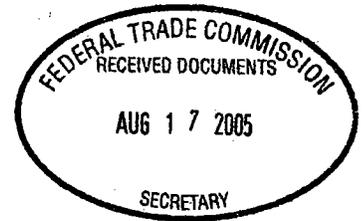


PUBLIC

**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)

(Karp 10/8/04 *Infineon* Dep.). Mr. Karp also testified that he gave the presentation not to present an actual licensing or litigation strategy, but “to give a presentation of what my activities had . . . been over the few months that I had been . . . at the company at that point.” *Id.* at 19 (403:1-5) (Karp 10/8/04 *Infineon* Dep.). Mr. Karp further testified that the presentation was only a “first cut” at a possible licensing program. *Id.* at 19 (402:16-18) (Karp 10/8/04 *Infineon* Dep.).

David Mooring, who then was Rambus’s Vice President of the Personal Computer Division (and later Rambus’s President), testified that he remembered Mr. Karp “coming forward with his kind of first volley” on a potential licensing program, which Rambus did not adopt. RX-2542; RX-2543 at 1 (33:3-6) (Mooring 10/14/04 *Infineon* Dep.). He explained that “to undertake something of the extent that Joel was proposing, it would have required other people’s buy in” and “this proposal fell on deaf ears at the time.” *Id.* at 2 (34:13-20) (Mooring 10/14/04 *Infineon* Dep.). *See* RRSF Nos. 9 & 29, which are incorporated by reference herein.

It is also important to note that the presentation by Mr. Karp borrows extensively from, and appears to be based upon, the memorandum previously prepared for Rambus by the Cooley Godward firm. *Compare* CX5006 (presentation) with CX5005 (memorandum). Finally, the Supplemental Evidence demonstrates that Rambus’s outside counsel were fully aware of, and possessed a copy of Mr. Karp’s March 1998 presentation. *Compare* CX5006 (produced from Rambus’s files) *with* CX5054 (produced from Mr. Johnson’s files). This demonstrates that all involved understood the prospect of litigation at this time, prior even to the issuance of relevant

patents, to be a distant one that presented no legal impediment to Rambus's adoption of a document retention policy.

CCSF NO. 24:

In his March 4, 1998, presentation to Rambus's Board of Directors, Vice President Joel Karp described some "Near Term Actions" as part of the "Licensing and Litigation Strategy," including "[n]eed to create document retention policy" "[n]eed to prepare discovery database," and "[n]eed to organize prosecuting attorney's files for issued patents." CX5006 at 8.

RAMBUS'S RESPONSE TO CCSF NO. 24:

See RRSF 23, above, for a full description of the referenced document.

Mr. Karp also testified that the reference to "near term actions" represented a status report on activities that Mr. Karp was then pursuing – not a request for Board approval of any policy or strategy. CX5069 at 20 (404:22-24) (Karp 10/8/04 *Infineon* Dep.).

CCSF NO. 25:

Rambus withheld from production to Infineon, under claims of privilege, the March 4, 1998, presentation by Vice President Joel Karp to the Rambus Board of Directors. Rambus asserted that Vice President Karp's presentation constituted both an attorney-client communication and attorney work product prepared in anticipation of litigation. CX5000 at 18, item 317; *see also* CX5069 at 16-17.

RAMBUS'S RESPONSE TO CCSF NO. 25:

Item 317 of Rambus's privilege log identified Joel Karp and Dan Johnson as authors of Mr. Karp's presentation and asserted the attorney-client and attorney work

product privileges. In light of the applicability of California law, Rambus disagrees with Complaint Counsel's implicit suggestion that the "work product" designation on Rambus's privilege log constitutes an admission that this document was prepared in anticipation of litigation. *See* RRSF No. 17.

CCSF NO. 26:

In his March 4, 1998, presentation to Rambus's Board of Directors, Vice President Joel Karp described a licensing and litigation strategy for DDR SDRAM, among other products. CX5006 at 1.

RAMBUS'S RESPONSE TO CCSF NO. 26:

Mr. Karp's "trial balloon" presentation does not explicitly mention litigation (rather than licensing) with respect to DDR SDRAM, and it certainly makes clear that licensing is the first, and preferred, option. CX5006 at 1-3. The presentation also confirms that *no* licensing *or* litigation would occur until after parts had been located and reverse engineered and infringement analyses had been prepared. *Id.* at 7.

CCSF NO. 27:

In his March 4, 1998, presentation to Rambus's Board of Directors, Vice President Joel Karp described Cooley Godward's "tiered litigation strategy" which was intended to kick-in if negotiations do not lead to licenses, and timing issues for proposed litigation. *Id.* at 3-7. The presentation also described a "Potential legal action against SLDRAM, Inc." *Id.* at 5.

RAMBUS'S RESPONSE TO CCSF NO. 27:

The proposed finding is not supported by the cited exhibit if the finding is

intended to suggest that a litigation strategy had been adopted by Rambus as of March 4, 1998 or that any litigation strategy “was intended to kick-in” at any point in time. *See* RRSF Nos. 9, 21 & 23, which are incorporated by reference herein. Although the document includes a line that reads “potential legal action against SDRAM, Inc.,” it refers to unfair competition and trade secret claims. Complaint Counsel have not explained the relevance of these claims to this action, nor have they cited any evidence that any such legal action was approved, rejected, or even discussed.

CCSF NO. 28:

In an October 1998 presentation, which either went to Rambus’s Board of Directors or to CEO Geoff Tate’s immediate staff, Vice President Karp asserted that Rambus would be ready to initiate litigation against manufacturers of SDRAM for patent infringement in the first quarter of 1999 and to initiate litigation regarding DDR SDRAM the quarter after that. CX5011 at 3; CX5069 at 44-45.

RAMBUS’S RESPONSE TO CCSF NO. 28:

Complaint Counsel mischaracterize the evidence in saying that Joel Karp asserted that Rambus “would be ready” to initiate litigation against manufacturers of SDRAM for patent infringement in the first quarter of 1999 or that it “would be ready” to initiate litigation regarding DDR SDRAM the quarter after that. The document plainly states only that Rambus “*Could* be ready to go in Q1 ’99 (*if access time patent issues*).” CX5011 at 3 (emphasis added). In the very next sentence, the document shows that Rambus was not anticipating litigation or intending to get itself ready by the first quarter of 1999, asking “however, big question is – what’s the rush? What is compelling

business reason? I can't think of any." *Id.* The document also evidences Rambus's belief that it was not in a position to contemplate litigation until it had strengthened its patent portfolio and completed its reverse engineering efforts, tasks that it did not contemplate finishing until calendar year 2000. *See id.* at 1-2.

Mr. Karp's preliminary suggestions were not embraced by Rambus as of October 1998 because, among other things, Rambus believed that it had no issued patents at that time that would be infringed by either SDRAM or DDR SDRAM devices and because Rambus's principal focus at that time was the successful market introduction of the RDRAM device. *See* RRSF Nos. 9, 23, & 29.

CCSF NO. 29:

Throughout the Summer and Fall of 1998, Rambus Vice President of Intellectual Property Joel Karp continued to anticipate litigation against manufacturers JEDEC compliant DRAM. *See, e.g.,* CX5017 ("IP Q3'98 Goals (First Cut) ... 2. Infringement Activity... Prepare claim chart for Micron SDRAM...3. IP Litigation Activity."); CX5014 ("IP Q3'98 Goals (Final)... 2. Infringement Activity... Prepare claim chart for Micron SDRAM...3. IP Litigation Activity."); CX5011 at 3 ("Strategy Update 10/98 - 1 ... Taiwan Strategy Is Best Course Of Action For Near Term (Next 2 or 3 Quarters) Mosel and Nanya for SDRAM ... Acer SIS VIA for SDRAM, DDR..."); *see also* CX5069 at 44-45 (CX5017 was likely created in June of 1998; CX5014 was likely created in September or October of 1998; CX5011 was either presented to Rambus Board of Directors or to Geoff Tate's immediate staff).

RAMBUS'S RESPONSE TO CCSF NO. 29:

Rambus disagrees that the documents cited by Complaint Counsel demonstrate that Rambus was anticipating litigation during the summer and fall of 1998. These documents address the potential licensing of Rambus's (then unissued) patents for non-compatible uses (such as SDRAM). Many of these documents also discuss and explore strategic issues surrounding potential litigation in the event that the patents issued, licensing negotiations were unsuccessful, and the company made the decision to proceed to litigation. But the evidence also reflects that executive board approval was required for any of these plans to move forward and that, as late as mid-1999, such approval had not been provided. *See, e.g.* CX5012 at 13 (R401172) (listing under "add/amend above goals" "commence litigation during Q2/00, *upon exec/board approval. (New)*") (emphasis added); 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.").

As of the summer and fall of 1998, Mr. Karp's suggestions had not been embraced by Rambus, both because of a concern that such efforts would distract from Rambus's principal focus (namely, RDRAM licensing and support) and, perhaps more importantly, because of Rambus's general belief that it had no issued patents at that time that would be infringed by either SDRAM or DDR SDRAM devices. RX-2542; RX-2543 at 1-2 (33:21-34:3) (Mooring 10/14/04 *Infineon Dep.*); *see also* RRSF No. 9, which is incorporated by reference herein.

Moreover, Complaint Counsel has presented no evidence to support its suggestion that Joel Karp or Rambus ever targeted DRAM manufacturers based on their compliance with JEDEC standards. *See* RRSF No. 10. Indeed, none of the cited exhibits even refers to JEDEC.

Finally, it is clear from the Supplemental Evidence that Mr. Karp continued to discuss licensing and (possible) litigation with Dan Johnson in 1998 and 1999, without any suggestion by Mr. Johnson that those discussions meant that Rambus should suspend or modify the document retention policy it had adopted on advice of counsel. RX 2521 at 15 (114:23-115:4) (Johnson 11/23/04 *Infineon* Dep.). These facts negate any inference of bad-faith that Complaint Counsel would like to draw from the cited documents.

2. Rambus Reasonably Anticipated Litigation Before the “1999 Shredding Party at Rambus.”

CCSF NO. 30:

Rambus reasonably anticipated litigation against manufacturers of JEDEC-complaint SDRAMs and DDR SDRAMs for patent infringement by early 1999. CCSF 9-29.

RAMBUS’S RESPONSE TO CCSF NO. 30:

This proposed finding is irrelevant because Complaint Counsel do not contend that JEDEC-related documents or other relevant documents were created or destroyed *after* the summer 1998 “shred day” event. Complaint Counsel’s proposed findings about post-1998 litigation strategies and document retention issues simply have no bearing on the issues raised by the pending motion. Moreover, the evidence cited by Complaint Counsel in CCSF 9-29 does not support the conclusion stated in this finding.

See RRSF Nos. 9-29, which are incorporated by reference herein.

CCSF NO. 31:

Rambus considered initiating litigation against manufacturers of JEDEC-compliant SDRAMs and DDR SDRAMs as a response to Intel's anticipated withdrawal from its relationship with Rambus. CCSF 32-33.

RAMBUS'S RESPONSE TO CCSF NO. 31:

This proposed finding is irrelevant for the reasons set out in RRSF No. 30. In addition, the evidence cited by Complaint Counsel does not support this conclusion. See RRSF Nos. 32-33, which are incorporated by reference herein.

CCSF NO. 32:

In late 1998 or January 1999, Rambus Vice President of Intellectual Property Joel Karp and outside counsel Dan Johnson developed a strategy memorandum for dealing with Rambus's deteriorating relationship with Intel. CX5069 at 47-49. That memorandum, entitled "Nuclear Winter Scenario," described a litigation strategy against DRAM manufacturers of JEDEC-compliant SDRAMs and DDR SDRAMs. CX5013 at 2 (describing patents available to Rambus in the 1999 timeframe); *Id.* at 4-6 (describing "Complaints against DRAM Companies," "Picking Litigation Targets," "Potential Litigation Forums," and "Preparation for Litigation"). The Nuclear Winter Scenario also included plans for litigation against Intel over its use of JEDEC-compliant SDRAM and DDR SDRAM technology. *Id.* at 3 ("Legal Action Against Intel").

RAMBUS'S RESPONSE TO CCSF NO. 32:

This proposed finding is irrelevant for the reasons set out in RRSF No. 30.

Complaint Counsel also have not established that Rambus's relationship with Intel was deteriorating as of late 1998 or early 1999. The only evidence cited by Complaint Counsel, Joel Karp's testimony, shows only that as of late 1998 or early 1999, there were contract discussions between Rambus and Intel that were "getting a bit touchy." CX5069 at 47 (535:20-25) (Karp 10/8/04 *Infineon* Dep.).

The evidence also shows that the "Nuclear Winter Scenario" document was purely a hypothetical exercise. Joel Karp testified that he was asked to prepare the document as a "what happens if Intel tells us to take a walk, kind of thing," "a strawman kind of scenario." *Id.* at 47 (536:2-8) (Karp 10/8/04 *Infineon* Dep.). The document itself states clearly that "at this time that *this is a very unlikely scenario*, even for something that's purely hypothetical." CX5013 at 2 (emphasis added). Accordingly, this document does *not* show that any litigation by Rambus was likely, and the reference to a "nuclear winter" certainly shows that such a prospect was considered highly *undesirable* to Rambus and as something that should be avoided if at all possible. Moreover, Mr. Karp testified that after he prepared the document, "they worked everything out with Intel and so it got – it got tabled or put on the shelf somewhere, and nothing ever happened to it." CX5069 at 49 (539:11-15) (Karp 10/8/04 *Infineon* Dep.).

Finally, outside counsel Dan Johnson was aware of Mr. Karp's preparation of the "scenario" exhibit and "provided information which found its way into [the] document." RX 2521 at 13-14 (96:07-96:09; 96:24-97:05; 97:16-20; 98:3-9; 98:11-13) (Johnson 11/23/04 *Infineon* Dep.). This is strong evidence of Rambus's good faith in its continued implementation of the document retention policy that Mr. Johnson had

proposed.

CCSF NO. 33:

Rambus's concerns about Intel and Rambus's preparations for litigation against Intel and the DRAM manufacturers over JEDEC-complaint SDRAM and DDR SDRAM continued at least through September of 1999. *See* CX5019 at 1-2 ("Question: Is there life at Rambus after Intel? Answer: There's better be because Intel has already started to let go.").

RAMBUS'S RESPONSE TO CCSF NO. 33:

The evidence cited by Complaint Counsel fails to support their conclusion. As stated above, Joel Karp testified that shortly after he drafted the "Nuclear Winter Scenario" document in late 1998 or early 1999, "they worked everything out with Intel and so it got – it got tabled or put on the shelf somewhere, and nothing ever happened to it." CX5069 at 49 (539:11-15) (Karp 10/8/04 *Infineon* Dep.). Because the evidence demonstrates that this document was nothing more than a "purely hypothetical," "strawman kind of scenario," there is no support for Complaint Counsel's assertion that Rambus ever "prepar[ed] for litigation against Intel and the DRAM manufacturers" or that the "preparations" "continued." *See* RRSF No. 32, which is incorporated by reference herein. Moreover, this proposed finding is irrelevant for the reasons set out in RRSF No. 30. Finally, Mr. Johnson testified that although he had not seen the presentation in question, he was aware of what it was about. RX2521 at 16 (120:5-9).

CCSF NO. 34:

In or around June of 1999, either Vice President Joel Karp or in-house IP

lawyer Neil Steinberg presented mid-year 1999 “Key Results” to Rambus’s executives. That presentation described Rambus’s efforts to obtain SDRAM and DDR SDRAM related patents. That presentation also set as a Rambus goal the selection of a company against which to litigate during the first quarter of 2000 and the commencement of litigation against that company in the second quarter of 2000. CX5012 at 13 (“KR99.5 UPDATE FOR IP,” corresponding to bates numbers R401172-173); CX5069 at 51.

RAMBUS’S RESPONSE TO CCSF NO. 34:

The cited presentation does not set any goals. The document makes clear that to set a “new” goal of this sort, executive board approval was required for any of these plans to move forward and that, as of the summer of 1999, such approval *had not been provided*. See CX5012 at 13 (R401172) (listing under “add/amend above goals” “commence litigation during Q2/00, upon exec/board approval. (*New*)”) (emphasis added). The document also makes clear that *licensing* was the first option, that it had not begun, and that no litigation would commence unless negotiations failed. *Id.* A later slide confirms this point by referring to “negotiations” in “Q4/99” and “possible” litigation in “Q2/00.” *Id.* at 16 (R401175). Finally, this proposed finding is irrelevant for the reasons set out in RRSF No. 30.

