

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

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

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

PUBLIC DOCUMENT

**RESPONSE OF COMPLAINT COUNSEL TO
THE COMMISSION'S ORDER REGARDING
DESIGNATION OF THE RECORD PERTAINING TO
SPOILIATION OF EVIDENCE BY RAMBUS**

Complaint Counsel submit this response to the Order of the Commission dated December 6, 2004. That Order was prompted by Complaint Counsel's July 2, 2004, motion seeking to compel production of and reopen the record to admit certain documents, disclosed by Rambus in the *Infineon* litigation but withheld in this proceeding, concerning the spoliation of evidence by Rambus. The Commission's Order questions whether the withheld documents may be cumulative of the record in these proceedings, and directs the parties to each file a detailed designation of the portions of the record below that it deems relevant to determining whether Rambus engaged in spoliation. Order at 3.

Complaint Counsel submit as Attachment A the detailed designation of the record in this proceeding regarding Rambus's spoliation of evidence, as directed by the Commission. As

further explication and designation of the record, Complaint Counsel also direct the Commission's attention to Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus's Willful, Bad-Faith Destruction of Material Evidence (filed below December 20, 2002), which discusses the evidence then known to Complaint Counsel and deemed relevant on the question of Rambus document spoliation.¹

Complaint Counsel also respond on several other matters pertinent to the Commission's Order. We inform the Commission of recent events in other pending litigation pertaining to the issue of Rambus document spoliation, including the recent revelation that Rambus conducted another "Shred Day" in December 2000 – complete with widespread collection of documents in burlap sacks to be destroyed by an industrial shredding company – in the midst of on-going discovery in the *Infineon* litigation and after Commission staff had begun its investigation of this matter. In addition, we address the ongoing relevance of the issue of spoliation in this proceeding, and the question of cumulativeness raised by the Commission's Order.

I. Since the Earlier Filings with the Commission on the Issue of Rambus Document Spoliation, There Have Been Events in Other Pending Litigation Relevant to this Issue and the Pending Motion.

As discussed in the pending motion, Complaint Counsel seek production of certain documents pertaining to the Rambus destruction of documents that have been produced to the

¹ This pretrial motion below was filed with copies of the relevant documents, as well as a compact disk containing copies of key documents and video clips of relevant deposition transcripts. Attachment B to this filing is a table providing exhibit numbers for those attachments to the motion that subsequently were used as trial exhibits. Complaint Counsel also submit herewith a compact disk containing video clips of portions of the deposition testimony of Rambus's outside counsel Lester Vincent, relevant to the issue of spoliation, that were admitted into evidence and played in open court in this matter, in the event the Commission wishes to view what was seen by the administrative law judge.

private litigants in the *Infineon* litigation but have not been produced to Complaint Counsel or the Commission in this case (the “Spoliation Documents”). Those documents were reviewed *in camera* by Judge Payne and led to the characterization of the Rambus conduct contained in Judge Payne’s rulings and discussed in the pending motion.

Recent events in the *Infineon* litigation provide some further elucidation of the scope and character of the documents withheld by Rambus. First, it appears that the number of relevant and withheld documents may be considerably greater than the 49 documents produced by Rambus to Infineon in September 2004 (but withheld from the Commission). In a telephone conference on November 19, 2004, Judge Payne ordered that approximately 280 additional documents relating to the Rambus document destruction, in possession of two law firms representing Rambus, be produced for *in camera* review by the Judge in a similar fashion to that conducted earlier. (See Attachment C). Complaint Counsel are not aware whether this process has been completed.

Second, recent filings and hearings in the *Infineon* litigation provide some further indication of the contents of the withheld documents, at least as viewed by parties in that case who (unlike Complaint Counsel or the Commission) have had a chance to review the documents. For example, on December 13, 2004, Infineon filed a Motion to Dismiss in that case based on grounds of document destruction and litigation misconduct by Rambus (Attachment D). As alternative relief, that motion seeks adverse inferences based on Rambus’s spoliation of evidence, tracking specific proposed inferences to specific destroyed documents that Infineon argues supports the proposed inferences. *Id.* at 55-58. However, the public version of that filing (the only version available to Complaint Counsel) redacts the specific document references

supporting particular proposed inferences.

In addition, recent hearings in the *Infineon* litigation suggest that the scope of the Rambus conduct in destroying documents may be even more extensive than previously suspected by Complaint Counsel. From the transcript of hearings held on December 3, 2004, in the *Infineon* litigation, it appears that Rambus may have engaged in continued destruction of documents after Commission staff began its investigation of this matter. These transcripts indicate that in December 2000, after it had sued Infineon for infringement and while the Commission staff's initial phase investigation was ongoing,² Rambus apparently held "Shred Day 2000."³ Although Complaint Counsel has no access to the confirming documents, it appears that Shred Day 2000 (like the similar events in 1998 and apparently 1999) involved wholesale, company-wide collection of massive volumes of documents in burlap sacks to be shredded by an industrial shredder, all without any instruction or oversight to ensure preservation of evidence relevant to Rambus's ongoing litigation or the Commission's investigation, and without any

² In August 2000, Rambus sued Infineon in Federal District Court for the Eastern District of Virginia, alleging patent infringement. In October 2000, Commission staff opened its investigation of Rambus. On December 26, 2000, the Commission approved compulsory process in this matter (Attachment E). On December 29, 2000, Commission staff informed Rambus of the investigation and instructed Rambus to preserve relevant documents (Attachment F), and in January 2001, Commission staff issued a subpoena to Rambus. (Attachment G).

