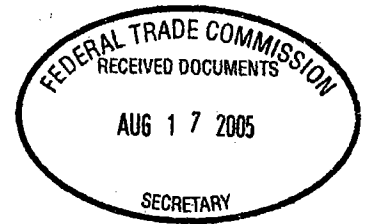


PUBLIC

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

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



In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**RESPONSES BY RESPONDENT RAMBUS INC.
TO COMPLAINT COUNSEL'S
SUPPLEMENTAL PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Respondent Rambus Inc. (“Rambus”) respectfully submits these responses to Complaint Counsel’s “Supplemental Proposed Findings of Fact and Conclusions of Law.”

I. Rambus, Intentionally and in Bad Faith, Destroyed Relevant Documents in Anticipation of Litigation.

CCSF NO. 1:

A party seeking sanctions for spoliation must demonstrate (1) that the party having control over the evidence had an obligation to preserve the evidence when it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was “relevant” to the party’s claim or defense such that a reasonable trier of fact could find that the evidence would support that claim or defense.

Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 107 (2d Cir. 2002); *Kronish v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

RAMBUS’S RESPONSE TO CCSF NO. 1:

This is not a proper “finding of fact,” for it addresses legal issues. It also understates Complaint Counsel’s burden on this motion, as set out in more detail in Rambus’s Response to Complaint Counsel’s Motion for Sanctions Due to Spoliation of Documents. For example, this proposed finding fails to acknowledge that a terminating sanction such as the one sought here is viewed as an “extreme,” “harsh” and “draconian” remedy, available only in the most egregious cases and requiring clear and convincing evidence of wrongdoing. *See generally Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003); *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1475 (D.C.Cir. 1995); *U.S. v. Shaffer Equipment Co.*, 11 F.3d 450, 462 (4th Cir. 1993).

CCSF NO. 2:

Without having seen the materials admitted to the record pursuant to the Commission's Order of July 20, 2005 (the "Supplemental Evidence"), ALJ Timony concluded that "Rambus's actions, regardless of its intent, amount to spoliation of evidence. Rambus destroyed or failed to preserve evidence for another's use ... in reasonably foreseeable litigation." Order on Complaint Counsel's Motions for Default Judgement and for Oral Argument (2/26/2003) at 4.

RAMBUS'S RESPONSE TO CCSF NO. 2:

This is not a proper "finding of fact." Moreover, Complaint Counsel fail to acknowledge that the only reason why Judge Timony had not seen many of the documents they moved to admit as part of the Supplemental Evidence is that they had failed to bring those documents to Judge Timony's attention. At least eight of the "CX" exhibits contained in the Supplemental Evidence and cited in Complaint Counsel's proposed supplemental findings were produced by Rambus prior to Judge Timony's ruling.

In any event, Judge Timony's ruling was mooted by Judge McGuire's determination, after a full trial, that there was no evidence of prejudice to Complaint Counsel or to the adjudicative process as a result of any alleged document destruction, as well as by his determination that Complaint Counsel had failed to meet their burden of proof on many essential issues where the proof was *necessarily* unaffected by *any* destruction of *any* Rambus document.

CCSF NO. 3:

After having reviewed all of the evidence including the Supplemental Evidence, Judge Payne concluded: “on the basis of the record and the law, 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. ...” *Infineon*, Transcript of March 1, 2005 at 1138-39.

RAMBUS’S RESPONSE TO CCSF NO. 3:

This is not in any sense a “finding of fact.” Moreover, Judge Payne’s few sentences about spoliation are in no sense a “final judgment” that can be given preclusive effect here, as Judge Whyte has already held in the *Hynix v. Rambus* case. *See* Order Denying Hynix’s Motion to Dismiss Patent Claims for Unclean Hands on the Basis of Collateral Estoppel (April 25, 2005) (“Hynix Collateral Estoppel Order”). Finally, Complaint Counsel cannot show and have not even tried to show that Infineon’s allegations of spoliation and prejudice are the same as those advanced by Complaint Counsel here. They are not. *See generally* Rambus’s Response to Complaint Counsel’s Motion for Sanctions Due to Rambus’s Spoliation of Documents, pp. 41-43.

