PUBLIC

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

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

MEMORANDUM BY RAMBUS INC. IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR DEFAULT JUDGMENT

I. INTRODUCTION

Despite its extraordinary length, Complaint Counsel's motion for default judgment is utterly without merit. Complaint Counsel's motion purports to seek a default judgment against Rambus based on Rambus's alleged destruction of documents in anticipation of litigation. But Complaint Counsel do not and cannot make the required showing that Rambus acted in bad faith when it adopted a routine document retention policy in 1998 similar to the policies in place at most public companies. Nor can 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. Given these and other failures of proof, there is no basis for depriving Rambus of its fundamental right to a hearing in this matter.

Unless intended simply as character assassination, this motion likely reflects a growing recognition by Complaint Counsel that there are serious holes in their case. Discovery in these proceedings has produced overwhelming evidence that directly refutes Complaint Counsel's core allegations relating to issues such as the scope of JEDEC's patent disclosure policy, the awareness on the part of JEDEC members that Rambus would seek patent coverage for various technologies being considered for standardization, and the extent to which JEDEC members relied on their mistaken belief that Rambus's patents were invalid in voting to adopt the SDRAM and DDR standards. Complaint Counsel appear to be more concerned with avoiding the need to prove allegations that are no longer

sustainable than with their proclaimed desire to "deter" bad faith conduct that is, in fact, entirely absent here.

It is the timing of this motion, as much as its content, that raises questions of motivation to the fore. Complaint Counsel do not cite in their motion any evidence that they obtained in discovery in this case; they rely entirely, for example, on depositions taken in other cases (where Complaint Counsel had no opportunity to evaluate the credibility of the witnesses firsthand). Indeed, all of the evidence they cite was available in June when the Complaint was filed, and the motion surely could have been filed then. Only after Rambus's subpoenas of third parties – most of them other JEDEC members – had turned up evidence that contradicted the fundamental premises of the Complaint did Complaint Counsel file (two days before Christmas) their request for entry of a default judgment.[1]

This motion also conflicts with one of the chief purposes for which Staff Counsel have stated this action was brought, namely, resolving the serious doctrinal issues left open by the Commission's consent decree in *Dell*. That goal would not be served by the preemptive sanction Complaint Counsel seek here, even if there were a factual or legal basis for such a sanction, which, as explained below, there assuredly is not. Complaint Counsel's motion should be denied.

[1] The only "new" materials Complaint Counsel point to that might justify this belated filing – notes from Rambus employee Joel Karp (*see* Mem. 52-53) – are not new at all. The notes were produced by Rambus in private litigation with Hynix in April 2001 and were apparently forwarded by Hynix to Complaint Counsel.

II. STATEMENT OF FACTS

The sole basis for Complaint Counsel's attempt to obtain a default judgment in their favor rests on Rambus's decision to adopt, on counsel's advice, a formal document retention policy in July 1998. Because virtually all public companies have in place similar policies, and because such policies are widely regarded as an essential component of any well-run business, Complaint Counsel contend (as they must) that "the policy was a sham," was not "adopted in the ordinary course of business," and was not "motivated by ordinary business concerns." Mem. 10. None of these assertions is remotely supported by the factual record in this case.

A. Rambus Adopted Its Document Retention Policy for Wholly Legitimate Business Purposes.

Stripped of the highly misleading "spin" placed on them by Complaint Counsel, the facts surrounding Rambus's adoption of its document retention policy are straightforward and unremarkable. [redacted], Rambus hired Cooley Godward, a highly regarded Silicon Valley law firm with many clients in the technology industry, [redacted]. [redacted].[2] [redacted]

[redacted]

[2] All of the deposition excerpts referenced in this memorandum are attached to the Declaration of Jacqueline M. Haberer, filed separately herewith. Some of the transcripts are confidential by virtue of their contents and therefore may not be filed in a public document pursuant to the Protective Order in this case, a copy of which is attached as Exhibit 3 to this memorandum.

[redacted] *Id* at 35. [redacted]

[redacted] *Id.* [redacted]

[redacted]; Declaration of Joel A. Karp filed separately herewith ("Karp Decl.") ¶ 3. Thus, Complaint Counsel are wrong when they assert that the idea of adopting a document retention policy "first originated" with Mr. Karp or Rambus's CEO Geoff Tate. Mem. 56.