³ Transcript of Conference, *Rambus Inc. v. Infineon Technologies AG*, Civil Action No. 3:00CV524 (E.D. Va. December 3, 2004) (hereinafter, "Conference Transcript;" Attachment H) at 10-11 ("We know now they shred millions of documents in 1999, and we know now that they did it again in December 2000 while this case was pending."); *see also id.* at 17, 25, 57 ("Now we have the documents that show it happened. We even have the shredding invoices that show how many burlap sacks were destroyed.").

record of what was destroyed.⁴ It appears that Rambus conducted Shred Day 2000 before Commission staff formally notified Rambus of the Commission's investigation; Complaint Counsel do not know whether Rambus may have learned of the investigation through industry sources before conducting Shred Day 2000.⁵

Finally, Complaint Counsel have become aware that the issue of Rambus document spoliation has become an issue in an additional pending litigation. In the ongoing litigation between Rambus and Hynix in the Northern District of California, Judge White conducted his own *in camera* review of the Spoliation Documents, and concluded that Hynix has established a *prima facie* case to compel production of these documents. Before compelling production, however, he ordered further briefing, giving Rambus the opportunity to rebut this *prima facie* showing.⁶

II. The Issue of Document Destruction Remains Highly Relevant to This Case.

The question of spoliation has, throughout this case, been highly relevant. As Judge Timony held below, the extensive document destruction engaged in by Rambus was, at a minimum, undertaken with "gross negligence concerning and reckless disregard of its

⁴ *Id.* at 53-54 ("In December of 2000, . . . Rambus again passes out burlap sacks to everybody in the company. . . . and there is a major office cleaning, and they destroyed documents. The shredding company comes. We have the shredding invoices. . . . [Rambus's 30(b)(6) witness testified] there was no express criteria except the document retention policy that Joel Karp had instituted.").

⁵ Two months later, in February 2001, Rambus submitted a White Paper to Commission Staff containing the misrepresentations set forth in Complaint Counsel's Reply Brief at 54-55.

⁶ Attachment I (Order, N.D. Cal., Dec. 17, 2004)

obligations to preserve documents relevant to litigation”⁷ – specifically, Rambus’s planned enforcement of its patents against users of the JEDEC standards. (The Spoliation Documents appear to confirm that Rambus’s destruction of documents was more than negligent – it was deliberate.) Based on Rambus’s “intentional destruction of documents that it knew or should have known were relevant to reasonably foreseeable litigation,” Judge Timony prior to trial below ordered that the following “rebuttable adverse presumptions” would exist for the remainder of the administrative proceedings:⁸

1. Rambus knew or should have known from its pre-1996 participation in JEDEC that developing JEDEC standards would require the use of patents held or applied for by Rambus;
2. Rambus never disclosed to other JEDEC participants the existence of these patents;
3. Rambus knew that its failure to disclose the existence of these patents to other JEDEC participants could serve to equitably estop Rambus from enforcing its patents as to other JEDEC participants;
4. Rambus knew or should have known from its participation in JEDEC that litigation over the enforcement of its patents was reasonably foreseeable;
5. Rambus provided inadequate guidance to its employees as to what documents should be retained and which documents should be purged as part of its corporate document retention program;
6. Rambus’s corporate document retention policy specifically failed to direct its employees to retain documents that could be relevant to any foreseeable litigation; and
7. Rambus’s corporate document retention program specifically failed to

⁷ Order on Complaint Counsel’s Motions for Default Judgment (February 26, 2003) at 8; *see also* Order Granting Complaint Counsel’s Motion for Collateral Estoppel (February 26, 2003) at 5.

⁸ *Id.* at 8-9.

require employees to create and maintain a log of the documents purged pursuant to the program.⁹

In his initial decision, Judge McGuire chose not to credit any of these presumptions as material to the disposition of the case.¹⁰ Judge McGuire did not, however, find that the adverse presumptions had been rebutted by record evidence. Rather, the reasoning was based on Judge McGuire's conclusions that the presumptions were "moot" or "not relevant to any material issues."¹¹

According to Judge McGuire, the first two presumptions (that Rambus knew that the developing JEDEC standards would require use of Rambus patents, and that Rambus failed to disclose the existence of its patents) were "moot" because Judge McGuire believed that the

⁹ Judge Timony also ruled that the following findings of fact made by the district court in *Rambus, Inc. v. Infineon Technologies AG* are binding on Rambus in this litigation:

- (1) When 'Rambus instituted its document retention policy in 1998,' it did so, 'in part, for the purpose of getting rid of documents that might be harmful in litigation.'
- (2) Rambus, at the time it implemented its 'document retention policy,' '[c]learly . . . contemplated that it might be bringing patent infringement suits during this timeframe' if its efforts to persuade semi-conductor manufacturers to license 'its JEDEC-related patents' 'were not successful.'
- (3) Rambus's 'document destruction' was done 'in anticipation of litigation.'

