

PUBLIC

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

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

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**RAMBUS'S AMENDED PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW IN RESPONSE TO
THE COMMISSION'S JULY 20, 2005 ORDER**

I. INTRODUCTION

Pursuant to the Commission's July 20, 2005 and August 4, 2005 Orders, respondent Rambus Inc. ("Rambus") respectfully submits its enclosed amended proposed findings of fact and conclusions of law relating to the supplemental evidence admitted into evidence as a result of the Commission's July 20, 2005 Order.

Rambus's proposed findings and conclusions are intended to supplement and amplify the following:

- (1) Rambus's Responses to Complaint Counsel's Proposed Findings of Fact ("RRFF"), filed on or about September 29, 2003, at RRFF 1718-1758;
- (2) Rambus's opening brief on appeal, filed on June 4, 2004, at pp. 35-36;
- (3) the findings and conclusions by Chief Judge McGuire at ¶¶ 983-1009 and pp. 243-245 of the Initial Decision; and
- (4) such other proposed findings, portions of the Initial Decision, or other matters as may be specifically referenced herein.

II. RAMBUS'S AMENDED PROPOSED FINDINGS OF FACT¹

A. Rambus Adopted A Document Retention Policy Based On The Advice Of Counsel.

1619. In January 1998, Rambus began to meet with attorneys at the law firm of Cooley Godward to discuss issues relating to patent licensing. At their first meeting on February 12, 2004, Cooley Godward partner Dan Johnson advised Rambus to adopt a document retention policy; RX 2521 (DTX 9023) at 11:24-12:1 (Johnson 11/23/04 *Infineon* Dep.) ("So I can—I can tell you that at the first meeting, I advised Mr. Karp that Rambus needed a document retention policy"); RX 2500 (DTX 3681) at 1 (Mr. Karp's notes from February 12, 1998 meeting

¹ Rambus had previously submitted Proposed Findings of Fact ¶¶ 1-1618. For the convenience of the Commission and the parties, Rambus will commence these amended proposed findings at ¶ 1619.

with lawyers from Cooley Godward) (“need company policy on document retention policy”); CX 5069 (DTX 9009) at 376:4-23 (Karp 10/8/04 *Infineon* Dep.) (“the outside counsel was suggesting [a document retention policy] from the very first time I met with them”).

1620. Mr. Johnson is a highly accomplished and respected member of the legal community. RX 2522; RX 2523 (PTX 9525) at 196:7-197:16 (Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson also has extensive knowledge about the legal requirements for document retention policies. He has advised between 20 and 30 companies about such policies and has lectured about document retention policies and electronic discovery at ABA and PLI seminars. *Id.* at 204:1-7; RX 2521 (DTX 9023) at 35:13-15 (Johnson 11/23/04 *Infineon* Dep.).

1621. Mr. Johnson testified that when he first met with Mr. Karp, he determined that Rambus “had no practice or policies that related to the gathering of documents, and storing these documents, and getting rid of documents that were simply accumulating over time.” RX 2521 (DTX 9023) at 34:9-17 (Johnson 11/23/04 *Infineon* Dep.). Johnson advised Karp that Rambus needed to address this situation by instituting a document retention policy. *Id.*

1622. Mr. Johnson testified that he advised Rambus to adopt a document retention policy for three principal reasons. First, Rambus needed to reduce paper document search costs in the event that Rambus was someday required to respond to subpoenas or document requests that might possibly be issued in connection with future lawsuits or investigations, including those in which Rambus was not a party. RX 2521 (DTX 9023) at 34:8-37:7 (Johnson 11/23/04 *Infineon* Dep.). Second, Mr. Johnson advised Rambus to adopt a document retention policy to reduce search costs for electronic documents in the same situation, particularly in light of the problems that arise from having to search obsolete or corrupted back-up media. *Id.* Third, Mr. Johnson felt it would be useful for Rambus to have a company-wide standard for the retention and destruction of documents, because the absence of such a standard might be cited by a future litigant as evidence of spoliation. RX 2522; RX 2523 (PTX 9525) at 219:23-220:18 (Johnson 11/23/04 *Infineon* Dep.).

B. The Specific Terms Of Rambus's Policy Were Recommended By Counsel.

1623. In March 1998, one of Mr. Johnson's partners at Cooley Godward, Diane Savage, forwarded to Mr. Karp a detailed memorandum on the subject of document retention policies. RX 2502 (DTX 3676) (March 19, 1998 Memorandum Re: Document Retention Policy Guidance); CX 5068 (DTX 9008) at 25:1-33:8 (Savage 10/12/04 *Infineon* Dep.).

1624. Mr. Karp drafted Rambus's document retention policy based upon Ms. Savage's legal memorandum, incorporating much of the Cooley Godward language *verbatim*. Compare RX 2502 (DTX 3676) (March 19, 1998 Memorandum re: Document Retention Policies Guidance) with RX 2503 (DTX 4028) (Rambus's Document Retention Policy); CX 5069 (DTX 9009) at 422:4-18 (Karp 10/8/04 *Infineon* Dep.) ("I created [the policy] and pretty much word-for-word from what's in [the legal memorandum]").

