

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond Division)

RAMBUS INC.,

Plaintiff/Counterclaim
Defendant,

v.

INFINEON TECHNOLOGIES AG, et al.,

Defendants/Counterclaim
Plaintiffs.

Civil Action No. 3:00CV524

Hon. Robert E. Payne

**INFINEON'S PROPOSED FINDINGS OF FACT
REGARDING RAMBUS' UNCLEAN HANDS AND SPOILIATION OF EVIDENCE**

Brian C. Riopelle (VSB #36454)
Robert M. Tyler (VSB #37861)
McGUIRE WOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030
804.775.1000 (phone)
804.775.1061 (fax)

John M. Desmarais
Gregory S. Arovas
Michael P. Stadnick
KIRKLAND & ELLIS LLP
153 East 53rd Street
New York, New York 10022-4611
212.446.4800 (phone)
212.446.4900 (fax)

*Attorneys for Defendants/Counterclaim
Plaintiffs Infineon Technologies AG, et al.*

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I. INTRODUCTION

This Court received evidence regarding Rambus' unclean hands and spoliation of evidence at a bench trial in this action on February 21-24, 2005. Pursuant to this Court's February 23, 2005 instructions to both parties, Infineon respectfully submits the following Proposed Findings Of Fact derived from that evidence.

II. PROPOSED FINDINGS OF FACT

A. **Rambus Was Aware That Its Conduct At JEDEC Could Jeopardize Its Efforts To Enforce Patents Against JEDEC-Standard DRAM Products**

1. Between 1992 and 1997, Rambus employees and executives were repeatedly informed by Rambus' in-house and outside counsel that Rambus' participation in JEDEC could be the focal point of an equitable estoppel defense in future patent litigations.

See DTX 1523 at R204571 (Vincent billing records indicating “[c]onference with Richard Crisp and Allen Roberts concerning equitable estoppel issue with respect to J[E]DEC”); DTX 1535 (Vincent notes stating “I said there could be equitable estoppel problem if Rambus creates impression in JEDEC that it would not enforce its patent or patent appln”); DTX 9004, Vincent Apr. 11, 2001 *Infineon* Dep. Tr. at 296-299, 305 (discussing DTXs 1523 and 1535); DTX 1555 (May 4, 1993 letter from Vincent to Crisp enclosing industry standards presentation on estoppel and antitrust issues); DTX 4013 at R233837 (Sept. 23, 1995 e-mail from Crisp to Diepenbrock and others regarding “Tony’s worst case scenario regarding estoppel”); DTX 9012, Diepenbrock Apr. 11, 2001 *Infineon* Dep. Tr. at 261-63, 265, 269-70, 271-74, 316-17 (testifying that he and Vincent advised Tate that Rambus should stop attending JEDEC meetings); DTX 1624 (Vincent notes stating “No further participation in any standards body – do not even get close”); DTX 1509 (letter from Vincent to Diepenbrock enclosing a copy of the proposed consent order in the FTC’s action against Dell regarding the threat of exercising patents that were not disclosed in a standard-setting process); DTX 6024 (Dec. 1995 Wilson Sonsini article circulated within Rambus regarding “Patent Rights and Industry Standards Associations”); DTX 4169 at R234663 (Jan. 22, 1996 e-mail from Crisp to Tate regarding Rambus’ withdrawal from JEDEC in part “due to fear we have exposure in some possible future litigation”).

B. Rambus Destroyed Documents In Anticipation Of Litigation And For The Purpose Of Obstructing The Presentation Of Defenses To Rambus' Infringement Claims

i. With The Hiring Of Joel Karp, Rambus Began Preparing To Enforce Its Patent Rights Against Manufacturers Of SDRAM And DDR SDRAM Products

2. Rambus hired Joel Karp as a Vice President in October 1997 for the specific purpose of licensing Rambus' patent portfolio for "non-compatible" (*i.e.*, non-RDRAM) products, including SDRAMs and DDR SDRAMs.

*See DTX 6307 (Oct. 21, 1997 e-mail from Tate to staff announcing Karp's role); DTX 4061 (Oct. 1, 1997 e-mail from Tate to executives announcing Karp's role); DTX 9010, Karp Jan. 8, 2001 Infineon Dep. Tr. at 19-20, 33 (testifying he was hired for specific purpose of licensing Rambus' patent portfolio for non-compatible products, *i.e.*, non-RDRAMs such as SDRAMs and DDR SDRAMs). -*

3. Rambus' non-compatible licensing program specifically included plans to file suit against SDRAM manufacturers who did not license Rambus' patents at royalty rates higher than those for RDRAMs:

TOP LEVEL KEY RESULTS FOR 1998

* * *

POSITION RAMBUS FOR THE FUTURE INCLUDING IP

* * *

18. Develop and enforce IP.
- A. Get access time register patent issued that reads on existing SDRAM.
 - B. Broad patents in place for Direct Rambus: next generation signaling, and chip-to-chip interconnect.
 - C. Get all infringers to license our IP with royalties > RDRAM (if it is a broad license) OR sue.

DTX 4071 at RF0627716; *see also* DTX 9009, Karp Oct. 8, 2004 Infineon Dep. Tr. at 436-437, 440-442 (discussing DTX 4071); DTX 4061 (Oct. 1, 1997 e-mail from Tate to executives regarding Karp's hiring, stating "the only acceptable deal is the royalty on infringing drams must be greater than the royalty on rambus drams").

4. In early 1998, Rambus retained Cooley Godward LLP to assist in developing Rambus' litigation strategy and licensing program for non-compatible memory devices.

See DTX 3682 (Cooley Godward Jan. – Feb. 1998 billing records); DTX 3681 (Karp notes of Feb. 12, 1998 meeting with Cooley Godward regarding licensing/litigation strategy); DTX 9008, Savage Oct. 12, 2004 *Infineon* Dep. Tr. at 10–12 (testifying Karp first contacted her seeking litigation assistance).

5. On February 12, 1998, Mr. Karp met with Cooley Godward attorneys to discuss Rambus' licensing and litigation strategy. Mr. Karp and the Cooley Godward attorneys discussed that “[r]oyalty rates will likely push us into litigation,” that “[we] [n]eed to litigate against someone to establish royalty rate and have court declare patent valid,” and that Rambus should “[m]ake ourselves battle ready” and “[s]elect experts in advance.”

DTX 3681 (Karp notes of Feb. 12, 1998 meeting); *see also* DTX 9009, Karp Oct. 8, 2004 *Infineon* Dep. Tr. at 370-80 (discussing DTX 3681); DTX 9023, Johnson Nov. 23, 2004 *Infineon* Dep. Tr. at 28-39 (discussing same).

6. Shortly after the February 12, 1998 meeting, Mr. Karp and outside counsel, Daniel Johnson, Jr., jointly prepared a “licensing and litigation strategy” document for Rambus. That document states that “various DRAM manufacturers may not be aware of Rambus' patent portfolio and the fees Rambus would charge for licensing its patents for non-compatible systems” and outlines a detailed “litigation strategy” to be implemented “[i]n the event that licensing discussions do not result in resolution.”

DTX 3678 at R401100–01; *see also* DTX 4133 at entry no. 315 (Rambus Feb. 12, 2004 Privilege Log).

7. On March 2, 1998, Mr. Karp presented Rambus' licensing and litigation strategy to Rambus' Board of Directors, setting forth a detailed, tiered litigation plan to be followed if DRAM manufacturers rejected Rambus' licensing demands.

See DTX 3680 at R401106 (“If licensing discussions do not result in resolution, tiered litigation strategy kicks in”; “Two options for existing licensees” are “Option 1: Breach of Contract Remedy” and “Option 2: Patent Infringement Suit”; listing as three venue options the ITC, Northern District of California, and Eastern District of Virginia); *id.* at R401110 (stating timeline for “commenc[ing] legal action” is four to six months after acquiring customer sample); *id.* at R401111 (“Near Term Actions” for “Licensing and Litigation Strategy” include “Need to create a document retention policy” and “Need to organize prosecuting attorney’s files for issued patents”); see DTX 8048 (Mar. 4, 1998 meeting minutes of Rambus Board of Directors stating “At this point Joel Karp joined the meeting and updated the Directors on the Company’s strategic licensing and litigation strategy.”); see also DTX 3582 at entry no. 317 (Rambus Jan. 22, 2004 Privilege Log).

8. While he was developing Rambus’ licensing and litigation strategy, Mr. Karp was aware from his past experience as a JEDEC representative and expert witness for Samsung that participation in JEDEC could be the focal point of an equitable estoppel defense in patent litigation involving JEDEC-standard products.

See DTX 9006, Donohoe Feb. 6, 2001 *Micron* Dep. Tr. at 56-59, 61-65, 67-69, 71 (testifying regarding same and discussing Karp’s sworn declaration in Samsung’s litigation against Texas Instruments); DTX 4309 at 2 (Karp’s sworn declaration in Samsung-Texas Instruments litigation stating that “[i]t 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”).

