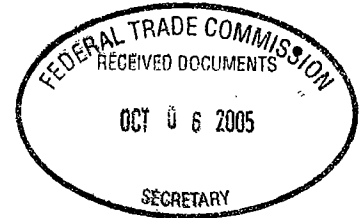


**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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



In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

PUBLIC VERSION

**COMPLAINT COUNSEL'S MOTION TO REOPEN THE RECORD
TO ADMIT DOCUMENTS FROM RAMBUS'S
NEWLY-FOUND BACK-UP TAPES
PERTAINING TO RAMBUS'S SPOILIATION OF EVIDENCE**

"[T]he record demonstrates that all pertinent and relevant materials were retained by Rambus and, if relevant to the issues raised in this litigation, produced."

Post-Trial Reply Brief of Respondent Rambus Inc. at 8 (Sept. 29, 2003).

Documents from Rambus's recently discovered back-up tapes (the "Backup Tape Documents"), obtained by Complaint Counsel for the first time between June and September 2005, demonstrate that this statement of Rambus, like so many others made during the course of this case, is simply not true. As set forth in Complaint Counsel's Proposed Supplemental Findings of Fact 134-144 and 167 (filed August 10, 2005), specific documents from among the

Backup Tape Documents produced to Complaint Counsel confirm that materials directly relevant to central issues in this case were not retained, but were purged from Rambus's business files and never produced in this litigation. Rambus objected to these specific Proposed Supplemental Findings of Fact on the ground that the cited documents, which came from Rambus's recently discovered back-up tapes of its own computer servers and were attached to previous filings with the Commission, had not been designated as exhibits and therefore were not part of the record in this case.¹

In order to resolve Rambus's objection, Complaint Counsel hereby move to reopen the record to incorporate as exhibits the nine documents cited in support of Complaint Counsel's Proposed Supplemental Findings of Fact 134-144 and 167.² Complaint Counsel also move the admission of a eight additional Backup Tape Documents that were not yet identified on August 10 when Complaint Counsel filed their Proposed Supplemental Findings of Fact.³ In addition, Complaint Counsel propose admission of the privilege log provided by Rambus listing Backup Tape Documents withheld from production under claim of privilege. The offered documents,

¹ See Responses by Respondent Rambus Inc. to Complaint Counsel's Supplemental Proposed Findings of Fact and Conclusions of Law 134-144, 167 (Aug. 17, 2005).

² These nine documents from Rambus's back-up tapes were attached to Complaint Counsel's Petition to Modify the Schedule (July 28, 2005). Rambus has already had full opportunity to respond to Complaint Counsel's assertions regarding those documents. See Responses by Respondent Rambus Inc. to Complaint Counsel's Supplemental Proposed Findings of Fact and Conclusions of Law 134-144, 167 (Aug. 17, 2005).

³ Pursuant to the Commission's Order of August 4, 2005, which denied Complaint Counsel's request to postpone the scheduled filing date, Complaint Counsel filed Proposed Findings relating to the Rambus spoliation of evidence on August 10, 2005. The Rambus rolling submission of documents from the backup tapes had not been completed at that time, and in fact continued into September 2005. It appears that Rambus has now completed its voluntary rolling submission, though no written confirmation of this has been received by Complaint Counsel.

marked as proposed exhibits CX5100-5117, are being filed under separate cover.

This filing is intended to complete the record with respect to Rambus's spoliation of evidence, based on Complaint Counsel's review of the materials we have received. Complaint Counsel wish to emphasize that the record already contains ample evidence establishing that Rambus violated Section 5 of the FTC Act, and more than sufficient evidence to establish that Rambus engaged in bad-faith spoliation of evidence. However, the attached small sample from the Backup Tape Documents serves to confirm concretely that, because of Rambus's spoliation of evidence, Complaint Counsel and the ALJs in the proceedings below were deprived of the use of documents that are on their face highly relevant to the issues in this case.

Admission of these Backup Tape Documents as exhibits would assist the Commission in its consideration of possible sanctions for Rambus's spoliation of evidence, and would not delay resolution of this case. Because this case has been pending for over 14 months since the close of briefing, Complaint Counsel have included only a small number of the relevant Backup Tape Documents. Because these documents are offered in support of Complaint Counsel's Supplemental Proposed Findings of Fact 134-144 and 167, to which Rambus has already replied, Complaint Counsel believe that this motion would not require the parties to file further proposed findings of fact.

I. Background

The Backup Tape Documents are the second of two sets of materials relating to Rambus's spoliation of evidence that have come to light since oral argument was heard by the Commission in this case in December 2004.

The first set of materials were records of the hearing in the *Infineon* case concerning

Rambus's spoliation of evidence.⁴ After correspondence and filings by Complaint Counsel and Rambus, the Commission by its Order of May 13, 2005, reopened the record in this case to admit documents from the record of the evidentiary hearing conducted in the *Infineon* case in March 2005 concerning Rambus evidence spoliation. Pursuant to the Commission's Order, Complaint Counsel and Rambus designated specific materials from the *Infineon* hearing record, which were admitted by the Commission by Order dated July 20, 2005. On August 10 and 17, pursuant to the Commission's schedule, Complaint Counsel and Rambus each submitted briefing, proposed findings and replies addressing questions raised by the *Infineon* case materials. On August 10, Complaint Counsel also filed a Motion for Sanctions against Rambus for evidence spoliation.

The Backup Tape Documents are a second set of materials that came to light in the course of discovery in a different private litigation,⁵ involving the assertion of Rambus patent claims against the DRAM producer Hynix Semiconductor, Inc., and defenses based in part on Rambus's conduct in the JEDEC process. In March and April 2005, Rambus found approximately 1,400 back-up tapes and other removable electronic media.⁶ Apparently over 1200 of these backup

⁴ *Rambus Inc. v. Infineon Technologies AG*, Civil Action No. 3:00cv524 (E.D. Va.). This case involved, *inter alia*, patent infringement claims against Infineon with respect to production of JEDEC-compliant DRAM devices and counterclaims against Rambus for common law fraud and monopolization because of conduct within JEDEC.

⁵ *Hynix Semiconductor Inc. v. Rambus Inc.*, Dkt. No. CV 00-20905 RMW (N. Cal.).

⁶ Rambus initially discovered a number of these back-up devices while searching for responsive documents during the discovery period in the FTC case, but failed to review their contents. See Rambus, Inc.'s Verified Statement Re: Discovery of Backup Tapes (April 27, 2005) at 2-4 (Attachment A).

tapes and electronic media are blank, having been wiped clean in July 1998.⁷ However, some of the readable back-up tapes and electronic media contain copies of relevant documents that had disappeared from Rambus's business files and servers, and a significant number of these documents had not been produced to Hynix in that litigation or to Complaint Counsel in connection with the present litigation.⁸

Rambus undertook to provide Hynix with documents from a limited subset of the newly unearthed backup tapes and electronic media. The Backup Tape Documents were produced in large part from a series of back-up tapes that purport to contain a back-up of some part of Rambus's computer system. Rambus has characterized these as "a reasonably complete backup of the Rambus servers as of May 19, 1996," although it acknowledges that one of the set (Tape 9 of 20) is missing.⁹ Rambus agreed to provide Complaint Counsel with copies of the same

⁷ See Supplemental Case Management Statement of Rambus Inc., *Hynix Semiconductor Inc. v. Rambus Inc.* (May 20, 2005) (Attachment B) at 4 ("1,077 pieces of media have been determined to be blank, bad media (which means no data can be read from the media), or cleaning cartridges."); Order Granting Rambus's Motion to Compel Discovery Regarding Hynix's Backup Tapes, *Hynix Semiconductor Inc. v. Rambus Inc.* (Special Master Ambler, Aug. 23, 2005) (Attachment C) at 3 ("over 1,200 of the tapes recently disclosed by Rambus were wiped clean in July 1998").

⁸ See Letter from Gregory P. Stone to The Honorable Ronald M. Whyte (April 4, 2005) (Attachment D) at 2 ("some of the data from some of these tapes constitutes text files . . . that might be responsive to Hynix's discovery requests."); Supplemental Case Management Statement of Rambus Inc., *Hynix Semiconductor Inc. v. Rambus Inc.* (May 20, 2005) (Attachment B) at 11 (Rambus "began producing documents from those tapes [to Hynix] on April 15, 2005.").

⁹ Supplemental Case Management Statement of Rambus Inc., *Hynix Semiconductor Inc. v. Rambus Inc.* (May 20, 2005) (Attachment B) at 11 .

Backup Tape Documents that it provided Hynix.¹⁰ Rambus, however, withheld from production to Hynix and Complaint Counsel a number of responsive documents under claim of privilege, as set forth on privilege logs provided to both Hynix and Complaint Counsel.¹¹ Among the Backup Tape Documents withheld from production were documents that were marked by Rambus as falling within a category of materials as to which Rambus, during the pendency of this case before the ALJ below, had emphatically waived any privilege claims.¹²

Rambus began a rolling production of the Backup Tape Documents to Complaint Counsel in June 2005. Although Rambus at one point estimated that the production would be

¹⁰ See Letter from Geoffrey D. Oliver to Gregory F. Stone (June 6, 2005) (Attachment E).

¹¹ These privilege logs are proposed CX 5117.

¹² The Rambus privilege log indicates that it has withheld documents that, had they been found in Rambus's business files during pre-trial discovery, would have been produced to Infineon pursuant to Judge Payne's crime-fraud discovery order. See CX5117 at 5 fn *. During the pre-trial phase of this Part III litigation, Rambus specifically waived any claim of privilege as to this category of documents:

“[Rambus has] decided not to assert privilege in this proceeding as to the documents subject to the prior discovery order entered by Judge Payne in the Infineon litigation. . . . [W]e do not contend that documents or testimony regarding conduct or communications during the time period '91 through June of '96 that were covered by Judge Payne's ruling that the privilege was vitiated are privileged.”

See Declaration of Gregory P. Stone Supporting Memorandum by Rambus Inc. In Opposition to Complaint Counsel's Motion to Compel Discovery Relating to Subject Matters as to which Rambus's Privilege Claims Were Invalidated on Crime-Fraud Grounds and Subsequently Waived (Jan. 20, 2003) (Attachment F) at ¶ 3, 4. Despite Rambus's explicit waiver of privilege, it now refuses to produce Backup Tape Documents from the identical time period relating to the identical subject matter – documents that Rambus itself admits would have been produced to Complaint Counsel had they been found in Rambus's business files during the course of discovery below.

substantially completed by late July, Complaint Counsel continued to receive responsive materials until early September. Approximately twenty boxes of paper copies of Backup Tape Documents have been received and reviewed by Complaint Counsel. The seventeen documents that are the subject of this motion are a small subset of the much larger number of previously unseen Backup Tape Documents now reviewed by Complaint Counsel that on their face appear to be relevant to issues in the current proceeding.

There can be no illusion that the limited number of documents offered by this motion, or the boxes of Backup Tape Documents thus far made available for review by Complaint Counsel, constitute all of the relevant materials destroyed by Rambus during its document purges. The vast majority of the backup tapes and electronic media discovered by Rambus have been erased or are unreadable. No backup of Rambus's computer servers could be expected to capture the files existing on free-standing computer hard-drives not connected to its server system, or hard copies of documents from the files of Rambus's outside patent counsel or from the Rambus business files that were shredded in the sessions organized by Rambus in 1998, 1999 and 2000.

Nonetheless, the offered documents confirm in a very concrete way that a substantial number of relevant documents existed on the Rambus computer servers as of May 1996 that were later purged from Rambus's business records. There can be no doubt that the efforts of Rambus to purge its files meant that the documents were not available for discovery either in Rambus's first patent infringement suits or in the Commission's proceeding. The Backup Tape Documents confirm that the materials destroyed by Rambus included precisely those documents that Complaint Counsel would need to litigate this case fully and the Commission would rely on to render a complete and accurate decision. Rambus's assertion to Judge McGuire below that "that

all pertinent and relevant materials were retained by Rambus and, if relevant to the issues raised in this litigation, produced”¹³ could not be further from the truth.

II. Argument

The Commission is authorized to reopen the record at any time. 16 C.F.R. § 3.71.

Reopening the record to receive supplemental evidence is appropriate if: (1) the moving party can demonstrate due diligence; (2) the proffered evidence is probative; (3) the proffered evidence is not cumulative; and (4) the non-moving party would not be prejudiced. *In re Brake Guard Products Inc.*, 125 F.T.C. 138, 248 n.38 (1998) *citing Chrysler Corp. v. FTC*, 561 F.2d 357, 361-63 (D.C. Cir. 1977) (affirming the admission of new evidence by the Commission). Those criteria are satisfied here.

A. Complaint Counsel Acted with Due Diligence.

Complaint Counsel have acted diligently to pursue relevant documents from Rambus throughout the investigation and litigation of this case. An investigative subpoena was issued by Complaint Counsel on a date that we now know was just two weeks after the last and largest of Rambus’s three organized document destruction sessions in 2000. Complaint Counsel repeated certain of its document requests in discovery requests during the Part III litigation. Indeed, the issue of spoliation of evidence by Rambus has been a central issue pursued by Complaint Counsel since the inception of this litigation.¹⁴

Consistent with this history, Complaint Counsel acted promptly to seek production of the

¹³ Post-Trial Reply Brief of Respondent Rambus Inc. (Sept. 29, 2003) at 8.

¹⁴ See Complaint ¶ 121 (June 17, 2002); Complaint Counsel’s Motion for Default Judgment Relating to Respondent Rambus Inc.’s Willful, Bad-faith Destruction of Material Evidence (Dec. 20, 2002).

backup tapes once we learned that Rambus had discovered their existence. As described above, in response to Complaint Counsel's inquiries concerning events in the Hynix litigation, Rambus produced such documents to Complaint Counsel from June 2005 to September 2005. Complaint Counsel filed this motion promptly after completing review of the submission.

B. The Offered Documents Are Probative.

The documents offered for admission to the record pursuant to this motion support Complaint Counsel's pending Motion for Sanctions Due to Rambus's Spoliation of Evidence, filed August 10, 2005 ("Sanctions Motion").

As discussed in the Sanctions Motion at 13-17, courts have found bad faith document destruction when firms, in anticipation of litigation, selectively preserve documents favorable to them, but allow other relevant evidence to be destroyed pursuant to established document retention programs. See *Stevenson v. Union Pac.R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004); *E*Trade Securities v. Deutsche Bank AG*, 2005 U.S. Dist Lexis 3021 at *14 (D.Minn 2005). To establish an appropriate sanction for spoliation, the degree of relevance of the destroyed evidence must be considered. *Kronish v. United States*, 150 F.3d 112, 127 (2d Cir. 1998). When it is difficult to identify a particular relevant document or documents because voluminous files that might contain that evidence have all been destroyed, "the prejudiced party may be permitted an inference in his favor so long as he has produced some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files." *Kronish*, 150 F.3d at 128.

The circumstances surrounding Rambus's wholesale destruction efforts in themselves plainly warrant an inference that the destruction reached evidence pertinent to the issues in this

case. *See* Sanctions Motion at 17-30. But documents that are the subject of this motion go beyond general circumstances and provide concrete evidence that there were particular relevant documents that did not survive in Rambus's business files after the document destruction efforts. The offered documents show that, prior to the Rambus document destruction, the Rambus computer servers contained specific documents relating to important aspects of this case.

For example, the Backup Tape Documents confirm explicitly that [

] Newly-discovered documents throw a completely new light on a Rambus Board of Directors meeting on June 25, 1992 at which CEO Geoff Tate led a discussion of the 5-year business plan. The business plan, already part of the record, contains the statement:

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

CX0543A at 17. The newly unearthed [

document appears to be the []¹⁵ Another new
outlines [], which

¹⁵ *See* CX5103 at 1 (“[

]”).

] ¹⁶ These documents go beyond the previously admitted Board minutes (CX0604) and provide the strongest evidence yet that, at this June 1992 meeting, [

]

Other of the Backup Tape Documents provide further illumination about Rambus's pattern of conduct:

- Rambus's CEO Geoffrey Tate [] ¹⁷
- [] ¹⁸
- Richard Crisp []

¹⁶ See CX5102 at 8 (“[

].

In June 1992 David Mooring was Vice President of Marketing and Sales.

¹⁷ See, e.g., CX5104 (Tate: “[]”); see also CX5106 (Tate: “[]”); CX5110 (Tate: “[

]”); CX5112 (Barth: “[]”).

¹⁸ CX5108 ([]); CX5109 at 4 (Dillon: []).

]¹⁹

- Richard Crisp informed CEO Tate, Vice President Roberts and others that “[
- As of March 1993 (before JEDEC published its 21-I Manual), engineer Billy Garrett [

]²¹

- Richard Crisp understood that [

]²²

- Richard Crisp understood that [

]²³

¹⁹ See, e.g., CX5114 (Toprani: []); see also CX5115 at 1 (Tate []); CX5116 at 2 (Toprani: []). The slides apparently prepared [] have never been identified.

²⁰ See, e.g., CX5105 (Crisp: []).

²¹ See, e.g., CX5107 (Garrett: []).

²² CX5113 (Crisp: []).

²³ See, e.g., CX5108 (Crisp: []).

- As early as the [] Rambus officers and management []²⁴

The Backup Tape Documents confirm the direct involvement in these issues of Rambus's highest-level officers and directors, including CEO Tate, Vice President Mooring, Vice President Roberts, founders and Board members Farnwald and Horowitz, and JEDEC representatives Crisp and Garrett.

The purpose of this motion is not to add to the record every relevant document found by Complaint Counsel in the Backup Tape Documents produced by Rambus, but rather simply to demonstrate concretely that there were relevant documents that did not survive the Rambus purges of its business files. These illustrative examples are only a few of the Backup Tape Documents that on their face are relevant to issues in this case, including not only Rambus's conduct but other issues as well.

C. The Offered Documents Are Not Cumulative.

The documents offered by this motion are not cumulative, either with respect to the focused question concerning document spoliation for which they are offered, or with respect to the substantive issues in this case to which they are relevant.

As discussed above, Complaint Counsel move the admission of these Backup Tape Documents for purposes of demonstrating concrete examples of documents relevant to issues in

²⁴ See, e.g., CX5100 (Tate: []); CX5101 (Tate: []); CX5111 (Barth: []).

this case that were in existence at the time the backup tapes were made, but that did not survive the repeated and extensive purges of its business files undertaken by Rambus in anticipation of its patent infringement efforts. The Backup Tape Documents are not cumulative on the issue of spoliation of evidence. These documents go beyond the documents from the *Infineon* case hearing record admitted by the Commission on July 21, which examined in detail the nature and purpose of the Rambus document destruction efforts. The Backup Tape Documents offered for admission pre-date the *Infineon* case documents and are concrete examples of particular relevant documents, created contemporaneously with and as part of Rambus's course of conduct involving JEDEC, that did not survive the efforts of Rambus to purge its business files.

The offered exhibits are exactly the kind of documents that, had they been available during the investigation, discovery and trial of this case before the ALJ, would have been part of the search for truth that is integral to a Commission administrative adjudication. Indeed, Judge McGuire expressly based his decision in part on his assessment of the issue of possible document destruction by Rambus, and specifically on his conclusion that "there is no indication that any documents, relevant and material to the disposition of the issues in this case, were destroyed."²⁵ By concretely demonstrating the existence of relevant and material documents that did not

²⁵ Initial Decision at 244:

[T]he document destruction issue in this case . . . does not warrant the Court's continued attention. Rambus's conduct in this regard is, at best, troublesome. In a different cause of action, the Court might well have sanctioned Rambus for having deprived Complaint Counsel of their ability to present the merits of the case However, the process has not been prejudiced as there is no indication that any documents, relevant and material to the disposition of the issues in this case, were destroyed.

survive the Rambus purges of its business files, they do not cumulate but directly contradict an express basis of Judge McGuire's adverse ruling on the merits.

Neither can the proposed exhibits properly be considered cumulative with respect to the substantive issues in the case to which they are facially relevant. Complaint Counsel firmly believe that the record already contains ample evidence establishing that Rambus violated Section 5 of the FTC Act.²⁶ However, this case is currently pending before the Commission precisely because Judge McGuire ruled to the contrary in the Initial Decision. To assist the Commission in understanding the relevant and non-cumulative character of the offered documents, Complaint Counsel attach as an Appendix to this motion a demonstrative Timeline that is intended to place the offered documents within the context of the larger body of evidence in the case.