1625. With respect to electronic mail and documents, Cooley Godward advised Rambus to "remove email from the system servers on a periodic basis" and that "tape back ups of email should be destroyed on a periodic basis." RX 2502 (DTX 3676) at 7 (March 19, 1998 Memorandum re: Document Retention Policy Guidance). The Cooley Godward lawyers also advised Rambus that "the Company and individual employees should be discouraged from archiving email," and counsel recommended that "E-mail that needs to be saved should be either: (a) printed in hard copy and kept in the appropriate file, or downloaded to a computer file and kept electronically or on disk as a separate file." *Id.*

1626. Rambus adopted its outside counsel's advice on these issues. The Rambus policy provided with respect to "Electronic Mail and Documents" that: "Rambus maintains complete system tape back-ups for a period of 3 months. Employees should not utilize email as a place to save documents beyond 3 months. Email that is required to be saved more than 3 months can be kept either in paper or a separate file on you hard drive." RX 2503 (DTX 4028) at 1 (Rambus's Document Retention Policy).

1627. With respect to contracts, the Cooley Godward lawyers advised that "Final, execution copies of all contracts entered into by the Company should be kept by the

Company. 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.” RX 2502 (DTX 3676) at 6 (March 19, 1998 Memorandum re: Document Retention Policy Guidance).

1628. Once again, Rambus’s policy closely tracks the advice it had received from its outside counsel. The Rambus policy provides: “Final, execution copies of all contracts entered into by Rambus are kept for at least 5 years after expiration of the agreement, and longer in the case of publicly filed contracts. All drafts. . . should be destroyed or systematically discarded.” RX 2503 (DTX 4028) at 2 (Rambus’s Document Retention Policy).

1629. The Cooley Godward lawyers also addressed Rambus’s “Development Documents and Trade Secrets” and advised that “Laboratory and development documents are often subject to intellectual property protection in their final form (*e.g.*, patents and copyrights). . . . The Company should keep all laboratory and development notebooks. . . . The Company should keep all documents designated as containing trade secret information for at least the life of the trade secret.” RX 2502 (DTX 3676) at 6 (March 19, 1998 Memorandum re: Document Retention Policy Guidance).

1630. As it had done with the other categories of documents, Rambus’s policy closely tracked its counsel’s suggestions with respect to lab notebooks and similar documents. The Rambus policy provides that “Engineering and development documents are often subject to intellectual property protection in their final form (*e.g.* patents, copyrights, trade secrets, proprietary information). The documents, notebooks, computer files, etc., relating to patent disclosures and proof of invention dates are of great value to Rambus and should be kept permanently.” RX 2503 (DTX 4028) at 1 (Rambus’s Document Retention Policy).

1631. As to press releases and public filings such as 10-K’s, the Cooley Godward lawyers recommended that Rambus “retain permanent copies of all press releases and publicly filed documents” but that “[a]ll drafts of publicly disseminated documents should be

destroyed upon publication of the document.” RX 2502 (DTX 3676) at 4 (March 19, 1998 Memorandum re: Document Retention Policy Guidance).

1632. Once again, Rambus followed its counsel’s advice, and its policy provides that “Rambus retains permanent copies of all press releases and publicly filed documents. All drafts of public documents should be destroyed upon publication of the documents.” RX 2503 (DTX 4028) at 1 (Rambus’s Document Retention Policy).

C. Rambus’s Document Retention Policy Is A Content-Neutral Retention Policy Common To Many Companies.

1633. The terms of Rambus’s two page document retention policy, based on the terms recommended by counsel, refer only to categories of documents and are content neutral. RX 2503 (DTX 4028) at 1-2. The policy contains no directive to discard documents relating to specific companies or to certain subjects. The policy does not “target” for destruction, for example, JEDEC or JEDEC-related documents. *Id.*

1634. The memorandum sent to Rambus by Cooley Godward was based on a form memorandum drafted by the law firm for its clients. CX 5068 (DTX 9008) at 27:1-5. (Savage 10/12/04 Infineon Dep.). Mr. Johnson testified that he had advised 20 to 30 clients on the same standard policies. RX 2522; RX 2523 (PTX 9525) at 204:1-7 (Johnson 11/23/04 Infineon Dep.); *see also id.* at 159:8-9 (“we gave them the traditional standard advice”).

1635. Rambus employees testified that Rambus’s policy was consistent with policies they had seen or been subject to at other companies. *E.g.*, RX 2548; RX 2549 (PTX 9523) at 20:2-8 (Larsen 5/18/04 Infineon Dep.); RX 2540; RX 2541 (PTX 9517) at 361:18-363:6 (Steinberg 10/6/04 Infineon Dep.); RX 2528; RX 2529 (PTX 9509) 578:13-17 (Diepenbrock 10/11/04 Infineon Dep.) (“It looked like the document retention policy that Mr. Karp established was consistent with other policies I had seen in place at another company, and it seemed like [this] was something in the normal course of business.”).

D. Rambus's Outside Counsel Assisted In And Approved The Presentation Of The Document Retention Policy To Rambus Employees.

1636. The Cooley Godward firm did not simply recommend specific policy language to Rambus. The firm also advised Rambus how to implement the policy. RX 2522; RX 2523 (PTX 9525) at 71:8-25 (Johnson 11/23/04 *Infineon* Dep.).