CCSF NO. 35:

Rambus continued to anticipate and prepare for litigation throughout the summer of 1999. See, e.g., CX5025 (“IP Q3’99 Goals – Final 7/1/99 ... 2. Infringing Devices. A. Initiate reverse engineering of infringing devices as required for litigation prep.”); CX5026 (“IP Q3’99 Goals – Final 7/1/99 ... 3. Licensing/Litigation Readiness...

G. Prepare litigation strategy against 1 of the 3 manufacturers... H. Ready for litigation with 30 days notice.”); CX5027-CX5029; CX5069 at 53 (describing the IP Q3’99 Goals as “various versions” of the document.); *see also* CX5045.

RAMBUS’S RESPONSE TO CCSF NO. 35:

The cited evidence does not support the conclusion that Rambus anticipated or prepared for litigation during the summer of 1999. These documents address the potential licensing of Rambus’s patents for non-compatible uses (such as SDRAM). And many of these documents also discuss and explore strategic issues surrounding potential litigation in the event that the patents issued, licensing negotiations were unsuccessful, and the company made the decision to proceed to litigation. But the evidence also reflects that executive board approval was required for any of these plans to move forward and that, as of the summer of 1999, such approval had not been provided. *See* RRSF 9, 23, 29, & 34 which are incorporated by reference herein. Finally, this proposed finding is irrelevant for the reasons set out in RRSF No. 30.

3. Rambus Reasonably Anticipated Litigation Before its Document Shredding Session in December 2000.

CCSF NO. 36:

Rambus reasonably anticipated litigation against makers of JEDEC standard complaint DRAM over patent infringement by early 2000. CCSF 9-35.

RAMBUS’S RESPONSE TO CCSF NO. 36:

This proposed finding is irrelevant because, as of early 2000, Rambus had put in place a “litigation hold” to preserve potentially relevant documents. *See* RSF 1677-1682.

CCSF NO. 37:

In a presentation to Rambus management on September 24, 1999, Rambus Vice President Joel Karp and in-house IP lawyer Neil Steinberg described a litigation strategy designed to increase the industry's respect for Rambus's IP. CX5019 at 3-4 ("we must increase the industry's perception of our value through aggressive assertion of our IP rights.... Currently industry does not have respect for Rambus IP. We have to earn that respect by substantiating our claims that cover pioneering technology. This is the main goal and must be achieved!!").

RAMBUS'S RESPONSE TO CCSF NO. 37:

The proposed finding is misleading to the extent it characterizes the exhibit as "describ[ing] a litigation strategy." Rather, it reflects the need to "earn [industry] respect by substantiating our claims that cover pioneering technology," which the document describes as "the main goal." The record shows that Rambus did indeed seek to license its technology and did indeed sign licenses with many in the industry.

CCSF NO. 38:

In their September 24, 1999 presentation to Rambus management, Vice President Joel Karp and in-house IP lawyer Neil Steinberg emphasized that Rambus's IP strategy was premised on the understanding that Rambus was eventually going to have to litigate in order to enforce its DRAM patents. *Id.* at 4 ("Even if we gain some initial settlements, we will have to ultimately pursue remedies in court. Companies like Micron will fight us tooth and nail and will never settle. Best route to IP credibility is through victory over a major DRAM manufacturer.").

RAMBUS'S RESPONSE TO CCSF NO. 38:

The proposed finding is misleading to the extent that it states that “Rambus’s IP strategy was premised on the understanding that Rambus was eventually going to have to litigate in order to enforce its DRAM patents.” First, as demonstrated above, this presentation was not a description of a litigation strategy. *See* RRSF No. 37, which is incorporated by reference herein. Second, the document states that patent claims are initially substantiated either by signing a lucrative license deal or winning in court. CX5019 at 5. In the portion quoted by Complaint Counsel, the document merely recognizes that some companies are particularly litigious and that Rambus might ultimately have to pursue its remedies against such companies in court. *Id.* at 6.

CCSF NO. 39:

In the fourth quarter of 1999, either Vice President Joel Karp or in-house IP lawyer Neil Steinberg prepared a presentation for Rambus’s executive staff entitled “SDRAM Targets.” CX5012 at 27 (corresponding to bates numbers R401186-189); CX5069 at 51-52. According to the presentation, Rambus was to “Prepare Infringement Case For 3 SDRAM Targets in Q4’99.” CX5012 at 27 (corresponding to bates number R401186). The first target was to be chosen by “early Q4’99.” *Id.* at 29 (corresponding to bates number R401188).

RAMBUS'S RESPONSE TO CCSF NO. 39:

The cited evidence is irrelevant to the issues presented by this motion.

CCSF NO. 40:

In October 1999, either Vice President Joel Karp or in-house IP lawyer Neil

Steinberg made a presentation to Rambus's Board of Directors entitled "Target Selection." The presentation discussed Rambus's plans for initiating negotiations and litigation against DRAM manufacturers with respect to their manufacture of JEDEC-compliant SDRAMs and DDR SDRAMs. CX5003 at 2-6; CX5069 at 53-54. Among the factors considered for target selection was a DRAM manufacturer's "experience in battle," "litigation story," "venue flexibility," and Rambus's exposure to a counterclaim by the manufacturer. *Id.*

RAMBUS'S RESPONSE TO CCSF NO. 40:

This proposed finding is misleading to the extent it describes the presentation as discussing "plans for initiating ... litigation." First, the document describes a plan for initiating negotiations and merely recognizes the *possibility* that if negotiations are unsuccessful, litigation may result. *See* CX5003 at 8 (file suit "*if no closure*") (emphasis added). Second, to the extent that this finding suggests that this document reflect a "plan" that had been adopted by Rambus, it is unsupported by the evidence. The document on its face states that it is a "recommendation" that remained subject to Board approval. CX5003 at 8. Finally, Complaint Counsel have presented no evidence to support its suggestion that Rambus ever targeted DRAM manufacturers based on their compliance with JEDEC standards. *See* RRSF No. 10. Indeed, the cited exhibit does not even refer to JEDEC.

CCSF NO. 41:

In the October 1999 presentation to Rambus's Board of Directors, either Vice President Joel Karp or in-house IP lawyer Neil Steinberg presented a time-line for

negotiations and litigation that contemplated filing a complaint in Delaware by February 1 of 2000. *Id.* at 7-8 (“File suit in Delaware ASAP, if no closure.”). In the Presentation either Mr. Karp or Mr. Steinberg suggested that the first target for Rambus’s patent litigation should be Hitachi. *Id.* at 8. The presentation suggested that Rambus plan to approach Hitachi during the fourth quarter for settlement negotiations. *Id.* If no settlement was reached, Rambus planned to sue Hitachi six weeks later. *Id.*

RAMBUS’S RESPONSE TO CCSF NO. 41:

The proposed finding is irrelevant, misleading and unsupported by the evidence cited, for the reasons set out in RRSF No. 40.

CCSF NO. 42:

In November 1999, Rambus had a company-wide off-site meeting at which Vice President Joel Karp discussed Rambus’s “Lexington” patent enforcement initiative against SDRAMs and DDR SDRAMs. CX5002 at 4 (“Three product categories are first targets for enforcement • DDR SDRAMs • SDR SDRAMs • Processors with memory interfaces”).

RAMBUS’S RESPONSE TO CCSF NO. 42:

The cited evidence is irrelevant to the issues presented by this motion.

CCSF NO. 43:

On January 18, 2000, Rambus initiated litigation against Hitachi in federal district court in Delaware, alleging that Hitachi’s SDRAMs and DDR SDRAMs infringed Rambus patents. CCF 1995.

RAMBUS’S RESPONSE TO CCSF NO. 43:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission’s July 20, 2005 Order.

CCSF NO. 44:

Lester Vincent understood in January of 2000 that Rambus had begun suing the DRAM manufacturers over their manufacture of JEDEC-compliant SDRAM and DDR SDRAM. CX5040 (“Filed suit against Hitachi. P001 case”).

RAMBUS’S RESPONSE TO CCSF NO. 44:

The proposed finding is misleading since the cited documents indicate only that Lester Vincent was aware in January 2000 that Rambus had filed suit against Hitachi. The document makes no reference to “DRAM manufacturers” in the plural sense, nor does it refer to “JEDEC-compliant devices.” *See* CX5040.

CCSF NO. 45:

On August 8, 2000, Rambus filed a patent infringement lawsuit against Infineon Technologies in federal district court in Virginia. CCF 2016.

RAMBUS’S RESPONSE TO CCSF NO. 45:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission’s July 20, 2005 Order.

CCSF NO. 46:

In August 2000, Micron sued Rambus in federal district court in Delaware seeking a declaratory judgment that its manufacture and sale of JEDEC-complaint SDRAM did not infringe Rambus’s patents. CCF 2020.

RAMBUS'S RESPONSE TO CCSF NO. 46:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission's July 20, 2005 Order.

CCSF NO. 47:

In August 2000, Hynix sued Rambus in federal district court in California seeking a declaratory judgment that its manufacture and sale of JEDEC-complaint SDRAM did not infringe Rambus's patents. CCFF 2019.

RAMBUS'S RESPONSE TO CCSF NO. 47:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission's July 20, 2005 Order.

III. Rambus Intentionally Destroyed its Documents.

CCSF NO. 48:

ALJ Timony found that Rambus destroyed its documents intentionally. Order on Complaint Counsel's Motions for Default Judgement and for Oral Argument (2/26/2003) at 8.

RAMBUS'S RESPONSE TO CCSF NO. 48:

This is not a proper finding of fact under the Commission's July 25, 2005 Order, as it is not based upon the supplemental evidence in any way. It is also misleading, since Judge Timony appears to have been using the word "intent" to refer simply to the purposeful act of discarding a document, without determining whether the underlying motivation was an improper one. Judge McGuire subsequently determined that the evidence was insufficient to show that Rambus "specifically intended to destroy

documents in an effort to assist in its defense strategies.” Order Denying Complaint Counsel’s Motion for Additional Adverse Inferences and Other Appropriate Relief (April 15, 2003) at 5, n.2. Judge McGuire’s finding was correct when made and remains correct today, for the reasons set forth in Rambus’s Amended Proposed Findings of Fact and in these responses to Complaint Counsel’s Supplemental Proposed Findings of Fact.

CCSF NO. 49:

Judge Payne concluded that “[i]t is beyond question that Rambus instituted a document retention policy and thereby intentionally destroyed documents.” *Rambus v. Infineon*, 220 F.R.D. at 283.

RAMBUS’S RESPONSE TO CCSF NO. 49:

This is not a proper finding of fact and is simply a quote from a district court’s discovery opinion. In the absence of a final judgment, intermediate opinions on discovery matters cannot be afforded preclusive effect. *See, e.g., In Re 949 Erie Street*, 824 F.2d 538, 541 (7th Cir. 1987) (holding that collateral estoppel does not apply “to an interlocutory order, which may be changed by the district court at any time prior to final judgment”); *Luben Indus., Inc. v. U.S.*, 707 F.2d 1037, 1040 (9th Cir. 1983) (holding that collateral estoppel does not apply in the absence of a final judgment).

A. Evidence available at Initial Decision.

CCSF NO. 50:

Rambus intentionally destroyed its hard copy documents. CCFF 1719, 1723-1727, 1731, 1734-1742, 1745-1750, 1752.

RAMBUS'S RESPONSE TO CCSF NO. 50:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission's July 20, 2005 Order. Rambus responded to these prior proposed findings at RRF 1719, 1723-1727, 1731, 1734-1742, 1745-1750, 1752.

CCSF NO. 51:

Rambus intentionally destroyed its electronic documents. CCFF 1720-1727, 1731-1732, 1734-1735, 1743, 1745, 1750-1753.

RAMBUS'S RESPONSE TO CCSF NO. 51:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission's July 20, 2005 Order. Rambus responded to these prior proposed findings at RRF 1720-1727, 1731-1732, 1734-1735, 1743, 1745, 1750-1753.

B. Evidence Developed since the Initial Decision.

1. Rambus Intentionally Destroyed Documents on "Shred Day 1998."

CCSF NO. 52:

Rambus intentionally destroyed electronically stored documents as part of its 1998 "document retention" scheme, reversing its practice of using full system backups for archival purposes. CX5018 ("Effective immediately, the policy is that full system backup tapes will be saved for 3 months only. Therefore, you can no longer depend on the full system backups for archival purposes."); *see also* CX5069 at 36-37 ("Q. And there were Macintosh backup tapes that Rambus had saved for quite a while; right, from

the early days? The Witness: Yes, that's – that's correct.... Q. And those Macintosh backup tapes were destroyed entirely as part of the implementation of the document retention policy; right? A. I – I didn't witness stuff being destroyed. That's my understanding is that they were being destroyed."); CX5085 at 11-12.

RAMBUS'S RESPONSE TO CCSF NO. 52:

The proposed finding is unsupported by the evidence cited if it is intended to suggest that Rambus had a "practice" of using full system backup tapes for archival purposes prior to its adoption of a document retention policy. Instead, the cited exhibit reflects notice to Rambus employees that, *if* any given employee was relying upon backup tapes for archival purposes, that employee should no longer do so. *See* CX5018.

The proposed finding is also misleading and argumentative in its characterization of Rambus's document retention policy as a "scheme;" the policy's provisions relating to electronic discovery (like the remainder of the policy) were initially suggested, recommended, and approved by experienced outside counsel. *See* RSF 1653-1656.

Finally, Allen Roberts who at the time was Rambus's Vice-President of Engineering and who was responsible for the information technology and computer systems in the company, testified that during his time at Rambus, there was *no* procedure put into place that automatically deleted files from Rambus's server or from individual computers. Thus, unless a user took affirmative action to delete a file or e-mail from Rambus's server or individual computers, that file or e-mail would be maintained, and Rambus did not implement any procedure that would have automatically deleted files or e-mails based on how old they were or other criteria. RX-2535 at 1, 7 (354:9-18; 428:12-15) (Roberts

10/14/04 *Infineon* Dep.).

CCSF NO. 53:

Rambus Vice President Joel Karp organized an “all day shredding party” on September 3, 1998. CX5023 at 1. In that “all day shredding party,” Rambus intentionally destroyed 185 burlap bags and 60 boxes full of documents. CX5050 at 1; CX5047 at 27 (corresponding to R400812). It took ProShred Security, a professional document destruction company, 10 hours to destroy the Rambus documents. *Id.*

RAMBUS’S RESPONSE TO CCSF NO. 53:

The proposed finding is not supported by the cited evidence to the extent it states that Mr. Karp was the organizer of the 1998 shredding event, or that the bags and boxes that were destroyed were “full of documents.” None of the cited exhibits so state. In fact, the evidence demonstrates that the bags and boxes contained a wide variety of materials, not just documents. *See* CX5069 at 42 (510:9-19) (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. . . . as something I would characterize as being a document, I would say is a very small portion of that.”); RX-2550; RX-2551 at 2 (117:22-118:8) (Stark 5/28/04 *Infineon* Dep.) (“old data books from Motorola that you could get from the web or through their literature service,” “three-ring binders” and “stacks of magazines and photocopies of articles”).

CCSF NO. 54:

In preparation for Shred Day 1998, Rambus employees were informed that they had to review the documents in their possession for compliance with Rambus's document retention policy. CX1044; CX1051.

RAMBUS'S RESPONSE TO CCSF NO. 54:

Complaint Counsel misstate the record when they describe this proposed finding as "[e]vidence developed since the Initial Decision." The finding does not cite to, and is not based on, any of the supplemental evidence. The proposed finding is, therefore, inappropriate under the Commission's July 20 Order. In any event, it supports no inference of bad faith.

CCSF NO. 55:

On October 14, 1998, Vice President Joel Karp, as part of a presentation, including Rambus's DDR SDRAM licensing activities, informed Rambus's Board of Directors of the "all day shredding party" as part of his "IP Update" to the Board. CX5023 at 5; CX5057 at 2 (Rambus Board minutes "Intellectual Property Mr. Karp reviewed the Company's current patent status and its strategic licensing plans."); CX5069 at 46 (Q. "This is listed on Rambus's privilege log as a Karp presentation to the board of directors. Is that accurate? A. I don't have a recall of the actual presentation, but it looks very much like the form of stuff that I would have presented to the Board.>").

