

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

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

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

PUBLIC

**COMPLAINT COUNSELS' REPLIES TO RAMBUS'S AMENDED PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW IN RESPONSE TO THE
COMMISSION'S JULY 20, 2005 ORDER**

I. INTRODUCTION

Complaint Counsel files these Reply Findings in response to Rambus's Amended Proposed Findings of Fact filed August 10, 2005. Attachment A to these Reply Findings is Rambus's privilege log describing documents not produced to Complaint Counsel in this case.

Rambus's headings and numbered proposed findings are reproduced, single-spaced. Following each of Rambus's numbered proposed findings is Complaint Counsels' response, double-spaced. These Reply Findings use the forms of citation set forth in Complaint Counsels'

Supplemental Proposed Findings of Fact filed August 10.¹ In addition, the following forms of citation are used:

- Complaint Counsels' Proposed Supplemental Findings of Fact are cited as follows: (CCSF 50) or (CCSF 143-145).
- Complaint Counsels' Responses to Rambus's Amended Proposed Findings of Fact are cited as follows: (CCRF 1619) or (CCRF 1620-1625).

II. RAMBUS'S AMENDED PROPOSED FINDINGS OF FACT

A. Rambus Adopted A Document Retention Policy Based On The Advice Of Counsel.

1619. In January 1998, Rambus began to meet with attorneys at the law firm of Cooley Godward to discuss issues relating to patent licensing. At their first meeting on February 12, 2004, Cooley Godward partner Dan Johnson advised Rambus to adopt a document retention policy; RX 2521 (DTX 9023) at 11:24-12:1 (Johnson 11/23/04 *Infineon* Dep.) (“So I can - I can tell you that at the first meeting, I advised Mr. Karp that Rambus needed a document retention policy”); RX 2500 (DTX 3681) at 1 (Mr. Karp's notes from February 12, 1998 meeting with lawyers from Cooley Godward) (“need company policy on document retention policy”); CX 5069 (DTX 9009) at 376:4-23 (Karp 10/8/04 *Infineon* Dep.) (“the outside counsel was suggesting [a document retention policy] from the very first time I met with them”).

Response to Finding No. 1619: This proposed finding is incomplete. Rambus, through Joel Karp, met with Mr. Johnson as a result of his request to Cooley Godwin attorney Diane Savage for “litigation assistance.” CCSF 79. In the “LICENSING/LITIGATION STRATEGY” meeting held on February 12, 1998, Mr. Karp and litigation counsel reached the conclusion that “[r]oyalty rates will probably push us into litigation quickly” against the DRAM manufacturers for infringement of its patents covering the JEDEC standards. CCSF 9-10. Also

¹ Complaint Counsels' proposed findings and reply findings submitted to the Administrative Law Judge below are referred to respectively as “CCFF” and “CCRF.” References to the evidence admitted by the Commission pursuant to its June 20, 2005, Order (the “Supplemental Evidence”) are by exhibit number and prefix as designated by Complaint Counsel and Rambus in the submissions preceding the Commission's June 20 Order.

in that meeting, Mr. Johnson told Mr. Karp that Rambus needs to “litigate against someone to establish royalty rate and have court declare patent valid.” CCSF 16. Therefore, they planned to have Rambus initiate litigation against its selected targets, based on carefully prepared legal claims. Mr. Johnson and Mr. Karp planned Rambus’s litigation strategies, including legal theories and its strategies for selecting expert witnesses for the anticipated litigation. CCSF 13. In that meeting, Mr. Johnson and Mr. Karp also identified likely litigation targets, including Micron, Fujitsu, Samsung and Hyundai. CCSF 18. Mr. Johnson told Mr. Karp that they needed a document retention policy in order for Rambus to make itself “battle ready” for this upcoming litigation. CCSF 12.

Rambus withheld the document memorializing this meeting as attorney work product prepared in anticipation of litigation. CX1804 at 23 (Rambus privilege log item 320).

1620. Mr. Johnson is a highly accomplished and respected member of the legal community. RX 2522; RX 2523 (PTX 9525) at 196:7-197:16 (Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson also has extensive knowledge about the legal requirements for document retention policies. He has advised between 20 and 30 companies about such policies and has lectured about document retention policies and electronic discovery at ABA and PLI seminars. *Id.* at 204:1-7; RX 2521 (DTX 9023) at 35:13-15 (Johnson 11/23/04 *Infineon* Dep.).

Response to Finding No. 1620: This proposed finding is incomplete. Mr. Johnson did not implement Rambus’s document retention program, Mr. Karp implemented the program. CCSF 93-95. Mr. Karp refused Mr. Johnson’s offer to help implement Rambus’s document retention program. CCSF 96. Furthermore, Mr. Johnson made recommendations regarding a document retention policy without knowing any specifics about Rambus’s past conduct. In particular, Rambus failed to inform Mr. Johnson that Rambus’s anticipated litigation

was unlikely to consist solely of routine patent infringement analysis, which would involve primarily a comparison of patent claims against an allegedly infringing product, but was also likely to involve allegations of inequitable and anticompetitive conduct at JEDEC, the resolution of which would implicate large volumes of Rambus’s business records and emails. CCSF 85-86 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”).

1621. Mr. Johnson testified that when he first met with Mr. Karp, he determined that Rambus “had no practice or policies that related to the gathering of documents, and storing these documents, and getting rid of documents that were simply accumulating over time.” RX 2521 (DTX 9023) at 34:9-17 (Johnson 11/23/04 *Infineon* Dep.). Johnson advised Karp that Rambus needed to address this situation by instituting a document retention policy. *Id.*

Response to Finding No. 1621: Complaint Counsel have no comment.

1622. Mr. Johnson testified that he advised Rambus to adopt a document retention policy for three principal reasons. First, Rambus needed to reduce paper document search costs in the event that Rambus was someday required to respond to subpoenas or document requests that might possibly be issued in connection with future lawsuits or investigations, including those in which Rambus was not a party. RX 2521 (DTX 9023) at 34:837:7 (Johnson 11/23/04 *Infineon* Dep.). Second, Mr. Johnson advised Rambus to adopt a document retention policy to reduce search costs for electronic documents in the same situation, particularly in light of the problems that arise from having to search obsolete or corrupted backup media. *Id.* Third, Mr. Johnson felt it would be useful for Rambus to have a company-wide standard for the retention and destruction of documents, because the absence of such a standard might be cited by a future litigant as evidence of spoliation. RX 2522; RX 2523 (PTX 9525) at 219:23-220:18 (Johnson 11/23/04 *Infineon* Dep.).

Response to Finding No. 1622: This proposed finding is misleading and incomplete. Mr. Johnson advised Rambus that it needed a document retention program as Rambus’s litigation counsel. CCRF 1619. The document retention policy was part of Rambus’s licensing and litigation strategy to make Rambus “battle ready” for its anticipated lawsuits

against the DRAM manufacturers. CCSF 9-18. Furthermore, Mr. Johnson never instructed Rambus that it was appropriate to destroy documents relevant to anticipated litigation. CCSF 92. Instead, Mr. Johnson made it clear to Rambus that they *could not* adopt a document retention policy in bad faith or use a document retention policy to destroy documents relevant to upcoming litigation. CCSF 90-92. Finally, Mr. Johnson made recommendations regarding a document retention policy without knowing that, in its planned patent litigation, Rambus would likely face the affirmative defense of equitable estoppel and allegations of antitrust violations based on its conduct at JEDEC. CCSF 85-86 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”).

Furthermore, this proposed finding is misleading to the extent it implies that Rambus adopted the policy due primarily to concerns other than concerns regarding the content of its files. For example, the instructions Mr. Karp gave to Mr. Vincent, to destroy specific categories of documents in his patent prosecution files, demonstrate that Rambus’s document retention policy was concerned with the content of the documents. CCF 1746-1747; CCSF 117, 128-133. In addition, the unguarded statement of Vice President Neil Steinberg regarding Infineon’s use of Rambus’s 1992 Business Plan confirms that Rambus implemented its document retention policy to resolve its concerns with the content of its files. CCSF 108 (“Once we get through our legal wrangling, I would like to implement the new document retention policy. As I have stated in the past, this new policy is similar to the previous policy – however, this time the IP group will attempt to execute the policy more effectively.”).

B. The Specific Terms Of Rambus’s Policy Were Recommended By Counsel.

1623. In March 1998, one of Mr. Johnson’s partners at Cooley Godward, Diane Savage, forwarded to Mr. Karp a detailed memorandum on the subject of document retention policies. RX 2502 (DTX 3676) (March 19, 1998 Memorandum Re: Document Retention Policy Guidance); CX 5068 (DTX 9008) at 25:1-33:8 (Savage 10/12/04 *Infineon Dep.*).

Response to Finding No. 1623: This proposed finding is incomplete and misleading. The memorandum that Ms. Savage sent to Mr. Karp was never intended to be Rambus’s document retention policy. CCSF 82. In particular, the memorandum sent by Ms. Savage was not intended to address any of Rambus’s specific litigation-oriented issues. CCSF 83 (“... I said this is a form memo, essentially, and he would have to design a customized document retention program that met [his] needs, and if [he had] specific litigation-oriented issues, the right person to contact is David Lisi.”). There is no evidence in the record that Mr. Karp contacted Mr. Lisi before designing its document retention policy.

1624. Mr. Karp drafted Rambus’s document retention policy based upon Ms. Savage’s legal memorandum, incorporating much of the Cooley Godward language *verbatim*. Compare RX 2502 (DTX 3676) (March 19, 1998 Memorandum re: Document Retention Policies Guidance) with RX 2503 (DTX 4028) (Rambus’s Document Retention Policy); CX 5069 (DTX 9009) at 422:4-18 (Karp 10/8/04 *Infineon Dep.*) (“I created [the policy] and pretty much word-for-word from what’s in [the legal memorandum]”).

Response to Finding No. 1624: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1623.

1625. With respect to electronic mail and documents, Cooley Godward advised Rambus to “remove email from the system servers on a periodic basis” and that “tape back ups of email should be destroyed on a periodic basis.” RX 2502 (DTX 3676) at 7 (March 19, 1998 Memorandum re: Document Retention Policy Guidance). The Cooley Godward lawyers also advised Rambus that “the Company and individual employees should be discouraged from archiving email,” and counsel recommended that “E-mail that needs to be saved should be

either: (a) printed in hard copy and kept in the appropriate file, or downloaded to a computer file and kept electronically or on disk as a separate file.” *Id.*

Response to Finding No. 1625: This proposed finding is incomplete and misleading. The Cooley Godward memorandum referred to in this proposed finding was not intended by Ms. Savage to be Rambus’s document retention policy. CCRF 1623; CX5068 at 4 (“... I said this is a form memo, essentially, and he would have to design a customized document retention policy that met your needs, and if you have specific litigation oriented issues, the right person to contact is David Lisi.”). Furthermore, the Cooley Godward attorneys were not in a position to give Rambus legal advice regarding the retention or destruction of documents, electronic or otherwise, relating to Rambus’s anticipated litigation because they never knew about the likelihood that such litigation would involve claims of equitable estoppel or antitrust violations based on Rambus’s conduct at JEDEC. CCSF 85-86 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”).