1637. Mr. Johnson advised Rambus that: (1) it should "have a program where they communicated to all their managers the scope of the policy"; (2) it needed to have someone "who would be responsible for the policy, because engineers are typically a very independent bunch"; and (3) it should "clearly identify" for employees those categories of documents that "should and should not" be kept. *Id.*

1638. Rambus's outside counsel also gave on-site assistance in the initial steps of the policy's implementation. On July 22, 1998, Mr. Johnson made a presentation to Rambus's managers regarding the need for, and parameters of, the new document retention policy. RX 2504 (DTX 3686) (Johnson's slide presentation to Rambus managers regarding the document retention policy).

1639. At the managers meeting, Mr. Johnson presented an "overview" of the policy, emphasizing its "goals and objectives." RX 2521 (DTX 9023) at 171:16-172:16 (Johnson 11/23/04 *Infineon* Dep.).

1640. As part of his presentation, Mr. Johnson specifically warned Rambus managers that destroying relevant documents once litigation commenced would be improper. RX 2504 (DTX 3686) at R124523, 124527-28, 124545-49; RX 2522; RX 2523 (PTX 9525) at 216:24-217:6 (Johnson 11/23/04 *Infineon* Dep.); RX 2524, RX 2525 (PTX 9503) at 275:15-22 (Barth 2/26/04 *Infineon* Dep.).

1641. In explaining the document retention policy to Rambus managers, Mr. Johnson recounted what he referred to as a "horror story" of a client that had incurred \$100,000 in expenses searching corrupted and obsolete backup tapes in response to a subpoena, as well as other e-mail discovery "horror stories." RX 2522; RX 2523 (PTX 9525) at 220:25-

222:3 (Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson testified that he had used his “horror stories” in similar circumstances and on continuing education panels regarding document retention issues. *Id.*

1642. Mr. Johnson gave careful attention in his presentation to issues relating to emails in order to emphasize to Rambus employees that emails and electronic documents should be treated in the same way as paper documents. RX 2504 (DTX 3686) at 124525-6, 124550; RX 2522; RX 2523 (PTX 9525) at 171:5-8 (Johnson 11/23/04 *Infineon* Dep.) (“if you don’t call out e-mail, most people don’t think of it as a document, or they didn’t in those days. So you needed to call e-mail out so that they understood”). Mr. Johnson explained that “the problem that you’re trying to avoid is having to search tons and tons of irrelevant data to try to find something that might be germane.” RX 2522; RX 2523 (PTX 9525) at 186:11-187:13 (Johnson 11/23/04 *Infineon* Dep.).

1643. In addition to Mr. Johnson’s slides, Mr. Karp prepared slides for presentation to Rambus employees that were based on the document retention policy and the Cooley Godward memorandum. CX 5069 (DTX 9009) at 471:22-472:8 (Karp 10/8/04 *Infineon* Dep.). These slides were reviewed and approved by Mr. Johnson. RX 2522; RX 2523 (PTX 9525) at 165:23-166:14 (Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson suggested, for example, that Mr. Karp add to his slide presentation the statement that “Elimination of email is an integral part of document control.” RX 2524; RX 2525 (PTX 9503) at 170:8-171:8 (Johnson 11/23/04 *Infineon* Dep.). He also suggested, consistent with his focus on email “horror stories,” that Mr. Karp add the line “email is discoverable in litigation or pursuant to subpoena.” *Id.*

1644. Moreover, the slides that Mr. Karp prepared for Mr. Johnson’s review repeatedly directed Rambus employees to “look for things to keep.” RX 2505 (DTX 4024) (Document retention policy presentation slides). Mr. Johnson testified that when he saw that directive on Mr. Karp’s slides, he told Mr. Karp that the result would be “the retention of more documents than [Rambus employees] were otherwise required to keep.” RX 2522; RX 2523 (PTX 9525) at 163:10-15 (Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson testified that:

“when you tell folks to look for things to keep, they’re going to keep more stuff than they might otherwise.

So in effect what he had done was that he had gotten a document retention program and essentially undercut it. And I said okay. You know, they were so concerned about throwing something out erroneously, that he put in the language about “Look for things to keep,” and I said okay, what that’s going to mean is you’re going to have a very narrow policy here.”

Id. at 159:15-23.

1645. In and after July, 1998, Mr. Karp introduced the document retention policy to numerous employees within Rambus, using the overhead slides that had been reviewed and approved by Mr. Johnson. CX 5069 (DTX 9009) at 466:21-467:25 (Karp 10/8/04 *Infineon* Dep.). Employees were told that Rambus was concerned about the expense of conducting a search for documents and data and that a properly implemented document retention policy could reduce the expenditure of both time and money if a search needed to be done. RX 2524; RX 2525 (PTX 9503) at 257:19-258:11 (Barth 2/26/04 *Infineon* Dep.) (“the intent was. . . we had a tremendous amount of material. . . if we were to get in litigation, we would end up having our engineers spending most of their time sorting through all that stuff. And so we needed to get rid of things that were not useful. . . . Not useful, in general. Just reduce the mess of junk that was laying around, so we wouldn’t have to sort through it.”); *id.* at 304:2-6 (“our intent was to reduce the volume of documents so we didn’t waste engineering time”); RX 2528; RX 2529 (PTX 9509) at 539:23-540:11 (Diepenbrock 10/11/04 *Infineon* Dep.) (testifying to discussion “with regard to the expense of producing e-mails if litigation were to take place. I think that was mentioned.”).