[redacted]. [redacted]

[redacted] *Id*. at 42. Commentators universally agree that reducing the costs associated with reviewing and producing

documents in response to subpoenas or discovery requests is a legitimate business concern and one of the principal benefits of adopting a document retention policy. *See, e.g.*, Jamie S. Gorelick et al., Destruction of Evidence § 10.2, at 310 (1989); John M. Fedders & Lauryn H. Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 Notre Dame L. Rev. 1, 13 (1980).

Mr. Karp, who is not a lawyer, drafted the document retention policy Rambus adopted in July 1998 [redacted] Karp Dep. Tr. at 342. The various provisions of the policy reflect standard features found in many document retention policies. For example, the policy covers all of the major categories of documents generated in the ordinary course of Rambus's business, and notes, where applicable, legal requirements governing the length of time certain types of documents must be retained. *See* Fedders & Guttenplan, *supra*, at 14 (document retention policies must ensure that documents are retained for minimum periods specified by applicable law).[3] The policy makes clear that e-mail and computer files are subject to the same policies and treated in the same manner as documents on paper. *See* Patrick R. Grady, *Discovery of Computer Stored Documents and Computer Based Litigation Support Systems: Why Give Up More Than Necessary*,

[3] Complaint Counsel imply that the written policy is deficient because it is addressed only to broad categories of documents. Mem. 42. However, that is an approach shared by many document retention policies. *See* Fedders & Guttenplan, *supra*, at 14 ("Some companies list by name each document to be retained or destroyed, while others prefer to list functional groups of documents.").

14 J. Marshall J. Computer & Info. L. 523, 527-28 (1996) (document retention policies should cover electronic as well as paper documents). As a general rule, the policy specifies that drafts of documents, such as contracts and publicly filed documents, should not be retained. *See* Gorelick et al., *supra*, § 9.7, at 303 ("Typically, for example, drafts of documents and rough sketches of products are not maintained."). And the policy seeks to ensure that documents of great value to the company, such as documents relating to proof of invention dates, are permanently retained.[4]

Complaint Counsel focus considerable attention on the policy's treatment of back-up tapes, suggesting that a policy of maintaining back-up tapes for a period of three months is somehow untoward. Mem. 36 n.46, 43. In fact, however, retaining back-up tapes for three months and then reusing or recycling them is a widely accepted business practice. *See Linnen v. A.H. Robins Co.*, 1999 WL 462015 at *1 (Mass. Super. Ct. 1999). Indeed, at many companies the retention period is significantly shorter. For example, [redacted]

[4] Complaint Counsel repeatedly suggests that an air of impropriety surrounds any policy that specifies the importance of preserving documents essential to a company's business, while allowing others to be discarded. Mem. 40-41, 43, 69. However, precisely that principle is the foundation upon which any effective document retention policy is based. Fedders & Guttenplan, *supra*, at 14 (sound policies ensure that "vital records are identified and safeguarded"); *see* Christopher V. Cotton, *Document Retention Programs for Electronic Records: Applying a Reasonableness Standard to the Electronic Era*, 24 J. Corp. L. 417, 418 n.6 (1999) ("'Each company should institute a document retention program through which all documents no longer necessary from a business standpoint and not required to be maintained by tax, environmental or other laws are regularly destroyed.'").

[redacted]

[redacted] Smith Dep. Tr. at 72.

Complaint Counsel are simply wrong when they suggest that Rambus's document retention policy mandated the systematic destruction of all e-mail more than three months old. Mem. 43. The policy itself says nothing about which specific e-mail messages should or should not be retained or how long the e-mail messages themselves should be retained. It simply governs how long a *back-up* copy of e-mail will be maintained on the company's computer system. As Allen Roberts, Rambus's Vice President of Engineering, testified:

> What this talks about is the back-up of information. Backup implies that – the way backup works is that you take what is usually considered a taped record of what is on a computer disk file and put it on file an[d] store it someplace off line. That's what was meant by backup. There was no policy of going through and destroying or removing information. It was how long do you keep these backups.

Roberts Dep. Tr. at 150. The policy itself specifically contemplates that some e-mail will need to be saved for more than three months, and provides that such e-mail "can be kept either in paper or a separate file on your hard drive."[5]

Complaint Counsel do not (and cannot) cite a single piece of evidence supporting their claim that Rambus adopted its document retention policy in order

[5] Complaint Counsel's motion conveys the erroneous impression that, having instituted its document retention policy, Rambus has few documents left in its files. Nothing could be less true. Rambus is in the process of producing in excess of 400,000 pages of documents to Complaint Counsel in response to its requests for production (at a cost well in excess of $500,000), and many thousands of those pages pre-date the implementation of Rambus's document retention policy.