From left to right, the Timeline tracks the time period in issue in this case, from 1989 to 2001. Along the Timeline are references to certain important documents in the case, with a line from the text box containing the reference to the approximate point on the timeline corresponding to the date of each of the documents. The text boxes are color-coded to reflect, as best Complaint Counsel has been able to reconstruct, the character and source of the referenced documents. The various colored boxes below the line represent documents that were in the record before the ALJ. The colored boxes above the line represent documents that have come to the attention of Complaint Counsel (and now the Commission) since the close of the record before the ALJ. The non-colored boxes above the line with question marks refer to documents

²⁶ See Appeal Brief of Counsel Supporting the Complaint (April 16, 2004); Reply Brief of Counsel Supporting the Complaint (July 2, 2004); Complaint Counsel's Proposed Findings of Fact (Sept. 6, 2003).

known to exist or very likely to have existed, but still never seen by Complaint Counsel or the Commission. (For a more detailed description of the information represented on the Timeline, please see the attached Appendix.)

What the Timeline shows, in a general fashion, is the recurring pattern of the discovery of crucial evidence about Rambus's conduct. Again and again, because of the wholesale destruction of Rambus's regular business files, crucial documents have been found in one or another set of lost documents or forgotten files. Again and again Rambus has argued that the additional documents show nothing new, that they are similar to documents that had been produced previously, or that there is nothing new to be found. Yet each new set of documents has helped to fill in the picture of Rambus's deliberate, decade-long scheme to mislead JEDEC and the industry and to capture monopoly power.

This pattern had become apparent in the evidence that was developed before trial and available to the ALJ, which is represented by the text boxes below the line. The blue boxes identify a relatively small number of key documents in this case that – to the best of Complaint Counsel's information – were actually found in Rambus's business files.²⁷ Most of the remaining boxes represent documents that were purged or intended to be purged from Rambus's business files or patent attorney Lester Vincent's files, and were found later in unexpected locations. Indeed, the collective effect of the multicolored boxes suggests how close Rambus came to getting away with its scheme.

²⁷ Because Rambus first produced many of these documents to litigants in its private litigation, and the documents were only later produced to FTC staff, Complaint Counsel do not have complete information as to the original location of each document produced by Rambus. What follows, and what is illustrated on the Timeline, is Complaint Counsel's best understanding of the locations in which the various documents were found.

The pattern has continued in the period since the close of record before the ALJ, as represented by the text boxes above the line. The pink boxes above the line represent selected documents from the *Infineon* case hearing record that were added to the record pursuant to the Commission's Order of July 21, 2005. The purple boxes above the line represent the selected Backup Tape Documents that are the subject of this motion. As can be seen, these documents are clearly distinct from the documents already in the record, and on their face contain important new information going well beyond the evidence already in the record. Complaint Counsel did not have the opportunity to use these documents or develop the evidence to their full effect in the administrative litigation below.

In sum, getting at the truth in this case has been like peeling the layers off an onion. Each new set of documents has revealed important new facts. And yet, each new set of documents has still left an indeterminable void of documents that are unavailable to Complaint Counsel or the Commission because of Rambus's efforts at document destruction. The Backup Tape Documents are no exception. They are not cumulative, because they provide the most concrete evidence available to the Commission that relevant documents were destroyed by the Rambus document policy.

D. There Is No Prejudice to Rambus from the Admission of These Documents.

Rambus is not prejudiced by the admission of the offered documents. The documents show in a concrete way the effects of its own bad-faith destruction of documents and provide specific examples of relevant documents that did not survive in Rambus's business files. Rambus was the source of these late-produced documents, so there can be question of their authenticity, and in fact Rambus has itself invited this motion by objecting to the Commission's

consideration of many of the documents without their formal admission to the record as exhibits.²⁸

Prompted by this motion, Rambus may well attempt to offer its own selection from among the large body of Backup Tape Documents. The Commission should resist any such effort. The small number of documents offered by Complaint Counsel by this motion are not intended to plumb the content of the full body of Backup Tape Documents. Such an undertaking might have been possible if the Rambus destruction efforts had not been successful, and the Backup Tape Documents had been available during the investigation and litigation of this case below. Had the documents been available in a timely fashion, they might have been used by both sides in this litigation, might have been integrated in the larger body of evidence, might have been the subject of questioning to knowledgeable witnesses at deposition and at trial, and might have been weighed by the ALJ in considering his ruling in the case. But none of that is possible now. CX5100-CX5117 represent a limited number of Backup Tape Documents that are offered by Complaint Counsel as concrete examples of documents once in Rambus's business files, relevant to the merits of this case, that did not survive the Rambus document purges. Indeed, any attempt by Rambus to designate its own choices from the backup tapes would be cumulative on this issue and simply reinforce the fundamental point that relevant documents did not survive in Rambus's business files for discovery and use in this litigation.

Any prejudice here has been suffered not by Rambus, but by Complaint Counsel and by the Commission in its efforts to conduct a full and fair administrative litigation. In such a

²⁸ See Responses by Respondent Rambus Inc. to Complaint Counsel's Supplemental Proposed Findings of Fact and Conclusions of Law 134-144, 167 (Aug. 17, 2005).

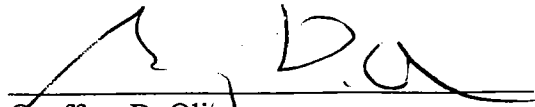
situation, when a portion of destroyed evidence is produced late by a party that has engaged in document spoliation, the spoliator should be prevented from using its carefully selected items from the evidence for its own particular purposes. Having adopted a document policy that prevented the Backup Tape Documents from being timely considered in the litigation below, Rambus should not be permitted to protest “prejudice” and add selected additional documents of its own choice.

III. CONCLUSION

For the reasons set forth above, Complaint Counsel move to reopen the record to incorporate as exhibits CX5100-5117 selected documents from the Backup Tape Documents, and the privilege log, produced by Rambus to Complaint Counsel between June and September 2005. These exhibits confirm concretely that, because of Rambus’s spoliation of evidence, Complaint Counsel and the ALJs in the proceedings below (and as a result, the Commission to date) were deprived of the use of documents that are on their face highly relevant to the issues in this case. The proposed exhibits support Complaint Counsel’s Proposed Supplemental Findings of Fact

134-144 and 167 (filed August 10, 2005). Admission of these exhibits would assist the Commission in its consideration of possible sanctions for Rambus's spoliation of evidence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G. D. Oliver", written over a horizontal line.

Geoffrey D. Oliver
Patrick J. Roach
Robert P. Davis

Bureau of Competition
Federal Trade Commission
Washington, DC 20008
Counsel Supporting the Complaint

Date: October 6, 2005

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

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

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

PUBLIC

PROPOSED ORDER

IT IS ORDERED THAT, Complaint Counsel's Motion to Reopen the Record To Admit Documents from Rambus's Newly-found Back-up Tapes Pertaining to Rambus's Spoliation of Evidence is hereby **GRANTED**; and

IT IS FURTHER ORDERED THAT the record in this proceeding shall be, and it hereby is, **REOPENED** to admit into evidence the documents submitted as CX5100 through CX5117.

By the Commission.

Donald S. Clark
Secretary

ISSUED: **XXX** __, 2005

1 GREGORY P. STONE (State Bar No. 078329)
 STEVEN M. PERRY (State Bar No. 106154)
 2 KELLY M. KLAUS (State Bar No. 161091)
 MUNGER, TOLLES & OLSON LLP
 3 355 South Grand Avenue
 Thirty-Fifth Floor
 4 Los Angeles, California 90071-1560
 Telephone: (213) 683-9100
 5 Facsimile: (213) 687-3702
Gregory.Stone@mto.com; Steven.Perry@mto.com;
 6 *Kelly.Klaus@mto.com*

7 PETER A. DETRE (State Bar No. 182619)
 CAROLYN HOECKER LUEDTKE (State Bar No. 207976)
 8 MUNGER, TOLLES & OLSON LLP
 560 Mission Street
 9 Twenty-Seventh Floor
 San Francisco, California 94105-2907
 10 Telephone: (415) 512-4000
 Facsimile: (415) 512-4077
 11 *Peter.Detre@mto.com; Carolyn.Luedtke@mto.com*

12 PETER I. OSTROFF (State Bar No. 045718)
 ROLLIN A. RANSOM (State Bar No. 196126)
 13 SIDLEY AUSTIN BROWN & WOOD LLP
 555 West Fifth Street, Suite 4000
 14 Los Angeles, California 90013-1010
 Telephone: (213) 896-6000
 15 Facsimile: (213) 896-6600
postroff@sidley.com; rransom@sidley.com

16 V. BRYAN MEDLOCK, JR. (admitted pro hac vice)
 17 SIDLEY AUSTIN BROWN & WOOD LLP
 717 N. Harwood, Suite 3400
 18 Dallas, Texas 75201
 Telephone: (214) 981-3300
 19 Facsimile: (214) 981-3400
 E-mail: *bmedlock@sidley.com*

20 Attorneys for Defendant
 21 RAMBUS INC.

22 UNITED STATES DISTRICT COURT
 23 NORTHERN DISTRICT OF CALIFORNIA

24 HYNEX SEMICONDUCTOR INC., et al.,
 25 Plaintiffs and Counter-Defendants,
 26 vs.
 27 RAMBUS INC.,
 28 Defendant and Counterclaimant.

CASE NO. CV 00-20905 RMW
**RAMBUS INC.'S VERIFIED
 STATEMENT RE: DISCOVERY OF
 BACKUP TAPES**

**RAMBUS'S VERIFIED STATEMENT RE
 DISCOVERY OF BACKUP TAPES**

1 As of April 21, 2005, Rambus Inc. ("Rambus") had discovered and forwarded to
 2 outside vendors 1,397 pieces of removable electronic media (including but not limited to media
 3 commonly called "backup tapes") for analysis as to whether or not they contain recoverable
 4 information.¹ As of April 21, 2005, 1,051 of these pieces of media had been determined to be
 5 blank, bad media, or cleaning cartridges, and 114 of the 1,397 pieces of media had been found to
 6 contain recoverable data. These 114 pieces of media have been restored so that they could be
 7 reviewed to determine whether any of their data constituted a document responsive to outstanding
 8 document requests. Another 232 of the 1,397 pieces of media were still being evaluated by
 9 Rambus's vendors to determine if they contained recoverable data; any media determined to
 10 contain recoverable data will be processed so that the data can be recovered and then reviewed for
 11 responsive documents. Rambus provided Hynix with a letter and table on April 22, 2005 that
 12 listed each of the 346 pieces of media that had, at that point, been restored or that were then being
 13 evaluated by its vendors. A copy of the April 22, 2005 letter and enclosed table is attached hereto
 14 as Exhibit A.

15 Pursuant to the terms of the [Proposed] Order submitted to the Court on April 21,
 16 2005, this is Rambus's verified statement explaining the circumstances of its recent discovery of
 17 the aforementioned media and why Rambus believes they were not discovered earlier.

18 **A. Nineteen 8mm "EPOCH" Backup Tapes**

19 Rambus has found and restored nineteen 8mm backup tapes with labels that each
 20 include a reference to the term "EPOCH" and that each bear the date "5/19/96." Rambus
 21 produced documents from these backup tapes on April 15, 2005 and April 22, 2005 and will
 22

23 ¹ Rambus, which is an engineering and design company, has substantially more than 1,397
 24 pieces of removable electronic media in its possession. The 1,397 pieces referenced in the text
 25 were identified in one of two ways. First, if the label information and/or information from the
 26 creator or custodian of the media provided a basis for believing that it might contain information
 27 responsive to outstanding discovery requests, then that piece of media was included in this total.
 28 Second, if Rambus was unable to determine whether or not a piece of media was likely to contain
 responsive information, Rambus forwarded that piece of media for analysis and it is included in
 the total. If Rambus was able to determine, based upon information provided by the creator or
 custodian, that a particular piece of media was unlikely to contain non-duplicative information
 responsive to outstanding discovery requests, Rambus did not forward this media to its vendors
 and it is not included in this total.

1 continue to produce any additional non-privileged responsive documents from these tapes as they
2 are identified. These tapes are assigned ID numbers 32 through 50 on the attached table.

3 In late 2002, in connection with a search for documents responsive to discovery
4 requests propounded by the Federal Trade Commission, Robert Kramer, who was then Litigation
5 Counsel and is now Director of Litigation at Rambus, found an open box (*i.e.*, without a lid) filled
6 with what appeared to be highly technical material. In the cubicle where it was found, this box
7 was stacked on top of boxes labeled with the name Victor Lee, which boxes Mr. Kramer had
8 observed also contained highly technical material. Mr. Kramer recalls reviewing the contents of
9 the open box at that time, and observing that it contained more than a dozen schematics or other
10 technical drawings, two packets with syringes (which syringes are in fact used in electronics), a
11 videotape (which it has since been determined contained a recording of a 64M Rambus DRAM
12 public announcement), a plastic bag containing tubes with computer chips inside, a variety of
13 chips in and out of plastic containers, several loose tapes, and two smaller boxes of tapes (which
14 in fact contained nineteen 8mm tapes).

15 Mr. Kramer recognized that the labels on the loose tapes related to highly technical
16 subjects; he therefore believed that these loose tapes did not contain material responsive to
17 pending discovery requests.² The tapes in the smaller boxes are the nineteen 8mm tapes assigned
18 ID numbers 32-50 on the attached table. Each of these tapes had a label with the word "EPOCH"
19 on it. Mr. Kramer recalls that, at the time he discovered the tapes in late 2002, he believed
20 "EPOCH" referred to a proper name for a technical project or a related technical server and that
21 these tapes also contained highly technical information that was not responsive to the outstanding
22 document requests. Accordingly, the tapes in the open box were not collected or reviewed for
23 discovery at that time.

24 In late 2004, Rambus cleaned out the cubicle where the open box was stored in
25 order to make room for a new employee. At that time, Mr. Kramer was still of the belief that the
26 contents of the various tapes in the open box were highly technical in nature and did not contain

27 ² The labels on these tapes indicated that the contents of the tapes related to RAC and
28 Umbriel. RAC refers to Rambus ASIC Cell. Umbriel was a highly technical server at Rambus.

1 material responsive to any pending document requests. Therefore, Rambus did not undertake to
2 review the tapes at that time.

3 On March 17, 2005, Rambus's inside and outside counsel met with Gary
4 Bridgewater, Rambus's IT Manager, in preparation for the then-upcoming May 2005 unclean
5 hands evidentiary hearing in this case. The communications that Rambus's counsel had with Mr.
6 Bridgewater are privileged. Without disclosing the substance of those communications, Rambus
7 can state that, during the course of that meeting, Rambus's counsel looked at the exterior of the
8 nineteen 8mm tapes with the "EPOCH" labels from the smaller boxes described above.
9 Thereafter, Rambus's counsel attempted to determine the content of those tapes.

10 **B. 8mm and DLT Tapes Found In Computer Equipment Cage**

11 After the March 17, 2005 meeting with Gary Bridgewater, Rambus conducted a
12 search for other tapes. On March 28, 2005, Rambus found six boxes of tapes in a locked
13 computer equipment "cage" located in Rambus's garage.³ (The term "cage" is a colloquial
14 expression for the storage areas in Rambus's garage that are surrounded by metal mesh fences.)
15 The tapes from this group of six boxes that Rambus found on March 28, 2005, that Rambus
16 believes have or may have recoverable data on them are assigned ID numbers 1-31, 51-153, and
17 208-1195 on the attached table.⁴ So far as Rambus can now determine, Rambus had not
18 previously searched the computer equipment cage in connection with any Rambus litigation. It
19 should be noted that, prior to March 2005, Rambus did not believe that system backup tapes from
20 time periods substantially prior to the initiation of litigation were in existence at the time that it
21 was conducting document collections.

22 Of the first six boxes found in the computer equipment cage, five were plastic
23 boxes that were previously used for off-site storage and contained more than a thousand 8mm

24 ³ In the weeks thereafter, Rambus searched the computer equipment cage again to ascertain
25 whether it contained additional tapes. A seventh box with more than one hundred additional
26 pieces of removable electronic media was discovered and sent to Rambus's outside vendor for
27 processing. Rambus does not yet know whether these pieces of media contain recoverable or
28 responsive data. These media are assigned ID numbers 1197-1205, 1207-1226, 1228-1287, 1289-
1293, 1295-1312, 1326, 1328, and 1331-1349 on the attached table.

⁴ Rambus has provided Hynix with color photocopies of photographs of these tapes and
their labels.

1 tapes, many with handwritten labels on them. So far as Rambus can now determine, these five
2 boxes of tapes had not previously been found and their contents had not previously been reviewed
3 in the course of Rambus's document collection efforts. As of April 22, 2005, Rambus believes
4 (based on the review conducted by the data-recovery firm that Rambus has retained for this
5 effort) that the 8mm tapes found in the five plastic boxes are blank.

6 The sixth box was a cardboard box containing approximately one hundred DLT
7 tapes that had nothing but bar code labels to identify them. Based upon its investigation to date,
8 Rambus has been unable to determine whether any of these DLT tapes had previously been found
9 or their contents reviewed in the course of Rambus's document collection efforts. As of April 22,
10 2005, Rambus believes that at least a portion of the DLT tapes found in the cardboard box have
11 recoverable data on them.⁵

12 C. Assorted Pieces of Removable Electronic Media

13 Since March 28, 2005, Rambus has continued to conduct a thorough search of its
14 offices for any removable electronic media that might contain non-duplicative data responsive to
15 outstanding discovery requests. The additional media that have been discovered since March 28,
16 2005, that have or may have recoverable data, and that meet the additional criteria described in
17 footnote one above are assigned ID numbers 154-207 and 1196-1397 on the attached table.
18 These media were found in various storage areas within the company, employee cubicles, and
19 general file areas. Based upon its investigation to date, Rambus has been unable to determine
20 whether any of these additional pieces of electronic media had previously been found or their
21 contents reviewed in the course of Rambus's document collection efforts. These tapes have
22 therefore been sent to Rambus's outside vendors for further analysis to determine whether they
23 have recoverable data on them or data that could include documents responsive to Hynix's
24 discovery requests.

25
26 ⁵ Hynix has asked about Rambus's understanding, as of April 4, 2005, regarding the
27 number of tapes that might contain recoverable data that might be responsive to outstanding
28 discovery requests. As of that date, it appeared that 164 of the tapes that had then been found
might have recoverable data on them.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The status of Rambus's restoration efforts has been the subject of a weekly tape-
by-tape update such as that in Exhibit A that Rambus began providing to Hynix on April 15,
2005.

DATED: April 27, 2005

MUNGER, TOLLES & OLSON LLP

By: 
CAROLYN HOECKER LUEDTKE

Attorneys for Defendant and Counterclaimant
Rambus Inc.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION

I, ROBERT K EULAN, hereby declare and say:

I am the CFO of Rambus Inc., defendant in this

action, and am authorized to make this verification for and on Rambus's behalf, and I make this verification for that reason. I have read the foregoing **RAMBUS INC.'S STATEMENT RE: DISCOVERY OF BACKUP TAPES** and know the contents thereof. The responses set forth therein, subject to inadvertent or undiscovered error, are based on and therefore necessarily limited by the records and information still in existence, presently recollected and thus far discovered in the course of the preparation of this response. Consequently, I reserve the right to make changes in this response if it appears at any time that omissions or errors have been made therein or that more accurate information is available. Subject to the limitations set forth herein, said response is true, correct and complete to the best of my knowledge, information and belief.

I am making this verification on behalf of Rambus, Inc.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

EXECUTED on this 27 day of April, 2005.

Rambus Inc.

By: Robert K Eulan

Exhibit A

MUNGER, TOLLES & OLSON LLP

Patrick Lynch, Esq.
April 22, 2005
Page 2

cc: Via Facsimile and U.S. Mail (w/o CD-ROM)
Kenneth L. Nissly, Esq.
Theodore G. Brown, III, Esq.