E. **Rambus Employees Followed The Content Neutral Guidelines Of The Document Retention Policy.**

1646. On September 3 and 4, 1998, Rambus employees participated in a company wide housecleaning, more colloquially referred to as a “shred day.” See CX 5071 (DTX 9017) at 42:21-47:6 (Kaufman 5/18/04 *Infineon* Dep.); RX 2534; RX 2535 (PTX 9514) at 392:8-394:23 (Roberts 10/14/04 *Infineon* Dep.). Employees were instructed to follow the document retention policy guidelines to determine what to keep and what to throw away. *Id.* Employees were given burlap sacks for material that needed shredding. *Id.* The burlap sacks were then taken to a shredding truck in the parking lot of the company and their contents destroyed. *Id.* At the close of business on September 3, 1998, Rambus served pizza and beer to its employees. CX 5071 (DTX 9017) at 46:13-47:6.

1647. A year later, on August 26, 1999, Rambus had another housekeeping event or “shred day” similar to the first. At the end of the day, Rambus again served refreshments to employees. CX 5071 (DTX 9017) at 88:25-90:14 (Kaufman 5/18/04 *Infineon* Dep.).

1648. Rambus’s use of burlap bags and shredders during the housekeeping days is unremarkable. Because Rambus’s work involves research and development, and because its documents often include confidential information that is proprietary to Rambus or obtained from third parties under NDA’s, there is nothing unusual about shredding; shredders are a widely used and appropriate method of destroying confidential material. See RX 2534; RX 2535 (PTX 9514) at 393:2-20 (Roberts 10/14/04 *Infineon* Dep.). As a regular practice even before the shred day, employees had a box in their office area for confidential documents that needed to be shredded instead of put in the trash can, and a truck came once a week to pick up the documents for shredding. RX 2534; RX 2535 (PTX 9514) at 393:3-303:11, 398:22-399:4 (Roberts 10/14/04 *Infineon* Dep.). Rambus managers were also aware that an individual had regularly been seen going through Rambus’s trash receptacles, and they wanted to avoid the possibility of confidential documents being found by such individuals. RX 2534; RX 2535 (PTX 9514) at 393:12-20 (Roberts 10/14/04 *Infineon* Dep.).

1649. The social events at the end of the “shred days” were also unexceptional; Rambus and many other high-technology companies routinely sponsored such events for their employees. RX 2534; RX 2535 (PTX 9514) at 401:8-17 (Roberts 10/14/04 *Infineon* Dep.).

1650. The record contains no evidence of the “normal” or “expected” volume of materials that a company of Rambus’s size and longevity would have produced and/or routinely discarded. In particular, there is no fact or expert testimony in the record about the disposal habits of other similarly situated engineering or high-tech firms. The use of shredders is, in fact, common in governmental agencies and in corporate America. *See, e.g.*, Pennington, “Appetite for Destruction,” *Cincinnati Enquirer* (June 30, 2005), p. 1D (available on LEXIS/NEXIS).

1651. The evidence in the record shows that because Rambus had not previously had similar events, employees used the “shred day” to clean out a variety of bulky material – such as old telephone books – that had accumulated over eight years of the company’s existence. CX 5069 (DTX 9009) at 510:8-16 (Karp 10/8/04 *Infineon* Dep.) (“I wouldn’t necessarily characterize it as documents . . . because I know there was just all sorts of stuff. You know, loose leaf binders and mostly lots of printouts of computer runs, stacks and stacks and stacks. I would say that was probably the bulk of it, and phone books that went back eight years.”); RX 2550; RX 2551 (PTX 9524) at 117:14-118:13 (Stark 5/28/04 *Infineon* Dep.) (“three-ring binders” and “stacks of magazines and photocopies of articles”); RX 2546; RX 2547 (PTX 9522) at 45:10-19 (Kaufman 5/18/04 *Infineon* Dep.) (“I actually used it sort of like a trash bag, so I had empty manila folders, various documents. Even just sort of personal things that I had on my desk that I didn’t need anymore”). There is thus no evidentiary basis for a finding that the “shred days” resulted in the destruction of an unusual amount of material.

1652. The evidence presented at trial establishes that Rambus employees followed the guidelines of the policy adopted on the advice of counsel in determining what documents to keep and what to throw away during the 1998 and 1999 shred days (and on a day to day basis). RX 2524; RX 2525 (PTX 9503) at 258:12-259:25, 276:17-24, 301:14-302:23 (Barth, 2/26/04 *Infineon* Dep.); RX 2534; RX 2535 (PTX 9514) at 392:3-397:14 (Roberts

10/14/04 Dep.); RX 2536; RX 2537 (PTX 9515) at 97:4-98:24 (Hampel 5/28/04 *Infineon* Dep.); RX 2546; RX 2547 (PTX 9522) at 85:7-12 (Kaufman 5/18/04 *Infineon* Dep.); CX 2082 at 841:16-18 (Crisp 4/13/01 *Infineon* Dep.) (“I definitely made an attempt to go through my files and look for things to keep as [Karp] had directed us to do.”).

