

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

**PUBLIC VERSION**

**In the Matter of**

**RAMBUS INC.,**

**a corporation.**

**Docket No. 9302**

**OPPOSITION OF RESPONDENT RAMBUS INC. TO COMPLAINT COUNSEL'S  
MOTION FOR ADDITIONAL ADVERSE INFERENCES AND OTHER APPROPRIATE  
RELIEF NECESSARY TO REMEDY RAMBUS INC.'S INTENTIONAL SPOILIATION  
OF EVIDENCE**

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## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief (hereinafter "Motion") is plainly a motion for reconsideration of Judge Timony's February 26, 2003 Order on Complaint Counsel's Motions for Default Judgment and Oral Argument ("Order Re Default Judgment"). In fact, the instant Motion is Complaint Counsel's second motion for reconsideration of the Order Re Default Judgment, the first having been filed on February 27, 2003.<sup>1</sup> As Your Honor explained in the March 26, 2003 Order Denying Respondent's Applications For Review ("March 26, 2003 Order"), "[m]otions for reconsideration should be granted only sparingly" and only where: "(1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest in justice." March 26, 2003 Order at 8. Complaint Counsel's instant motion fails entirely to satisfy any one of these three tests. Thus, Complaint Counsel's third bite at the apple should be denied because there has been "no intervening changes in controlling law or new evidence since the filing of the February 26 and February [27] Orders," and there has been no showing that those Orders constituted "clear error" or will result in "manifest injustice." *Id.* Indeed, Complaint Counsel make no effort to argue that there has been an intervening change in the law or that the Orders of February 26 and February 27 constituted either clear error or result in manifest injustice. All that Complaint Counsel offer is a most

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<sup>1</sup> On February 27, 2003, Complaint Counsel filed a Request For Immediate Clarification Of February 26, 2003 Order On Complaint Counsel's Motions For Default Judgment And For Oral Argument, which Request for Clarification was denied the same day by Judge Timony's Order Denying Request for Clarification.

feeble argument that two e-mails, produced in January of this year, “shed[] light on the true magnitude of the document destruction.” Motion at 3. In fact, however, these e-mails offer no new evidence; the scope and nature of Rambus’s efforts to implement its document retention program have long been known and were fully presented in Complaint Counsel’s original Motion for Default Judgment. *See, e.g.*, Motion at 7 (point (8)), n. 11.

Respondent urges Your Honor to deny the instant motion because it does not meet any of the requirements that a reconsideration motion must meet. Rather than re-visiting motions decided more than a month ago, it is time to focus on trial. Both sides have gathered the evidence they need within the compressed time frame allowed, and urged by Complaint Counsel.<sup>2</sup> Until recently, Complaint Counsel contended they had the evidence they felt would justify a ruling in their favor. Motion for Default Judgment at 12, n. 13 (“Complaint Counsel is confident that, notwithstanding Rambus’s efforts to escape justice by systematically destroying material evidence, the proof that remains is more than sufficient to establish the merits of Complaint Counsel’s claims.”) Indeed, unless the instant Motion is intended simply as character assassination or is an effort to “poison the waters,” it must instead reflect a growing recognition by Complaint Counsel that there are serious holes in their case – holes that cannot be blamed on Rambus’s document retention program. Discovery in this case 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 of the technologies included in RDRAM and being

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<sup>2</sup> As recently as last week, third parties were continuing to produce documents. The significance of those documents is plain, as the recently -lodged Mitsubishi documents show.

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 that included features invented by Rambus.