*ii. **Rambus Launched A Document Destruction Campaign At The Same Time That It Was Preparing To Enforce Patent Rights Against Manufacturers Of SDRAM And DDR SDRAM Products***

9. At the same time that he was preparing Rambus for patent enforcement efforts against SDRAM and DDR SDRAM manufacturers, Mr. Karp worked with outside counsel and Rambus management to formulate a “document retention policy” as part of Rambus’ litigation strategy.

See DTX 3680 at R401111 (“near term actions” proposed as part of the “licensing and litigation strategy” included the “[n]eed to create a document retention policy”); DTX 3681 (Karp’s notes from Feb. 12, 1998 meeting with Cooley Godward attorneys to discuss “licensing/litigation strategy,” reflecting his understanding that to “[m]ake ourselves battle ready” Rambus would “[n]eed a company policy on document retention policy;” with respect to patent prosecution files, Rambus would “clean out all attorney notes so that file is same as official file”); DTX 8035A at R300711 (Mar. 18, 1998 notes from one-on-one meeting of Karp and Tate where they discussed “Geoff’s goals” regarding “shredding” and “document retention”); DTX 3676 (Mar. 19, 1998 memo from Cooley Godward to Karp regarding “Rambus Inc. Document Retention Policy Guidance” and advising Karp to contact a Cooley Godward lawyer with any “specific litigation-oriented issues”); DTX 3683 (Apr. 27, 1998 memo regarding same).

10. When it adopted its document retention policy, Rambus anticipated patent infringement litigations involving SDRAM and DDR SDRAM products, and intended to destroy evidence that would be discoverable in those anticipated litigations.

See DTX 9010, Karp Jan. 8, 2001 *Infineon* Dep. Tr. at 19-20, 33 (testifying he was hired in October 1997 for specific purpose of licensing Rambus’ patent portfolio for non-compatible products, *i.e.*, non-RDRAMs such as SDRAMs and DDR SDRAMs); DTX 9012, Diepenbrock Apr. 11, 2001 *Infineon* Dep. Tr. at 207-08 (testifying regarding Karp’s document retention policy that Rambus was concerned documents would be “discoverable in a lawsuit”); DTX 3680 at R401111 (March 1998 Karp Licensing and Litigation Strategy presentation to Board of Directors noting “Need to create document retention policy” as aspect of a “Licensing and Litigation Strategy”); DTX 4024 (Karp’s July 22, 1998 Presentation regarding Rambus’ Document Retention Policy stating “Email – Throw It Away . . . E-mail is discoverable in litigation or pursuant to a subpoena”); DTX 9016, Roberts Apr. 14, 2001 *Infineon* Dep. Tr. at 338-39 (testifying that one of the reasons Karp gave for purging files was they were discoverable in subsequent litigations); DTX 3686 (July 22, 1998 presentation entitled “Before Litigation: A Document Retention/Destruction Policy” discussing “discoverable documents” and the need for an “Effective Document Retention Policy” on “The Eve of Litigation”); DTX 8036 at 40-41 (discussing Karp and Johnson slides).

11. As part of the new document retention policy, Rambus implemented an electronic backup policy that resulted in the destruction of large numbers of electronic files, including all of the backup tapes for the Macintosh computers in use during the first decade of Rambus – the entire time Rambus was a JEDEC member.

See DTX 5185 (Mar. 16, 1998 email from Roberts to Lau noting “there is a growing worry about the e-mail backups as being discoverable information” and proposing a regular deletion of e-mail backup tapes so that backups would be deleted after three months); DTX 8035A at R300769 (“Mac tapes — GONE”); DTX 3697 (May 14, 1998 email from Karp to various Rambus employees; “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”); DTX 9009, Karp Oct. 8, 2004 *Infineon* Dep. Tr. at 484-85 (“By the time I got there, there were very few Macs, but I do believe — my understanding is when the company started, everybody had Macs.”); *id.* (testifying that Macintosh backup tapes were destroyed as part of the document retention policy).

12. Rambus’ document retention policy was developed and implemented with input and/or approval from Rambus’ executive staff and Board of Directors.

See DTX 9009, Karp Oct. 8, 2004 *Infineon* Dep. Tr. at 423-25 (Rambus executive group approved document retention policy); DTX 3680 (March 1998 Karp Licensing and Litigation Strategy presentation to Board of Directors including “Need to create document retention policy” as a “near term action”); DTX 3582 at entry no. 317 (Jan. 22, 2004 privilege log entry regarding same); DTX 9009, Karp Oct. 8, 2004 *Infineon* Dep. Tr. at 398-404 (discussing pages R401106-R401111 of DTX 3680); DTX 3712 at R401307 (Oct. 14, 1998 Karp presentation describing “All Day Shredding Party Held On Sept. 3”); DTX 9009, Karp Oct. 8, 2004 *Infineon* Dep. Tr. at 526 (identifying DTX 3712 as Karp’s presentation to the Board of Directors).

13. Neil Steinberg began working as outside counsel for Rambus no later than June 1998.

DTX 8038, Steinberg Dec. 2, 2004 Decl. ¶¶ 6–8.

14. From the very beginning, Mr. Steinberg's work for Rambus as outside counsel included "licensing and preparation for litigation" involving third parties using SDRAMs and DDR SDRAMs.

DTX 9007, Steinberg Jan. 16, 2001 *Infineon* Dep. Tr. at 95-98, 100-04 ("I was handling – we were preparing for litigation.").

15. By the time he began working for Rambus as outside counsel, Mr. Steinberg was aware from his past experience as litigation counsel for Samsung that participation in standard-setting bodies could be the focal point of an equitable estoppel defense in patent litigation involving standardized products.

See DTX 9006, Donohoe Feb. 6, 2001 *Micron* Dep. Tr. at 55-65, 67, 71 (testifying that while at Samsung, Steinberg worked with Karp, oversaw Samsung's 1996 litigation against Texas Instruments, and was intimately involved in the formulation and preparation of Samsung's equitable estoppel defense); DTX 5058 at 16 (Samsung brief regarding equitable estoppel).

16. On July 22, 1998, Rambus held a "managers meeting" where Mr. Karp and Mr. Johnson discussed Rambus' new document retention policy and noted that concerns over the discoverability of documents in future litigation were a reason for its adoption.

See DTX 9009, Karp Oct. 8, 2004 *Infineon* Dep. Tr. at 469 (testifying about his presentation at the July 22, 1998 managers meeting); DTX 4024 (July 22, 1998 presentation stating "email is discoverable in litigation" and "elimination of email is an integral part of document control"); DTX 9012, Diepenbrock Apr. 11, 2001 *Infineon* Dep. Tr. at 207-08 (testifying that he was told one of the benefits of not keeping e-mails and other documents was because "some of that stuff is discoverable" "in a lawsuit").

17. Pursuant to Rambus' document retention policy, Rambus employees were expressly directed to destroy certain categories of discoverable documents, including e-mail and materials used during license negotiations.

DTX 4024 (Karp's July 22, 1998 Presentation regarding Rambus' Document Retention Policy stating "Email – Throw It Away");

DTX 4118 (Notes of Donnelly from July 22, 1998 meeting stating that “email” and “files on computers, disks, backup tapes” are discoverable and to “delete old emails”); DTX 4375 (July 27, 1998 Rambus Document Retention Policy” stating that e-mail would be saved for only three months and “all drafts [of contracts] ... and any materials used during negotiations ... should be destroyed or systematically discarded.”)

18. Pursuant to its new document retention policy, Rambus purged its internal patent files of documents other than those available in the public PTO files.

PTX 9509, Diepenbrock Oct. 11, 2004 *Infineon* Dep. Tr. at 575-76 (testifying notes and mental impressions from prosecution files of issued patents were not supposed to remain in the file); DTX 3681 (Feb. 12, 1998 meeting with Cooley Godward stating “clean out all attorney notes so that file is same as official file.”); DTX 4474 at F&W00004 (Fenwick & West billing records from July 29-30, 1998 showing they assisted Rambus by “organiz[ing] Rambus patent files” “to confirm with [Rambus’] file retention policy”); DTX 9023, Johnson Nov. 23, 2004 *Infineon* Dep. Tr. at 179-185 (testifying that the July 30, 1998 Fenwick & West billing entry shows they were “helping Rambus to implement the document retention policy with respect to their issued patents”).

19. On September 3, 1998, Rambus held an event called “Shred Day,” where Rambus brought a shredding truck to its headquarters to collect and destroy documents that had been placed in burlap bags distributed to all Rambus employees for that purpose.

See DTX 4026 (Sept. 3, 1998 e-mail from Karp to staff stating “It took about 5 hours to completely fill the shredding truck”); DTX 4027 (Sept. 2, 1998 e-mail from Larsen to Staff stating, “Thursday is Shred Day 1998”); DTX 4105 (Aug. 19, 1998 e-mail from Larsen regarding “Thursday 9/3: Shredder Day” and stating “please put your burlap bag outside your cube and the shredding service will pick it up”); Kaufman May 18, 2004 *Infineon* Dep. Tr. at 44-45, 62-64.