F. The Document Retention Policy Did Not Target “Harmful” Documents.

1. Rambus’s Handling Of Email Under The Document Retention Policy Was Appropriate.

1653. At the advice of counsel, Rambus told its employees to identify important emails to keep, save them in hard copy or a separate electronic file, and delete the remainder. RX 2505 (DTX 4024) (Karp slides); RX 2503 (DTX 4028) (document retention policy); RX 2502 (DTX 3676) (Memorandum re: Document Retention Policy Guidance); RX 2516; RX 2517 (PTX 9526) at 343:8-348:17 (Karp 8/7/01 *Micron* Dep.). These instructions were content neutral and were to be applied to any email on any topic. *Id.*

1654. Consistent with the advice of its counsel, Rambus also instituted a policy of overwriting its back up tapes every three months. CX 5018 (DTX 3697) at 1. When this occurred, Rambus employees were reminded to make sure they took steps to archive important e-mails because they could not depend on the company back up tapes for that purpose. *See id.* (e-mail from Mr. Karp and copied to counsel informing employees “you can no longer depend on the full system backups for archival purposes. Any valuable data, engineering or otherwise, must be archived separately”). Rambus specifically consulted with counsel when it made this change and took actions based upon and consistent with that advice. *Id.*; RX 2522; RX 2523 (PTX 9525) at 185:12-188:25 (Johnson 11/23/04 *Infineon* Dep.).

1655. Mr. Johnson explained this advice in his deposition testimony:

“The problem with it was twofold. One, as I said, with the changing in the technology, even if it took the snapshot every two years, you were still going to be back in the same morass of potentially

corrupted data. It made more sense to make sure you just deleted stuff that was trash and kept the stuff that was, in fact, important. Because otherwise, you got corrupted data, you've got irreconcilable conflicts between systems that would be used to search the data, and you hadn't done anything, other than written down the way in which you were going to hold irrelevancies.

“So what I told them was, if you do that, don't have a document retention program because all you've done is created the same problems that you were trying to avoid. And with the problem that you're trying to avoid is having to search tons and tons of irrelevant data to try to find something that might be germane. And over time the costs would go up dramatically.

“So that is – that's – that has happened enough – it happened to enough clients so if you say it enough, people start to figure it out.

“The first time they get a bill when someone says \$150,000 because we can't – you've got this corrupted data, and the general counsel gets his head chewed off from the chairman, or the CEO, then they want a document retention program.

“So you tell them in advance, do it this way. You're going to be better off long term.”

RX 2522; RX 2523 (PTX 9525) at 186:11-187:13 (Johnson 11/23/04 *Infineon Dep.*).

1656. Rambus's decision to recycle full system back up tapes every three months as recommended by counsel is a standard practice utilized in many companies.

RX 2522; RX 2523 (PTX 9525) at 187:14-188:21 (Johnson 11/23/04 *Infineon Dep.*).

1657. While Rambus did institute an established policy for recycling back up tapes, Rambus did *not* implement a program of automatically deleting all emails after three months. RX 2534; RX 2535 (PTX 9514) at 427:7-428:7 (Roberts 10/14/04 *Infineon* Dep.).

2. Rambus’s Document Retention Policy Did Not Target Internal JEDEC-Related Documents For Destruction.

1658. The supplemental evidence does not show that JEDEC documents were targeted for destruction by Rambus in any way. There is no testimony or document suggesting that the document retention policy had anything to do with JEDEC or was ever linked to JEDEC documents in any manner. Not a single email or other Rambus document admitted into this record mentions Rambus’s participation in JEDEC in connection with the formation or implementation of the document retention policy.

1659. The supplemental evidence does not support an inference that Rambus implemented its document retention program in an effort to cover up some purported impropriety in connection with its attendance at JEDEC meetings.

3. Rambus’s Treatment Of Its Patent Prosecution Files Followed The Advice Of Counsel And Is Standard Practice.

1660. Mr. Johnson advised Mr. Karp at the February 12, 1998 meeting that Rambus should clean out its patent prosecution files so the files are the “same as official file.” RX 2521 (DTX 9023) at 33:13-21 (Johnson 11/23/04 *Infineon* Dep.); RX 2500 (DTX 3681) (notes from Feb. 12, 1998 meeting between Mr. Karp and Cooley, Godward).

1661. The trial record shows that the standard practice for maintenance of patent prosecution files is to conform the files for issued patents to the PTO file. Mr. Johnson described this policy as “standard operating procedure.” RX 2521 (DTX 9023) at 182:3-8 (Johnson 11/23/04 *Infineon* Dep.). Rambus’s former patent counsel, Mr. Vincent, testified that Rambus’s direction to clean out its patent files was the “accepted norm.” RX 2532; RX 2533 (PTX 9511) at 106:13-20 (Vincent 10/15/04 *Infineon* Dep.). Peter Leal, an attorney specializing in licensing who participated in meetings with Rambus regarding its licensing strategy, testified that he

“typically advise[d] a client” to follow this procedure. RX 2544; RX 2545 (PTX 9519) at 47:2-13 (Leal 10/13/04 *Infineon* Dep.). He also testified that this was the practice at IBM when he worked there. *Id.* at 47:17-48:1 (“[t]hat’s the way we did it back at IBM.”). Rambus’s former in-house patent counsel, Anthony Diepenbrock, testified that, based upon his experience as a patent attorney, it is the “standard policy” for maintaining patent files. RX 2528; RX 2529 (PTX 9509) at 575:23-576:22 (Diepenbrock 10/11/04 *Infineon* Dep.).

a. **Mr. Karp’s direction to Mr. Vincent regarding the cleaning of his files was content neutral and completely consistent with Mr. Johnson’s advice and the standard practice.**

1662. Mr. Vincent’s cleaning of Rambus’s patent files did not destroy relevant documents. Pursuant to his understanding of the “accepted norm,” Mr. Vincent retained all communications with the PTO, all materials related to conception and reduction to practice of the invention, correspondence related to maintenance fees, notes of any teleconferences with the patent examiner, and any prior art. RX 2532; RX 2533 (PTX 9511) at 104:21-106:20, 181:18-21 (Vincent 10/15/04 *Infineon* Dep.).