Tape Log

ID#	Media Type	Backup software used	Size (GB)	Status
1	DLT IV	Bud tools v4 - NO NDMP	42.49452	Data Restored
2	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
32	8MM	UFS Dump	4.92672	Data Restored
33	8MM	UFS Dump	2.72465	Data Restored
34	8MM	UFS Dump	4.22886	Data Restored
35	8MM	UFS Dump	3.32825	Data Restored
36	8MM	UFS Dump	4.25617	Data Restored
37	8MM	UFS Dump	4.31687	Data Restored
38	8MM	UFS Dump	4.36374	Data Restored
39	8MM	UFS Dump	3.99751	Data Restored
40	8MM	UFS Dump	2.33414	Data Restored
41	8MM	UFS Dump	4.06555	Data Restored
42	8MM	UFS Dump	0.34800	Data Restored
43	8MM	UFS Dump	3.97967	Data Restored
44	8MM	UFS Dump	2.91905	Data Restored
45	8MM	UFS Dump	2.45778	Data Restored
46	8MM	UFS Dump	2.93522	Data Restored
47	8MM	UFS Dump	3.99507	Data Restored
48	8MM	UFS Dump	3.86959	Data Restored
49	8MM	UFS Dump	1.01545	Data Restored
50	8MM	UFS Dump	4.80901	Data Restored
51	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
54	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
56	DLT IV	Bud tools v4 - NO NDMP	16.04782	Data Restored
57	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
58	DLT IV	Bud tools v4 - NO NDMP	14.83008	Data Restored
60	DLT IV	Bud tools v4 - NO NDMP	38.12145	Data Restored
61	DLT IV	Bud tools v4 - NO NDMP	27.78927	Data Restored
62	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
63	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
64	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
65	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
67	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
68	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
69	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
70	DLT IV	Bud tools v4 - NO NDMP	2.53456	Data Restored
72	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
73	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
74	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
76	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
78	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
78	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
80	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
81	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
82	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
83	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
84	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
85	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
86	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
87	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
88	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
89	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
90	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
91	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
92	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
93	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
94	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
95	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
96	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
97	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
98	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
99	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
100	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing

4/22/2005

8:26 AM

Tape Log

ID#	Media Type	Backup software used	Size (GB)	Status
101	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
102	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
103	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
104	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
105	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
106	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
107	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
108	DLT IV	Bud tools v4 - NO NDMP	39.49291	Data Restored
109	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
110	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
111	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
112	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
113	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
114	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
115	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
116	DLT IV	Bud tools v4 - NO NDMP	28.16933	Data Restored
118	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
119	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
120	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
121	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
122	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
123	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
124	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
125	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
126	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
127	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
128	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
129	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
130	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
133	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
134	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
135	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
136	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
137	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
138	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
139	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
140	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
141	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
142	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
143	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
144	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
148	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
147	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
148	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
150	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
151	DLT IV	Bud tools v4 - NDMP		Restoration Efforts ongoing
152	DLT IV	Bud tools v4 - NDMP	18.27137	Data Restored
153	DLT IV	Bud tools v4 - NO NDMP	2.78127	Data Restored
154	BMM	Currently Unknown	1.74861	Data Restored
155	BMM	Currently Unknown	1.72722	Data Restored
156	BMM	Currently Unknown	4.38885	Data Restored
157	BMM	Currently Unknown	1.51863	Data Restored
158	BMM	Currently Unknown	1.54734	Data Restored
159	BMM	Currently Unknown	0.01300	Data Restored
160	BMM	Currently Unknown	4.43471	Data Restored
161	BMM	Currently Unknown	0.00002	Data Restored
162	BMM	Currently Unknown	0.01478	Data Restored
163	BMM	Currently Unknown	0.85064	Data Restored
164	BMM	Currently Unknown	0.86695	Data Restored
168	BMM	Currently Unknown	1.20894	Data Restored
170	BMM	Currently Unknown	1.63504	Data Restored
171	BMM	Currently Unknown	0.68038	Data Restored
172	BMM	Currently Unknown		

4/22/2005

9:26 AM

Tape Log

ID#	Media Type	Backup software used	Size (GB)	Status
173	BMM	Currently Unknown	1.57713	Data Restored
175	BMM	Currently Unknown	1.81908	Data Restored
178	BMM	Currently Unknown	0.20223	Data Restored
177	BMM	Currently Unknown	0.00489	Data Restored
180	BMM	Currently Unknown	0.01889	Data Restored
182	BMM	Currently Unknown	2.33608	Data Restored
184	BMM	Currently Unknown	1.29707	Data Restored
184	BMM	Currently Unknown	0.00000	Data Restored
185	BMM	Currently Unknown	0.58010	Data Restored
186	BMM	Currently Unknown	0.81797	Data Restored
187	BMM	Currently Unknown	5.28186	Data Restored
188	BMM	Currently Unknown	1.53109	Data Restored
188	BMM	Currently Unknown	0.29068	Data Restored
197	DDS	Currently Unknown	2.25188	Data Restored
198	BMM	Currently Unknown	0.00288	Data Restored
199	DC-6150	Currently Unknown	0.02193	Data Restored
200	DC-6150	Currently Unknown	0.13923	Data Restored
202	DC-6150	Currently Unknown	0.00291	Data Restored
203	DC-6150	Currently Unknown	0.00858	Data Restored
204	DC-6150	Currently Unknown	1.98557	Data Restored
205	DC-6150	Currently Unknown	0.02233	Data Restored
207	DC-6150	Currently Unknown		Restoration Efforts ongoing
1187	BMM	Currently Unknown		Restoration Efforts ongoing
1198	BMM	Currently Unknown		Restoration Efforts ongoing
1199	BMM	Currently Unknown		Restoration Efforts ongoing
1200	BMM	Currently Unknown		Data Restored
1201	BMM	TAR		Restoration Efforts ongoing
1202	BMM	Currently Unknown		Restoration Efforts ongoing
1203	BMM	Currently Unknown		Restoration Efforts ongoing
1204	BMM	Currently Unknown		Restoration Efforts ongoing
1205	BMM	Currently Unknown		Restoration Efforts ongoing
1206	BMM	Currently Unknown		Restoration Efforts ongoing
1207	BMM	Currently Unknown		Restoration Efforts ongoing
1208	BMM	Currently Unknown		Restoration Efforts ongoing
1208	BMM	TAR	2.86125	Data Restored
1209	BMM	TAR		Data Restored
1210	BMM	Currently Unknown		Restoration Efforts ongoing
1211	BMM	TAR	0.28114	Data Restored
1212	BMM	TAR		Restoration Efforts ongoing
1213	BMM	Currently Unknown		Restoration Efforts ongoing
1214	BMM	Currently Unknown		Restoration Efforts ongoing
1215	BMM	Currently Unknown		Restoration Efforts ongoing
1216	BMM	Currently Unknown		Restoration Efforts ongoing
1217	BMM	Currently Unknown		Data Restored
1218	BMM	TAR		Restoration Efforts ongoing
1219	BMM	Currently Unknown		Data Restored
1220	BMM	TAR	2.33020	Restoration Efforts ongoing
1221	BMM	Currently Unknown		Restoration Efforts ongoing
1222	BMM	Currently Unknown		Data Restored
1223	BMM	TAR	3.96885	Restoration Efforts ongoing
1224	BMM	Currently Unknown		Restoration Efforts ongoing
1225	BMM	Currently Unknown		Restoration Efforts ongoing
1226	BMM	Currently Unknown		Restoration Efforts ongoing
1227	BMM	Currently Unknown		Restoration Efforts ongoing
1228	BMM	Currently Unknown		Restoration Efforts ongoing
1229	BMM	Currently Unknown		Data Restored
1230	BMM	TAR		Data Restored
1231	BMM	TAR	3.25846	Data Restored
1232	BMM	TAR	0.91858	Data Restored
1233	BMM	TAR	0.01604	Data Restored
1234	BMM	TAR		Data Restored
1234	BMM	TAR	0.61208	Data Restored
1235	BMM	TAR	4.02940	Data Restored
1238	BMM	TAR	1.75049	Data Restored
1237	BMM	TAR	5.18166	Data Restored
1238	BMM	TAR		Data Restored

4/27/2005

9:26 AM

Tape Log

ID#	Media Type	Backup software used	Size (GB)	Status
1239	8MM	TAR	0.06608	Data Restored
1240	8MM	TAR		Data Restored
1241	8MM	TAR		Data Restored
1242	8MM	TAR	4.29775	Data Restored
1243	8MM	TAR		Data Restored
1244	8MM	Currently Unknown		Restoration Efforts ongoing
1245	8MM	TAR	5.38130	Data Restored
1246	8MM	Currently Unknown		Restoration Efforts ongoing
1247	8MM	Currently Unknown		Restoration Efforts ongoing
1248	8MM	Currently Unknown		Restoration Efforts ongoing
1249	8MM	Currently Unknown		Restoration Efforts ongoing
1250	8MM	TAR	0.03484	Data Restored
1251	8MM	TAR	0.15132	Data Restored
1252	8MM	TAR		Data Restored
1253	8MM	TAR	2.78671	Data Restored
1254	8MM	TAR	1.23833	Data Restored
1255	8MM	TAR	2.88125	Data Restored
1256	8MM	Currently Unknown		Restoration Efforts ongoing
1257	8MM	Currently Unknown		Restoration Efforts ongoing
1258	8MM	Currently Unknown		Restoration Efforts ongoing
1259	8MM	Currently Unknown		Restoration Efforts ongoing
1260	8MM	Currently Unknown		Restoration Efforts ongoing
1261	8MM	Currently Unknown		Restoration Efforts ongoing
1262	8MM	Currently Unknown		Restoration Efforts ongoing
1263	8MM	Currently Unknown		Restoration Efforts ongoing
1264	8MM	Currently Unknown		Restoration Efforts ongoing
1265	8MM	Currently Unknown		Restoration Efforts ongoing
1266	8MM	TAR	2.40568	Data Restored
1267	8MM	TAR	2.40598	Data Restored
1268	8MM	TAR	3.52878	Data Restored
1269	8MM	TAR	4.41725	Data Restored
1270	8MM	TAR	6.25745	Data Restored
1271	8MM	Currently Unknown		Restoration Efforts ongoing
1272	8MM	TAR	0.18951	Data Restored
1273	8MM	Currently Unknown		Restoration Efforts ongoing
1274	8MM	TAR	2.49735	Data Restored
1275	8MM	TAR	3.80647	Data Restored
1276	8MM	TAR	0.13850	Data Restored
1277	8MM	TAR	2.29589	Data Restored
1278	8MM	Currently Unknown		Restoration Efforts ongoing
1279	8MM	Currently Unknown		Restoration Efforts ongoing
1280	8MM	Currently Unknown		Restoration Efforts ongoing
1281	8MM	Currently Unknown		Restoration Efforts ongoing
1282	8MM	TAR	3.23724	Data Restored
1283	8MM	Currently Unknown		Restoration Efforts ongoing
1284	8MM	Currently Unknown		Restoration Efforts ongoing
1285	8MM	Currently Unknown		Restoration Efforts ongoing
1286	8MM	Currently Unknown		Restoration Efforts ongoing
1287	8MM	TAR	2.52159	Data Restored
1288	8MM	TAR		Data Restored
1289	8MM	Currently Unknown		Restoration Efforts ongoing
1290	8MM	TAR		Data Restored
1291	8MM	TAR		Data Restored
1292	8MM	Currently Unknown		Restoration Efforts ongoing
1293	8MM	TAR		Data Restored
1294	8MM	TAR		Data Restored
1295	8MM	Currently Unknown		Restoration Efforts ongoing
1296	8MM	Currently Unknown		Restoration Efforts ongoing
1297	8MM	Currently Unknown		Restoration Efforts ongoing
1298	8MM	Currently Unknown		Restoration Efforts ongoing
1299	8MM	Currently Unknown		Restoration Efforts ongoing
1300	8MM	TAR		Data Restored
1301	8MM	Currently Unknown		Restoration Efforts ongoing

4/22/2005

9:26 AM

Tape Log

ID#	Media Type	Backup software used	Size (GB)	Status
1302	8MM	Currently Unknown		Restoration Efforts ongoing
1303	8MM	Currently Unknown		Restoration Efforts ongoing
1304	8MM	Currently Unknown		Restoration Efforts ongoing
1305	8MM	Currently Unknown		Restoration Efforts ongoing
1306	8MM	Currently Unknown		Data Restored
1307	8MM	TAR	0.25717	Restoration Efforts ongoing
1308	8MM	Currently Unknown		Data Restored
1309	8MM	TAR	2.32242	Restoration Efforts ongoing
1310	8MM	Currently Unknown		Data Restored
1311	8MM	TAR		Data Restored
1312	8MM	TAR	0.20507	Restoration Efforts ongoing
1313	DC-8150	Currently Unknown		Restoration Efforts ongoing
1314	DC-8150	Currently Unknown		Restoration Efforts ongoing
1315	DC-8150	Currently Unknown		Restoration Efforts ongoing
1316	DC-8150	Currently Unknown		Restoration Efforts ongoing
1317	DC-8150	Currently Unknown		Restoration Efforts ongoing
1318	DC-8150	Currently Unknown		Restoration Efforts ongoing
1319	DC-8150	Currently Unknown		Restoration Efforts ongoing
1320	DC-8150	Currently Unknown		Restoration Efforts ongoing
1321	DC-8150	Currently Unknown		Restoration Efforts ongoing
1322	DC-8150	Currently Unknown		Restoration Efforts ongoing
1323	DC-8150	Currently Unknown		Restoration Efforts ongoing
1324	DC-8150	Currently Unknown		Restoration Efforts ongoing
1325	DC-8150	Currently Unknown		Restoration Efforts ongoing
1326	44 MB Cartridge	Currently Unknown		Restoration Efforts ongoing
1327	DLT IV	Currently Unknown		Restoration Efforts ongoing
1328	DDS	Currently Unknown		Restoration Efforts ongoing
1331	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1332	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1333	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1334	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1335	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1336	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1337	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1338	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1338	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1340	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1341	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1342	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1343	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1344	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1346	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1346	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1347	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1348	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1349	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1350	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1351	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1352	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1353	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1354	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1355	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1356	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1357	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1358	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1359	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1360	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1361	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1362	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1363	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1364	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1365	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1366	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing

4/22/2005

9:26 AM

Tape Log

IDs	Media Type	Backup software used	Size (GB)	Status
1367	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1368	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1369	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1370	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1371	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1372	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1373	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1374	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1375	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1376	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1377	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1378	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1379	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1380	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1381	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1382	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1383	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1384	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1385	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1386	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1387	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1388	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1389	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1390	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1391	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1392	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1393	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1394	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1395	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1396	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing
1397	3.5 Floppy	Currently Unknown		Restoration Efforts ongoing

4/22/2005

9:28 AM

1 GREGORY P. STONE (State Bar No. 078329)
2 STEVEN M. PERRY (State Bar No. 106154)
3 MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
30 Thirty-Fifth Floor
4 Los Angeles, California 90071-1560
4 Telephone: (213) 683-9100
4 Facsimile: (213) 687-3702
5 *gregory.stone@mto.com; steven.perry@mto.com*

6 PETER A. DETRE (State Bar No. 182619)
7 CAROLYN HOECKER LUEDTKE (State Bar No. 207976)
8 MUNGER, TOLLES & OLSON LLP
560 Mission Street
8 Twenty-Seventh Floor
8 San Francisco, California 94105-2907
9 Telephone: (415) 512-4000
9 Facsimile: (415) 512-4077
10 *peter.detre@mto.com; carolyn.luedtke@mto.com*

11 PETER I. OSTROFF (State Bar No. 045718)
12 ROLLIN A. RANSOM (State Bar No. 196126)
13 SIDLEY AUSTIN BROWN & WOOD LLP
555 West Fifth Street, Suite 4000
13 Los Angeles, California 90013-1010
14 Telephone: (213) 896-6000
14 Facsimile: (213) 896-6600
15 *postruff@sidley.com; rransom@sidley.com*

16 V. BRYAN MEDLOCK, JR. (admitted *pro hac vice*)
17 SIDLEY AUSTIN BROWN & WOOD LLP
717 N. Harwood, Suite 3400
17 Dallas, Texas 75201
18 Telephone: (214) 981-3300
18 Facsimile: (214) 981-3400
19 E-mail: *bmedlock@sidley.com*

19 Attorneys for Defendant and Counterclaimant
20 RAMBUS INC.

21 UNITED STATES DISTRICT COURT
22 NORTHERN DISTRICT OF CALIFORNIA

23 HYNIX SEMICONDUCTOR INC., et al.,

24 Plaintiffs and Counter-Defendants,

25 vs.

26 RAMBUS INC.,

27 Defendant and Counterclaimant.
28

CASE NO. CV 00-20905 RMW

**SUPPLEMENTAL CASE MANAGEMENT
STATEMENT OF RAMBUS INC.**

Date: May 20, 2005
Time: 10:30 a.m.
Cttn: Courtroom 6, 4th Floor
Before: Hon. Ronald M. Whyte

RAMBUS'S SUPPLEMENTAL CASE
MANAGEMENT STATEMENT

1 On April 4, 2005, Rambus Inc. ("Rambus") advised the Court and counsel for the
2 various Hynix entities involved in this case that it had discovered a large number of backup tapes
3 (collectively, with other removable electronic media, "backup media") that might contain
4 information, not previously produced, that was responsive to discovery requests in this case. See
5 letter dated April 4, 2005, from Gregory P. Stone to The Honorable Ronald M. Whyte, a copy of
6 which is attached hereto as Exhibit A. The Court held a telephonic Status Conference on April
7 11, 2005, to discuss these developments with the parties. Consistent with the Court's comments
8 during the April 11 Status Conference, on April 21, 2005, the parties jointly submitted a proposed
9 order that, among other things, vacated the trial and pretrial dates for the first two phases of this
10 case – an evidentiary hearing on Hynix's unclean hands claim and the trial of Rambus's patent
11 infringement claims – but left intact the October 17, 2005 trial date and various pretrial dates for
12 the third phase of this case – Hynix's antitrust and section 17200 counterclaims. A copy of this
13 proposed order, which the Court apparently has not yet entered, is attached hereto as Exhibit B.
14 On April 22, 2005, this Court held a further Case Management Conference at which the backup
15 media recently discovered by Rambus were further discussed. Following this hearing, the Court
16 entered a Supplemental Case Management Order dated May 2, 2005, a copy of which is attached
17 hereto as Exhibit C.

18 In compliance with the proposed order filed by the parties, Rambus served on
19 Hynix, on April 27, 2005, a Verified Statement Re: Discovery Of Backup Tapes, a copy of which
20 is attached hereto as Exhibit D. Each Friday, beginning on April 15, 2005, Rambus has delivered
21 to Hynix's counsel a letter, accompanied by documents, restored and obtained from the recently-
22 discovered backup media, that are responsive to Hynix's document requests as limited or
23 construed by Rambus's responses and objections and various Orders of this Court and of Special
24 Master Read Ambler. Copies of each of these five letters are attached collectively as Exhibit E
25 hereto.¹

26
27 ¹ Hynix, through its counsel, has raised certain questions about the information Rambus has
28 provided to Hynix in its Verified Statement and in its weekly letters. The correspondence
between counsel on these topics is attached hereto as Exhibits F, G, H and I.

1 Sufficient information has now been obtained regarding the various pieces of
2 backup media that Rambus has discovered and that were thought to potentially contain responsive
3 information to permit Rambus to advise the Court and Hynix of the following: (1) Rambus can
4 now describe a process that it proposes to follow respecting the extent to which it intends to
5 restore and review the backup media that it has discovered; (2) Rambus can predict with some
6 confidence that its production of documents and other information from the backup media that
7 remains to be reviewed will be completed prior to July 29, 2005; and (3) the unclear hands
8 evidentiary hearing and the trial of Rambus's patent infringement claims can now be rescheduled
9 for September and October 2005, respectively.

