UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

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

SUPPLEMENTAL MEMORANDUM OF COMPLAINT COUNSEL IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF, AND TO REOPEN THE RECORD TO ADMIT, DOCUMENTS RELATING TO RESPONDENT RAMBUS INC.'S SPOLIATION OF EVIDENCE

On March 1, 2005, following a five-day evidentiary hearing, Judge Robert Payne of the

U.S. District Court for the Eastern District of Virginia dismissed Rambus's patent infringement

claims against Infineon Technologies AG, on grounds of Rambus's spoliation of evidence and

unclean hands.[1] Complaint Counsel submits this Supplemental Memorandum in support of its

pending Motion to Compel and Reopen the Record to present newly-available evidence that

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[1]   *Rambus, Inc. v. Infineon Technologies AG*, Civil Action No. 3:00CV524 (E.D. Va.),
Hearing Transcript (March 1, 2005) at 1138-39 (Attachment 1) (hereinafter "Hearing
Transcript").

Complaint Counsel first obtained following that evidentiary hearing.

In Rambus's private patent-infringement lawsuit against Infineon, Infineon moved to dismiss Rambus's claims based on Rambus's destruction of evidence and other litigation misconduct.[2] Rambus opposed Infineon's motion.[3] Beginning on Monday, February 21, 2005, Judge Payne held a five-day evidentiary hearing, at which Infineon and Rambus presented documentary evidence, live witness testimony and deposition testimony on the issue of Rambus's spoliation of evidence and litigation misconduct. Following submission of proposed findings of fact and closing argument, Judge Payne granted Infineon's motion and dismissed Rambus's patent infringement case on grounds of spoliation of evidence and unclean hands:

> I conclude, on the basis of the record and the law, that Infineon has proved, by clear and convincing evidence, that Rambus is guilty of and liable for unclean hands that bar its access to this court.
>
> And I have concluded that [Infineon] has proved, by clear and convincing evidence, a spoliation that warrants dismissal of this action as the only appropriate sanction after having – of the patent infringement case after having considered the alternatives.[4]

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[2]   *See* Response of Complaint Counsel to the Commission's Order Regarding Designation of the Record Pertaining to Spoliation of Evidence by Rambus, at Attachment D (December 22, 2004). In addition to the litigation misconduct previously found by Judge Payne (including false testimony by Rambus's then-CEO Geoffrey Tate and former JEDEC representative Richard Crisp), Infineon argued that Rambus intentionally destroyed relevant documents in anticipation of litigation, Rambus witnesses lied in deposition testimony regarding the destruction of documents, Rambus witnesses lied in F.R.C.P. 30(b)(6) deposition testimony regarding existing documents that were not produced to Infineon, and Rambus attempted to cover up the destruction of JEDEC-related documents by mis-numbering documents obtained from third parties. *See generally* Hearing Transcript at 771-903, 1087-1137 (Attachment 1).

[3]   *See* Objections By Respondent Rambus Inc. To Complaint Counsel's Response to the Designation of Record Pertaining to Spoliation of Evidence By Rambus; Request to Submit Additional Exhibit (February 4, 2005).

[4]   Hearing Transcript at 1138-39, (Attachment 1).

Judge Payne announced that he would issue a written opinion setting forth the grounds for his decision. *Id*. In a development timed to prevent Judge Payne from issuing his written decision, however, and to try to preserve its patent infringement claims against other companies, Rambus has settled its patent infringement suit against Infineon.[5]

Because it now appears that Judge Payne may never issue a written opinion explaining his bench ruling, the transcript and documents from the evidentiary hearing before Judge Payne provide the sole explanation of the grounds for his ruling. Some of the evidence from that hearing is in the record in the FTC proceeding. But during the course of that evidentiary hearing, Infineon and Rambus used publicly certain of the documents relating to spoliation of evidence that Rambus was compelled to produce to Infineon but that Rambus has withheld from Complaint Counsel and the Commission on grounds of privilege (the "Spoliation Documents"). These documents are the subject of Complaint Counsel's pending Motion to Compel Production Of, and to Reopen the Record to Admit, Documents Relating to Respondent Rambus Inc.'s Spoliation of Evidence (filed July 2, 2004).

Complaint Counsel recently obtained copies of the documents that were used publicly at

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[5]   "'This [settlement] got us out of [Federal District Court in] Virginia at a point where there is likely to be less impact on future cases,' said Harold Hughes, Rambus's chief executive." *Rambus, Infineon Reach Settlement*, Wall Street Journal, March 22, 2005 (Attachment 2).

The full terms of the Rambus-Infineon settlement agreement have not been made public. It appears, however, that Rambus and Infineon reached a global settlement resolving Rambus's patent infringement claims against Infineon, Infineon's equitable and antitrust claims against Rambus, and Rambus's antitrust lawsuit against Infineon arising from Infineon's alleged conspiracy with other DRAM manufacturers.

the evidentiary hearing before Judge Payne.[6] A number of these documents (attached hereto)

shed additional light on Rambus's destruction of evidence relevant to the present proceeding, as

well as on the misleading nature of various arguments Rambus has advanced during the course

of this litigation.[7] Complaint Counsel respectfully submit this Supplemental Memorandum to

inform the Commission of this additional evidence.

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[6]   A substantial portion of these documents were withheld from Complaint Counsel and the
Commission during the course of the present litigation. Despite our best efforts during the
course of this Part III litigation, Complaint Counsel were unable to obtain copies of the
documents attached to this submission until two to three weeks after the evidentiary hearing.
Complaint Counsel do not know how many additional Spoliation Documents have been turned
over to Infineon in the private litigation but continue to be withheld from Complaint Counsel and
the Commission.