RAMBUS'S RESPONSE TO CCSF NO. 55:

The proposed finding is not supported by the cited evidence. Exhibit CX5023 does not state that it is a Board of Directors presentation, and Mr. Karp was

unable to confirm that he actually presented the information in CX5023 to the Board of Directors. *See* CX5069 at 46 (526:20-24) (Karp 10/8/04 *Infineon* Dep.) (“I don’t have a recall of the actual presentation”). Moreover, although the minutes of the October 14, 1998 Board of Directors meeting state that “Mr. Karp reviewed the Company’s current patent status and its strategic licensing plans,” those minutes do not reflect that Mr. Karp made any presentation regarding a “shredding party,” or make any other reference to that topic. *See* CX5057 at 2.

The proposed finding is also misleading. The document cited by Complaint Counsel, CX5023, does not discuss any “shredding party” in the context of licensing activities; that reference is on a separate page entitled “other activities.” CX5023 at 1. The page entitled “licensing activity overview” makes no reference to any shredding. Indeed, contrary to Complaint Counsel’s suggestion, it does not even indicate that Rambus had actually engaged in any licensing activity at that point in time. *Id.* at 4.

2. Rambus’s Outside Counsel Was Instructed by Rambus to Destroy Documents by April 1999.

CCSF NO. 56:

Vice President Joel Karp intentionally instructed Rambus’s outside counsel for patent prosecution, Lester Vincent, to destroy documents. CX5033 (“Meeting w/ Joel Karp... File clearance ... document retention policy: 11 of 49 issued patent files for BSTZ [Vincent’s law firm Blakely Sokoloff] have been cleared another 5 are awaiting my review. Doing 2 a day. Secretary assigned full time to file clearance.”); CX5069 at 49 (“I can generally recall that I had discussions – or at least a discussion with him about the

policy, but I have no independent recollection of the date, other than what this document says. Q. But you did instruct them to follow it, follow the document retention policy at least as far as their files for Rambus; right? A. Right.”).

RAMBUS’S RESPONSE TO CCSF NO. 56:

The proposed finding is entirely irrelevant to the issues in this case, and Complaint Counsel cannot contend that any “missing” documents from Mr. Vincent’s prosecution files would have helped them establish the essential elements of their claims. As noted elsewhere, Complaint Counsel have always conceded, for purposes of this case, that the Rambus patents at issue are valid in all respects. The proposed finding is also misleading to the extent it suggests that Mr. Karp specifically advised Mr. Vincent to “destroy” documents. As the cited document and testimony make clear, Mr. Vincent was simply instructed to comply with Rambus’s document retention policy. *See* CX5069 at 49 (541:15-18) (Karp 10/8/2004 *Infineon* Dep.) (“Q: But you did instruct [Blakely Sokoloff] to follow it, follow the Rambus document retention policy, at least as far as their files for Rambus; right? A: Right.”). Moreover, to the extent that Complaint Counsel intends to suggest through this proposed finding that there was anything unusual or improper about this instruction, such a suggestion is not supported by the evidence. *See, e.g.,* RX-2530; RX-2531 at 5-6 (539:5-13) (Vincent 10/9/2001 *Micron* Dep.) (testifying that other clients had similarly requested that Mr. Vincent comply with their document retention policies, and that he had done so). *See also* RSF 1661 (recommendation that Rambus’s patent files be conformed to official Patent Office file had originated with Rambus’s outside counsel and was consistent with approach taken at

other law firms and businesses).

CCSF NO. 57:

Outside patent counsel Lester Vincent's "clean-up" of his firms files relating to Rambus's patenting and standard-setting activity continued throughout 1999 and into 2000, with plans to destroy more files in the summer of 2001. CX5037 at 1; *see generally* CX5056; CX5072; *see also* CX5066 ("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."); CX5035 ("The issued patent disks have been erased per the document retention policy."); *see also* CCFF 1745-1752.

RAMBUS'S RESPONSE TO CCSF NO. 57:

The proposed finding is irrelevant to *this* case and is not supported by the cited evidence to the extent it suggests that Mr. Vincent's cleaning of his patent files extended to "standard-setting activity." On the contrary, the cited evidence confirms that documents relating to standard-setting were *not* destroyed, but were instead preserved in the chron file that Mr. Vincent maintained at Blakely Sokoloff. *See* CX5066 at 2. The proposed finding is also not supported by the evidence to the extent it states that Mr. Vincent "plan[ned] to destroy more files in the summer of 2001." With respect to whether certain files had been *reviewed* by Mr. Vincent, the cited exhibit, CX5056, states "[w]ait til end of Summer per LJV 2001." It makes no reference to any "plan" to

“destroy files” in 2001. Finally, to the extent Complaint Counsel relies upon CCF 1745-1752 in putative support of this proposed finding, Rambus has fully responded to Complaint Counsel’s earlier proposed findings and incorporates that response here. *See* RRFF 1745-1752.

3. Rambus Intentionally Destroyed Documents on August 26, 1999.

CCSF NO. 58:

In the Spring of 1999, as part of his “IP Q2’99 Goals,” Vice President Joel Karp planned to evaluate compliance with the 1998 document retention policy. CX5024 (“3. IP Database... D. Document retention checkups.”); *see also* CX5025 (“3. Licensing/Litigation Readiness . . . C. Organize document retention compliance day.”); CX5026 at 2 (“5. Database Maintenance . . . D. Organize document retention compliance event.”); CX5028.

RAMBUS’S RESPONSE TO CCSF NO. 58:

The proposed finding is not supported by the evidence cited. None of the cited exhibits makes reference to the 1998 document retention policy and, from the face of the documents, the latter two exhibits appear to have been prepared in or around July 1999 and to relate to the third quarter of 1999, rather than “Spring of 1999.” *See* CX5026 at 1-2 (“IP Q3’99 Goals – FINAL 7/1/99”; CX5025 (which appears to be a draft of CX5026).

CCSF NO. 59:

Part of Vice President Joel Karp’s plan was to organize another “shredding party.” CX5027 at 1-2 (“3. Licensing/Litigation Readiness... I. Organize 1999 shredding

party at Rambus.”); CX5045 at 1 (“3. Licensing/Litigation Readiness ... G. Organize 1999 shredding party at Rambus.”).

RAMBUS’S RESPONSE TO CCSF NO. 59:

The finding cites to two exhibits ostensibly prepared by Mr. Karp that refer to a “shredding party,” one of which appears to be a draft of the other. Compare CX5045 (“first cut” of “IP Q3 ’99 Goals”) with CX5027 (“final” version). However, Complaint Counsel have also offered, as CX5026, a second “final” version of the “IP Q3 ’99 Goals” document, which makes no reference to a “shredding party,” but instead makes reference to “[o]rganiz[ing] document *retention* compliance event” under the heading “Database Maintenance.” See CX5026 at 2 (emphasis added). Accordingly, it does not appear that the finding is supported by the supplemental evidence. Moreover, the draft goals, CX5045, were produced to Complaint Counsel prior to the trial.

CCSF NO. 60:

Rambus’s CEO Tate was aware of the 1999 document shredding day at Rambus. CX5034 (“I’m sorry I’ll miss the shredder party tomorrow – besides the nice party there will be a fun announcement.”).

RAMBUS’S RESPONSE TO CCSF NO. 60:

The only cited exhibit was produced to Complaint Counsel long before the trial in this case. It is not, therefore, “evidence developed since the Initial Decision,” as Complaint Counsel claim.

CCSF NO. 61:

In its 1999 shred day, Rambus intentionally destroyed approximately 150

burlap bags of documents. CX5052 at 1. The professional document destruction company took approximately four and a half hours to complete the task. *Id.* See also CX5046 (“Leave your burlap bags outside your cube before you leave tonight . . . the shredding company will start collecting bags at 9:00 am tomorrow . . .”).

RAMBUS’S RESPONSE TO CCSF NO. 61:

Rambus has no specific response, except to note that CX5046, cited in this proposed finding, was produced prior to trial and should not be given any weight in connection with this motion.

4. Rambus Intentionally Destroyed Documents in 2000.

CCSF NO. 62:

Mr. Vincent, Rabmus’s outside patent counsel, after briefly ceasing his file cleaning when the Hitachi case was filed, began destroying documents once again as soon as the case settled in June 2000. See CX5036 (listing patent files cleaned up and “reviewed” by Vincent on June 23, 2000).

RAMBUS’S RESPONSE TO CCSF NO. 62:

This finding is misleading and omits relevant information. The only documents that the Blakely firm discarded after the Hitachi lawsuit ended were *copies* of documents that had already been provided to counsel in connection with the Hitachi litigation. See RRFF 1752; see also RX-2508 (Feb. 1, 2000 Letter from Lester Vincent to Rambus enclosing copies of patent files); CX5073 at 1-2 (77:17-78:09) (Vincent 10/15/2004 *Infineon* Dep) (confirming transmittal of patent files to Rambus for production in *Hitachi* litigation); RX-2530; RX-2531 at 6 (543:8-12) (Vincent 10/9/01

Micron Dep.) (“Q: With respect to the documents that were purged after the Hitachi case came to an end, how do you know that Rambus has copies of those documents? A: Because copies were provided – photocopies were provided by me to Rambus.”).

CCSF NO. 63:

On July 17, 2000, Vice President Neil Steinberg instructed Rambus executives to destroy all drafts of contracts and negotiation materials. CX5020 at 2.

RAMBUS’S RESPONSE TO CCSF NO. 63:

This proposed finding is misleading and irrelevant. A complete set of all drafts and negotiation materials was maintained in the IP group at Rambus, both before and after Mr. Steinberg’s e-mail. RX-2540; RX-2541 at 1 (238:2-22) (Steinberg 10/6/2004 *Infineon Dep.*). Mr. Steinberg explained that the reason for his reminder to Rambus executives that they should not also maintain drafts (in addition to the fact that the IP group had a complete set) was that, in his experience, executives would arrive at internal meetings with drafts when a final (and often different) agreement had been signed. *Id.* at 1-2 (238:23-239:18) (Steinberg 10/6/2004 *Infineon Dep.*). His directive was therefore intended to ensure “that what they were focusing on was indeed the actual agreement.” *Id.* at 2 (239:18-240:1) (Steinberg 10/6/2004 *Infineon Dep.*).

CCSF NO. 64:

On December 28, 2000, Sure Shred, a professional document destruction company, destroyed 410 burlap bags of Rambus documents. CX5053; *see also* CX5020 at 1-2 (email from Steinberg to the exec distribution list quoting the document retention policy and stating that “you and your team are to destroy or systematically discard” drafts

and materials used in contract negotiations.).

RAMBUS'S RESPONSE TO CCSF NO. 64:

This proposed finding is irrelevant and misleading. In or around December 2000, Rambus moved into a new office building; as part of the office move, the referenced document disposal company destroyed materials that did not need to be moved from the old building to the new building. *See* CX5071 at 14 (99:5-7) (Kaufman 5/18/2004 *Infineon* Dep); RX-2546; RX-2547 at 2 (106:23-107:8) (Kaufman 5/18/2004 *Infineon* Dep.). As of this time a litigation hold had long been in place. *See* RSF 1677-1682. In addition, the citation to Mr. Steinberg's e-mail is both irrelevant (as the e-mail is dated July 17, 2000, *see* CX5020 at 1, and therefore unrelated to Complaint Counsel's proposed finding respecting events of December 28, 2000) and misleading, *see* RRSF 63.

IV. Rambus Destroyed its Documents in Bad Faith, in Order to Get Rid of Documents That Might Be Harmful to it in Litigation.

CCSF NO. 65:

Judge Payne concluded that "the record in this case shows that Rambus implemented a 'document retention policy,' in part, for the purpose of getting rid of documents that might be harmful in litigation." *Rambus v. Infineon*, 155 F.Supp 2d 668, 682 (E.D.Va. 2001); *see also* Order Granting Complaint Counsel's Motion for Collateral Estoppel (2/26/03) at 5 (granting full collateral estoppel effect to Judge Payne's finding of fact that "[w]hen 'Rambus instituted its document retention policy in 1998,' it did so 'in part, for the purpose of getting rid of documents that might be harmful in litigation.'").

RAMBUS'S RESPONSE TO CCSE NO. 65:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission's July 20, 2005 Order. Moreover, to the extent that the proposed finding contains "facts," those facts were known to Complaint Counsel prior to the trial and prior to the filing of the parties' post-trial findings and appeal briefs, and were cited in those papers. *See, e.g.*, CCF 1758. In addition, the cited finding by Judge Payne was made in 2001 in connection with an attorneys' fee award that was subsequently *vacated* by the Federal Circuit. *See Rambus*, 318 F.3d at 1106. The court considering the *Hynix v. Rambus* case cited the vacatur in refusing to give collateral estoppel effect to this preliminary finding by Judge Payne. *See Hynix v. Rambus*, No. CV 00-20905 RMW (N.D.Cal., Nov. 24, 2004) at 5.

Moreover, Complaint Counsel are simply incorrect if they are now suggesting that a document retention policy is improper if its *adoption* is motivated in part by a company's desire to eliminate potentially damaging documents. As the Supreme Court has recently recognized, however, document retention policies are both "common in business" and *routinely* "created in part to keep certain information from getting into the hands of others, including the Government" *Arthur Andersen LLP v. U.S.*, ___ U.S. ___, 125 S.Ct. 2129, 2135 (2005). Moreover, the article cited by the Supreme Court on this point states that "one of the *best* reasons for having a formal [document retention] policy is that it reduces legal exposure through the destruction of possibly incriminating evidence." Christopher R. Chase, *To Shred or Not to Shred*, 8 Fordham J. Corp. & Fin. L. 721, 725 (2003) (emphasis added).

In short, even if one of Rambus's goals in adopting the policy was to eliminate those harmful documents that were not otherwise in the category of "things to keep" under the policy – a point that Rambus does not concede – that goal would not illegitimize the policy, particularly since there is no evidence that particular *categories* of documents were targeted for destruction. Rambus's document retention policy was content-neutral in its preparation, and content-neutral in its implementation.

CCSF NO. 66:

Judge Payne also concluded that the record as of May 2004 "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." *Rambus v. Infineon Technologies*, 222 F.R.D. 280, 298 (E.D.Va. 2004).

RAMBUS'S RESPONSE TO CCSF NO. 66:

This is not a proper finding of fact and is simply a quote from a district court's discovery opinion. In the absence of a final judgment, intermediate opinions on discovery matters cannot be afforded preclusive effect. *See, e.g., In Re 949 Erie Street*, 824 F.2d 538, 541 (7th Cir. 1987) (holding that collateral estoppel does not apply "to an interlocutory order, which may be changed by the district court at any time prior to final judgment"); *Luben Indus., Inc. v. U.S.*, 707 F.2d 1037, 1040 (9th Cir. 1983) (holding that collateral estoppel does not apply in the absence of a final judgment). Moreover, in reaching the cited conclusion, the district court did not follow the procedures established by the Supreme Court for piercing a litigant's attorney-client privileges and did not afford Rambus an opportunity to be heard fully on the court's factual determinations, many of

which were demonstrably wrong. For example, the opinion suggested that “the destroyed documents may also include reverse engineering documents and claim charts and other infringement related documents,” and surmised that “[s]uch documents, to which one would have expected Rambus to have claimed a privilege based on the other claims it has made in this litigation, are conspicuously absent from Rambus’ various privilege logs.” *Rambus v. Infineon Technologies*, 222 F.R.D. at 297 & n.34. This suggestion was subsequently shown to be incorrect. Claim charts regarding the patents in suit were not on Rambus’s privilege logs because they were not privileged. Rambus had presented the charts to accused infringers, and they had been produced to Infineon. CX5079 at 459-62 and 527-541 (*Infineon Trial Tr.* vol. 3).

CCSF NO. 67:

ALJ Timony instituted a rebuttable adverse presumption that “Rambus knew that its failure to disclose the existence of [its] patents to other JEDEC participants could serve to equitably estop Rambus from enforcing its patents as to other JEDEC participants.” Order on Complaint Counsel’s Motions for Default Judgement and for Oral Argument (2/26/2003) at 9.