1626. Rambus adopted its outside counsel’s advice on these issues. The Rambus policy provided with respect to “Electronic Mail and Documents” that: “Rambus maintains complete system tape back-ups for a period of 3 months. Employees should not utilize email as a place to save documents beyond 3 months. Email that is required to be saved more than 3 months can be kept either in paper or a separate file on you hard drive.” RX 2503 (DTX 4028) at 1 (Rambus’s Document Retention Policy).

Response to Finding No. 1626: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

1627. With respect to contracts, the Cooley Godward lawyers advised that “Final, execution copies of all contracts entered into by the Company should be kept by the Company. The Company should, upon execution of a contract, destroy or systematically discard

all internal drafts and any materials used during negotiations that are not part of the final contract.” RX 2502 (DTX 3676) at 6 (March 19, 1998 Memorandum re: Document Retention Policy Guidance).

Response to Finding No. 1627: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

1628. Once again, Rambus’s policy closely tracks the advice it had received from its outside counsel. The Rambus policy provides: “Final, execution copies of all contracts entered into by Rambus are kept for at least 5 years after expiration of the agreement, and longer in the case of publicly filed contracts. All drafts... should be destroyed or systematically discarded.” RX 2503 (DTX 4028) at 2 (Rambus’s Document Retention Policy).

Response to Finding No. 1628: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

1629. The Cooley Godward lawyers also addressed Rambus’s “Development Documents and Trade Secrets” and advised that “Laboratory and development documents are often subject to intellectual property protection in their final form (e.g., patents and copyrights). . . The Company should keep all laboratory and development notebooks... The Company should keep all documents designated as containing trade secret information for at least the life of the trade secret.” RX 2502 (DTX 3676) at 6 (March 19, 1998 Memorandum re: Document Retention Policy Guidance).

Response to Finding No. 1629: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

1630. As it had done with the other categories of documents, Rambus’s policy closely tracked its counsel’s suggestions with respect to lab notebooks and similar documents. The Rambus policy provides that “Engineering and development documents are often subject to intellectual property protection in their final form (e.g. patents, copyrights, trade secrets, proprietary information). The documents, notebooks, computer files, etc., relating to patent disclosures and proof of invention dates are of great value to Rambus and should be kept permanently.” RX 2503 (DTX 4028) at 1 (Rambus’s Document Retention Policy).

Response to Finding No. 1630: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

1631. As to press releases and public filings such as 10-K's, the Cooley Godward lawyers recommended that Rambus "retain permanent copies of all press releases and publicly filed documents" but that "[a]ll drafts of publicly disseminated documents should be destroyed upon publication of the document." RX 2502 (DTX 3676) at 4 (March 19, 1998 Memorandum re: Document Retention Policy Guidance).

Response to Finding No. 1631: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

1632. Once again, Rambus followed its counsel's advice, and its policy provides that "Rambus retains permanent copies of all press releases and publicly filed documents. All drafts of public documents should be destroyed upon publication of the documents." RX 2503 (DTX 4028) at 1 (Rambus's Document Retention Policy).

Response to Finding No. 1632: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

C. Rambus's Document Retention Policy Is A Content-Neutral Retention Policy Common To Many Companies.

1633. The terms of Rambus's two page document retention policy, based on the terms recommended by counsel, refer only to categories of documents and are content neutral. RX 2503 (DTX 4028) at 1-2. The policy contains no directive to discard documents relating to specific companies or to certain subjects. The policy does not "target" for destruction, for example, JEDEC or JEDEC-related documents. *Id.*

Response to Finding No. 1633: This proposed finding is contradicted by the record evidence. Rambus's two page document retention policy is not content neutral. The policy requires the retention of documents that would help Rambus in its anticipated litigation. CCSF 100-102. In sharp contrast, the policy encourages the destruction of all other documents,

including documents that are relevant to the same anticipated litigation, but that might establish that Rambus should be equitably estopped from asserting its patents or that Rambus should be investigated by the Commission under the theory of the *Dell* consent. CCSF 103. As a result of Rambus's document retention policy, when Rambus executed its shred days in 1998, 1999, and 2000, documents favorable to its anticipated litigation against the DRAM manufacturers were retained but documents unfavorable to that litigation were destroyed. CCSF 112-144.

Furthermore, to the extent this proposed finding implies that Rambus's document retention policy was recommended by counsel, the proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

1634. The memorandum sent to Rambus by Cooley Godward was based on a form memorandum drafted by the law firm for its clients. CX 5068 (DTX 9008) at 27:1-5. (Savage 10/12/04 *Infineon* Dep.). Mr. Johnson testified that he had advised 20 to 30 clients on the same standard policies. RX 2522; RX 2523 (PTX 9525) at 204:1-7 (Johnson 11/23/04 *Infineon* Dep.); *see also id.* at 159:8-9 ("we gave them the traditional standard advice").

Response to Finding No. 1634: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625. Furthermore, this proposed finding is also misleading as there is no evidence in the record to indicate that any of the document retention policies described by these witnesses were adopted as part of the firm's litigation strategy.

1635. Rambus employees testified that Rambus's policy was consistent with policies they had seen or been subject to at other companies. E.g., RX 2548; RX 2549 (PTX 9523) at 20:2-8 (Larsen 5/18/04 *Infineon* Dep.); RX 2540; RX 2541 (PTX 9517) at 361:18-363:6 (Steinberg 10/6/04 *Infineon* Dep.); RX 2528; RX 2529 (PTX 9509) 578:13-17 (Diepenbrock 10/11/04 *Infineon* Dep.) ("It looked like the document retention policy that Mr. Karp established was consistent with other policies I had seen in place at another company, and it seemed like [this] was something in the normal course of business.").

Response to Finding No. 1635: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1634.

D. Rambus’s Outside Counsel Assisted In And Approved The Presentation Of The Document Retention Policy To Rambus Employees.

1636. The Cooley Godward firm did not simply recommend specific policy language to Rambus. The firm also advised Rambus how to implement the policy. RX 2522; RX 2523 (PTX 9525) at 71:8-25 (Johnson 11/23/04 *Infineon* Dep.).

Response to Finding No. 1636: This proposed finding is incomplete and misleading. First, the Cooley Godward firm did not recommend any specific policy language to Rambus. CCRF 1623, 1625. Second, any advice given by the Cooley Godward firm is limited by the fact that Cooley Godward attorneys could not have given Rambus legal advice regarding documents relating to Rambus’s anticipated litigation because they never knew about the likelihood that such litigation would involve claims of equitable estoppel or antitrust violations based on Rambus’s conduct at JEDEC. CCSF 85-86 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”). Finally, Mr. Karp specifically refused Mr. Johnson’s offer to assist Rambus in its implementation of the document retention policy. CCSF 93-96. Instead, Mr. Karp and others at Rambus planned, supervised and implemented Rambus’s document retention policy, including “Shred Day 1998,” the 1999 “shredding party” at Rambus and the 2000 “housecleaning.” CCSF 93-96, 106-107.

1637. Mr. Johnson advised Rambus that: (1) it should “have a program where they communicated to all their managers the scope of the policy”; (2) it needed to have someone “who would be responsible for the policy, because engineers are typically a very independent

bunch”; and (3) it should “clearly identify” for employees those categories of documents that “should and should not” be kept. *Id.*

Response to Finding No. 1637: This proposed finding is incomplete. Mr. Johnson also instructed Rambus that a document retention policy could not be adopted in bad faith, that Rambus could not adopt a document retention program that was intended to destroy documents that might be relevant to anticipated litigation, and that a firm should not destroy documents that might be relevant to anticipated litigation. CCSF 90-92 (“If you’ve got a transaction or some issues that you are aware of that are going to lead to litigation, then you keep it.”); *see also* RX-2523 at 17 (“If you’re trying to get rid of documents to keep someone from getting them, that doesn’t work. You’re going to be liable. You’ve got to have a document retention policy that you believe in for all of the right reasons, and you want to make sure they know if they’re playing a game, they’re in trouble.”).

1638. Rambus’s outside counsel also gave on-site assistance in the initial steps of the policy’s implementation. On July 22, 1998, Mr. Johnson made a presentation to Rambus’s managers regarding the need for, and parameters of, the new document retention policy. RX 2504 (DTX 3686) (Johnson’s slide presentation to Rambus managers regarding the document retention policy).

Response to Finding No. 1638: This proposed finding is incomplete and misleading. Mr. Johnson gave one presentation to a small number of Rambus managers. The presentation that Mr. Johnson gave was a generic presentation that took no account of Rambus’s specific situation. CCSF 89; RX-2523 at 10 (The presentation Johnson gave to Rambus managers “is generic. It’s not specific to Rambus.”). Mr. Johnson was not involved in the meetings in which Mr. Karp described the document retention policy to Rambus employees.

CCSF 93. Mr. Johnson offered to have his firm assist Rambus in implementing the document retention program, but Mr. Karp declined. CCSF 94-96.

1639. At the managers meeting, Mr. Johnson presented an “overview” of the policy, emphasizing its “goals and objectives.” RX 2521 (DTX 9023) at 171:16-172:16 (Johnson 11/23/04 *Infineon* Dep.).

Response to Finding No. 1639: This proposed finding is incomplete and misleading for the reasons set forth in CCRF 1638.

1640. As part of his presentation, Mr. Johnson specifically warned Rambus managers that destroying relevant documents once litigation commenced would be improper. RX 2504 (DTX 3686) at R124523, 124527-28, 124545-49; RX 2522; RX 2523 (PTX 9525) at 216:24-217:6 (Johnson 11/23/04 *Infineon* Dep.); RX 2524, RX 2525 (PTX 9503) at 275:15-22 (Barth 2/26/04 *Infineon* Dep.).

Response to Finding No. 1640: This proposed finding is incomplete and misleading for the reasons set forth in CCRF 1637.