20. Rambus destroyed approximately 185 bags and 60 boxes of documents in connection with Shred Day 1998.

See Kramer Feb. 23, 2005 Trial Tr. at 414-16; DTX 4069 at R400812 (Sept. 3, 1998 ProShred invoice).

21. Rambus had roughly 140 employees on Shred Day 1998.

DTX 9017, Kaufman May 18, 2004 *Infineon* Dep. Tr. at 56.

22. Rambus employees held a party with “pizza, beer, champagne, etc.,” to celebrate the completion of Shred Day 1998.

See DTX 4026 (Sept. 3, 1998 e-mail from Karp to staff and executives reminding “Don’t forget; pizza, beer, champagne, etc. ... See you there.”); DTX 4027 (Sept. 2, 1998 e-mail from Larsen to staff stating “We will have a shred day Celebration ... on Thursday.”).

23. On October 14, 1998, Mr. Karp reported to Rambus’ Board of Directors that the “All Day Shredding Party [Was] Held On Sept. 3.”

DTX 3712 at R401307; *see also* DTX 5477 (Oct. 14, 1998 Minutes of Rambus Board of Directors stating “Mr. Karp reviewed the Company’s current patent status and its strategic licensing plans.”).

24. Rambus kept no log or other record of the exact number and nature of the documents it destroyed in connection with Shred Day 1998.

See, e.g., Kramer Feb. 23, 2005 Trial Tr. at 416-17 (testifying “there’s no log at Rambus about what Rambus destroyed”).

25. By November 1998, Rambus had at least three issued U.S. patents that it believed it could enforce against manufacturers of SDRAM and DDR SDRAM devices.

See DTX 3691 at R401209 (listing ‘580, ‘327, and ‘481 patents); *see also* DTX 9009, Karp Oct. 18, 2004 *Infineon* Dep. Tr. at 534-36 (testifying regarding DTX 3691).

26. In late 1998, Mr. Karp, with help from outside counsel, drafted a patent enforcement scenario for 1999 in which he identified specific issued Rambus patents to assert, listed SDRAM and DDR SDRAM products as infringing products, named specific DRAM manufacturers (including Siemens, Infineon’s predecessor) as targets, and proposed specific litigation venues (including this Court).

See DTX 3691 at R401209–213; *see also* DTX 9009, Karp Oct. 18, 2004 *Infineon* Dep. Tr. at 534-36.

27. Rambus nevertheless delayed until DRAM manufacturers had incurred sunk costs in developing Rambus' new Direct RDRAM technology before seeking to enforce its patents against SDRAM and DDR SDRAM products.

See DTX 3687 at R401154-55 (Oct. 1998 Steinberg presentation stating "Continue In Stealth Mode During '99 ... We should not assert patents against Direct partners until ramp reaches a point of no return ... Probably not until Q1 '00").

28. In April 1999, pursuant to instructions from Rambus, Lester Vincent, Rambus' outside patent prosecution counsel, began purging Rambus patent prosecution files of documents not found in the public PTO files.

See DTX 9019, Vincent Oct. 15, 2004 *Infineon* Dep. Tr. at 101-03 (testifying that he went through Rambus' patent files to destroy documents); *see also* DTX 9018, Vincent Nov. 30, 2004 *Infineon* Dep. Tr. at 9-11, 13-15, 17 (testifying that Mr. Karp "encouraged me to try and wrap up it up, and said that Rambus had actually done their document retention on their patent files in, you know, at — at one big event"); DTX 3710 at R401300 (May 5, 1999 Vincent handwritten note to "clean out all the Rambus files that have issued"); DTX 3737 (Apr. 12, 1999 Vincent handwritten note stating he "cleaned" 11 of 49 patent files, was "[d]oing 2 a day," and had his "secretary assigned full time to file clearance"); PTX 9510, Vincent Oct. 9, 2001 *Micron* Dep. Tr. at 529 (testifying he had been asked to destroy documents in Blakely Sokoloff's files).

29. Several of the prosecution files that Mr. Vincent purged in 1999 were directly related to the patents-in-suit.

Compare, e.g., DTX 2160 (U.S. Pat. No. 5,841,580 is the grandparent of the '918 patent and the parent of the '263 patent) with DTX 3784 at BSTZ 12, entry no. 95 (U.S. Pat. No. 5,841,580 files purged by Vincent on June 29, 1999); *see also* DTX 9019, Vincent Oct. 15, 2004 *Infineon* Dep. Tr. at 154–55, 180–82 (testifying about cleaning up files of patents in the Rambus patent family tree).

30. The documents that Mr. Vincent destroyed pursuant to Rambus' instructions included drafts of patent applications and amendments, handwritten notes of prosecuting attorneys, correspondence to and from Rambus, drawings, electronic files, and audiotapes of meetings with inventors.

See PTX 9510, Vincent Oct. 9, 2001 *Micron* Dep. Tr. at 531 (testifying he destroyed "drafts, handwritten notes [of patent prosecution counsel], letters or faxes, and maybe drawings," as well as "correspondence from Rambus to Blakely, Sokoloff or from Blakely, Sokoloff to Rambus," relevant to the patents-in-suit); *id.* at 532-33 (testifying he destroyed "draft handwritten drawings or informal drawings," "electronic versions," "[a]udio tapes of meetings with inventors and maybe dictation tapes").

31. After a hiatus during Rambus' litigation with Hitachi, Mr. Vincent resumed purging his Rambus patent prosecution files on June 23, 2000, the very same day that Rambus first notified Infineon of its alleged infringement. Rambus never instructed Mr. Vincent to cease "implement[ing] the document retention policy" despite its "anticipation of litigation with Infineon Technologies."

See DTX 3784 (Rambus Issued Patent File Cleanup Chart noting files reviewed 6/23/00); DTX 5377 (logging cleanup of patent files on June 23, 2000); DTX 9019, Vincent Oct. 15, 2004 *Infineon* Dep. Tr. at 183-87 (discussing cleanup of files that occurred on June 23, 2000); PTX 167 (June 23, 2000 assertion letter); DTX 9019, Vincent Oct. 15, 2004 *Infineon* Dep. Tr. at 189 (quoted above).

32. The files that Mr. Vincent purged on or after June 23, 2000 included at least one of the applications for the patents that Rambus listed in its assertion letter to Infineon and which Rambus later asserted in this case (the '804 patent).

Compare DTX 3689 at R401193, entry no. 16 (Serial No. 08/798,525 is Docket No. P010DCD) *with* DTX 3784 at BSTZ 10, entry no. 39 (P010DCD purged by Vincent on June 23, 2000).

*iii. Rambus Intensified Its Purge Of Relevant Documents
And Preparation For Litigation In 1999 After
Hiring Neil Steinberg As In-House Counsel*

33. On April 26, 1999, Neil Steinberg, who had been helping Rambus prepare for litigation as one of Rambus' outside counsel, joined Rambus as in-house counsel.

See DTX 9007, Steinberg Jan. 16, 2001 *Infineon* Dep. Tr. at 52; DTX 9007, Steinberg Jan. 16, 2001 *Infineon* Dep. Tr. at 95-98, 100-04 ("I was handling – we were preparing for litigation.").

34. In June 1999, Mr. Steinberg delivered a presentation to Rambus executives in which he discussed "SDRAM Targets," indicated that Rambus would "Prepare [an] Infringement Case For 3 SDRAM Targets in Q4 '99," and noted that "Potential Targets Include . . . Infineon."

DTX 3689 -at R401186; *see also* DTX 4133 at entry no. 363 (Rambus Feb. 12, 2004 Privilege Log).

35. As part of its litigation strategy, and with the approval of Rambus CEO Geoff Tate, Rambus planned and then held a second "shredder party" on August 26, 1999, where Rambus brought a shredding truck to its headquarters to collect and destroy documents that had been placed in burlap sacks distributed to all employees for that purpose.

See DTX 4067 at RF0584307 (June 27, 1999 IP Q3 '99 Goals including "[o]rganizing 1999 shredding party at Rambus"); DTX 4068 (Aug. 25, 1999 Kaufman e-mail to staff to "[l]eave your burlap bags outside your cube"); *see also* DTX 4069 at R400818-21 (Aug. 1999 shredding invoice documents); DTX 3759 (Aug. 25, 1999 Tate e-mail to all staff, stating "by the way, i'm sorry i'll miss the shredder party tomorrow — besides a nice party there will be a fun announcement!").

36. Rambus destroyed 150 burlap sacks, or approximately 185 banker boxes, of documents during the 1999 "shredder party."

See DTX 4214 (Aug. 26, 1999 shredding invoice estimating 150 shred bags); DTX 9017, Kaufman May 18, 2004 *Infineon* Dep. Tr. at 90-92 (testifying she understood the estimated volume of

shredding services to be 150 shred bags); *see also* Kramer Feb. 23, 2004 Trial Tr. at 416 (testifying on the Sure Shred bag to box conversion, that 1 bag is 1.25 banker boxes).

37. On October 14, 1999, Rambus briefed its Board of Directors on its litigation strategy, identifying Hitachi as a litigation target, Delaware as a litigation venue, and setting a four-month schedule for the filing of a complaint.