RAMBUS’S RESPONSE TO CCSF NO. 67:

This is not a proper finding of fact under the Commission’s July 20 Order, as it is not based upon the supplemental evidence in any way. Indeed, Judge Timony’s order has previously been cited by Complaint Counsel on many occasions. In any event, there is nothing in the supplemental evidence that in any way undermines Judge McGuire’s post-trial conclusion that the rebuttable inference cited in this finding

has no bearing on Complaint Counsel’s failure to prove the essential elements of their claims. For example, this inference – which refers to Rambus’s state of mind – does nothing to affect Judge McGuire’s conclusion that under JEDEC’s rules and policies, disclosure of intellectual property was voluntary, not required. *See generally* Initial Decision, p. 265 (finding that there is “*overwhelming* evidence from contemporaneous documents, the conduct of participants, and trial testimony that the disclosure of intellectual property interests was encouraged and voluntary, not required or mandatory”) (emphasis added). The cited inference also does nothing to erode the impact of the Federal Circuit’s holding, adopted by Judge McGuire, that Rambus’s state of mind about the scope of its patent applications was not relevant to its disclosure obligations:

“Complaint Counsel cannot salvage their case by relying on proof that Rambus might have believed (albeit wrongly) that claims in its applications, if issued, would have covered technologies being standardized by JEDEC. As the Federal Circuit observed:

‘The JEDEC policy, though vague, does not create a duty premised on subjective beliefs. JEDEC’s disclosure duty erects an objective standard. It does not depend on a member’s subjective belief that its patents do or do not read on the proposed standard. . . . [T]he JEDEC test in fact depends on whether claims reasonably might read on the standard. A member’s subjective beliefs, hopes, and desires are irrelevant. Hence, Rambus’s mistaken belief that it had pending claims covering the standard does not substitute for the proof required by the objective patent policy.’”

Initial Decision, p. 277, *quoting Infineon Technologies A.G. v. Rambus Inc.*, 318 F.3d 1081, 1104 (Fed. Cir. 2003) (emphasis added).

The cited inference was also rebutted at trial by the overwhelming weight of the evidence. The trial demonstrated that there is no basis for concluding that Rambus's conduct at JEDEC meetings should have led it to expect that litigation involving that conduct was likely to arise in the future. It is undisputed that Rambus sought and obtained the advice of counsel regarding its participation in JEDEC shortly after it began attending JEDEC meetings, that its counsel discussed the doctrine of equitable estoppel with Rambus employees, and that counsel *also* provided guidelines as to appropriate conduct. Outside counsel Lester Vincent informed Mr. Crisp and Mr. Roberts that there could be a risk of equitable estoppel if "Rambus creates impression on JEDEC that it would not enforce" its intellectual property, and he suggested that Rambus might consider abstaining from voting. CX1942.

The record evidence showed, and Judge McGuire found, that Rambus heeded the advice of its counsel and took steps to ensure that it did not create any misleading impressions regarding its intellectual property. For example, in May 1992, at Mr. Crisp's very first JEDEC meeting on behalf of Rambus, the chairman of the JC 42.3 committee asked Mr. Crisp if he cared to comment about whether Rambus had any intellectual property regarding a proposed feature of the SDRAM. CX2089 at 134-36, (Meyer 4/6/04 *Infineon Trial Tr.*), CX1079, 5/6/92 Crisp e-mail; Initial Decision ¶¶ 811-817. As the trip reports and notes prepared by various JEDEC representatives show, Mr. Crisp *declined to comment* in response to the question. *Id. See also* CX0903, May 1992 memorandum at 5; RX-0290 at 3, 5/7/92 handwritten notes by IBM representative Mark Kellogg.

Mr. Crisp's refusal to respond to the question did *nothing* to mislead JEDEC members into believing that they need not be concerned about Rambus's intellectual property. IBM representative Mark Kellogg testified, for example, that the exchange between the Committee Chairman and Mr. Crisp was "a flag," in part because of Crisp's "lack of response." Trial Tr. at 5322-3 (Kellogg). The Committee Chairman, Gordon Kelley, similarly testified that a "no comment" from a JEDEC member in response to a question about intellectual property was "surprising" and constituted "notification to the committee that there should be a concern." Trial Tr. at 2579 (Kelley).

Mr. Crisp also openly refused to respond to inquiries regarding intellectual property at the September 1995 JEDEC meeting. At that meeting, Mr. Crisp presented a written statement regarding questions that had been raised at the prior meeting:

"At this time Rambus elects not to make a specific comment on our intellectual property position relative to the Synlink proposal. Our presence or silence at committee meetings does not constitute an endorsement of any proposal under the committee's consideration nor does it make any statement regarding potential infringement of Rambus intellectual property."

JX0027, Sept. 11, 1995 JC42.3 Meeting Minutes at 26.

Rambus's open, public refusals to respond to questions about intellectual property, and its statement that its presence at meetings "does not constitute an endorsement of any proposal . . . [or] make any statement regarding potential infringement," could not have lulled anyone into believing that Rambus did not have or would not obtain intellectual property rights. The Chairman of the committee acknowledged this point at trial, testifying that Rambus's refusal to comment was "notification to the committee that there

should be a concern.” Trial Tr. at 2579 (Kelley). In light of this evidence, it is not surprising that Judge McGuire found that Mr. Crisp’s refusals to comment “put members on notice” that Rambus might seek broad patent coverage. Initial Decision, ¶ 281. There is nothing in the supplemental evidence that can or does affect this finding.

CCSF NO. 68:

ALJ Timony instituted a rebuttable adverse presumption that “Rambus provided inadequate guidance to its employees as to what documents should be retained and which documents could be purged as part of its corporate document retention program.” *Id.*

RAMBUS’S RESPONSE TO CCSF NO. 68:

This is not a proper or relevant supplemental finding of fact for the reasons set forth in response to CCSF No. 67. The proposed finding is also contradicted by the weight of the evidence. Rambus provided, both in writing and orally at staff meetings, a significant amount of information to its employees regarding the importance of retaining documents. Rambus’s document retention policy was provided to all employees in writing and specifically instructed employees to retain various categories of documents. CX1040. Those document retention instructions were summarized in slides that Mr. Karp used when he delivered presentations to staff. The slides Mr. Karp presented to all Rambus employees specifically instructed Rambus employees, in bold-faced type, “LOOK FOR THINGS TO KEEP” and “LOOK FOR REASONS TO KEEP IT.” CX1264 at 4, 7. The slides also provided specific guidance regarding the importance of retaining various kinds of documents, including documents related to: (1) Intellectual

Property (“All Documents Designated As Containing Trade Secret Information Should Be Kept For The Life Of The Trade Secret”) CX1264 at 5-6; (2) Human Resources (“Most Personnel Records Must Be Kept For 3 Years.”) CX1264 at 2; (3) Tax/Legal (“Audit Period Is 3 Years,” “Inside Counsel Subject To Same Document Retention Policy As Rest of Company”) CX1264 at 3; (4) Engineering (“LOOK FOR REASONS TO KEEP IT”) CX1264 at 7; (5) Marketing and Sales (“Generally Kept for 3 Years”, “LOOK FOR THINGS TO KEEP”) CX1264 at 8; and (6) Contracts (If You Feel That A Particular Document Would Aid You In Refreshing Your Recollection – Keep It”, “LOOK FOR THINGS TO KEEP”). CX1264 at 10.

CCSF NO. 69:

ALJ Timony instituted a rebuttable adverse presumption that “Rambus’s corporate document retention program specifically failed to direct its employees to retain documents that could be relevant to any foreseeable litigation.” *Id.*

RAMBUS’S RESPONSE TO CCSF NO. 69:

This is not a proper or relevant supplemental finding of fact for the reasons set forth in response to CCSF No. 67. The proposed finding is also contradicted by the weight of the evidence. The document retention policy, by its nature, recognized the possibility of future disputes and instructed employees to keep documents that would foreseeably be relevant to those potential disputes. For example, employees were specifically instructed to keep (1) documents demonstrating that Rambus is entitled to trade secret protection, CX1264 at 5; (2) documents demonstrating proof of invention dates, *id.*; and (3) documents that would aid in refreshing recollection regarding

contracts, *id.* at 10. Rambus also specifically instructed its employees to maintain their own e-mail archives. CX2114 at 136 (Karp 2/5/03 *FTC* Depo.), CX1031 (e-mail from Joel Karp 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”)); CX2102 at 343-345 (Karp 8/7/01 *Micron* Depo). The evidence also shows that Rambus instituted a litigation hold at the appropriate time and communicated that “hold” to the appropriate employees. *See, e.g.*, RX-2506 (1/5/01 email by CEO Tate regarding notice from FTC of an investigation, stating that Rambus had been “ordered to CEASE ALL DOCUMENT DESTRUCTION of any relevant documents” and observing that “since antitrust/jedec is an issue in our active court cases we should not be destroying any relevant documents anyway”

This rebuttable inference also does not support a conclusion that spoliation of evidence occurred. No case had held that a company must preserve all documents that “could be relevant” to “any foreseeable litigation.” Instead, “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* Jamie S. Gorelick, Stephen Marzen & Lawrence Solum, *Destruction of Evidence*, § 3.12, at 104 (1989) 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).

As applied in the patent context, the requirement that litigation be probable, rather than merely possible, means that a patentee has no duty to take affirmative steps to preserve evidence for another party’s use unless (at a minimum) the patentee has (1) an issued patent (without which the patentee has no cause of action), (2) a basis for concluding that it may assert that patent against an infringer of that patent, and (3) the knowledge that it will pursue litigation against the infringer rather than negotiate a license. Any broader rule would be too amorphous to understand and administer and would create incentives (as it has here) for the accused infringer to avoid questions relating to the patent’s validity, application and enforceability with charges of deliberate spoliation.

CCSF NO. 70:

ALJ Timony instituted a rebuttable adverse presumption that “Rambus’s corporate document retention program specifically failed to require employees to create and maintain a log of the documents purged pursuant to the program.” *Id.*

RAMBUS'S RESPONSE TO CCSF NO. 70:

This is not a proper or relevant supplemental finding of fact for the reasons set forth in response to CCSF No. 67. Moreover, Complaint Counsel have never offered any evidence or citation to support the proposition that a corporation is required or expected to keep a log of documents that are not retained under a document management policy. The other policies in the trial record contain no such instructions to employees. *See, e.g.*, RX-1102; RX-1724.

CCSF NO. 71:

ALJ Timony found that the evidence available as of February 26, 2003 did not indicate that Rambus's document retention program was a sham. *Id.*

RAMBUS'S RESPONSE TO CCSF NO. 71:

The supplemental evidence demonstrates that Judge Timony was correct and that the document retention program was not a sham. Rambus was advised in early 1998 by its outside counsel, the Cooley Godward firm, to adopt a document retention program. *See* RX-2521 (DTX9023) 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 (DTX3681) at 1 (Mr. Karp's notes from February 12, 1998 meeting with lawyers from Cooley Godward) (“need company policy on document retention policy”); CX5069 at 11 (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”).

Mr. Johnson was and is a highly accomplished and respected member of

the legal community. RX-2522; RX-2523 (PTX9525) at 14-15 (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 16 (204:1-7) (Johnson 11/23/04 *Infineon* Dep.); RX-2521 (DTX9023) at 6 (35:13-15) (Johnson 11/23/04 *Infineon* Dep.).

The Cooley Godward firm subsequently provided Rambus with a template for a document retention policy, which Rambus adopted, in many instances *verbatim*. See RSF 1619-1632. It is also undisputed that Mr. Johnson both presented the policy to Rambus's managers and reviewed and approved Mr. Karp's presentations to Rambus employees. See RSF 1633-1645. It is thus clear that the policy cannot be called a "sham."

CCSF NO. 72:

ALJ McGuire found that the evidence available as of April 15, 2003, was insufficient to show that Rambus "specifically intended to destroy documents in an effort to assist in its defense strategies." Order Denying Complaint Counsel's Motion for Additional Adverse Inferences and Other Appropriate Relief (April 15, 2003) at 5, n.2.

RAMBUS'S RESPONSE TO CCSF NO. 72:

Judge McGuire's finding was correct when made and remains correct today, for the reasons set forth in Rambus's Amended Proposed Findings of Fact and in these responses to Complaint Counsel's Supplemental Proposed Findings of Fact.

A. Evidence Available at Initial Decision.

CCSF NO. 73:

Rambus developed its document retention program in bad faith. CCFF 1718, 1720-1722, 1726, 1732-1733, 1756-1757.

RAMBUS'S RESPONSE TO CCSF NO. 73:

The evidence does not support this conclusion. *See* RRF 1718-1757.

CCSF NO. 74:

Rambus executed its document retention program in bad faith. CCFF 1728-1730, 1737-1742, 1745-1752, 1756-1757.

RAMBUS'S RESPONSE TO CCSF NO. 74:

The evidence does not support this conclusion. *See* RRF 1718-1757.

B. Evidence Developed since the Initial Decision.

CCSF NO. 75:

Rambus developed its document retention policy in anticipation of litigation over whether JEDEC-compliant DRAM infringed its patents but while the document retention policy instructed Rambus employees to maintain documents that would be helpful to it in that litigation, the document retention policy failed to instruct employees to maintain documents relevant to its attendance and conduct at JEDEC. CCSF 76-109.

RAMBUS'S RESPONSE TO CCSF NO. 75:

The evidence does not support these conclusions. *See* RRF 1718-1757; RRF 76-109.

CCSF NO. 76:

In October 1997, Joel Karp joined Rambus as Vice President of Intellectual Property in order to assist Rambus in obtaining patents that cover JEDEC compliant DRAM and to enforce those patents against the industry. CCFF 1701-1706.

RAMBUS'S RESPONSE TO CCSF NO. 76:

Complaint Counsel misstate the record when they describe this proposed finding as “[e]vidence developed since the Initial Decision.” The finding does not cite to, and is not based on, any of the supplemental evidence. Complaint Counsel have simply recycled the proposed findings they made to Judge McGuire, in particular CCFF 1701-1706. Rambus responded to those findings at RRFF 1701-1706.

CCSF NO. 77:

Prior to joining Rambus, Vice President Karp had participated in a litigation between Samsung and Texas Instruments in which Samsung, his employer at the time, asserted an equitable estoppel defense to a patent infringement suit by TI relating to a JEDEC standard. Karp submitted a declaration in support of Samsung's position. CX2957 at 2 (“It is contrary to industry practice and understanding for an intellectual property owner to remain silent during the standard setting process - and then after a standard has been adopted and implemented - later attempt to assert that its intellectual property covers the standard and allows it to exclude others from practicing the standard.”).

RAMBUS'S RESPONSE TO CCSF NO. 77:

Complaint Counsel again misstate the record by suggesting that this

proposed finding represents “[e]vidence developed since the Initial Decision.” The document in question was admitted at trial as CX2957, and Complaint Counsel included the quoted portion on the very first page of their opening brief on appeal. The proposed finding is, therefore, inappropriate under the Commission’s July 20 Order.

The proposed finding is also misleading and incomplete. Mr. Karp’s declaration refers to an “intellectual property owner” whose “intellectual property covers the standard,” not a company such as Rambus that had no undisclosed patent applications that were necessary to practice any technologies balloted for standardization at JEDEC. *See Rambus*, 318 F.3d at 1104. Moreover, the declaration emphasizes the need for disclosure when a company “actively participates” in the standard-setting process and “promotes” the standard in question, which are practices that – all agree – Rambus did not engage in. CX2957 at 2.

CCSF NO. 78:

When Karp arrived at Rambus as Vice President of Intellectual Property, the possibility that Rambus’s conduct at JEDEC could lead to collateral estoppel being a defense to Rambus’s assertion of its patents against the DRAM industry was already familiar to Rambus employees such as JEDEC representative Crisp, in-house counsel Diepenbrock and Rambus’s outside patent counsel Vincent. CCFF 422, 821, 849-85, 889, 891, 956-957.

RAMBUS’S RESPONSE TO CCSF NO. 78:

As the citations indicate, Complaint Counsel have again misrepresented the record by suggesting that this finding is based on “[e]vidence developed since the Initial

Decision.” All of the cited evidence was available prior to trial, and Rambus thoroughly rebutted the cited findings in its own reply findings. *See* RRF 422, 821, 849-85, 889, 891, 956-957. *See also* RRSF 67. That rebuttal will not be repeated here.

CCSF NO. 79:

In late 1997 or early 1998 Vice President Karp contacted Diane Savage, a partner at Rambus’s law firm Cooley Godward, and told her that he was looking for someone to provide him with “litigation assistance.” CX5068 at 1-2; *see also* CX5008 at 1 (Cooley Godward bill for services rendered through 2/28/98 indicates a meeting between Karp and Peter Leal, another Cooley lawyer, on January 15, 1998). Karp never described to Savage the nature of the litigation Rambus was preparing for. CX5068 at 2.

RAMBUS’S RESPONSE TO CCSF NO. 79:

Rambus has no specific response.

CCSF NO. 80:

Ms. Savage introduced Vice President Karp to Dan Johnson, a litigation partner at the Cooley firm, and set up a meeting between Karp and Johnson. CX5068 at 2.

RAMBUS’S RESPONSE TO CCSF NO. 80:

Rambus has no specific response.