10 In Section I of this Case Management Conference Statement, Rambus sets forth
11 background on its newly-discovered backup media. In Section II, Rambus sets forth the legal
12 standards applicable to the review of Rambus's backup media, which are properly classified as
13 "inaccessible" data, and demonstrates that the approach that has been voluntarily adopted by
14 Rambus meets – indeed, exceeds – its obligations under the law. Section III explains the process
15 by which Rambus is proposing to determine from the recently-discovered backup media what
16 documents existed in July 1998 (and why this date is significant) and what documents were
17 created between July 1998 and February 2000 that are responsive to Hynix's document requests
18 and have not already been produced. Section IV responds to Hynix's May 17, 2005
19 Supplemental Case Management Conference Statement. Finally, Section V sets forth Rambus's
20 proposed trial schedule for the three modules in this action.

21 **I. BACKGROUND ON REVIEW OF RECENTLY-DISCOVERED BACKUP MEDIA**

22 Rambus has conducted an exhaustive search for backup media. Rambus has
23 forwarded 1,414 pieces of backup media to its outside vendors for analysis as to whether or not
24 they contain recoverable information.² That backup media currently can be divided into three

25 ² Rambus, which is an engineering and design company, has substantially more than 1,414 pieces
26 of removable electronic media in its possession. The 1,414 pieces referenced in the text were
27 identified in one of two ways. First, if the label information and/or information from the creator
28 or custodian of the media provided a basis for believing that it might contain information
responsive to outstanding discovery requests, then that piece of media was included in this total.
Second, if Rambus was unable to determine whether or not a piece of media was likely to contain
responsive information, Rambus forwarded that piece of media for analysis and it is included in

1 groups. First, 1,077 pieces of media have been determined to be blank, bad media (which means
2 no data can be read from the media), or cleaning cartridges. Second, 327 of the 1,414 pieces of
3 media have been found to contain recoverable data. Third, another 10 of the 1,414 pieces of
4 media are still being evaluated by Rambus's outside vendor to determine if they contain
5 recoverable data.

6 Within the second group -- the media that to date have been found to contain
7 recoverable data -- the backup media have been separated further into two sub-groups: (A) those
8 that are not reasonably likely to contain information or documents that are responsive to Hynix's
9 document requests; and (B) those that either are reasonably likely to contain responsive
10 information or documents, or as to which no determination has yet been made one way or the
11 other. Within this latter sub-group, the (B) sub-group, as described further below, the backup
12 media has been broken down into three further sub-groups based on the date on which the data
13 was recorded to or stored on the backup media. Rambus proposes handling these various
14 categories of media in different ways; the process Rambus proposes for each category, and the
15 rationale underlying that process, are described in Section III below.

16 Before turning to the specific proposals Rambus is making to address these four
17 categories of media, a bit of context may be useful. As the Court knows, Rambus first brought a
18 patent infringement action on January 18, 2000, when it sued Hitachi. Later, on August 8, 2000,
19 Rambus sued Infineon for patent infringement. Shortly thereafter, on August 28 and August 29,
20 2000, respectively, Micron and Hynix filed separate suits against Rambus seeking, *inter alia*, a
21 declaratory judgment that certain of Rambus's patents were invalid or not infringed. Rambus
22 began collecting documents from various of its employees and files in late 1999. In 1999 and
23 early 2000, Rambus advised employees that it had identified as likely sources of relevant
24 documents that a "litigation hold" was being imposed and that those individuals should retain
25 documents related to the issues in suit.

26 the total. If Rambus was able to determine, based upon information provided by the creator or
27 custodian, that a particular piece of media was unlikely to contain non-duplicative information
28 responsive to outstanding discovery requests, Rambus did not forward this media to its vendors
and it is not included in this total.

1 These efforts to collect relevant documents and to ensure the ongoing preservation
2 of documents modified the then-existing document retention practices at Rambus. Rambus's
3 then-existing document retention policy has been fairly described as a "standard" policy, of the
4 type found at many companies, and it was put in place at the suggestion of and in accordance with
5 the advice of well-respected attorneys, Dan Johnson (initially at Cooley Godward and later of
6 Fenwick & West) and Diane Savage (of Cooley Godward). This policy was put in place in July
7 1998. Prior to July 1998, Rambus did not have a document retention policy; employees could
8 retain documents and keep or delete e-mails as they determined was appropriate, subject to the
9 constraints of storage space limitations (physical and computer-based) and organizational
10 initiatives (commonly known as "spring cleaning"). There has been no claim that Rambus should
11 not have put a document retention policy in place in July 1998; there has been no claim that it
12 should have continued to operate without any company-wide guidelines for document retention.
13 Rather, the claim made in the *Infineon* litigation and repeated here is that, in July 1998, Rambus's
14 document retention policy should have included a "litigation hold" for documents relevant to
15 claims that SDRAMs and DDR SDRAMs infringed Rambus patents.³

16 The critical time period, then, for the spoliation allegations that Hynix makes
17 against Rambus starts in July 1998 and ends in early 2000. In other words, what documents
18 (including e-mails) existed in July 1998 or were created after that date that were thrown away or
19 deleted before early 2000? One way that has been suggested for Rambus to restore what
20 documents existed in July 1998 is through the use of its backup tapes; however, those tapes were
21 to have been destroyed or erased under the terms of Rambus's document retention policy, which
22 provided that backup tapes would be retained for only 90 days.⁴ Similarly, if daily backup tapes

23 ³ Hynix makes this claim although none of the patents-in-suit had issued as of July 1998 (indeed,
24 the first of the patents-in-suit did not issue until approximately one year later), and although
25 Hynix did not release samples of its first DDR SDRAM part until June 1999 and JEDEC did not
26 publish a DDR SDRAM standard until August 1999. Among other things, Rambus intends to
27 prove, during the upcoming "unclean hands" evidentiary hearing, that no litigation hold was
28 required until early 2000. Notwithstanding this fact, as discussed further below, Rambus has
voluntarily assumed the obligation of reviewing certain backup media created prior to that date.

⁴ Contrary to assertions that Hynix has made in correspondence to Rambus, the law recognizes
that a party ordinarily is not required to preserve inaccessible backup tapes, even when it
reasonably anticipates or is involved in litigation. See, e.g., *Zubulake v. UBS Warburg LLC*, 220

1 had been created and retained for every day from July 1998 until February 2000, Rambus might
2 be able to recreate all the electronic documents and other data that existed during that time period,
3 but that no longer exist (perhaps because they were overwritten, deleted or lost, such as when a
4 hard drive crashed). Having now discovered certain backup media that may contain what existed
5 in electronic form in July 1998, when Rambus instituted its document retention policy, and that
6 shed light on what was created after that date, Rambus proposes to take more than reasonable
7 steps to retrieve this information from that media.

8 **II. PARTIES ARE NOT ORDINARILY REQUIRED TO SEARCH BACKUP MEDIA**

9 Parties do not usually restore inaccessible backup tapes in order to comply with
10 discovery requests, and in only rare circumstances are they required to do so. See *McPeck v.*
11 *Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001) ("There is certainly no controlling authority for the
12 proposition that restoring all backup tapes is necessary in every case. The Federal Rules of Civil
13 Procedure do not require such a search, and the handful of cases [that discuss the issue] are
14 idiosyncratic and provide little guidance."); *Rowe Entertainment, Inc. v. William Morris Agency,*
15 *Inc.*, 2002 WL 975713, *7 (S.D.N.Y. 2002) ("[A] party that happens to retain data only in case of
16 emergency or simply because it has neglected to discard it, should not be put to the expense of
17 producing it. Judge Francis found that the back-up tapes clearly fell into [this] category as there
18 is no evidence that defendants ever search these tapes for information or even have the means for
19 doing so."); see also *Byers v. Illinois State Police*, 2002 WL 1264004, at *11-12 (N.D. Ill. 2002).

20 This limitation on responding parties' discovery obligations is in large part due to

21 F.R.D. 212, 218 (S.D.N.Y. 2003) ("*Zubulake IV*"); *Thompson v. United States Dept. of Housing*
22 *and Urban Devel.*, 219 F.R.D. 93, 100 (D. Md. 2003); see also *The Sedona Principles: Best*
23 *Practices Recommendations & Principles for Addressing Electronic Document Production* (Jan.
24 2004 version) at 20, 24-25 (available at <http://www.thesedonaconference.org/publications.html>).
25 Accordingly, there is no basis for Hynix's suggestion that the recycling or erasure of Rambus's
26 backup tapes was improper. Notably, Hynix continued its practice of recycling backup tapes at
27 periodic intervals after it sued Rambus. Thus, consistent with the law and with the practice of
28 other companies, such as Hynix, it would be proper for Rambus to have continued to recycle its
backup tapes even after it was involved in litigation, and it certainly would have been proper for
Rambus to continue recycling backup tapes *until* it was involved in litigation (notably, Hynix
continues to recycle its backup tapes to this day). Put differently, there is no basis in law or in the
contemporary practice of others (including Hynix) to impose on Rambus an obligation to retain
all of its backup tapes beginning in July 1998, or even earlier, which is what Hynix apparently
argues Rambus should have done.

1 the nature and purpose of backup media. Backup media generally do not contain information that
2 is accessed regularly during the course of business. Rather, the primary purpose of backup media
3 is to preserve a corporation's electronic information in case of a catastrophic event. See Manual
4 for Complex Litigation (4th) § 11.446 ("Backup data are created and maintained for short-term
5 disaster recovery, not for retrieving particular files, databases, or programs."); Proposed
6 Amendments to the Federal Rules of Civil Procedure, August 2004 version (attached hereto as
7 Exhibit J), at 11. ("[S]ome information may be stored solely for disaster-recovery purposes and be
8 expensive and difficult to use for other purposes."); see also *McPeek*, 202 F.R.D. at 33 ("Backup
9 tapes are by their nature indiscriminant.").

10 Because backup media are intended for disaster recovery, rather than routine use, it
11 is often difficult to access the information on the media, particularly on a selective basis. See
12 *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 319 (S.D.N.Y. 2003) ("*Zubulake I*") (describing a
13 host of technical difficulties encountered in trying to access data on a backup tape); see also
14 Manual for Complex Litigation (4th) § 11.446 ("[Backup] tapes or disks must be restored to the
15 system from which they were recorded, or to a similar hardware and software environment,
16 before any data can be accessed."). As a result, retrieving information from backup tapes can be
17 extremely expensive and time consuming, particularly when the tapes are in outmoded or
18 obsolete formats. See *Byers v. Illinois State Police*, 2002 WL 1264004, *10 (N.D. Ill. 2002)
19 ("[D]ated archival systems commonly store information on magnetic tapes which have become
20 obsolete. Thus, parties incur additional costs in translating the data from the tapes into useable
21 form."). Due to the difficulties inherent in retrieving relevant data from backup media, they have
22 rightfully been treated differently than more accessible document storage systems.

23 Although some courts have in certain circumstances imposed an obligation to
24 search backup media, their analysis has not been uniform, and instead appears devised on a case-
25 by-case basis. See *McPeek*, 202 F.R.D. at 33; see also *Report of the Civil Rules Advisory*
26 *Committee*, at 3 (May 17, 2004, revised Aug. 3, 2004 ("Case law is emerging, but it is not
27 consistent and discovery disputes are rarely the subject of appellate review."). As the law in this
28 area is developing, with mixed decisions and no clear precedent, the most useful source from

1 which to ascertain the scope of a party's duty to search inaccessible media such as backup tapes is
2 the Proposed Amendments to the Federal Rules of Civil Procedure ("Proposed Amendments"),
3 attached hereto as Exhibit J.⁵ The Proposed Amendments are the product of work of the Civil
4 Rules Advisory Committee over the last several years. See *Report of the Civil Rules Advisory*
5 *Committee*, at 2, 5. The Proposed Amendments were promulgated in large part because the
6 current version of Federal Rules does not adequately address the complexity of electronic
7 discovery. See *id.* at 4 ("The uncertainties and problems lawyers, litigants, and judges face in
8 handling electronic discovery under the present federal discovery rules are reflected in the
9 growing demand for additional rules in this area.")⁶

10 The Proposed Amendment to Rule 26(b)(2) specifically addresses searching
11 electronically stored information that is "not reasonably accessible." Its provisions compel the
12 conclusion that Rambus should not be required to search its backup media to any extent beyond
13 that already undertaken by Rambus.

14 The Proposed Rule states, in pertinent part:

15 A party need not provide discovery of electronically stored
16 information that the party identifies as not reasonably accessible.
On motion by the requesting party, the responding party must show

17 ⁵ The Sedona Conference Working Group on Electronic Document Production, is a good
18 secondary source for principled guidance. Its work involves a collaborative effort by leading
19 academics, judges and practitioners to devise a workable set of guidelines for electronic
20 discovery. The Working Group also advocates that a party typically should not be required to
preserve or search all inaccessible data. See *The Sedona Principles: Best Practices*
Recommendations & Principles for Addressing Electronic Document Production (January 2004
version) at 23-25, 31, 44-46 (available at http://www.thosedonaconference.org/publications_html)

21 ⁶ Presumably for similar reasons, the Ninth Circuit Advisory Board also proposed a model local
22 rule addressing the obligation to search backup tapes, which likewise supports Rambus's position
23 set forth in this Case Management Statement. The text of the Ninth Circuit Advisory Board's
24 proposed model local rule reads as follows: "Rule 2: The obligation to search for electronic data
25 and documents shall be *limited* to a search of *active data* that admits of efficient searching and
26 retrieval. The preservation or searching of non-active data and information such as disaster
27 recovery backup tapes; deleted, shadowed, fragmented or residual data or documents; or any
28 source other than active information shall not be required absent an order of the court upon
motion by the requesting party demonstrating a need for such preservation or searching, the
likelihood that relevant information not available from other sources will be found in such media,
and that the relevance of such information and data outweighs the cost, burden, and disruption of
retrieving and processing the data from such sources." Memorandum from the Ninth Circuit
Advisory Board, *Proposed Model Local Rule on Electronic Discovery*, available at
<http://www.krollontrack.com/library/9thCirDraft.pdf> (emphasis added).

1 that the information is not reasonably accessible. If that showing is
2 made, the court may order discovery of the information for good
cause.

3 Proposed Rule 26(b)(2)(C) (attached as Exhibit K).⁷ The Committee Note clarifies the meaning
4 of the phrase "not reasonably accessible" as follows:

5 For example, some information may be stored solely for disaster-
6 recovery purposes and be expensive and difficult to use for other
7 purposes. Time-consuming and costly restoration of the data may
8 be required and it may not be organized in a way that permits
9 searching for information relevant to the action. Some information
10 may be "legacy" data retained in obsolete systems; such data is no
11 longer used and may be costly and burdensome to restore and
retrieve. Other information may have been deleted in a way that
12 makes it inaccessible without resort to expensive and uncertain
forensic techniques, even though technology may provide the
13 capability to retrieve and produce it through extraordinary efforts.
14 *Ordinarily such information would not be considered reasonably
15 accessible.*

16 Proposed Amendments, August 2004 version, at 11 (emphasis added).

17 The backup media in Rambus's possession do not contain "reasonably accessible"
18 information. In particular, the server backup tapes that Rambus has discovered were "stored
19 solely for disaster-recovery purposes and [are] expensive and difficult to use for other purposes,"
20 and the information on the media is "legacy data, retained in obsolete systems." Specifically,
21 these tapes are remnants from prior disaster recovery backup systems used by the company at
22 varying points in time. Some media contain data from more than one backup session; in other
23 cases, a single backup session spans multiple tapes. Because this media was intended to be used
24 for disaster recovery, not as data archives, user data is intermixed with system files, making
25 extraction of the user data particularly difficult.

26 The "legacy" and "obsolete" nature of the media and the software and hardware
27 used with the media is likewise apparent. The media types include DLT, 8mm, DC-6150, DDS,
28 and 44MB cartridge), each of which can be read only with matching equipment. Many different
types of backup software were used to create the media, including Tar, Dump.SOLARIS, Veritas,

⁷ The above text is that of the recent draft of the Proposed Amendments. It was distributed May 4, 2005 on compact disc at the Association of Business Trial Lawyers Seminar entitled "Zubulake Earthquake: The Looming Traps in E-Discovery."

1 Bud Tools, and Dump.NetApp. Moreover, some of the media contain backups not of traditional
2 servers, but of network-attached storage devices backed up using the NDMP protocol, adding
3 further complexity to the restoration process. Files created under the Unix, Windows and
4 Macintosh operating systems have been found on the same tape sets, with each Macintosh file
5 split into separate, paired files for storage on a Unix file system. Various outdated data
6 compression formats have been encountered, including LHZ, HQX, and SIT. In short, the data
7 on these backup media was not organized to facilitate targeted access of user-generated data, and
8 the process of extracting and segregating possible user-generated data from the backup media has
9 already taken weeks and cost Rambus in excess of \$1 million.⁸

10 Accordingly, under Proposed Rule 26(b)(2), Rambus should be required to search
11 the backup media at issue only if Hynix can demonstrate good cause, which requires the Court to
12 “balance the requesting party’s need for the information and the burden on the responding party.”
13 Proposed Amendments, August 2004 version, at 14. *See also* Manual for Complex Litigation
14 (4th) § 11.446 (noting that limitations on discovery authorized in existing Rule 26(b)(2) “should
15 be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of
16 computer data and systems.”).⁹ Hynix simply cannot sustain this burden. Notwithstanding that
17 Hynix cannot establish that it has any need for any responsive information that may be on
18 Rambus’s backup media, or that any need it does have outweighs the burden on Rambus of
19 restoring data, processing it and reviewing it for responsive documents, Rambus has voluntarily
20 adopted an approach to restoring and reviewing the data contained on certain of the backup media

21
22 ⁸ Rambus estimates that the cost required to process, have counsel review, and produce
documents from each gigabyte of data is approximately \$17,200, requiring 107 hours of time.

23 ⁹ These standards were not created out of thin air. Rather, the unique problems increasingly
24 presented by the existence of inaccessible data sources have been recognized in the emerging case
law. *See* Proposed Amendments, August 2004 version, at 14 (acknowledging case law has begun
25 to develop on the topic and citing *Zubulake I*, *Rowe*, and *McPeck*). Although the precise tests
adopted by the courts that have considered these issues vary, the courts have uniformly advocated
26 restraint in imposing any duty to restore and then review the contents of backup media. *See, e.g.,*
McPeck, 202 F.R.D. at 34-35 (“If the likelihood of finding something was the only criterion, there
27 is a risk that someone will have to spend hundreds of thousands of dollars to produce a single e-
mail. . . . It must be recalled that ordering the producing party to restore backup tapes upon a
28 showing of likelihood that they will contain relevant information in every case gives the plaintiff
a gigantic club with which to beat his opponent into settlement.”).

1 it has located, consistent with the factual background and legal principles set forth above, as
2 described in Section III below. Because Rambus's estimates regarding completion of its review
3 of materials from the backup media are necessarily based upon the approach that it has adopted,
4 Rambus requests that the Court consider this approach and acknowledge that Rambus may
5 proceed accordingly.

6 **III. RAMBUS'S PROPOSAL REGARDING ITS PROCESS FOR REVIEW OF**
7 **SELECTED RECENTLY-DISCOVERED BACKUP MEDIA**

8 **A. System Backup From May 19, 1996**

9 Rambus has discovered nineteen 8mm backup tapes that were created (populated
10 with data) on May 19, 1996.¹⁰ Rambus's outside vendors have restored these nineteen tapes and
11 determined that they all contain recoverable data; there is a total of 65 gigabytes of data on these
12 tapes. Although one tape (Tape 9 of 20) appears to be missing, this set of nineteen tapes appears
13 to be a reasonably complete backup of the Rambus servers as of May 19, 1996. Rambus has
14 already begun to review documents from these nineteen tapes for responsiveness to Hynix's
15 requests for production and began producing documents from these tapes on April 15, 2005.
16 Although it believes that review of the documents on these tapes is not required by law, Rambus
17 has voluntarily undertaken this action because it appears that these nineteen backup tapes
18 constitute the most complete backup that pre-dates Rambus's adoption of its document retention
19 policy.