But, should Your Honor decide to reconsider Judge Timony's Order Re Default Judgment and reach the "merits" of the instant Motion, Respondent submits that you should deny the Motion in its entirety. First, Complaint Counsel completely mischaracterize Rambus's document retention program, which was instituted in good faith to address the accumulation of massive amounts of irrelevant and unneeded paper at a company that had been without any systematic document retention program for its first eight years of operation. Indeed, Rambus's document retention program was instituted in good faith on the advice of Rambus's outside counsel. Judge Timony made no finding to the contrary. Rather, he concluded that the program was not instituted in bad faith, but rather reflected gross negligence or reckless disregard of what Judge Timony concluded was Rambus's obligation "to maintain documents potentially relevant to litigation and to inventory those documents destroyed." Order Re Default Judgment at 7. Second, there is no nexus or causal link between the 100 additional inferences Complaint Counsel ask Your Honor to draw and Rambus's document retention policy.<sup>3</sup> Indeed, Complaint

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<sup>3</sup> In fact, there is no factual support whatsoever for the vast majority of arguments, contentions and allegations in Complaint Counsel's motion. However, since it seems that whenever Rambus fails to specifically contest a point or allegation made by Complaint Counsel, even those lacking in factual support, Complaint Counsel then view that uncontested point as conceded (*see, e.g.*, Motion at 6 n.9, 7 n. 11 & 14-15), Rambus states here, as clearly as it can, that the fact that it does not contest every point does not mean it concedes those points. Rather, it simply reflects the view of Rambus's counsel that arguments generally are won or lost on controlling points, and it is not necessary or helpful to address every single point opposing counsel make. Put differently, in this and other briefs Rambus's counsel try to give Your Honor the salient authority you need to decide the motion presented, and do not write their briefs having in mind how points made by Complaint Counsel and not there directly contested because they are of limited

Counsel offer no evidence to suggest that pertinent documents bearing on the issues as to which they seek adverse inferences were not maintained. Even if Complaint Counsel have shown a “foul,” or the possibility of a “foul,” they have not linked it to any “harm.” Lacking any causal link, it becomes plain that what Complaint Counsel seek is not remedial relief, what they seek is punishment, and more punishment. Motion at 11 (“Rambus has escaped with little more than a ‘mild rebuke.’ . . . . [M]ore can, and must, be done, . . . also to ensure that such inferences in this case properly fulfill the punitive and deterrence functions that Judge Timony himself recognized to be par amount.”) Finally, Complaint Counsel’s argument that a rebuttable presumption may be overcome only by “clear and convincing” evidence is wholly unsupported in the law. All Complaint Counsel can cite is the musing of a District Judge in what can most generously be called *dicta*. More significantly, Complaint Counsel fail to cite authority, including authority of the Commission, which establish that the presumptions imposed by Judge Timony may be overcome by evidence “sufficient to support a finding of the nonexistence of the presumed fact.” 21 Wright and Graham, Federal Practice & Procedure § 5122 at 571. The presumptions imposed by Judge Timony do not and should not shift the burden of proof or change the quanta of evidence required for a party to meet its burden.

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materiality might be turned against Rambus in some other context or in some other motion. That fight, if there is to be one, should be left for another day.



## II. FACTUAL BACKGROUND<sup>4</sup>

Judge Timony concluded that Rambus's document retention program and the destruction of documents as part of that program were not in bad faith. Rather, he found "that Rambus acted with gross negligence concerning and reckless disregard of its obligations to preserve documents relevant to possible litigation." He expressly rejected Complaint Counsel's contention that "Rambus's document retention program was nothing more than a sham." Order Re Default Judgment at 8.<sup>5</sup> Yet, Complaint Counsel persist in trying to portray Rambus's document retention program as having been implemented in bad faith. As shown below, there is no factual support for this contention.

### 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]

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<sup>4</sup> Much of the factual background pertinent to Complaint Counsel's Motion was earlier set forth in the Memorandum By Rambus Inc. In Opposition To Complaint Counsel's Motion For Default Judgment, the Declaration of Joel A. Karp, and the Declaration of Jacqueline M. Haberer, each of which was filed in its non-public version on January 13, 2003, and in its public version on January 15, 2003. Yet, some of that factual background is so directly responsive to the instant Motion, as it was to Complaint Counsel's earlier version of the same motion, that it deserves repeating here.