1641. In explaining the document retention policy to Rambus managers, Mr. Johnson recounted what he referred to as a “horror story” of a client that had incurred \$100,000 in expenses searching corrupted and obsolete backup tapes in response to a subpoena, as well as other e-mail discovery “horror stories.” RX 2522; RX 2523 (PTX 9525) at 220:25-222:3 (Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson testified that he had used his “horror stories” in similar circumstances and on continuing education panels regarding document retention issues. *Id.*

Response to Finding No. 1641: This proposed finding is incomplete and misleading. Mr. Johnson described two horror stories. The horror story not mentioned by Rambus relates to a client of Mr. Johnson that was found to have spoliated evidence. *See, e.g.,* RX-2504 at 6; *see also* RX-2523 at 18-19 (“I had a client. They had no backup systems. They had no policy. At one point they discovered that their files were corroded, deleted a bunch. Six

months later got sued for sexual harassment, and the claim was [they] destroyed all of this material six months ago. It must have been timed to the harassing activity. So therefore, that's going to be evidence in this case of sexual harassment.... So without a policy, ... this deleted email results in an inference being created..."). This proposed finding is also incomplete and misleading for the reasons set forth in CCRF 1637.

1642. Mr. Johnson gave careful attention in his presentation to issues relating to emails in order to emphasize to Rambus employees that emails and electronic documents should be treated in the same way as paper documents. RX 2504 (DTX 3686) at 124525-6, 124550; RX 2522; RX 2523 (PTX 9525) at 171:5-8 (Johnson 11/23/04 *Infineon* Dep.) ("if you don't call out e-mail, most people don't think of it as a document, or they didn't in those days. So you needed to call e-mail out so that they understood"). Mr. Johnson explained that "the problem that you're trying to avoid is having to search tons and tons of irrelevant data to try to find something that might be germane." RX 2522; RX 2523 (PTX 9525) at 186:11-187:13 (Johnson 11/23/04 *Infineon* Dep.).

Response to Finding No. 1642: This proposed finding is incomplete and misleading for the reasons described in CCRF 1637.

1643. In addition to Mr. Johnson's slides, Mr. Karp prepared slides for presentation to Rambus employees that were based on the document retention policy and the Cooley Godward memorandum. CX 5069 (DTX 9009) at 471:22-472:8 (Karp 10/8/04 *Infineon* Dep.). These slides were reviewed and approved by Mr. Johnson. RX 2522; RX 2523 (PTX 9525) at 165:23-166:14 (Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson suggested, for example, that Mr. Karp add to his slide presentation the statement that "Elimination of email is an integral part of document control." RX 2524; RX 2525 (PTX 9503) at 170:8-171:8 (Johnson 11/23/04 *Infineon* Dep.). He also suggested, consistent with his focus on email "horror stories," that Mr. Karp add the line "email is discoverable in litigation or pursuant to subpoena." *Id.*

Response to Finding No. 1643: This proposed finding is incomplete and misleading for the reasons described in CCRF 1620.

1644. Moreover, the slides that Mr. Karp prepared for Mr. Johnson's review repeatedly directed Rambus employees to "look for things to keep." RX 2505 (DTX 4024) (Document retention policy presentation slides). Mr. Johnson testified that when he saw that directive on Mr. Karp's slides, he told Mr. Karp that the result would be "the retention of more documents than [Rambus employees] were otherwise required to keep." RX 2522; RX 2523 (PTX 9525) at 163:10-15 (Johnson 11/23/04 *Infinion* Dep.). Mr. Johnson testified that:

"when you tell folks to look for things to keep, they're going to keep more stuff than they might otherwise. So in effect what he had done was that he had gotten a document retention program and essentially undercut it. And I said okay. You know, they were so concerned about throwing something out erroneously, that he put in the language about "Look for things to keep," and I said okay, what that's going to mean is you're going to have a very narrow policy here."

Id. at 159:15-23.

Response to Finding No. 1644: This proposed finding is misleading and incomplete. The slides produced by Mr. Karp, like the document retention policy itself, makes no mention of Rambus's presence or conduct at JEDEC, Rambus's anticipated litigation against the DRAM manufacturers, or the need to maintain documents relevant to anticipated litigation. CCSF 103-107. The overwhelming weight of the evidence is that, throughout the shred days in 1998, 1999, and 2000, Rambus employees were never told to maintain documents relevant to Rambus's anticipated litigation against the DRAM manufacturers except to the extent that the documents might be favorable to Rambus in that litigation. CCSF 106-107; RX-2503 (documents "relating to patent disclosures and proof of invention dates are of great value to Rambus and should be kept permanently"). For example, Mr. Diepenbrock was never told to retain documents relevant to Rambus's anticipated litigation against the DRAM manufacturers. CCSF 105. In fact, Rambus's own director of litigation, who was also Rambus's 30(b)(6) witness on document destruction, was unaware of any instructions to Rambus employees to maintain documents other than the document retention policy written by Mr. Karp. CCSF 107.

1645. In and after July, 1998, Mr. Karp introduced the document retention policy to numerous employees within Rambus, using the overhead slides that had been reviewed and approved by Mr. Johnson. CX 5069 (DTX 9009) at 466:21-467:25 (Karp 10/8/04 *Infineon* Dep.). Employees were told that Rambus was concerned about the expense of conducting a search for documents and data and that a properly implemented document retention policy could reduce the expenditure of both time and money if a search needed to be done. RX 2524; RX 2525 (PTX 9503) at 257:19-258:11 (Barth 2/26/04 *Infineon* Dep.) (“the intent was... we had a tremendous amount of material... if we were to get in litigation, we would end up having our engineers spending most of their time sorting through all that stuff. And so we needed to get rid of things that were not useful... Not useful, in general. Just reduce the mess of junk that was laying around, so we wouldn’t have to sort through it.”); *id.* at 304:2-6 (“our intent was to reduce the volume of documents so we didn’t waste engineering time”); RX 2528; RX 2529 (PTX 9509) at 539:23-540:11 (Diepenbrock 10/11/04 *Infineon* Dep.) (testifying to discussion “with regard to the expense of producing e-mails if litigation were to take place. I think that was mentioned.”).

Response to Finding No. 1645: This proposed finding is incomplete and misleading. When Mr. Johnson reviewed Rambus’s document retention policy, he was unaware that Rambus’s anticipated litigation was unlikely to consist solely of routine patent infringement analysis, which would involve primarily a comparison of patent claims against an allegedly infringing product, but was also likely to involve allegations of inequitable and anticompetitive conduct at JEDEC, the resolution of which would implicate large volumes of Rambus’s business records and emails. CCSF 85-86 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”). As a result, he could not have provided advice regarding the appropriateness of Rambus’s document retention policy with respect to documents relating to Rambus’s conduct at JEDEC.

Furthermore, this proposed finding is incomplete because it omits that the document retention policy aimed to preserve documents that were “of great value” to Rambus in anticipated litigation while allowing the elimination of documents that were unfavorable to

Rambus in the same litigation. CCSF 100-108. Rambus employees were told that some Rambus documents were “discoverable in litigation or pursuant to a subpoena.” RX-2505 at 1. But Rambus employees were never told to retain documents that might be relevant to its anticipated litigation against the DRAM manufacturers. CCRF 1644. Instead they were told to throw them away. RX-2505 at 1. *See also* CCRF 1622.

E. Rambus Employees Followed The Content Neutral Guidelines Of The Document Retention Policy.

1646. On September 3 and 4, 1998, Rambus employees participated in a company wide housecleaning, more colloquially referred to as a “shred day.” *See* CX 5071 (DTX 9017) at 42:21-47:6 (Kaufman 5/18/04 *Infineon* Dep.); RX 2534; RX 2535 (PTX 9514) at 392:8-394:23 (Roberts 10/14/04 *Infineon* Dep.). Employees were instructed to follow the document retention policy guidelines to determine what to keep and what to throw away. *Id.* Employees were given burlap sacks for material that needed shredding. *Id.* The burlap sacks were then taken to a shredding truck in the parking lot of the company and their contents destroyed. *Id.* At the close of business on September 3, 1998, Rambus served pizza and beer to its employees. CX 5071 (DTX 9017) at 46:13-47:6.

Response to Finding No. 1646: This proposed finding is incomplete. It fails to note that “Shred Day 1998” was specifically intended to make Rambus “battle ready” for its anticipated patent litigation against the DRAM manufacturers, that Rambus employees were never instructed to retain documents relevant to that anticipated litigation during “Shred Day 1998,” or that it resulted in Rambus employees purging from Rambus’s business files large numbers of documents directly relevant to that litigation. CCSF 12, 52-55, 103-108, 110-144.

1647. A year later, on August 26, 1999, Rambus had another housekeeping event or “shred day” similar to the first. At the end of the day, Rambus again served refreshments to employees. CX 5071 (DTX 9017) at 88:25-90:14 (Kaufman 5/18/04 *Infineon* Dep.).

Response to Finding No. 1647: This proposed finding is incomplete. It fails to note that 1999 “shredding party” was specifically intended to make Rambus “battle ready” for its anticipated patent litigation against the DRAM manufacturers, that Rambus employees were never instructed to retain documents relevant to that anticipated litigation during “Shred Day 1998,” or that it resulted in Rambus employees purging from Rambus’s business files large numbers of documents directly relevant to that litigation. CCSF 12, 58-61, 103-108, 110-144.

1648. Rambus’s use of burlap bags and shredders during the housekeeping days is unremarkable. Because Rambus’s work involves research and development, and because its documents often include confidential information that is proprietary to Rambus or obtained from third parties under NDA’s, there is nothing unusual about shredding; shredders are a widely used and appropriate method of destroying confidential material. *See* RX 2534; RX 2535 (PTX 9514) at 393:2-20 (Roberts 10/14/04 *Infineon* Dep.). As a regular practice even before the shred day, employees had a box in their office area for confidential documents that needed to be shredded instead of put in the trash can, and a truck came once a week to pick up the documents for shredding. RX 2534; RX 2535 (PTX 9514) at 393:3-303:11, 398:22-399:4 (Roberts 10/14/04 *Infineon* Dep.). Rambus managers were also aware that an individual had regularly been seen going through Rambus’s trash receptacles, and they wanted to avoid the possibility of confidential documents being found by such individuals. RX 2534; RX 2535 (PTX 9514) at 393:12-20 (Roberts 10/14/04 *Infineon* Dep.).

Response to Finding No. 1648: Complaint Counsel have no comment, except to note that this proposed finding indicates that Rambus employees regularly destroyed documents without having received instructions to retain documents that might be relevant to Rambus’s anticipated litigation against the DRAM manufacturers. (“As a regular practice even before the shred day, employees had a box in their office area for confidential documents that needed to be shredded instead of put in the trash can, and a truck came once a week to pick up the documents for shredding.”).

1649. The social events at the end of the “shred days” were also unexceptional; Rambus and many other high-technology companies routinely sponsored such events for their employees. RX 2534; RX 2535 (PTX 9514) at 401:8-17 (Roberts 10/14/04 *Infineon Dep.*).

