

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

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

In the Matter of  RAMBUS INCORPORATED,  a corporation.
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Docket No. 9302

**PUBLIC**

**COMPLAINT COUNSEL’S  
SUPPLEMENTAL PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

Complaint Counsel submit these supplemental proposed findings of fact and conclusions of law pursuant to the Order of the Commission dated June 20, 2005. The numbered findings (referred to hereafter as “CCSF”) are intended to supplement and amend the proposed findings and reply findings submitted by Complaint Counsel to the Administrative Law Judge below.<sup>1</sup> The numbered proposed conclusions of law are intended to supplement those submitted by Complaint Counsel to the Administrative Law Judge below.

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

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**COMPLAINT COUNSEL’S  
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**I. Rambus, Intentionally and in Bad Faith, Destroyed Relevant Documents in Anticipation of Litigation.**

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).
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.
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.

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

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).
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.

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.
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).

**A. Evidence Available at Initial Decision.**

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.

**B. Evidence Developed since the Initial Decision.**

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

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).
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).
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.
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.”).
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.”).
  14. In February 1998, Rambus asked its lawyers to review Rambus’s contracts with its licensees to help formulate a litigation strategy. CX5007.
  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.
  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.”).
  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.
  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.
  19. Following the February 12, 1998, meeting, Rambus's outside counsel at Cooley Godward prepared a "litigation strategy memorandum" for Rambus. CX5008 at 2.
  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.”)

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.*
22. Vice President Karp noted two additional 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.
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.”).
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.
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.
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.
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.
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.

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).

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

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



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.
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.

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

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

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

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. CCF 2019.

### **III. Rambus Intentionally Destroyed its Documents.**

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.
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.

#### **A. Evidence available at Initial Decision.**

50. Rambus intentionally destroyed its hard copy documents. CCF 1719, 1723-1727, 1731, 1734-1742, 1745-1750, 1752.
51. Rambus intentionally destroyed its electronic documents. CCF 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."**

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.
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.*

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.
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.").

## **2. Rambus's Outside Counsel Was Instructed by Rambus to Destroy Documents by April 1999.**

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.").
57. Outside patent counsel Lester Vincent's "clean-up" of his firm's 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.

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

58. In the Spring of 1999, as part of his "IP Q2'99 Goals," Vice President Joel Karp planed 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.

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.”).
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.”).
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 . . .”).

#### **4. Rambus Intentionally Destroyed Documents in 2000.**

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

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

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.’”).

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).
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.
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.*
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.*
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.*
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.*
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.

**A. Evidence Available at Initial Decision.**

73. Rambus developed its document retention program in bad faith. CCFF 1718, 1720-1722, 1726, 1732-1733, 1756-1757.
74. Rambus executed its document retention program in bad faith. CCFF 1728-1730, 1737-1742, 1745-1752, 1756-1757.

**B. Evidence Developed since the Initial Decision.**

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.
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.
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.").
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.
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.
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.
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.

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...”).
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.”).
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-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.”).
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.”).
86. Neither Vice President Karp nor in-house patent counsel Steinberg ever mentioned 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.*

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

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 unclear hands hearing as DXT-4024. *See* DX0504 at 2.]
94. Rambus’s outside law firm Cooley Godward was never involved in the implementation of the document retention program. CX5076 at 10, 18.
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.”).
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.”).
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.
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.”).

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.
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.
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.
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.
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.
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.*
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).
106. As in the 1998 shred days, in the 1999 shred day, Rambus employees were referred to the Rambus document retention policy to understand what types of documents they should keep. CX5071 at 11 (“... the instructions were to, you know, make sure that people

referred to the document retention policy to look for which documents they needed to keep.”).

107. As late as the December 2000, document destruction, Rambus employees were told to refer to the document retention policy to understand what to keep and were not told to maintain documents relevant to any pending litigation. CX5071 at 14; *see also* CX5079 at 7 (corresponding to transcript pages 406-407) (Rambus’s Director of Litigation, who was also Rambus’s 30(b)(6) witness on document destruction, was unaware of any instructions to maintain documents other than the document retention policy written by Vice President Karp.).
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.”).
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.”).

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

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.
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.”).