CCSF NO. 81:

At some point Vice President Karp also contacted Ms. Savage of the Cooley firm and requested information regarding document retention policies, because “Rambus was considering adopting a document retention policy.” *Id.* Savage notified

Karp that Cooley had a “template agreement” that he could use as a “starting place for his consideration.” *Id.* at 2-3.

RAMBUS’S RESPONSE TO CCSF NO. 81:

The proposed finding is incomplete and misleading. The supplemental evidence shows that 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 (DTX9023) at 1-2 (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 (DTX3681) at 1 (Mr. Karp’s notes from February 12, 1998 meeting with lawyers from Cooley Godward) (“need company policy on document retention policy”); CX5069 (DTX9009) at 11 (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”).

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 (DTX9023) at 5-6 (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.*

CCSF NO. 82:

By March 19, 1998, outside counsel Savage forwarded a “Document

Retention Policy Guidance” to Vice President Karp. CX5004. By its own terms, the document was not intended to be Rambus’s own customized document retention policy, but instead was “intended for information purposes only.” *Id.* (“The Company should be advised, however, that a comprehensive document retention policy must be customized to conform to the Company’s business practice and needs. This memorandum is not intended to address the Company’s business in particular, but is intended for information purposes only. The Company should review this memorandum with management as part of the process of designing a customized document retention policy...”).

RAMBUS’S RESPONSE TO CCSF NO. 82:

The supplemental evidence shows that Mr. Johnson was well aware that Rambus had adopted many, if not all, of the recommended provisions contained in the template and that the firm advised Rambus about how to implement the policy after it was adopted. *See* RSF nos. 1623-1645.

CCSF NO. 83:

In particular, the document that outside counsel Savage sent Vice President Karp explicitly did not address litigation-oriented issues. *Id.* (“If you have specific litigation-oriented issues please feel free to contact David Lisi of our office..., as he is the litigator who is the principal author of the guidelines set forth herein.”); CX5068 (“... 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.”).

RAMBUS'S RESPONSE TO CCSF NO. 83:

The supplemental evidence shows that as part of his presentation to Rambus's managers, Mr. Johnson specifically warned Rambus managers that destroying relevant documents once litigation commenced would be improper. RX-2504 (DTX3686) at R124523, 124527-28, 124545-49; RX-2522; RX-2523 (PTX9525) at 17 (216:24-217:6) (Johnson 11/23/04 *Infineon* Dep.); RX-2524, RX-2525 (PTX9503) at 7 (275:15-22) (Barth 2/26/04 *Infineon* Dep.). 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 (PTX9503) at 7 (275:18-22) (Barth 2/26/04 *Infineon* Dep.).

CCSF NO. 84:

On February 12, 1998, Vice President Karp met with outside counsel Johnson and other Cooley Godward attorneys. CX5007; CX5008 at 1. In that meeting, Johnson advised Karp that Rambus needed a document retention policy. RX-2522; RX-2523 at 1; CX5007. However, it is unclear from the record whether Johnson first suggested the idea of Rambus adopting such a policy or whether Ms. Savage had spoken to Rambus about it first. RX-2523 at 15-16 ("Q. And do you know who first suggested the idea to Rambus of adopting the document retention policy? A. Well, I know that I clearly talked with them about it in the first meetings.... Now I can't remember if Diane talked to them about it and mentioned it to me, or if I brought it up on my own volition. I just don't remember.").

RAMBUS'S RESPONSE TO CCSF NO. 84:

Rambus has no specific response, other than to note that the proposed finding – about who first talked to whom – is irrelevant to this case.

CCSF NO. 85:

Outside counsel Johnson was never made aware of Rambus's attendance at JEDEC or of any possible issues that might arise in the planned litigation relating to Rambus's conduct at JEDEC. RX-2523 at 4-5 ("When I read in the newspaper about the JEDEC issue, I was flabbergasted. It honestly, not only it never came up when I was involved in any input with the client, but when I read about it, I was scratching my head because I couldn't figure out what the issue was... But to answer your question unequivocally, let me make sure I make it clear, I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.").

RAMBUS'S RESPONSE TO CCSF NO. 85:

Mr. Johnson's testimony demonstrates that Rambus did not have a concern in 1998 that its attendance at JEDEC meetings would be an issue in any future licensing or litigation activities. As discussed previously, the evidence at trial showed overwhelmingly that Rambus had no intellectual property to disclose, that the rules did not require disclosure in any event, and that nothing Rambus did or said at JEDEC meetings misled anyone. *See generally* RRSF 67; Initial Decision, pp. 260-282.

CCSF NO. 86:

Neither Vice President Karp nor in-house patent counsel Steinberg ever mentioned to Johnson that they had used JEDEC-related defenses to defend a patent

lawsuit while they were at Samsung. *Id.* at 5. The first time that outside counsel Johnson heard that both had used JEDEC-related defenses to patent infringement allegations while they were at Samsung was at the deposition for the unclean hands hearing in the Infineon case. *Id.*

RAMBUS'S RESPONSE TO CCSF NO. 86:

As noted above, Mr. Johnson's testimony demonstrates that Rambus did not have a concern in 1998 that its attendance at JEDEC meetings would be an issue in any future licensing or litigation activities. Moreover, the fact pattern in the referenced Samsung case was entirely different from this case. *See* RRSF 77.

CCSF NO. 87:

Despite the fact that the memorandum sent by outside counsel Savage to Vice President Karp was a generic document retention program that did not take into account any litigation-related issues that Rambus might have, Karp drafted Rambus's document retention policy "pretty much word-for-word from" that memorandum. CX5069 at 21; *see generally*, RX-2553 at 2-4.

RAMBUS'S RESPONSE TO CCSF NO. 87:

As noted above, Mr. Johnson knew the details of Rambus's policy and even presented it to Rambus's managers. *See* RRSF []. It is also noteworthy that one of the *additions* by Mr. Karp that caught Mr. Johnson's attention was found in Mr. Karp's presentation slides, used in presenting the document retention policy at company-wide meetings. The slides that Mr. Karp prepared for Mr. Johnson's review repeatedly directed Rambus employees to "look for things to keep." RX-2505 (DTX4024)

(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 (PTX9525) at 8 (163:10-15) (Johnson 11/23/04 *Infineon* 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 7 (159:15-23) (Johnson 11/23/04 *Infineon* Dep.).

CCSF NO. 88:

That document retention policy was emailed to Rambus managers and employees on July 22, 1998. CCFF 1723. As late as August of 2001, all new employees of Rambus received a copy of the document retention policy. CX5085 at 7.

RAMBUS'S RESPONSE TO CCSF NO. 88:

Rambus has no specific response, except to note in response to the second sentence that in addition to the document retention policy, Rambus had instituted a "litigation hold" at or near the commencement of litigation in January 2000.

CCSF NO. 89:

Also on July 22, 1998, Vice President Karp organized a meeting between himself, outside counsel Johnson and Rambus's managers to allow Johnson to make a

presentation regarding document retention at Rambus. CX5069 at 27-29. At the meeting, Johnson made the main presentation and Karp said little. RX-2523 at 11.

RAMBUS'S RESPONSE TO CCSF NO. 89:

Rambus has no specific response.

CCSF NO. 90:

Outside counsel Johnson, in his presentation, made clear that a document retention policy could not be adopted in bad faith. CX5010 at 3 (corresponding to R401138) (“A formal document retention policy will likely shield a company from any negative inferences or defaults due to destruction of documents, unless the policy was instituted in bad faith or exercised in order to limit damaging evidence available to potential plaintiffs.”); *see also id.* at 11 (corresponding to R401146) (“A negative inference does not arise where the destruction was a matter of routine with no fraudulent intent. But, if the party knew or should have known that the documents would become material at some point in the future, such documents should be preserved.”).

RAMBUS'S RESPONSE TO CCSF NO. 90:

The cited testimony supports a finding that the document retention policy was *not* a sham and was *not* adopted in bad faith.

CCSF NO. 91:

In particular, outside counsel Johnson made it clear that Rambus could not start a program that was intended to destroy documents that might be relevant to anticipated litigation. RX-2523 at 10 (“Made it clear that they couldn’t start a program if they were anticipating filing some lawsuit and they needed – they could not be engaged

in conduct which in my view was unacceptable, which is, okay, you guys are going to go out and willy nilly destroy documents to clean your files. In fact, this is just the opposite of that.”); *id.* at 17 (“you cannot put in place a document retention program if you’re doing so in bad faith. 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 the right reasons, and you want to make sure they know if they’re playing a game, they’re in trouble.”).

RAMBUS’S RESPONSE TO CCSF NO. 91:

The cited testimony supports a finding that the document retention policy was *not* a sham and was *not* adopted in bad faith.

CCSF NO. 92:

At no time in his presentation did outside counsel Johnson advise that a document retention program can allow a firm to destroy documents that might be relevant to reasonably anticipated litigation before the litigation has commenced. *Id.* at 17-18 (“The reason is with a document retention program, what should happen is you’ve got a lot of extraneous material that you generate throughout the course of your business, that you don’t want to end up having to search for constantly. 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.”).

RAMBUS’S RESPONSE TO CCSF NO. 92:

The cited testimony supports a finding that the document retention policy was *not* a sham and was *not* adopted in bad faith.

CCSF NO. 93:

After the presentation by outside counsel Johnson to Rambus's managers, Vice President Karp implemented the policy by scheduling meetings throughout the company to describe Rambus's new document retention policy. CX5069 at 33-34. In those meetings, Karp, without Johnson or any other Cooley Godward attorney, presented relevant portions of a presentation he generated from Rambus's document retention policy – RX-2505 (already admitted as CX-1264); CX5069 at 34. [The presentation was identified in the Karp deposition as Defendant's Trial Exhibit Number 4134, but was admitted at the unclean hands hearing as DXT-4024. *See* DX0504 at 2.]

RAMBUS'S RESPONSE TO CCSF NO. 93:

It is correct that 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. CX5069 (DTX9009) (471:22-472:8) (Karp 10/8/04 *Infineon* Dep.). These slides were reviewed and approved by Mr. Johnson. RX-2522; RX-2523 (PTX9525) (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 (PTX9503) (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.*

CCSF NO. 94:

Rambus's outside law firm Cooley Godward was never involved in the

implementation of the document retention program. CX5076 at 10, 18.

RAMBUS'S RESPONSE TO CCSF NO. 94:

Rambus has no specific response, except to note that Mr. Johnson appears to have left the Cooley Godward firm *before* the “implementation” of the document retention policy. *See* CCSF no. 95.

CCSF NO. 95:

After leaving Cooley Godward, outside counsel Johnson went to the law firm Fenwick and West. RX-2523 at 15. Fenwick and West’s only role in the implementation of Rambus’s document retention program was to send a legal assistant over to Rambus to help Rambus organize its patent files. *Id.* at 19 (“The only activity we – we – as best I can recall, we did the following: one they asked us to send a legal assistant over to help them get organized. We did that. Two, we told them they should put their most critical documents on – in some kind of a database so that they’d be able to access it, ... and ... they wouldn’t lose it.”).

RAMBUS'S RESPONSE TO CCSF NO. 95:

Rambus has no specific response, except to note that the quoted testimony, which appears in RX-2521 rather than RX-2523, is irrelevant to this motion.

CCSF NO. 96:

Rambus declined outside counsel Johnson’s offer to help implement the document retention program. *Id.* (“We offered to bring over our people to help them go through and execute on their document retention policy. They declined that. That’s it.”).

RAMBUS'S RESPONSE TO CCSF NO. 96:

The proposed finding does not contain a citation, but it is clear from the deposition testimony of Dan Johnson that Complaint Counsel have previously cited that Mr. Johnson understood the questioning to refer to the actual collection and management of the company's documents. *See* RRSF 95. It is also clear from Mr. Johnson's testimony that he himself presented the policy to Rambus's managers and that he himself reviewed, suggested changes to, and approved the slides used by Mr. Karp to present the policy to Rambus's employees. *See* RRSF 93.

CCSF NO. 97:

In Vice President Karp's quarterly IP goals lists, organizing shred days was often one of the tasks described as part of Rambus's "Licensing/Litigation Readiness" program. *See, e.g.*, CX5027 at 1-2; CX5045.

RAMBUS'S RESPONSE TO CCSF NO. 97:

The finding cites to only two exhibits in support of its position that "shred days" were *often* described as part of "licensing/litigation readiness." One of the two cited exhibits appears to be a draft of the other, so it does not appear that the finding's reference to "often" is supported by the supplemental evidence. *Compare* CX5045 ("first cut" of "IP Q3 '99 Goals") with CX5027 ("final" version of same document). In addition, Complaint Counsel have also offered, as CX5026, a *second* "final" version of the "IP Q3 '99 Goals" document, which places the reference to the document retention program in a separate category of goals entitled "Database Maintenance." CX5026 at 7.

CCSF NO. 98:

The concepts of document destruction and document retention appear to have been synonymous to Vice President Karp. *Compare* CX5027 (IP Q3'99 Goals – Final 7/1/99 describing the need for a “1999 shredding party at Rambus” but not describing a “document retention compliance event.”) *with* CX5028 (IP Q3'99 Goals – Final 7/1/99 describing the need for a “document retention compliance event” but no mention of a “1999 shredding party at Rambus”) *and* CX5029 (same). *See also* CX5045 (IP Q3'99 Goals – First Cut 6/27/99 where organizing a “1999 shredding party at Rambus” is an item under licensing/litigation readiness and where there is no other mention of “document retention.”).

RAMBUS'S RESPONSE TO CCSF NO. 98:

It is not clear what inference Complaint Counsel would have the Commission draw from these documents, but it is well recognized that companies establish document retention programs as a means of effectively managing, and *reducing*, the enormous amount of paper and electronic communications that they generate and receive. *See, e.g., Arthur Andersen LLP*, 125 S.Ct. at 2135. No adverse inference can be drawn from such a goal.

CCSF NO. 99:

Rambus's document retention program in conjunction with its “shred days,” “all day shred parties,” and “house cleanings” ensured that documents favorable to Rambus's upcoming litigation was maintained but that documents unfavorable to that litigation was destroyed. CCSF 100-107.

RAMBUS'S RESPONSE TO CCSF NO. 99:

The cited findings do not support this conclusory finding. *See* RRSF 100-107.

CCSF NO. 100:

Both the document retention policy itself and the presentation that Vice President Karp gave to Rambus employees describing the document retention program required that information relating to patent disclosures and proof of invention dates be kept permanently. RX-2505 at 4.

RAMBUS'S RESPONSE TO CCSF NO. 100:

There is no reason to believe that the referenced documents would automatically be favorable to Rambus in a patent infringement case. If such documents were to establish invention dates *after* a particular prior art publication, for example, they would be quite damaging to Rambus's case. Accordingly, their inclusion in the list of "things to keep" demonstrates that the document retention policy was content-neutral and offers no support for the contrary inference that Complaint Counsel would apparently ask the Commission to draw.

CCSF NO. 101:

Both the document retention policy itself and the presentation that Vice President Karp gave to Rambus employees describing the document retention program required that documents containing trade secret information be kept for the life of the trade secret. *Id.* at 3.

RAMBUS'S RESPONSE TO CCSF NO. 101:

Once again, there is no reason to predict that the referenced documents would be either favorable or unfavorable to Rambus's position in future litigation, and their inclusion in the list of "things to keep" shows the content-neutral nature of the policy.

CCSF NO. 102:

Both the document retention policy itself and the presentation that Vice President Karp gave to Rambus employees describing the document retention program required that final execution copies of all contracts should be kept indefinitely. *Id.* at 8.

RAMBUS'S RESPONSE TO CCSF NO. 102:

It is perfectly understandable why a company would want to keep signed copies of contracts it has entered into. That motivation has nothing to do with whether such documents would have a favorable or unfavorable effect in future lawsuits, and no inference of wrongdoing can be drawn from the cited provision.

CCSF NO. 103:

Neither the document retention policy itself nor the presentation that Vice President Karp gave to Rambus employees describing the document retention program required that Rambus employees maintain documents that might be relevant to Rambus's conduct at JEDEC or that might otherwise help an alleged infringer establish equitable estoppel. CCF 1728-1730. *See generally*, RX-2503, RX-2505.

RAMBUS'S RESPONSE TO CCSF NO. 103:

There was no reason for Rambus to believe that its JEDEC membership

would give rise to any issue in any future litigation. *See* RRSF 67 and Initial Decision, pp. 260-282. Given the general nature of the document retention policy and the presentation slides, moreover, it would be unusual to have a reference in either the policy or the slides to a narrow topic such as “JEDEC.”