[7]   To use the words of Judge Payne, not only the documents destroyed pursuant to
Rambus's document retention policy, but also the documents that Rambus withheld pursuant to
claims of privilege, were precisely the kinds of documents that "contain information that is
useful in ascertaining truth and in testing the validity of positions taken in litigation."
Memorandum Opinion (Payne, J.), *Rambus, Inc. v. Infineon Technologies AG*, at 46 (E.D. Va.,
May 18, 2004) ("Crime-Fraud Opinion") (*see* Attachment A to Complaint Counsel's Reply
Brief, filed on July 2, 2004). Thus, when Judge Payne pierced Rambus's privilege claims and
ordered Rambus to produce formerly privileged documents dating from 1991 to mid-1996, those
documents "told a story far different than reflected in Rambus' initial discovery responses and
depositions." *Rambus, Inc. v. Infineon Technologies AG*, 155 F.Supp.2d 660, 682-83 (E.D. Va.,
2001), *reversed on other grounds*, 318 F.3d 1081 (Fed. Cir. 2003). The formerly privileged
documents revealed that then-CEO Geoffrey Tate and Rambus's former JEDEC representative
Richard Crisp "simply did not admit the truth" in their sworn deposition testimony, *id*., and that
statements in Rambus's White Paper to FTC staff were not true. *See* Reply Brief of Counsel
Supporting the Complaint (July 2, 2004) at 54-56. Similarly, the newly available documents
reveal that additional arguments advanced by Rambus during the course of this litigation are
either false or highly misleading.

I. **The Newly Available Evidence Confirms That Rambus Engaged in Deliberate, Systematic Destruction of Evidence As Part of Its Litigation Strategy.**

The newly available documents confirm the conclusions previously reached by Judge Payne that Rambus's destruction of documents was "an integral part of the company's patent litigation strategy," and, indeed, was "part and parcel of the company's litigation strategy."[8] In so doing, they supply the one piece missing from Judge Timony's decision in this case, by which that ALJ denied Complaint Counsel's motion for default judgment against Rambus but imposed a series of presumptions. The newly available documents confirm that Rambus's destruction of documents was not merely undertaken with "gross negligence concerning and reckless disregard of its obligations to preserve documents relevant to litigation,"[9] but was in fact intentional, undertaken with the purpose of improving Rambus's litigation position in patent infringement lawsuits it was planning against targeted members of the industry.[10]

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[8]   Crime-Fraud Opinion at 43; Memorandum Opinion (Payne, J.), *Rambus, Inc. v. Infineon Technologies AG*, at 18 (E.D. Va., May 18, 2004) (*see* Attachment B to Complaint Counsel's Reply Brief, filed on July 2, 2004).

[9]   Order on Complaint Counsel's Motions for Default Judgment (Timony, ALJ, February 26, 2003) at 8.

[10]   Case law clearly establishes that sanctions are appropriately levied against a party responsible for destroying documents that the party knew or should have known would be relevant to potential litigation. *See, e.g., Lewy v. Remington Arms Co.,* 836 F.2d 1104, 1112 (8th Cir. 1987); *In re Wechsler*, 121 F. Supp. 2d 404, 415 (D. Del. 2000); *Bayoil S.A. v. Polembros Shipping Ltd.*, 196 F.R.D. 479, 482-83 (S.D. Tex. 2000); *McGuire v. Acufex Microsugical, Inc.,* 175 F.R.D. 149, 153, 154 n.5 (D. Mass. 1997); *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 (D. Minn. 1989); *Telectron, Inc. v. Overhead Door Corp.,* 116 F.R.D. 107, 126 (S.D. Fla. 1987). For a more complete discussion of relevant legal precedent, *see* Memorandum in Support of Complaint Counsel's Motion for Default Judgment at 79-108 (December 20, 2002).

**A.   Rambus Planned the Destruction of Large Volumes of
        Documents Pursuant to its Document "Retention" Policy
        While Anticipating and Planning for Litigation.**

Rambus has maintained in this litigation that its document "retention" policy was not

adopted in anticipation of litigation, but rather in good faith. In its post-trial reply brief, for

example, Rambus represented to the Administrative Law Judge (and thus to the Commission)

that "the policy was not developed 'in anticipation of litigation'." Rambus Post-Trial Brief at 9;

see also Rambus's Response to Complaint Counsel's Proposed Finding of Fact 1732 ("as Mr.

Karp testified, Rambus was *not* anticipating litigation at the time") (emphasis in original). The

portion of the Spoliation Documents now available to Complaint Counsel establish that

Rambus's statements are simply not true.

The newly-public documents clearly establish that Rambus was anticipating litigation in

early 1998, at the very time it was first planning to adopt a document retention/destruction

policy. R124470 (February 12, 1998) ("LICENSING/LITIGATION STRATEGY: . . . Royalty

rates will probably push us into litigation quickly. . . . Need to litigate against someone to

establish royalty rate and have court declare patent valid.") (Attachment 3); R124456 (February

23, 1998) at R124457 ("In the event that licensing discussions do not result in resolution, the

following is a litigation strategy for Rambus.") (Attachment 4); R124461 (Presentation to Board

of Directors,[11] March 2, 1998) at R124463 ("If licensing discussions do not result in resolution,

tiered litigation strategy kicks in") (Attachment 5).

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[11]   Although the document does not so indicate on its face, Item 317 on Rambus's Privilege
Log confirms that this document was distributed to the Rambus Board of Directors, apparently
on March 4, 1998, when Joel Karp gave a presentation to the Board regarding "the Company's
strategic licensing and litigation strategy." CX0613 at 2.