1663. Moreover, Mr. Vincent cleaned only the patent files and not his general files relating to his work for Rambus; no documents in his Rambus general files were destroyed. Materials relating to JEDEC and Mr. Vincent’s advice to Rambus regarding equitable estoppel were not specific to the prosecution of any particular patent application and, therefore, were kept in Mr. Vincent’s general files and produced. *Id.* See RX 2530; RX 2531 (PTX 9510) at 530:13-17; DTX 4264 (Mr. Vincent’s spreadsheet showing files cleaned); CX 5072 (DTX 9018) at 54:19-57:21 (Vincent 11/30/04 *Infineon* Dep.).

1664. Mr. Vincent’s cleaning of the files in July 2000 had no impact on the documents produced in this litigation. Copies of the files cleaned by Mr. Vincent in July 2000 had already been provided to Rambus and its litigation counsel in connection with the *Hitachi* litigation in January 2000. RX 2530; RX 2531 (PTX 9510) at 543:8-12 (Vincent 10/9/01 *Micron*

Dep.); RX 2508 (DTX 3791), Feb. 1, 2000 Letter from Lester Vincent to Neil Steinberg at BSTZ 00060 (enclosing copies of patent files).

b. Mr. Diepenbrock's maintenance of Rambus's internal patent files was appropriate.

1665. While at Rambus, Mr. Diepenbrock also followed the accepted practice of cleaning patent files once patents had issued. Mr. Diepenbrock does not recall Mr. Karp instructing him to do so; he was simply following the “understanding” that “depending on the status of the file, if the file went to issuance or was abandoned, that, you know, the file should be looked at, and certain things kept in the files and other things, notes and mental impressions taken out of the files.” RX 2528; RX 2529 (PTX 9509) at 573:23-577:10 (Diepenbrock 10/11/04 *Infineon Dep.*).

1666. Mr. Diepenbrock understood that it was “standard policy” that notes and mental impressions should be removed from the file “because it was not a part of the record.” *Id.* at 576. Mr. Diepenbrock testified that cleaning the files of issued patents in this way “seemed like that was the right thing to do” because such notes did not seem like “relevant information” once the patent had issued. *Id.* at 577.

4. Relevant Patent-Related Documents Were Maintained.

1667. The supplemental evidence does not show that Rambus targeted or destroyed prior art pursuant to its document retention policy. Every witness that testified on the matter confirmed that they had retained prior art and that they did not destroy it in implementing the policy. *See, e.g.*, RX 2524; RX 2525 (PTX 9503) at 276:17-24 (Barth 2/26/04 *Infineon Dep.*); CX 5073 (DTX 9019) at 181:18-21 (Vincent 10/15/04 *Infineon Dep.*).

1668. The supplemental evidence also does not show that infringement analyses or reverse engineering documents were targeted or destroyed as a result of Rambus's document retention policy. The evidence established that Rambus conducted infringement analyses for the patents in suit after they issued in the 1999 and 2000 time frame, and that these documents were

maintained under the document retention policy and produced to Infineon. RX 2540; RX 2541 (PTX 9517) at 364:20-373:25 (Steinberg 10/6/04 *Infineon* Dep.).

1669. At the February 2005 *Infineon* trial, Infineon's counsel, Gregory Arovas, confirmed in his testimony that he had reviewed Rambus's document production in this case and had found approximately a dozen infringement analysis from the 1999-2000 time frame. CX 5079 Trial Tr. at 527:10-536:7 (Arovas). He acknowledged that Rambus had produced an infringement analysis or claim chart for many of the major DRAM manufacturers during that period. *Id.* Rambus's counsel, Sean Cunningham, confirmed these same facts in his own testimony. CX 5078 Trial Tr. at 305:12-314:17 (Cunningham).

1670. Throughout this action, Complaint Counsel have *presumed* for purposes of this proceeding that the Rambus patents in question were both valid and infringed. Any destruction of patent-related documents would therefore be highly unlikely to have affected counsel's ability to present relevant arguments and evidence at trial.

G. Rambus Instituted A Litigation Hold As Soon As Litigation Was Reasonably Foreseeable.

1671. Litigation "is an ever-present possibility in American life." *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992) (holding that for Rule 26 purposes, there is a difference between having the "general possibility of litigation" in mind and "anticipating" litigation).

1672. The supplemental evidence shows an awareness on the part of Joel Karp as early as the fall of 1997 that *if* some of Rambus's patent applications ripened into patents, and *if* the claims of those patents covered SDRAM or DDR SDRAM devices, and *if* licensing negotiations fell apart, there was "a *chance* of litigation." RX 2516; RX 2517 (PTX 9526) at 339:18-23 (Karp 8/7/01 Dep.) (emphasis added). This awareness of a "general possibility" is not the equivalent of "anticipating" litigation.