Order Granting Complaint Counsel's Motion for Collateral Estoppel (February 26, 2003) at 5. Rambus did not appeal this order or these findings in its cross-appeal, and thus these findings are binding on Rambus in this matter.

¹⁰ *Initial Decision* at 244.

¹¹ *Id.* at 244-245.

JEDEC disclosure requirements were merely “voluntary.”¹² His conclusion of mootness, therefore, rested in large part on his mistaken interpretation of Rambus’s obligations as a JEDEC participant, which as discussed at length in Complaint Counsel’s merits briefs is one of the most fundamental issues presented in this case. To the extent Commissioners may disagree with Judge McGuire’s interpretation of Rambus’s obligations pursuant to JEDEC’s purpose, policies and rules, then Rambus’s knowledge that its patents pertained to JEDEC work and its failure to disclose them would be directly relevant. Thus, the application of these adverse presumptions remains centrally involved in the resolution of this appeal.

Judge McGuire summarily ignored the remaining presumptions on grounds, not that they had been rebutted by record evidence, but rather that they were “not relevant to any material issues.”¹³ As noted above, the presumptions that Judge McGuire considered irrelevant stated, among other things, that Rambus failed to provide adequate guidance to its employees concerning what documents were to be retained or purged, failed to direct employees to retain documents that might be relevant to foreseeable litigation, and failed to direct employees to maintain any log of the documents that were purged. It is baffling how these matters could be considered irrelevant; indeed, Judge McGuire’s “silly” finding¹⁴ that “there is no indication that

¹² *Id.* at 245. As to the second presumption, concerning Rambus’s failure to disclose the existence of its patents to JEDEC, Judge McGuire concluded not only that the issue was moot but also that Rambus, while not actually disclosing its patent interests, had raised “red flags” concerning potential patent enforcement, a factual conclusion that is fundamentally in dispute before the Commission. *Id.* Application of the adverse presumption is relevant to the resolution of this disputed issue.

¹³ *Id.* at 245.

¹⁴ That’s “really kind of a silly finding, isn’t it?” Oral Argument, Second Session (December 9, 2004) (“Oral Argument”) at 159 (question of Commissioner Leary).

any documents, relevant and material to the issues in this case, were destroyed” in Rambus’s spoliation of evidence¹⁵ is flatly contradicted by the simple fact that nobody can say for certain today what was destroyed. Yet at oral argument, Rambus counsel continued to argue that the Rambus document destruction program did not destroy any documents pertaining to the scope of Rambus’s claims and their relationship to JEDEC’s work, the motivation for its conduct, or the evaluation of alternative technologies.¹⁶ These issues are of course at the heart of the merits of this case, and could well have been illuminated by documents from Rambus files that no longer exist.

In short, in light of the rebuttable presumptions established by Judge Timony, the continuing representations by Rambus counsel about the contents of the missing documents, and crucial disputed fact issues pertaining to Rambus’s knowledge and intent, the question of Rambus’s document spoliation continues to be highly relevant in this case. Whether or not the Commission chooses to order production of the Spoliation Doc, the Commission necessarily must consider whether and what inferences to apply in its weighing of the record evidence here in light of the conduct of Rambus in destroying documents.

III. Not Having Seen the Spoliation Documents, Complaint Counsel Cannot Say Whether They Are Cumulative.

The Commission’s Order states that the documents produced by Rambus in the *Infineon* case but withheld here “appear to address only the process by which Rambus developed and implemented its document retention program” and not the content of the destroyed documents,

¹⁵ *Initial Decision* at 244.

¹⁶ Oral Argument at 161.

and may be cumulative of the record below on the issue of spoliation. Order at 2. Complaint Counsel respectfully disagree with the first assessment. Without first reviewing the Spoliation Documents, there is no basis to conclude that they shed no light on the content of the destroyed documents. With respect to whether the Spoliation Documents are cumulative, Complaint Counsel cannot advance any informed view because Complaint Counsel have not had the opportunity to review them, nor do Complaint Counsel know how the Commission will interpret the existing record evidence on spoliation. However, it is clear that on both the issues of the process and purpose of the Rambus document destruction and the content of the destroyed documents, there continues to be material dispute between the parties, and Complaint Counsel believe that production of the Spoliation Documents would likely assist the Commission in resolving these issues.

A. The Spoliation Documents Do Not Appear Cumulative Regarding the Fact of Spoliation, Since Rambus’s Process and Purpose in Destroying Documents Remains In Dispute.