Indeed, as early as February 1998, Rambus was not only planning to initiate patent infringement actions, but had retained outside counsel for that purpose, had started "preparing a discovery data base," and was evaluating the possible fora in which to sue its targets. R124456 at R124457, R124458 ("Rambus may be able to obtain an advantage over its competitors by choosing a court such as the eastern district of Virginia, 'the rocket docket', or the ITC.") (Attachment 4); *see also* R124461 (Presentation to Board of Directors, March 2, 1998) ("Option 2: Patent Infringement Suit . . . patent suit can be brought in venue of our choice – ITC – Northern California – Eastern District of Virginia (Rocket Docket)") (Attachment 5).[12]

In other words, in early 1998, at the very time that Rambus was affirmatively collecting documents and "preparing a discovery data base" that it could use offensively against its selected targets in patent infringement litigation (R124456 at R124457, R124458 (Attachment 4)) it was simultaneously planning a policy to destroy large volumes of documents, including documents directly relevant to that same anticipated litigation.[13]

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[12]   During this time period, Rambus still hoped to persuade the industry to adopt RDRAM as the primary future memory architecture. By late 1998, Rambus recognized that, if it sued DRAM manufacturers for patent infringement with respect to SDRAMs and DDR SDRAMs, DRAM manufacturers would be unlikely to work with Rambus to support RDRAM. Thus, Rambus decided "not [to] assert patents" against DRAM manufacturers until they became committed and locked in to launching RDRAM – in Rambus's words, "until ramp reaches a point of no return" – most likely in the first quarter of 2000. R125562 at R125565 (Attachment 6). Rambus thus decided to "Continue in Stealth Mode During '99." *Id*. at R125566. Rambus nevertheless continued to plan for its contemplated patent infringement litigation throughout 1999.

[13]   For a description of Rambus's development of its document retention policy in the first half of 1998, *see* Memorandum in Support of Complaint Counsel's Motion for Default Judgment at 32-44 (December 20, 2002).

**B.   Rambus's Destruction of Documents Was an Integral Part of
its Litigation Strategy.**

The newly available documents also establish beyond any doubt that Rambus adopted its

document retention policy, and destroyed documents pursuant to that policy, as part and parcel

of that litigation strategy. Thus, a document entitled "Cooley, Godward Meeting 2/12/98

Licensing/Litigation Strategy" clearly sets forth Rambus's plan to adopt a document retention

policy and to clean out files in order to "[m]ake ourselves battle ready:"

> – . . . Royalty rates will probably push us into litigation quickly.
>
> – Make ourselves battle ready. . . . Need company policy on
> document retention policy.
>
> – Prosecution files: clean out all attorney notes so that file is same
> as official file.
>
> . . .
>
> Need to litigate against someone to establish royalty rate and have
> court declare patent valid.

R124470 (February 12, 1998) (Attachment 3). A document setting forth Rambus's plans for

initiating patent infringement suits, including evaluation of potential fora and preparation of a

discovery data base, carries the handwritten notation: "Document retention policy – patent

attorney files." R124456 at R124458 (February 23, 1998) (Attachment 4). Among Rambus's

top "IP Litigation Activity" goals for the second quarter of 1998 was to "Propose policy for

document retention," which was marked as "Done." R127174 (Attachment 7). A subsequent

document used to describe and explain Rambus's document retention policy stated:

BEFORE LITIGATION

A Document Retention/Destruction Policy

and

The Eve of Litigation

The Need for an Effective Document Retention Policy

R124521 at R124522, R124553 (July 22, 1998) (Attachment 8). Shortly thereafter, Rambus's

list of goals for "IP Litigation Activity" for the third quarter of 1998 stated, "Implement

document retention action plan," which was also marked "Done." R127166 at 1 (emphasis

added) (Attachment 9). Indeed, contrary to Rambus's claims, Rambus planned its "1999

shredding party" as a specific part of its preparation for litigation:

> 3. Licensing/Litigation Readiness
> . . .
> E. Prepare litigation strategy against 1 of the 3 [DRAM]
> manufacturers . . .
> F. Ready for litigation with 30 days notice
> G. Organize 1999 shredding party at Rambus

RF0584307 at 1 (June 27, 1999) (emphasis added) (Attachment 10).

　　Rambus's litigation and document destruction strategy was endorsed at the very highest

levels of the company. Previously produced materials already establish that CEO Geoff Tate

was directly involved in planning and adopting Rambus's document retention policy. *See*

Memorandum in Support of Complaint Counsel's Motion for Default Judgment at 33-39, 53-54,

60 (December 20, 2002). The newly available documents confirm that Rambus management[14]

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[14]　　It appears that Vice President Joel Karp made the presentation to the Rambus Board of
Directors. *See* CX0613 at 2.

informed the Rambus Board of Directors that the company's litigation strategy included creation

of a document retention policy and "organiz[ing]" the files of Rambus's patent counsel:

> Licensing and Litigation Strategy
>
> Near Term Actions
>
> – Need to create document retention policy
> – Need to prepare discovery database
> – Need to organize prosecuting attorney's files for issued patents

R124461 at R124468 (March 2, 1998) (Attachment 5).

C. The Newly Available Documents Contradict Many of Rambus's Representations Concerning its Document "Retention" Program.

The newly available documents also reveal that specific arguments made by Rambus

throughout this litigation concerning its document "retention" program are highly misleading, if

not flat-out untrue.

Rambus has implied that the purpose of its document policy was not to destroy

documents, but to preserve documents and "look for things to keep." Designation of Record by

Respondent Rambus Inc. Regarding Alleged Spoliation of Evidence (December 22, 2004) at 2-3

(citing CX1264 and quoting Joel Karp: "the idea was not 'destroying,' the idea was, you know,

culling out the things that needed to be kept . . ..").

Of course, some might consider holding three separate company-wide campaigns to

collect tens of thousands of pounds of documents in burlap sacks to be run through industrial-

strength shredders to be somewhat inconsistent with a policy intended to cull and preserve

documents. CX1051 ("Thursday is Shred Day 1998"); CX1052 ("It took about 5 hours to

completely fill the shredding truck (capacity is 20,000 lbs)"); R400785 (August 25, 1999) ("the

shredding company will start collecting bags at 9:00 am tomorrow morning. And don't forget

the shredder party tomorrow at 5:00 pm.") (Attachment 11); R400786 at R400788 (December

28, 2000) (SureShred: "Certificate of Destruction . . . Shred contents of 460 Shred Bags")

(Attachment 12); CX1079 (hoping someone has a DDR datasheet "that hasn't fallen victim to

the document retention policy :-) ").

But the newly available documents expose Rambus's argument as simply untrue. When

Joel Karp instructed outside counsel Lester Vincent to "Clean out all the Rambus files," he was

not concerned about keeping documents, but about causing documents to disappear. R401300 at

1 (Attachment 13); R124470 at 1 (Attachment 3). Indeed, the contrast could not be stronger

between Rambus's looking for documents to keep as part of its own "discovery data base," and

its plans to clean out its attorney's files and implement a "1999 shredding party at Rambus."