II. Rambus Had an Obligation to Preserve Evidence When it Destroyed the Documents.

CCSF NO. 4:

The obligation to preserve evidence arises when the party has notice that the evidence may be relevant to future litigation. *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 107 (2d Cir. 2001); *Kronish v. United States*, 150 F.3d 112, 126

(2d Cir. 1998).

RAMBUS'S RESPONSE TO CCSF NO. 4:

This is not a proper “finding of fact” and in any event misstates the applicable legal standard. Complaint Counsel must show that Rambus knowingly destroyed evidence at a time that litigation against Complaint Counsel was “reasonably foreseeable.” *Silvestri v. General Motors Corp.*, 271 F.3d at 583, 590 (4th Cir. 2001). Courts applying the reasonable foreseeability standard to precomplaint destruction of evidence have adopted the following test: “The proper inquiry here is whether defendant, *with knowledge that this lawsuit would be filed*, willfully destroyed documents which it knew or should have known would constitute evidence relevant to this case.” *Struthers Patent Corp. v. Nestle Co.*, 558 F. Supp. 747, 765-66 (D.N.J. 1981) (emphasis added) (quoting *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed. R. Serv. 2d 423, 427 (N.D. Ind. 1977)). *See also* Gorelick, *supra*, § 3.12, at 104 (quoting standard and noting that “[o]ther courts have adopted similar standards”). “[T]he duty to preserve evidence prior to the filing of a lawsuit typically arises when the party is on notice that the litigation is ‘likely to be commenced,’” and “[t]here appear to be no cases extending the foreseeability requirement to a remote possibility of future litigation.” Jeffrey S. Kinsler & Anne R. Keyes MacIver, *Demystifying Spoliation of Evidence*, 34 Tort & Ins. L.J. 761, 764 (1999). *See also* American Bar Association, Section of Litigation, Civil Discovery Standards, August 1999, Standard No. 10 (“For the duty [to preserve evidence] to attach *before* a suit has been filed . . . the litigation must be *probable*, not *merely possible*.”) (emphasis added).

CCSF NO. 5:

Even without having seen the Supplemental Evidence, ALJ Timony concluded that “Here all credible evidence indicates that Rambus knew or should have known that it could reasonably anticipate litigation concerning patent infringements from the proposed JEDEC standards for RAM. ... Certainly by the time Rambus chose to commence its document retention program in 1998, it knew or reasonably could anticipate RAM-related litigation.” Order on Complaint Counsel’s Motions for Default Judgement and for Oral Argument (2/26/2003) at 6.

RAMBUS’S RESPONSE TO CCSF NO. 5:

This is not a proper finding of fact, and the quoted opinion was both interlocutory in nature and incorrect on this issue, and it did not address anticipation of this litigation.

CCSF NO. 6:

ALJ Timony instituted a rebuttable adverse presumption that “Rambus knew or should have known from its participation in JEDEC that litigation over the enforcement of its patents was reasonably foreseeable.” *Id.* at 9.

RAMBUS’S RESPONSE TO CCSF NO. 6:

This is not a proper finding of fact, and the quoted presumption is moot and irrelevant for the reasons set forth in the Initial Decision at pp. 244-245. The presumption was also rebutted at trial, *see* Rambus’s Responses to Complaint Counsel’s Supplemental Findings (“RRSF”), No. 67, and does not in any event address anticipation of this litigation.

CCSF NO. 7:

Judge Payne concluded that “the Court has already found, as a matter of fact, that Rambus anticipated litigation when it instituted its document retention program.” *Rambus v. Infineon*, 220 F.R.D. 264, 286 (E.D. Va. 2004); *see also* Order Granting Complaint Counsel’s Motion for Collateral Estoppel (Timony, J., February 26, 2003) at 5 (collateral estoppel applies to Judge Payne’s earlier findings).