DTX 3675 (Oct. 14, 1999 presentation to Rambus' Board of Directors discussing litigation strategy, litigation targets, litigation venues, and litigation timing); *see also* DTX 9009, Karp Oct. 8, 2004 *Infineon* Dep. Tr. at 559–60 (discussing DTX 3675 and testifying that either he or Steinberg presented it to the Board of Directors); DTX 9021, Steinberg Oct. 6, 2004 *Infineon* Dep. Tr. at 293–95 (discussing DTX 3675).

38. On October 22, 1999, Rambus sent a letter to Hitachi asserting several issued and allowed patents against Hitachi's SDRAM and DDR SDRAM products.

See DTX 5380 (Oct. 22, 1999 letter from Karp).

39. As planned, Rambus filed suit against Hitachi in January 2000.

See DTX 8039 (Jan. 18, 2000 Rambus press release regarding filing Hitachi lawsuit).

40. Rambus' outside counsel in the *Hitachi* litigation, Cecilia Gonzalez, testified that she learned during her efforts to collect documents responsive to Hitachi's requests for production that Rambus had implemented a document retention program. Ms. Gonzalez characterized the documents destroyed as "historical documents prior to a certain date."

Gonzalez Feb. 22, 2005 Trial Tr. at 120.

41. Ms. Gonzalez further testified that she learned Rambus was unable to locate broad categories of documents relevant to the *Hitachi* litigation, which had been destroyed as part of the document retention program, including financial documents, JEDEC documents, and correspondence with Hitachi.

See Gonzalez Feb. 22, 2005 Trial Tr. at 120 (“[T]here were certain documents that did not exist any longer in Rambus’ files); *id.* at 122 (“In looking for documents that would be responsive to 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.”); *id.* at 123 (testifying that she was unable to find “a complete collection of the interactions between Rambus and Hitachi that dated back prior to 1998”); *id.* at 124 (testifying that in her “discovery collections at Rambus,” “copies of Richard Crisp’s JEDEC emails were not found in anyone else’s files throughout the company”); *id.* at 145-46 (testifying that she could not find financial documents, Hitachi correspondence, and JEDEC documents during her discovery collection at Rambus).

42. Mr. Steinberg consulted with Ms. Gonzalez regarding the destruction of documents in the Spring of 2000. Ms. Gonzalez unequivocally told him that Rambus had a “duty to maintain documents and not destroy anything that is relevant or pertains to the litigation” when contemplating litigation.

Gonzalez Feb. 22, 2005 Trial. Tr. at 132-33.

43. On June 22, 2000, Rambus issued a press release announcing the settlement of its litigation against Hitachi.

See DTX 3453 (June 22, 2000 Rambus press release regarding Hitachi settlement).

44. The next day, June 23, 2000, Rambus sent a letter to Infineon accusing Infineon’s SDRAM and DDR SDRAM products of infringing Rambus’ patents.

See PTX 167 (June 23, 2000 letter from Steinberg asserting “many of your products infringe” Rambus’ patents).

45. That very same day, Rambus’ former outside patent counsel, Mr. Vincent, resumed purging Rambus’ patent prosecution files pursuant to Rambus’ instructions, including files related to one of the patents identified in Rambus’ letter to Infineon, which Rambus later asserted in this case.

See DTX 3784 (Rambus Issued Patent File Cleanup Chart noting files reviewed 6/23/00); DTX 3787 (Blakely Sokoloff invoices); DTX 9019, Vincent Oct. 15, 2004 *Infineon* Dep. Tr. at 183-87 (discussing cleanup of files that occurred on June 23, 2000); PTX 167 (June 23, 2000 assertion letter); DTX 9019, Vincent Oct. 15, 2004 *Infineon* Dep. Tr. at 189 (quoted above).

46. On July 17, 2000, less than a month before Rambus filed suit against Infineon, Neil Steinberg sent an e-mail to all executives at Rambus reminding them about the “Document Destruction Policy Re: Contracts.” The attachment to that e-mail admonished Rambus’ executives that:

with respect to ‘drafts and any materials used during the negotiations that are not part of the final contract’ you and your team are to destroy or systematically discard such drafts and materials. This pertains to all licenses – whether compatible or non-compatible.

DTX 3700; *see also* DTX 4133 at entry no. 1960 (Rambus’ Feb. 12, 2004 Privilege Log).

47. Rambus filed suit against Infineon in this Court on August 8, 2000, alleging that Infineon’s JEDEC-compliant SDRAM and DDR SDRAM products infringe patents stemming from Rambus’ original 1990 patent application.

48. During witness interviews before the first trial in this case, numerous Rambus witnesses, including Richard Crisp, David Mooring, and Billy Garrett, informed Rambus’ outside counsel that Rambus had destroyed a large number of documents after Mr. Karp joined the company.

See DTX 8004 at GCWF03456 (Oct. 5, 2000 Crisp interview notes stating “after Joel [Karp] joined the company all docs were then destroyed”); DTX 8015 at GCWF03413 (Oct. 25, 2000 Garrett interview notes stating “retention policy - if you don’t need it, get rid of it ... changed within a year after Joel [Karp] came”); *id.* at GCWF03412 (Oct. 26, 2000 Mooring interview notes stating “Joel [Karp] arrived in late ’97 and initiated the retention policy”); *id.* at GCWF03422 (Nov. 1, 2000 Mooring/Garrett interview notes stating “got rid of all the stuff - doc retention policy ... *jedec stuff all went away*”) (emphasis added); Cunningham Feb. 22, 2005

Trial Tr. at 228-34 (testifying regarding Garrett and Mooring interview notes).

49. In December 2000, four months after filing suit against Infineon and while this litigation was in the discovery phase, Rambus conducted another company-wide document purge, complete with burlap sacks and a shredding service. Rambus destroyed 460 bags — or 575 banker boxes — of documents in December 2000, which is more than 2 per employee.

See DTX 4217 at R400787-88 (Dec. 28, 2000 Sure Shred invoice); *see also* DTX 9017, Kaufman May 18, 2004 *Infineon* Dep. Tr. at 51-52 (testifying that burlap bags were handed out at the end of 2000 for a “housecleaning”); Kramer Feb. 23, 2005 Trial Tr. at 405-407 (discussing destruction of documents in Dec. 2000); *see also id.* at 416 (testifying on the Sure Shred bag to box conversion, that 1 bag is 1.25 banker boxes).

50. There is no contemporaneous evidence that before the December 2000 document purge Rambus employees were given any instructions to retain documents that might be relevant to the Rambus SDRAM/DDR SDRAM litigations.

See Feb. 24, 2005 Trial Tr. at 654-655, quoting Diepenbrock Oct. 11, 2004 *Infineon* Dep. Tr. at 616 (testifying that he was never instructed to “retain documents that might be relevant to the litigations Rambus was planning” as part of Mr. Karp’s “litigation strategy”); DTX 9015, Mitchell Apr. 9, 2001 *Infineon* Dep. Tr. at 102-104 (testifying he was never told to save “documents relating to JEDEC or SDRAM or DDR or SyncLink”); DTX 9017, Kaufman May 18, 2004 *Infineon* Dep. Tr. at 100 (testifying she was “not aware of specific instructions” “not to destroy documents relevant to the pending litigation against Infineon”); Kramer Feb. 23, 2005 Trial Tr. at 407 (testifying he was “unaware of anybody giving specific instructions”).

51. On January 12, 2001, after certain Rambus documents were made non-confidential in the *Hyundai/Hynix* litigation, Mr. Steinberg emailed Rambus executives that the IP group would “more effectively” execute the document retention program after Rambus “[got] through our legal wrangling.”

DTX 3729 (Jan. 12, 2001 Steinberg e-mail to executives); *see also* DTX 9021, Steinberg Oct. 6, 2004 *Infineon* Dep. Tr. at 249-53 (discussing DTX 3729).

52. Rambus destroyed documents in bad faith and for the purpose of depriving its anticipated and actual litigation adversaries of evidence that could be used to defend against Rambus' patent infringement claims.

See supra, Proposed Findings of Fact Nos. 9 - 51.

*iv. **Rambus Destroyed Categories Of Documents Relevant To This Litigation***

53. Rambus employees and agents destroyed attorney notes, correspondence, and other documents from Rambus' patent prosecution files.