to "eliminate documents it feared would be damaging in future litigation." Mem. 10. The evidence, including the evidence Complaint Counsel cites, demonstrates that the primary motivation for Rambus's adoption of the policy was its legitimate desire to reduce the expenses incurred in the review and production of documents responsive to discovery requests. As noted earlier, that is not only a wholly legitimate business concern, but also one of the primary reasons *all* companies of any size seek to implement document retention policies.[6]

The testimony of Mr. Karp, the individual at Rambus primarily responsible for drafting the document retention policy, could not be clearer on this point. He testified that he was most concerned about a "third-party type request," in which Rambus, even though not a party to litigation, would be served with broad requests for documents. Karp Dep. Tr. at 335. [redacted] *Id*. at 336. As Mr. Karp stated, his concern was not with the *contents* of the documents Rambus had accumulated during its eight-year corporate history, but with the sheer *volume* of

[6] *See* Cotton, *supra*, at 421 n. 32 ("The occasional presence of a 'smoking gun' in documents produced in litigation is not what motivates a business to implement a document retention and destruction program. Rather it is the administrative burden and cost of searching through mounds of paper and electronic files in response to each request.") (internal quotation marks omitted).

those documents: "[M]y concern was that if I was ever asked to produce those thousands of back-up tapes, *regardless of what they concerned* – they did not just contain e-mail, they contained everything – that it would be a task that would be beyond the human endurance to have to try to figure out what was on those things." *Id*. at 348 (emphasis added); *see also id*. at 335 ("And there was a concern that there was so much stuff that people would not know even where to find the real stuff. There would be so many extraneous things that it was necessary to find out what's extraneous and what's not.").

The evidence cited by Complaint Counsel on this issue simply confirms that Rambus was motivated by legitimate business concerns in adopting its document retention policy. For example, Complaint Counsel place heavy reliance on a March 16, 1998, e-mail from Mr. Roberts to Joseph Lau, which stated that "there is a growing worry about the e-mail back-ups as being discoverable information." CC Tab 82 at R200430.[7] When asked specifically what he meant by this, Mr. Roberts explained: "Just that there was e-mail that would be something that would have to be gone through if there ever was litigation in the company. And that it was a vast volume of material that somebody would have to wade through at probably very expensive rates." Roberts Dep. Tr. at 144. Mr. Roberts also testified that concerns over the cost of review and production had

[7] "CC Tab" refers to the compilation of evidence submitted by Complaint Counsel in support of their motion for default judgment, and is followed by the applicable tab and page references.

nothing to do with whether e-mail stored on back-up tapes could be used against Rambus in litigation. The concern was simply that, given the volume of material that existed, if discovery requests were received "potentially all of that e-mail, *relevant or not*, would have to be reviewed, and that that was an expensive process." *Id*. at 146 (emphasis added); *see also id*. at 151 ("you're talking about a vast amount of information that, in theory, somebody would request and say we want to go through every single last byte at $300 an hour times whatever"); *id*. at 148 (noting that the years of back-up tapes contained "tons and tons of information," and "that if there was litigation, . . . somebody very expensive would have to go read through every word").

The testimony of other Rambus employees is to the same effect. For example, Richard Barth was specifically asked whether Mr. Karp was concerned that the company's engineers were keeping documents that might be harmful to Rambus in litigation. He responded:

> I don't recall him being so much worried about documents that were harmful to Rambus in that it would reveal you know, some dastardly secret.
>
> What I do remember is that, yeah, we are pack rats and the amount of stuff that we had was enormous. And the concern was that if we had to go and grind through all that and produce it, it would just kill us. We'd get no engineering done. All our resources would be consumed by plowing through old stuff.

Barth Dep. Tr. at 343-44.[8]

As this evidence demonstrates, when Rambus witnesses referred to concerns about documents being "discoverable in a lawsuit" (CC Tab 2 at 8) or "discoverable in subsequent litigations" (CC Tab 3 at 339), they were not referring to concerns that the substance of such documents would prove harmful to Rambus in litigation. They were instead referring solely to the concern that maintaining vast volumes of documents and electronic files that were neither required by law to be kept nor needed by employees to perform their jobs would result in exorbitant drains on the company's financial and human resources simply to respond to the most routine request for documents.

B. Rambus's Document Retention Policy Was Implemented in a Manner Fully Consistent With Legitimate Business Practices.

As explained above, no evidence supports Complaint Counsel's claim that Rambus's document retention policy was adopted with illegitimate motives. Nor, as explained below, is there any evidence to support Complaint Counsel's similarly unfounded allegation that, in implementing the policy, Rambus employees "were directed to seek out and destroy documents that might be harmful to Rambus in future litigation." Mem. 88 (emphasis omitted).