1673. The evidence also shows that Rambus executives were well aware in the late 1990's that before any assertion of patent rights could be made, the devices in question

would have to be analyzed to determine if they infringed whatever claims might be issued by the PTO. *See, e.g.*, CX 919 (2/10/97 Tate email noting that “with so little hard data and no silicon there are no patents that we can definitely say are infringed.”); *id.* (same email showing Mr. Tate’s instruction to “wait on taking action til we see silicon. . . .’); CX 5005 (DTX 3678) at 2 (2/98 “proposed strategy” reviewed at meeting with Cooley Godward, stating that “[o]nce on the market, Rambus will purchase the competing product” before “determin[ing] what its next steps will be.”). It is undisputed that the convergence of “hard data,” “silicon” and issued Rambus patents covering the accused devices did not occur until late 1999.

1674. The evidence also shows that Rambus’s principal focus in 1998 and 1999 was the successful market introduction of the RDRAM device, and that it was therefore *not* interested in that time period in asserting any patent rights against DRAM manufacturers. RX 2542; RX 2543 (PTX 9518) at 32:19-21; 33:3-18; 33:21-34:8; 34:13-20 (Mooring 10/14/04 *Infineon* Dep.). The evidence also shows that Rambus wanted first and foremost to *license* its patents rather than incur the risk and expense of litigation. *See, e.g.*, CX 960 at 1 (10/1/97 Tate e-mail stating that Mr. Karp’s “role is to prepare and then to negotiate to license our patents”). *See also* CX 5074 (DTX 9021) at 292:20-293:07 (Steinberg 10/6/04 *Infineon* Dep.) (“No, we were not contemplating litigation. In fact, we were trying to avoid litigation we wanted to identify prospective licensees that avoided that.”).

1675. The patents that Rambus has asserted against DRAM manufacturers did not issue until June 22, 1999. RX 1472 at 1 (U.S. Patent No. 5,915,105). The record shows that Rambus did not anticipate litigation until the end of 1999, when Rambus’s efforts to license its recently issued patents to Hitachi broke down. CX 5074 (DTX 9021) at 208:07-209:08 (Steinberg 10/6/04 *Infineon* Dep.) (“it was in the December time frame that I began to understand that the negotiation with Hitachi might end up as an enforcement proceeding in a federal district court.”)

1676. Rambus did not retain litigation counsel for the *Hitachi* matter until December 1999. CX 5074 (DTX 9021) at 210:04-15 (Steinberg 10/6/04 *Infineon* Dep.);

RX 2522; RX 2523 (PTX 9525) at 135:12-14; 135:19-136:3; 137:16-19 (Johnson 11/23/04 *Infineon Dep.*). It is objectively unreasonable to conclude that a company is “anticipating” litigation before it has retained litigation counsel, particularly in lawsuits of the magnitude involved here.

H. Once Litigation Against Hitachi Was Probable, Rambus Put In Place A Reasonable “Litigation Hold” To Preserve Potentially Relevant Documents.

1677. As noted above, the initial company-wide presentation of Rambus’s document retention policy had included an explicit instruction that “[o]nce litigation has commenced, a party cannot destroy either relevant evidence or discoverable information.” RX 2504 (DTX 3686) at 8 (Mr. Johnson’s document retention policy presentation slides). The presentation warned of the severe consequences that might result “[i]f relevant evidence is destroyed” after litigation has commenced: “the party may be liable for sanctions, up to and including default judgment.” *Id.*

1678. Rambus’s employees got the message and understood that if litigation occurred, they were “not allowed” to destroy relevant documents because it was “outside the rules.” RX 2524; RX 2525 (PTX 9503) at 275:18-22 (Barth 2/26/04 *Infineon Dep.*).

1679. The record shows that prior to filing suit against Hitachi in early 2000, Rambus and its counsel reinforced these messages by instructing employees with potentially relevant documents to preserve those documents. Mr. Steinberg testified that in or around December 1999, he and Mr. Karp identified “those folks that would have documents that were likely to be relevant in any litigation” and told them to retain all relevant documents and not destroy them. RX 2540; RX 2541 (PTX 9517) at 346:18-348:20; 348:23 (Steinberg 10/6/04 *Infineon Dep.*); RX 2538; RX 2539 (PTX 9516) at 95:2-8 (Steinberg 8/1/01 *Infineon Dep.*).

1680. Lawyers from the Gray, Cary firm, after the firm was retained in connection with the Hitachi litigation, also instructed dozens of Rambus employees that they needed “to preserve all documents that would be relevant to the litigation.” CX 5078 Trial Tr. at 302:14-305:11 (Cunningham). Rambus employee Craig Hampel, among others, testified that he

was told “in late 99 or early 2000” that because of the “Hitachi lawsuit or potential for a lawsuit,” he should not destroy such relevant documents as “exchanges with DRAM partners [and] competitive analysis.” RX 2536; RX 2537 (PTX 9515) at 93:13-17; 93:19-94:1; 96:12-24.