RAMBUS’S RESPONSE TO CCSF NO. 7:

This is not a proper finding of fact. Moreover, for the reasons set out in Rambus’s Response to Complaint Counsel’s Motion for Sanctions Due to Rambus’s Spoliation of Documents, Judge Payne’s interlocutory orders on discovery issues do not and cannot have preclusive effect here and do not in any event address anticipation of this litigation.

A. Evidence Available at Initial Decision.

CCSF NO. 8:

Rambus was planning litigation relating to its JEDEC-related intellectual property when it was also planning its document retention program. CCFF 1718, 1755-1758.

RAMBUS’S RESPONSE TO CCSF NO. 8:

This “supplemental” finding simply summarizes several proposed findings that Complaint Counsel had previously submitted to Judge McGuire. Rambus previously demonstrated why the proposed findings cited in this “supplemental” finding were inaccurate. *See* Rambus’s Responses to Complaint Counsel’s Proposed Findings of Fact

(“RRFF”), ¶¶ 1718, 1755-1758.

B. Evidence Developed since the Initial Decision.

1. Rambus Reasonably Anticipated Litigation Before “Shred Day 1998.”

CCSF NO. 9:

Rambus reasonably anticipated litigation against makers of JEDEC standard complaint DRAM over patent infringement by early 1998. CCSF 8, 10-20; CX5048 at 3 (“Top Level Key Results for 1998 . . . 18. Develop and enforce IP . . . C. Get all infringers to license our IP with royalties > RDRAM (if it is a broad license) or sue.”); *see also* CX5055 (email from Karp dated January 6 1998 re obtaining DDR SDRAM samples).

RAMBUS’S RESPONSE TO CCSF NO. 9:

Complaint Counsel falsely state that the cited evidence was “developed since the Initial Decision.” *Both* of the two documents cited, CX5048 (RF0627714-731) and CX5055 (R222926), had been produced to Complaint Counsel *before* trial began in this case. The fact that Complaint Counsel may have overlooked this evidence in the past is no excuse for their assertion that the evidence is “new,” and this proposed finding should be stricken or ignored.

The proposed finding is also just plain wrong. The most that can fairly be said is that in early 1998, Rambus was generally aware 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 (PTX9526) at 4 (339:18-23) (Karp 8/7/01 *Micron Dep.*)

(emphasis added). A mere general awareness of the possibility of litigation is not the equivalent of “anticipating litigation.”

The earliest-issued 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). Rambus executives were well aware in the late 1990s 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.*, CX0919 (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. . . .’); CX5005 (DTX3678) at 2 (2/98 document 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.

Moreover, the evidence cited by Complaint Counsel does not support this conclusion. The portion of CX5048 quoted by Complaint Counsel is from a section of that document titled “Position Rambus *for the Future* Including IP” and speaks only in general conceptual terms about developing and enforcing intellectual property rights. CX5048 at 3 (emphasis added). The description of Joel Karp’s January 6, 1998 email is also misleading and fails to support a conclusion that Rambus was anticipating litigation in early 1998. In that email, Mr. Karp says only that he is aware that a company has sent samples to certain other companies and that this might be an opportunity to obtain some

parts. *See* CX5055.

At most, this evidence shows that one Rambus employee, Joel Karp, was investigating hypothetical scenarios that Rambus might someday face. But to actually adopt any licensing or litigation plan required approval of the Board of Directors. *See* RX-2543 at 2 (34:13-20) (Mooring 10/14/04 *Infineon* Dep.) (“to undertake something of the extent that Joel was proposing, it would have required other people’s buy in”). In 1998, Mr. Karp’s ideas had not been embraced by Rambus. *See* RX-2521 at 15 (114:23-115:4) (Johnson 11/23/04 *Infineon* Dep.) (“Mr. Karp was always talking about issues like this. As you see from the document, this – he’s now well into 1999 and he was still trying to get management approval.”). Because Rambus’s principal focus in 1998 and 1999 was the successful market introduction of the RDRAM device, and because Rambus believed that it had no issued patents at that time that would be infringed by either SDRAM or DDR SDRAM devices, Rambus was not interested at that time in considering litigating against DRAM manufacturers, who were (they claimed) working to introduce the RDRAM device. RX-2543 at 1-2 (33:21-34:3) (Mooring 10/14/04 *Infineon* Dep.); *see* RRSF Nos. 23 & 29, which are incorporated by reference herein.