<sup>5</sup> As Your Honor is aware, Rambus opposed the motion for default judgment and argued that it should have been denied in its entirety. Rambus's position in this regard remains unchanged – the sanctions imposed by Judge Timony are not justified. Thus, Rambus's acknowledgement at this point in time of Judge Timony's findings and of the sanctions he chose to impose should not be viewed as conceding their propriety, but instead simply as recognition of his decision.

[REDACTED]<sup>6</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]; Declaration of

Joel A. Karp filed on January 13, 2003 (“Karp Decl.”) ¶ 3. Thus, the idea of adopting a document retention policy originated with Rambus’s outside counsel, and later was implemented by Joel Karp and others at Rambus.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] *Id.* at 42.

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<sup>6</sup> All of the deposition excerpts referenced in this memorandum, with one exception noted below, are attached to the Declaration of Jacqueline M. Haberer, filed on January 13, 2003. Unless Your Honor would prefer otherwise, Rambus will not refile those excerpts, and will simply refer to and rely on that prior filing.

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 & Supp. 2003); 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's concerns were similar. 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]

[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 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.”).

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).<sup>7</sup> 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*, 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

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<sup>7</sup> Complaint Counsel seem to imply that Rambus's policy is deficient because it is addressed only to broad categories of documents. 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.”).



Roberts Dep. Tr. at 150. *See also* [REDACTED]. 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.”

For example, Complaint Counsel have placed 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.<sup>9</sup> 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 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

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<sup>9</sup> “CC Tab” refers to the compilation of evidence submitted by Complaint Counsel in support of their motion for default judgment, filed on December 20, 2002, and is followed by the applicable tab and page references.

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.

As this evidence demonstrates, Rambus witnesses were concerned 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.**

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. That process proceeded in two steps. First, Mr. Karp [REDACTED]

[REDACTED]

[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.

In explaining how the policy should be implemented, Mr. Karp encouraged employees to “LOOK FOR THINGS TO KEEP” and to “LOOK FOR REASONS TO KEEP IT.” Karp Decl. Exh. B at R124530, R124531, R124534-R124538. Testimony earlier cited by Complaint Counsel confirms the nature of the guidance Mr. Karp gave during his presentations. *See* Motion for Default Judgment at 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 might fear would be damaging in future litigation. 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, also was asked to comply with Rambus's document retention policy soon after it was implemented. In accordance with the policy, [REDACTED]

[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 January 3, 2003); Memorandum in Support of Respondent Rambus Inc.'s Motion for Summary Decision at 12-33 (filed February 27, 2003). For example, in the September 1994 JC42 Members' Manual at 3 (attached at Tab 2), members are told that JEDEC will "adhere rigidly" to the EIA policies contained in EP-7-A and EP-3-F.<sup>10</sup> These manuals, copies of which are attached at Tabs 4 and 5, contain absolutely no suggestion that patent applications need be disclosed. That the EIA policies did not require the disclosure of patent applications was confirmed in January 1996 by formal

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<sup>10</sup> That EIA manuals take precedence over JEDEC manuals was confirmed by JEDEC President John Kelly during his *Infineon* trial testimony: "The JEDEC manual is subordinate to the EIA manual, . . . because in the hierarchy of EIA, JEDEC was subordinate to EIA." April 30, 2001 *Infineon* Trial Tr. at 317 (attached at Tab 3).

comments submitted by EIA to the FTC in connection with a proposed Consent Order between the FTC and Dell Computer Corporation. (A copy of these comments is attached at Tab 6.) In its comments, EIA stated that “allowing patented technology in standards is pro competitive.” It went on to state that it “encourages the early, voluntary disclosure of patents that relate to the standards in work.” There was absolutely no suggestion that disclosure of patent applications was other than “voluntary.”<sup>11</sup> As recently as February 2000, JEDEC’s Board of Directors confirmed that the disclosure of patent applications was at most “voluntary” and that it was *not* required under JEDEC’s patent policy but was merely “encourage[d].” *See* excerpt from February 7-8, 2000, JEDEC Board meeting, attached at Tab 7.<sup>12</sup>