R124456 at R124457 (Attachment 4); RF0584307 at 1 (Attachment 10).

In January 2001, Neil Steinberg, Rambus's Vice President of Intellectual Property,

captured the exact purpose of the policy. After seeing Hynix use Rambus's June 1992 draft

Business Plan against Rambus in court,[15] he made clear that the purpose of Rambus's document

retention policy was to destroy precisely this type of document:

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[15]   The June 1992 draft Business Plan stated:

> Finally, we believe that Sync DRAMs infringe on some claims in
> our filed patents; and that there are additional claims we can file
> for our patents that cover features of Sync DRAMs. Then we will
> be in a position to request licensing (fees and royalties) from any
> manufacturer of Sync DRAMs.

CX0543A at 17.

> 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.*

R401340 at 1 (January 12, 2001) (Attachment 15). Fortunately, the June 1992 draft business plan survived. We will never know how many other documents did not.

Indeed, almost all of the Rambus documents central to this case are still in existence today not because Rambus employees sought them out and took affirmative steps to keep them, but because they were filed in unexpected locations where they happened to escape destruction. Most JEDEC-related documents were destroyed; only a handful survived.[16] Rambus's June 1992 draft Business Plan survived through oversight.[17] Richard Crisp's surviving e-mails regarding JEDEC, for example, were widely distributed within Rambus. Yet they were wiped clean from everybody's files at the company. They were not found in any Rambus files, but in a computer

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[16] One of the few surviving JEDEC-related documents from Rambus files is Rambus's copy of the JEDEC 21-I Manual. *See* CX0208A. Although this copy (as produced by Rambus) is not complete, it contains the most important sections, including the statement of the JEDEC disclosure policy:

> The Chairperson of any JEDEC committee, subcommittee or working group must . . . call attention to the obligation of all participants to inform the meeting of any knowledge they may have of any patents, or pending patents, that might be involved in the work they are undertaking.

CX0208A at 19.

[17] *See* R401340 (next time, "the IP group will attempt to execute the [document retention] policy more effectively.") (Attachment 15).

Richard Crisp had at home in his attic.[18] *See* Hearing Transcript at 865-66 (Attachment 1).

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[18]   Rambus has argued that Richard Crisp's e-mails were among the documents that were affirmatively preserved. *In the Matter of Rambus, Inc.*, (Docket No. 9302), Transcript of Oral Argument - Second Session (December 9, 2004) at 160-61. This statement is highly misleading. Rambus took no steps whatsoever to preserve Richard Crisp's e-mails. Rather, the e-mails survived by accident, through no action on Rambus's part, only because Richard Crisp happened to transfer the e-mails from one computer to another, and later found that those e-mails were still saved in a computer in his attic. *See Rambus, Inc. v. Infineon Technologies AG*, Civil Action No. 3:00CV524 (E.D. Va.), Hearing Transcript (March 1, 2005) at 865-66.

The e-mails that survived in Mr. Crisp's attic included a number of e-mails showing that Rambus understood the importance JEDEC and its members attached to patent disclosure, and documenting Richard Crisp's statement intended to assure JEDEC members that Rambus was complying with the disclosure policy:

> CX0711 at 1 (Crisp: "TI was chastized for not informing JEDEC that it had a 1987 patent on quad CAS devices.");
>
> CX0711 at 16 (Crisp: "Micron says the [JEDEC disclosure] policy exists due to anti-trust concerns.");
>
> CX0711 at 187 (Crisp: "Hitachi stated that they have a patent relating to [a newly balloted item at JEDEC]. This created a big ruckus.");
>
> CX0711 at 166, 167 (Crisp: "I reminded them [the JEDEC committee] that we have actually reported a patent to the committee in the past").

The e-mails that disappeared from Rambus's files, but were found in Richard Crisp's attic, also document Rambus's understanding that it had patent applications relevant to on-going JEDEC work and its intent to assert patents against companies practicing the JEDEC standards in the future:

> CX0711 at 36-37 ("JEDEC #3 (NEC PROPOSES PLL ON SDRAM!!! . . . What is the exact status of the patent with the PLL claim?****");
>
> CX0711 at 52, 54 (Crisp: "So in summary, I would say that the STBUS scheme [proposed at JEDEC] . . . may well infringe our patents.");
>
> CX0711 at 56, 58 (Crisp: "Of course they [JEDEC members] may get into patent trouble if they do this [source synchronous clocking]!");
>
> CX0711 at 68, 73 (Crisp: "I think it makes no sense to alert them to a potential [patent]

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Similarly, Rambus wiped out most of Vice President Robert's e-mails from its files and

computers; some of Roberts' e-mails survived only because they happen to have been found on

his home computer. *Id*. at 866. Lester Vincent's surviving handwritten notes were not "cleaned

out" only because they were not filed in the Rambus patent files, but rather for some reason were

located in his personal chronological file.[19] *Id*. at 875-76; *see also* CX3126 at 416-22. Many of

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> problem they can easily work around.");

> CX0711 at 110, 113-14 (Crisp: "It is essential that we be absolutely sure we have the [SyncLink] standard adequately covered by patents. I am more convinced of this than ever.").

[19]   These notes included documents establishing that Lester Vincent warned Rambus of the risk that, if it participated in JEDEC and failed to disclose its patent applications, it could lose the right to enforce its patents pursuant to the doctrine of equitable estoppel. *See, e.g.:*

> CX 1941 at 1 (Vincent: "<u>JEDEC</u> – said need preplanning before accuse others of infringement . . . – Advising <u>JEDEC</u> of patent application") (emphasis in original);

> CX1942 (Vincent: "I said there could be equitable estoppel problem if Rambus creates impression on JEDEC that it would not enforce its patent or patent appln");

> CX1958 at 12 (presentation from Vincent: "Two possible theories for non-enforcement [of a patent involved in an industry standard]: 1) Estoppel? 2) Antitrust?");

> CX1990 (Vincent: "the Federal Trade Commission charged that Dell restricted competition in the personal computer industry and undermined the standard-setting process by threatening to exercise undisclosed patent rights against computer companies adopting the VL-Bus standard.");

> CX1928 (Vincent: "No further participation in any standards body . . . – do not even get <u>close</u>!!") (emphasis in original).