20 **B. Media Created Before May 19, 1996**

21 To date, Rambus's outside vendors have identified 108 pieces of backup media
22 with recoverable data that were created *before* the May 19, 1996 backup described in Section
23 III(A). These 108 pieces of media are listed on Exhibit L and contain 26 gigabytes of data.
24 Rambus does not believe that it should be required to search these 108 pieces of media. While
25 there may have been responsive documents both created and destroyed prior to May 19, 1996, not
26 even Hynix contends that Rambus should have had a litigation hold in place at this time.

27 ¹⁰ It appears from the labels on the tapes – which identify each tape as X of 20 – that this set
28 originally consisted of twenty tapes.

1 Accordingly, there is no justification for requiring Rambus to go beyond its review of the May
2 19, 1996 backup, and to further restore and search backup media created prior to that date.

3 C. Media Created After May 19, 1996, And Before February 2000

4 In light of the allegations lodged by Hynix, Rambus intends to review (in addition
5 to the May 19, 1996 backup tapes) the data on the backup media created after May 19, 1996, and
6 before February 2000, that appear reasonably likely to contain documents responsive to Hynix's
7 requests or that Rambus cannot exclude as *not* reasonably likely to contain responsive documents.
8 There are currently twenty-five pieces of media within this category and they contain a total of 39
9 gigabytes of data. A list of the twenty-five pieces of media in this category is attached as Exhibit
10 M.

11 In addition, there are currently eighty pieces of backup media with a total of 159
12 gigabytes of data that were created after May 19, 1996 and before February 2000 that have been
13 determined by Rambus *not* to be reasonably likely to contain discoverable information. A list of
14 these eighty pieces of media is attached as Exhibit N. Because they are not reasonably likely to
15 contain discoverable information, Rambus does not intend to review data from these eighty pieces
16 of media for responsiveness to Hynix's discovery requests.

17 As restoration efforts for some tapes are ongoing and as Rambus learns more about
18 the contents of the media, Rambus may identify additional pieces of media that should be listed
19 on Exhibit M and N, or Rambus may adjust its assessment of whether a piece of media is
20 reasonably likely to contain documents responsive to Hynix's requests. Rambus will keep Hynix
21 apprised if it moves additional tapes into or between either of these two categories.

22 D. Media Created After February 2000

23 As Rambus earlier explained, it began collecting documents for its then-pending
24 patent infringement litigation in late 1999, and its efforts in furtherance of this process continued
25 thereafter. During this same time period, Rambus imposed a "litigation hold" on various of its
26 employees who, it thought, were reasonably likely to possess relevant documents. There thus is
27 no reason to impose on Rambus the burden and expense of restoring and reviewing documents
28 found on media created after February 2000 (*i.e.*, after the document collection had begun and

1 Rambus had instituted a litigation hold). Indeed, if in the circumstances of this case Rambus
2 were to be required to undertake this extraordinary effort, it would be equally appropriate to
3 require all parties in all litigation, including Hynix, to undertake a similar effort to restore and
4 review inaccessible data.

5 To date, Rambus has identified ninety-five pieces of media created between July
6 2000 and October 2000, listed on Exhibit O, which contain a total of 4,291 gigabytes of data. For
7 the reasons set forth above, Rambus does not intend to review this data. If Rambus were able to
8 reduce the per gigabyte cost of processing, review, and production from \$17,200 per gigabyte to
9 \$5,000 per gigabyte, the cost of processing reviewing all this data would still exceed \$20 million.

10 E. Review Of Data For Documents Responsive To Hynix's Discovery Requests

11 Thus, Rambus currently proposes to review data from the May 19, 1996 backup
12 tapes as well as the twenty-five additional pieces of electronic media listed on Exhibit M. As
13 noted above, restoration efforts are ongoing for additional pieces of media and, if any of that
14 media falls within the May 20, 1996 to February 2000 time frame and is reasonably likely to
15 contain discoverable data, or cannot be excluded on the grounds that it is not reasonably likely to
16 contain discoverable data, then there may be additional pieces of media that Rambus will review.
17 In the meantime, Rambus has already completed a review of much of the data from the May 19,
18 1996 backup tapes. Given the current rate at which it can restore and review data, and allowing
19 for certain additional processes to be implemented to improve Rambus's ability to avoid
20 producing duplicates, *i.e.*, documents that have been produced at some earlier point, either as part
21 of other productions or from backup media, Rambus expects to complete the production of
22 additional responsive documents from this set of media by not later than July 29, 2005.¹¹

23
24 ¹¹ This date also takes into account the time Rambus estimates it will take to review three
25 additional sets of documents. One set is documents that were recently collected from certain HR
26 and IT department employees who have been added as custodians based on Hynix's new
27 document retention and backup media allegations. A second set of documents includes
28 documents from Rambus's server that belong to employees who left Rambus prior to the 2002
document collection for the FTC proceedings and whose files on the server were not identified
during that collection. The third set of documents is a set of documents from Rambus's 2002
FTC collection that Rambus determined were not responsive to the FTC's document requests, but
which Rambus is revisiting to consider whether production to Hynix is called for.

1 **F. Blank Or "Bad" Media**

2 Hynix has requested the opportunity to have its experts inspect the media that
3 Rambus's experts have determined is blank or unreadable ("bad" media). There are 1,074 pieces
4 of media (along with three cleaning cartridges) in this category. Hynix has stated that it wants to
5 determine for itself that the media are blank, whether they previously contained data, and when
6 any data previously on the media was erased. Rambus is agreeable in principle to allowing Hynix
7 to undertake this exercise, and has suggested that Hynix also seek to determine when any data
8 that was previously stored on the media was placed there (in other words, when the media was
9 originally populated with data).

10 Because Hynix will need to examine Rambus's original media, and because there
11 are risks that the process of examining the media could alter the media or any data on the media,
12 and because Rambus is engaged in litigation with other parties who also may want access to these
13 original tapes, Rambus has proposed that Hynix submit a written protocol that it will follow
14 during its examination, that this protocol be agreed to by Rambus and its other adversaries, and
15 that experts representing Hynix, Rambus and Rambus's other adversaries, be permitted to be
16 present during the examination.

17 On May 17, 2005, Hynix responded, suggesting a protocol for review of the blank
18 tapes by its outside vendor. However, Hynix rejected Rambus's proposal that parties involved in
19 other lawsuits with Rambus be permitted to participate. A copy of Hynix's response is attached
20 as Exhibit P. As discussed in Section IV(B) below, the protocol proposed by Hynix for
21 inspection of the blank tapes is generally acceptable, but Hynix's unilateral review of this media
22 is not. Therefore, Rambus expects that the issue will need to be addressed at the upcoming Case
23 Management Conference.

24 **IV. RESPONSE TO HYNIX'S MAY 17, 2005 SUPPLEMENTAL CASE**
25 **MANAGEMENT STATEMENT**

26 On May 17, 2005, Hynix submitted a Supplemental Case Management Statement
27 addressing various issues relating to Rambus's ongoing review of backup media. To the extent
28

1 not addressed above, this Section responds to the statements and proposals set forth in that
2 Supplemental Case Management Conference Statement.

3 As an initial matter, the bulk of Hynix's Supplemental Case Management
4 Conference Statement is directed toward discovery issues, including its arguments about the
5 adequacy of Rambus's Verified Statement respecting discovery of the backup media and its
6 proposals for substantial, expedited discovery relating to such backup media. Rambus
7 respectfully submits that these issues are more appropriately presented to Special Master Ambler
8 in the first instance. While Rambus shares Hynix's interest in moving expeditiously toward trial,
9 and looks forward to the opportunity to have its patent infringement claims considered on the
10 merits at the earliest possible opportunity, Hynix's unilateral request for immediate consideration
11 and expedited treatment of discovery issues by this Court (on issues that Hynix did not even raise
12 with Rambus prior to filing its Supplemental Case Management Statement, much less satisfy its
13 meet-and-confer obligations) ignores the process that the Court has established for such issues.
14 Hynix's approach also ignores the fact that there are *numerous* issues that are presently before
15 Judge Ambler (or that will be shortly) that may impact case management scheduling and the
16 ability of the parties to get to trial. These include recent and continuing disputes over Hynix's
17 unfounded claims of privilege, Hynix's disregard of an Order by Judge Ambler that a former
18 executive be made available for deposition on two-weeks notice, and its continuing failure to
19 produce documents that Rambus must have in order to defend against Hynix's claims. Hynix
20 should not be permitted to pick and choose which discovery disputes are exempted from the
21 process the Court has established, and have the Court deal with those issues it wants treated on an
22 expedited basis.

23 To the extent the Court is inclined to consider the substance of the proposals raised
24 by Hynix, Rambus's response to those proposals is set forth below. In such event, Rambus also
25 requests that the Court resolve one additional issue that has recently been raised between the
26 parties, as set forth in Section IV(A).

1 A. Permitting Judge Abraham Sofaer (Ret.) Access To "Special Confidential"
2 Documents

3 Retired United States District Judge Abraham Sofaer has recently joined Rambus's
4 Board of Directors. In light of his substantial litigation background and judicial experience,
5 Rambus believes that it would be highly beneficial to permit Judge Sofaer access to documents
6 marked by Hynix as "Special Confidential" under the protective order in this action. By letter
7 dated May 17, 2005 (attached hereto as Exhibit Q), Rambus requested that Hynix advise it of any
8 objections that Hynix may have to permitting Judge Sofaer such access. Rambus hopes that the
9 parties will be able to resolve this matter quickly and without the Court's intervention. In the
10 event the parties are not able to resolve this issue, Rambus requests that the Court enter an order
11 permitting Judge Sofaer access to "Special Confidential" documents, subject to the terms and
12 provisions of the protective order.

13 B. EED's Review of Blank Backup Tapes

14 As set forth above in Section III(F), Rambus does not object in principle to
15 Hynix's request that its outside vendor, EED, review the original blank backup media consistent
16 with a mutually-agreeable protocol. In fact, the protocol proposed by Hynix is acceptable so long
17 as it is clarified that (a) Rambus's counsel must approve any analysis of data discovered by EED,
18 (b) any costs associated with EED's review of the blank media will be borne by Hynix, and (c)
19 any results of EED's review will be shared with Rambus. However, for the reasons also set forth
20 above, any such review must include other parties involved in litigation with Rambus, such as
21 Micron, that likewise may have an interest in evaluating these media.

22 C. Rambus's Verified Statement

23 In both correspondence with Rambus and in its Supplemental Case Management
24 Statement, Hynix raises certain objections to the Verified Statement that Rambus provided
25 pursuant to the proposed Order filed with the Court on April 21. A copy of the Verified
26 Statement is attached as Exhibit D; a letter from Rambus's counsel addressing the issues raised by
27 Hynix respecting that statement is attached as Exhibit G. Rambus submits that the Court's review
28 of these documents will readily confirm both the completeness and adequacy of Rambus's efforts.

1 In any event, Rambus cannot provide information that it does not have. Hynix
2 asks "how or why" the computer storage area, located in a locked cage in Rambus's parking
3 garage, was not searched. As counsel for Rambus has already informed Hynix, although it is
4 difficult to state with certainty why any particular area was *not* searched, it was presumably
5 because no one expected that it was likely that responsive documents would be stored in a
6 computer equipment storage cage. Hynix does not (and presumably cannot) articulate what
7 additional information it seeks.

8 Hynix also asserts that Rambus is attempting to "cloak in privilege" certain facts
9 known by Rambus's IT manager, Gary Bridgewater. Not so. As Rambus's counsel informed
10 Hynix, any underlying facts known to Mr. Bridgewater that are relevant to this case may be
11 elicited from him in deposition. *See* Exhibit G. However, Hynix may not learn the content of
12 Mr. Bridgewater's communications with counsel; it is that privileged information (*i.e.*, what Mr.
13 Bridgewater told counsel during a meeting earlier this year) that Hynix now seeks.

14 In sum, there is no basis for Hynix's contentions respecting the propriety or
15 adequacy of Rambus's Verified Statement. If Hynix desires additional information respecting the
16 facts contained in that statement, it may obtain such information in the Rule 30(b)(6) deposition
17 that it has already noticed.

18 **D. Expedited Discovery Dates**

19 Hynix requests that discovery relating to Rambus's discovery of and production of
20 documents from Rambus's backup media be expedited, and specifically seeks that the time limits
21 associated with depositions (apparently only the two identified in Hynix's Supplemental Case
22 Management Statement) and certain unidentified interrogatories be shortened.

23 With respect to the two depositions that Hynix has identified, Rambus is
24 committed to working with Hynix to find dates in the near future that accommodate both the
25 parties' interest in prompt completion of this discovery and the schedules and other commitments
26 of both the witness(es) and the lawyers. At present (and without consulting with Rambus), Hynix
27 has scheduled both depositions for the day after Memorial Day and the day before a previously-
28 scheduled deposition of a Hynix witness, D.S. Chung. Due to scheduling conflicts, Rambus will

1 not be able to make its witnesses available on that day. Rambus proposes that the parties meet
2 and confer respecting this issue, and expects that they will be able to mutually agree upon an
3 acceptable date.

4 With respect to interrogatories, Rambus cannot respond to Hynix's proposal
5 without first considering the number and scope of the interrogatories that Hynix intends to
6 propound (including the extent to which they overlap with the deposition topics that Hynix has
7 identified). Rambus therefore proposes that, to the extent Hynix intends to propound
8 interrogatories respecting the discovery of and/or recovery of data from Rambus's backup media,
9 it provide a copy of such interrogatories to Rambus so that it can make an informed determination
10 about how much time it will need to respond.

11 **E. Expedited Briefing For Additional Issues Relating to Rambus's Production**

12 Hynix requests a special "expedited" briefing schedule for issues related to
13 Rambus's back-up tape production and suggests that it has already initiated the "meet and confer"
14 process on these issues. Hynix is deliberately unclear about what issues it seeks to have heard on
15 an expedited basis. Indeed, Hynix notably does not describe the "meet and confer" it claims to
16 have "initiated." First, Hynix wrote a letter to Rambus with a variety of questions and requests,
17 such as asking for better quality pictures of the labels of the backup media. See Exhibit H.
18 Rambus responded completely and promptly to Hynix's letter and Hynix has raised no further
19 issues or concerns. See Exhibit I. Second, Hynix claimed that one of Rambus's production CDs
20 was "unreadable" and demanded a replacement CD. See Exhibit R. Shortly thereafter, Hynix
21 apologized for the confusion and informed Rambus that the technical issues with the CD were on
22 Hynix's end. See Exhibit S. In the event that Hynix identifies other discovery-related issues,
23 Rambus suggests, as discussed above, that any such issues should be heard by Judge Ambler if,
24 after the parties have met and conferred, the issue remains unresolved. Rambus has no objection
25 to Hynix's request that any and all discovery motions related to Rambus's production from the
26 backup media be heard on one date and briefed in one letter brief.

1 **F. Hynix's Proposed Trial Schedule**

2 1. Trial Dates

3 Rambus disagrees with Hynix's trial schedule proposal. Instead, based on the
4 process for reviewing backup media outlined in Section III above, Rambus proposes the unclean
5 hands evidentiary hearing be set for September 6, 2005, and the Patent module be set for October
6 17, 2005, which is the date currently calendared for the Conduct module. Specific proposed dates
7 are set forth in Section V below. In light of Rambus's expected completion date for its review
8 and production of documents from backup media, there is no basis for delaying the unclean hands
9 evidentiary hearing until October, or deferring indefinitely a trial on the merits of Rambus's
10 patent infringement claims.

11 Rambus's counsel has a scheduling conflict with that latter of Hynix's proposed
12 Case Management Conference dates of June 24, 2005 and July 15, 2005. Rambus suggests
13 instead that Case Management Conferences be held on June 24, 2005 and July 29, 2005. Rambus
14 does agree that the Conduct trial dates can be scheduled at a July 2005 Case Management
15 Conference.

16 2. Timing of Expert Witness Depositions

17 Hynix asks this Court to address its appeal from the Discovery Master's May 5,
18 2005 discovery order regarding expert depositions at a Case Management Conference. This is
19 procedurally improper. Under Local Rule 72-2, this Court can order Rambus to file an opposition
20 brief in response to Hynix's appeal or, if no briefing schedule is set within fifteen days, then
21 Hynix's appeal is automatically deemed denied. There is no reason (and Hynix identifies none)
22 for expedited and extraordinary consideration of this issue.

23 **V. PROPOSED SCHEDULE FOR TRIAL OF THIS CASE**

24 In light of the foregoing, Rambus proposes the following pre-trial schedule for the
25 three modules to be tried in this case. In addition, Rambus attaches a proposed pre-trial order that
26 reflects the following dates:
27
28

1 **CASE MANAGEMENT CONFERENCES**

2 Rambus proposes that the Court set further Case Management Conferences for
3 June 24, 2005 and July 29, 2005 at 10:30 a.m.

4 **UNCLEAN HANDS: EVIDENTIARY HEARING**

5

EVENT	PROPOSED DATE
All filings required by the Court's Standing Order re Pretrial Preparation (Heading B, including Joint Pretrial Statement) to be made.	August 18, 2005 (10 court days before Pretrial Conference for Evidentiary Hearing)
All filings required by the Court's Standing Order re Pretrial Preparation (Heading C) to be made.	August 25, 2005 (5 court days before Pretrial Conference for Evidentiary Hearing)
Pretrial Conference for Evidentiary Hearing	September 1, 2005 (subject to Court approval)
Evidentiary Hearing (limited to 15 hours per side, exclusive of opening and closing statements)	September 6, 2005 (subject to Court approval)

6
7
8
9
10
11
12
13
14
15
16

17

18 **PATENT TRIAL**

19

EVENT	PROPOSED DATE
Parties shall exchange Pretrial Statement for Patent Trial (including all items in Court's Standing Order Re: Pretrial Preparation, §B(8))	September 19, 2005
All filings required by the Court's Standing Order re Pretrial Preparation (Heading B, including Amended Joint Pretrial Statement) to be made.	September 28, 2005 (10 court days before Final Pretrial Conference)
All filings required by the Court's Standing Order re Pretrial Preparation (Heading C) to be made.	October 5, 2005 (5 court days before Final Pretrial Conference)

20
21
22
23
24
25
26
27
28

EVENT	PROPOSED DATE
Final Pretrial Conference for Patent Trial	October 13, 2005 (subject to Court approval)
Patent Trial (limited to 15 hours per side, exclusive of jury selection, and opening and closing statements)	October 17, 2005 (Subject to Court Approval)

CONDUCT TRIAL

All existing dates should be vacated; new dates should be determined at a subsequent Case Management Conference on July 29, 2005.

DATED: May 19, 2005

MUNGER, TOLLES & OLSON LLP

By: Gregory P. Stone /s/ Gregory P. Stone

Attorneys for Defendant and Counterclaimant
Rambus Inc.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO:

I, the undersigned, declare: that I am employed in the aforesaid County; I am over the age of 18 and not a party to the within action; my business address is 33 New Montgomery Street 19th Floor, San Francisco, California 94105.

On May 19, 2005, I served upon the interested party(ies) in this action the foregoing document(s) described as:

SUPPLEMENTAL CASE MANAGEMENT STATEMENT OF RAMBUS INC.

By placing the original a true copy thereof enclosed in sealed envelope(s) addressed as stated on the attached service list.

BY FEDERAL EXPRESS PRIORITY OVERNIGHT DELIVERY (AS INDICATED ON ATTACHED SERVICE LIST) I caused such envelope(s) to be placed for Federal Express collection and delivery at San Francisco, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for Federal Express mailing. Under that practice it would be deposited with the Federal Express office on that same day with instructions for overnight delivery, fully prepaid, at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the Federal Express delivery date is more than one day after dated of deposit with the local Federal Express office, pursuant to this affidavit.

BY ELECTRONIC MAIL - (AS INDICATED ON ATTACHED SERVICE LIST) I caused such documents to be sent by electronic mail for instantaneous transmittal via telephone line.

(FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on May 19, 2005, at San Francisco, California.