**A. Evidence Available at Initial Decision.**

112. Rambus destroyed documents that might be discoverable in litigation. CCFE 1732-1733, 1754.
113. Rambus employees that destroyed documents were critically involved in Rambus’s JEDEC-related IP litigation plans. CCFE 1737-1750, 1752-1754.
114. Rambus JEDEC representative Richard Crisp destroyed “anything he had on paper” in his office. CCFE 1738.
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.”).
116. Rambus in-house counsel Anthony Diepenbrock, Rambus’s in-house attorney responsible for patent prosecution relating to the JEDEC standard, destroyed his documents. CCFE 1737.
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.

## **B. Evidence Developed since the Initial Decision.**

### **1. General Absence of Historical Documents.**

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

### **2. Destruction of Documents of Rambus's JEDEC Representatives and Executives.**

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").
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.").

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.”).
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.*
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.”).
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.”).
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.”).

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

128. Rambus outside patent counsel Lester Vincent also cleaned out his email system in May 1999. CX5060 at 3.
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.
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* CCF 1745-1748. The P007D and P007DC files related to Rambus’s ‘692 patent application. DX0014; *see also* CCF 932-935, 947-948, 962-967, 1069, 1074-75, 1183-1198.

131. It appears that, at some point in 1999 or 2000, Rambus's outside patent counsel Lester Vincent completed "clean-up" of his files labeled P010D. CX5036 at 2; *see also* CCFF 1745-1748. The P010D files related to Rambus's '961 patent application. DX0014; *see also* CCFF 900-901, 932-934, 947-948, 955-958, 962, 1028, 1125-1163.
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* CCFF 1745-1748. The P010DC files related to Rambus's '490 patent application. DX0014; *see also* CCFF 900-901, 932-934, 947-948, 955-958, 962, 1028, 1049, 1164-1182.
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.

#### **4. Further Confirmation of Document Destruction.**

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.
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.")).
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.")).



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 . . .")).
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.
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").
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").
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”).
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”).
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”).
144. 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 understanding of the equitable estoppel implications of its presence and conduct at JEDEC. *See, e.g.*, 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.* (“Email responding to above 9/7/1995 email from Crisp and requesting legal review of draft statement at JEDEC meeting concerning patent position.”); *id.* (“Email string among Cates, Crisp, Diepenbrock, Toprani and exec regarding legal review of draft statement at JEDEC meeting concerning patent position.”); 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 1 (“Email transmitting legal advice regarding estoppel issues.”).

**VI. The Supplemental Evidence Reveals Misstatements and Misrepresentations of Fact by Rambus and its Executives in the Course of this Matter.**

145. When deposed in this matter in February 2003, Rambus Vice President for Intellectual Property Joel Karp testified that, although Rambus was aware that litigation was a possibility, it did not plan litigation or anticipate litigation before filing its lawsuit against Hitachi in late 1999. CX2114 at 161:25-162:6 (“Q . . . at that point in time, July 22<sup>nd</sup>, 1998, was Rambus anticipating potential litigation? A No.”); *id.* at 162:10-163:5 (“Once we started to put the licensing program together in the middle of 2000, we had . . . I was aware very often that if negotiations failed that there would be litigation. But there was no litigation actually planned prior to actually filing it. There was no anticipation of it at that time, but it was certainly a possibility.”).
146. Rambus quoted and relied upon Mr. Karp’s statements in its Reply Findings submitted to ALJ McGuire in September 2003. *See* Responses to Complaint Counsel’s Proposed Findings of Fact, Response to Finding No. 1732 (“as Mr. Karp testified, Rambus was *not* anticipating litigation at the time.”) (emphasis in original); *see also* Response to Finding No. 1718 (quoting Mr. Karp’s testimony). The privilege log produced to Complaint Counsel in this case indicates that Rambus had asserted privilege over, and had withheld from production in this case, documents demonstrating these statements to be untrue.
147. In fact, the Supplemental Evidence reveals that, in the first half of 1998, Vice President Karp and other Rambus officers, managers and counsel not only reasonably anticipated litigation, but actively planned to initiate litigation. CX5048 at 3 (“Top Level Key Results for 1998 . . . 18. Develop and enforce IP . . . C. Get all infringers to license our IP . . . or sue.”); CX5007 (Notes of “LICENSING/ LITIGATION STRATEGY” meeting between Karp and outside lawyers; “Royalty rates will probably push us into litigation quickly;” “Need to litigate against someone to establish royalty rate and have court declare patent valid;” 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.”); 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.”); CX5006 at 3 (“Licensing and Litigation Strategy . . . – Option 1: Breach of Contract Remedy – Option 2: Patent Infringement Suit . . . Patent suit can be brought in venue of our choice – ITC – Northern California – Eastern District of Virginia (Rocket Docket)”); CX5005 at 2 (“ . . . a tiered litigation strategy has been developed. . . . The first option is to pursue breach of contract remedies. . . . Rambus may elect to file a patent infringement suit.”); *see also* CX5017 (“IP Q3’98 Goals (First Cut) . . . 2. Infringement Activity . . . Prepare claim chart for Micron SDRAM . . . 3. IP Litigation Activity.”); CX5014 (same).