Thus, Complaint Counsel ask Your Honor to impose rebuttable presumptions or adverse inferences without any showing that material evidence relating to those issues was not preserved. They also ask Your Honor to impose rebuttal presumptions or adverse inferences that are flatly contradicted by the evidence readily available to both sides. As demonstrated below, these desperate efforts on Complaint Counsel’s part to create a “winning strategy” that is based not on evidence and not on reality, but on fiction, should be rejected.

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<sup>11</sup> The JC42 Members’ Manual is generally to the same effect, although it suggests that a sponsor or presenter, which Rambus never was, should disclose patent applications that it possesses if they would read on the proposal being made. *See* Tab 2 at 3.

<sup>12</sup> A few days after the February 2000 JEDEC Board meeting, long-time JEDEC/EIA Secretary Ken McGhee sent an e-mail to the JEDEC 42.4 committee confirming what had been set forth in the official minutes and 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 at Tab 8.

### **III. ARGUMENT**

#### **A. Complaint Counsel Fail To Satisfy The Standard For Reconsideration.**

Complaint Counsel's briefing in support of their Motion for Default Judgment was 125 pages in length. This was supplemented by 118 exhibits, totaling several hundred pages more. Being fully advised by these voluminous filings, Judge Timony selected certain remedies that he deemed appropriate, and rejected others. Complaint Counsel now ask Your Honor to revisit Judge Timony's determinations, to impose additional sanctions on Rambus, and to change the very nature of the sanctions Judge Timony chose to impose.

It is clear that Complaint Counsel disagree with Judge Timony's Order Re Default Judgment. Although stating that they do not challenge his choice of remedies, namely, his imposition of seven rebuttable presumptions, they clearly do. *See, e.g.*, Complaint Counsel's Motion at 2, note 2. Complaint Counsel ask Your Honor to impose on Rambus an additional 100 rebuttable adverse presumptions, although Complaint Counsel now refer to them as adverse inferences. These 100 new proposed adverse inferences are intended to "gut" Rambus's defense, but Complaint Counsel ask for even more, requesting Your Honor to decide that adverse inferences are not rebuttable except upon a showing by Rambus of clear and convincing contrary evidence. What Complaint Counsel are asking, then, is that Your Honor completely redesign Judge Timony's Order Re Default Judgment by adding 100 more rebuttable adverse inferences and by raising the burden imposed on Rambus to rebut those inferences to what Complaint Counsel obviously hope will be unachievable heights. It is obvious that what Complaint Counsel are asking is that Your Honor reconsider the Order Re Default Judgment entered by Judge Timony. But as set

forth below, they fail to satisfy the standard Your Honor articulated quite plainly just the day before Complaint Counsel filed the instant Motion.

In Your Honor's March 26 Order Denying Respondent's Applications, at page 8, you set forth the following standard for motions for reconsideration:

"Motions for reconsideration should be granted only sparingly. *Karr v. Castle*, 768 F. Supp. 1087, 1090 (D. Del. 1991). Such motions should be granted only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest injustice. *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F.Supp.2d 1, 3 (D.D.C. 2002). Reconsideration motions are not intended to be opportunities "to take a second bite at the apple" and relitigate previously decided matters. *Greenwald v. Orb Communications & Marketing, Inc.*, 2003 WL 660844 at \*1 (S.D.N.Y. Feb. 27, 2003)."

Complaint Counsel do not contend that there has been an intervening change in controlling law, nor do they contend that Judge Timony committed clear error or that his Order Re Default Judgment constituted manifest injustice. Rather, to the extent they make any effort to justify their motion for reconsideration, their effort is based solely on their recent discovery of two e-mails. However, these e-mails fall far short of establishing new evidence that would justify a motion for reconsideration.