These documents also establish that Richard Crisp and others at Rambus worked closely with Lester Vincent to amend Rambus's pending patent applications in order to cover technologies that Richard Crisp had seen presented at JEDEC. *See, e.g.:*

> CX1946 (Vincent: "Richard Crisp wants to add claims to original application . . . to control latency output timing . . . check whether original application has blocks(?)");

the remaining important e-mails were produced late in the FTC litigation (and not at all in the

Infineon litigation) precisely because they no longer existed in the expected locations; rather,

they were discovered later in a forgotten file on a server.[20] In sum, much of the key evidence in

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> CX1947 (Vincent: "Richard [Crisp] has claims for cases we have filed plus claims for divisionals.");
>
> CX1949 (Vincent: Richard Crisp proposed adding claims covering multibank design and programmable latency "so cause problem with synch DRAM and Ram link," as well as claims covering on-chip PLL);
>
> CX1959: (Ware: claims covering "programmable CAS latency" are "directed against SDRAMs;" claims covering a DRAM with a PLL are "directed against future SDRAMs and RamLink.").

These notes also confirm that Rambus executives at the highest levels were already planning to enforce patents covering technologies that Rambus observed at JEDEC:

> CX1970 (Vincent: "w/ [CFO] Gary Harmon, [CEO] Geoff Tate, [Vice President] Allen Roberts;" "Enforcement – Sink DRAMs . . . Programmable latency – PLLs").

[20]   *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 19 fn. 44. These forgotten documents included a number of e-mails regarding Rambus's understanding of the goals of JEDEC and the risks involved in not disclosing relevant patents and applications:

> CX0903 (Crisp: "Open standards seem at odds with [Rambus's] business model"; "The job of JEDEC is to create standards which steer clear of patents which must be used to be in compliance with the standard whenever possible.");
>
> CX0783 (Crisp: "I certainly do not want to bring this intellectual property issue up without careful consideration. I especially do not want it all over JEDEC.");
>
> CX0837 (Crisp: "regarding Tony's worst case scenario regarding [equitable] estoppel: The only thing lost is the ability to enforce our rights against those that can prove estoppel applies.");
>
> CX0858 (Crisp: "I understand the concerns about the [JEDEC] patent policy and some potential exposure we could have in the event of a future litigation.");
>
> CX0868 (Crisp: "I think we should have a long hard look at our IP and if there is a

this case survived, not because Rambus made any effort to keep it, but rather because it was in

unexpected locations and accidently survived Rambus's document purge.[21] If such a large

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problem, I believe we should tell JEDEC that there is a problem. Other opinions?").

The forgotten e-mails also confirm Rambus's attempts to ensure that they amended their pending patent applications to cover technologies proposed for use at JEDEC:

CX0686 (Crisp e-mail regarding adding claims covering programmable CAS latency and on-chip PLL/DLL);

CX0738 (Dillon: "high harassment value" of adding patent claims covering auto-precharge on SDRAMs);

CX0867 (Tate: "prepare the minefield").

Further, the lost e-mails document Rambus's intention to enforce its patents against companies practicing JEDEC standards, if necessary by suing for patent infringement:

CX0757 (Roberts: "So if we want to fight this one (after the claim [covering PLL on a DRAM] is issued), we better stock up our legal warchest.");

CX0757 (Crisp: "It seems likely we will have to fight litigation at some point in the future [in areas such as on-chip PLL and programmable CAS latency]. . . . I think it is very important to go after one we are certain we can win first.");

CX0763 (Crisp: "I would hope we would sue other companies [for using on-chip PLL]");

CX0835 (Crisp: "Let the IP war begin");

CX1084 ("ddr meaning . . . Doubled DRAM Royalties (for Rambus)").

If Rambus forgot about the existence of such important documents as these, how can it now assure the Commission that no relevant documents were destroyed?

[21]   Indeed, this demonstrates just how close Rambus came to getting away with its scheme. Had Rambus not missed copies of the 1992 Business Plans, the Crisp e-mails, and the Roberts e-mails, there might not have been sufficient evidence to support initiating an FTC case, and there almost certainly would have been insufficient evidence for Judge Payne to pierce Rambus's attorney-client privilege and order production of Lester Vincent's documents. Even with Judge Payne's order, if Lester Vincent had filed his handwritten notes in Rambus-specific files rather than in his general chronological file, they too likely would have disappeared, and there would

volume of highly relevant documents survived only by accident, how many equally relevant documents was Rambus successful in destroying?

Rambus has also implied that it was not concerned with the substance or content of the documents, but simply wanted to reduce the volume of documents to be searched. Designation of Record by Respondent Rambus Inc. Regarding Alleged Spoliation of Evidence (December 22, 2004) at 4 ("As the policy's author, Mr. Karp explained, his concern was not the *content* of the emails but their volume and the time and expense involved in searching them.") (emphasis in original).

Again, the newly available documents demonstrate just how misleading this assertion is. Rambus's "Document Retention/Destruction Policy" focused on e-mails and electronic documents because of their content – "'Candid comments' can have a significant impact on the outcome of a case." R124521 at R124522, R124525, R124526 (Attachment 8). When Neil Steinberg observed Rambus's June 1992 Business Plan being used against Rambus in court, he was upset that it had survived Rambus's "Document Retention/Destruction Policy" – not because of the expense of reviewing it, but because the content was harmful to Rambus in its patent infringement litigation. R401340 at 1 (Attachment 15).