Milvi Giesinger

SERVICE LIST
Hynix v. Rambus, Inc.
USDC CV-00-20905 RMW

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Theodore G. Brown, III
Townsend and Townsend and
Crew LLP
379 Lytton Avenue
Palo Alto, CA 94301
E-mail: tgbrown@townsend.com

Patrick Lynch
Kenneth R. O'Rourke
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071-2899
E-mail: plynch@omm.com,
korourke@omm.com

Susan van Keulen,
Thelen Reid & Priest LLP
225 West Santa Clara Street
Suite 1200
San Jose, CA 95113
E-mail: svankeulen@thelenreid.com

PROOF OF SERVICE BY HAND

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 560 Mission Street, Twenty-Seventh Floor, San Francisco, California 94105-2907.

On May 19, 2005, 2004, I served the foregoing documents described as:

SUPPLEMENTAL CASE MANAGEMENT STATEMENT OF RAMBUS INC.

on the interested party in this action by placing true copies thereof enclosed in a sealed envelope addressed as follows:

Geoffrey H. Yost, Esq.
Thelen Reid & Priest LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3601
E-mail: gyost@thelenreid.com

I caused such an envelope to be delivered by hand via WHEELS OF JUSTICE, INC., 657 Mission Street, Suite 502, San Francisco, CA 94105, to the offices of the addressee.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 19, 2005, 2004, at San Francisco, California.

Milvi Giesinger

Exhibit L

Exhibit L
Tapes from Before May 19, 1996 That Rambus Does Not Propose To Review

Tape No.	Tape Label	Media Type	Gross Size (GB)
		8MM	0.01
160	Anagram files Oct 11, 94	8MM	0.87
168	"WS NINTENDO RAC Tape out #1 9-1-94, w5/bi.n ws/rev1.0/cad/chip, tar"	8MM	0.00
177	rac_sgi.stream 7/24/95	8MM	0.58
186	V5 rev 2.0 NEC RAC tapeout 1-95 V5/REV2.0/pe	DC-6150	0.00
199	(no label)	DC-6150	0.02
200	cirrus feb 1	DC-6150	0.14
202	BACKUP/ARCHIVE TAPE P2/4MEG TOSHIBA DATA Rev 1.0 MARCH 10, 1992 VH	DC-6150	0.00
203	(post-it note attached "scratch"	DC-6150	0.01
204	cirrus whole chip May 8	DC-6150	0.02
207	cirrus feb 3	8MM	0.11
1197	(PAPER LABEL IN CASE) /chuang /lyu /harver /us /wei	8MM	0.07
1198	(PAPER LABEL IN CASE) /andy /chau / cobrunso /horowitz /jkim /kiji /khlee /nickall /p2 /randolph /stark /victor /wayne /yang /ying	8MM	0.22
1200	(NO LABEL)	8MM	0.09
1203	4.1.1b IPX system	8MM	0.00
1207	ix/rev1.0 tapesys 8501 4 28 95	8MM	0.11
1208	v5/rev1.1 tapesys 8501 4/3/95	8MM	2.49
1213	U2/revA_cpi tape sys 85018/18/95	8MM	0.15
1214	-srnvas/getstart/projects tape sys 8501 9/29/95	8MM	0.47
1215	w2/rev2.0 tape sys 8501	8MM	1.37
1218	watchdog 12/04/95	8MM	0.00
1222	W5/rev2.0 tape sys 8501 3 29 95	8MM	0.00
1226	4.1.3 IPX system	8MM	0.47
1230	U5/revd.0 tapesys 8501 5/16/95	8MM	0.02
1233	/usr/galindo tape sys 8501 9/30/95	8MM	0.61
1235	v5 rev2.0 Archive Nec RAC tar 1.30.95	8MM	0.09
1239	v5/rev1.2 tapesys 8501 4/3/1995	8MM	1.22
1246	/home/set/usr3 crash dump 12/13/95	8MM	0.18
1249	original 4.1.2 system	8MM	0.03
1250	/user/bogatin tape sys 8501 9/30/95	8MM	0.73
1256	u2/revA_Npi tapesys 8501 8/28/95	8MM	0.00
1260	/user/opus 5/10/93	8MM	0.00
1262	W5/trac1.0 tape sys 8501 3.29.95	8MM	0.00
1265	v5/rev2.0 tapesys8501 4 4 95	8MM	0.00
1271	U2/revA_N tapesys 8501 8/24/1995	8MM	0.19
1272	w2/trac1.0 tapesys 8501 4 29 95	8MM	2.50
1274	U2/revA_A tapesys 8501 8/15/95	8MM	3.24
1282	U2/revA tapesys 8501 8/14/95	8MM	2.52
1287	u2/revA_F tapesys 8501 8/24/95	8MM	0.72
1288	clock 4 20 9-8-92 RAC		

Exhibit L
Tapes from Before May 19, 1996 That Rambus Does Not Propose To Review

Tape No.	Tape Label	Media Type	Gross Size (GB)
1290	v12/rev1.0 tapesys 8501	8MM	1.21
1294	/home/mars/user1/ractemp/20 9-30-92	8MM	0.39
1295	W5 rev 2.0 Archive Nintendo RAC tar 1/30/1995	8MM	0.25
1300	(NO LABEL)	8MM	1.41
1307	w2/rev1.1 tapesys 8501	8MM	0.26
1311	U2/revA_c tape sys 8501 8/16/95	8MM	2.58
1312	W2/rev1.2 Tape Sys 8501	8MM	0.21
1314	Rambus Company Confidential 9-15-92 uqRAC	DC-6150	0.11
1316	For Rambus 12/21/91 There are three GDS II files 1) V16CNP.ingds2 (output buffer) 2) TPAD.ingds2 (pad to buffer connection) 3) VPJ3BN.ingds2 (ESR cell) The tape is written by "tar" command. From: Vertex	DC-6150	0.00
1317	No Label- Post-it " 1-22-92 TAR format Vertex test tape 1"	DC-6150	0.00
1319	Rambus 12/20/91 There are 3 files on tape V16CNP.ingds2 (output buffer), VPJ3BN.INGDS2 (ESR cell), tpad.ingds2 (pad connection cell) Yellow Post-it "BAD"	DC-6150	0.00
1320	SME2491Y0011 w/o PLL updates early December '91	DC-6150	0.05
1321	Rambus Inc. Company Confidential vs RAC updates 10-6-92	DC-6150	0.00
1325	No Label- Post-it in case "Viki: Vertex Semi. Tar 1 v50i.drac 1-8-92 Roy Wen 408-456-8900 x2350"	DC-6150	0.00
1326	Rambus Accounting BU-1 (post-it in case reads 5/29/92, 9/15/92, 10/31/94)	44 MB Cartridge	0.03
1331	Rambus Budget - All Master Disk 10/9/91	3.5 Floppy	0.00
1332	Rambus 11/91 BU	3.5 Floppy	0.00
1333	Rambus Bu 8/91 ML 8/91 B4CLS 8/91 W/P's	3.5 Floppy	0.00
1334	Rambus 3/92 Backup	3.5 Floppy	0.00
1335	Rambus 7/91 BU 6 ML7/91 B4CLS 7/91 W/P's	3.5 Floppy	0.00
1336	Rambus Backup 11/7/91	3.5 Floppy	0.00
1337	Rambus ACCTNG BU I FY90 Audit Schedules FY90 Tax Schedules ML OLD 10/90 FY90 ML files	3.5 Floppy	0.00
1338	Rambus 1/92 Backup ML 1/92 B4CLS Rambus 1/92 W/P's	3.5 Floppy	0.00
1339	Rambus ACCTNG BU IV 3/91 W/P's & ML F/a 4/30/91 4/91 W/P's & ML	3.5 Floppy	0.00
1341	Rambus ACCTNG BU V 5/91 W/P's & ML 6/91 W/P's & ML	3.5 Floppy	0.00
1342	FY92 ML BU w/ FY93 Audit Adj	3.5 Floppy	0.00
1343	FY93 ML BU w/ FY93 Audit Adj	3.5 Floppy	0.00
1344	Rambus ML 9/91 B4CLS 9/91 W/P's	3.5 Floppy	0.00
1345	Rambus 10/91 BU	3.5 Floppy	0.00
1346	Rambus 2-92 BU ML2/92 B4CLS 2/92 W/P's Misc. W/P's	3.5 Floppy	0.00
1347	Rambus ACCTNG BU II MLN 11/90 (no MLN 10/90) MLN 12/90	3.5 Floppy	0.00
1348	Rambus 12/91 W/P's Bkup, Rambus 12/91 B4CLS Bkup	3.5 Floppy	0.00
1349	FY91 ML BU w/ FY93 Audit Adj	3.5 Floppy	0.00
1350	Rambus Corporate Backgrounder Framemaker/Mac v3.0 New version 7/6/9 Disk 1/1 DFI 6-9-93	3.5 Floppy	0.00
1351	BACKUP 4/2 Mktg Plan. Bullis Site Councils	3.5 Floppy	0.00
1352	Billy's Graphics App Note 6/7/93	3.5 Floppy	0.00

Exhibit L
Tapes from Before May 19, 1996 That Rambus Does Not Propose To Review

Tape No.	Tape Label	Media Type	Gross Size (GB)
1354	Backup 5/3 FM DOC's 4/93	3.5 Floppy	0.00
1355	Rambus Technical Backgrounder 9/30/94	3.5 Floppy	0.00
1356	Powerpoint / Windows G.U.I Blk Diagram John Peddis	3.5 Floppy	0.00
1358	Rambus Inc. 1/16/95, 1/18/95 New Versions, 2 PCI Papers 1/95 Post-it "common\usr\garrett\documents\pci95seos_Final"	3.5 Floppy	0.00
1359	Rambus 6/1/95 New Slides for CEO Tour	3.5 Floppy	0.00
1360	Rambus Inc Enabling Tech for Graphics	3.5 Floppy	0.00
1361	Rambus 8/4/93, Ref Manual #1, RDRAM_ref.book, title page (/ 1/2x9 format) ...toc, ...LOF, LOT, Change History, Introduction, logical 4M RDRAM, Logical/8M RDRAM, logo files, template	3.5 Floppy	0.00
1362	Rambus 7/30/93 Pentium Document, PTM.book, et al	3.5 Floppy	0.00
1364	Rambus Inc. 5/3/95 Text for "enabling Hi Perf PC Graphics" PCI Paper	3.5 Floppy	0.00
1366	Backgrounder - old 12/92	3.5 Floppy	0.00
1367	Rambus Inc 5/3/95 "Enabling Tech" Template, New	3.5 Floppy	0.00
1369	Rambus Inc. J Cates 415 903-3800 "Rambus. Demo postscript"	3.5 Floppy	0.00
1370	Rambus 7/7/95 SVPC95.doc Mac	3.5 Floppy	0.00
1371	Main Memory Backgrounder 7/20/AM	3.5 Floppy	0.00
1372	Backup 4/2 Billy's excel files 4Q92, JC Spare Backup	3.5 Floppy	0.00
1373	Backup, Pcheck (Pentium App Note)	3.5 Floppy	0.00
1374	Backup 12/92 Spare, Rambus Channel foil, PVC Prev	3.5 Floppy	0.00
1375	Back-up PVC Docs 12/92, 1/93	3.5 Floppy	0.00
1378	Backup 6/93	3.5 Floppy	0.00
1379	PC Outlook 12/94 pwpt.4.0	3.5 Floppy	0.00
1380	Rambus 8/13/93 Ref Manual #2, Logical Packet ?????, Logical Operating Modes, Logical Transaction Formation, Logical Transaction Interaction, Logical Address Mapping, Logical Initialization	3.5 Floppy	0.00
1382	Rambus Memory: Enabling Technology for PC Graphics REV 1.0, Rec'd 5/3/95	3.5 Floppy	0.00
1383	Rambus 8/13/93, Ref Manual #3, Logical Transaction Format, Logical Command function, Physical Mechanical, Physical Electrical, Physical Timing, Notation, Glossary, RDRAM_ref1x	3.5 Floppy	0.00
1384	64M 5T Longlead update.1, Version 8/22/95	3.5 Floppy	0.00
1385	Rambus Inc. 7/18/95, 64M Backgrounder Info	3.5 Floppy	0.00
1386	Cirus Logic Logo Pg 3 as (cirlogo)	3.5 Floppy	0.00
1387	Testimonials 8/23 8AM, updated 8/23 7PM, update 8/24 9AM	3.5 Floppy	0.00
1388	Sales Pres Cirus 8/9, Rambus John Dillon	3.5 Floppy	0.00
1390	Powerpoint Mac, Rambus PC Outlook BW, 1/10/94, Contact: Nancy Hannum Work (408) 522- 7566, Home (415)858-1843	3.5 Floppy	0.00
1392	Testimonial 8/22/95	3.5 Floppy	0.00
1393	2/24/94 Rambus Inc, J Carter 415 903 4725, Framemaker 3.0 file, Compcan	3.5 Floppy	0.00
1394	Rambus, Toshiba Rambus Products, Summary with die photo merged, Framemaker 3.0 for Mac, Compressed with Disk Doubler, 16 Jul '93	3.5 Floppy	0.00
1395	Rambus Inc. 5/7/95 RUGBE Technical Overview, Powerpoint Background	3.5 Floppy	0.00
Total			25.79

Exhibit M

Exhibit M
Tapes From May 20, 1996 Through February 2000 That Rambus Proposes To Review

ID#	Tape Label	Media Type	Gross Size (GB)
154	Venus:/home/venus/usr1, Venus:/home/venus/usr2	8MM	2.76
155	Jupiter:/home/jupiter/usr2" Case label "Jupiter:/home/jupiter/usr2, /dev/sd4f usr2 rdump Odsbfu 54.000 6000 125	8MM	1.75
156	/home/jupiter/usr2 11/5/97	8MM	1.73
158	Venus:/home/venus/usr4	8MM	1.52
159	users (archived) 6/26/98 before netapp upgrade	8MM	1.55
161	/index 2 backup before move to/user 7/23/98	8MM	4.43
170	mars:/home/mars/usr1, mars:/home/mars/usr2, 7/2/97	8MM	1.21
171	mars:/home/mars/usr4	8MM	1.64
175	Venus:/home/venus/usr 5/23/97	8MM	1.82
184	(no label)	8MM	1.30
188	(no label)	8MM	5.28
196	users before deleting (archived) 7/21/98	8MM	1.53
1206	/home/umbriel/usr0 (errors) 8-13-92	8MM	0.77
1247	Venus:/home/venus/usr5 usr10 5/23/97	8MM	2.66
1258	Mars: /home/mars/usr 7	8MM	1.70
1261	Venus:/home/venus/usr6 usr 7 5/23/97	8MM	2.55
1266	archive/lgdisk for mching 5/28/1998	8MM	2.41
1278	miranda lvc-0 8/5/97	8MM	0.10
1299	Venus:/home/venus/usr8 usr9 5/23/1997	8MM	2.47
1310	lgsem.0on1=/1g 7/15/98 (archive)	8MM	
SDI 5106	No Label	3.5 Floppy	0.00132
SDI 5109	1 st IDF IRhino3A	Zip Disk	0.05664
SDI5110	TSERN HD Mac Backup Disk 1 12/9/97	Zip Disk	0.08300
SDI 5111	WEB FTP	CD	0.02343
SDI 5113	Copy of Gary B's email backup	CD	0.06387

Total	39.39
--------------	--------------

Exhibit N

Exhibit N
Tapes from May 20, 1996 Through February 2000 That Rambus Does Not Propose To Review

ID#	Tape Label	Media Type	Gross Size (GB)
157	/index 7/22/98 before move /index2	8MM	4.39
162	tarindex/tarlist 010298	8MM	0.00
163	3M 8MM (NO LABEL)	8MM	0.01
164	Netra web logs 12/2/97	8MM	0.85
172	gTRAC gjyeh 5/7/98	8MM	0.68
173	qg-112m "x5 nec tranceiver TAYAOUT x5/REV 1.0, 12-16-95"	8MM	1.58
176	WI5, VS8, Y17	8MM	0.20
180	(no label)	8MM	0.02
182	(no label)	8MM	2.34
185	(no label)	8MM	0.00
197	ACT PATCH BUNDLE, Y2K PATCH BUNDLE, RECOMMENDED PATCH BUNDLE, SICL, F660 SOFTWARE REV. 4.1.1	DDS	0.29
198	backup of /, /export, /export/cache ufsdump oubdsf 80 54000 /2000 after bastion host removal 8/5/97	8MM	2.25
205	"design planner version hld2.4D8a"	DC-6150	1.99
1201	(BLUE LABEL - Rambus Inc-Equipment No. 030104)	8MM	0.00
1204	archived gsemcon/log 7/17/98	8MM	0.00
1205	/user/tmp4atd HJ Liaw 1/2 2/1/99	8MM	2.86
1209	tararchive of /index/speedy/index/saturn 11/17/1997	8MM	0.36
1210	tarindex/tarlist 061998 (2/2)	8MM	4.54
1211	V15, SX2, V0, V12 5/5/97	8MM	0.28
1212	Logic C Modeling rel.36	8MM	0.30
1216	/home/hppo/uso0/epic/3.4	8MM	0.00
1217	w10 Chuck Hung 4/3/98	8MM	6.48
1219	gtar archive .v1 .v2 .v3 1/9/1998	8MM	2.33
1220	pcd/y2 pcd/w2 cvt 11/19/98	8MM	0.00
1221	tar index/tarlist 041098	8MM	3.97
1223	/servers/tarlist old apps 082898	8MM	4.39
1224	W2,V7 5/5/97	8MM	1.48
1227	/home/umbriel/user0/p2	8MM	3.26
1231	archive/fg for mching 5/28/98	8MM	0.92
1232	Tape 3 Venus, Sun 9/19/1997	8MM	3.23
1234	k2 t2 t2ii t5 11 4/30/1997	8MM	4.03
1236	V17 D115 5/12/97	8MM	1.75
1237	W5 W8 5/13/97	8MM	5.18
1238	W10a Chuck Hung/4-2-98	8MM	2.14
1240	U9, U10 5/9/97	8MM	1.46
1241	W1/bin, w1/epic Ho 4/1/98	8MM	4.30
1242	y2 5/1/97	8MM	1.29
1243	/md/ix/doc/releases/releases 97* 98* Victor Lee	8MM	0.43
1244	proxy access logs tar format on hetra 9/29/1997	8MM	5.38
1245	W1/rev 1.0 HO 4/1/1998	8MM	1.72
1248	backup of sun sd0 10/28/97	8MM	0.15
1251	/home/mars/user4/arsoft	8MM	2.13
1252	ra2 for John Ho 4/1/98	8MM	2.80
1253	Pcd/v1/rev2.0 John Ho 11 17 98	8MM	1.24
1254	gtar archive of /plos/szsa sy 1/8/98	8MM	2.86
1255	tar archive of /index/satran/index/speedy 11/17/97	8MM	0.00
1259	pcd/raz 11/25 cvt	8MM	2.19
1264	speedy watchdog db_120897 12/16/1997	8MM	2.41
1267	tar evf /dev/rst29 watchdog db_120897 db_010298	8MM	

Exhibit N

Tapes from May 20, 1996 Through February 2000 That Rambus Does Not Propose To Review

ID#	Tape Label	Media Type	Gross Size (GB)
1268	V22 Chuck Hung 4/2/98	8MM	3.53
1269	W10a W22 Y 10 Chuck Hang 2/5/1999	8MM	4.42
1270	/user/tmp4atd HJ Liaw 2/2	8MM	6.26
1273	/server2/tarlist old apps.082598	8MM	8.84
1275	W/5 Chung 5/6/98	8MM	3.61
1276	W5/rev2.1 tape sys 8501	8MM	0.14
1277	tar indx/tarlist 070198	8MM	2.30
1279	server2/tarlist oldapps 8/31/1998	8MM	12.75
1281	Tape2 speedy jupiter index 9/20/97	8MM	0.00
1284	/server2/tarlist oldapps. 8/25/1998	8MM	0.00
1286	/proj/w10:/proj/w8:/proj/v10	8MM	4.55
1291	-gasbarro/pluto.log 6-7-96	8MM	0.12
1293	undertow	8MM	0.01
1297	W8, V15, V10 Chuck Hung 4/3/98	8MM	3.35
1302	tape 1 index tar evf/dev/rmt/ocba watchdog 9/20/97	8MM	0.00
1303	/pcd/z2 11/19/98	8MM	4.79
1304	U5 5/8/97	8MM	4.21
1305	u2 5/6/97	8MM	4.02
1306	ufsdump/export starting 12/11/97	8MM	0.51
1309	tar archive of / proj/ x2 x5 1/8/98	8MM	2.32
1315	Chronologic Simulation SPARC	DC-6150	0.03
1318	Tech File (drc.pw.165g-mk, drc.pw.165gdv drc.udv) CADENCE (layers, strm.eyr.file sdatemplate)	DC-6150	0.00
1323	5ME2291Z0003 w/ PLL updates	DC-6150	0.05
1324	tar newchip/ tape #2 Wed Sept 16 (PM) Rambus Inc. Proprietary Data	DC-6150	0.10
1398	W15 from V28	8mm	1.77
1399	W15	8mm	0.13
1400	gTRAC Giyeh 5/7/98	8mm	0.68
1401	yeh	8mm	0.04
1405	No label	4mm	0.01
SDI 5107	Thermal Analysis	3.5 Floppy	0.00
SDI 5108	SSC.FM	3.5 Floppy	0.00
Total			158.97