Complaint Counsel has not seen the Spoliation Documents, and thus cannot say for certain what those documents establish with respect to Rambus’s purposes in planning and implementing its “document retention policy.” The best information that Complaint Counsel has to the contents of the Spoliation Documents is reflected in the findings reached by Judge Payne in the *Infineon* litigation, based on his review of the withheld *Infineon* documents. Judge Payne concluded:

- Rambus’s document policy was set up for an impermissible purpose – the destruction of relevant, discoverable documents at a time when Rambus anticipated initiating litigation to enforce its patent rights against already

identified adversaries.¹⁷

- Advice regarding the adoption and implementation of the document policy was specifically linked with Rambus’s patent licensing and litigation strategy.¹⁸ Rambus’s document policy was an integral part of Rambus’s patent litigation strategy and was part and parcel of that strategy.¹⁹

¹⁷ Memorandum Opinion (Payne, J.), *Rambus Inc. v. Infineon Technologies AG*, Civil Action No. 3:00cv524 (E.D. Va. May 18, 2004) (Crime-Fraud Opinion) at 48. (A copy of the Crime-Fraud Opinion is attached to Complaint Counsel’s Reply Brief as Attachment A.)

¹⁸ Crime-Fraud Opinion at 44.

¹⁹ Crime-Fraud Opinion at 43, 45; Memorandum Opinion (Payne, J.), *Rambus Inc. v. Infineon Technologies AG*, Civil Action No. 3:00cv524 (E.D. Va. May 18, 2004) (Waiver Opinion) at 18. (A copy of the Waiver Opinion is attached to Complaint Counsel’s Reply Brief as Attachment B.)

This finding is particularly important because Rambus’s “patent licensing and litigation strategy” included consideration of the risks posed by equitable estoppel and antitrust liability arising out of Rambus’s conduct at JEDEC and the Commission’s *Dell* decision. *See, e.g.*, CX 1941 at 1 (Vincent: “JEDEC – said need preplanning before accuse others of infringement . . . – Advising JEDEC of patent application”) (emphasis in original); CX1942 (Vincent: “I said there could be equitable estoppel problem if Rambus creates impression on JEDEC that it would not enforce its patent or patent appln”); CX0711 at 16 (Crisp: “Micron says the [JEDEC disclosure] policy exists due to anti-trust concerns.”); CX1958 at 12 (presentation from Vincent: “Two possible theories for non-enforcement [of a patent involved in an industry standard]: 1) Estoppel? 2) Antitrust?”); CX0837 at 1 (Crisp: “The only thing lost [pursuant to equitable estoppel] is the ability to enforce our rights against those that can prove estoppel applies . . . We do not have our patent invalidated.”); CX0858 at 2 (Crisp: “I understand the concerns about the [JEDEC] patent policy and some potential exposure we could have [due to equitable estoppel and laches] in the event of future litigation.”); CX1990 (Vincent: “the Federal Trade Commission charged that Dell restricted competition in the personal computer industry and undermined the standard-setting process by threatening to exercise undisclosed patent rights against computer companies adopting the VL-Bus standard.”); CX1928 (Vincent: “No further participation in any standards body . . . – do not even get close!!”) (emphasis in original); CX0868 (Crisp: “I think we should have a long hard look at our IP and if there is a problem, I believe we should tell JEDEC that there is a problem. Other opinions?”); CX2965 at 2 (Karp: “It is contrary to industry practice and understanding for an intellectual property owner to remain silent during the standard-setting process – and then after a standard has been adopted and implemented – later attempt to assert that its intellectual property covers the standard . . .”); Tr. 6216-19 (Diepenbrock: Rambus’s participation in JEDEC led to risk that some of Rambus’s patents could be rendered unenforceable pursuant to equitable estoppel); CX3124 at 190-194,

- Rambus conceived of the document policy as necessary because the company was planning to embark on patent litigation against DRAM manufacturers.²⁰
- Rambus selectively extracted part of a management presentation (as to which Rambus asserts privilege) and attached it to the affidavit of Mr. Joel Karp in this case, in an effort to convince the ALJ in this matter that Rambus’s policy was not directed toward destroying documents that would be discoverable during litigation.²¹

The Spoliation Documents might be cumulative with respect to this issue of the purpose of Rambus’s destruction of evidence if Rambus were to stipulate to these findings. This appears unlikely, however. As recently as the December 9 oral argument before the Commission, counsel for Rambus continued to try to portray the process and purpose of the Rambus document “retention” program as essentially innocuous. The program, said Rambus counsel, was undertaken on advice of counsel, was intended simply to dispose of things that were “not important to keep,” and was motivated by a desire to reduce the burden of reviewing “unimportant or irrelevant documents” when complying with subpoenas.²² If the Commission were to entertain Rambus’s argument,²³ the Spoliation Documents appear to be directly relevant to a contested issue.

196-198 (Vincent: he informed Crisp and others that, pursuant to equitable estoppel and the *Dell* order, Rambus’s participation in JEDEC could lead to its patents being held unenforceable).

²⁰ Waiver Opinion at 18.

²¹ Waiver Opinion at 8.

²² Oral Argument at 158-59.