Response to Finding No. 1649: Complaint Counsel have no comment.

1650. The record contains no evidence of the “normal” or “expected” volume of materials that a company of Rambus’s size and longevity would have produced and/or routinely discarded. In particular, there is no fact or expert testimony in the record about the disposal habits of other similarly situated engineering or high-tech firms. The use of shredders is, in fact, common in governmental agencies and in corporate America. *See, e.g.*, Pennington, “Appetite for Destruction,” *Cincinnati Enquirer* (June 30, 2005), p. 1D (available on LEXIS/NEXIS).

Response to Finding No. 1650: Complaint Counsel have no comment.

1651. The evidence in the record shows that because Rambus had not previously had similar events, employees used the “shred day” to clean out a variety of bulky material - such as old telephone books - that had accumulated over eight years of the company’s existence. CX 5069 (DTX 9009) at 510:8-16 (Karp 10/8/04 *Infineon Dep.*) (“I wouldn’t necessarily characterize it as documents ... because I know there was just all sorts of stuff. You know, loose leaf binders and mostly lots of printouts of computer runs, stacks and stacks and stacks. I would say that was probably the bulk of it, and phone books that went back eight years.”); RX 2550; RX 2551 (PTX 9524) at 117:14-118:13 (Stark 5/28/04 *Infineon Dep.*) (“three-ring binders” and “stacks of magazines and photocopies of articles”); RX 2546; RX 2547 (PTX 9522) at 45:10-19 (Kaufman 5/18/04 *Infineon Dep.*) (“I actually used it sort of like a trash bag, so I had empty manila folders, various documents. Even just sort of personal things that I had on my desk that I didn’t need anymore”). There is thus no evidentiary basis for a finding that the “shred days” resulted in the destruction of an unusual amount of material.

Response to Finding No. 1651: This proposed finding is incomplete and misleading. The record shows that Rambus never believed that it had any need of a shred day until it prepared to sue manufacturers of JEDEC-compliant SDRAMs and DDR SDRAMs for patent infringement. Until Rambus started planning to sue DRAM manufacturers for patent infringement, its emphasis had been on preserving, not destroying, documents. The evidence in the record further establishes that both of Rambus’s principal JEDEC representatives, Richard

Crisp and Billy Garrett possessed substantial quantities of business records, including records relating to Rambus's conduct at JEDEC. CCSF 121, 123-124. Mr. Crisp destroyed "anything he had on paper" in his office. CCSF 114. Mr. Garrett also destroyed all of his JEDEC-related records as a result of Rambus's document retention policy. CCSF 124 ("got rid of all the stuff – doc retention policy – jedec stuff all went away."). Furthermore, the amount of bulky material at Rambus does not explain why Rambus outside counsel Lester Vincent was instructed to destroy his documents as well. CCSF 117; CCF 1746-1747 (Vincent destroyed "prosecution documents," correspondence between Rambus and his law firm, and his own drafts and notes).

1652. The evidence presented at trial establishes that Rambus employees followed the guidelines of the policy adopted on the advice of counsel in determining what documents to keep and what to throw away during the 1998 and 1999 shred days (and on a day to day basis). RX 2524; RX 2525 (PTX 9503) at 258:12-259:25, 276:17-24, 301:14-302:23 (Barth, 2/26/04 *Infineon* Dep.); RX 2534; RX 2535 (PTX 9514) at 392:3-397:14 (Roberts 10/14/04 Dep.); RX 2536; RX 2537 (PTX 9515) at 97:4-98:24 (Hampel 5/28/04 *Infineon* Dep.); RX 2546; RX 2547 (PTX 9522) at 85:7-12 (Kaufman 5/18/04 *Infineon* Dep.); CX 2082 at 841:16-18 (Crisp 4/13/01 *Infineon* Dep.) ("I definitely made an attempt to go through my files and look for things to keep as [Karp] had directed us to do.").

Response to Finding No. 1652: This proposed finding is incomplete. The evidence presented at trial also establishes that Rambus's employees followed Rambus's document retention policy in December of 2000 as well. CCSF 107.

This proposed finding is also misleading. To the extent that Rambus followed the "advice of counsel" in adopting its document retention policy, it rendered that advice ineffective by not providing that counsel all of the information that was relevant. In particular, Rambus never gave its outside counsel reason to believe that Rambus had attended JEDEC and therefore anticipated possible equitable estoppel claims and might be subject to an investigation by the

Commission. CCSF 85-86 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”).

F. The Document Retention Policy Did Not Target “Harmful” Documents.

1. Rambus’s Handling Of Email Under The Document Retention Policy Was Appropriate.

1653. At the advice of counsel, Rambus told its employees to identify important emails to keep, save them in hard copy or a separate electronic file, and delete the remainder. RX 2505 (DTX 4024) (Karp slides); RX 2503 (DTX 4028) (document retention policy); RX 2502 (DTX 3676) (Memorandum re: Document Retention Policy Guidance); RX 2516; RX 2517 (PTX 9526) at 343:8-348:17 (Karp 8/7/01 *Micron* Dep.). These instructions were content neutral and were to be applied to any email on any topic. *Id.*

Response to Finding No. 1653: This proposed finding is incomplete and misleading to the extent that it implies that Rambus adopted its document retention policy at the advice of counsel. To the extent that Rambus followed the “advice of counsel” in adopting its document retention policy, it rendered that advice ineffective by not providing that counsel all of the information that was relevant. In particular, Rambus never gave its outside counsel reason to believe that Rambus had attended JEDEC and therefore anticipated possible equitable estoppel claims and might be subject to an investigation by the Commission. CCSF 85-86 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”).

Furthermore, the contention in this proposed finding that Rambus’s document retention policy was “content neutral” is contrary to the record evidence for the reasons described in CCRF 1633.

1654. Consistent with the advice of its counsel, Rambus also instituted a policy of overwriting its back up tapes every three months. CX 5018 (DTX 3697) at 1. When this occurred, Rambus employees were reminded to make sure they took steps to archive important e-mails because they could not depend on the company back up tapes for that purpose. *See id.* (e-mail from Mr. Karp and copied to counsel informing employees “you can no longer depend on the full system backups for archival purposes. Any valuable data, engineering or otherwise, must be archived separately”). Rambus specifically consulted with counsel when it made this change and took actions based upon and consistent with that advice. *Id.*; RX 2522; RX 2523 (PTX 9525) at 185:12-188:25 (Johnson 11/23/04 *Infineon* Dep.).

Response to Finding No. 1654: This proposed finding is incomplete and misleading for the reasons described in CCRF 1653. This proposed finding is also incomplete and misleading because it fails to mention that the archives were also subject to Rambus’s document retention policy. In particular, Rambus’s system backup tapes were only retained for three months. CCSF 52. Furthermore, to the extent that emails were printed out as hard copy in response to Mr. Karp’s issuance of the policy in July of 1998, those same emails were potentially destroyed in “Shred Day 1998,” Rambus’s “shredding party” of 1999, or Rambus’s “house cleaning” in December of 2000.

1655. Mr. Johnson explained this advice in his deposition testimony:

“The problem with it was twofold. One, as I said, with the changing in the technology, even if it took the snapshot every two years, you were still going to be back in the same morass of potentially corrupted data. It made more sense to make sure you just deleted stuff that was trash and kept the stuff that was, in fact, important. Because otherwise, you got corrupted data, you’ve got irreconcilable conflicts between systems that would be used to search the data, and you hadn’t done anything, other than written down the way in which you were going to hold irrelevancies.

“So what I told them was, if you do that, don’t have a document retention program because all you’ve done is created the same problems that you were trying to avoid. And with the problem that you’re trying to avoid is having to search tons and tons of

irrelevant data to try to find something that might be germane. And over time the costs would go up dramatically.

“So that is - that’s - that has happened enough - it happened to enough clients so if you say it enough, people start to figure it out. “The first time they get a bill when someone says \$150,000 because we can’t - you’ve got this corrupted data, and the general counsel gets his head chewed off from the chairman, or the CEO, then they want a document retention program.

“So you tell them in advance, do it this way. You’re going to be better off long term.”

RX 2522; RX 2523 (PTX 9525) at 186:11-187:13 (Johnson 11/23/04 *Infineon Dep*).

Response to Finding No. 1655: This proposed finding is incomplete and misleading because it omits a relevant portion of Mr. Johnson’s testimony. The system that Mr. Johnson had a “problem with” was Rambus’s backup system. RX 2523 at 12 (186:6-186:10). That system, which Rambus destroyed in accordance with the document retention policy, was “a full snapshot” of Rambus’s system. *Id.*

1656. Rambus’s decision to recycle full system back up tapes every three months as recommended by counsel is a standard practice utilized in many companies. RX 2522; RX 2523 (PTX 9525) at 187:14-188:21 (Johnson 11/23/04 *Infineon Dep.*).

Response to Finding No. 1656: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625. Furthermore, this proposed finding is irrelevant to the extent that it attempts to describe the document retention policies of firms that are not destroying documents relevant to anticipated litigation.

1657. While Rambus did institute an established policy for recycling back up tapes, Rambus did *not* implement a program of automatically deleting all emails after three months. RX 2534; RX 2535 (PTX 9514) at 427:7-428:7 (Roberts 10/14/04 *Infineon Dep.*).

Response to Finding No. 1657: This proposed finding is misleading and contrary to the record evidence. The presentation that Mr. Karp gave to Rambus employees described Rambus’s document retention policy with respect to email: “In general, email messages should be deleted as soon as they are read. Don’t forget to ‘empty trash’ occasionally. Make sure settings delete email from the server (at least every few days).” RX-2505 at 1.

2. **Rambus’s Document Retention Policy Did Not Target Internal JEDEC-Related Documents For Destruction.**

1658. The supplemental evidence does not show that JEDEC documents were targeted for destruction by Rambus in any way. There is no testimony or document suggesting that the document retention policy had anything to do with JEDEC or was ever linked to JEDEC documents in any manner. Not a single email or other Rambus document admitted into this record mentions Rambus’s participation in JEDEC in connection with the formation or implementation of the document retention policy.

Response to Finding No. 1658: This proposed finding is argument unsupported by any record evidence. Furthermore, this proposed finding is misleading. Rambus’s document retention policy was designed as part of its patent litigation strategy against DRAM manufacturers for their manufacture of JEDEC-compliant SDRAM and DDR SDRAM. CCRF 1619; CCSF 9-29, 75-109. The policy was designed and implemented by Rambus employees who well understood the implications that equitable estoppel and an FTC investigation pursuant to the theory in the *Dell* consent could have for that litigation. CCSF 76-78. Yet neither the document retention policy, nor the presentation made in support of that policy, instruct Rambus employees or outside patent counsel to maintain documents that might be relevant to whether Rambus’s conduct at JEDEC could support either an equitable estoppel defense or a *Dell*-type investigation by the Commission despite requiring the retention of documents that might be useful to Rambus in its litigation against the DRAM manufacturers. CCSF 100-108.