148. The Supplemental Evidence reveals that Vice President Karp and other Rambus officers, managers and counsel continued to anticipate litigation throughout 1999, well before Rambus sued Hitachi. *See, e.g.*, 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.”); CX5045 (same).
149. In several filings in this matter, Rambus quoted and relied on 2001 deposition testimony of Vice President for Intellectual Property Joel Karp, in which Mr. Karp testified that, when planning Rambus’s document retention policy, he was most concerned about a “third-party type request,” in which Rambus, even though not a party to litigation, would be served with broad requests for documents. CX2102 (transcript of Karp deposition (Micron v. Rambus, 8/1/01) at 335:15-337:9 (“Actually, the third-party situation was the thing I was most concerned about ....”)).
150. Rambus quoted prominently and relied upon Mr. Karp’s statements in written submissions to both ALJ Timony and ALJ McGuire. Memorandum in Opposition to Complaint Counsel’s Motion for Additional Adverse Inferences (filed April 7, 2003) at 8 (“[Mr. Karp] testified that he was most concerned about a ‘third-party type request,’ in which Rambus, even though not a party to litigation, would be served with broad requests for documents.”); *id.* at 7 (same); Rambus’s Responses to Complaint Counsel’s Proposed Findings of Fact, Response to Finding No. 1718 (“the ‘worry’ – if there was one – was that Rambus might be subpoenaed in connection with litigation in which it was not a party, not that Rambus itself might be a party to any specific case or type of litigation.”). The privilege log produced to Complaint Counsel in this case indicates that Rambus had asserted privilege over, and had withheld from production in this case, documents demonstrating these statements to be untrue.
151. In fact, the Supplemental Evidence reveals that, at the time they were planning Rambus’s document retention policy, Vice President Karp and other Rambus officers, managers and counsel were concerned, not with third party litigation, but with offensive litigation that Rambus planned to institute against DRAM manufacturers. CX5048 at 3 (“Top Level Key Results for 1998 . . . 18. Develop and enforce IP . . . C. Get all infringers to license our IP . . . or sue.”); CX5007 (Notes of “LICENSING/ LITIGATION STRATEGY” meeting between Karp and outside lawyers; “Need to litigate against someone to establish royalty rate and have court declare patent valid;” 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.”); 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.”); CX5006 at 3 (“Licensing and Litigation Strategy . . . – Option 1: Breach of Contract Remedy – Option 2: Patent Infringement Suit . . . Patent suit can be brought in venue of our choice – ITC – Northern California – Eastern District of Virginia (Rocket Docket)”; CX5005 at 2 (“ . . . a tiered litigation strategy has been