CCSF NO. 10:

By February 12, 1998, Rambus’s Vice President of Intellectual Property Joel Karp had contacted outside counsel to discuss, among other things, patent licensing and infringement litigation against DRAM manufacturers complying with JEDEC standards. CX5007 (Notes of “LICENSING/LITIGATION STRATEGY” meeting between Karp and lawyers from Cooley Godward).

RAMBUS'S RESPONSE TO CCSF NO. 10:

Complaint Counsel overstate the import of the notes by asserting that they show that by February 12, 1998, Joel Karp had contacted outside counsel to discuss “infringement litigation against DRAM manufacturers complying with JEDEC standards.” Dan Johnson, an attorney who was at Cooley Godward in early 1998, testified that the purpose of his first meeting with Joel Karp was for “us at Cooley Godward to introduce ourselves, for us to gain some understanding of the level of sophistication of Rambus, and for us to develop some things to do for future activities.” RX-2522; RX-2523 at 1 (12:24-13:3) (Johnson 11/23/04 *Infineon* Dep.).

Mr. Johnson testified that he and Joel Karp discussed the “development of a licensing strategy” for Rambus’s intellectual property. *Id.* at 1 (13:10-13). As Mr. Johnson explained, at that time “Rambus had very few patents. They had a lot of – a lot of applications. What Rambus had was intellectual property, and they had a series of contracts wit the memory manufacturers. So the licensing strategy related to the series of contracts, but there wasn’t any patents to – at that point that I was aware of, or if there were, they were not something that they were talking to us about.” RX-2522; RX-2523 at 1-2 (13:18-25) (Johnson 11/23/04 *Infineon* Dep.). The mere fact that someone may have mentioned the possibility of litigation if, well into the future after patents issued and licensing negotiations proved unsuccessful, is not evidence that litigation was “reasonably foreseeable.”

Finally, if Complaint Counsel are correct that the meeting included a discussion of possible infringement litigation, then the fact that Mr. Johnson was present

for that discussion, and that he obviously did not feel that it presented any impediment to Rambus's subsequent adoption of the document retention policy that Mr. Johnson proposed, is strong evidence of Rambus's good faith in adopting that policy. *See, e.g., Lucent Information Management, Inc. v. Lucent Technologies, Inc.*, 186 F.3d 311, 318 (3d Cir. 1999) ("courts have found that reliance on the advice of counsel after conducting a trademark search is sufficient to defeat an inference of bad faith"); *State Farm Mutual Automobile Ins. Co. v. Johnson Kinsey Inc.*, 228 Cal.App.3d 721, 725, 279 Cal.Rptr. 116, 118 (1991) ("[i]n response to a plaintiff's allegations of bad faith and malice, a defendant is entitled to show it acted reasonably and with proper cause based on the advice of its counsel.").

CCSF NO. 11:

In a meeting held on February 12, 1998, Rambus Vice President of Intellectual Property Joel Karp, outside counsel Dan Johnson and others discussed a proposed license program for Rambus and concluded that "Royalty rates will probably push us into litigation quickly." CX5007.