1659. The supplemental evidence does not support an inference that Rambus implemented its document retention program in an effort to cover up some purported impropriety in connection with its attendance at JEDEC meetings.

Response to Finding No. 1659: This proposed finding is argument unsupported by any record evidence. Furthermore, this proposed finding is misleading for the reasons stated in CCRF 1658.

3. Rambus’s Treatment Of Its Patent Prosecution Files Followed The Advice Of Counsel And Is Standard Practice.

1660. Mr. Johnson advised Mr. Karp at the February 12, 1998 meeting that Rambus should clean out its patent prosecution files so the files are the “same as official file.” RX 2521 (DTX 9023) at 33:13-21 (Johnson 11/23/04 *Infineon* Dep.); RX 2500 (DTX 3681) (notes from Feb. 12, 1998 meeting between Mr. Karp and Cooley, Godward).

Response to Finding No. 1660:This proposed finding is misleading and incomplete. To the extent that Rambus followed the “advice of counsel” in adopting its document retention policy, it rendered that advice ineffective by not providing that counsel all of the information that was relevant. In particular, Rambus never told its outside counsel that Rambus’s anticipated litigation was unlikely to consist solely of routine patent infringement analysis, which would involve primarily a comparison of patent claims against an allegedly infringing product, but was also likely to involve allegations of inequitable and anticompetitive conduct at JEDEC, the resolution of which would implicate large volumes of Rambus’s business records and emails as well as notes and correspondence from patent counsel’s files. CCSF 85-86 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”).

1661. The trial record shows that the standard practice for maintenance of patent prosecution files is to conform the files for issued patents to the PTO file. Mr. Johnson described this policy as “standard operating procedure.” RX 2521 (DTX 9023) at 182:3-8 (Johnson 11/23/04 *Infineon* Dep.). Rambus’s former patent counsel, Mr. Vincent, testified that Rambus’s direction to clean out its patent files was the “accepted norm.” RX 2532; RX 2533 (PTX 9511) at 106:13-20 (Vincent 10/15/04 *Infineon* Dep.). Peter Leal, an attorney specializing in licensing who participated in meetings with Rambus regarding its licensing strategy, testified that he “typically advise[d] a client” to follow this procedure. RX 2544; RX 2545 (PTX 9519) at 47:213 (Leal 10/13/04 *Infineon* Dep.). He also testified that this was the practice at IBM when he worked there. *Id.* at 47:17-48:1 (“[t]hat’s the way we did it back at IBM.”). Rambus’s former in-house patent counsel, Anthony Diepenbrock, testified that, based upon his experience as a patent attorney, it is the “standard policy” for maintaining patent files. RX 2528; RX 2529 (PTX 9509) at 575:23-576:22 (Diepenbrock 10/11/04 *Infineon* Dep.).

Response to Finding No. 1661: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1660.

a. **Mr. Karp’s direction to Mr. Vincent regarding the cleaning of his files was content neutral and completely consistent with Mr. Johnson’s advice and the standard practice.**

1662. Mr. Vincent’s cleaning of Rambus’s patent files did not destroy relevant documents. Pursuant to his understanding of the “accepted norm,” Mr. Vincent retained all communications with the PTO, all materials related to conception and reduction to practice of the invention, correspondence related to maintenance fees, notes of any teleconferences with the patent examiner, and any prior art. RX 2532; RX 2533 (PTX 9511) at 104:21-106:20, 181:18-21 (Vincent 10/15/04 *Infineon* Dep.).

Response to Finding No. 1662: The assertion in this proposed finding that “Mr. Vincent’s cleaning of Rambus’s patent files did not destroy relevant documents” is unsupported by record evidence. Furthermore, this assertion is contrary to the record evidence. The record evidence is clear that documents destroyed by Mr. Vincent include legal advice to Rambus regarding: (1) JEDEC’s patent disclosure policy, (2) Rambus patent applications relating to the JEDEC standard while Rambus was still a member of JEDEC, (3) statements to be made by Rambus representatives to JEDEC regarding Rambus’s patent applications relating to the

JEDEC standard, (4) Rambus's exit from JEDEC in the wake of *Dell*, and (5) equitable estoppel issues relating to Rambus's attendance and conduct at JEDEC. CCSF 135-144. The supplemental evidence confirms that he destroyed such materials from his files for Rambus's '651 application, '961 application, '490 application, '692 application, '646 application and '327 patent, which are precisely the files most likely to contain evidence relevant to this matter. CCSF 128-133.

1663. Moreover, Mr. Vincent cleaned only the patent files and not his general files relating to his work for Rambus; no documents in his Rambus general files were destroyed. Materials relating to JEDEC and Mr. Vincent's advice to Rambus regarding equitable estoppel were not specific to the prosecution of any particular patent application and, therefore, were kept in Mr. Vincent's general files and produced. *Id.* See RX 2530; RX 2531 (PTX 9510) at 530:1317; DTX 4264 (Mr. Vincent's spreadsheet showing files cleaned); CX 5072 (DTX 9018) at 54:19-57:21 (Vincent 11/30/04 *Infineon* Dep.).

Response to Finding No. 1663: This proposed finding is contrary to the record evidence. The record evidence is that much of Mr. Vincent's advice to Rambus regarding JEDEC was destroyed by Mr. Vincent as part of his implementation of Rambus's document retention policy. CCRF 1662. Furthermore, the documents that Mr. Vincent did produce were not from Mr. Vincent's "Rambus general files" but from his chron file. See CX5066 at 2 (corresponding to GCWF03448) ("Lester also found notes on a 1992 meeting with Crisp and Allen Roberts re: standard setting. Despite a document retention policy that [K]arp began upon joining R (the policy dictated that correspondence be shredded?), these newly found documents were not shredded and thus still exist because they were in Lester's own chron file and not Blakely's official Rambus files."). The record evidence establishes that this partial evidence from Mr. Vincent's files survived only by accident; the only reason Mr. Vincent failed to clean

out his chron file was because of his mistaken belief that they “should not have much R material.” CX5060 at 3 (corresponding to GCWF03484).

1664. Mr. Vincent’s cleaning of the files in July 2000 had no impact on the documents produced in this litigation. Copies of the files cleaned by Mr. Vincent in July 2000 had already been provided to Rambus and its litigation counsel in connection with the *Hitachi* litigation in January 2000. RX 2530; RX 2531 (PTX 9510) at 543:8-12 (Vincent 10/9/01 *Micron* Dep.); RX 2508 (DTX 3791), Feb. 1, 2000 Letter from Lester Vincent to Neil Steinberg at BSTZ 00060 (enclosing copies of patent files).

Response to Finding No. 1664: This proposed finding is unsupported by the record evidence. Because Mr. Vincent had already cleaned out the files relating to Rambus’s ‘651 application, ‘961 application, ‘490 application, ‘692 application, ‘646 application and ‘327 patent, the evidence most likely to be of direct relevance to this matter had already been destroyed by January 2000. CCSF 128-133. There is some evidence that Mr. Vincent forwarded some portions of prosecution files to Mr. Steinberg on February 1, 2000. However, that does not support the conclusion that the July 2000 file cleaning by Mr. Vincent “had no impact on the documents produced in this litigation” because the record does not indicate what documents were sent to Mr. Steinberg in February 2000. Furthermore, the record does not indicate what documents were destroyed by Mr. Vincent in July 2000.

b. Mr. Diepenbrock’s maintenance of Rambus’s internal patent files was appropriate.

1665. While at Rambus, Mr. Diepenbrock also followed the accepted practice of cleaning patent files once patents had issued. Mr. Diepenbrock does not recall Mr. Karp instructing him to do so; he was simply following the “understanding” that “depending on the status of the file, if the file went to issuance or was abandoned, that, you know, the file should be looked at, and certain things kept in the files and other things, notes and mental impressions taken out of the files.” RX 2528; RX 2529 (PTX 9509) at 573:23-577:10 (Diepenbrock 10/11/04 *Infineon* Dep.).

Response to Finding No. 1665: This proposed finding is incomplete and misleading to the extent that it suggests that it is the “accepted practice” to remove evidence relating to conduct that is likely to lead to an equitable estoppel defense in anticipated litigation to enforce the patents, or that might cause the company to be subject to an investigation by the Commission. Furthermore, this proposed finding demonstrates that Mr. Diepenbrock may have destroyed documents relevant to Rambus’s anticipated litigation against the DRAM manufacturers. The record evidence demonstrates that Mr. Diepenbrock was never instructed, and failed to instruct others, to maintain documents relevant to that anticipated litigation. CCSF 105.

1666. Mr. Diepenbrock understood that it was “standard policy” that notes and mental impressions should be removed from the file “because it was not a part of the record.” *Id.* at 576. Mr. Diepenbrock testified that cleaning the files of issued patents in this way “seemed like that was the right thing to do” because such notes did not seem like “relevant information” once the patent had issued. *Id.* at 577.

Response to Finding No. 1666: This proposed finding is incomplete and misleading to the extent that it suggests that it is the “accepted practice” to remove evidence relating to conduct that is likely to lead to an equitable estoppel defense in anticipated litigation to enforce the patents, or that might cause the company to be subject to an investigation by the Commission. Furthermore, this proposed finding demonstrates that Mr. Diepenbrock may have destroyed documents relevant to Rambus’s anticipated litigation against the DRAM manufacturers. The record evidence demonstrates that Mr. Diepenbrock was never instructed, and failed to instruct others, to maintain documents relevant to that anticipated litigation. CCSF 105.

4. Relevant Patent-Related Documents Were Maintained.

1667. The supplemental evidence does not show that Rambus targeted or destroyed prior art pursuant to its document retention policy. Every witness that testified on the matter confirmed that they had retained prior art and that they did not destroy it in implementing the policy. *See, e.g.*, RX 2524; RX 2525 (PTX 9503) at 276:17-24 (Barth 2/26/04 *Infineon* Dep.); CX 5073 (DTX 9019) at 181:18-21 (Vincent 10/15/04 *Infineon* Dep.).

Response to Finding No. 1667: Complaint Counsel have no way to verify whether Rambus did or did not destroy prior art from its files prior to its litigation against the DRAM manufacturers.