The first e-mail on which Complaint Counsel rely, Ed Larsen's September 2, 1998, e-mail to "staff@rambus.com" simply announces that the following day, Thursday, September 3, is the day on which documents to be destroyed will be collected for shredding. There is nothing new about this fact. *See, e.g.*, Motion for Default Judgment at 48. And the fact that, at the end of the day, there would be a "celebration" in the "new 1<sup>st</sup>

floor open area” seems surprisingly immaterial.<sup>13</sup>

The second e-mail also contains nothing new. It simply establishes that the volume of paper, print-outs, net lists, schematics, simulation results, old telephone books, and other materials that were identified to be shredded was large. But this is not a new fact. As Complaint Counsel point out in their Motion, *see, e.g.*, Motion at n. 11, they presented Judge Timony with ample evidence that large volumes of paper (collected in burlap bags) and “thousands of electronic back-up tapes, containing equally massive amounts of e-mail and other documentation,” (Motion at 7) were destroyed.<sup>14</sup> Obtaining a more specific count of the number of pages picked up by the shredding company – for which this e-mail is of limited evidentiary value – can hardly justify reconsideration and 100 more adverse inferences.

Lacking any intervening change in the controlling law, unable to point to any manifest injustice that would result from Judge Timony’s Order Re Default Judgment or to any clear error underlying it, and failing to point to any “new” facts that were not already presented to Judge Timony, Complaint Counsel fail to justify reconsideration of the Order Re Default Judgment. On this ground alone the Motion can and should be denied.

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<sup>13</sup> Mr. Larsen was Vice President of Administration. The fact that he would be reminding people of “collection day” is hardly surprising. It also is not surprising that he would look for an excuse to hold a “celebration” in the new open area on the first floor. This was, after all, a very small company trying to build and maintain *esprit de corps*.

<sup>14</sup> In their Motion for Default, Complaint Counsel also argued that “Rambus destroyed massive numbers of Rambus documents, including documents directly relevant to this litigation” and that the evidence destroyed included “literally thousands of back-up tapes,” “e-mails” and “files.” Motion for Default at 61-62.

**B. Complaint Counsel Fail To Show Any Nexus Or Causal Link Between Rambus's Document Retention Policy And Any Of The 100 Adverse Inferences Complaint Counsel Ask Your Honor To Impose.**

There must be a nexus between evidence that has not been preserved and any adverse inference to be drawn. *E.g., Applied Telematics, Inc. v. Sprint Communications Co.*, 1996 U.S. Dist. LEXIS 14053, \*11 (E.D. Pa. 1996) (“[t]he parties agree that plaintiff must show a nexus between the proposed inference and the destroyed evidence”). Put differently, the destruction of evidence must have prejudiced the other party and the presumption must address that prejudice. *E.g., Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8<sup>th</sup> Cir. 1993); *Donais v. United States*, 1997 U.S. Dist. LEXIS 14509, \*22-24 (N.D. Ill., 1997); Gorelick, et al., *supra*, § 3.17, at 127 & Supp. 160 (“[a]lthough courts demand prejudice before awarding sanctions, demonstrating prejudice in practice means establishing that the destroyed material is directly relevant to issues in the case, usually allegations in the parties’ pleadings”). As the *Donais* court explained:

The second factor to consider in determining the appropriateness of an adverse inference instruction is the content of the evidence destroyed. This factor is generally broken down into three subparts: (1) whether the evidence was relevant to the lawsuit; (2) whether the evidence would have supported the inference sought; and (3) whether the non-destroying party has suffered prejudice from the destruction of the evidence.

*Donais*, 1997 U.S. Dist. LEXIS 24068 at \*22-23.

Examining Complaint Counsel’s Motion carefully reveals that Complaint Counsel have made almost no effort to show what specific evidence was not preserved. *See* Motion at 7 n.12. Significantly, Complaint Counsel provide no response to Rambus’s detailed showing that copies of all JEDEC-related documents were maintained. *See supra* at 11-14.