- developed. . . . The first option is to pursue breach of contract remedies. . . . Rambus may elect to file a patent infringement suit.”); *see also* CX5017 (“IP Q3’98 Goals (First Cut) . . . 2. Infringement Activity . . . Prepare claim chart for Micron SDRAM . . . 3. IP Litigation Activity.”); CX5014 (same).
152. In this matter, Rambus quoted and relied on 2001 deposition testimony of Vice President for Intellectual Property Joel Karp, in which Mr. Karp testified that his concern was not with the contents of the documents destroyed by Rambus, but solely with their volume. CX2102 (transcript of Karp deposition (Micron v. Rambus, 8/1/01) at 347:18-348:6 (“[M]y concern was that if I was ever asked to produce those thousands of back-up tapes, regardless of what they concerned . . . that it would be a task that would be beyond the human endurance to have to try to figure out what was on those things.”).
153. Rambus quoted prominently and relied upon Mr. Karp’s statements in this matter. Memorandum in Opposition to Complaint Counsel’s Motion for Additional Adverse Inferences (filed April 7, 2003) at 8 (“As Mr. Karp stated, his concern was not with the *contents* of the documents Rambus had accumulated during its eight-year corporate history, but with the sheer *volume* of those documents.” (emphasis in original)); *id.* at 7 (same). The privilege log produced to Complaint Counsel in this case indicates that Rambus had asserted privilege over, and had withheld from production in this case, documents demonstrating these statements to be untrue.
154. In fact, the Supplemental Evidence reveals that Rambus was concerned about the substance of documents that might affect the outcome of litigation and tailored its document destruction efforts accordingly. *See, e.g.*, CX5010 at 6 (R401139-41) (describing “horror stories” where supposedly deleted e-mails altered the outcome of litigation, resulting in liability); CX5020 (reminding employees to destroy drafts of contracts and materials used during negotiations); CX5007 (“Licensing/Litigation Strategy” contrasts need to gather documents to put together a searchable electronic database and the need for a document retention policy, and focuses on patent prosecution files: “clean out all attorney notes”); CX5022 at 4 (“Clean out all the Rambus [patent prosecution] files that have issued”); CX5033 (“File clearance re document retention policy – 11 of 49 issued patent files for BSTZ have been cleared – another 5 are awaiting my review”); CX5031 (after noting that Rambus’s June 1992 Business Plan was used against Rambus in court, “this new [document retention] policy is similar to the previous policy – however, this time the IP group will attempt to execute the policy more effectively.”).
155. Rambus’s Vice President of Intellectual Property Neil Steinberg, designated as the company representative with knowledge to testify on behalf of Rambus pursuant to F.R.C.P. 30(b)(6), testified that he didn’t believe that the July 22, 1998, presentation to Rambus employees by Mr. Karp regarding Rambus’s document retention policy used any other documents than a two page document. CX5085 at 6 (page 65:25-66-18). *See*

- CX1040. This transcript was provided to and relied upon by FTC staff during the course of its Part II investigation in this matter.
156. In fact, the Supplemental Evidence reveals a 17-page set of slides dated July 22, 1998, that set forth the background and specifics of the policy. The detailed slides described the policy as a “Document Retention/Destruction Policy.” CX5010 at 2 (R401137) (“BEFORE LITIGATION A Document Retention/Destruction Policy”). The slides make clear that Rambus focused on documents that would be discoverable in litigation, urged that “special care” be taken with e-mail and electronic documents, and sought to avoid “horror stories” where supposedly deleted e-mails are found and used to prove a case against the company. *Id.* at 4-6 (R401139-41). The slides also noted that, “If crucial documents have been destroyed intentionally, courts have entered default judgments against the destroying party.” *Id.* at 10 (R401145).
  157. Rambus’s Vice President of Intellectual Property Neil Steinberg, designated as the company representative with knowledge to testify on behalf of Rambus pursuant to F.R.C.P. 30(b)(6), testified under oath that only on one occasion, in or around July 1998, did Rambus distribute burlap sacks to employees to collect documents for shredding. CX5085 at 8 (page 75:12-20). This transcript was provided to and relied upon by FTC staff during the course of its Part II investigation in this matter.
  158. In fact, the Supplemental Evidence reveals that on at least two other occasions, in August 1999 and in December 2000, Rambus again held shred days and distributed burlap sacks to Rambus employees to collect documents for shredding. CX5045 (IP Q3’99 Goals (Steinberg was Patent Counsel): “Organize 1999 shredding party at Rambus”); CX5046 (Kaufman e-mail to all staff (8/25/99): “Leave your burlap bags outside your cube before you leave tonight . . . the shredding company will start collecting at 9:00 am tomorrow morning. And don’t forget the shredder party tomorrow at 5:00 pm ... lots of good food & a special announcement!”); CX5034 (Tate e-mail to all staff (8/25/99): “I’m sorry I’ll miss the shredder party tomorrow.”); CX5047 at 3 (400788) (SureShred Invoice and Certificate of Destruction (12/28/00): “Shred contents of 460 Shred Bags”).
  159. Despite the central importance of allegations of spoliation of evidence in this litigation (see Complaint at ¶ 121), at no time did Rambus correct the testimony of Mr. Steinberg or inform Complaint Counsel that Rambus had, in fact, held at least three separate shred days over the course of two-and-a-half years.
  160. Rambus’s primary representative at JEDEC, Richard Crisp, testified that his JEDEC-related e-mails were located on Rambus’s main server and were produced from that location. CX2082 (Crisp Deposition, *Rambus v. Infineon*, (4/13/01), pages 841:23-842:12 (“Q. Why did you still have your JEDEC mailbox e-mails collected? A. . . . there were some other documents that I had later found on our main server that I had apparently copied over to that machine as a means for converting from a Macintosh

laptop to an IBM PC laptop that they had issued us. . . . And then I forgot about the directory that was on there. So that's where the second group of documents came from."). This deposition transcript was provided to, and relied upon by, Complaint Counsel. *See generally* CX2082.