1668. The supplemental evidence also does not show that infringement analyses or reverse engineering documents were targeted or destroyed as a result of Rambus's document retention policy. The evidence established that Rambus conducted infringement analyses for the patents in suit after they issued in the 1999 and 2000 time frame, and that these documents were maintained under the document retention policy and produced to Infineon. RX 2540; RX 2541 (PTX 9517) at 364:20-373:25 (Steinberg 10/6/04 *Infineon* Dep.).

Response to Finding No. 1668: Complaint Counsel have no way to verify whether Rambus did or did not destroy infringement analyses or reverse engineering documents from its files prior to its litigation against the DRAM manufacturers.

1669. At the February 2005 *Infineon* trial, Infineon's counsel, Gregory Arovas, confirmed in his testimony that he had reviewed Rambus's document production in this case and had found approximately a dozen infringement analysis from the 1999-2000 time frame. CX 5079 Trial Tr. at 527:10-536:7 (Arovas). He acknowledged that Rambus had produced an infringement analysis or claim chart for many of the major DRAM manufacturers during that period. *Id.* Rambus's counsel, Sean Cunningham, confirmed these same facts in his own testimony. CX 5078 Trial Tr. at 305:12-314:17 (Cunningham).

Response to Finding No. 1669: Complaint Counsel have no way to verify whether Rambus did or did not destroy infringement analyses or reverse engineering documents from its files prior to its litigation against the DRAM manufacturers.

1670. Throughout this action, Complaint Counsel have *presumed* for purposes of this proceeding that the Rambus patents in question were both valid and infringed. Any destruction of patent-related documents would therefore be highly unlikely to have affected counsel's ability to present relevant arguments and evidence at trial.

Response to Finding No. 1670: To the extent that this proposed finding implies that Rambus's destruction of documents relating to its conduct at JEDEC is "highly unlikely to have affected counsel's ability to present relevant arguments and evidence at trial," this proposed finding is argument that is unsupported by any record evidence.

Furthermore, Rambus's destruction of patent-related documents harmed Complaint Counsel's ability to show that a patent (the '327) and number of patent applications Rambus had on file while it was at JEDEC (in particular, the '961, '490, '692, and '646 applications) related to, and may have covered, the standards JEDEC was working on while Rambus was there.

Rambus has argued that it "had no undisclosed patent claims (or claims in patent applications) during the time that it was at JEDEC that read on JEDEC standards or even on presentations made at JEDEC." Brief of Appellee and Cross-Appellant Rambus, Inc. (June 2, 2004) at 27 (emphasis added); *see also id* at 28-35 (arguing that the claims in Rambus's '327 patent, '961 application, '490 application, '692 application and '646 application did not "cover []" features considered by JEDEC). As Complaint Counsel have explained, Rambus is wrong in defining this issue, wrong on the law and wrong on the facts. Rambus's course of conduct subverting the JEDEC standard-setting process involved far more than just failure to disclose. Rambus's disclosure obligation was based on its reasonable belief at the time, not on any formal, after-the-fact patent claims analysis. Even if after-the-fact claims analysis were determinative,

the record evidence establishes that claims in the patents and applications listed above did cover features under consideration for inclusion and included in the JEDEC standards. *See* Reply Brief of Counsel Supporting The Complaint (July 2, 2004) at 40-48; *see also* CCFF 1122-1237. Should the Commission reject all three of Complaint Counsel’s positions, however, and determine that liability depends on showing that Rambus’s pending patent claims actually covered ongoing JEDEC work and that the evidence submitted by Complaint Counsel to establish this was insufficient, Complaint Counsel very likely was harmed by Rambus’s purging of the very evidence most likely to establish the scope of coverage of Rambus’s ‘327 patent and ‘651, ‘961, ‘490, ‘692 and ‘646 applications: Mr. Vincent’s prosecution files for those specific patents and applications. CCSF 56-57, 128-133.

G. Rambus Instituted A Litigation Hold As Soon As Litigation Was Reasonably Foreseeable.

1671. Litigation “is an ever-present possibility in American life.” *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992) (holding that for Rule 26 purposes, there is a difference between having the “general possibility of litigation” in mind and “anticipating” litigation).

Response to Finding No. 1671: This proposed finding is argument that is unrelated to the facts of this case. The facts of this case demonstrate that Rambus had more than the “‘general possibility of litigation’ in mind.” Rather, in February of 1998, Rambus actively planned to initiate patent infringement and breach of contract litigation, against specific manufacturers of JEDEC-compliant SDRAM and DDR SDRAM, in its own carefully selected fora. CCSF 9-29; *see also Rambus v. Infineon*, 222 F.R.D. 280, 298 (E.D.Va. 2004) (“Rambus actually started a [document retention] program because it anticipated that it would soon begin litigation.”).

1672. The supplemental evidence shows an awareness on the part of Joel Karp as early as the fall of 1997 that *if* some of Rambus’s patent applications ripened into patents, and *if* the claims of those patents covered SDRAM or DDR SDRAM devices, and *if* licensing negotiations fell apart, there was “*a chance* of litigation.” RX 2516; RX 2517 (PTX 9526) at 339:18-23 (Karp 8/7/01 Dep.) (emphasis added). This awareness of a “general possibility” is not the equivalent of “anticipating” litigation.

Response to Finding No. 1672: This proposed finding relies on self-serving testimony by Rambus Vice President Karp, the architect of the Rambus document retention policy, attempting to characterize his litigation planning efforts as something other than “anticipating” litigation. The proposed finding is contrary to the weight of the evidence that Rambus anticipated litigation in February 1998. CCSF 9-29; *see also Order on Complaint Counsel’s Motions for Default and for Oral Argument (2/26/2003)* at 6 (Judge Timony: “[c]ertainly by the time Rambus chose to commence its document retention program in 1998, it knew or reasonably could anticipate RAM-related litigation.”).

The truth is that in various ways, at various times, Rambus has expressed diametrically opposing views itself about whether it was anticipating litigation in 1998, depending on what characterization would serve its purpose at the time. In July 2001, for purposes of withholding documents from discovery, Rambus told counsel for Micron that Rambus **was** anticipating litigation in February and March 1998. *See* CX1804 (Micron Privilege Log) at 23, entry 320 (2/12/98 document “reflecting work in anticipation of litigation”); *see also* entries 297 (assertion of work product privilege for 2/23/98 document), 315 (assertion of work product privilege for 2/23/98 document), 317 (assertion of work product privilege for 3/2/98 document).

In February 2003, for purposes of withholding documents from discovery, Rambus told Complaint Counsel that Rambus **was** anticipating litigation in February and March 1998. *See* Rambus' Privilege Log (2/13/03, attached as Attachment A) at 28, entry 320 (2/12/98 document "reflecting work in anticipation of litigation"); *see also* entries 297 (assertion of work product privilege for 2/23/98 document), 315 (assertion of work product privilege for 2/23/98 document), 317 (assertion of work product privilege for 3/2/98 document).

In September 2003, for purposes of avoiding sanctions due to destruction of documents, Rambus told ALJ McGuire that Rambus **was not** anticipating litigation in February and March 1998. *See* Responses to Complaint Counsel's Proposed Findings of Fact (September 29, 2003), Response to Finding No. 1732 ("as Mr. Karp testified, Rambus was *not* anticipating litigation at the time.") (emphasis in original); *see also* Response to Finding No. 1718 (quoting Mr. Karp's testimony); Post-Trial Reply Brief of Respondent Rambus Inc. (Sept. 29, 2003) at 9.

In a November 2004 deposition conducted by counsel for Infineon, Rambus repeatedly objected on attorney-client and work product grounds to questioning of its former outside counsel Mr. Johnson concerning his meetings with Rambus in February and March 1998, thus asserting that Rambus **was** anticipating litigation at the time. *See generally* CX5076; CX5079 at 49 (corresponding to transcript pages 573-74 (Judge Payne: "And in every objection where an attorney-client privilege, work product claim, . . . that admits that there's anticipation of litigation [in February of 1998]").

In February 2005, for purposes of avoiding dismissal of its case against Infineon on grounds of spoliation of evidence, Rambus told Judge Payne that Rambus **was not** anticipating litigation in February and March 1998. RX-2553 at 18-20. Judge Payne rejected Rambus's arguments, which were premised on nearly identical proposed findings to those Rambus has proposed to the Commission. DX0507 at 1139 ("I have concluded that [Infineon] has proved, by clear and convincing evidence, a spoliation that warrants dismissal of this action as the only appropriate sanction after having – of the patent infringement case after having considered the alternatives.").

1673. The evidence also shows that Rambus executives were well aware in the late 1990's that before any assertion of patent rights could be made, the devices in question would have to be analyzed to determine if they infringed whatever claims might be issued by the PTO. *See, e.g.*, CX 919 (2/10/97 Tate email noting that "with so little hard data and no silicon there are no patents that we can definitely say are infringed."); *id.* (same email showing Mr. Tate's instruction to "wait on taking action til we see silicon..."); CX 5005 (DTX 3678) at 2 (2/98 "proposed strategy" reviewed at meeting with Cooley Godward, stating that "[o]nce on the market, Rambus will purchase the competing product" before "determin[ing] what its next steps will be."). It is undisputed that the convergence of "hard data," "silicon" and issued Rambus patents covering the accused devices did not occur until late 1999.

Response to Finding No. 1673: Rambus executives' evaluation of JEDEC-compliant SDRAM and DDR SDRAM in order to detail the specific nature and degree of infringement were part of licensing and litigation strategy established in February of 1998. The contention in this proposed finding that "[i]t is undisputed that the convergence of 'hard data,' 'silicon' and issued Rambus patents covering the accused devices did not occur until late 1999" is contradicted by the record evidence. Instead, the record evidence demonstrates that Rambus completed that "convergence" around the time of Rambus's first shred day. *See, e.g.*, CX5014 at 1 ("IP Q3'98 Goals (Final) ... 2. Infringement Activity A. Procure SLDRAM/DDR SDRAM

parts (if available) - Done (Samsung DDR @ SII) ... D. Prepare claim charts for Fujitsu SDRAM
- Done E. Prepare claim charts for Micron SDRAM - Done 3. IP Litigation Activity A.
Implement document retention action plan - Done”).

1674. The evidence also shows that Rambus’s principal focus in 1998 and 1999 was the successful market introduction of the RDRAM device, and that it was therefore *not* interested in that time period in asserting any patent rights against DRAM manufacturers. RX 2542; RX 2543 (PTX 9518) at 32:19-21; 33:3-18; 33:21-34:8; 34:13-20 (Mooring 10/14/04 *Infineon* Dep.). The evidence also shows that Rambus wanted first and foremost to *license* its patents rather than incur the risk and expense of litigation. *See, e.g.*, CX 960 at 1 (10/1/97 Tate e-mail stating that Mr. Karp’s “role is to prepare and then to negotiate to license our patents ...”). *See also* CX 5074 (DTX 9021) at 292:20-293:07 (Steinberg 10/6/04 *Infineon* Dep.) (“No, we were not contemplating litigation. In fact, we were trying to avoid litigation we wanted to identify prospective licensees that avoided that.”).