See PTX 9510, Vincent Oct. 9, 2001 *Micron* Dep. Tr. at 530-33 (testifying he discarded "drafts, handwritten notes, letters, or faxes, and maybe drawings"); DTX 9012, Diepenbrock Apr. 11, 2001, *Infineon* Dep. Tr. at 204-05 (testifying he cleaned out his emails and files and he believed other employees cleaned out their emails and files); DTX 8012 at GCWF03484 (Notes of Feb. 1, 2000 interview with Vincent stating "Clean out of files in May 99 - gave his sec a matrix of the document retention policy and asked him to clean up files; ... went through and cleared out emails in may 99"); DTX 8022 (Notes of Dec. 5, 2000 interview with Vincent stating that document retention policy mandated destruction of notes and correspondence); DTX 8019 (Notes of Oct. 16, 2000 interview with Griffin stating "doc retention - once patent issued, everything other than official communications and cya communications with client were jettisoned"); PTX 9509, Diepenbrock Oct. 11, 2004 *Infineon* Dep. Tr. at 575-76 (notes and mental impressions deleted from Rambus' prosecution files); DTX 4474 at F&W00004 (Fenwick & West billing records from July 29-30, 1998 showing they assisted Rambus by "organiz[ing] Rambus patent files" "to confirm with [Rambus'] file retention policy"); DTX 9023, Johnson Nov. 23, 2004 *Infineon* Dep. Tr. at 179-185 (testifying that the July 30, 1998 Fenwick & West billing entry shows they were "helping Rambus to implement the document retention policy with respect to their issued patents").

54. Rambus employees and agents destroyed JEDEC-related documents from the files of Rambus' JEDEC representatives.

See DTX 9005, Crisp Apr. 13, 2001 *Infineon* Dep. Tr. at 841-45 (testifying he cleaned out his files including any “JEDEC-related materials” he “had on paper”); DTX 9001, Crisp Nov. 8, 2000 *Infineon* Dep. Tr. at 222-226 (testifying as to JEDEC-related materials he no longer had); DTX 8004 at GCWF03454, GCWF03456 (Notes of Oct. 8, 2000 interview with Crisp stating “after Joel joined the company all docs were then destroyed”); DTX 8015 at GCWF03413, GCWF03416 (Gray Cary interview notes with Rambus’ JEDEC representative Garrett; he “wasn’t able to find anything”; “retention policy - if you don’t need it, get rid of it”; “reasons - for patents applying for - patents in progress versus final applications - early stuff could be misleading. patent work that went into a filing could be destroyed. get rid of drafts.”; “he thought it was a bit draconian”; for production in Hitachi case, “didn’t find anything relating to JEDEC.”; “he was a packrat before the document retention policy was put in place. he kept everything”); DTX 3866 (Oct. 26, 2000 e-mail from Krisman to Steinberg noting older JEDEC-related financial records “must have been destroyed during the document retention effort a couple of years ago”); Gonzalez Feb. 22, 2005 Trial Tr. at 123-24, 146 (testifying she was “looking for certain JEDEC-related documents and couldn’t find them”).

55. Rambus employees and agents destroyed correspondence, meeting presentations with third parties, and other documents generated during Rambus’ licensing negotiations with DRAM manufacturers.

See DTX 3676 at R401091 (Mar. 19, 1998 memo from Cooley Godward to Karp stating “the Company should, upon execution of a contract, destroy or systematically discard all internal drafts and any materials used during negotiations that are not part of the final contract”); DTX 4375 at R33605 (July 22, 1998 Rambus document retention policy stating “All drafts . . . and any materials used during negotiations that are not part of the final contract . . . should be destroyed or systematically discarded.”); DTX 3700 (July 17, 2000 e-mail from Steinberg to Rambus executives regarding “Reminder of Document Destruction Policy Re: Contracts” and ordering them to “destroy or systematically discard” draft materials for all licenses, “whether compatible or non-compatible.”); Gonzalez Feb. 22, 2005 Trial Tr. at 123 (testifying she was unable to “find a complete collection of the interactions between Rambus and Hitachi that dated back prior to 1998”).

56. Rambus employees and agents destroyed documents relating to Rambus' early contacts with Infineon.

See DTX 9021, Steinberg Oct. 6, 2004 *Infineon* Dep. Tr. at 259-60 (testifying he "did not have a full collection of the Infineon/Siemens tech transfer documents in the Rambus files").

57. Rambus employees and agents also destroyed notes, files, and other records from the files of one of the inventors of the patents-in-suit.

See DTX 9014, Horowitz Jan. 20, 2001 *Infineon* Dep. Tr. at 15-18, 28-30, 160-61 (testifying that "if they were in my files [the IBM notes] would have been destroyed" and that "because of the document retention policy, people went through, collected what they thought was of value, and shredded the rest").

58. Rambus employees and agents destroyed notes made on the prior art as well as references found in-connection with prior art searches that were never cited to the PTO.

PTX 9512, Steinberg Mar. 7, 2001 *Micron* Dep. Tr. at 71, 73-75 (testifying notes made on prior art references that were not submitted to the PTO "were discarded in the April 1999 time frame").

59. Rambus employees and agents destroyed Board of Directors presentations, business plans and meeting notes.

See DTX 9013, Mooring Nov. 16, 2000 *Infineon* Dep. Tr. at 61-62. (testifying overheads used at a Board presentation were "disposed of"; PTX 4024 (Karp presentation stating "Destroy All Copies of Materials Prepared For Off-Site and Motivational Meetings").

60. Rambus employees and agents destroyed e-mails and other electronic files.

See DTX 9010, Karp Jan. 8, 2001 *Infineon* Dep. Tr. at 61-64 (testifying he "went through [his] computer and deleted the filings [he] had relating to Rambus" and that he "deleted most of the e-mails"; DTX 8035A at R300769 ("Mac tapes - GONE"); DTX 9009, Karp Oct. 8, 2004 *Infineon* Dep. Tr. at 489-85 (Rambus destroyed Macintosh back-up tapes); DTX 3697 (May 14, 1998 email from Karp to various Rambus employees; "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"). Gonzalez Feb 22, 2005 Trial Tr at 123-24 (Crisp e-mails found on home computer not found anywhere in Rambus' files); Cunningham Feb. 22, 2005 Trial Tr. at 200 (Roberts e-mails found on home computer not found elsewhere in Rambus' files).

61. Rambus produced a total of approximately 97 boxes of documents to Infineon in this case.

See Arovas Feb. 23, 2005 Trial Tr. at 445.

62. Rambus destroyed well over 10 times as many boxes of documents during its 1998, 1999, and 2000 document purges as Rambus produced to Infineon in this case.

Compare Arovas Feb. 23, 2005 Trial Tr. at 445 *with* Kramer Feb. 23, 2003 Trial Tr. at 416 (testifying on the Sure Shred bag to box conversion, that 1 bag is 1.25 banker boxes) *and* DTX 4069 at R400812-13, R400819-20, R400787-88 (invoices from Sept. 3-4, 1998, Aug. 26, 1999, and Dec. 28, 2000, respectively).

63. Rambus produced less than 8 boxes of prior art to Infineon in this case, at least 90% of which came from outside sources rather than Rambus' own files.

See Arovas Feb. 23, 2005 Trial Tr. at 472-74.

64. Rambus produced approximately twelve claim chart documents to Infineon, none of which pre-dated late 1999.

See Arovas Feb. 23, 2005 Trial Tr. at 459, 461, 464.

65. Although Rambus documents indicate that Rambus performed reverse engineering studies on SDRAM products in 1998 and 1999, Rambus produced no SDRAM-related reverse engineering documents to Infineon in this action.

Compare DTX 3712 at R401311 ("Reverse Engineering Effort Will Take Approximately Two Months") *with* Arovas Feb. 23, 2005 Trial Tr. at 465-66 (testifying he did not see any reverse-engineering reports for SDRAM or DDR SDRAM or SGRAM products in the Rambus production to Infineon).

66. Because Rambus had purged prior art and JEDEC-related documents from its internal files, Rambus obtained prior art and JEDEC-related documents from third party sources and produced them to its litigation adversaries with “R” production numbers.

See Cunningham Feb. 22, 2005 Trial Tr. at 204-07 (testifying regarding obtaining documents from JEDEC and stamping them with “R” numbers); DTX 8005 at 27-28 (Gray Cary production log identifying documents obtained from JEDEC); DTX 8009 at 12-13 (Gray Cary document collection overview identifying prior art collected from patent search service); Cunningham Feb. 22, 2005 Trial Tr. at 217-19 (testifying regarding same); Arovos Feb. 23, 2005 Trial Tr. at 446-56 (testifying regarding third-party sources of prior art and JEDEC documents produced by Rambus with “R” production numbers).

67. Pursuant to its document retention policy, Rambus destroyed documents relevant to the issues of patent infringement, invalidity, equitable estoppel, implied license, prosecution laches, monopolization, and unfair competition being litigated in this action.

See supra, Proposed Findings of Fact Nos. 53 - 67.

68. Rambus’ destruction of documents has prejudiced Infineon’s defense against Rambus’ patent infringement claims in this case.

C. After Filing Suit, Rambus Engaged In Litigation Misconduct Aimed At Concealing Evidence of Its Conduct As A Member of JEDEC

i. Rambus Concealed Vast Numbers Of Documents Memorializing Its Scheme To Secretly Patent The JEDEC Standards

69. Despite the massive scale of Rambus’ pre-litigation document purge, a number of documents damaging to Rambus’ litigation positions serendipitously escaped destruction because they were contained in the personal files of Rambus employees or counsel.