Exhibit O

Exhibit O
Tapes After February 2000 That Rambus Does Not Propose To Review

ID#	Tape Label	Media Type	Gross Size (GB)
1	B00020	DLT IV	42.49
2	B00086	DLT IV	11.60
51	B00100	DLT IV	44.90
54	B00116	DLT IV	68.33
56	B00118	DLT IV	16.05
57	B00135	DLT IV	45.87
58	B00123	DLT IV	14.83
60	B00124	DLT IV	38.12
61	B00131	DLT IV	27.79
62	B00129	DLT IV	16.02
63	B00132	DLT IV	69.75
64	B00130	DLT IV	53.19
65	B00127	DLT IV	66.87
67	B00076	DLT IV	17.61
68	B00014	DLT IV	59.38
69	B00094	DLT IV	37.47
70	B00117	DLT IV	2.53
72	B00091	DLT IV	52.29
73	B00025	DLT IV	64.29
74	B00126	DLT IV	65.04
76	B00090	DLT IV	95.70
78	B00036	DLT IV	16.09
79	B00022	DLT IV	37.98
80	B00033	DLT IV	59.93
81	B00096	DLT IV	52.72
82	B00047	DLT IV	59.95
83	B00056	DLT IV	5.27
84	B00058	DLT IV	54.52
85	B00119	DLT IV	40.45
86	B00046	DLT IV	74.90
87	B00048	DLT IV	68.09
88	B00051	DLT IV	48.88
89	B00042	DLT IV	52.65
90	B00049	DLT IV	45.95
91	B00045	DLT IV	42.29
92	B00099	DLT IV	49.09
93	B00067	DLT IV	40.99
94	B00134	DLT IV	68.77
95	B00122	DLT IV	68.74
96	B00121	DLT IV	40.87
97	B00111	DLT IV	68.13
98	B00038	DLT IV	68.13
99	B00108	DLT IV	15.06
100	B00080	DLT IV	41.27
101	B00075	DLT IV	38.11
102	B00081	DLT IV	49.20
103	B00059	DLT IV	54.73
104	B00002	DLT IV	70.10
105	B00001	DLT IV	54.78
106	B00000	DLT IV	55.21

Exhibit O
Tapes After February 2000 That Rambus Does Not Propose To Review

ID#	Tape Label	Media Type	Gross Size (GB)
107	B00102	DLT IV	59.56
108	B00115	DLT IV	39.49
109	B00007	DLT IV	45.78
110	B00008	DLT IV	54.33
111	B00009	DLT IV	23.22
112	B00110	DLT IV	46.49
113	B00037	DLT IV	60.59
114	B00092	DLT IV	42.49
115	B00093	DLT IV	39.69
116	B00114	DLT IV	28.16
118	B00084	DLT IV	56.91
119	B00068	DLT IV	54.66
120	B00070	DLT IV	59.77
121	B00054	DLT IV	68.26
122	B00074	DLT IV	0.83
123	B00072	DLT IV	40.87
124	B00030	DLT IV	68.13
125	B00044	DLT IV	15.06
126	B00106	DLT IV	41.27
127	B00040	DLT IV	38.11
128	B00004	DLT IV	43.21
129	B00005	DLT IV	49.20
130	B00097	DLT IV	54.73
133	B00095	DLT IV	70.10
134	B00082	DLT IV	54.78
135	B00079	DLT IV	55.21
136	B00069	DLT IV	59.56
137	B00105	DLT IV	1.76
138	B00013	DLT IV	45.78
139	B00039	DLT IV	54.33
140	B00103	DLT IV	23.22
141	B00109	DLT IV	46.49
142	B00012	DLT IV	60.59
143	B00066	DLT IV	42.49
144	B00062	DLT IV	39.69
146	B00089	DLT IV	68.50
147	B00087	DLT IV	56.91
148	B00032	DLT IV	54.66
150	B00010	DLT IV	59.77
151	B00104	DLT IV	68.26
152	B00107	DLT IV	0.83
153	B00113	DLT IV	18.27
187	tpz013gz m 10/1/02	8MM	0.82
1402	BLANK	8mm	2.06
1403	Batra Pradeep's Desktop	DLT IV	23.11

Total	4290.98
--------------	----------------

Hon. Read Ambler (Ret.)
State Bar No. 44156
JAMS
160 West Santa Clara Street
Suite 1150
San Jose, California 95113
(408) 288-2240
Fax (408) 295-5267

Special Master

NOT FOR CITATION
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HYNIX SEMICONDUCTOR, INC.,
HYNIX SEMICONDUCTOR AMERICA,
INC., HYNIX SEMICONDUCTOR U.K.
LTD., and HYNIX SEMICONDUCTOR
DEUTSCHLAND GmbH,

Plaintiffs,

vs.

RAMBUS, INC.,

Defendant.

Case No. CV 00-20905 RMW

**ORDER¹ GRANTING RAMBUS'S
MOTION TO COMPEL DISCOVERY
REGARDING HYNIX'S BACKUP
TAPES**

Date: August 23, 2005
Time: 3:00 p.m.
Court: Hon. Read Ambler (Ret.)
Place: JAMS
160 West Santa Clara St.
Suite 1150
San Jose, California 95113

AND RELATED CROSS ACTIONS.

Rambus, Inc. ("Rambus") has filed a motion to compel discovery regarding Hynix's backup tapes. Hynix Semiconductor, Inc. ("Hynix Korea"), Hynix Semiconductor America, Inc. ("Hynix America"), Hynix Semiconductor U.K. LTD. ("Hynix U.K."), and Hynix Semiconductor Deutschland GmbH ("Hynix Germany") (collectively "Hynix") have filed an opposition to the

¹ This disposition is not appropriate for publication and may not be cited.

1 motion. The motion was heard on August 23, 2005. The Special Master has considered the
2 papers and the arguments of counsel.

3 Background

4 On November 4, 2004, a Hynix representative testified that since the early 1990's, Hynix
5 has maintained quarterly backups of email and server electronic information. Declaration of
6 Carolyn Hoecker Luedtke ("Luedtke Decl."), Exh. A at 58:17-20, 129:2-131:15. Hynix maintains
7 quarterly backup tapes for five years. *Id.* In response to broad questions about the steps taken to
8 collect and search for documents responsive to Rambus's five sets of requests for production,
9 Hynix's Rule 30(b)(6) designees on the scope of Hynix's search did not mention reviewing
10 information on Hynix's backup tapes. *See* Luedtke Exhs. B-F (deposition testimony of Sungchul
11 Kim and Jin Ho Lee). Rambus's deposition questions to these two individuals, however, did not
12 specifically raise the issue of backup tapes. *Id.* Rambus has taken the deposition of ten different
13 Hynix 30(b)(6) witnesses on the subject of Hynix's retention, collection and production of
14 documents, some of them multiple times. Yost Decl., ¶ 5. Rambus has only asked backup tape
15 questions of one of these ten witnesses. *Id.*

16 On January 31, 2005, Judge Whyte found that Hynix had made a prima facie showing that
17 Rambus deliberately destroyed documents relevant to the litigation. *See* January 31, 2005 Order
18 Compelling Production of Documents (Spoliation - Redacted Public Version) at 13:15-20.) The
19 order states that further discovery on the crime/fraud spoliation issue must be by agreement or
20 further order of the Court. *Id.* The Court set the issue for trial on May 9, 2005. On February 3,
21 2005, Rambus produced documents related to Rambus's spoliation previously withheld as
22 privileged. Yost Decl., Exh. A.

23 On February 8, 2005, Hynix asked Rambus to provide Rule 30(b)(6) testimony regarding
24 how Rambus disposed of electronic data. *Id.* Specifically, Hynix requested deposition testimony
25 regarding the following topics: (1) electronic archives maintained by Rambus, including server
26 and system hard drives and backup tapes; (2) how electronic data was backed up on individual
27 work stations, laptops, and desk tops; (3) Rambus's deletion or erasing of electronic data in the
28 late 1990s, and (4) any existing backups . . . of the contents of the hard drives of Rambus systems
29 (including, without limitation, e-mail servers) and/or individual employee desktop or laptop
computers or work stations as they existed prior to the 1998 Shred Day." *Id.* Rambus refused to
provide this discovery, and a teleconference was held with Judge Whyte.

1 On February 11, 2005, Judge Whyte issued an order stating that the court did not find
 2 good cause for the 30(b)(6) deposition sought by Hynix. The February 11, 2005 order further
 3 states that "Rambus has never claimed privilege over the contents or implementation of its
 4 document retention policy, thus nothing has prevented Hynix from conducting the requested
 5 discovery prior to receiving the documents compelled produced pursuant to the court's January
 6 31, 2005 order."

7 On April 4, 2005, Rambus announced in a letter to Judge Whyte that Rambus may still be
 8 in possession of backup tapes containing data responsive to Hynix's discovery requests.² On
 9 April 6, 2005, Judge Whyte ordered Rambus to preserve the backup tapes. On April 11, the Court
 10 vacated the spoliation trial date; by May 20, all trial dates were vacated.

11 Following the Court's order requiring the preservation of the tapes, Rambus began a
 12 rolling production of responsive documents from the recently-discovered media. Rambus has
 13 provided to Hynix a list of all pre-litigation backup tapes in its possession that it contends are
 14 reasonably likely to contain responsive information or that Rambus cannot exclude as not
 15 reasonably likely to contain responsive information.³ Rambus has also provided Rule 30(b)(6)
 16 testimony about the contents of particular tapes. Hynix also has been taking depositions
 17 exploring Rambus's alleged delay in disclosing the media and the content of the tapes. Hynix
 18 discovered that over 1,200 of the tapes recently disclosed by Rambus in were wiped clean in July
 19 1998. Yost Dec., Exhibit C at 83:13-84:2. Rambus agreed to search recently-discovered tapes
 20 containing data for the period of May 19, 1996 to February 2000, but did not agree to search tapes
 21 dated prior to May 19, 1996 and after February 2000.

22 On June 16, 2005, Rambus served Rule 30(b)(6) notices upon Hynix Korea and Hynix
 23 America seeking information about the backup tapes in Hynix's possession. Luedtke Decl., Exhs.
 24 J & K. During the hearing on the motion, counsel for Rambus clarified that the deposition notices
 25 were served upon Hynix International and Hynix America, and were not served upon Hynix UK
 26 and Hynix Germany, and that therefore Rambus is not asking each of the Hynix subsidiaries to go
 27 out and look for their backup tapes. The notices, in pertinent part, seek testimony regarding

28 ² Rambus indicated that it had discovered over 1,400 pieces of media (primarily backup tapes and diskettes in, among
 29 other locations, a storage area in its garage and Rambus's "litigation storage room." See Yost Decl., Exhs. B and C.
³ For these tapes, Rambus has provided a list of the labels of the tape, the type of backup media, the date of the
 latest file on the tape, and the volume of data on the tape. For a subset of tapes, as requested by Hynix and/or ordered
 by the Court, Rambus has provided either folder level directories or file level directories indicating what information
 is contained on particular tapes.

1 numerous topics related to Hynix's search for responsive documents, the existence and identify of
 2 backup tapes and any searches of the backup tapes. *Id.* On June 27, 2005, Hynix objected to the
 3 deposition notices on numerous grounds (including relevance and that the topics were duplicative
 4 of prior notices) and refused to produce a witness on the topics related to backup tapes. *Id.*, Exh.
 5 L. On July 13, 2005, Rambus responded to Hynix objections and suggested that the parties' meet
 and confer in person to resolve any remaining dispute.

6 Also on July 13, 2005, Rambus's refusal to produce the directory structures of over a
 7 hundred tapes representing backup tapes from before May 1996 was heard by Judge Whyte.
 8 Rambus argued that it was under no obligation restore and search for any media dated before May
 9 19, 1996, because the media contents could have been legitimately destroyed pursuant to a
 10 document retention plan. Rambus asserted that any such media was not material to Rambus's
 11 alleged spoliation of documents beginning in 1998. Rambus argued that Hynix must show good
 12 cause and exceptional circumstances to be entitled to discovery derived from backup tapes, which
 13 it claimed Hynix could not do. Hynix argued that information potentially responsive to prior
 14 discovery requests in the action was likely only available on the recently-discovered media, and
 15 that this fact alone was sufficient cause for the court to require Rambus to search the pre-May 19,
 16 1996 electronic media. Hynix further asserted that in conjunction with the *prima facie* showing to
 17 date that Rambus engaged in spoliation, Hynix had undeniably demonstrated the good cause
 18 necessary to require Rambus to search and produce responsive documents from the pre-May 19,
 19 1996 media. *See* Judge Whyte's July 15, 2005 Order Re: Restoration and Production of Media.

20 During the July 13, 2005 hearing, Judge Whyte queried the parties as follows:

21 But what if the only need is that the other documents have been destroyed pursuant
 22 to a document retention policy, but for some reason, this particular file had documents in
 it, didn't get destroyed pursuant to the retention policy, and therefore they exist? They are
 only backup, but they're the only thing in existence.

23 In response, counsel for Hynix stated that:

24 If those facts existed, namely that the documents, the only copy was
 25 in a backup tape and the other documents had been destroyed
 innocently by fire or by a legitimate document retention policy or
 26 some other innocent cause, we think that would be sufficient cause
 to warrant, certainly to warrant going as far as we're talking about
 27 here to determine if that only copy of the existing documents
 contains material evidence. And in this case, it is particularly
 28 important to be able to go back in time, because the events that give
 rise to these claims are very old and, memories have faded, some
 29 people are not available, in Hynix's case in particular because of the

1 financial problems the company went through. Very few of the
 2 people who were employees of Hynix during those years are still
 3 with Hynix. So good cause would exist, in the hypothetical you
 4 presented, to investigate the backup tapes even absent spoliation.
 5 But in this case, the evidence is that Rambus did not dispose of
 6 these 1990, 1991, 1992, 1993 documents until 1998. It would have
 7 had these documents in, quote, "active files" and they would have
 8 been available for inspection from the active files without the
 9 necessity of going to backup tapes but for the fact that Rambus
 10 deliberately destroyed them. And that added fact distinguishes this
 11 case from the innocent loss of documents case. I think in the
 12 innocent loss of documents, we would have good cause to go into
 13 these backup tapes. But we have even stronger case here because
 14 there was a deliberate destruction ...

9 Luedtke Decl., Exh. I.

10 On July 15, 2005, Judge Whyte ordered Rambus to provide Hynix with the "directory
 11 structure information" for the pre-May 19, 1996 tapes. See July 15, 2005 Order Re: Restoration
 12 and Production of Media. In pertinent part, the order provides as follows:

13 The court has found no direct support for Rambus's position that the obligation to
 14 search recently-discovered media should be limited by reference to Hynix's allegations of
 15 spoliation where the parties acknowledge the potential presence of otherwise relevant and
 16 responsive material. Furthermore, the court does not necessarily agree that spoliation is
 17 the only issue presented by the recently-discovered media. These issues would have
 18 arisen absent the allegations of spoliation had Rambus discovered a similar cache of media
 19 containing potentially-responsive information.

20 ...
 21 The court will not make a final determination as to whether Rambus should be
 22 required to search the [pre-May 19, 1996 media] at this time. However, it concludes that
 23 the recently-discovered media dated before May 19, 1996 are not entitled to the protection
 24 Rambus seeks: a blanket exclusion from discovery obligations. Rambus should, under
 25 the circumstances, produce the directory structures for the [pre-May 19, 1996 media] to
 26 Hynix.

27 An order that Rambus categorically search the [pre-May 19, 1996] media would be
 28 overbroad and unjustified at this time in light of the time and expense involved. [Footnote
 29 omitted] The court concludes that Hynix must make a more targeted request so that the
 court can assess, if necessary, whether requiring further exploration of the [pre-May 19,
 1996 media] is warranted. In order to do so, Hynix must have more information about the
 media. Accordingly, the court orders Rambus to produce the directory structure
 information to Hynix for [pre-May 19, 1996] media. This will enable Hynix to make a
 more targeted discovery request and will permit the court, if necessary, to assess the
 appropriateness of requiring Rambus to search the [pre-May 19, 1996 media] in light of
 cost, burden, and need.

1 On July 21, 2005, counsel for Rambus and Hynix met and conferred regarding the backup
 2 tape deposition notices Rambus propounded upon Hynix. During that conversation, Rambus's
 3 counsel proposed a compromise --"that Rambus would accept a list of the folder or file directories
 4 from the tapes in place, initially, of a Rule 30(b)(6) deposition on the topics contained in the June
 5 16, 2005 notices." Luedtke Decl., ¶ 14. Counsel for Hynix stated that Hynix would not be
 6 providing any discovery on its backup tapes in any form. *Id.*; see also Exh. N. During the
 7 parties' meet and confer, Rambus's counsel asked Hynix's counsel to confirm if Hynix has
 8 searched this backup media so that Rambus would know if a motion to compel a search of that
 9 media was moot. Luedtke Decl. ¶ 14 & Exh. H. Hynix did not respond to these requests.

10 The present motion was filed on August 9, 2005. Rambus requests that the Special Master
 11 either: (a) compel Hynix to produce a witness in response to the June 16, 2005 deposition notices
 12 to explain the nature and contents of Hynix's backup tapes that it has not reviewed; and/or (b)
 13 compel Hynix to produce to Rambus a list of all the backup tapes in Hynix's possession through
 14 July 2000, the month before this lawsuit was filed.⁴ During the hearing on the motion, counsel
 15 for Rambus stated that Rambus would be agreeable to allowing Hynix to list only those backup
 16 tapes that could reasonably contain documents responsive to Rambus's requests or that Hynix
 17 cannot exclude as not reasonably likely to have documents responsive to Rambus's requests.

18 *Requests to File Under Seal*

19 Rambus requests, pursuant to Civil Local Rules 79-5(d) and 7-11, that the Special Master
 20 permit the filing under seal of unredacted versions of exhibits A, B, C, D, E, R, S, V, W, X, Y, Z,
 21 AA, and AB to the Luedtke declaration in support of Rambus's motion to compel discovery
 22 regarding Hynix's backup tapes. Hynix and certain third parties designated certain documents
 23 and deposition transcripts as "Confidential" and "Special Confidential" under the stipulated
 24 Protective Order. The documents identified above constitute such designated material or excerpts
 25 from deposition transcripts that have been designated by Hynix or third parties as "Confidential"
 26 and "Special Confidential" pursuant to the Protective Order. Luedtke Decl. in support of
 27 Rambus's Misc. Administrative Request to File Documents under Seal, ¶ 3.

28 ⁴ Rambus asserts that this list should include, at a minimum, all available information from the label of the tape, the
 29 date of or latest file date contained on the backup, and the volume of data contained on the backup.

Rambus's request is narrowly tailored to respect the parties' confidentiality designations. For good cause shown, the requests for sealing are GRANTED. In accordance with Civil Local Rule 79-5 and the Protective Order, Rambus shall file the above-referenced exhibits under seal.