[8] Perhaps not coincidentally, Complaint Counsel included page 343 of Mr. Barth's deposition transcript in its compilation of evidence (*see* CC Tab 57), which contains the first two lines of this passage. Complaint Counsel chose not to provide the Court with the very next page of the transcript, which contains the remainder of the passage quoted in text.

After the document retention policy had been finalized in July 1998, Mr. Karp began the process of making sure that all of the company's employees were familiar with it.[9] As Mr. Karp's notes reflect, that process proceeded in two steps. First, Mr. Karp and [redacted] CC Tab 46 at R300791. After that meeting, Mr. Karp then made a presentation to each of Rambus's operating divisions, during which he explained the terms of the policy, provided further guidance on how each division should go about implementing the policy, and answered any questions employees had about the policy. Karp Decl. ¶ 4. Mr. Karp used a series of overhead slides in making these presentations, which are attached as Exhibit B to his declaration.[10]

As the slides reflect, Mr. Karp did not "exhor[t] Rambus employees to destroy documents that could be discoverable in litigation," as Complaint Counsel claim. Mem. 6-7. In fact, in explaining how the policy should be implemented, Mr. Karp encouraged employees to "LOOK FOR THINGS TO KEEP" and to

[9] Complaint Counsel try to draw sinister inferences from even this innocuous fact, stating that Mr. Karp "appears to have been extraordinarily comprehensive" in reaching out to all Rambus employees. Mem. 47 n.59. Of course, publishing a newly adopted document retention policy to all affected employees is precisely what companies are advised to do. *See*, *e.g.*, Grady, *supra*, at 542.

[10] These slides were previously included on Rambus's privilege log due to the belief that they had been created by Rambus's outside counsel. In connection with this motion, however, Rambus has learned that these slides were in fact created by Joel Karp and used by him to explain the document retention policy to Rambus employees, as set forth in Mr. Karp's declaration. Accordingly, they are being produced herewith and removed from Rambus's privilege log.

"LOOK FOR REASONS TO KEEP IT." Karp Decl. Exh. B at R124530, R124531, R124534-R124538. Testimony cited by Complaint Counsel themselves confirms the nature of the guidance Mr. Karp gave during his presentations. *See* Mem. 2 (quoting testimony of Richard Crisp) ("I definitely made an attempt to go through my file and *look for things to keep* . . . as [Mr. Karp] had directed us to do.") (emphasis added).

Nor did Mr. Karp, or anyone else at Rambus, direct employees to target the elimination of either JEDEC-related documents or any other category of documents that Rambus supposedly feared "would be damaging in future litigation." Mem. 9 n.7. Mr. Crisp, for example, testified that "nobody came in and told me specifically, 'Throw away these kinds of things and keep these kinds of things.'" CC Tab 1 at 844. That no such directive to "seek out and destroy" JEDEC-related documents was given is also confirmed by the fact that employees did *not* destroy such documents after the document retention policy was implemented. Mr. Roberts, for example, testified that he saved JEDEC-related e-mails from Mr. Crisp on his computer:

> Q: But you got rid of some of them after Joel Karp's meeting?
> . . .
> THE WITNESS: Relative to JEDEC?
> Q: Yes, JEDEC e-mails.
> A: No, I don't believe so.
> Q: Why not?
> A: That wasn't high on my list of things to do.
> Q: Why were you saving Richard Crisp JEDEC e-mails on your computer in the first place?
> A: One could ask why you save all kinds of e-mails . . . . [I]t was nothing other than just being pack rattish.

CC Tab 3 at 338.

Lester Vincent, Rambus's outside patent counsel at the time, was also asked to comply with Rambus's document retention policy soon after it was implemented. In accordance with the policy, [redacted] CC Tab 102 at 425-26. Notably, he did not discard documents relating to JEDEC or Rambus's participation in JEDEC:

[redacted]

Id. at 416; *see also* Barth Dep. Tr. at 344 ("Q: Did you throw away any documents that might have related to JEDEC? A: That's highly unlikely.").