See DTX 9005, Crisp Apr. 13, 2001 *Infineon* Dep. Tr. at 841-42 (certain JEDEC-related e-mail files of Crisp were inadvertently retained because he had long before copied them onto a server as a means for transferring data from a Macintosh to a PC, and he forgot to delete them from the server); DTX 9022, Crisp Oct. 16, 2004 *Infineon* Dep. Tr. at 298-299, 301-303 (although Crisp

reportedly found e-mails on a hard drive in his attic, both the hard drive and the computer he took with him when he left Rambus were destroyed in 2002); Kramer Feb. 23, 2005 Trial Tr. at 407 (other relevant e-mails were preserved on the hard drive of Roberts' home computer); Cunningham Feb. 22, 2005 Trial Tr. at 192-200 (same); DTX 8022 at GCWF 03505 (other JEDEC-related materials inadvertently survived because Rambus' outside patent counsel had filed them in his general "chron files," rather than the Rambus-specific files that were subsequently purged); DTX 9019, Vincent Oct. 15, 2004 *Infineon* Dep. Tr. at 140 (same).

70. Although Rambus had collected and reviewed these documents no later than January 2001, Rambus failed to produce or identify on its privilege logs many of these inadvertently-retained documents during the original discovery period.

See, e.g., Cunningham Feb. 22, 2005 Trial Tr. at 192-193 (Roberts e-mails were not produced); DTX 8022 at GCWF 3505 (Dec. 5, 2000 Gray Cary notes of interview with Vincent regarding documents sent to Steinberg including notes of 1992 meeting with Crisp and Roberts regarding standard setting.)

71. Rambus produced nearly the same volume of documents after remand (approximately 105,000 pages) as before the first trial (approximately 138,000 pages).

See Cunningham Feb. 22, 2005 Trial Tr. at 316-17.

72. Many of the late-produced Rambus documents were highly relevant to Infineon's claims and defenses and were contrary to the litigation positions Rambus was advancing during the original trial:

- a. A July 11, 1997 e-mail from Rambus President David Mooring to Rambus executives stating that "We have not yet told Siemens that we think SLDRAM and SDRAM-DDR infringe our patents. We think that will just irritate them."

DTX 6026.

- b. A September 12, 1995 e-mail from Rambus CEO Geoff Tate to Rambus executives, marketing personnel, and engineers informing them that "it would be very helpful if, any time you have any e-mail talking about competitive technology developments/directions (e.g. JEDEC meeting reports, etc.) if you would add [in-house patent counsel] to your distribution list."

DTX 4005.

- c. A February 20, 1996 e-mail from Richard Crisp to various Rambus executives and in-house counsel regarding minutes from the January 1996 JEDEC meeting, stating that:

I have put copies of the JC42.3 meeting minutes in each of your mail slots. Notice the Micron presentation especially the part about the separate transmit and receive clocks. I think we should have a long hard look at our IP and if there is a problem, I believe we should tell JEDEC that there is a problem.

Other opinions?

rdc

DTX 4006.

- d. A September 4, 1996 e-mail from Richard Crisp to all staff at Rambus, stating that:

One more time so that all hear the material I presented in my Rambler contained some JEDEC material which is not permitted to be shared with any company who is not a member of JEDEC

DTX 4172.

73. Some of the late-produced Rambus documents were obtained from the hard drive of a home computer belonging to Allen Roberts.

See Cunningham Feb. 22, 2005 Trial Tr. at 192-200.

74. Although Rambus first learned about Mr. Roberts' hard drive in December 2000, and devoted scores of hours to reviewing, analyzing, and indexing the documents stored therein, Rambus failed to produce many of the relevant and responsive documents on Mr. Roberts' hard drive before the original trial.

See DTX 3981 at GCWF 02274-91 (Gray Cary billing records for Dec. 14-22, 2000 regarding Roberts e-mails); DTX 8024 (20-page index of Roberts e-mails prepared by Gray Cary); Cunningham Feb. 22, 2005 Trial Tr. at 192-97, 199-200 (Roberts sent a CD-ROM of his e-mails around Dec. 15, 2000, and around four to six Gray Cary attorneys "reviewed in paper form printouts of all or substantially all of the e-mails that were on Mr. Roberts' computer"); DTX 9016, Roberts Apr. 14, 2001 *Infineon* Dep. Tr. at

331, 333-35 (Roberts first met with Gray Cary attorneys in this case in December 2000, and he gave them a copy of e-mail files).

75. Specifically, Rambus failed to produce any of the 235 e-mails contained in the patents.mbx file from Mr. Roberts' hard drive.

See Cunningham Feb. 22, 2005 Trial Tr. at 198-202 (admitting same); DTX 8024 at GCWF03695 (Gray Cary index of Roberts e-mails showing patents file).

76. Rambus' lawyers had described that file on an index of Mr. Roberts' hard drive as containing "LOTS OF KEY DOCS." It was the only file so described and it was the only file not produced.

See Cunningham Feb. 22, 2005 Trial Tr. at 198-99, 281-83 (admitting same); DTX 8024 at GCWF 03695 (Gray Cary index of Roberts e-mails showing patents file.).

77. Nevertheless, Rambus in bad faith allowed its Rule 30(b)(6) witnesses to repeatedly testify falsely that certain files from the hard drive of Allen Roberts' computer had not been produced because they had been "corrupted." The relevant files on Mr. Roberts' hard drive had never been corrupted.

See Kramer Feb. 23, 2005 Trial Tr. at 407-12 (admitting false testimony in Dec. 20, 2002 *Hynix* deposition, April 23, 2003 *Hynix* deposition, and Feb. 26, 2004 *Infineon* deposition was "just flat-out wrong"); Cunningham Feb. 22, 2005 Trial Tr. at 257-58 (admitting files were never corrupted).

*ii. **Rambus Witnesses Provided False And Misleading Testimony Regarding Rambus' Participation In JEDEC***

78. Rambus' JEDEC representative, Richard Crisp, testified during his first deposition that he "never, ever" participated in discussions relating to the prosecution strategy for Rambus' patent portfolio. Mr. Crisp further testified that no non-lawyer employees were involved in patent-filing decisions.

See DTX 9001, Crisp Nov. 8, 2000 *Infineon* Dep. Tr. at 60, 62.

79. Mr. Crisp's testimony was false. Documents that Rambus produced only after Infineon served a subpoena on Rambus' former patent counsel establish beyond any doubt that Mr. Crisp personally provided counsel with ideas for claims that should be filed in response to the technology discussions at JEDEC.

See, e.g., DTX 9005, Crisp Apr. 13, 2001 *Infineon* Dep. Tr. at 783, 786-87 (admitting same); DTX 9003, Crisp Apr. 23, 2001 *Micron* Dep. Tr. at 47-50 (admitting same).

80. Many of those documents were in Rambus' possession *before* Mr. Crisp's original deposition.

See DTX 8022 at GCWF 3505 (Dec. 5, 2000 counsel interview notes with Vincent; Vincent "found a 1993 cover letter to Crisp enclosing some standard setting documents" and "found notes on a 1992 meeting with Crisp and Alan Roberts re standard setting."); DTX 5353 (Jan. 31, 2001 letter from Vincent to Steinberg enclosing files); DTX 3915 (Feb. 1, 2000 letter from Vincent to Steinberg enclosing files); DTX 3832 (Oct. 18, 2000 Federal Express label from Vincent to Steinberg).

81. Rambus Vice President Allen Roberts, who was in charge of Rambus' Patent Prosecution until late 1995, testified during his initial deposition that he knew nothing about Rambus' participation in JEDEC until years after Rambus' withdrawal.

See DTX 9002, Roberts Jan. 23, 2001 *Infineon* Dep. Tr. at 154-55 ("I was not aware that Rambus was a participant in any JEDEC process until approximately 12 months ago.").

82. Mr. Robert's testimony was false. Documents produced pursuant to Infineon's subpoena of Lester Vincent reveal that Mr. Roberts had several meetings and discussions with Mr. Vincent regarding Rambus' participation in JEDEC.

See, e.g., DTX 1535 (Vincent notes of Mar. 27, 1992 conference with Crisp and Roberts, stating "Rambus is member of JEDEC," "Allen is ordering JEDEC bylaws," and "Rambus attended meeting with 100 others where JEDEC's proposal to establish std for small-swing signals for synch DRAM was discussed"); DTX 1523 at R204571 (Vincent's Mar. 1992 billing records

reflecting “Teleconference with Allen Roberts concerning patent application for address remapping and concerning J[E]DEC.”).

83. Rambus had collected and reviewed those documents prior to Mr. Roberts’ deposition.

See DTX 8022 at GCWF 3505 (Dec. 5, 2000 Gray Cary notes of interview with Vincent regarding documents sent to Steinberg including notes of 1992 meeting with Crisp and Roberts regarding standard setting.)

iii. Rambus Made False Statements In Pre-Trial Briefing Regarding Rambus’ Scheme To Secretly Patent The JEDEC Standards

84. Rambus echoed the false testimony of its witnesses in briefs opposing Infineon’s efforts to obtain discovery into Rambus’ alleged misconduct at JEDEC. In briefing before this Court, Rambus falsely stated that “Rambus’ JEDEC representatives had no knowledge of Rambus’ patent claims during their attendance at JEDEC meetings.”