²³ The Commission should disregard Rambus’s argument because factual findings to the contrary have already been conclusively entered in this matter and Rambus did not appeal those findings. Order Granting Complaint Counsel’s Motion for Collateral Estoppel (February 26, 2003) at 5.

The Spoliation Documents might nevertheless be cumulative with respect to the issue of Rambus's motivations if the Commission were to conclude, on the basis of the record already developed in this proceeding, that the process and purpose of the Rambus document program was as characterized by Judge Payne.²⁴ See Attachment A, Sections 1, 2 and 3 for a list of that evidence.²⁵ If the Commission is not prepared to enter Judge Payne's findings in this matter on the basis of the record evidence, however, the Spoliation Documents cannot be considered cumulative.

²⁴ Judge Payne's findings are consistent with those entered in this matter by Judge Timony. Judge Timony noted that the implementation of the Rambus document program was begun through presentations to Rambus employees by Rambus Vice-President Joel Karp, who had responsibility for preparation and strategy for Rambus patent enforcement; that the program gave little guidance to employees about what documents they should keep and what they should purge; that no instruction was given to Rambus employees to retain documents relevant to future litigation; and that employees were not instructed to create and retain an inventory of the documents purged. Order on Complaint Counsel's Motions for Default Judgment (Feb. 26, 2003) at 3-4. Judge Timony's ruling gave Rambus the opportunity to rebut the adverse presumptions on these issues at trial, but as noted above Judge McGuire did not find that these presumptions had been rebutted by Rambus. Judge Payne's findings, based on his review of the Spoliation Documents, went beyond those of Judge Timony in one critical area. Judge Timony found that the evidence before him did not establish that Rambus's document retention policy was a "sham", but instead found that Rambus acted with "gross negligence concerning and reckless disregard of its obligations to preserve documents relevant to possible litigation." Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument (entered below February 26, 2003) at 8. In contrast, Judge Payne found, on the basis of the Spoliation Documents that have been withheld in this matter, that Rambus acted intentionally and strategically, as "part and parcel of its litigation strategy." Crime-Fraud Opinion at 43-45, 48; Waiver Opinion at 18.

²⁵ See also Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus's Willful, Bad-Faith Destruction of Material Evidence (filed on December 20, 2002); Memorandum by Rambus Inc. In Opposition to Complaint Counsel's Motion for Default Judgment (January 13, 2003); Complaint Counsel's Corrected Reply to Rambus Inc.'s Memorandum in Opposition to Motion for Default Judgment (January 27, 2003); Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument (February 26, 2003); Order Granting Complaint Counsel's Motion for Collateral Estoppel (February 26, 2003).

B. The Spoliation Documents Do Not Appear To Be Cumulative Regarding the Content of the Destroyed Documents, Which Is Largely Unknown.

Again, because Rambus has refused to give Complaint Counsel access to the Spoliation Documents, it is impossible for Complaint Counsel to say whether those documents are cumulative regarding the substance of the evidence that was destroyed. Judge Payne’s review of the Spoliation Documents, however, indicate that the Spoliation Documents may relate to more than simply the process by which the policy was developed and implemented.²⁶ Judge Payne found that:

- Rambus’s spoliation of evidence was voluminous and was on an enormous scale, sweeping up and purging millions of documents under the control of Rambus, both at its own facilities and in the offices of its retained outside patent counsel;²⁷
- In addition to Shred Day 1998, Rambus also conducted Shred Days in 1999 and 2000;²⁸
- The destroyed documents include many of the kinds of documents usually generated in the course of business that contain information that is useful in ascertaining truth and in testing the validity of positions taken in litigation;²⁹
- The destroyed documents included many kinds of documents with potential relevance to this case, including e-mail communications, notes of license negotiations, contract drafts, documents about activities at JEDEC, reverse

²⁶ See generally Crime-Fraud Opinion at 33-35.

²⁷ Crime-Fraud Opinion at 43.

²⁸ Crime-Fraud Opinion at 15, 34-35. See also CX1051; CX1052; Oral Argument at 163 (according to Rambus counsel, in 1998 Rambus destroyed documents amounting to the equivalent of “two very full trash cans per employee per month”); Conference Transcript (Attachment F) at 10-11, 17, 25, 53-54, 57.

²⁹ Crime-Fraud Opinion at 46.

engineering documents, claim charts, and other infringement-related documents.³⁰

Rambus argues that these findings were largely based on documents already in evidence in this matter. Complaint Counsel acknowledge that there is sufficient evidence in this record to support almost all of these findings. See Attachment A, Section 4. Complaint Counsel expect that the Spoliation Documents might contain additional evidence, however, that would further detail the extent of Rambus's document destruction and further support these findings. In particular, it appears that the Spoliation Documents contain evidence regarding Shred Day 1999 and Shred Day 2000 that is not contained in the current record. Crime-Fraud Opinion at 15, 31-32; Conference Transcript (Attachment H) at 10-11, 17 (Rambus shredded millions of pages of documents in 2000), 53-54, 57 (documents collected in burlap sacks; shredding company retained to destroy documents).