RAMBUS'S RESPONSE TO CCSF NO. 11:

Joel Karp testified that the quotation cited by Complaint Counsel was not a "conclusion," as Complaint Counsel suggest, but was simply his attempt to capture an unattributed comment made during that meeting. CX5069 at 10 (371:10-14) (Karp 10/8/04 *Infineon* Dep.) ("my style would have been to have captured things that people said. So someone would have -- would have made that comment, and I just don't know who."). Assuming that the statement was made, however, it supports *only* a finding that

Rambus adopted its document retention policy in *good* faith, not bad faith. The comment was allegedly made at a meeting between Rambus and a well respected law firm. Present was Dan Johnson, a lawyer with considerable expertise in advising companies about the appropriate way to create and implement a document retention policy. The fact that the comment (if made) was made in Mr. Johnson's presence and that he then proceeded to advise Rambus on the creation and implementation of a document retention policy shows that neither Mr. Johnson, nor his colleagues at Cooley Godward, nor Rambus's managers believed that litigation was reasonably foreseeable under the circumstances or that there was anything at all improper about adopting a document retention policy.

CCSF NO. 12:

In February 1998, as part of Rambus's litigation and licensing plans for its cases against the DRAM manufacturers, Rambus planned to simultaneously gather critical documents into an electronic database and develop a document retention policy. CX5007 ("Make ourselves battle ready. Start gathering critical documents in company so we can start putting together an electronic database.... Need company policy on document retention policy.").

RAMBUS'S RESPONSE TO CCSF NO. 12:

Rambus disagrees that "as part of Rambus's litigation and licensing plans for its cases against the DRAM manufacturers, Rambus planned to simultaneously gather critical documents into an electronic database and develop a document retention policy." Outside counsel Dan Johnson testified that he advised Mr. Karp that Rambus needed a document retention policy after he discovered 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 at 5-6 (34:8-12)

(Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson testified that he advised Rambus to adopt a document retention policy for a number of 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 at 5-7 (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 back-up 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. *Id.* at 6-7; RX-2522; RX-2523 at 17-18 (Johnson 11/23/04 *Infineon* Dep.).

CCSF NO. 13:

As early as February 1998, Rambus planned its litigation strategies, including developing its legal theories and its strategies for selecting experts for the litigation. CX5007 (“Select experts in advance. Other approach is breach of contract. Dan contends that breach of contract is much easier to prove than patent infringement.”).

RAMBUS’S RESPONSE TO CCSF NO. 13:

The notes cited by Complaint Counsel – Joel Karp’s notes from his February 12, 1998 meeting with Cooley Godward – fail to support the conclusion that by

February 1998, Rambus had planned its litigation strategies, developed its legal theories, or developed its strategy for selecting experts. The notes appear to be very preliminary comments about hypothetical circumstances that might arise far into the future, after patents (perhaps) issued, after infringement analyses (perhaps) resulted in a conclusion that issued claims had been infringed, and after licensing negotiations (perhaps) had broken down irretrievably.

Moreover, as noted above, the presence at this meeting of outside counsel Dan Johnson, and the fact that the remark about “breach of contract” is attributed directly to him, are strong indicia of good faith on Rambus’s part. Complaint Counsel do not even try to rebut Mr. Johnson’s testimony about his expertise in the legal aspects of document retention practices, and they certainly do not suggest that he was engaged in any conspiracy to destroy evidence or obstruct justice. As a result, no inference can be drawn from the discussion at this meeting that Rambus was acting in bad faith in subsequently adopting a document retention policy proposed by the same lawyers who were at the meeting. To the contrary: the fact, if it is a fact, that Rambus was being advised by the same respected law firm, at the same moment in time, about issues involving future licensing, possible future litigation and the contours of a document retention policy is strong evidence of *good faith*. See *Lucent Information Management Inc.*, 186 F.3d at 318. In other words, the evidence that Complaint Counsel rely on so heavily in fact shows conclusively that Rambus had no reason to believe in February 1998 that the document retention policy that their counsel was suggesting to them was in any way improper or wrongful.

CCSF NO. 14:

In February 1998, Rambus asked its lawyers to review Rambus's contracts with its licensees to help formulate a litigation strategy. CX5007.