Even more importantly, however, Complaint Counsel make absolutely no effort to show that evidence not preserved would have supported even one, let alone all, of the 100 adverse inferences they ask Your Honor to impose. They also make absolutely no showing that they have suffered prejudice, or that the evidence they need to establish their claims is not available from other sources.<sup>15</sup> To illustrate Complaint Counsel's failure to demonstrate the required nexus between the inferences they seek and the evidence they contend was not preserved, Rambus's counsel append as Attachment A an annotated version of Complaint Counsel's "corrected" Attachment A. In this annotated version we point out, inference by inference, that there is in fact no nexus between the inferences proposed by Complaint Counsel and any evidence not preserved. In other words, even though Complaint Counsel have not carried their burden, or even attempted it, we have taken on the task of illustrating how we would rebut it if they had.

Rather than attempting to carry their burden, Complaint Counsel seek instead to demonstrate that Judge Timony did not punish Rambus harshly enough. In doing so, they run afoul of at least two issues of constitutional moment. First, in seeking just to punish Rambus, they run afoul of the Fifth Amendment. *See, e.g., Hovey v. Elliott*, 167 U.S. 409, 413 (1897); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-50 (1909); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 210-212 (1958).

Second, they seek to punish Rambus because it has exercised its First Amendment right to defend itself from unfair press attacks and to keep its shareholders informed.

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<sup>15</sup> For instance, Complaint Counsel would have no ground for complaint if Rambus had not maintained all the copies of JEDEC minutes it received, since a full set of those minutes is available from JEDEC.



Pointing to four press reports (*see* Motion at 10-11 nn. 14-17 and Tabs 5-8), Complaint Counsel argue that Rambus's public statements evidence that it was not punished enough.<sup>16</sup> But that is not at all what these reports show. Rather, they show exactly what we have told Your Honor – that we believe Rambus can present evidence to overcome the rebuttable presumptions imposed by Judge Timony and that we will prevail. Further, when faced with the prospect of a default judgment, which is exactly what Complaint Counsel asked Judge Timony for (and what he described as a “drastic sanction” that was “inappropriate and unjustified”), and to instead be sanctioned with rebuttable adverse presumptions was, compared to the alternative, “qualifiedly good news.” The alternative was to be prevented from presenting a defense.

It also is useful to put these statements in historical context. When this action was initiated, Complaint Counsel launched a coordinated PR offensive directed at Rambus. This included a very aggressive press release, as well as innumerable speaking engagements and public presentations on this case. The impact on Rambus was extraordinary; its stock price dropped by nearly 50% in the two days following Complaint Counsel's press release. Then, following the Federal Circuit's decision in *Infineon*, Complaint Counsel issued another press release (Tab 9), with no apparent reason or motivation other than to try to stem any favorable reaction to that ruling by the investing community. Complaint Counsel have continued to challenge the Federal Circuit's

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<sup>16</sup> Relying on press reports to prove exactly what someone said is an inherently unreliable source of evidence, as anyone who has been quoted in the press well knows. Moreover, such “evidence” is hearsay. Further, at least one of the reports on which Complaint Counsel rely contains at least one obvious error. *See* Tab 5 (describing this action as a “patent-infringement” case).

decision, urging Your Honor to be guided by the dissent and by the briefs of various amici filed in support of Infineon's petition for rehearing or rehearing en banc.<sup>17</sup>

But what is most troubling are the actions of Complaint Counsel that immediately preceded the press reports attached to their Motion. Within minutes of Judge Timony's ruling being issued, Bloomberg published a misleading article on the ruling and its effect. (Tab 10.) As we can see, even before the Order was available on the website, Complaint Counsel's lead trial attorney was being quoted in the Bloomberg article, and the statements attributed to Mr. Royall appear (at least as published) to be misleading, and to suggest incorrectly that Rambus destroyed documents during the course of this proceeding that it should have produced in this proceeding. (*See also* Motion at Tab 8.) The impact of these articles was alarming. Rambus's stock price dropped by nearly 20%. Rambus's management had no choice but to speak out – to the press and to analysts – to reassure them that the Order Re Default Judgment, and the other Orders issued that same day, were not fatal to Rambus's defense, and that Rambus would, in fact, be able to present its defense and that it still expected to prevail.