1681. Additional evidence that Rambus employees understood the need to preserve – and produce – relevant documents can be found in the decision by Richard Crisp to search the contents of an old hard drive that was stored in his attic at home. FTC Trial Tr. at 3573:10-3574:11 (Crisp); CX 5075 (DTX 9022) at 296:18-20; 296:23; 302:22-303:5 (Crisp 10/16/04 *Infineon* Dep.). At the time that Mr. Crisp located numerous JEDEC and SyncLink-related emails on that old hard drive, no one else knew of their existence. Mr. Crisp copied the emails onto a diskette and provided them to Mr. Steinberg, who provided them to outside counsel. *Id.*; RX 2541; RX 2542 (PTX 9517) at 356:24-357:24 (Steinberg 10/6/04 *Infineon* Dep.).

1682. Contemporaneous written evidence confirms the understanding of Rambus employees that relevant documents, including evidence relating to JEDEC, needed to be preserved after litigation had commenced. In an email sent on January 5, 2001 that described a letter from the Federal Trade Commission asking Rambus to preserve relevant documents, Geoff Tate wrote that “since antitrust/jedec is an issue in our active court cases we should not be destroying any relevant documents anyways *so this shouldn't be a change in situation.*” RX 2506 (DTX 3708) at 1 (emphasis added).

I. Nothing In The Supplemental Evidence Alters Judge McGuire's Findings That Complaint Counsel Failed To Meet Their Burden Of Proof On Numerous Essential Elements Of Their Claims.

1683. None of the supplemental evidence affects in any way Judge McGuire's findings that Complaint Counsel failed to meet their burden of proof on numerous essential elements of their claims, including findings regarding the scope of the JEDEC patent policy, the claims contained in the patents and patent applications filed by Rambus, the reasonableness of

Rambus's royalty rates and the question of whether DRAM manufacturers are "locked in" to using technologies covered by Rambus's patents, as illustrated below.

1684. Nothing in the supplemental evidence could have any effect, for example, on Judge McGuire's finding that JEDEC members were not required to disclose patent applications or an intention to file or amend patent applications. Initial Decision, ¶¶ 772-774 and pp. 269-270. This finding was largely based on "clear and unambiguous official statements of policy" from JEDEC's files and on Judge McGuire's determination that "after-the-fact testimony of interested witnesses" was not credible. *Id.*

1685. None of the supplemental evidence affects in any way Judge McGuire's finding that "the disclosure of intellectual property interests [by JEDEC members] was encouraged and voluntary, not required or mandatory." Initial Decision, p. 265. This finding was largely based on "the manuals which discuss the patent policy, a March 1994 memorandum by JEDEC's secretary, the EIA's comments to the FTC in connection with the *Dell* consent decree, JEDEC's internal memoranda, the ANSI patent policy guidelines, the actions of other JEDEC members in not disclosing patents and JEDEC's reaction thereto, the ballot for voting on technology, and the patent tracking list," which are all "evidence that disclosure of intellectual property under the EIA/JEDEC patent policy was not mandatory." *Id.*

1686. None of the supplemental evidence affects in any way Judge McGuire's finding that intellectual property disclosures by JEDEC members were "not expected until formal balloting" and his finding that "many of the presentations relied upon by Complaint Counsel never were balloted at JEDEC. . . ." Initial Decision, pp. 273-274. These findings were largely based on JEDEC's own official minutes and the testimony of JEDEC Council Chairman Gordon Kelley. *Id.*, ¶¶ 783-785 and pp. 273-274.

1687. Nothing in the supplemental evidence affects in any way Judge McGuire's determination that Complaint Counsel had failed to demonstrate that amendments to broaden the claims contained in patent applications were improper, either under patent law or EIA/JEDEC rules. *Id.*, p. 331.

1688. Nothing in the supplemental evidence affects in any way Judge McGuire's finding that JEDEC standardization is neither necessary nor sufficient to ensure that a technology or feature achieves marketplace success. *Id.*, ¶¶ 1037-1048 and pp. 302-303.

1689. Nothing in the supplemental evidence affects in any way Judge McGuire's determination that the technologies covered by Rambus's patents were at all relevant times superior to the alternatives proposed by Complaint Counsel. *Id.*, ¶¶ 1128-1402.

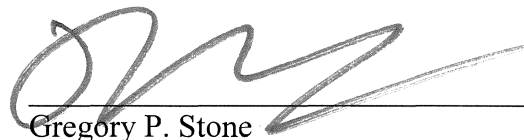
1690. Nothing in the supplemental evidence affects in any way Judge McGuire's finding that Complaint Counsel had not shown the existence of commercially viable, non-infringing alternatives to the technologies covered by Rambus patents. *Id.* and pp. 312-318.

1691. Nothing in the supplemental evidence affects in any way Judge McGuire's finding that Complaint Counsel had not shown that DRAM manufacturers were presently "locked in" to the use of the Rambus technologies. *Id.*, ¶¶ 1582-1664 and pp. 326-328.

1692. In sum, Rambus's allegedly improper document destruction did not affect and could not have affected Complaint Counsel's ability to meet its burden of proof on numerous essential elements of their claims. The Initial Decision was entirely correct in its holding that "the process here has not been prejudiced" by Rambus's alleged destruction of documents. *Id.*, p. 244.

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Respectfully submitted,



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

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

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

CERTIFICATE OF SERVICE

I, Helena T. Doerr, hereby certify that on August 10, 2005, I caused a true and correct copy of *Rambus's Amended Proposed Findings Of Fact And Conclusions Of Law In Response To The Commission's July 20, 2005 Order* to be served on the following persons by hand delivery:

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