RAMBUS'S RESPONSE TO CCSF NO. 14:

Complaint Counsel overstate the contents of the notes, which do not show or even suggest that Rambus *asked* Mr. Johnson and his colleagues to review the license agreements in question. *See* CX5007 (stating only that "they are going to review" and that "they will review" four contracts). In any event, for the reasons stated above, the cited language supports only the conclusion that Rambus acted in good faith in 1998 in adopting a document retention policy on its counsel's advice.

CCSF NO. 15:

In February 1998, as part of Rambus's litigation and licensing plans for its cases against the DRAM manufacturers, Rambus considered whether to develop and implement a document retention program by itself or to have its lawyers develop the plan. CX5007.

RAMBUS'S RESPONSE TO CCSF NO. 15:

This proposed finding is inconsistent with the cited exhibit and inconsistent with the weight of the evidence. Outside counsel Dan Johnson testified that he advised Mr. Karp that Rambus needed a document retention policy after he discovered 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 at 5-6 (34:8-12) (Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson

testified that he advised Rambus to adopt a document retention policy for a number of 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 at 5-7 (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 back-up 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. *Id.* at 6-7; RX-2522; RX-2523 at 17-18 (Johnson 11/23/04 *Infineon* Dep.).

CCSF NO. 16:

In the meeting held on February 12, 1998, Rambus outside counsel Dan Johnson stated that Rambus needs “to litigate against someone to establish royalty rate and have court declare patent valid.” *Id.*; *see also* CX5076 at 7 (Deposition testimony of Dan Johnson); CX5069 at 11-12 (Deposition of Joel Karp “the overall idea was that at some point in order to really establish the validity of a patent, it’s something that would have to happen in court.”).

RAMBUS’S RESPONSE TO CCSF NO. 16:

Complaint Counsel overstate the import of the testimony if they are suggesting that Mr. Johnson believed, or advised Rambus, that litigation was necessary,

recommended or even *available* at that time. As Mr. Karp's cited testimony makes clear, Mr. Johnson's statement was only a general observation that the validity of a patent can only be finally established by a court. In any event, as noted above, if the statement *was* made, it can only have been part of a hypothetical set of circumstances far off in the future, given that Rambus had no issued patents to assert. Moreover, Mr. Johnson obviously did not feel at the time that litigation was sufficiently foreseeable that he could not propose to Rambus – as he says he did – that it adopt a document retention policy.

CCSF NO. 17:

When asked about his statement that Rambus needs “to litigate against someone to establish royalty rate and have court declare patent valid,” outside counsel Dan Johnson was instructed not to answer in part on the ground that the statement was attorney work product prepared in anticipation of litigation. CX5076 at 7-8 (“And I would add a further objection on the grounds of attorney work product privilege to the extent it’s calling for his mental impressions.”). *See also id.* at 8-9, 12.

RAMBUS'S RESPONSE TO CCSF NO. 17:

Rambus does not dispute that Dan Johnson was instructed not to answer this question in part on the ground that the statement reflects privileged attorney work product. Rambus does not agree that Dan Johnson was instructed not to answer because the statement was attorney work product *prepared in anticipation of litigation*. The transcript portions cited do not contain any reference to anticipation of litigation. Rambus further disagrees with Complaint Counsel's implicit suggestion that this work product objection constitutes an admission that this statement was made in anticipation of

litigation.