Of far more relevance to the issues before the Commission is the fact that none of the supplemental evidence supports the proposition that JEDEC-related materials were ever singled out for destruction. In addition, Complaint Counsel have never pointed to a category of JEDEC-related materials that a JEDEC member such as Rambus would be *expected* to have but that Rambus did not have.

CCSF NO. 104:

Joel Karp gave a presentation to Rambus employees about the document retention policy that stated that email is “discoverable in litigation or pursuant to a subpoena” and that Rambus employees should throw email away. RX-2505 at 1. But that presentation fails to warn Rambus employees that they should not destroy documents relevant to anticipated litigation. *Id.*

RAMBUS’S RESPONSE TO CCSF NO. 104:

The quoted line was added to Mr. Karp’s presentation at the suggestion of outside counsel Dan Johnson. RX-2522; RX-2523 (PTX9525) at 9 (170:8-171:8) (Johnson 11/23/04 *Infineon* Depo.). As Mr. Johnson has explained, his view was that “if you don’t call out email, most people don’t think of it as a document, or they didn’t in those days. So you needed to call email out so that they understood.” *Id.* Johnson had also recounted to Rambus managers and Mr. Karp 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 (PTX9525) at 18-19 (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.* Mr. Johnson also 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 (PTX9525) at 12-13 (186:11-187:13) (Johnson 11/23/04 *Infineon Dep.*).

CCSF NO. 105:

Anthony Diepenbrock, Rambus’s in-house counsel involved in prosecuting patents relating to the JEDEC standard (CCFF 1056 et seq.), was never told to retain documents that might be relevant to the litigations that Rambus was planning against the DRAM manufacturers over infringement of JEDEC-related patents. CX5080 at 20 (corresponding to transcript page 655).

RAMBUS’S RESPONSE TO CCSF NO. 105:

The proposed finding misstates the question that Mr. Diepenbrock was asked. Mr. Diepenbrock also testified that Rambus’s document retention policies were consistent with those that had been in place at his previous employer and he testified that he had never heard anyone suggest that a purpose of Rambus’s document retention policy was to destroy documents that might be harmful to Rambus in future litigation. RX-2529 at 4 (611:21-24; 612:3-5; 613:6-10) (Diepenbrock 10/11/04 *InfineonDep.*).

CCSF NO. 108:

In January 2001, in-house patent counsel Steinberg notified Rambus executives that the 1992 Rambus Business Plan had been made public by the Judge in Rambus's case against Hynix and drew the lesson that Rambus's "document retention policy" needed to be changed, or at least executed more effectively. CX5031 ("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.").

RAMBUS'S RESPONSE TO CCSF NO. 108:

The proposed finding is irrelevant. Mr. Steinberg did not become a Rambus employee until the spring of 1999, and did not move to California from the East coast until the fall of 1999 (CX-2059, Karp Infineon Depo. (1/8/01) at 39:9-17). Thus, Mr. Steinberg could have had nothing to do with the institution or implementation of Rambus's document retention policy in mid-1998. Even if Mr. Steinberg's wry comment in an email written in January 2001, long after the document retention policy was instituted, and after a litigation hold was in place, could be interpreted as expressing his view about how the Rambus document retention policy should have been implemented, it can have no bearing on how the document retention policy actually was implemented and, therefore, no conceivable bearing on any issues in this case. Indeed, as the email points out, many documents, such as the June 1992 Business Plan, that Complaint Counsel view as relevant to their case were in fact retained.

CCSF NO. 109:

Vice President Karp testified he has “no idea” how to figure out what documents were destroyed in shred day 1998 and shred day 1999 other than to interview every employee in the company and ask them what they remember destroying. CX5069 at 55 (“[O]ther than interviewing every employee in the company and asking for each one what – what – if they remember what they destroyed, that would be the only way. I can’t think of any other way.”).

RAMBUS’S RESPONSE TO CCSF NO. 109:

Complaint Counsel have never offered any testimony or other evidence to establish that *any* company keeps a record of the many documents discarded on a regular basis. This finding is irrelevant to any issue in the case.

V. Rambus Destroyed Evidence That Was Relevant and Adverse to its Interests in this Case.

CCSF NO. 110:

The term “relevant” in the context of evidence destruction means that the party seeking sanctions “must adduce sufficient evidence from which a reasonable trier of fact could infer that ‘the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.’” *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002), quoting *Kronish v. United States*, 150 F.3d 112, 127 (2d Cir. 1998). When voluminous files have been destroyed, “the prejudiced party may be permitted an inference in his favor as long as he has produced some evidence suggesting that a document or documents relevant to substantiating his claim would have been among the destroyed files.” *Kronish*, 150 F.3d at 128.

RAMBUS'S RESPONSE TO CCSF NO. 110:

This is not a proper finding of fact, but simply legal argument. It is also improper under the Commission's July 20 Order, as it is not based upon the supplemental evidence in any way.

The proposed finding is also irrelevant because, as the case cited by Complaint Counsel itself makes clear, in order to justify *any* sanction for spoliation, a party must show (1) that the documents were willfully and intentionally destroyed in anticipation of litigation; (2) that the documents destroyed were relevant and material to the party's claims; and (3) that the document destruction has injured the party by materially prejudicing its ability to succeed on its claims. *Residential Funding Corp.*, 306 F.3d at 107 ("a party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time 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 it would support that claim or defense"); *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (requiring proof of deliberate destruction); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (spoliation requires finding that "the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction"). Complaint Counsel have failed to establish any of the three prongs of this test. *See* RRSF 112-144.

CCSF NO. 111:

The party seeking sanctions can also show relevance by demonstrating that the destruction was done in bad faith. *Residential Finding*, 306 F.3d at 108 (“Where a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party.”).

RAMBUS’S RESPONSE TO CCSF NO. 111:

This is not a proper finding of fact, but simply legal argument. It is also improper under the Commission’s July 20 Order, as it is not based upon the supplemental evidence in any way.

The proposed finding is also irrelevant because Complaint Counsel have failed to show either bad faith on the part of Rambus or that Rambus had an obligation to preserve any documents that it destroyed. RRSF 110, 112-144.

A. Evidence Available at Initial Decision.

CCSF NO. 112:

Rambus destroyed documents that might be discoverable in litigation.

CCFF 1732-1733, 1754.

RAMBUS’S RESPONSE TO CCSF NO. 112:

The proposed finding of fact is likely true of every company in the United States, if not the world. It goes without saying that any document that is destroyed may be discoverable in some litigation at some point in time. That fact does not mean that all companies, individuals and other organizations must therefore keep all documents that

come in to their possession simply because those documents might someday be discoverable in litigation. The correct legal test requires a party alleging improper destruction of documents to establish (1) that the documents were willfully and intentionally destroyed in anticipation of litigation; (2) that the documents destroyed were relevant and material to the party's claims; and (3) that the document destruction has injured the party by materially prejudicing its ability to succeed on its claims. (RRSF 110.) In light of the well-established law and consistent with weighty considerations of public policy, the finding Complaint Counsel propose is irrelevant to any issue raised in this proceeding.

Rambus has previously responded to the original proposed findings cited by Complaint Counsel. RRFF 1732-33, 1754.

CCSF NO. 113:

Rambus employees that destroyed documents were critically involved in Rambus's JEDEC-related IP litigation plans. CCF 1737-1750, 1752-1754.

RAMBUS'S RESPONSE TO CCSF NO. 113:

The proposed finding is not supported by the evidence. It is undoubtedly true that every Rambus employee has at one time or another discarded a document. Thus, Complaint Counsel's proposed finding reduces to the assertion that there is a group of Rambus employees who, in Complaint Counsel's terms, "were critically involved in Rambus's JEDEC-related IP litigation plans." However, Rambus had no JEDEC-related IP litigation plans, either in the past or today. Complaint Counsel's proposed finding thus makes sense only if Complaint Counsel mean to suggest by this proposed finding that

there were certain Rambus employees who were “critically involved” in plans to sue manufacturers of DRAMs that those manufacturers advertised or represented as JEDEC-compliant. But this suggestion or proposed finding is not supported by any of the original findings cited by Complaint Counsel, all of which relate to alleged document destruction, and not to litigation plans. Rambus has previously responded to the proposed findings cited by Complaint Counsel. RRFF 1737-50, 1752-54.

CCSF NO. 114:

Rambus JEDEC representative Richard Crisp destroyed “anything he had on paper” in his office. CCF 1738.

RAMBUS’S RESPONSE TO CCSF NO. 114:

This proposed finding is irrelevant and misleading as previously set forth. RRFF 1738. The record is uncontradicted that Mr. Crisp discarded many paper documents because “because most of the paper I had in my office were things I knew I didn’t need to keep. Most of the things I needed to keep were electronic files that I had on my computer.” (Crisp, Tr. 3428). The paper materials that were in his office and were discarded were wholly irrelevant to this action, including brochures, copies of official meeting minutes maintained by the organizations in question, and duplicates of official publications. (*See id.* (describing the documents as “data books” and “brochures from marketing conferences”)).

CCSF NO. 115:

Many of Richard Crisp’s JEDEC-related emails were purged from Rambus’s business files, computers and active server files. CX5078 (Gonzales testimony

(2/22/05) at 14 (page 124:9-13: “Q. Now did you find in your discovery collections at Rambus copies of those JEDEC e-mails from Richard Crisp mailbox in anyone else’s files throughout the company? A. No, we did not.”); *see also* CCSF 118-123. Although some of Mr. Crisp’s individual JEDEC-related e-mails were discovered accidentally two-and-a-half years later in an unused and forgotten server file, the only organized (although incomplete) set of Crisp’s JEDEC-related e-mails that was located and produced at the time of Rambus’s litigation-related search for responsive documents was not found anywhere at Rambus. Rather, it was found on an old, unused hard drive in Mr. Crisp’s attic, which Mr. Crisp subsequently discarded. CX5075 (Crisp Deposition (2/21/05)) at 3 (page 297:2-9: “Q. Where was that computer located? Within your home? A. Right. It was at my home somewhere. Q. Was it in your attic? A. That sounds vaguely familiar. I just don’t remember.”); *id.* at 4 (page 299:1-6: “it would be more accurately described as just a disk drive that had been in an old pc.”); *id.* at 5 (page 302:22-303:5: “Q. The hard drive that you found in your attic with JEDEC e-mails on it, where is it located physically today? A. I have no idea. Q. What did you do with it? A. Again, it was probably thrown away when I moved. It was a very old hard drive that was not even in use at the time with very low capacity. So I just don’t think I have it anymore.”).

RAMBUS’S RESPONSE TO CCSF NO. 115:

This proposed finding is irrelevant and misleading. To the extent that Complaint Counsel mean to suggest that there was a coordinated effort to destroy Mr. Crisp’s emails, there is no support for such a suggestion and Complaint Counsel cite to none. Rather, the “organized” set of Mr. Crisp’s JEDEC-related emails referred to in the

proposed finding is a large collection of e-mails that Mr. Crisp *chose* to save from loss during a computer system change. (CX711; Crisp, Tr. 3572-76; 3588-96). In order to transfer these emails from his Macintosh to his P.C., Mr. Crisp uploaded (i.e., copied) them to Rambus's server from the Macintosh and then downloaded (i.e., copied) them to the P.C. The documents were intentionally preserved, were produced in discovery, and were admitted into evidence. (Crisp, Tr. 3572-76, 3588-92).

CCSF NO. 116:

Rambus in-house counsel Anthony Diepenbrock, Rambus's in-house attorney responsible for patent prosecution relating to the JEDEC standard, destroyed his documents. CCF 1737.

RAMBUS'S RESPONSE TO CCSF NO. 116:

This proposed finding is not supported by the evidence. The portion of the proposed finding relating to Mr. Diepenbrock's alleged destruction of his documents has been rebutted previously. RRFF 1737. The evidence in fact shows that Mr. Diepenbrock retained all of his important documents. (Trial Tr. at 6236 (Diepenbrock) ("I removed some documents from my work product files that were old, and in some cases I had questions about the retention policy, and I asked Mr. Karp, and documents were not removed if there was any reason to save them.")) The portion of the proposed finding alleging that Mr. Diepenbrock was "responsible for patent prosecution relating to the JEDEC standard," is not supported by the cited finding or by any other evidence in the record.

CCSF NO. 117:

Rambus's outside counsel Lester Vincent, who was responsible for prosecuting its JEDEC-related patents and who also counseled Rambus regarding its obligations relating to JEDEC and other standard-setting organizations destroyed his Rambus-related documents. CCSF 56-57, 128-133.

RAMBUS'S RESPONSE TO CCSF NO. 117:

The proposed finding relating to Mr. Vincent's alleged destruction of Rambus-related documents is not supported by the evidence. RRSF 56-57, 128-133. Likewise, the proposed finding that Mr. Vincent was "responsible for prosecuting [Rambus's] JEDEC-related patents" is not supported by the cited findings nor by any other evidence in the record. All of the patents that Rambus has asserted against DRAM manufacturers for products advertised as JEDEC-compliant were prosecuted to issuance by Rambus in-house counsel after Rambus took over the prosecution from Mr. Vincent's firm (and all but two issued from applications filed by Rambus in-house counsel, not Mr. Vincent's firm). (See RX-2533 at 18 (transcript page 205:12-24) (Mr. Vincent transferred responsibility for prosecution of the relevant patents to Mr. Steinberg in late 1998).) While Mr. Vincent did provide some counseling to Rambus regarding JEDEC, the implication that he destroyed documents relating to such counseling is false. The record is uncontradicted that Mr. Vincent did not destroy any of his files "that related to the legal advice [Mr. Vincent] provided to Rambus about the disclosures of patents and patent applications to JEDEC" or "relating to the disclosure policy of JEDEC." (CX3126 (Vincent 4/12/01 *Infineon* Dep. at 416.) JEDEC-related documents were kept in

Mr. Vincent's *general* files; Mr. Vincent only cleaned certain of his *patent* files for issued patents. (RSF 1663). Moreover, all of Mr. Vincent's relevant general files, as well as his relevant patent prosecution files, were turned over to Rambus's counsel for production in the *Hitachi* litigation. (CX5038; RX2508).

B. Evidence Developed since the Initial Decision.

1. General Absence of Historical Documents.

CCSF NO. 118:

Rambus's attorneys attempting to comply with document requests in a JEDEC DRAM-related litigation against Hitachi in 2001 found a general lack of historical documents in the Rambus files. CX5078 at 13 (Corresponding to transcript page 120) ("Q. And how would you categorize the types of documents that you were looking for that you couldn't find? A. It would be difficult to characterize them to any specific grouping. It was more historical documents prior to a certain date, were – either didn't exist or seemed to be incomplete.").

RAMBUS'S RESPONSE TO CCSF NO. 118:

The proposed finding is irrelevant. Complaint Counsel have pointed to nothing to suggest that any unspecified "historical documents" were improperly destroyed. Nor have Complaint Counsel shown any prejudice from the unavailability of any so-called "historical documents." To the contrary, Complaint Counsel have conceded that they have had "an unusual degree of visibility into the precise nature of Rambus' conduct, as well as the underlying motivations for what Rambus did." (Opening Statement, Tr. at 15.)

Furthermore, the current record makes plain that many documents that were not located by Rambus's former counsel during the very brief course of the *Hitachi* action – which settled five years ago – have long since been located and produced for use in various subsequent lawsuits. That Rambus has continued to devote significant resources to collecting potentially responsive documents for production, reviewing them and producing those that are responsive and not privileged does not form a basis for any criticism of Rambus.

CCSF NO. 119:

Rambus's attorneys found that the document retention policy caused the loss of the historical documents. *Id.* at 14 (Corresponding to transcript pages 122) (“In looking for documents that would be responsive to the Hitachi document requests, there were requests for some historical documents that the company simply did not have because of this document retention policy that had been adopted in ‘98 and which had resulted in the destruction of certain documents.”).

RAMBUS'S RESPONSE TO CCSF NO. 119:

See RRSF No. 118.

CCSF NO. 120:

Among the documents that Rambus's attorneys found missing were JEDEC-related documents. *Id.* at 20 (Corresponding to transcript page 146).

RAMBUS'S RESPONSE TO CCSF NO. 120:

The proposed finding is misleading. Rambus's attorneys were able to obtain the “missing” JEDEC-related documents by simply getting them from JEDEC.