The fact that individuals who complied with the document retention policy did not discard JEDEC-related documents demonstrates that no directive targeted at such documents was ever given. Indeed, had Rambus's document retention policy been a "sham" designed to eliminate specific types of documents that would be harmful to Rambus in future litigation involving JEDEC-compliant parts, one would expect very specific individuals – such as Messrs. Tate, Crisp, Barth, Vincent, Karp, and Roberts – to have discarded all JEDEC-related documents. Instead, these individuals have produced volumes of relevant

documents and given many days of deposition testimony, none of which even hints that harmful evidence was targeted for elimination.

More fundamentally, however, Complaint Counsel's entire argument is premised on the false assumption that Rambus violated JEDEC's patent disclosure policy and feared that its conduct at JEDEC would render its patents unenforceable. As Rambus has noted elsewhere, there is now overwhelming evidence that JEDEC merely encouraged, but did not *require*, the disclosure of patent applications. *See* Memorandum by Rambus Inc. in Response to Motion by Department of Justice to Halt Discovery Relating to the DRAM Grand Jury at 4 (filed Jan. 3, 2003). For example, as recently as February 2000, JEDEC's Board of Directors confirmed that the disclosure of patent applications was *not* required under JEDEC's patent policy but was merely "encourage[d]." *See* excerpt from February 7-8, 2000, Board meeting, attached as Exhibit 1.[11]

Rambus submits this evidence not to pre-try the merits but to show that Complaint Counsel cannot properly ask Your Honor to base a default sanction on the *presumption* that Rambus had something to "cover up," when it is now clear that Rambus had no disclosure obligations with respect to patent applications in the first place. And Complaint Counsel also misrepresent the record when they

[11] A few days after the February 2000 Board meeting, long-time JEDEC/EIA Secretary Ken McGhee sent an e-mail to the JEDEC 42.4 committee explaining that disclosure of patent applications goes "one step beyond the patent policy," and noting that such disclosure "cannot be required of members at meetings." *See* February 11, 2000, e-mail, attached as Exhibit 2.

suggest that Mr. Karp knew that Rambus's conduct at JEDEC would call into question the enforceability of the company's patents, given his participation in JEDEC in the 1991-1996 timeframe as a representative for Samsung. Mem. 57-58. As Mr. Karp has testified, he saw nothing during his tenure at JEDEC that would have given him cause for concern, and the first time he "even became aware of any potential issues surrounding JEDEC was when Hitachi filed their counterclaims in the suit that Rambus filed against them [in January 2000]." Karp Dep. Tr. at 313, 318.[12]

III. ARGUMENT

Complaint Counsel ask the Commission to enter a default judgment against Rambus on all liability issues, thereby depriving Rambus of any opportunity to contest the unprecedented theory of antitrust liability advanced in this action. As the case law makes clear, depriving a party of its day in court is the gravest possible sanction and may be imposed only in the most egregious cases of

[12] Complaint Counsel note that in the *Infineon* litigation Judge Payne awarded Infineon attorneys' fees based in part on his view that Rambus had destroyed documents pursuant to its document retention policy "for the purpose of getting rid of documents that might be harmful" in litigation. Mem. 3 (quoting Judge Payne's order). Complaint Counsel are disingenuous, however, when they assert that Rambus "has never challenged [Judge Payne's] conclusion that the company engaged in sanctionable misconduct by destroying documents in anticipation of litigation." Mem. 3-4. Rambus has, in fact, vigorously contested that conclusion in the *Micron* litigation, and elsewhere, where Rambus has pointed out that Judge Payne's conclusion about the purpose for which Rambus adopted its document retention policy is based largely on the same erroneous interpretation of comments concerning documents being "discoverable in litigation" that Complaint Counsel rely on here. Rambus has not appealed the erroneous factual findings underlying Judge Payne's award of attorneys' fees in the *Infineon* case only because doing so was not necessary to seek reversal of the award, given the legally defective premises upon which the award is based.

evidence destruction. *See, e.g., TeleCom Int'l Am. Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999) (sanction of dismissal is a "drastic remedy" to be imposed only in "extreme circumstances"); *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 552 (D. Minn. 1989) (entering judgment against a party who has lost or destroyed evidence must be regarded as sanction of "last resort").

To obtain the extreme remedy it seeks here, Complaint Counsel must prove, by clear and convincing evidence, three elements: (1) that Rambus destroyed documents relevant to this action willfully and in bad faith; (2) that Complaint Counsel have been prejudiced by the alleged loss of such documents; and (3) that no lesser sanctions are adequate. *Id.* Complaint Counsel come nowhere near making the showing required to establish any one of these elements. This motion must therefore be denied.