A work product objection is not a binding admission that litigation was anticipated when a statement was made or a document prepared especially where, as here, the statement was made by a California lawyer. Under California law, unlike federal law, the protection afforded to an attorney's work product is denominated a "privilege." See *State Farm Fire & Cas. Co. v. Sup. Ct.*, 54 Cal. App. 4th 625, 650 (1997). Moreover, California law also differs from federal law in that it protects a lawyer's work product prepared "in a nonlitigation capacity." *County of Los Angeles v. Sup. Ct.*, 82 Cal. App. 4th 819, 833 (2000) ("The protection afforded by the privilege is not limited to writings created by a lawyer in anticipation of a lawsuit. It applies as well to writings prepared by an attorney while acting in a nonlitigation capacity."). While federal courts resolving state law claims often hold under Fed. R. Evid. 501 that the federal work product *doctrine* applies to work product issues, Rambus has located no case analyzing the applicability of Rule 501 given California's use of the "privilege" language and the absolute nature of the protection afforded by the privilege. Given the clear language of Rule 501 (when construing state law claims, "the privilege" of a person "shall be determined in accordance with State law"), a strong argument exists that California law affords a work product "privilege" to the work of the California lawyers in this case, at least with respect to the state law claims at issue here. See, e.g., *Saldi v. Paul Revere Life Ins. Co.*, 224 F.R.D. 169, 193 (E.D. Pa. 2004) (applying Pennsylvania law of work product in diversity case).

CCSF NO. 18:

In a meeting held on February 12, 1998, Rambus Vice President of Intellectual Property Joel Karp, outside counsel Dan Johnson and others also discussed possible litigation approaches. Cooley Godward was tasked to “review Micron, Fujitsu and Samsung and Hyundai contracts and formulate litigation strategy driven by results of the analysis – breach-scope of license, NDA or patent infringement.” CX5007.

RAMBUS’S RESPONSE TO CCSF NO. 18:

This proposed finding is duplicative of CCSF 14, and Rambus’s response to CCSF 14 is incorporated herein by this reference.

CCSF NO. 19:

Following the February 12, 1998, meeting, Rambus’s outside counsel at Cooley Godward prepared a “litigation strategy memorandum” for Rambus. CX5008 at 2.

RAMBUS’S RESPONSE TO CCSF NO. 19:

Complaint Counsel’s reference comes from a shorthand statement in a Cooley Godward bill dated March 25, 1998. The actual memorandum states that it is a “*proposed* licensing and litigation strategy for Rambus,” and it states that “[i]n the event that licensing discussions do not result in resolution, the following is a litigation strategy for Rambus.” CX5005 at 1-2 (emphasis added). It is thus clear that licensing was the principal goal. The contingent and distant nature of any litigation was also made clear by the statement that:

“... Rambus will not initiate any action until a competing product enters the market. Once on the market, Rambus will purchase the competing product, reverse engineer it to determine if it infringes the patent, *and then determine what its next steps will be.*”

Id.

Moreover, as with the above proposed findings, it is clear that Rambus had no reason to believe that these discussions with outside counsel of possible future litigation meant that it could not, or should not, adopt the document retention policy that was being simultaneously proposed by those *same* lawyers. The proposed finding thus supports a conclusion that the policy was adopted in good faith.

CCSF NO. 20:

In late February 1998 Rambus’s outside attorneys recommended a litigation and licensing program to Rambus regarding “manufacturers who ... have plans to build competing products without paying royalties to Rambus.” CX5005 at 1; *see also id.* at 2 (“In the event that licensing discussions do not result in resolution, the following is a litigation strategy for Rambus.”)

RAMBUS’S RESPONSE TO CCSF NO. 20:

Complaint Counsel’s quotations from the “*proposed* licensing and litigation strategy for Rambus” are misleading. CX5005 at 1 (emphasis added). The document does not state that it is a litigation strategy regarding “manufacturers who ... have plans to build competing products without paying royalties to Rambus” as Complaint Counsel suggest. The full text from which Complaint Counsel selectively quote states: “Rambus faces global competition for its technology from DRAM manufacturers of two types.

The first includes licensed manufacturers *who having received proprietary information and training pursuant to a license from Rambus*, have plans to build competing products without paying royalties to Rambus.” CX5005 at 1 (emphasis added). Moreover, the document further states that “Given that various DRAM manufacturers may not be aware of Rambus’ patent portfolio and the fees that Rambus would charge for licensing its patents for non-Rambus compatible systems, *Rambus will develop a non-discriminatory licensing program.*” *Id.* (emphasis added). In addition, the document “assumes that Rambus will not initiate any action until a competing product enters the market. Once on the market, Rambus will purchase the competing product, reverse engineer it to determine if it infringes the patents, *and then determine what its next steps will be.*” *Id.* at 2 (emphasis added).