CX5078 at 24 (Corresponding to transcript page 162) (“JUDGE PAYNE: Why did you go to the ITC -- to JEDEC to get these documents in the first place? THE WITNESS: Because we wanted to get a full -- the full story of Rambus’ participation in JEDEC and there were documents that were not in Rambus’ files that related to that.”). Complaint Counsel have acknowledged that the critical JEDEC-related documents that they needed for this case were produced by Rambus prior to trial. Motion at 19 (referring to emails that “formed the core of the case against Rambus. . . .”).

2. Destruction of Documents of Rambus’s JEDEC Representatives and Executives.

CCSF NO. 121:

Nearly all of the JEDEC-related hard copy documents of Rambus’s primary JEDEC representative Richard Crisp were destroyed as a result of Rambus’s document destruction. CX5059 at 4 (“What other docs did [JEDEC] send to RC?... comms by email... what about ballots?... he kept some... after Joel joined the company all docs were then destroyed. ... 10/97 doc retention/destruction policy”).

RAMBUS’S RESPONSE TO CCSF NO. 121:

The proposed finding is incomplete and misleading. The record is uncontradicted that Mr. Crisp discarded many paper documents “because most of the paper I had in my office were things I knew I didn’t need to keep. Most of the things I needed to keep were electronic files that I had on my computer.” (Crisp, Tr. 3428; *see* RRSF 114; RRFF 1738.)

While Complaint Counsel do cite to supplemental evidence in support of this finding, the finding itself is no different in substance from findings that Complaint

Counsel submitted prior to the Initial Decision. *See* CCF 1738; *see also* CCSF 114.

Indeed, Mr. Crisp testified, and it has never been disputed, that he threw away most of the publicly available paper materials that he had received from JEDEC, such as official minutes of JEDEC meetings and ballots, but that he *retained* the vast majority of the JEDEC-related materials that he had created. For instance, Mr. Crisp retained electronic documents such as his e-mailed trip reports of the meetings he attended. (Crisp, Tr. 3570-6.) RRSF 115.

CCSF NO. 122:

CX0711, a collection of Crisp's JEDEC-related emails, was found on an old, unused hard drive in Mr. Crisp's attic, which Mr. Crisp subsequently discarded. CCSF 115. Although some of Mr. Crisp's individual JEDEC-related e-mails were discovered accidentally two-and-a-half years later in an unused and forgotten server file, Rambus's attorneys did not find the set of JEDEC-related emails corresponding to CX0711 in its search of Rambus's working files. CX5078 at 14 (Corresponding to transcript page 124) ("Q. Now did you find in your discovery collections at Rambus copies of those JEDEC e-mails from Richard Crisp mailbox in anyone else's files throughout the company? A. No, we did not.").

RAMBUS'S RESPONSE TO CCSF NO. 122:

This proposed finding is irrelevant and misleading. To the extent that Complaint Counsel mean to suggest that there was a coordinated effort to destroy Mr. Crisp's emails, there is no support for such a suggestion and Complaint Counsel cite to none. Rather, as the finding suggests, CX0711 contains a large collection of e-mails that

Mr. Crisp *chose* to save from loss during a computer system change. (CX711; Crisp, Tr. 3572-76; 3588-96. In order to transfer these emails from his Macintosh to his P.C., Mr. Crisp uploaded (i.e., copied) them to Rambus's server from the Macintosh (hence the copy on the server) and then downloaded (i.e., copied) them to the P.C. The documents were intentionally preserved, were produced in discovery, and were admitted into evidence. (Crisp, Tr. 3572-76, 3588-92).

While Complaint Counsel cite to supplemental evidence in support of this finding, the finding itself is similar in substance to findings that Complaint Counsel submitted prior to the Initial Decision. *See* CCFF 1753. Moreover, it is undisputed that Mr. Crisp's emails were preserved through the process described above. The supplemental proposed finding is not relevant to this matter.

CCSF NO. 123:

Prior to the creation of the document retention policy at Rambus, Richard Crisp was a "packrat." CX5069 at 33 ("I have a picture in my mind of his office before, and that's – you couldn't even get into his office.").

RAMBUS'S RESPONSE TO CCSF NO. 123:

To the extent that the proposed finding is meant to imply that Mr. Crisp destroyed a large volume of paper documents, the finding is irrelevant in light of the uncontradicted evidence that Mr. Crisp discarded many paper documents "because most of the paper I had in my office were things I knew I didn't need to keep. Most of the things I needed to keep were electronic files that I had on my computer." (Crisp, Tr. 3428). The paper materials that were in his office and discarded were wholly

irrelevant to this action, such as brochures and duplicates of official publications. *See id.* (describing the documents as “data books” and “brochures from marketing conferences”); *see also* RRSF 114, 122; RRFF 1738.

CCSF NO. 124:

Billy Garrett, Rambus’s other primary JEDEC representative, also destroyed all of his JEDEC-related hard copy and computer stored documents as a result of the document retention policy. CX5062 at 11 (corresponding to GCWF 3422) (“got rid of all the stuff – doc retention policy jedec stuff all went away.”). Prior to the document retention policy, Garrett was a “packrat.” *Id.* at 5 (corresponding to GCWF 3416). But when he searched his files in 2001 for Rambus’s case against Hitachi, Garrett “didn’t find anything relating to JEDEC.” *Id.*

RAMBUS’S RESPONSE TO CCSF NO. 124:

The proposed finding is not supported by the evidence. Complaint Counsel rely on attorney notes with Billy Garrett, who attended only three JEDEC meetings (the last in March 1993 (JX15)). Complaint Counsel quote the notes as stating “got rid of all the stuff – doc retention policy – jedec stuff all went away,” but omit the immediately preceding notes: “there were handouts of presentations – sent to billy – stuffed them into drawer – got compilation of jc 42 standard – compilation – did not look thru it much.” CX5062 at 11. The notes omitted by Complaint Counsel suggest that the “stuff” that Mr. Garrett “got rid of” consisted of publicly available JEDEC materials. *See also id.* at 5 (“didn’t find anything relating to JEDEC. Wasn’t necessary. Got rid of it. Only thing he specifically remembers throwing away was the specifications.”)

CCSF NO. 125:

Rambus President David Mooring also apparently had no documents relating to his attendance at JEDEC. CX5063 at 12 (corresponding to GCWF 3412). When asked by Rambus's attorneys for documents relating to JEDEC he pointed them to Richard Crisp and Billy Garrett and mentioned the document retention policy. *Id.* ("go to [Crisp because] he had a tendency to save things. Billy Garrett – would also have docs.").

RAMBUS'S RESPONSE TO CCSF NO. 125:

The proposed finding is not supported by the evidence. While the attorney notes cited do indicate that Mr. Mooring advised the attorneys to check with "RC," likely a reference to Richard Crisp, and Billy Garrett for documents, they are silent as to whether Mr. Mooring had found any documents relating to JEDEC. In any case, even if the proposed finding were accurate, it would be irrelevant. Complaint Counsel point to no evidence that Mr. Mooring, who only attended three JEDEC meetings (the last in September 1993 (JX17)), would likely have had JEDEC-related documents in addition to the emails that have been produced.

CCSF NO. 126:

Unlike Richard Crisp and Vice President Allen Roberts, who were able to produce documents from their personal files after leaving Rambus, in-house counsel Tony Diepenbrock did not keep any of his files after leaving Rambus. CX5064 ("2. What docs / files do you have - Tony has no rambus docs whatsoever. 3. Overview of the files – Rambus' document retention policy was created/mandated by Joel [K]arp.").

RAMBUS'S RESPONSE TO CCSF NO. 126:

The proposed finding, to the extent that it suggests that Mr. Diepenbrock destroyed Rambus-related files after leaving Rambus, is not supported by the evidence. The statement "Tony has no rambus docs whatsoever" indicates that Mr. Diepenbrock left his Rambus-related files at Rambus upon his departure. There is nothing improper about a decision by an employee (particularly a lawyer) that he will not take a company's documents with him when he leaves. It is likely that Mr. Diepenbrock considered his files to be confidential to Rambus and that he felt it appropriate to leave those files at Rambus.

CCSF NO. 127:

Vice President Allen Roberts also destroyed documents pursuant to Rambus's document retention policy. CX5084 at 3 ("Yes, I believe that I purged some documents in regards to that direction.").

RAMBUS'S RESPONSE TO CCSF NO. 127:

The proposed finding is incomplete and misleading. Mr. Roberts testified that, in response to the document retention policy, he simply followed his usual practice of discarding documents that were no longer necessary. RX-2535 at 4 ("Every day as part of normal business, there's documents that you no longer need, and you decide if those are confidential documents or not, and if they're confidential documents, they go into the box for confidential destruction, and if they're not confidential documents, they go into the trash. I mean, this was no different than -- no different than what had already been in place, effectively. It just said, you know, here's the things that you need to

keep.”).

The proposed finding is also irrelevant. Complaint Counsel point to no evidence suggesting that Mr. Roberts improperly destroyed any documents.

3. Destruction of Documents of Rambus’s Outside Patent Counsel.

CCSF NO. 128:

Rambus outside patent counsel Lester Vincent also cleaned out his email system in May 1999. CX5060 at 3.

RAMBUS’S RESPONSE TO CCSF NO. 128:

The proposed finding is not supported by the evidence, is incomplete and is misleading. First, the attorney notes cited by Complaint Counsel do not say that Mr. Vincent “cleaned out” his email system in May 1999; rather, the notes state that he “went through and cleared out emails” at that time. CX5060 at 3. There is no indication in the notes of what emails were “cleaned” and what emails were retained. Of course, if Mr. Vincent were simply deleting *all* emails, there would have been no need to “[go] through” them.

Moreover, the proposed finding is irrelevant. First, Complaint Counsel point to no evidence suggesting that any deletion of emails by Mr. Vincent in May 1999 was in any way improper. Second, as the attorney notes cited by Complaint Counsel also indicate, email was “not much used” by Mr. Vincent in the early 1990s. *Id.* Moreover, Mr. Vincent “switched to a different server” for his emails in 1998, and his emails prior to that time were lost in the transition. *Id.* Thus, whatever emails may have been deleted by Mr. Vincent in May 1999, they could not have included emails generated during the

bulk of the period that Mr. Vincent was prosecuting Rambus patent applications, including the entire period that Rambus was a member of JEDEC.

CCSF NO. 129:

On or before July 28, 1999, Rambus outside patent counsel Lester Vincent completed “clean-up” of his files labeled P001C2. CX5036 at 1; *see also* CCF 1745-1748. The P001C2 files related to Rambus’s ‘646 patent application and ‘327 patent. *Id.*; DX0014; *see also* CCF 1004-1008, 1069, 1076-1077, 1092-1095, 1100-1114, 1199-1237.

RAMBUS’S RESPONSE TO CCSF NO. 129:

The proposed finding is incomplete and misleading. Complaint Counsel, who have throughout this litigation presumed that the Rambus patents at issue here are valid, have never tried to explain why Mr. Vincent’s patent prosecution files would likely contain relevant documents that were not preserved.

This finding also relies on a chart prepared by Mr. Vincent’s secretary for his own internal use with respect to the date of alleged “completed ‘clean-up’.” But that chart simply records dates on which Mr. Vincent “reviewed” certain files. CX5036. As Mr. Vincent testified, simply because it is marked on the chart that he “reviewed” a particular file does not mean that anything in the file was destroyed. (RX-2533, Vincent 10/15/04 *Infineon* Dep. Tr. at 145.)

The proposed finding is also irrelevant. The record shows that Mr. Vincent retained all relevant documents (RSF 1662-63). In particular, all documents relating to JEDEC were maintained in Mr. Vincent’s general files, as opposed to his patent files.

These files were not cleaned and all relevant documents contained in them were produced. *Id.* Complaint Counsel have made no showing that the cleaning of certain Rambus patent files had any impact on the presentation of their case. In addition, Complaint Counsel have failed to show that conforming the prosecution files for issued patents to the official patent office file is in any way improper. To the contrary, the record shows that this is standard practice. RSF 1661.

CCSF NO. 130:

On or before June 23, 2000, Rambus outside patent counsel Lester Vincent completed “clean-up” of his files labeled P007D and P007DC. CX5036 at 2; *see also* CCFF 1745-1748. The P007D and P007DC files related to Rambus’s ‘692 patent application. DX0014; *see also* CCFF 932-935, 947-948, 962-967, 1069, 1074-75, 1183-1198.

RAMBUS’S RESPONSE TO CCSF NO. 130:

The proposed finding is incomplete and misleading. Complaint Counsel, who have throughout this litigation presumed that the Rambus patents at issue here are valid, have never tried to explain why Mr. Vincent’s patent prosecution files would likely contain relevant documents that were not preserved.

This finding also relies on a chart prepared by Mr. Vincent’s secretary for his own internal use with respect to the date of alleged “completed ‘clean-up’.” But that chart simply records dates on which Mr. Vincent “reviewed” certain files. CX5036. As Mr. Vincent testified, simply because it is marked on the chart that he “reviewed” a particular file does not mean that anything in the file was destroyed. (RX-2533, Vincent

on the chart that he “reviewed” a particular file does not mean that anything in the file was destroyed. (RX-2533, Vincent 10/15/04 *Infineon* Dep. Tr. at 145.)

The proposed finding is also irrelevant. The record shows that Mr. Vincent retained all relevant documents (RSF 1662-63). In particular, all documents relating to JEDEC were maintained in Mr. Vincent’s general files, as opposed to his patent files. These files were not cleaned and all relevant documents contained in them were produced. *Id.* Complaint Counsel have made no showing that the cleaning of certain Rambus patent files had any impact on the presentation of their case. In addition, Complaint Counsel have failed to show that conforming the prosecution files for issued patents to the official patent office file is in any way improper. To the contrary, the record shows that this is standard practice. RSF 1661.

CCSF NO. 132:

On or before June 23, 2000, Rambus outside patent counsel Lester Vincent completed “clean-up” of his files labeled P010DC. CX5036 at 2; *see also* CCF 1745-1748. The P010DC files related to Rambus’s ‘490 patent application. DX0014; *see also* CCF 900-901, 932-934, 947-948, 955-958, 962, 1028, 1049, 1164-1182.

RAMBUS’S RESPONSE TO CCSF NO. 132:

The proposed finding is incomplete and misleading. Complaint Counsel, who have throughout this litigation presumed that the Rambus patents at issue here are valid, have never tried to explain why Mr. Vincent’s patent prosecution files would likely contain relevant documents that were not preserved. This finding also relies on a chart prepared by Mr. Vincent’s secretary for his own internal use with respect to the date of

alleged “completed ‘clean-up’.” But that chart simply records dates on which Mr. Vincent “reviewed” certain files. CX5036. As Mr. Vincent testified, simply because it is marked on the chart that he “reviewed” a particular file does not mean that anything in the file was destroyed. RX-2533, Vincent 10/15/04 *Infineon* Dep. Tr. at 145.)

The proposed finding is also irrelevant. Mr. Vincent’s cleaning of patent files on June 23, 2003 had no impact on the documents produced in this litigation because copies of those files had already been provided to Rambus and its litigation counsel in connection with the *Hitachi* litigation in January 2000. RSF 1664. In addition, Complaint Counsel have failed to show that conforming the prosecution files for issued patents to the official patent office file is in any way improper. To the contrary, the record shows that this is standard practice. RSF 1661.

CCSF NO. 133:

On or before May 13, 1999, Rambus outside patent counsel Lester Vincent completed “clean-up” of his files labeled P014D. CX5036 at 2; *see also* CCFF 1745-1748. The P014D files related to Rambus ‘651 patent application. DX0014; *see also* CCFF 900-901, 932-934, 947-948, 955-958, 962.

RAMBUS’S RESPONSE TO CCSF NO. 133:

The proposed finding is incomplete and misleading. Complaint Counsel, who have throughout this litigation presumed that the Rambus patents at issue here are valid, have never tried to explain why Mr. Vincent’s patent prosecution files would likely contain relevant documents that were not preserved. This finding also relies on a chart prepared by Mr. Vincent’s secretary for his own internal use with respect to the date of

alleged “completed ‘clean-up’.” But that chart simply records dates on which Mr. Vincent “reviewed” certain files. CX5036. As Mr. Vincent testified, simply because it is marked on the chart that he “reviewed” a particular file does not mean that anything in the file was destroyed. RX-2533, Vincent 10/15/04 *Infineon* Dep. Tr. at 145.)

The proposed finding is also irrelevant. The record shows that Mr. Vincent retained all relevant documents (RSF 1662-63). In particular, all documents relating to JEDEC were maintained in Mr. Vincent’s general files, as opposed to his patent files. These files were not cleaned and all relevant documents contained in them were produced. *Id.* Complaint Counsel have made no showing that the cleaning of certain Rambus patent files had any impact on the presentation of their case. In addition, Complaint Counsel have failed to show that conforming the prosecution files for issued patents to the official patent office file is in any way improper. To the contrary, the record shows that this is standard practice. RSF 1661.