161. At trial, Rambus elicited testimony from Richard Crisp implying that he deliberately preserved JEDEC-related documents on his computer. *See* Trial Transcript at 3572-73 ("Q. Did you take any steps at any point in time to preserve electronic JEDEC-related materials? A. Yes, sir, I did. . . . Q. And did that mean that there ended up being preserved at your home JEDEC-related e-mails? A. That's correct . . ."). Rambus then cited and relied upon this testimony to argue that Mr. Crisp's JEDEC-related e-mails had been intentionally preserved as part of Rambus's document retention policy. Rambus Inc.'s Responses to Complaint Counsel's Proposed Findings of Fact, Response to Finding No. 1720 ("Rambus's JEDEC representative testified that he preserved his JEDEC-related emails pursuant to the document retention policy. (Crisp, Tr. 3576). He also testified that he had gone out of his way to preserve those e-mails, through two computer system changes, even though it meant that he had to use his home computer equipment. (Crisp, Tr. 3572-3).").
162. Rambus cited prominently and relied upon Mr. Crisp's statements in this matter. Post-Trial Reply Brief of Respondent Rambus, Inc. (filed Sept. 29, 2003) at 9 ("Mr. Crisp, in particular, testified that he took affirmative steps to, and did, archive and preserve his JEDEC-related e-mails, shepherding them through several changes to Rambus computer equipment.").
163. In fact, the Supplemental Evidence now reveals what Rambus already knew – that the preservation of Mr. Crisp's JEDEC-related e-mails was entirely accidental. Mr. Crisp's e-mails were deleted 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 individual Crisp 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.”).

164. In its reply findings to ALJ McGuire, Rambus stated, “Complaint Counsel have conceded that they have not suffered any prejudice as a result of any documents that were not retained by Rambus.” Rambus Inc.’s Responses to Complaint Counsel’s Proposed Findings of Fact, Response to Finding No. 1728; *see also* Response to Finding No. 1736, No. 1745, No. 1749.
165. Rambus’s statement with respect to Complaint Counsel having “conceded” lack of prejudice was, of course, false when made: Complaint Counsel never made any such concession. *See, e.g.*, Memorandum in Support of Complaint Counsel’s Motion for Default Judgment Relating to Respondent Rambus Inc.’s Willful, Bad Faith Destruction of Material Evidence (December 20, 2002) at 91-99 (“Complaint Counsel Has Been Severely and Demonstrably Prejudiced by Rambus’s Bad-Faith Document Destruction.”).
166. Rambus stated to ALJ McGuire, “the record demonstrates that all pertinent and relevant materials were retained by Rambus and, if relevant to the issues raised in this litigation, produced.” Post-Trial Reply Brief of Respondent Rambus Inc. (September 29, 2003) at 8; *see also* Oral Argument (December 9, 2004) at 161 (“It is our position that [Rambus] did not destroy any of those documents” relating to the relationship of Rambus’s patent claims to JEDEC’s work or Rambus’s motivation for its conduct).
167. Complaint Counsel identified numerous documents that Rambus destroyed in the course of its deliberate and carefully planned Shred Day 1998, its 1999 Shredding Party, and its shredding event in 2000. *See* Response of Complaint Counsel to the Commission’s Order Regarding Designation of the Record Pertaining to Spoliation of Evidence By Rambus (December 22, 2004) at 16-21. Recently available evidence now confirms that Rambus did not retain and produce all materials pertinent and relevant to this matter. Rather, Rambus has discovered back-up tapes containing a substantial number of documents relevant to this matter that were purged from Rambus’s business files and servers and never produced in this matter. CCSF 134-144; *See also* Complaint Counsel’s Petition to Modify the Schedule in the Commission’s July 20, 2005 Order at 4-8, Attachment 10 (Rambus Privilege Log listing 58 documents, withheld by Rambus, that Rambus concedes would have been produced in this litigation had they existed in Rambus’s business files and been found on a timely basis).