Litigation was thus clearly described as a far-off contingency, to be considered as a last option only if *all* of the following occurred: (1) issued patents; (2) infringing products; and (3) failed licensing negotiations. None of these three elements were present as of February 1998, which likely explains why none of those involved in the discussion, including outside counsel, believed that there was any impediment to the development of a content-neutral document retention policy.

CCSF NO. 21:

In a “proposed licensing and litigation strategy” memorandum dated February 23, 1998, Rambus’s outside counsel described for Rambus a “tiered litigation strategy” needed by Rambus because of the “number of potential disputants.” CX5005 at 2. That memorandum describes potential litigation timing and potential legal theories for

Rambus that differentiates between current licensees of RDRAM and “unlicensed competitors.” *Id.*

RAMBUS’S RESPONSE TO CCSF NO. 21:

Complaint Counsel’s continual efforts to mine the same short memo for evidence of bad faith are unavailing. The memo cuts the other way. It describes a proposed *licensing* strategy for Rambus and then refers to a possible litigation strategy “[i]n the event that licensing discussions do not result in resolution.” CX5005 at 2. The document does not state that Rambus “needed” a tiered litigation strategy due to the number of potential disputants, but instead states merely that Cooley Godward had developed a “tiered” strategy for that reason. *See id.* The document is preliminary, conceptual and hypothetical in that it “assumes that Rambus will not initiate any action until a competing product enters the market. Once on the market, Rambus will purchase the competing product, reverse engineer it to determine if it infringes the patents, *and then determine what its next steps will be.*” *Id.* (emphasis added). Complaint Counsel have cited no evidence that as of February 1998 any competing product had entered the market or that Rambus had reverse engineered any such product to determine if it infringed any patent that had issued at that time. *See* RRSF No. 9. Moreover, the fact that this document was prepared by the same lawyers who were simultaneously advising Rambus on the adoption of a document retention policy is strong evidence of Rambus’s good faith in adopting that policy.

CCSF NO. 22:

Vice President Karp noted two addition issues on Rambus outside counsel’s

proposed licensing and litigation strategy memorandum: “document retention policy” and “patent attorney files.” CX5005 at 3; CX5069 at 16.

RAMBUS’S RESPONSE TO CCSF NO. 22:

Rambus does not dispute that the handwritten notations on CX5005 at 3 were made by Joel Karp. Rambus does not agree with Complaint Counsel’s characterization of those notes as “addition[al] issues.” Mr. Karp’s notations reflected advice that Dan Johnson had provided at their earlier meeting that Rambus should adopt a document retention policy and conform its patent attorney’s prosecution files so the file is the same as the official file. CX5007; RX-2521 at 5 (33:13-21) (Johnson 11/23/04 *Infineon* Dep.); CX5069 at 11 (376:4-23) (Karp 10/8/04 *Infineon* Dep.). As stated above, counsel’s simultaneous involvement in these “strategy” discussions and in the promulgation of a document retention policy is strong evidence of good faith on Rambus’s part in the adoption of the policy.

CCSF NO. 23:

On March 4, 1998, Rambus Vice President of Intellectual Property Joel Karp made a presentation to Rambus’s Board of Directors of Rambus’s “licensing and litigation strategy”. CX0613 at 2 (“Intellectual Property: At this point Joel Karp joined the meeting and updated the Directors on the Company’s strategic licensing and litigation strategy.”).

RAMBUS’S RESPONSE TO CCSF NO. 23:

Mr. Karp testified that his presentation was a “trial balloon” regarding a “*proposed* licensing and litigation strategy for Rambus.” CX5069 at 15 (391:22-392:3)