Again, the Spoliation Documents might be cumulative if Rambus were to stipulate to the entry of Judge Payne's findings in this matter, the application of Judge Timony's presumptions, and the application of appropriate additional presumptions. See Memorandum in Support of Infineon's Motion to Dismiss (Attachment D) at 55-58 (setting forth appropriate presumptions based on contents of the Spoliation Documents). The Spoliation Documents might also be cumulative if the Commission were to find that the record evidence supports entry of Judge Payne's findings in this matter, the reimposition of Judge Timony's presumptions, and the application of additional appropriate presumptions. See Attachment A, Section 4.

Rambus continues to contest these issues, however. At oral argument, counsel for

³⁰ *Id.* at 46.

Rambus argued that there is no evidence that any relevant documents are actually missing. Oral Argument at 159, 161. This is simply untrue.

For example, all but one-and-a-half lines of what potentially might have been one of the most important documents in this case has disappeared. In 1993, Rambus expected that JEDEC might propose to use on-chip PLL/DLL technology, and Richard Crisp and Vice President Allen Roberts worked with patent counsel Lester Vincent to file a patent application to cover an SDRAM using this technology. In September 1994, Richard Crisp urgently reported to his management that NEC had proposed that JEDEC use on-chip PLLs in the next-generation standard. CX0711 at 36. He concluded by asking, “What is the exact status of the patent with the PLL claim?” CX0711 at 37. What did Vice President Roberts say in response? A surviving fragment of his e-mail tells us that he wrote about plans to enforce Rambus’s expected patent against future generation SDRAMs and the likelihood of litigation if they were to do so. CX0757 at 1 (Roberts: “So if we want to fight this one (after the claim is issued), we better stock up our legal warchest.”). What else did he say? Did the missing e-mail contain a discussion of the risk of equitable estoppel? Did it discuss Rambus’s understanding of JEDEC’s patent policy, Rambus’s obligations to disclose to JEDEC, or the availability of alternative technologies should Rambus disclose? We’ll never know.³¹

Counsel for Rambus also assert that all of the expected types of documents exist,

³¹ Rambus has produced very few e-mails from Vice President Roberts. Multiple e-mails sent by Roberts survive, in whole or in part, only as fragments of embedded text in e-mails written by Richard Crisp or others. CX0757; CX0763; CX0764; CX0765; CX0770; CX0835. We’ll never know whether those embedded fragments are complete, or what other Roberts e-mails have disappeared entirely.

“including all of Richard Crisp's e-mails from all the meetings that he attended at JEDEC.”³²

Again, this is simply not correct. In fact, we are missing reports from Richard Crisp and Billy Garrett (Rambus's alternate representative at JEDEC) from three of the most important JEDEC meetings:³³

1. July 1992.³⁴ This meeting (attended by Richard Crisp and Vice President David Mooring) was the first after Richard Crisp spoke directly to Lester Vincent about adding claims to Rambus's pending patent applications regarding programmable CAS latency and burst length.³⁵ It was also the first JEDEC meeting after Rambus CEO Geoff Tate's draft business plan, which stated, “we believe that Sync DRAMs infringe on some claims in our filed patents; and that there are additional claims we can file for our patents that cover features of Sync DRAMs. Then we will be in position to request patent licenses (fees and royalties). . . .”³⁶ At this meeting, JEDEC voted to adopt programmable CAS latency and burst length. When asked to explain Rambus's no vote, Richard Crisp gave an unpersuasive technical explanation, but never disclosed Rambus's patent position.³⁷
2. December 1992.³⁸ At this meeting (attended by Richard Crisp and Vice President David Mooring), Chairman Townsend showed and described the language being

³² Oral Argument at 160-61 (“[Those Crisp e-mails] are there. You can look at the dates on which there were meetings and you can look at the dates on which he wrote e-mails and you can find the correspondence between those two.”)

³³ Crisp's regular practice was to prepare such reports for his management. *See, e.g.*, Tr. 3139 (Crisp).

³⁴ *See* JX0013 (Minutes of JEDEC 42.3 Meeting (7/21/1992)).

³⁵ CX1947 (Vincent: “Richard has claims for cases we have filed plus claims for divisionals.”); *see also* CX1946 (Vincent: “Richard Crisp wants to add claims to original application . . . to control latency output timing . . . check whether original application has blocks (?”).

³⁶ *See* CX0543A at 17.

³⁷ JX0013 at 9-11.

³⁸ *See* JX0014 (Minutes of JEDEC 42.3 Meeting (12/9/1992)).

added to the JEDEC Manual (issued in 1993 as the 21-I Manual) including the statement, “the obligation of all participants to inform the Committee of any knowledge they may have of any patents, or pending patents, that might be involved in the work they are undertaking.”³⁹ This was also the meeting at which Gordon Kelley of IBM stated his concern that certain “offenders” had not disclosed pending patents on a timely basis.⁴⁰

3. March 1993:⁴¹ At this meeting (attended by Billy Garrett), the JEDEC JC-42.3 Subcommittee adopted the package of features that made up the SDRAM standard and forwarded the package to the JEDEC Council for final approval. This was the final JEDEC meeting before Lester Vincent completed and filed the amendment to Rambus’s pending ‘651 application, which was intended to cover programmable CAS latency as adopted by JEDEC.