DTX 8047, Rambus’ [Feb. 26, 2001] Opposition to Infineon’s Motion to Compel Deposition Testimony And Documents at 6.

85. Likewise, in seeking mandamus relief from this Court’s March 7, 2001 privilege-piercing Order, Rambus falsely informed the Federal Circuit that Richard Crisp “did not counsel with any lawyers or other Rambus employees regarding pending patent applications.”

DTX 8053, Rambus Inc.’s Petition for Writ of Mandamus, Prohibition and Other Appropriate Relief at 16.

86. The very documents that Rambus was seeking to shield from discovery proved just the opposite.

See DTX 1523 at R204569 (“Conference with Richard Crisp concerning revisions to amendment.”); *id.* at R204579 (“Review J[E]DEC publications. Teleconference with Richard Crisp concerning abstracts for patent applications. . . . Send letter to Richard Crisp enclosing copies of patents applications filed on March 6, 1992.”).

D. Rambus Engaged In Further Litigation Misconduct To Cover Up Its Willful Destruction And Concealment Of Evidence

i. Rambus Concealed Vast Numbers Of Documents Memorializing Its Pre-Litigation Document Destruction Program

87. Within weeks after Rambus filed its complaint in this case, Infineon served a document request seeking “[a]ll documents related to any document retention or document destruction policy in effect at Rambus at any time since March 1, 1990.”

See DTX 4522, Plaintiff Rambus Inc.’s Responses to Defendants’ First Set of Requests for the Production of Documents and Things at Request No. 48.

88. Rather than responding to Infineon’s document request in good faith, Rambus concealed a large number of nonprivileged documents demonstrating that Rambus had systematically destroyed documents in an attempt to eliminate discoverable evidence. The documents that Rambus withheld from Infineon included, for example, (1) company-wide e-mails discussing the logistics of Rambus’ document retention policy and the 1998 and 1999 document shredding parties, (2) invoices for the shredding services used by Rambus in 1998, 1999 and 2000 for those shredding parties, and (3) quarterly goals tying Rambus’ document “retention” policy and shredding parties to its litigation strategy

See, e.g., DTX 4022 (July 17, 1998 e-mail from Saputra copied to all staff discussing logistics of 3-month system backup policy); DTX 4105 (Aug. 19, 1998 e-mail from Larsen to all staff regarding “Thursday 9/3: Shredder Day”); DTX 4025 (Aug. 24, 1998 e-mail from Karp to all staff stating “By now, everyone at Rambus should have heard at least one presentation on the implementation of the document retention policy.”); DTX 4069 (invoices for shredding services); DTX 4071 at RF 0627716 (“Top Level Key Results For 1998” included plan to “Get all infringers to license our IP with royalties > RDRAM (if it is a broad license) OR sue”); DTX 4067 (“IP Q3 ’99 goals” included “Prepare for litigation with 30 days notice” and “Organize 1999 shredding party at Rambus”).

89. By way of example, the non-privileged documents that Rambus failed to produce in response to Infineon's document request regarding Rambus' document retention policy included:

- a. A September 3, 1998 e-mail from Joel Karp to *all Rambus employees* titled "Shred Day: Status Report" and stating:

It took about 5 hours to completely fill the shredding truck (capacity is 20,000 lbs.). . . . They feel they can finish the job tomorrow. Worst case is that they might have to come back Tuesday to pick up anything that still remains after tomorrow's session. By the way, if anyone needs any more bags there's a box-full in the building entrance area. . . . Don't forget, pizza, beer, champagne, etc., at 5pm in the Autodesk space. See you there.

DTX 4026.

- b. A June 27, 1999 document identifying Rambus' "IP Q3'99 Goals" with respect to topic 3, "Licensing/Litigation Readiness" as follows:

- D. Prepare licensing positions against 3 manufacturers
- E. Prepare litigation strategy against 1 of the 3 manufacturers (re: 3D)
- F. Ready for litigation with 30 days notice
- G. Organize 1999 shredding party at Rambus.

DTX 4067 at RF0583407.

- c. An August 25, 1999 e-mail announcement to *all Rambus employees* titled "Burlap Bags Tomorrow" and stating:

Leave your burlap bags outside your cube before you leave tonight . . . the shredding company will start collecting bags at 9:00 am tomorrow morning. And don't forget the shredder party tomorrow at 5:00 p.m. . . . lots of good food & a special announcement!

DTX 3759.

90. Even despite this Court's November 4, 2003 Order instructing Rambus to update its original document production, Rambus continued to withhold numerous documents establishing that it had conducted company-wide document purges in August 1999 and December 2000.

See DTX 8045 (Feb. 17, 2004 letter from Klaus to Desmarais withdrawing claims of privilege on documents in bates range R40000-R400724 and producing R400725-R401044); DTX 8046, (Nov. 19, 2004 letter from Klaus to Stadnick regarding production of documents in bates range R401504-R401565).

91. Rambus concealed documents in bad faith from its outside counsel and litigation adversaries for the purpose of depriving its litigation adversaries of evidence that could be used to defend against Rambus' patent infringement claims.

See *supra*, Proposed Findings of Fact Nos. 87 - 90.

92. Because Rambus had broadly destroyed relevant documents, and in order to fill the gaps, it obtained prior art and JEDEC documents from outside sources and produced them to Infineon as part of its own production of documents.

See Cunningham Feb. 22, 2003 Trial Tr. at 210-16 (JEDEC documents); *id.* at 218-19, 248 (prior art); Arovas Feb. 23, 2003 Trial Tr. at 447-50, 467-75; DTX 8005 (Gray Cary document index); DTX 8009 (May 11, 2001 e-mail from Cunningham to Howrey Simon attorneys enclosing document index for *Hitachi* litigation).

*ii. **Rambus Made False Statements In Briefing Regarding Rambus' Document Destruction Program***

93. Having destroyed, concealed, or asserted privilege claims over all documents relating to the adoption and implementation of its document destruction program, Rambus repeatedly misrepresented the timing and purpose of that program to this Court. In a brief opposing Infineon's post-trial motion for attorneys' fees, Rambus falsely stated that the destruction of documents pursuant to its document retention policy occurred "*years before the Infineon litigation began.*" Rambus' own documents, however, establish that Rambus continued to destroy documents pursuant to its document retention policy in 1999 and 2000, even after this litigation was pending.

See DTX 8041 at 18 (emphasis in original); *see also* DTX 4068 (Aug. 25, 1999 e-mail from Kaufman to staff regarding “burlap bags tomorrow!”); DTX 4069 at R400787-R400788 (Sure Shred invoices from 2000); *id.* at R400819-R400820 (ProShred invoices from 1999).

94. At oral argument on Infineon’s post-trial motion for attorneys’ fees,

Rambus repeated its misrepresentation regarding the timing of Rambus’ document destruction:

THE COURT: Well, but when did they do that destruction of documents?

MR. ALLCOCK: 1998.

THE COURT: Well, that was when?

MR. ALLCOCK: Actually, it was in 1997. It was 1997/1998. The patents weren’t even filed. The patents that were in the suit weren’t even filed.

THE COURT: That’s when the policy went into effect. When did the destruction occur?

MR. ALLCOCK: I believe that’s when it happened.

DTX 8042, July 16, 2001 Hr’g Tr. at 250.

95. During the same argument, Rambus also falsely informed the Court that

“[t]he document retention policy had nothing to do with litigation.”

Id. at 249.

96. Rambus’ own contemporaneous documents confirm that Rambus’

document retention policy was adopted as an integral part of its litigation strategy.

See DTX 3681 (Agenda from Feb. 12, 1998 meeting with Cooley Godward regarding “Licensing/Litigation Strategy”); DTX 3680 at R401111 (“Licensing and Litigation Strategy” presentation listing “Need to create document retention policy” and “Need to organize prosecuting attorney’s files for issued patents” as “NEAR TERM ACTIONS”).

iii. Rambus Witnesses Provided False And Misleading Testimony Regarding Rambus' Destruction And Concealment Of Documents

97. Before the original trial, no Rambus employee ever informed Rambus' own outside litigation counsel in this case, the *Hyundai/Hynix* case, or the *Hitachi* case that Rambus had conducted company-wide document purges in August 1999 and December 2000.

See Gonzalez Feb. 22, 2005 Trial Tr. at 129-30, 136 (testifying regarding failure of Rambus employees to inform her of 1999 and 2000 document purges); Cunningham Feb. 22, 2005 Trial Tr. at 187-92 (testifying regarding same).

98. On August 1, 2001, Neil Steinberg testified on Rambus' behalf as a Rule 30(b)(6) witness in the *Micron* case. Mr. Steinberg prepared for his testimony by interviewing a number of longtime Rambus employees, including Geoff Tate, David Mooring, Richard Crisp, Allen Roberts, and Billy Garrett, as well as representatives from Rambus' information technology group.

See DTX 9020, Steinberg Aug. 1, 2001 *Micron* Dep. Tr. at 7-10.