A. Rambus Did Not Implement Its Document Retention Policy in Bad Faith.

A court may use its inherent power to enter a default judgment "only if it finds, first, by clear and convincing evidence – a preponderance is not sufficient – that the abusive behavior occurred." *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995). The "abusive behavior" that is a necessary predicate for depriving a litigant of its day in court requires a showing of bad faith. *Cole v. Keller Indus., Inc.*, 132 F.3d 1044, 1047 (4th Cir. 1998) ("absent bad-faith conduct . . . dismissal on the grounds of spoliation of evidence is not authorized");

Pressey v. Patterson, 898 F.2d 1018, 1021-22 (5th Cir. 1990) (reversing entry of default judgment where no showing of bad faith was made).[13]

Bad faith in this context requires Complaint Counsel to show that Rambus destroyed the documents in question "intend[ing] to prevent use of the evidence in litigation." *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 74 (S.D.N.Y. 1991). Although Complaint Counsel assert that Rambus had an obligation to preserve documents whose relevance to this action was "reasonably foreseeable" (Mem. 83), neither the factual predicate for this assertion (reasonable foreseeability) nor the legal standard asserted by Complaint Counsel (an affirmative duty to preserve) is correct. For example, mere negligence in losing or destroying evidence does not constitute bad faith. *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997). What Complaint Counsel must show is that Rambus acted with the specific intent to destroy documents to prevent their use by litigation adversaries. *See In re Wechsler*, 121 F. Supp. 2d 404, 415 (D. Del. 2000) (default sanction requires showing that destruction was "intended to prevent the other side from examining the evidence"); *Capellupo*, 126 F.R.D. at 551 (bad faith requires "[p]urposeful impairment of the opposing party's ability to discover information").

[13] Complaint Counsel contend that "sanctions would be appropriate in this case even if there were no reason to believe Rambus acted in bad faith." Mem. 85 & n.102. The two cases Complaint Counsel cite for this proposition, however, involved the far less severe sanction of an adverse inference imposed against a spoliator at trial. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Glower v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). There is contrary authority holding that, even in that context, a finding of bad faith is required. *See, e.g., United States v. Hill*, 973 F.2d 652, 655 (8th Cir. 1992); *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975).

This is an element of proof, measured under a "clear and convincing evidence" standard, that Complaint Counsel have not and cannot meet.

Complaint Counsel have presented *no* evidence, let alone clear and convincing evidence, establishing that Rambus adopted and implemented its document retention policy for the purpose of preventing the use of documents in subsequent litigation. In attempting to establish this necessary predicate for the relief they seek, Complaint Counsel rely most heavily on statements by Rambus employees that the vast quantities of e-mail and other documents accumulated by the company would potentially be "discoverable in subsequent litigations." Mem. 3. As explained above, these references simply allude to the fact that, *because* all of those documents were potentially discoverable, they would all have to be reviewed at great cost if Rambus became involved in litigation or received third-party document requests. [redacted] and the desire to reduce the costs associated with reviewing and producing large quantities of documents is widely regarded as one of the principal benefits of adopting such a policy. Complaint Counsel are simply wrong in arguing that concern about the *content* of specific documents being discoverable was the motivating force behind Rambus's decision to adopt its document retention policy.

Complaint Counsel are also wrong when they assert that Rambus's CEO, Geoff Tate, told Mr. Karp to destroy back-up tapes and files from the "pre June

1996" period. Mem. 86. Complaint Counsel manufacture the claim that Mr. Tate said anything about "destroying" back-up tapes; no such conversation is reflected in Mr. Karp's notes. CC Tab 46 at R300801. [redacted] *Id.* Complaint Counsel's attempt to distort the record on this point is indicative of the complete absence of evidence supporting their claim that "Rambus instituted its 'document retention' policy for the very purpose of destroying, and thereby depriving opposing litigants of, relevant evidence." Mem. 87 (underlining in original).

Complaint Counsel quote snippets of cases throughout their memorandum but seldom discuss the facts of the cases on which they rely. That tactic is telling because the cases in which courts have found that parties destroyed evidence in bad faith involve facts that bear no resemblance to those at issue here. For example, in *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987), an antitrust case, the court imposed a default judgment against the defendant after the defendant's general counsel issued a memorandum ordering the immediate destruction of all sales documents covered by a request for production that had been personally served on him earlier that day. *Id.* at 109-10. Similarly, in *Computer Assocs. Int'l v. American Fundware, Inc.*, 133 F.R.D. 166 (D. Colo. 1990), the court imposed a default judgment against the defendant in a copyright infringement case where the defendant had destroyed source code *after*

it received plaintiff's discovery requests seeking that very source code. *Id.* at 169-70. And in *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984), the court granted a default judgment against an aircraft manufacturer that adopted a policy pursuant to which employees were instructed "to destroy any documents that would be detrimental to Piper in a law suit." *Id.* at 482. As these cases illustrate, the targeted destruction of evidence with the specific intent to deprive a litigation opponent of its use is the hallmark of findings of bad faith in this context.