Response to Finding No. 1674: The contention in this proposed finding that Rambus “was therefore *not* interested in that time period in asserting any patent rights against DRAM manufacturers” in 1998 and 1999 is contrary to the record evidence which establishes that Rambus prepared and implemented its plans to initiate litigation against the DRAM manufacturers throughout 1998 and 1999. CCSF 9-29 (1998), CCSF 30-35 (1999); *see also* *Rambus v. Infineon*, 222 F.R.D. at 298 (“In sum, the record to date shows that, from early 1998 through 2000, Rambus had in effect a document retention program that was conceived and implemented as an integral part of its licensing and litigation strategy.”).

1675. The patents that Rambus has asserted against DRAM manufacturers did not issue until June 22, 1999. RX 1472 at 1 (U.S. Patent No. 5,915,105). The record shows that Rambus did not anticipate litigation until the end of 1999, when Rambus’s efforts to license its recently issued patents to Hitachi broke down. CX 5074 (DTX 9021) at 208:07-209:08 (Steinberg 10/6/04 *Infineon* Dep.) (“it was in the December time frame that I began to understand that the negotiation with Hitachi might end up as an enforcement proceeding in a federal district court.”).

Response to Finding No. 1675: This proposed finding is incomplete and misleading. The record establishes that Rambus’s own Vice-President in charge of IP, Joel Karp, believed that Rambus patents issued and applied for while Rambus was still at JEDEC, prior to June of 1996, were available for Rambus to use to sue DRAM manufacturers for their production of JEDEC-compliant SDRAM and DDR SDRAM. CX5013 at 2 (“The patents available to us in the 1999 timeframe are: • ‘327 - covers DDR (dual edged clocking) • ‘481 covers DDR (PLL circuitry) • ‘580 - covers DDR and PC100 (access time register)”). Each of the patents mentioned by Mr. Karp were issued well prior to June of 1999. *See* CX2010 at 1 (the ‘327 “recently issued” by May of 1996); CX1502 at 11 (‘481 issued in August of 1997); CX1510 at 1 (‘580 patent issued in November of 1998).

The evidence establishes instead that Rambus chose to delay initiating litigation for its own strategic purposes. Rambus hoped to induce DRAM manufacturers to adopt, and become locked in to producing, RDRAMs before it sued them for patent infringement with respect to SDRAMs and DDR SDRAMs. CCSF 172 (“We should not assert patents against Direct partners until ramp reaches point of no return.”). Rambus launched its first lawsuit in late 1999, after Intel withdrew its support for RDRAM and it became clear that RDRAM would fail in the marketplace. *See* Appeal Brief of Counsel Supporting The Complaint (April 16, 2004) at 71-73. Regardless of Rambus’s delay in filing complaints for its own strategic reasons, Rambus fully expected, anticipated, and planned for litigation beginning in February 1998.

1676. Rambus did not retain litigation counsel for the *Hitachi* matter until December 1999. CX 5074 (DTX 9021) at 210:04-15 (Steinberg 10/6/04 Infineon Dep.); RX 2522; RX 2523 (PTX 9525) at 135:12-14; 135:19-136:3; 137:16-19 (Johnson 11/23/04 *Infineon*

Dep.). It is objectively unreasonable to conclude that a company is “anticipating” litigation before it has retained litigation counsel, particularly in lawsuits of the magnitude involved here.

Response to Finding No. 1676: This proposed finding is contrary to the record evidence which demonstrates that Rambus retained litigation counsel in February of 1998 for the purpose of initiating litigation against the DRAM manufacturers for their production of JEDEC-compliant SDRAM and DDR SDRAM. CCRF 1619; CCSF 9-29.

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

1677. As noted above, the initial company-wide presentation of Rambus’s document retention policy had included an explicit instruction that “[o]nce litigation has commenced, a party cannot destroy either relevant evidence or discoverable information. RX 2504 (DTX 3686) at 8 (Mr. Johnson’s document retention policy presentation slides). The presentation warned of the severe consequences that might result “[i]f relevant evidence is destroyed” after litigation has commenced: “the party may be liable for sanctions, up to and including default judgment.” *Id.*

Response to Finding No. 1677: This proposed finding is contrary to the record evidence. There was no “initial company-wide presentation” of Rambus’s document retention policy. Mr. Johnson gave a presentation to a limited number of Rambus managers regarding Rambus’s legal obligations, but he was not involved in Rambus’s implementation of the policy. CCSF 93-96. Instead, Mr. Karp, without Mr. Johnson, presented Rambus’s document retention policy throughout the company. CCSF 93. Mr. Johnson offered to assist Mr. Karp in the implementation of the document retention policy, but Mr. Karp declined. CCSF 96. Furthermore, the document retention policy itself never instructed Rambus employees to maintain documents relevant to anticipated litigation relating to JEDEC-complaint DRAM. CCSF 102-108. Mr. Johnson could not have instructed Rambus employees to maintain

documents relevant to Rambus's conduct at JEDEC, because Rambus never informed him of that conduct. CCSF 85-86 ("When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.").

1678. Rambus's employees got the message and understood that if litigation occurred, they were "not allowed" to destroy relevant documents because it was "outside the rules." RX 2524; RX 2525 (PTX 9503) at 275:18-22 (Barth 2/26/04 *Infineon* Dep.).

Response to Finding No. 1678: This proposed finding is contrary to the record evidence. The document retention policy forwarded to all Rambus employees says nothing about retaining documents relevant to litigation. *See* RX-2503. The presentation by Mr. Karp to Rambus employees instructed Rambus employees to throw email away because it is "discoverable in litigation or pursuant to a subpoena." RX-2505 at 1. To the extent Rambus employees got any "message" at all, it was to eliminate email and other documents that are "discoverable in litigation or pursuant to a subpoena." *Id.*

1679. The record shows that prior to filing suit against Hitachi in early 2000, Rambus and its counsel reinforced these messages by instructing employees with potentially relevant documents to preserve those documents. Mr. Steinberg testified that in or around December 1999, he and Mr. Karp identified "those folks that would have documents that were likely to be relevant in any litigation" and told them to retain all relevant documents and not destroy them. RX 2540; RX 2541 (PTX 9517) at 346:18-348:20; 348:23 (Steinberg 10/6/04 *Infineon* Dep.); RX 2538; RX 2539 (PTX 9516) at 95:2-8 (Steinberg 8/1/01 *Infineon* Dep.).

Response to Finding No. 1679: This proposed finding is contrary to the record evidence that Rambus destroyed large quantities of documents in 2000 after these alleged instructions. CCSF 62-64. Rambus's Vice President and General Counsel himself instructed Rambus employees to destroy all drafts of contracts and negotiation materials in July of 2000.

CCSF 63. Furthermore, Rambus destroyed over 400 burlap bags of documents in December of 2000. CCSF 64. Even in the December 2000 “house cleaning,” Rambus employees were given no instructions to maintain documents relevant to litigation, anticipated or otherwise, but were instructed to comply with Rambus’s document retention policy which makes no mention of documents relevant to litigation. CCSF 107. Rambus’s recently-discovered back-up tapes confirm that, whether in 1998, 1999 or 2000, large numbers of documents directly relevant to this matter disappeared from Rambus’s files. CCSF 134-144.

1680. Lawyers from the Gray, Cary firm, after the firm was retained in connection with the Hitachi litigation, also instructed dozens of Rambus employees that they needed “to preserve all documents that would be relevant to the litigation.” CX 5078 Trial Tr. at 302:14-305:11 (Cunningham). Rambus employee Craig Hampel, among others, testified that he was told “in late 99 or early 2000” that because of the “Hitachi lawsuit or potential for a lawsuit,” he should not destroy such relevant documents as “exchanges with DRAM partners [and] competitive analysis.” RX 2536; RX 2537 (PTX 9515) at 93:13-17; 93:19-94:1; 96:12-24.

Response to Finding No. 1680: There is some record evidence that Rambus outside counsel in 2000 may have instructed some Rambus employees to maintain their documents. However, the record evidence demonstrates that many of the Rambus employees interviewed by that outside counsel had already destroyed all of their JEDEC-related documents. *See, e.g.*, CX5059 at 4 (corresponding to GCWF03456) (Crisp: “after Joel joined the company all docs were then destroyed ... 10/[98] doc retention/destruction policy”); CX 5062 at 11 (corresponding to GCWF03422) (Garrett: “got rid of all the stuff – doc retention policy ... jedec stuff all went away”); CX5063 at 12 (corresponding to GCWF03412) (Mooring: “go to [Crisp because] he had a tendency to save things ... Billy Garrett would also have docs.”); *see also* CCSF 118-120 (Rambus outside counsel unable to locate “historical documents” including JEDEC related documents).

1681. Additional evidence that Rambus employees understood the need to preserve - and produce - relevant documents can be found in the decision by Richard Crisp to search the contents of an old hard drive that was stored in his attic at home. FTC Trial Tr. at 3573:10-3574:11 (Crisp); CX 5075 (DTX 9022) at 296:18-20; 296:23; 302:22-303:5 (Crisp 10/16/04 *Infineon* Dep.). At the time that Mr. Crisp located numerous JEDEC and SynLink-related emails on that old hard drive, no one else knew of their existence. Mr. Crisp copied the emails onto a diskette and provided them to Mr. Steinberg, who provided them to outside counsel. *Id.*; RX 2541; RX 2542 (PTX 9517) at 356:24-357:24 (Steinberg 10/6/04 *Infineon* Dep.).

Response to Finding No. 1681: The record supports the contention in this proposed finding that when Mr. Crisp located numerous JEDEC and Synlink-related emails on his old hard drive in his attic, no one else knew of their existence. This is because Rambus apparently destroyed all copies of the emails in Rambus's business files and active server files. CCSF 121-122. Those emails were apparently provided to outside counsel so they could produce them in Rambus's litigations. The remaining contentions in this proposed finding are without support in the record.

1682. Contemporaneous written evidence confirms the understanding of Rambus employees that relevant documents, including evidence relating to JEDEC, needed to be preserved after litigation had commenced. In an email sent on January 5, 2001 that described a letter from the Federal Trade Commission asking Rambus to preserve relevant documents, Geoff Tate wrote that "since antitrust/jedec is an issue in our active court cases we should not be destroying any relevant documents anyways *so this shouldn't be a change in situation.*" RX 2506 (DTX 3708) at 1 (emphasis added).