99. Mr. Steinberg testified that "Shred Day 1998" was the only occasion on which Rambus employees were provided with burlap bags for shredding purposes.

See DTX 9020, Steinberg Aug. 1, 2001 *Micron* Dep. Tr. at 86-87.

100. Mr. Steinberg's testimony was false. Documents that Rambus had withheld from production demonstrate that Rambus conducted "Shred Days," complete with burlap sacks and shredding trucks, in both 1999 and 2000.

DTX 4069 at R400787-88 (Sure Shred invoices from Dec. 28, 2000); *id.* at R400819-R400820 (ProShred invoices from Aug. 26, 1999).

101. In the *Hyundai/Hynix* case, Rambus' Rule 30(b)(6) witness, Robert Kramer, echoed Mr. Steinberg's false testimony that "Shred Day 1998" had been a one time event.

See Kramer Feb. 23, 2005 Trial Tr. at 402-03, 404-06 (admitting false testimony).

102. Mr. Steinberg also falsely testified in the *Micron* case that (1) no slide presentation was shown to Rambus employees regarding Rambus' new document retention policy and (2) no instructions regarding the destruction of documents were provided to Rambus employees during that meeting. Documents that Rambus withheld under claims of privilege establish that Rambus employees had in fact been shown slide presentations that specifically instructed them to destroy e-mail and other documents.

See DTX 9020, Steinberg Aug. 1, 2001 *Micron* Dep. Tr. at 64-66, 75; DTX 4118 at RF0498196 (Employee Donnelly's July 22, 1998 notes regarding "[n]eed to have document retention/destruction policy."); DTX 4024 (Karp July 22, 1998 presentation stating "In General, Email Messages Should Be Deleted As Soon As They Are Read").

103. Rambus' 30(b)(6) witness also said there had been no presentations to the Board of Directors regarding shred days. That testimony was false.

See Kramer Feb. 24, 2005 Trial Tr. at 610-14 (admitting false testimony and admitting shred day presentations); DTX 3712 (Karp October 1998 presentation to Board of Directors informing it of "All Day Shredding Party Held On Sept. 3").

104. When confronted by evidence proving that Rambus had purged documents in 1999 and 2000, Mr. Steinberg also offered false testimony regarding the date on which Rambus contemplated litigation against manufacturers of SDRAM and DDR SDRAM products. During his initial deposition in this action, before Rambus' document destruction came to light, Mr. Steinberg candidly admitted that beginning in August 1998, his work for Rambus included "licensing and preparation for litigation" involving third parties using SDRAMs and DDR SDRAMs.

See DTX 9007, Steinberg Jan. 16, 2001 *Infineon* Dep. Tr. at 95-101.

105. On remand, however, after Infineon learned of Rambus' Shred Days, Mr. Steinberg steadfastly denied that Rambus was contemplating litigation even as late as October 1999, the date of a Rambus presentation addressing the selection of "targets" from among DRAM manufacturers, including Infineon.

See DTX 9021, Steinberg Oct. 6, 2004 *Infineon* Dep. Tr. at 293-94 ("I don't know how you're spinning these documents or how the Court is spinning them, but I'm telling you we did not contemplate litigation."); *see also* DTX 3675 at R401069-76 (addressing the selection of targets).

106. Rambus in bad faith permitted its Rule 30(b)(6) corporate designees to provide false testimony for the purpose of depriving its litigation adversaries of evidence that could be used to defend against Rambus' patent infringement claims, and to cover up its prior document destruction and concealment of evidence.

See, supra, Proposed Findings of Fact Nos. 77, 98 - 105.

*iv. **Rambus Obstructed Court-Ordered Discovery Into Rambus' Document Destruction Program***

107. At an October 16, 2004 deposition following this Court's May 18, 2004 Orders, when asked about what Daniel Johnson, Jr. said about document retention and destruction at Rambus on July 22, 1998, Mr. Crisp claimed he had forgotten what he "remembered in May 2004 regarding the comments by Mr. Johnson" merely because "[f]ive months went by."

DTX 9022, Crisp Oct. 16, 2004 *Infineon* Dep. Tr. at 276-77.

108. Rambus improperly instructed certain third party deponents – including its former outside counsel, Daniel Johnson, Jr. – not to answer questions clearly within the scope of the May 18, 2004 Orders. For example, Rambus instructed Mr. Johnson not to answer questions

directed to the relationship between Rambus' document retention policy and its litigation strategy – the very purpose of the deposition.

See DTX 9023, Johnson Nov. 23, 2004 *Infineon* Dep. Tr. at 48-49, 52-54, 56, 58-59, 115-16.

109. Despite being specifically told by this Court that instructions not to answer would violate this Court's may 18 Orders, Rambus instructed Mr. Johnson not to answer questions at the deposition at least 35 times.

See generally DTX 9023, Johnson Nov. 23, 2004 *Infineon* Dep. Tr.; *see also* Oct. 5, 2004 Hr'g Tr. at 27-28.

110. Rambus even instructed Mr. Johnson not to answer questions regarding documents as to which this Court specifically held Rambus' privilege claims waived.

See, e.g., DTX 9023, Johnson Nov. 23, 2004 *Infineon* Dep. Tr. at 23-24, 29-33, 38-41, 115-16; *cf. Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 287 (E.D. Va. 2004) (discussing goals set forth in "Licensing/Litigation Readiness" section of document); DTX 4067 at RF0583407 (items 3.D. to 3.G. in goals set forth in "Licensing/Litigation Readiness" section of document); DTX 3681 (Feb. 12, 1998 meeting with Cooley Godward notes).

E. Despite Being Specifically Requested To Do So By Infineon And This Court, Rambus Failed To Bring Any Live Witnesses Who Participated In Rambus' Document Destruction To Testify Regarding Rambus' Conduct And Intent

111. Rambus failed to produce *any* witness for trial who was employed at Rambus during the 1998, 1999, and 2000 shredding days, even though Rambus stipulated "there's many people at Rambus today who were there in 1998, 1999 and 2000," and even though both Infineon and this Court requested live witnesses.

Feb. 23, 2005 Trial Tr. at 400; *see also* Kramer Feb. 23, 2005 Trial Tr. at 389 (testifying there are "current employees at Rambus who are employed today who were at Rambus during shred day 1998 and 1999").

112. Geoff Tate is Chairman of the Board of Directors of Rambus, and was the CEO of Rambus in 1998, 1999 and 2000. Rambus failed to produce Mr. Tate to testify live at this trial.

See Kramer Feb. 23, 2005 Trial Tr. at 390-91.

113. David Mooring is an officer at Rambus and serves on its Board of Directors. Mr. Mooring was employed by Rambus in 1998, 1999, and 2000. Rambus failed to produce Mr. Mooring to testify live at this trial.

See Kramer Feb. 23, 2005 Trial Tr. at 391-92.

114. Joel Karp is presently a consultant for Rambus. Rambus failed to produce Mr. Karp to testify live at this trial.

See Kramer Feb. 23, 2005 Trial Tr. at 392-93.

115. Rambus' director of litigation, Robert Kramer, testified at trial that he did not contact Mr. Steinberg, and he was not aware of anybody from Rambus contacting Mr. Steinberg, to ask him to appear at the trial.

See Kramer Feb. 23, 2005 Trial Tr. at 393-96.

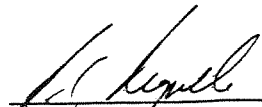
III. CONCLUSION

Infineon respectfully requests the Court enter the foregoing Proposed Findings Of Fact, along with such conclusions of law and any relief the Court deems just and proper.

Respectfully submitted,

INFINEON TECHNOLOGIES AG,
INFINEON TECHNOLOGIES NORTH
AMERICA CORP., and INFINEON
TECHNOLOGIES HOLDING
NORTH AMERICA INC.

BY COUNSEL:



Brian C. Riopelle (VSB #36454)
Robert M. Tyler (VSB #37861)
McGUIRE WOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030
804.775.1000 (phone)
804.775.1061 (fax)

OF COUNSEL:

John M. Desmarais
Gregory S. Arovas
Michael P. Stadnick
KIRKLAND & ELLIS LLP
Citigroup Center
153 East 53rd Street
New York, New York 10022
212.446.4800 (phone)
212.446.4900 (fax)

CERTIFICATE OF SERVICE

I certify that on this 28th day of February, 2005, a copy of the foregoing INFINEON'S PROPOSED FINDINGS OF FACT REGARDING RAMBUS' UNCLEAN HANDS AND SPOILIATION OF EVIDENCE was sent to Counsel for Rambus Inc. as listed below:

BY HAND

Michael W. Smith, Esq.
Craig T. Merritt, Esq.
R. Braxton Hill, IV, Esq.
CHRISTIAN & BARTON, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219

Gregory P. Stone, Esq.
c/o R. Braxton Hill, IV, Esq.
CHRISTIAN & BARTON, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-

VIA FEDERAL EXPRESS

John M. Guaragna, Esq.
GRAY CARY WARE & FREIDENRICH LLP
1221 S. MoPac Expressway, Suite 400
Austin, TX 78746