Rambus also quoted the testimony of Joel Karp to imply that, when it instituted its document destruction plan, Rambus was not concerned with litigation in which it would be a

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have been no means of correcting Rambus's false assertions that it never attempted to amend its patents to cover SDRAMs while it was attending JEDEC. *See* Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 54-56. Only because these documents survived were the parties able to continue litigation to the point where Rambus found, and was forced to produce, the later-discovered documents. And yet, despite the accidental survival of these materials, we still don't know what or how many other relevant documents were successfully destroyed and have been lost to us.

party (let alone the instigator). Rather, Rambus suggested, the concern was with the possibility

of having to review documents in response to a subpoena from a third party in litigation to which

Rambus was not a party. Memorandum by Rambus Inc. In Opposition to Complaint Counsel's

Motion for Default Judgment at 8 (January 13, 2003) ("[Joel 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.").

It is now clear that Rambus's use of this testimony was misleading.[22] The newly

available documents establish that Rambus adopted its "Document Retention/Destruction Policy,

" R124521 at R124522 (Attachment 8), as part of its <u>own</u> plans to institute <u>offensive</u> litigation

against its own selected litigation targets. R124470 (February 12, 1998)

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[22]   Throughout this litigation, Rambus has continually hidden behind phrases such as, "there
is no evidence that" or "[a witness] testified that," to advance arguments that were false or
misleading. In its Motion for Summary Judgment, for example, Rambus stated, "there is no
evidence that Rambus was provided with a copy of JEP 21-I [the JEDEC 21-I Manual] while it
was a JEDEC member." Memorandum In Support of Rambus Inc.'s Motion for Summary
Decision at 22 (February 26, 2003). In fact, Rambus knew very well that it had been given a
copy of the 21-I Manual while it was a JEDEC member. Richard Crisp specifically admitted as
much, CX2104 at 852-53, and Rambus produced from its own files the copy of the 21-I Manual
it had been given. CX0208A.

Similarly, Rambus argued that "Complaint Counsel had not met their burden of proving
that Rambus representative Richard Crisp had any 'actual knowledge' of the claims contained in
any of the [relevant] patents or patent applications." Brief of Appellee and Cross-Appellant
Rambus Inc. (June 2, 2004) at 25. This argument is not only a red herring (*see* Reply Brief of
Counsel Supporting the Complaint (July 2, 2004) at 37-40), but also false. Richard Crisp helped
draft the claims of the '651 and '692 applications, and received copies at the time they were
filed. CX1957; CX1961. He demonstrated knowledge of the claims of the '327 patent. CX0899
(depending on how SyncLink uses double edge clocking, "they may get into trouble with our
'327 patent"). He had full access to the files of all patent applications, including the '961 and
'490, and reviewed many of them. CX0798; Tr. 3585-86. The only missing evidence is whether
Richard Crisp received copies of the '961 and '490 applications when they were filed. We will
never know, because copies of the relevant correspondence has never been found – it was
apparently among the material that Lester Vincent cleansed from the files.

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("LICENSING/LITIGATION STRATEGY: . . . Need company policy on document retention

policy. . . . <u>Need to litigate against someone</u> to establish royalty rate and have court declare

patent valid.") (emphasis added) (Attachment 3); R124456 at R124457, R124458 (February 23,

1998) ("In the event that licensing discussions do not result in resolution, the following is a

litigation strategy for Rambus. . . . <u>Rambus may be able to obtain an advantage over its</u>

<u>competitors by choosing a court</u> such as the eastern district of Virginia, 'the rocket docket', or

the ITC."; "Document retention policy – patent attorney files") (emphasis added) (Attachment

4); R124461 (Presentation to Board of Directors, March 2, 1998) at R124463 ("Option 2: Patent

Infringement Suit . . . <u>patent suit can be brought in venue of our choice</u> – ITC – Northern

California – Eastern District of Virginia (Rocket Docket)"), R124468 ("Need to create

document retention policy") (emphasis added) (Attachment 5).[23]

II. The Newly Available Documents Confirm That Rambus's Spoliation of Evidence Was Directed At Material Relevant to This Proceeding.

The newly available documents also shed some (though still grossly insufficient)

additional light on the nature of materials that were destroyed.

A document prepared in July 1998 not only confirms that Rambus's "Document

Retention/Destruction Policy" was specifically tied to anticipated litigation (R124521 at

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[23] Before Judge Payne, Rambus argued that its spoliation of evidence should not result in sanctions because its document destruction was not specific to JEDEC-related documents. Hearing Transcript at 958 (Attachment 1). Rambus's argument was apparently rejected by Judge Payne. This argument, if accepted by the Commission, would mean that a company could destroy documents with impunity – at the very time it is planning to initiate litigation and sue others regarding the very subject matter addressed by those documents – so long as the company also destroyed other categories of documents as well. Indeed, according to Rambus's argument, the more documents a company destroyed in anticipation of litigation, the less likely it would face any form of sanctions. Needless to say, if the Commission were to accept this argument, it would create perverse incentives with potentially harmful consequences in future matters.

R124522 (Attachment 8)), but also highlights the nature of the documents destroyed pursuant to that policy. The document indicates that the policy targeted "Discoverable Documents," including e-mail messages, computer files, corporate databases, back-up tapes, system records and logs, and computers and disks. *Id.* at R124524. In the words of Judge Payne, these are precisely "the kinds of documents usually generated in the course of business that contain information that is useful in ascertaining truth and in testing the validity of positions taken in litigation." Crime-Fraud Opinion at 46. The document confirms that Rambus took "Special Care" with e-mails because they were generally less formal than other written documents and "'candid comments' can have a significant impact on the outcome of a case." R124521 at R124525 (Attachment 8); *see also id.* at R124526 (noting "Horror Stories" where supposedly deleted e-mails were used as evidence against litigants).