Crisp’s and Garrett’s reports regarding these meetings could have provided evidence regarding Rambus’s understanding of JEDEC’s patent disclosure policy, whether Rambus considered making any patent disclosure, Rambus’s understanding of potential alternative technologies for programmable CAS latency and programmable burst length, Rambus’s expectation of what JEDEC would have done had Rambus made a patent disclosure, and Rambus’s intentions to sue firms producing JEDEC-compliant products, among other issues, as well as the reasons why Rambus decided not to make any patent disclosure to JEDEC.⁴²

Other regularly-prepared documents are also missing. For example, Rambus has never

³⁹ *Id.* at 3, 25.

⁴⁰ *See* CX0685 (e-mail from David Mooring to Farmwald, Tate, Roberts, Crisp and others (12/11/1992)).

⁴¹ JX0015 (Minutes of JEDEC 42.3 Meeting (3/3-4/1993)).

⁴² Additionally, we do not have any of the meeting notes of John Dillon, Rambus’s representative at the JEDEC JC-15 Committee. *See* CX0602 at 5. John Dillon is the engineer who first suggested amending Rambus’s pending patent applications to cover auto-precharge because of its “high harassment value” with respect to manufacturers of SDRAM controllers. CX0738.

produced correspondence between Rambus and outside patent counsel Lester Vincent regarding the amendments to the '961 and '490 patent applications covering programmable CAS latency and (in the case of the '961) programmable burst length.⁴³

Counsel for Rambus admits that we have no way of knowing what “one-off” documents might have been destroyed (Oral Argument at 161), but nevertheless insists that nothing is missing. Of course, neither Complaint Counsel, nor the Commission, nor even Rambus, has any way of knowing what “one-off” documents are missing.⁴⁴ Yet there are strong indications that

⁴³ Rambus has argued that Complaint Counsel has failed to prove that Richard Crisp had “actual knowledge” of the specific claims contained in Rambus’s pending patent applications. *See* Brief of Appellee and Cross-Appellant Rambus Inc. at 25. But Complaint Counsel has demonstrated that Lester Vincent sent Richard Crisp copies of the amendments to the '651 and '692 applications (on both of which Crisp had been involved). CX1957 (attaching draft amendments to the '961, which were subsequently transferred and filed on the '651); CX1961. Since Crisp was the individual who first suggested amending patent applications to cover programmable CAS latency and burst length, Vincent most likely sent copies of the '961 and '490 applications to Crisp as well. In light of its document destruction, Rambus shouldn’t be permitted to hide behind the absence of correspondence relating to the amendments to the '961 and '490 applications and argue that there has been a failure of proof.

⁴⁴ Indeed, Rambus showed in the *Infineon* litigation that it is incapable of reliably representing that no relevant documents are missing. In that litigation, Rambus represented to Infineon (and implicitly the District Court) that it had produced all relevant documents that it had. Rambus later discovered a substantial quantity of highly relevant documents – including some of the most important documents in this case – that it had failed to produce. Rambus claimed that it was unaware of the existence of these documents until they were inadvertently discovered on a server. These documents – the existence of which Infineon, the District Court, the Federal Circuit, and purportedly even Rambus did not suspect – included such central documents as:

CX0686 (Crisp e-mail regarding adding claims covering programmable CAS latency and on-chip PLL/DLL);

CX0738 (Dillon: “high harassment value” of adding patent claims covering auto-precharge on SDRAMs);

CX0757 at 1 (Roberts: “So if we want to fight this one (after the claim [covering PLL on

a DRAM] is issued), we better stock up our legal warchest.”);

CX0757 at 1 (Crisp: “It seems likely we will have to fight litigation at some point in the future [in areas such as on-chip PLL and programmable CAS latency]. . . . I think it is very important to go after one we are certain we can win first.”);

CX0763 (Crisp: “I would hope we would sue other companies [for using on-chip PLL]”);

CX0783 (Crisp: “I certainly do not want to bring this intellectual property issue up without careful consideration. I especially do not want it all over JEDEC.”);

CX0835 (Crisp: “Let the IP war begin”);

CX0837 at 1 (Crisp: “regarding Tony’s worst case scenario regarding [equitable] estoppel: The only thing lost is the ability to enforce our rights against those that can prove estoppel applies.”);

CX0858 at 2 (Crisp: “I understand the concerns about the [JEDEC] patent policy and some potential exposure we could have in the event of a future litigation.”);

CX0867 (Tate: “prepare the minefield”);

CX0868 (Crisp: “I think we should have a long hard look at our IP and if there is a problem, I believe we should tell JEDEC that there is a problem. Other opinions?”).