**VII. The Supplemental Evidence Warrants Additional Findings on the Merits of the Case.**

**A. Rambus Believed That its Patents and Patent Applications Covered the JEDEC Standards.**

168. Rambus's Vice President in charge of Intellectual Property, Joel Karp, believed that the '327 patent covered dual edged clocking on JEDEC-compliant DDR SDRAM. CX5013 at 2 ("The patents available to us for the 1999 timeframe are: '327 - covers DDR (dual edged clocking)"). This patent derived from the '646 application that Rambus filed while it was at JEDEC. CCF 1633-1636. The '327 patent issued while Rambus was at JEDEC. CCF 1634.
169. Rambus's Vice President in charge of Intellectual Property, Joel Karp, believed that the '481 patent covered PLL circuitry on JEDEC-compliant DDR SDRAM. CX5013 at 2 ("The patents available to us for the 1999 timeframe are: '481 - covers DDR (PLL circuitry)"). This patent derived from the '729 application which was a continuation of the '692 application that Rambus filed while it was at JEDEC. CCF 1642-1645; DX0014.
170. Rambus's Vice President in charge of Intellectual Property, Joel Karp, believed that the '580 application covered programmable CAS latency on JEDEC-compliant SDRAM and DDR SDRAM. CX5013 at 2 ("The patents available to us for the 1999 timeframe are: '580 - covers DDR and PC100 (access time register)"). This patent derived from the '520 application with claims identical in coverage to the '490 application that Rambus filed while it was at JEDEC. CCF 1649, 1651-1656; DX0014.

**B. Rambus Did Not Believe That the DRAM Industry Knew That Rambus Had Patents Covering SDRAM and DDR SDRAM**

171. In November of 1999, Rambus's Vice President in charge of IP, Joel Karp, did not believe that other members of the DRAM industry understood that Rambus had patents covering JEDEC-compliant SDRAM and DDR SDRAM. CX5069 at 54 ("I don't know who actually ... came up with Lexington, but it fits in a sense that it was the shot heard around the world. We fully anticipated at that point that once people became aware that we had IP covering sync DRAM, DDR, that it was going to make some noise."); *see also* CX5002 at 3; CCF 1238-1265.

**C. Rambus's Litigation Timing Depended on the Hope That the DRAM Industry Would Become Locked in to Rambus's DRAM Technology.**

172. Rambus's litigation strategy was based on its knowledge that once the DRAM industry prepared for and began ramp of a DRAM architecture, including RDRAM, it would reach

a point of no return. Thereafter, the industry could not switch away from that architecture even if Rambus sued DRAM manufacturers for patent infringement. CX5011 at 3 (“We should not assert patents against Direct partners until ramp reaches point of no return.... [R]isks of damaging establishment of dominant standard outweigh potential return.”); *see also* CCF 2500.

**COMPLAINT COUNSEL'S  
SUPPLEMENTAL PROPOSED  
CONCLUSIONS OF LAW**

1. Rambus has committed spoliation by intentionally destroying documents in anticipation of litigation.
2. Rambus has acted in bad faith by destroying documents with the intention of keeping those documents from potential adversaries, including Complaint Counsel.
3. Rambus has hindered Complaint Counsel's ability to prosecute this case by destroying documents relevant to a number of issues in this case, including but not limited to:
  - a. documents relating to Rambus's understanding of JEDEC's patent disclosure policy;
  - b. documents relating to Rambus's attempts to obtain patent coverage over JEDEC's SDRAM and DDR SDRAM standards while Rambus was still a member of JEDEC;
  - c. documents relating to Rambus's concerns regarding equitable estoppel and enforcement actions by the Commission;
  - d. documents relating to the effect Rambus's conduct at JEDEC may have had on Rambus's power to control prices in various DRAM technology markets.
4. The documents destroyed wrongfully by Rambus are inferred to have contained information that would have been adverse to Rambus's litigation position in this case including but not limited to Rambus's positions with respect to the issues identified in ¶ 3 above.
5. The Order entered hereinafter is appropriate to remedy the violations of law found to exist.

**CERTIFICATE OF SERVICE**

I, Beverly A. Dodson, hereby certify that on August 10, 2005, I caused a copy of the attached, *Complaint Counsel's Supplemental Proposed Findings of Fact And Conclusions of Law*, to be served upon the following persons:

by hand delivery to:

The Commissioners  
U.S. Federal Trade Commission  
via Office of the Secretary, Room H-135  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

and by electronic transmission and overnight courier to:

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