C. **To Require Rambus To Rebut Adverse Presumptions By Clear And Convincing Evidence Would Be Wholly Contrary To Law.**

Complaint Counsel argue that Rambus must be required to rebut by clear and convincing evidence the seven rebuttable adverse presumptions imposed by Judge Timony, as well the additional 100 adverse presumptions that they ask Your Honor to impose. Motion at 29-31. In support of this argument, Complaint Counsel rely only on an unpublished District Court decision in which this heightened standard of proof was not

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<sup>17</sup> On Friday, April 4, 2003, the Federal Circuit denied rehearing and rehearing en banc.

imposed, but simply entertained and then rejected. *See Cabnetware v. Sullivan*, 1991 U.S. Dist. Lexis 20329 (E.D. Cal. 1991). There, the court “considered” enhancing the presumption of copying that arises in all copyright cases on a showing of access and substantial similarity with a requirement that the accused software copyright infringer rebut the presumption with clear and convincing evidence. *Id.* at \*11. The court “considered” this punitive enhancement because the accused infringer had destroyed documents after receiving plaintiff’s request for production of those documents. *Id.* at \*3-4, \*7-11. Here, by contrast, Rambus disposed of the documents in issue years before this action was even contemplated or filed. More importantly, the court in *Cabnetware* merely “considered” imposing, but did not actually impose, the burden of proof that Complaint Counsel ask Your Honor to impose on Rambus. The *Cabnetware* court’s musings are hardly authority on which Your Honor should impose this heightened, and Complaint Counsel hope insurmountable, standard of proof.

Complaint Counsel also cite to *Anderson v. Cryovac*, 862 F.2d 910 (1<sup>st</sup> Cir. 1988). But this citation is wholly unavailing of support for Complaint Counsel’s argument. That case does not involve a spoliation adverse inference, but rather involves a motion for a new trial based on discovery misconduct that resulted in certain evidence being concealed until after the trial was concluded. *Id.* at 926. The “clear and convincing” burden of proof standard applied there was applied to both the movant and the non-movant and was specific to the context of a new trial motion. *Id.* (noting that the burdens adopted “strike[] an acceptable balance between the need to preserve the finality of judgments and the need to enforce discovery rules.”). Thus, the standard adopted there has no application here.

But there are, however, cases and other authorities that do consider what proof is required to overcome an adverse presumption imposed as a sanction for spoliation of evidence. For instance, Fed. R. Evid. 301 provides that “a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.”<sup>18</sup> Wright and Graham explain that the quantum of evidence that one must produce to rebut the facts inferred or presumed from one’s document destruction is, at most, the burden of producing evidence “sufficient to support a finding of the nonexistence of the presumed fact.” 21 Wright and Graham, *Federal Practice & Procedure* § 5122 at 571. Similarly, the Federal Circuit, in *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992), writing in the context of the presumption of laches imposed after a more than six-year delay in bringing a patent infringement action, stated that “[T]he evidence must be sufficient to put the existence of a presumed fact into genuine dispute. The presumption compels the production of this minimum quantum of evidence from the party against whom it operates, nothing more.” *See also In the Matter of Novartis Corp.*, 1999 FTC Lexis 63, at \*26 (1999) (noting that, to rebut a presumption of materiality, “Respondent can present evidence that tends to disprove the predicate fact from which the presumption springs ... or evidence directly