Outside patent counsel Lester Vincent's meticulous record-keeping confirms that he cleaned out the files of each of the Rambus patents and patent applications relevant to this matter. Mr. Vincent maintained a detailed spreadsheet, entitled "Rambus (073305) Issued Patent File Clean-Up," to keep track of his file cleansing. This spreadsheet confirms that on May 13, 1999, Mr. Vincent reviewed all his files relating to the '717 patent (including the '651 application[24]) to ensure that the "patent file clean-up" for those files had been completed, and on July 28, 1999, he did the same for the files relating to Rambus's '327 patent (including the

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[24]   *See* DX0014. In May 1993, in response to proposals first made by Richard Crisp, Lester Vincent filed an amendment to the '651 patent application intended to add claims covering use of programmable CAS latency in SDRAMs. *See* CCFF 900-01, 910-20, 928, 932-36, 946-49, 955-58. Rambus later discovered that the claims were not as broad as originally thought.

related '646 application).[25] MEDVA0001028 at MEDVA0001028, MEDVA0001029

(Attachment 14). The spreadsheet further shows that, on June 23, 2000 – after Rambus had

already sued Hitachi for patent infringement and then settled with Hitachi, after Rambus had

issued threat letters to Mitsubishi and Nvidia (CX1109; CX1371), and on the very same day that

Rambus issued threat letters to Infineon and Hynix (CX1127; CX1129) – Mr. Vincent completed

his "clean-up" of his files relating to Rambus's '692 application,[26] its '490 application,[27] and (as

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[25]   In September 1994, as part of the "attempt to work the claims for the MOST/SDRAM
defense," CX0746 at 1, Lester Vincent filed an amendment to Rambus's pending '646 patent
application to add claims covering, *inter alia*, use of dual edged clocking on a DRAM. In April
1996, the '646 issued as the '327 patent. Although Rambus was intending to enforce this patent,
see CX1267, CX0889, the '327 was the only issued patent omitted from the list attached to
Rambus's withdrawal letter to JEDEC. For a description of the development of the '646 and the
'327, see CCFF 987-93, 1004-08, 1069, 1074-77, 1092-95, 1100-14; *see also* CCFF 1199-1237.

       In 1999, Rambus planned to threaten to enforce its '327 patent against manufacturers of
JEDEC-compliant DDR SDRAMs (R127141 at R127142, R127147, R127148 (Attachment 16)),
and in 2000 actually did threaten some companies with the '327 patent. CX1371 at 119, 125.
In its litigation, however, Rambus chose to assert later-issued patents (also claiming priority
back to the same 1990 application) covering dual-edged clocking in JEDEC-compliant DDR
SDRAMs. CCFF 1953-58, 1967-68, 2022; CX1363; CX1371; CX1855; CX1867; CX1880;
CX1891.

[26]   MEDVA0001028 at MEDVA0001029 (P007D and P007DC files) (Attachment 14).

       In June 1993, based on proposals first made by Richard Crisp "directed against future
SDRAMs," CX1959, Lester Vincent filed an amendment to Rambus's pending '692 patent
application to add claims covering use of on-chip PLL. He filed a further amendment in October
1995. *See generally* CCFF 928, 932-36, 939, 946-49, 962-67, 981, 1009-25, 1069, 1074-75; *see
also* CCFF 1183-98. On-chip PLL/DLL was part of Rambus's "Offensive" IP strategy. *See,
e.g.,* CX1267; CX1970; CX0711 at 36, 37; CX0757; CX0763.

       In early 1997, after having left JEDEC, Rambus's '692 application issued as the '481
patent. In 1999, Rambus planned to assert its '481 patent against companies manufacturing
JEDEC-compliant DDR SDRAMs. R127141 at R127142, R127147-48 (Attachment 16). In
2000, Rambus decided instead to assert later-issued patents (that also originated from Rambus's
original '898 application, filed in 1990) that also contained claims covering use of on-chip
PLL/DLL. CCFF 1953-58, 1966, 2022; CX1363; CX1371; CX1855; CX1867; CX1880;

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best we can determine from Mr. Vincent's table) its '961 application.[28]

Lester Vincent has previously confirmed that he deleted from his files all drafts of the patent amendments, notes of meetings and telephone conversations, notes of other lawyers, letters, faxes and e-mails to and from Rambus, informal patent drawings, and audiotapes of inventor interviews. CX3129 (Vincent, Dep.) at 530-33; CX3126 (Vincent, Dep.) at 425-26. We can now confirm that this also applied to the files of the patent applications at issue in this matter. Indeed, Mr. Vincent destroyed documents from the files of the specific patent applications that Rambus was seeking to amend in order to cover on-going JEDEC work. Thus, we now know that any information in the files of the '327 patent, the '646 application, the '692 application, the '961 application or the '490 application showing the relationship between those

CX1891.

[27]   MEDVA0001028 at MEDVA0001029 (P010DC files) (Attachment 14).

[28]   Listing number 35 on Lester Vincent's spreadsheet is illegible. MEDVA0001028 at 0001029 (Attachment 14). It appears that this listing is for Mr. Vincent's P010D files, which corresponded to Rambus's '961 application. *See* DX0014.

In May 1994 (one year after Lester Vincent filed the amendment of Rambus's '651 patent application), Vice President Roberts told Mr. Vincent that Rambus wanted to "re-assess the strength" of certain of its pending claims, including those relating to CAS latency. CX0734. The results of this internal review are not known. In January 1995, however, Lester Vincent added claims to Rambus's pending '961 application covering use of programmable CAS latency and burst length in SDRAMs. *See* CCFF 987-93, 1028; *see also* CCFF 1125-63. In June 1995, Mr. Vincent added claims to Rambus's pending '490 application covering use of programmable CAS latency in SDRAMs. CCFF 1049, 1164-82.

Rambus abandoned both the '961 and '490 applications. After it withdrew from JEDEC, however, Rambus obtained patents based on its original 1990 application that covered use of programmable CAS latency and burst length in SDRAMs and DDR SDRAMs. CCFF 1650-67. One such patent was Rambus's '580 patent, which Rambus planned to enforce against manufacturers of JEDEC-compliant SDRAMs and DDR SDRAMs. R127141 at R127142 (Attachment 16).

applications and on-going JEDEC work, the origin of the claims language (including whether the

claims were based on JEDEC work), and the scope of coverage of the claims in those

applications, was destroyed.[29]

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[29] Fortunately, Mr. Vincent did not destroy the contents of his general files. Thus, we still have his notes of at least some of his conversations with Rambus regarding general topics, such as JEDEC, disclosure of its patent applications, and equitable estoppel, as well as his notes of early meetings with Richard Crisp and others to discuss multiple technologies to be added to Rambus's pending patent claims. *See supra* footnote 17. It appears, however, that once a particular technology was designated for embodiment in a specific patent application, any further information regarding the development or scope of coverage of the specific claims was destroyed during Mr. Vincent's cleansing of his files.