Nothing even remotely similar is present here. All of the documents at issue were destroyed in the ordinary course of business, pursuant to a standard company-wide policy applicable to all categories of documents generated within Rambus. Thus, no evidence supports Complaint Counsel's claim that Mr. Karp told employees that the document retention policy "was designed to eliminate 'discoverable' evidence." Mem. 87 (emphasis omitted). The evidence demonstrates just the opposite: Mr. Karp told employees to err on the side of retaining documents and to "look for things to keep." Karp Decl. ¶ 5 & Exh. B. Nor was there any attempt to "single out" JEDEC-related documents for destruction, as Complaint Counsel falsely claim. Mem. 90-91. That is confirmed not only by the testimony of individuals who recall the directions they were given in connection with implementation of the policy, but also by their actions. Several key individuals notably did *not* destroy JEDEC-related documents within their

possession, refuting any contention that destruction of those documents was the top priority underlying adoption of the policy.

In sum, Complaint Counsel have fallen woefully short of providing clear and convincing proof – or any proof, for that matter – that Rambus acted in bad faith. In the absence of such proof, this motion must be denied.

B. Complaint Counsel Have Failed to Prove Any Prejudice Suffered by the Supposed Loss of Relevant Evidence.

To warrant the imposition of a default judgment, the injured party must have been "severely prejudiced" by the destruction of evidence. *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 74 (S.D.N.Y. 1991). Complaint Counsel seek to avoid shouldering their burden of demonstrating such prejudice by contending that they are entitled to rely on a "presumption of prejudice." Mem. 92. The cases Complaint Counsel cite in support of this contention, however, make clear that any such presumption applies only where the injured party has first demonstrated that its opponent acted in bad faith.

In *Anderson v. Cryovac, Inc.*, 862 F.2d 910 (1st Cir. 1988), for example, the court noted that "[i]n the case of intentional misconduct, as where concealment was *knowing and purposeful*, it seems fair to presume that the suppressed evidence would have damaged the nondisclosing party." *Id.* at 925 (emphasis added). In explaining why such a presumption must be refuted by clear and convincing evidence, the court noted that such a burden is "an appropriate antidote for deliberate misconduct," such as "intentionally shredding documents in order to

stymie the opposition." *Id.* And in *Bright v. Ford Motor Co.*, 578 N.E.2d 547 (Ohio Ct. App. 1990), the court held that the defendants were entitled to a rebuttable presumption that they had been prejudiced after the plaintiffs' experts degreased, cleaned, and inspected the key piece of evidence (a car) before turning it over to the defendants for testing. The plaintiffs had done so in direct violation of a court-imposed order directing that the car be "maintained in its present condition." *Id.* at 258. Because the plaintiffs had "willfully violated the protective order and destroyed evidence," the court held that prejudice to the defendants would be presumed, and shifted the burden to the plaintiffs to prove that the defendants had not been prejudiced. *Id.*

Because Complaint Counsel have not established that Rambus acted in bad faith, they must prove prejudice without the benefit of any "presumption." Complaint Counsel have utterly failed to make that showing here. Indeed, in their memorandum, Complaint Counsel do little more than recite broad categories of documents potentially affected by Rambus's document retention policy and assert that these categories are "broad enough to encompass virtually every issue in this case" – an assertion that, as noted in the next section, is demonstrably false in any event. Mem. 96. Complaint Counsel have made no attempt to describe the content of even a single document that once existed which might have bolstered their case had it been preserved. *See Skeete v. McKinsey & Co.*, 1993 WL 256659 at *7 (S.D.N.Y. 1993) (to demonstrate prejudice, "the moving party usually sets forth some type of extrinsic evidence as to the contents of the missing materials

which demonstrates the extent to which such materials would have been harmful to the spoliator"). Instead, Complaint Counsel simply declare that their inability to "muster supporting proof" for each of the key factual allegations Rambus has contested in this action must itself be deemed proof that prejudice is "palpable and substantial." Mem. 97. This falls far short of demonstrating the "severe prejudice" necessary to warrant imposition of a default judgment.

