plaintiff failed to preserve the "central piece of evidence in [the] case," his conduct could not form the basis for dismissal where the plaintiff's intent was unclear from the record). The destruction of materials pursuant to a corporate retention policy does not rise to that level of bad faith unless the evidence is clear that the destruction was undertaken to obstruct an opponent's ability to obtain the evidence. *See Morris,* 373 F.3d at 901.

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 accident at issue in the litigation. The district court found a level of bad faith

sufficient to justify an adverse inference (by definition a lesser sanction than dismissal), but the Eighth Circuit reversed. The Eighth Circuit acknowledged that when the tape was destroyed, the railroad had "'general knowledge that such

that even though the tape was destroyed pursuant to an eviden

Complaint Counsel Have Not In

First, it is now undisputed that Rambus adopted its document retention policy at the suggestion of outside counsel, and the policy itself was prepared in large part by outside counsel. Moreover, those same outside lawyers were aware of and participated in discussions relating to the future licensing of

Whether viewed separately or in combination, this evidence is entirely inconsistent with Complaint Counsel's supposition about the document retention policy being instituted to cover up evidence of alleged JEDEC misconduct.

First, Complaint Counsel insist that Rambus JEDEC representative Richard Crisp destroyed "anything he had on paper in his office." CCSF 114. What the evidence actually shows is that *publicly available* JEDEC documents (such as official minutes of meetings and unmarked ballots), *i.e.*, information that the JEDEC office retained, were discarded. The disposal of publicly available information does not show bad faith.

Second, Complaint Counsel suggest that the JEDEC-related documents that Rambus did locate and produce in litigation survived "accidentally." CCSF 115, 122; Motion at 20. The record evidence, however, shows that JEDEC documents survived only by accident contradicts the record evidence, which shows that Blakely, Sokoloff's Rambus files include "general" files which, 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); CX5072 at 54-55 (Vincent 11/30/04 *Infineon* Dep.). There is no evidence that Mr. Vincent was asked to clean the general files. It is instead likely that the JEDEC-related documents in Mr. Vincent's files were retained not by "accident," as Complaint Counsel hypothesize, but rather because they were in general files which Mr. Vincent did not clean out.

Finally, Complaint Counsel point to a hodge-podge of "snippets" culled from e-mails and documents to try to establish a bad faith attempt to undermine the truth-finding process. For example, Complaint Counsel point to Mr. Crisp's use of a joke in an e-mail regarding "DDR datasheets." Motion at 19. But DDR datasheets are publicly available information, not "JEDEC-related documenail elcauseough ge

In sum, neither the evidence that is in the record nor Complaint Counsel's 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 Rambus destroyed any such documents knowing that they would be relevant. Complaint Counsel thus also fail to meet this requirement to establish spoliation.

3. Complaint Counsel Have Not Shown That Rambus Destroyed Potentially Relevant Documents At A Time When Litigation Was Reasonably Foreseeable

To obtain any sanction based on a claim of spoliation for the pre-complaint destruction of documents, Complaint Counsel must show that Rambus knowingly destroyed evidence at a time that litigation against Complaint Counsel was "reasonably foreseeable." *Silvestri*, 271 F.3d at 590. Courts applying the reasonable foreseeability standard to precomplaint destruction of evidence have adopted the following test: "'The proper inquiry here is whether defendant, *with knowledge that this lawsuit would be filed*, willfully destroyed documents which it knew or should have known would constitute evidence relevant to this case.'" *Struthers Patent Corp. v. Nestle Co.*, 558 F. Supp. 747, 765-66 (D.N.J. 1981) (emphasis added) (quoting *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed. R. Serv. 2d 423, 427 (N.D. Ind. 1977)). *See also* Gorelick,

supra, § 3.12, at 104 (quoting standard and noting that "[o]ther courts have adopted similar standards"). "[T]he duty to preserve evidence prior to the filing of a lawsuit typically arises when the party is on notice that the litigation is 'likely to be commenced,'" and "[t]here appear to be no cases extending the foreseeability requirement to a remote possibility of future litigation." Jeffrey S. Kinsler & Anne R. Keyes MacIver,

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 such a strategy was not adopted. *See* Rambus Responses to Complaint Counsel's Statement of Undisputed Facts at 12-13. In any event, documents showing that Mr. Karp, and later Mr. Steinberg (who joined the company as an employee in April of 1999), considered litigation contingencies in the context of thinking about how to assert patents that *might* issue at some point in the future does not establish that litigation was "reasonably foreseeable." It shows, at most, that litigation was a *possibility* – as it is for any entity that applies for and obtains patents – but one that was contingent. It depended upon such uncertain factors as whether patents would issue, whether they would cover SDRAM and DDR SDRAM devices, and whether manufacturers of those devices would agree to take a license for the right to use Rambus's patented inventions. As discussed above, however, the *possibility* of litigation does not suffice to create a duty to institute a litigation hold; it is the *probability* of litigation that does, and in Rambus's case that probability did not materialize until late 1999.

Complaint Counsel contend that, regardless of whether litigation was reasonably foreseeable in September 1998 or August 1999, Rambus committed spoliation in December 2000 when its employees were given burlap sacks to use for disposing of materials that they did not need to take with them when Rambus moved to a different building. Nearly a year before the office move, however, Rambus had taken steps to put in place a litigation hold, telling personnel likely to possess potentially relevant material

to retain that material and not discard it. *See* RSF 1667-1672; RRSF 64.[9] As the *Infineon* court explained in its opinion denying Rambus discovery of Complaint Counsel's document retention practices, a corporation is not obligated to stop throwing away documents simply because it is in litigation. A party has a duty "to ensure the preservation of all *relevant* documents – not to preserve every document irrespective of relevancy." See Memorandum Opinion, *Rambus Inc. v. Infineon Technologies AG*, Civ. No. 3:00CV524 (E.D. Va. Sept. 29, 2004), p. 8 n.6. There is no evidence that Rambus's office move in 2000 violated this requirement.