4. Further Confirmation of Document Destruction.

CCSF NO. 134:

Recently discovered back-up tapes confirm that a substantial volume of relevant documents disappeared from Rambus’s business files and, as a result, are missing from the record in this matter. CCSF 135-144.

RAMBUS’S RESPONSE TO CCSF NO. 134:

Complaint Counsel asked the Commission to delay the filing deadline for these findings so that they could move to admit additional documents relating to the backup tapes described in this finding and in CCSF 135-144. The Commission *denied*

that petition on August 4, 2005 and ordered the parties to submit their findings “related to documents already in the record” in accordance with the schedule previously set by the Commission. Complaint Counsel chose to disregard this clear command. The proposed findings about the backup tapes should, therefore, be stricken. Those findings are also incomplete, misleading and irrelevant as set forth below. *See* RRSF 135-144.

CCSF NO. 135:

In March and April 2005, Rambus found approximately 1,400 back-up tapes and other removable electronic media. The vast majority of these back-up tapes and electronic media have been erased, are blank, or otherwise cannot be read. Letter from Geoffrey D. Oliver to Donald S. Clark (June 14, 2005) at Attachment 1 (Supplemental Case Management Statement of Rambus Inc., *Hynix Semiconductor Inc. v. Rambus Inc.* (May 20, 2005) at 4 (“1,077 pieces of media have been determined to be blank, bad media (which means no data can be read from the media), or cleaning cartridges.”)).

RAMBUS’S RESPONSE TO CCSF NO. 135:

This proposed finding should be stricken for the reasons set out in RRSF 134. In any case, to the extent that Complaint Counsel mean to suggest that there was anything improper in Rambus’s erasure of back-up tapes, there is no basis for such a suggestion. In July 1998, Rambus adopted its outside counsel’s advice with respect to a policy for back-up tapes, providing for Rambus to maintain back-up tapes for three months and advising employees not to rely on the back-up tapes for documents that should be saved for longer than three months. RX-2503; RSF 1625-26. Complaint

Counsel have pointed to nothing to suggest that this policy was in any way improper and, indeed, it is a standard practice utilized in many companies. RSF 1656.

Even if Rambus had reasonably anticipated litigation when it adopted its document retention policy – which it did not (*see* RRSF 147) – the law recognizes that a party ordinarily is not required to preserve inaccessible backup tapes, even when it anticipates or is involved in litigation. *See, e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“*Zubulake IV*”); *Thompson v. United States Dept. of Housing and Urban Devel.*, 219 F.R.D. 93, 100 (D. Md. 2003); *see also The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document-Production* (Jan. 2004 version) at 20, 24-25 (available at http://www.thesedonaconference.org/publications_html). Accordingly, there is no basis for any suggestion that the recycling or erasure of Rambus’s backup tapes was improper.

That backup tapes were erased should not have come as a surprise to Complaint Counsel. The Rambus policy of saving material on backup tapes for only three months was the subject of evidence and testimony developed at the hearing of this matter, and, in fact, was the subject of one of Complaint Counsel’s original proposed findings. CCFF 1720 (citing documents and testimony of Joel Karp regarding back-up tape policy); CX1040 (Rambus document retention policy, including back-up tape policy). The fact that the tapes referred to in the proposed finding were erased is simply corroboration of the prior testimony of witnesses and the contents of the policy.

CCSF NO. 136:

A number of the readable back-up tapes and electronic media recently

discovered by Rambus apparently contain copies of documents relevant to Rambus's on-going patent-infringement and antitrust litigation with Hynix that had disappeared from Rambus's business files and servers. It appears that a significant number of these documents had not been produced to Hynix in that litigation or to Complaint Counsel in connection with the present litigation. *See* Letter from Geoffrey D. Oliver to Donald S. Clark (May 5, 2005) at Attachment 1 (Letter from Gregory P. Stone to The Honorable Ronald M. Whyte (April 4, 2005) at 2 (“some of the data from some of these tapes constitutes text files . . . that might be responsive to Hynix's discovery requests.”)); Letter from Geoffrey D. Oliver to Donald S. Clark (June 14, 2005) at Attachment 1 (Supplemental Case Management Statement of Rambus Inc., *Hynix Semiconductor Inc. v. Rambus Inc.* (May 20, 2005) at 11 (Rambus “began producing documents from those tapes [to Hynix] on April 15, 2005.”).

RAMBUS'S RESPONSE TO CCSF NO. 136:

This proposed finding should be stricken for the reasons set out in RRSF 134. In any case, the documents that Rambus has recently produced to Hynix and that have also been produced to Complaint Counsel are, as a whole, either duplicative or cumulative, or are largely supportive of the conclusions drawn by Judge McGuire and the positions taken by Rambus. (*See* Response By Respondent Rambus Inc. to Complaint Counsel's Petition to Modify the Schedule in the Commission's July 20, 2005 Order (July 29, 2005).)

Moreover, although Rambus is attempting to avoid the production of duplicates – that is documents that have been previously produced – from the backup

tapes to the extent possible (*see* Letter from Geoffrey D. Oliver to Donald S. Clark (June 14, 2005) at Attachment 1 (Supplemental Case Management Statement of Rambus Inc., *Hynix Semiconductor Inc. v. Rambus Inc.* (May 20, 2005) at 13), the process has not been as successful as had been hoped. Thus, the production of any particular document to Hynix – or to Complaint Counsel – from the backup tapes does not necessary mean that the document had not been produced previously.

CCSF NO. 137:

In connection with its production to Hynix of documents from its newly-found back-up tapes, Rambus has asserted privilege with respect to at least 58 documents that were not found in Rambus’s business files or on its servers, and thus “not reviewed and produced during Infineon case and . . . not among the documents subsequently produced to Hynix . . .” Letter from Geoffrey D. Oliver to Donald S. Clark (June 14, 2005) at Attachment 2 (Rambus Privilege Log) at 5, fn. *; Complaint Counsel’s Petition to Modify the Schedule in the Commission’s July 20, 2005 Order (July 28, 2005) at Attachment 10. These documents have never been produced to Complaint Counsel. *Id.* at Attachment 3 (Letter from Geoffrey D. Oliver to Gregory P. Stone (June 6, 2005) at 2 (“I understand that Rambus will not produce to us any document as to which it asserts claims of privilege . . .”)).

RAMBUS’S RESPONSE TO CCSF NO. 137:

This proposed finding should be stricken for the reasons set out in RRSF 134. In any case, to the extent that Complaint Counsel mean to suggest that there was anything improper in Rambus’s erasure of back-up tapes, there is no basis for such a

suggestion. In any case, to the extent that Complaint Counsel mean to suggest that there is something improper in Rambus not producing recently-discovered privileged documents, there is no basis for such a suggestion. Rambus risks a finding of waiver if it voluntarily produces such documents. Indeed, Complaint Counsel themselves argued *in this case* that Rambus had waived its privilege as to several broad subject matters by producing privileged documents in one lawsuit that had been ordered produced in a second lawsuit. (*See* Complaint Counsel's Motion to Compel Discovery Relating to Subject Matters as to Which Rambus's Privilege Claims Were Invalidated on Crime-Fraud Grounds and Subsequently Waived (Jan. 7, 2003)). Rambus has no choice but to assert the privilege in these circumstances.

Further, Rambus has properly asserted the privilege. While the documents would have been subject to the *Infineon* trial court's March 2001 order piercing the attorney-client privilege, that order is not entitled to collateral estoppel effect in this matter or the *Hynix* matter for several reasons: (1) it was a discovery order, which does not meet the requirements for a final judgment; (2) the judgment into which that discovery order merged was reversed, and the order therefore may not form the basis for collateral estoppel; and (3) it would be inequitable in the extreme to treat the discovery order as a valid final judgment deserving of collateral estoppel, when the fraud theory on which that order was based was held by the Federal Circuit to have no support in an evidentiary record that included the very documents that Rambus was compelled to produce pursuant to that order.

CCSF NO. 138:

The descriptions contained in Rambus's privilege log indicate that documents purged from Rambus's business files and servers, and thus never produced in this litigation, are likely to be directly relevant to this litigation. CCSF 139-144.

RAMBUS'S RESPONSE TO CCSF NO. 138:

This proposed finding should be stricken for the reasons set out in RRSF 134. In any case, to the extent that Complaint Counsel mean to suggest that the newly logged privileged documents were deliberately "purged" or would support their position on the merits, there is no basis for such a suggestion, as set forth below. RRSF 139-144.

CCSF NO. 139:

The descriptions contained in Rambus's privilege log indicate that documents purged from Rambus's business files and servers, and thus never produced in this litigation, are likely to be directly relevant to the substance of JEDEC's disclosure policy and Rambus's understanding of that policy. Letter from Geoffrey D. Oliver to Donald S. Clark (June 14, 2005) at Attachment 2 (Rambus Privilege Log) at 2 ("Email describing request for, and legal advice of, Lester Vincent Esq. regarding JEDEC disclosure policy"); Complaint Counsel's Petition to Modify the Schedule in the Commission's July 20, 2005 Order (July 28, 2005) at Attachment 10 (Third Privilege Log, Dated June 10, 2005) at 2 ("Chart reflecting legal advice regarding antitrust and patent issues").

RAMBUS'S RESPONSE TO CCSF NO. 139:

This proposed finding should be stricken for the reasons set out in RRSF 134. In any case, there is no basis for Complaint Counsel to assume that any of the documents described on the privilege log were ever “purged,” at least if Complaint Counsel is trying to suggest something sinister by that term. It seems more than a little absurd to suggest that Rambus deliberately destroyed *privileged* documents in 1998 because of some ability at that time to predict that years later, a federal judge might take the nearly unprecedented step of piercing Rambus’s attorney-client privileges and ordering that those privileged documents be produced.

There is also no basis for Complaint Counsel to assume that the privileged documents would be helpful to their cause. Judge McGuire previously found that the privileged documents already in the record supported Rambus’s position on various issues and showed that Rambus had not acted in bad faith.

CCSF NO. 140:

The descriptions contained in Rambus’s privilege log indicate that documents purged from Rambus’s business files and servers, and thus never produced in this litigation, are likely to be directly relevant to Rambus’s efforts to obtain patent claims covering the ongoing work of JEDEC. Letter from Geoffrey D. Oliver to Donald S. Clark (June 14, 2005) at Attachment 2 (Rambus Privilege Log) at 2 (“Email seeking information and legal advice to be obtained from Rambus counsel regarding possible additional patent claims”); *id.* at 3 (“Email providing information for the purpose of facilitating the rendition of and reflecting legal advice of Lester Vincent, Esq. regarding

possible patent claims”).

RAMBUS’S RESPONSE TO CCSF NO. 140:

This proposed finding should be stricken for the reasons set out in RRSF 134. In any case, there is no basis for Complaint Counsel to assume that any of the documents described on the privilege log were ever “purged,” at least if Complaint Counsel is trying to suggest something sinister by that term. It seems more than a little absurd to suggest that Rambus deliberately destroyed *privileged* documents in 1998 because of some ability at that time to predict that years later, a federal judge might take the nearly unprecedented step of piercing Rambus’s attorney-client privileges and ordering that those privileged documents be produced.

There is also no basis for Complaint Counsel to assume that the privileged documents would be helpful to their cause. Judge McGuire previously found that the privileged documents already in the record supported Rambus’s position on various issues and showed that Rambus had not acted in bad faith.

CCSF NO. 141:

The descriptions contained in Rambus’s privilege log indicate that documents purged from Rambus’s business files and servers, and thus never produced in this litigation, are likely to be directly relevant to the actual or anticipated scope of coverage of Rambus’s pending patent applications while Rambus was a member of JEDEC. Letter from Geoffrey D. Oliver to Donald S. Clark (June 14, 2005) at Attachment 2 (Rambus Privilege Log) at 1 (“Email transmitting legal advice of Lester Vincent, Esq. regarding patent issues”); *id.* At 3 (“Email string . . . reflecting legal advice

of Rambus counsel regarding status of patent claims . . .”); Complaint Counsel’s Petition to Modify the Schedule in the Commission’s July 20, 2005 Order (July 28, 2005) at Attachment 10 (Rambus Privilege Log Through May 13, 2005) at 2 (“Memorandum providing legal advice regarding Rambus patent claims”); *id.* at Attachment 10 (Third Privilege Log, Dated June 10, 2005) at 2 (“Presentation summary reflecting legal advice regarding patent status and strategy”; “Evaluation of patent applications for purpose of providing legal advice regarding patent claims and reflecting legal advice regarding same”).

RAMBUS’S RESPONSE TO CCSF NO. 141:

This proposed finding should be stricken for the reasons set out in RRSF 134. The proposed finding is also irrelevant. First, there is no reason to believe that the few entries on the privilege log cited by Complaint Counsel provide materially different information from the large number of documents, privileged and not, and extensive testimony in the record regarding Rambus’s beliefs regarding the scope of its patent coverage. Second, contrary to the proposed finding, the cited documents could have not bearing on the “actual . . . scope of coverage or Rambus’s pending applications,” an objective inquiry that depends on the claim language. Third, regardless of the content of the documents, Judge McGuire has already ruled that, in light of his resolution of the case, Rambus’s beliefs about the scope of its patent coverage is irrelevant (Initial Decision at 244 (finding adverse presumption about Rambus’s knowledge of the scope of its patent coverage moot because “[t]he evidence shows that even if Rambus knew that developing JEDEC standards would require the use of Rambus

patents, Rambus was not required to disclose those patents or applications, as the disclosure of intellectual property was voluntary.”.)

CCSF NO. 142:

The descriptions contained in Rambus’s privilege log indicate that documents purged from Rambus’s business files and servers, and thus never produced in this litigation, are likely to be directly relevant to whether Rambus put other JEDEC members on notice that its patent applications were relevant to JEDEC’s on-going work. Letter from Geoffrey D. Oliver to Donald S. Clark (June 14, 2005) at Attachment 2 (Rambus Privilege Log) at 4 (“Email providing legal advice regarding draft statement at JEDEC meeting concerning patent position”); *id.* at 5 (“Email reflecting legal advice of Lester Vincent, Esq. regarding draft letter to JEDEC”).

RAMBUS’S RESPONSE TO CCSF NO. 142:

This proposed finding should be stricken for the reasons set out in RRSF 134. The proposed finding is also not supported by the evidence. Whether Rambus put JEDEC members on notice that its patent applications were relevant to JEDEC’s on-going work necessarily depend on the actual statements made to JEDEC members – about which there is no dispute – and not on the content of privileged comments regarding draft statements to JEDEC.

The proposed finding is also irrelevant. There is no reason to believe that the cited entries on the privilege log cited by Complaint Counsel would undermine Judge McGuire’s conclusion that “Rambus, through its conduct, raised sufficient red flags to put members of JEDEC and others on notice that there were patent applications

pending, and that members of JEDEC, in fact, were well aware that Rambus sought to make intellectual property claims on the relevant technology.” Initial Decision at 244-45.

CCSF NO. 143:

The descriptions contained in Rambus’s privilege log indicate that documents purged from Rambus’s business files and servers, and thus never produced in this litigation, are likely to be directly relevant to the circumstances surrounding Rambus’s exit from JEDEC. Letter from Geoffrey D. Oliver to Donald S. Clark (June 14, 2005) at Attachment 2 (Rambus Privilege Log) at 5 (“Email reflecting legal advice of Lester Vincent, Esq. regarding draft letter to JEDEC”); Complaint Counsel’s Petition to Modify the Schedule in the Commission’s July 20, 2005 Order (July 28, 2005) at Attachment 10 (Rambus Privilege Log Through May 13, 2005) (Third Privilege Log, Dated June 10, 2005) at 1 (“Draft letter to Electronic Industries Association reflecting legal advice regarding JEDEC”).

RAMBUS’S RESPONSE TO CCSF NO. 143:

This proposed finding should be stricken for the reasons set out in RRSF 134. The proposed finding is also not supported by the evidence. Whether Rambus put JEDEC members on notice that its patent applications were relevant to JEDEC’s on-going work necessarily depend on the actual statements made to JEDEC members – about which there is no dispute – and not on the content of privileged comments regarding draft statements to JEDEC.

The proposed finding is also irrelevant. There is no reason to believe that the cited entries on the privilege log cited by Complaint Counsel would undermine