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<sup>18</sup> The actual weight of a spoliation adverse inference is less than that of a presumption, so Rule 301 overstates the burden that is imposed by a finding that a spoliation adverse inference should be imposed. 21 Wright and Graham, *Federal Practice & Procedure* § 5124 (noting that the “so-called ‘presumption’ against spoliators” is actually a “mere inference” that allows, but does not require, the finder of fact to infer one fact from another.).

contradicting” the presumption itself). In the words of the Commission, “[t]his is not a high hurdle.” *Id.*

Furthermore, the D.C. Circuit has held that to require a “clear showing” to rebut a presumption improperly shifts the burden of proof. In an antitrust enforcement action seeking to prevent an acquisition, the Court expressly rejected the argument that, to rebut the presumption of anticompetitive effect that flows from “a showing that a transaction will lead to undue concentration in the market,” the defendant must make a “clear showing that entry into the market by competitors would be quick and effective.” *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990). The court rejected that characterization of defendant’s rebuttal burden because, among other things, “by stating that the defendant can rebut a prima facie case only by a clear showing, the standard in effect shifts the government’s ultimate burden of persuasion to the defendant.” *Id.* at 989-91.

Thus, Your Honor should reject Complaint Counsel’s request that you hold Rambus to the very difficult standard of rebutting the rebuttable adverse inferences by clear and convincing evidence and, instead, consistent with the authority cited above and with Fed. R. Evid. 301, allow Rambus to rebut the adverse inferences, if it can, by presenting evidence sufficient to support a finding of the nonexistence of the presumed fact.

#### IV. CONCLUSION

The Motion, however denominated, obviously is a motion for reconsideration of Judge Timony's Order Re Default Judgment. However, it fails to satisfy the criteria, set forth in Your Honor's March 26, 2003 Order, under which reconsideration will be entertained. On this ground alone, the Motion should be denied.

If addressed on its "merits," the Motion also should be denied because the facts do not support the relief sought, because there is no nexus between the inferences Complaint Counsel seek and the documents not preserved, and because it would be contrary to federal law to require Rambus to overcome rebuttable adverse inferences, or rebuttable adverse presumptions, by clear and convincing evidence.

DATED: April \_\_, 2003 Respectfully submitted,

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Gregory P. Stone  
Steven M. Perry  
Sean P. Gates  
Peter A. Detre  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue, 35<sup>th</sup> Floor  
Los Angeles, California 90071  
(213) 683-9100  
(213) 687-3702 (facsimile)

A. Douglas Melamed  
Jay Palansky  
Kenneth A. Bamberger  
Jacqueline M. Haberer  
WILMER, CUTLER & PICKERING  
2445 M Street, N.W.  
Washington, D.C. 20037  
(202) 663-6000

Sean C. Cunningham  
John M. Guaragna  
Gray, Cary, Ware & Freidenrich LLP  
401 "B" Street, Suite 2000  
San Diego, California 92101  
(619) 699-2700

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 April 10, 2003, I caused a true and correct copy of the public version of the *Opposition of Respondent Rambus Inc. to Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief Necessary to Remedy Rambus Inc.'s Intentional Spoliation of Evidence* to be served on the following persons by hand delivery:

Hon. Stephen J. McGuire  
Administrative Law Judge  
Federal Trade Commission  
Room H-112  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Donald S. Clark, Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Richard B. Dagen, Esq.  
Assistant Director  
Bureau of Competition  
Federal Trade Commission  
Room H-372  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

M. Sean Royall, Esq.  
Deputy Director, Bureau of Competition  
Federal Trade Commission  
Room H-372  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Malcolm L. Catt, Esq.  
Attorney  
Federal Trade Commission  
Room H-372  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

\_\_\_\_\_  
Jacqueline M. Haberer



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

**CERTIFICATION**

I, Jacqueline M. Haberer, hereby certify that the electronic copy of the public version of the *Opposition of Respondent Rambus Inc. to Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief Necessary to Remedy Rambus Inc.'s Intentional Spoliation of Evidence* accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on April 10, 2003 by other means:

**Jacqueline M. Haberer**  
**April 10, 2003**