For these reasons, Complaint Counsel has failed to demonstrate that Rambus knowingly destroyed relevant documents at a time when litigation was reasonably foreseeable.

E. Complaint Counsel Cannot Show Prejudice Because Rambus's Alleged Destruction Of Documents Is Entirely Irrelevant To Complaint Counsel's Claims In This Case

After many months of considering the testimony and documentary evidence on these issues, and after preparing over 1,650 individual findings of fact. Judge McGuire

[9] 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* CCSF 107, 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. Moreover, there is contemporaneous documentary evidence referring to Rambus being under a litigation hold. *See* RX-2506 (Jan. 5, 2001 e-mail regarding notice of FTC investigation and that Rambus had been "ordered to CEASE ALL DOCUMENT DESTRUCTION of any relevant documents"; "since antitrust/jedec is an issue in our active court cases we should not be destroying any relevant documents anyways so this shouldn't be a change in situation").

concluded that Complaint Counsel had failed to meet their burden of proof on each essential element of their claims. Ju

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 prove [illegible]

Complaint Counsel's failure [illegible]

Judge Payne's Ruling Has No Collateral Estoppel Or Preclusive Effect

Unable to satisfy the burden of proof necessary to obtain a default judgment, Complaint Counsel [illegible]

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 Platters, Inc.*, 838 F.2d 318, 326 (9th Cir. 1988).

In addition, where, as here, a bench trial was conducted, the decision must comport with Rule 52(a), which requires that "the court *shall find the facts specially* and state *separately* its conclusions of law thereon." Fed. R. Civ. P. 52(a) (emphasis added). A decision that does not meet the Rule's requirements cannot qualify as the "last word" of the prior court, *Restatement* § 13 cmt. a, such that collateral estoppel may apply. Indeed, the Rule's drafters recognized that special findings and conclusions were essential to a later court's application of collateral estoppel:

> Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issue and the determination thereon. Thus, they not only aid the appellate court on review, but *they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment.*

Fed. R. Civ. P. 52 adv. comm. note (citations omitted; emphasis added); *see also Colorado Coal Furnace Distribs, Inc. v. Prill Mfg. Co.*, 605 F.2d 499, 507 (10th Cir. 1979) (among purposes of Rule is "to make definite just what is decided by the case to enable the application of Res judicata and estoppel principles to subsequent decisions").

Given this purpose, it is not surprising that research has failed to unearth any case in which a decision after a bench trial that did not meet Rule 52(a)'s requirements was nonetheless given preclusive effect.

Judge Payne's two-sentence conclusion at the close of the bench trial cannot

Complaint Counsel have not attempted to show, and could not show, that the identical issues that they would preclude Rambus from litigating here were "actually and necessarily decided" by the Infineon court. *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979). It is insufficient simply to argue that there was evidence in the Infineon record from which the trial court could have found facts in common with the allegations that Complaint Counsel make. In fact, the rule for collateral estoppel is exactly the opposite: "If the decision could have been rationally grounded upon an issue other than that which the [party] seeks to foreclose from consideration, collateral estoppel does not preclude relitigation of the asserted issue." *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1518 (9th Cir. 1985); *see also Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 912 (9th Cir. 1997). Infineon's necessarily case-specific arguments for finding unclean hands and spoliation involved numerous allegations that Complaint Counsel do not and cannot make here. Because the law precludes subsequent courts and parties from guessing about which facts the Infineon court might (and might not) have credited, there can be no preclusive effect here. As Judge Whyte ruled in the *Hynix* matter, "[i]t is simply not possible to determine what findings Judge Payne made and how he applied those findings to determine Rambus had committed spoliation warranting dismissal of its patent claims in the *Infineon* litigation, thus this court cannot evaluate those findings to determine the impact on this litigation." *Hynix* Collateral Estoppel Order at 4-5.

Complaint Counsel have pointed to Judge Payne's that Infineon "has proved . . . a spoliation that warrants dismissal." Motion, p. 13. But the test for spoliation by its very terms virtually forecloses an identity of interests across multiple cases. Spoliation is a legal conclusion, not an evidentiary fact. *United States v. Hernandez*, 572 F.2d 218, 221 n.3 (9th Cir. 1978) (distinguishing between ultimate and evidentiary facts). To find spoliation, the Virginia court had to find that there was (1) deliberate and prejudicial 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

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, 217 (1st Cir. 1982). It follows then that an "adverse inference about a party's consciousness of the weakness of his case. . . cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and his willful conduct resulted in its loss or destruction." *Vodusek*, 71 F.3d at 156. As explained in detail above, there has been no showing that Rambus destroyed documents with the intent to suppress the truth. No adverse inferences suggesting Rambus destroyed documents to avoid any weakness of its case are warranted.

In addition, the cases in which inferences are issued illustrate the level of the required connections necessary for adverse inferences. These cases involve key pieces of 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 with (and, by their nature, can have nothing to do with) anything that might have been in Rambus' documents. For these and all of the other reasons set out in this brief, Complaint Counsel's motion should be denied.

DATED: August 19, 2005

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

CERTIFICATE OF SERVICE

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