Because of Mr. Vincent's cleansing of his files (at Rambus's instruction), a number of questions remain unanswered. For example, at his September 1992 meeting with Lester Vincent, Richard Crisp told Mr. Vincent that he would get Mr. Vincent copies of the "Ramlink spec & synch DRAM spec." CX1949 at 4. A portion of an IEEE document was found in Mr. Vincent's files, but no JEDEC documents ever emerged. What JEDEC documents, if any, did Mr Crisp provide to Mr. Vincent? In which file did Mr. Vincent place them? How did Mr. Vincent use them?

Similarly, little is known about the '961 and '490 applications. What was the result of Mr. Vincent's assessment of the strength of the '651 application following Vice President Roberts' May 1994 e-mail? Who at Rambus worked with Lester Vincent on the claims for the '961 and '490 applications? Did Mr. Vincent perform an analysis to ensure that (unlike the '651) they covered JEDEC-compliant SDRAMs?

With respect to the '646 application and the '327 patent, did Mr. Vincent conduct any analysis of the scope of coverage of the claims in October 1995 when Rambus learned that the patent would issue? What advice did Mr. Vincent give Rambus regarding the enforcement readiness of the '327 patent? We may never know the answers.

III.   The Relevance of the Newly Available Spoliation Materials to the Substantive Issues in this Case.

The newly available documents also contradict a number of Rambus's arguments on the merits. As merely one example, today Rambus argues at length that its '327 patent, its '646 application (which issued as the '327 patent) and its '692 application (which issued as the '481 patent) did not cover the on-going work of JEDEC or the resulting standards.[30] The Spoliation Documents establish that Rambus's self-serving argument is simply not correct. Rambus based its litigation strategy on the fact that the '327 patent and the '481 patent do cover the JEDEC standards. In sharp contrast to its convoluted arguments today, Rambus set forth its strategy in simple, straightforward terms in a 1999 document entitled "Nuclear Winter Scenario:"

> – '327 – covers DDR (dual edged clocking)
> – '481 – covers DDR (PLL circuitry)
> – '580[31] – covers DDR and [SDRAM] (access time register)

R127141 at R127142 (Attachment 16). Rambus even planned to send out threat letters to members of the industry stating:

> It is our view that [Semiconductor Memory Manufacturer]'s Synchronous memory devices (e.g., all densities, configurations and speeds of SDRAMs, SGRAMs, SSRAMs, DDR SDRAMs, DDR SGRAMs, DDR SSRAMs, and SLDRAMs) and products incorporating such devices, infringe one or more claims of the '327, '481 and/or '580 patents.

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[30]   This argument is, of course, irrelevant. *See* CCFF 800-866.

[31]   The '580 was a later-issued patent that claimed priority back to Rambus's original 1990 patent application and contained claims covering programmable access time, also known as programmable CAS latency. CCFF 1650-61.

Id. at R127148.[32]

Another newly available document contradicts Rambus's assertion that "switching from one type of DRAM to another is relatively simple." Rambus Answering Brief at 75-76. This document confirms that Rambus chose to delay its patent infringement actions because it knew that the industry faces great difficulty in switching from one type of DRAM to another. In 1998, Rambus recognized that an infringement action would likely cause the industry to drop any support for Rambus's RDRAM product. So rather than sue immediately, Rambus made the strategic decision that it "should not assert patents against [RDRAM] partners until [the] ramp reaches a point of no return." R125562 at R125565 (Attachment 6). After the "point of no return," the industry would be locked in to that particular architecture; thereafter, Rambus could sue industry members for patent infringement without concern that they would, or could, abandon RDRAMs. This "point of no return," or lock-in, is precisely the same phenomenon that Rambus exploited with respect to SDRAMs and DDR SDRAMs.

CONCLUSION

As set forth in Complaint Counsel's Appeals Brief, Reply Brief, and Proposed Findings of Fact, the Commission has before it ample evidence in the record to determine that the elements of the Commission's Complaint are met and Rambus committed a violation of Section

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[32] Rambus has also asserted that it paid no attention to JEDEC standards, but considered solely whether individual products infringed its patents. This has already been disproved elsewhere. CCFF 800-821, 834, 854-57. But the Spoliation Documents provide additional confirmation that Rambus's assertion was simply untrue – Rambus did consider JEDEC standards and believed that the JEDEC standards, if implemented, would necessarily result in products that would infringe its patents. R120292 (IP Update, January 18, 2000) at R120298 ("Terms & Conditions – SDR/DDR License . . . ALL synchronous memory products having an interface which is compatible with JEDEC [SDRAM] and DDR SDRAM specifications") (Attachment 17).

5 of the FTC Act. Indeed, Complaint Counsel hope that, despite Rambus's spoliation of evidence, the Commission will reach and decide the merits of this matter.

But Complaint Counsel also urge the Commission not to lose sight of Rambus's intentional campaign of destruction of evidence relevant to this and other related litigation. The subset of the Spoliation Documents recently obtained by Complaint Counsel confirm the intent of Rambus to purposefully destroy documents as part of its plan to litigate against users of the JEDEC standards, and elucidate (to some additional degree) the character of the documents destroyed. They demonstrate that many of the representations made by Rambus in the course of the investigation and litigation of this case have been, at best, misleading. Complaint Counsel respectfully renew our request that the Commission compel Rambus to produce the remaining Spoliation Documents, and reopen the record in this case to admit all Spoliation Documents used by Rambus or Infineon in open court and now in the possession of Complaint Counsel (including those documents attached hereto), as well as all additional Spoliation Documents yet to be produced by Rambus.

Respectfully submitted,

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Geoffrey D. Oliver
Patrick J. Roach

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20008
(202) 326-2275
Counsel for the Complaint

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