CX0899 at 1 (Crisp: depending on how SyncLink uses dual-edge clocking, “they may get into trouble with our ‘327 patent”);

CX0903 at 2 (Crisp: “Open standards seem at odds with [Rambus’s] business model”; “The job of JEDEC is to create standards which steer clear of patents which must be used to be in compliance with the standard whenever possible.”); and

CX1084 (Crisp: “ddr meaning . . . Doubled DRAM Royalties (for Rambus)”).

See Affidavit of Avery W. Gardiner (2/19/03) and Affidavit of Karma M. Giulianelli (2/20/03), (originally filed with Memorandum In Support of Complaint Counsel’s Motion to Compel an Additional Day of Deposition Testimony of Richard Crisp (2/21/03)).

Indeed, in the height of irony, among Rambus’s forgotten documents were those describing “Shred Day 1998,” which included the following:

many such “one-off” documents have been destroyed. As one example, in October 1992, Richard Crisp reported to Rambus’s Board of Directors regarding “the SDRAM status at JEDEC [and] the Rambus patent strategy.” CX0606 at 2. No copy of this presentation or any other documents relating to this presentation have ever surfaced. Documents relating to this presentation could have revealed Rambus’s understanding of the patent disclosure policy at JEDEC, Rambus’s evaluation of the feasibility of alternatives to the technologies in the JEDEC standard, Rambus’s understanding of what would have happened at JEDEC had Rambus disclosed its IP, Rambus’s patent licensing and litigation strategy, and the reasons why Rambus elected not to disclose its patent applications to JEDEC.⁴⁵

Again, Complaint Counsel is not in position to know whether the Spoliation Documents

CX1051 (Larson: “Thursday is Shred Day 1998. . . . The shredding service will be here Thursday AM to begin the process.”);

CX1052 (Karp: “It took about 5 hours to completely fill the shredding truck (capacity is 20,000 lbs). . . . They feel they can finish the job tomorrow.”);

CX1079 (Crisp: “Hopefully someone here has [a DDR datasheet from 1996 or 1997] that hasn’t fallen victim to the document retention policy :-)”).

In short, Rambus was supposedly unaware of these important surviving documents when it incorrectly assured Infineon that all relevant documents had been produced. How can the Commission rely now on Rambus’s assurance today that we have all relevant documents when Rambus itself has no idea of what documents have been destroyed?

⁴⁵ We will never know whether other one-off documents were created. For example, any analysis by Lester Vincent of the coverage of Rambus’s patent applications has been lost. Similarly, in February 1996, after Rambus was informed of the Commission’s proposed consent in the *Dell* matter, Richard Crisp suddenly became far more concerned about informing JEDEC of Rambus’s relevant patent applications. He circulated a Micron clocking proposal, and wrote, “I think we should have a long hard look at our IP and if there is a problem, I believe we should tell JEDEC that there is a problem. Other opinions?” CX0868. We know that Rambus did not disclose. Did anybody write back with “other opinions,” and overrule Crisp? We’ll never know.

are cumulative or whether they would shed further light on what documents have been destroyed. Complaint Counsel has listed in Attachment A the record evidence relating to Rambus's spoliation of evidence. Complaint Counsel respectfully submit that, at a minimum, the Commission can find that the Spoliation Documents are cumulative only if it rejects Rambus's self-serving arguments that nothing is missing, and instead concurs with the views of Judges Timony and Payne that Rambus engaged in reckless or intentional spoliation of evidence as part of its litigation strategy for asserting its patents against the JEDEC standards. If the Commission chooses to apply appropriate adverse inferences against Rambus on the basis of the record evidence of spoliation, then it may indeed be cumulative to make further inquiry about what documents in fact have been destroyed.

IV. Conclusion.

As the ultimate trier of fact it is the Commission, not Complaint Counsel, that is in the position to best determine whether the Spoliation Documents withheld by Rambus and sought by Complaint Counsel are unnecessarily cumulative of the record already developed in this case. There can be little doubt, however, that the process and purpose of the Rambus document destruction remains in dispute despite the record developed below, or that documents relevant to crucial issues in this case no longer exist because of the Rambus document destruction.

As requested by the pending Complaint Counsel motion, the Commission can choose to require production of the Spoliation Documents for whatever additional illumination they may provide concerning the destruction process or the content of the documents destroyed. Alternatively, the Commission could choose to forego production of the Spoliation Documents, reinstate Judge Timony's presumptions, and apply whatever additional inferences it deems

appropriate when assessing the numerous fact issues implicated by the destruction of more than 20,000 pounds of documents from Rambus's files. Whatever choice the Commission makes, however, there can be little doubt that the fact of Rambus's extensive document destruction is important and crucially relevant to issues at the core of this case.

Respectfully submitted,

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Counsel Supporting the Complaint

Date: December 22, 2004

CERTIFICATE OF SERVICE

I, Brian P. Beall, hereby certify that on December 22, 2004, I caused a copy of the attached, *Response of Complaint Counsel to the Commission's Order Regarding Designation of the Record Pertaining to Spoliation of Evidence by Rambus*, to be served upon the following persons:

by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
via Office of the Secretary, Room H-159
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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