Response to Finding No. 1682: The contention in this proposed finding that there was some understanding among "Rambus employees that relevant documents, including evidence relating to JEDEC, needed to be preserved after litigation had commenced" is not supported by the record. RX-2506 is incomplete as it contains only the first page of what appears to be a multiple page email. More importantly, the implication in the email that Rambus was not destroying documents relevant to litigation is contradicted by the fact that Rambus had

destroyed over 400 burlap bags of documents less than a week prior to the date on the email. CCSF 64. That document destruction was done without any instructions being given to Rambus employees to retain documents relevant to litigation (other than whichever employees had been contacted by outside counsel). CCSF 107. Rambus's recently - discovered back-up tapes confirm that, whether in 1998, 1999 or 2000, large numbers of documents directly relevant to this matter disappeared from Rambus's files. CCSF 134-144.

I. Nothing In The Supplemental Evidence Alters Judge McGuire's Findings That Complaint Counsel Failed To Meet Their Burden Of Proof On Numerous Essential Elements Of Their Claims.

1683. None of the supplemental evidence affects in any way Judge McGuire's findings that Complaint Counsel failed to meet their burden of proof on numerous essential elements of their claims, including findings regarding the scope of the JEDEC patent policy, the claims contained in the patents and patent applications filed by Rambus, the reasonableness of Rambus's royalty rates and the question of whether DRAM manufacturers are "locked in" to using technologies covered by Rambus's patents, as illustrated below.

Response to Finding No. 1683: The supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. What the supplemental documents do confirm, however, in detail not known before to Complaint Counsel, Judges Timony or McGuire, or the Commission, is Rambus's spoliation of evidence in the years after it left JEDEC. This evidenced destruction was part and parcel of its patent litigation efforts directed against firms practicing the JEDEC standards, was done in bad faith in anticipation of litigation for the purpose of destroying relevant evidence, and was carried out with the effect of destroying documents relevant not only to Rambus's patent enforcement efforts, but to the

present case before the Commission. A party that engages in such conduct is not entitled to support its position by relying on arguments concerning a lack of evidence, and a trier of fact in such circumstances may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23.

There can be no doubt that the initial decision was burdened by Rambus's destruction of evidence. Judge McGuire noted in his Order denying Complaint Counsels' motion for additional adverse inferences that further sanctions would be appropriate should evidence appear that Rambus destroyed its documents in bad faith. *See Order Denying Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief* (4/15/2003) at 4-5, n.2. The supplemental documents provide that evidence and show that relevant documents were destroyed.

Moreover, the documents recently provided by Rambus from its back-up tapes demonstrate that Rambus intentionally destroyed documents relevant to this case. Rambus's broad-ranging purge of documents from its files destroyed documents relating to: Rambus's understanding of the JEDEC patent disclosure policy as early as 1992 (*see* CCSF 139), Rambus's efforts to obtain patent claims covering the ongoing work of JEDEC (*see* CCSF 140), the actual or anticipated scope of coverage of Rambus's pending patent applications while Rambus was a member of JEDEC (CCSF 141), whether Rambus put other JEDEC members on notice that its patent applications were relevant to JEDEC's on-going work (CCSF 142), the circumstances surrounding Rambus's exit from JEDEC (CCSF 143), and Rambus's

understanding of the equitable estoppel implications of its presence and conduct at JEDEC (CCSF 144).

Nevertheless, despite Rambus's document destruction, some of the supplemental documents clearly rebut Judge McGuire's factual findings. For example, the supplemental documents show that Rambus believed as late as 1999 that patents deriving from applications filed while Rambus was at JEDEC covered various aspects of the JEDEC standard, including dual-edged clocking, on-chip PLL/DLL, and programmable CAS latency. CCSF 168-170. In addition, the supplemental documents rebut Judge McGuire's finding that the industry knew of Rambus patent rights, since the documents indicate that Rambus's Vice President in charge of enforcing those rights believed, as late as November 1999, that the industry did not know of those patent rights. CCSF 171 ("We fully anticipated at that point that once people became aware that we had IP covering sync DRAM, DDR, that it was going to make some noise."). Finally, the supplemental documents illustrate that Rambus's patent litigation strategy was premised in part on waiting for the industry to become locked in to a DRAM standard before suing in order to ensure that the industry did not switch away from that standard. CCSF 172 ("[R]isks of damaging establishment of dominant standard outweigh potential return.").

1684. Nothing in the supplemental evidence could have any effect, for example, on Judge McGuire's finding that JEDEC members were not required to disclose patent applications or an intention to file or amend patent applications. Initial Decision, ¶¶ 772-774 and pp. 269-270. This finding was largely based on "clear and unambiguous official statements of policy" from JEDEC's files and on Judge McGuire's determination that "after-the-fact testimony of interested witnesses" was not credible. *Id.*

Response to Finding No. 1684: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 31-60; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 13-53.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the JEDEC disclosure policy. Indeed, it appears that Rambus's broad-ranging purge of documents from its files destroyed documents relating to Rambus's understanding of the JEDEC patent disclosure policy as early as 1992. *See* CCSF 139. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference, applied to this issue, would indicate that the destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace.

1685. None of the supplemental evidence affects in any way Judge McGuire's finding that "the disclosure of intellectual property interests [by JEDEC members] was encouraged and voluntary, not required or mandatory." Initial Decision, p. 265. This finding was largely based on "the manuals which discuss the patent policy, a March 1994 memorandum by JEDEC's secretary, the EIA's comments to the FTC in connection with the *Dell* consent decree,

JEDEC's internal memoranda, the ANSI patent policy guidelines, the actions of other JEDEC members in not disclosing patents and JEDEC's reaction thereto, the ballot for voting on technology, and the patent tracking list, which are all "evidence that disclosure of intellectual property under the EIA/JEDEC patent policy was not mandatory." *Id.*

Response to Finding No. 1685: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 31-60; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 13-53.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the JEDEC disclosure policy. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference, applied to this issue, would indicate that the destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace.

1686. None of the supplemental evidence affects in any way Judge McGuire's finding that intellectual property disclosures by JEDEC members were "not expected until formal balloting" and his finding that "many of the presentations relied upon by Complaint Counsel never were balloted at JEDEC...." Initial Decision, pp. 273-274. These findings were

largely based on JEDEC's own official minutes and the testimony of JEDEC Council Chairman Gordon Kelley. *Id.*, ¶¶ 783-785 and pp. 273-274.

Response to Finding No. 1686: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 31-60; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 13-53.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the JEDEC disclosure policy. Indeed, it appears that Rambus's broad-ranging purge of documents from its files destroyed documents relating to Rambus's understanding of the JEDEC patent disclosure policy as early as 1992. *See* CCSF 139. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference, applied to this issue, would indicate that the destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace.

1687. Nothing in the supplemental evidence affects in any way Judge McGuire's determination that Complaint Counsel had failed to demonstrate that amendments to broaden the

claims contained in patent applications were improper, either under patent law or EIA/JEDEC rules. *Id.*, p. 331.

Response to Finding No. 1687: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 31-60; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 40-53.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the propriety of Rambus's efforts to expand the scope of its pending patent applications to cover the work of JEDEC. Indeed, it appears that Rambus's broad-ranging purge of documents from its files destroyed documents relating to Rambus's efforts to obtain patent claims covering the ongoing work of JEDEC (*see* CCSF 140), the actual or anticipated scope of coverage of Rambus's pending patent applications while Rambus was a member of JEDEC (CCSF 141), and whether Rambus put other JEDEC members on notice that its patent applications were relevant to JEDEC's on-going work (CCSF 142). Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference,

applied to this issue, would indicate that the destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace.

1688. Nothing, in the supplemental evidence affects in any way Judge McGuire's finding that JEDEC standardization is neither necessary nor sufficient to ensure that a technology or feature achieves marketplace success. *Id.*, ¶¶ 1037-1048 and pp. 302-303.

Response to Finding No. 1688: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 61-73; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 58-88.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the availability of alternative technologies to those within the scope of Rambus's constantly amended patent applications at the time when JEDEC was considering the content of the proposed standards. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference, applied to this issue, would indicate that the

destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace.

1689. Nothing in the supplemental evidence affects in any way Judge McGuire's determination that the technologies covered by Rambus's patents were at all relevant times superior to the alternatives proposed by Complaint Counsel. *Id.*, ¶¶1128-1402.

Response to Finding No. 1689: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 74-96; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 58-84.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the availability of alternative technologies to those within the scope of Rambus's constantly amended patent applications at the time when JEDEC was considering the content of the proposed standards. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference, applied to this issue, would indicate that the

destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace.

1690. Nothing in the supplemental evidence affects in any way Judge McGuire's finding that Complaint Counsel had not shown the existence of commercially viable, non-infringing alternatives to the technologies covered by Rambus patents. *Id.* and pp. 312-318.

Response to Finding No. 1690: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 82-96; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 58-72.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the availability of alternative technologies to those within the scope of Rambus's constantly amended patent applications at the time when JEDEC was considering the content of the proposed standards. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference, applied to this issue, would indicate that the

destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace.

1691. Nothing in the supplemental evidence affects in any way Judge McGuire's finding that Complaint Counsel had not shown that DRAM manufacturers were presently "locked in" to the use of the Rambus technologies. *Id.*, ¶¶ 1582-1664 and pp. 326-328.

Response to Finding No. 1691: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 65-71; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 89-95.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the power of JEDEC standards and the effect of such standards to lock in the industry to the technologies specified in the standards. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference, applied to this issue, would indicate that the destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace. Indeed, the supplemental documents illustrate that Rambus's patent litigation strategy was premised in part on waiting for the

industry to become locked in to a DRAM standard before suing in order to ensure that the industry did not switch away from that standard. CCSF 172 (“We should not assert patents against Direct partners until ramp reaches point of no return.... [R]isks of damaging establishment of dominant standard outweigh potential return.”).

1692. In sum, Rambus’s allegedly improper document destruction did not affect and could not have affected Complaint Counsel’s ability to meet its burden of proof on numerous essential elements of their claims. The Initial Decision was entirely correct in its holding that “the process here has not been prejudiced” by Rambus’s alleged destruction of documents. *Id.*, p. 244.

Response to Finding No. 1692: This proposed finding is argument, and is incorrect for all the reasons set forth in response to proposed findings 1683-1691.

CERTIFICATE OF SERVICE

I, Beverly A. Dodson, hereby certify that on August 17, 2005, I caused a copy of the attached, *Complaint Counsels' Replies to Rambus's Amended Proposed Findings of Fact and Conclusions of Law in Response to the Commission's July 20, 2005 Order*, 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-135
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

and by electronic transmission and overnight courier to:

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