Although Complaint Counsel purport to remain "confident" that they have sufficient evidence to prove their claims (Mem. 12 n.13), that assertion (while erroneous) significantly undermines their claim of prejudice. Even in cases involving findings of willful and bad faith conduct, courts have declined to impose a default judgment when the remaining evidence is adequate to allow the injured party a full and fair opportunity to prepare its case for trial. For example, in *Capellupo v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1989), the court found that the defendant and its agents had "ordered and participated in the knowing and intentional destruction of documents and evidence . . . [as] part of a premeditated effort to subvert the proceedings." *Id.* at 546. However, the court declined to impose a default judgment against the defendant because it noted that "there remains other evidence concerning [defendant's] liability, if any," and that "[n]notwithstanding defendant's document destruction, it appears plaintiffs have not been wholly deprived of the means to attempt their proof." *Id.* at 553. Similarly, in *Bass v. General Motors Corp.*, 150 F.3d 842 (8th Cir. 1998), the trial court declined to dismiss the plaintiffs' case despite finding that the plaintiffs had

intentionally destroyed the critical piece of evidence during their preparation for trial and that the defendant had been prejudiced as a result. The court of appeals affirmed, noting that even without the missing evidence, the defendant "was capable of presenting an adequate defense." *Id.* at 851.

Complaint Counsel certainly have not been deprived of the ability to prepare their case for trial in a full and fair manner. To the extent Complaint Counsel find themselves unable to "muster supporting evidence" on issues such as causation, injury, and market power, that is not because any documents have been discarded pursuant to Rambus's document retention policy, but because Complaint Counsel's claims are wholly without merit. Complaint Counsel are not entitled to the relief they seek.

C. Even if Complaint Counsel Could Demonstrate Both Bad Faith and Prejudice, Entry of a Default Judgment Here Would Not Be a Permissible Sanction.

"[T]here is a strong policy favoring a trial on the merits and against depriving a party of his day in court." *Bass v. General Motors Corp.*, 150 F.3d 842, 851 (8th Cir. 1998) (internal quotation marks omitted). This policy "rests upon the recognition that the opportunity to be heard is a litigant's most precious right and should be sparingly denied." *Id.* (internal quotation marks omitted). Thus, it is well settled that a default judgment is the gravest possible sanction, and one that may not be imposed without express findings by the court explaining why no lesser sanction would suffice. *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1479 (D.C. Cir. 1995) (a district court "may not rely on its inherent

power to impose a sanction of either default or dismissal without explaining why lesser sanctions were likely to be ineffective"); *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994) (key consideration is whether "there is a lesser sanction that will avoid substantial unfairness to the opposing party"). In light of these principles, courts generally impose a default judgment as a remedy for document destruction in two narrow circumstances: "where the destroyed document is dispositive of the case, so that an issue-related sanction effectively disposes of the merits anyway; and where the guilty party has engaged in such wholesale destruction of primary evidence regarding a number of issues that the district court cannot fashion an effective issue-related sanction." *Shepherd*, 62 F.3d at 1479 (citations omitted).

Even accepting as true all of Complaint Counsel's speculative assertions about the nature of the documents that allegedly have been lost, this case does not remotely fall within either of the scenarios justifying imposition of a default judgment. It is certainly not the case that any document or group of documents allegedly lost would have been "dispositive" of this action. There is no reason to believe that Rambus destroyed any documents bearing on any of a host of important issues that *must* be resolved to determine liability here – issues that include causation (*i.e.*, the technical or economic viability of alternative technologies and lock-in), injury (*i.e.*, reasonable and non-discriminatory royalties), reliance, and market power. Thus, it is not the case – despite Complaint

Counsel's assertions – that the list of issues potentially affected by lost documents "would encompass all issues as to liability." Mem. 100.

In sum, entry of a default judgment against Rambus on all liability issues without affording Rambus an opportunity to contest Complaint Counsel's proof (or lack thereof) would be unfair, unwarranted, and unsupported by the case law.

IV. CONCLUSION

By this motion, Complaint Counsel seek to avoid the problems of proof inherent in the theories of antitrust liability they have chosen to pursue – theories which are not only legally unprecedented but factually unsupported as well. Complaint Counsel have come nowhere near establishing any of the elements necessary to warrant imposition of the relief they have demanded. For the reasons stated above, their motion for default judgment should be denied.

DATED: January _____, 2003

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on January 15, 2003, I caused a true and correct copy of the public version of the *Memorandum by Rambus Inc. in Opposition to Complaint Counsel's Motion for Default Judgment* to be served on the following persons by hand delivery:

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