Legal Standard

"Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Fed. R. Civ. P. 26(b)(1). "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)." *Id.*

"The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed. R. Civ. Proc. 26(b)(2).⁵

"Under the discovery rules, the presumption is that the responding party must bear the expense of complying with discovery requests, but it may invoke the district court's discretion under Rule 26(c) to grant orders protecting it from undue burden or expense in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery." *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y.,2003) ("Zubulake I")(citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978)).

"The application of these various discovery rules is particularly complicated where electronic data is sought because otherwise discoverable evidence is often only available from expensive-to-restore backup media." *Zubulake I* at 316. Under Fed. R. Civ. Proc. 34(a), a party

⁵ "The decision whether to require a responding party to search for and produce information not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case." See Exh. E to Hynix's Opposition [Proposed Amendments to the Federal Rules of Civil Procedure (June, 2005) (relevant pp. 55-69 attached hereto as Exhibit E; see, p. 64, discussing draft Rule 26(b)(2)(iii)).]

1 may request discovery of any document, "including writings, drawings, graphs, charts,
 2 photographs, phonorecords, and other data compilations." "Electronic documents are no less
 3 subject to disclosure than paper records." *Zubulake I* at 317(citation omitted); *Playboy*
 4 *Enterprises, Inc. v. Welles*, 60 F.Supp.2d 1050, 1053 (S.D.Cal.1999). "This is true not only of
 5 electronic documents that are currently in use, but also of documents that may have been deleted
 and now reside only on backup disks." *Zubulake I* at 317.

6 "Cost-shifting should be considered only when electronic discovery imposes an 'undue
 7 burden or expense' on the responding party." *Zubulake I* at 318. "Whether production of
 8 documents is unduly burdensome or expensive turns primarily on whether it is kept in an
 9 accessible or inaccessible format (a distinction that corresponds closely to the expense of
 10 production)." *Id.* "Whether electronic data is accessible or inaccessible turns largely on the
 11 media on which it is stored." *Id.* Five categories of data, listed in order from most accessible to
 12 least accessible, are described in the literature on electronic data storage: (1) active, online data;
 13 (2) near-line data; (3) offline storage/archives; (4) backup tapes; and (5) erased, fragmented or
 14 damaged data. *Id.* at 318-319. "Of these, the first three categories are typically identified as
 15 accessible, and the latter two as inaccessible." *Id.* at 319-320. Where the data is accessible, "the
 producing party should bear the cost of production." *Id.* at 320.

16 A court should consider cost-shifting only when electronic data is relatively inaccessible,
 17 such as in backup tapes. *Zubulake I* at 324. "Because the cost-shifting analysis is so fact-
 18 intensive, it is necessary to determine what data may be found on the inaccessible media." *Id.*
 19 "Requiring the responding party to restore and produce responsive documents from a small
 20 sample of the requested backup tapes is a sensible approach in most cases." *Id.*; see also *McPeck*
 21 *v. Ashcroft* 202 F.R.D. 31, 34-35 (D.D.C.,2001.). In conducting the cost-shifting analysis, the
 22 following factors should be considered, weighted more-or-less in the following order:

- 23 1. The extent to which the request is specifically tailored to discover relevant information;
- 24 2. The availability of such information from other sources;
- 25 3. The total cost of production, compared to the amount in controversy;
- 26 4. The total cost of production, compared to the resources available to each party;
- 27 5. The relative ability of each party to control costs and its incentive to do so;
- 28 6. The importance of the issues at stake in the litigation; and
- 29 7. The relative benefits to the parties of obtaining the information.

Zubulake I at 321, 324; *OpenTV v. Liberate Technologies*, 219 F.R.D. 474 (N.D.Cal.,2003.).

"When evaluating cost-shifting, the central question must be, does the request impose an "undue

1 burden or expense" on the responding party?," i.e., "how important is the sought-after evidence in
 2 comparison to the cost of production?" *Id.* at 323. "The more likely it is that the backup tape
 3 contains information that is relevant to a claim or defense, the fairer it is that the responding party
 4 search at its own expense." "The less likely it is, the more unjust it would be to make the
 5 [responding party] search at its own expense." *Id.*

6 "As a general rule, where cost-shifting is appropriate, only the costs of restoration and
 7 searching should be shifted." *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290
 8 (S.D.N.Y., 2003) ("*Zubulake II*"). "Restoration, of course, is the act of making inaccessible
 9 material accessible." *Id.* "That 'special purpose' or 'extraordinary step' should be the subject of
 10 cost-shifting. *Id.* "Search costs should also be shifted because they are so intertwined with the
 11 restoration process." *Id.* "However, the responding party should always bear the cost of
 12 reviewing and producing electronic data once it has been converted to an accessible form." *Id.*

13 In *Zubulake I*, Zubulake served upon UBS a request for production of all documents
 14 concerning any communication by or between UBS employees concerning Plaintiff. "Document"
 15 was defined to include electronic or computerized data compilations. UBS produced
 16 approximately 100 pages of e-mails and indicated that its production was complete. UBS never
 17 searched for responsive e-mails on any of its backup tapes and informed Zubulake that the cost of
 18 producing e-mails on backup tapes would be prohibitive. Zubulake knew that there were
 19 additional responsive e-mails that UBS had failed to produce because she herself had produced
 20 approximately 450 pages of e-mail correspondence. *Id.* at 313. The court ordered UBS to
 21 produce all responsive e-mails that existed on its optical disks or on its active servers at its own
 22 expense. *Id.* at 324. UBS was also ordered to produce, at its expense, responsive e-mails from
 23 any five backup tapes selected by Zubulake." *Id.* UBS was ordered to prepare an affidavit
 24 detailing the results of its search, as well as the time and money spent." *Id.* The court concluded
 25 that "after reviewing the contents of the backup tapes and UBS's certification, the Court will
 26 conduct the appropriate cost-shifting analysis." *Id.*

27 Discussion

28 Rambus contends that information respecting Hynix's backup tapes is discoverable
 29 information, and that the relevance of the information on the tapes far outweighs the minimal
 burden of providing a backup tape catalog, citing *Zubulake I* and *McPeck*. Rambus asserts that
 there is substantial evidence that numerous highly relevant documents would be available only

1 from Hynix's backup tapes, on the basis that: (1) Hynix's document preservation practices
 2 suggest that electronic documents were likely deleted during critical time periods of this case; (2)
 3 Hynix has a corporate policy that it should follow "the 'paperless office' as a guiding rule; (3)
 4 Hynix has had financial trouble, including massive layoffs, that further supports the premise that
 5 important Hynix information only exists on its backup tapes; and (4) Rambus's analysis of
 6 Hynix's document collection and production reveals that there are significant deficiencies in the
 7 documents produced by Hynix and it is probable that these documents missing from Hynix's
 8 production exist on Hynix's backup tapes. See Luedtke Decl. ¶¶ 26-30 and Exhs. D, E, I, R, S, T,
 9 V, W, X, Y, Z, AA and AB. Rambus asserts that it has conducted electronic searches on the
 10 documents produced by Hynix and has been unable to locate the specific documents identified in
 11 their motion in Hynix's production to Rambus. *Id.*

12 Hynix contends that Rambus cannot meet the legal standard for obtaining backup tape
 13 discovery. Hynix asserts that Rambus only speculates about what may be on Hynix's backup
 14 tapes, and asserts that this is insufficient to allow backup tape discovery. With respect to
 15 Rambus's citation to documents allegedly not received from Hynix, Hynix asserts that the parties
 16 did not meet and confer regarding this issue, and notes that some of the documents identified by
 17 Rambus are in fact included on a Hynix privilege log. Yost Decl., Exh. D. Hynix asserts that
 18 Judge Whyte refused Hynix's discovery regarding Rambus's backup tape policies more than 6
 19 months ago, and the Court's reasoning there applies with equal force here. Hynix asserts that
 20 even if the requested information was relevant, nothing prevented Rambus from taking this
 21 discovery in a timely manner. Hynix further asserts, without citation to evidence, that Hynix
 22 already searches its backup tapes as necessary for documents responsive to Rambus's requests.

23 In reply, Rambus asserts that: (1) the information respecting Hynix's backup tapes is
 24 discoverable and not subject to any special discovery standard; (2) Rambus presented substantial
 25 evidence of the relevance of information concerning Hynix's backup tapes;⁶ (3) Hynix failed to
 26 present any evidence of burden; (4) Hynix's surprising claim that it has searched backup tapes in

27 ⁶ On August 10, 2005, the day after Rambus filed this motion to compel, Rambus deposed former Hynix vice
 28 president of worldwide marketing Farhad Tabrizi. During that deposition, Mr. Tabrizi testified that he
 29 "continuously" deleted email while he worked at Hynix. Luedtke Reply Decl., Exhibit A at 67:21-68:4. Tabrizi
 testified that even after he received an instruction to retain documents relevant to this litigation and after Hynix sued
 Rambus, he continued to delete his email at regular intervals because he thought that Hynix was "backing up all the
 emails" and he was "hoping that they have all the backups." *Id.* at 68:5-71:20

1 the past warrants further discovery; and (5) Rambus's discovery request related to backup tapes is
 2 not untimely.

3 As an initial matter, it is important to note that the present motion does not seek
 4 production of any portion of Hynix's backup tapes. Rambus instead seeks either 30(b)(6)
 5 testimony about Hynix backup tapes created prior to July 2000 or a list of all the backup tapes in
 6 Hynix's possession through July 2000. A party is entitled to discovery regarding the existence,
 7 description and location of any documents in Hynix's possession. Hynix's statement in its
 8 opposition brief that it has searched its backup tapes "to fill in gaps" in its document collection
 9 raises more issues than it seeks to resolve. Information regarding Hynix's backup tapes is
 10 relevant to Rambus's claims in this action.

11 The more difficult question is whether Rambus's effort to commence backup tape
 12 discovery is untimely and/or duplicative of prior discovery. At first glance, Judge Whyte's
 13 February 11, 2005 order denying Hynix the opportunity to obtain discovery regarding Rambus's
 14 backup tapes would appear to require that the motion be denied. Judge Whyte's order was made
 15 *after* Hynix was found to have made a prima facie showing that Rambus deliberately destroyed
 16 documents relevant to the litigation. The stated basis for the order is that "Rambus has never
 17 claimed privilege over the contents or implementation of its document retention policy, thus
 18 nothing has prevented Hynix from conducting the requested discovery prior to receiving the
 19 documents compelled produced pursuant to the court's January 31, 2005 order."

20 Prior to 2005, Rambus had conducted extensive discovery regarding Hynix's document
 21 retention policy, including numerous depositions of Hynix's personnel. While Rambus asserts
 22 that it first learned that Hynix maintained backup tapes on November 4, 2004, Rambus waited for
 23 7 1/2 months, until June 16, 2005, to pursue further discovery from Hynix regarding Hynix's
 24 backup tapes. During the intervening period, due Rambus's belated-disclosure of its backup
 25 tapes, Hynix has been conducting backup tape discovery. Rambus has failed to present evidence
 26 that Hynix has withheld relevant data from production and has failed to establish that any
 27 prevented Rambus from conducting the requested discovery in a timelier manner.

28 Nonetheless, Hynix has not provided the Special Master with the complete context for the
 29 February 11, 2005 hearing and order. Rambus asserts that in the February 11, 2005 order, Judge
 Whyte "denied Hynix's efforts to pursue discovery related to a module of the trial for which
 discovery was closed." Rambus further asserts that the discovery that Rambus is seeking is

1 directly related to, among other things, the third trial module (the so-called "conduct trial"), for
 2 which discovery is not closed. Subsequent to the February 11, 2005 order, all of the initial trial
 3 dates in this matter were vacated. Based upon the record presented, the Special Master cannot
 4 conclude that the present request is barred by the prior order or that the current requests are
 5 untimely.

6 Accordingly, Rambus's motion is GRANTED IN PART. Hynix America and Hynix
 7 Korea, within 14 days of receipt of this order, shall provide Rambus with a list of backup tapes, in
 8 Hynix's possession through July 2000, that reasonably could contain documents responsive to
 9 Rambus's requests or that Hynix America and Hynix Korea cannot exclude as not reasonably
 10 likely to have documents responsive to Rambus's requests. The list should include all available
 11 information from the label of the tape, the date of or latest file date contained on the backup, and
 12 the volume of data contained on the backup.

//

Order

For the reasons set forth above,

1. Rambus's motion to compel discovery regarding Hynix's backup tapes is granted in part. Hynix America and Hynix Korea, within 14 days of receipt of this order, shall provide Rambus with a list of backup tapes, in their possession through July 2000, that reasonably could contain documents responsive to Rambus's requests or that Hynix America and Hynix Korea cannot exclude as not reasonably likely to have documents responsive to Rambus's requests. The list should include all available information from the label of the tape, the date of or latest file date contained on the backup, and the volume of data contained on the backup.
2. Counsel for Rambus shall file this order and serve opposing counsel and the court with filed-endorsed copies. Counsel for Rambus shall ensure that prior to filing, any and all appropriate measures are taken to avoid disclosure of confidential information.

IT IS SO ORDERED.

Dated: 9/6/05



 Hon. Read Ambler (Ret.)
 Special Master

PROOF OF SERVICE BY FACSIMILE AND MAIL

I, Elizabeth Medina, not a party to the within action, hereby declare that on September 6, 2005 I served the attached Order Granting Rambus's Motion To Compel Discovery Regarding Hynix's Backup tapes on the parties in the within action by mailing and faxing true copies thereof, at San Jose, California, addressed as follows:

Kenneth R. O'Rourke Esq.
O'Melveny & Myers LLP
400 S. Hope St.
Suite 1060
Los Angeles, CA 90071 USA
Tel: (213) 430-6000
Fax: (213) 430-6407

Patrick Lynch
O'Melveny & Myers LLP
400 S. Hope St.
Suite 1060
Los Angeles, CA 90071 USA
Tel: (213) 430-6000
Fax: (213) 430-6407

Gregory P. Stone Esq.
Munger, Tolles & Olson, LLP
355 S. Grand Ave.
Suite 3500
Los Angeles, CA 90071
Tel: 213-683-9255
Fax: 213-687-3702

Geoffrey H. Yost Esq.
Thelen, Reid & Priest LLP
101 Second Street
Suite 1800
San Francisco, CA 94105-3601
Tel: 415-369-7552
Fax: (415)371-1211

Theodore G. Brown III Esq.
Townsend & Townsend & Crew
379 Lytton Avenue
Floor 2
Palo Alto, CA 94301-1431
Tel: 650-326-2400
Fax: 650-326-2422

John M. Guaragna Esq.

Daniel J. Furnias Esq.
Townsend & Townsend & Crew
379 Lytton Avenue
Floor 2
Palo Alto, CA 94301-1431
Tel: 650-324-6312
Fax: 650-326-2422

Susan Van Keulen Esq.
Thelen, Reid & Priest LLP
225 West Santa Clara Street
Suite 1200
San Jose, CA 95113
Tel: 408-282-1813
Fax: 408-287-8040

Kenneth L. Nissly Esq.
Thelen, Reid & Priest LLP
225 West Santa Clara Street
Suite 1200
San Jose, CA 95113
Tel: 408-292-5800
Fax: 408-287-8040

Jordan T. Jones Esq.
Townsend & Townsend & Crew
379 Lytton Avenue
Floor 2
Palo Alto, CA 94301-1431
Tel: 650-463-7617
Fax: 650-326-2422

Sean Cunningham Esq.
DLA Piper Rudnick Gray Cary US LLP
401 B St.
Suite 1700
San Diego, CA 92101 USA
Tel: 619-699-2700
Fax: 619-699-2701

Scott W. Burt

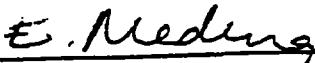
DLA Piper Rudnick Gray Cary US LLP
401 B St.
Suite 2000
San Diego, CA 92101 USA
Tel: 619-699-2700
Fax: 619-699-2701

Kelly M. Klaus Esq.
Munger, Tolles & Olson, LLP
355 S. Grand Ave.
Suite 3500
Los Angeles, CA 90071
Tel: 213-683-9238
Fax: 213 687 3702

Jones Day
77 West Wacker Drive
Suite 3500
Chicago, IL 60601 USA
Tel: 312-782-3939
Fax: 312-782-8585

Peter I. Ostroff Esq.
Sidley, Austin, Brown & Wood
555 W. Fifth St.
Suite 4000
Los Angeles, CA 90013
Tel: 213-896-6000
Fax: 213-896-6600

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Jose,
CALIFORNIA on September 6, 2005.



Signature

MUNGER, TOLLES & OLSON LLP

388 SOUTH GRAND AVENUE
THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1560
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

580 MISSION STREET
SAN FRANCISCO, CALIFORNIA 94105-2907
TELEPHONE (415) 812-6000
FACSIMILE (415) 812-6077

April 4, 2005

RYAN R. BAUM
MICHAEL A. BERNARDI
ALAN V. FREEMAN
RONALD L. GIBSON
EDWARD S. GROSSMAN
EDWARD S. VOLKERT
DANIEL C. SHAPIRO
ROBERT E. DEANAN
JEFFREY L. WICKHAMMER
ROBERT W. ADLER
CARY S. LERMAN
CHARLES D. SACKAL
RONALD R. MEYER
CHRISTOPHER F. STONE
MILAN E. MARWINEZ
BRAD D. BRIAN
BRADLEY B. PHILLIPS
GEORGE H. BARRETT
WILLIAM D. TERRY
STEVEN L. BURKE
ROBERT B. SIKES
STEPHEN H. BARNSTON
JOHN W. SPRECK
TERRY E. BRONZEE
STEVEN H. PERRY
NANA S. HUI
JOSSELYN D. LEE
MICHAEL R. GOTT
MICHAEL E. SOLOFF
GREGORY B. PHILLIPS
LAWRENCE C. BARRY
NATHANIEL H. HEDDING
GLENN D. POMERANTZ
THOMAS B. WALPER
RONALD C. HANSEN
PATRICK J. CANTERTY, JR.
JAY H. PLATTNER
O'NEILL H. WOLFE
SANDRA A. SCHULZ-JONES
MARK H. EPSTEIN
HENRY WEISSMANN

LEVIN S. ALURED
MARC A. SECOR
DYNIA L. BARBER
BRIAN W. WILLIAMS
JEFFREY A. HARRIS
JENNIFER T. STANCO
BRETT LINDLEY WYLES
MARC L.S. BROWNE
JEROME C. ROTH
STEPHEN D. ROSE
JEFFREY L. BLOCH
BARTH T. VINCIG
TED BONE
MARC SHIMBERMAN
STANLEY N. SOKOLOFF
MARTIN D. BORN
DANIEL P. COLLINS
STEVEN S. WELLS
WILLIAM C. HANCOCK, JR.
RICHARD C. SHRYVER
ROBERT L. SMALLWOOD
BRUCE A. ABBOTT
JOHNATHAN E. ALTMAN
MARTY AMY TICO
MICHAEL J. STANLISH
KELLY M. BLAKE
STEVE B. SELIGMAN
GUYTON A. BRIDE
KEVIN S. RAMBUS
MELISSA W. HARRIS
ROBERT B. ESCALANTE
DAVID C. SHREVE
ANNEKA WOOD JEFFRIES
PETER J. BRYNE
PAUL J. WINTFORD
KIM M. WOODRUFF
CARL H. ROSE
DAVID H. ROSENBERG
DAVID H. PIV
TODD L. HOLS
LISA J. DENNEY

MALCOLM A. HENNING
DREW J. WINDMAY
TIMOTHY J. GIBNEY
JAMES E. BRYNE
J. MARTIN WELSH
GORDON ST. JOHN
ROBT E. SHIBRA
ALAN S. STON
MARGA HENNING
SUSAN A. RABAN
LINDA E. COLEMAN
LINDA H. SHAW
SHARLENE BAKER STONE
BRIET J. ROSSA
CAROLYN HODGSON LINDTKE
JENNIFER S. SHAFER
LISA MARIE CARLSON
MARGA S. WELSH
JOHN P. HUNT
LYNN HEALEY SCALITO
C. BRAD LEE
BRYAN T. BRONSTEIN
RICHARD S. SCHMIDT
BRUCE S. ALLAN
DREW H. STEINBERG
ANDREW H. PIV
STUART C. MILLER
MARGA SEITZMAN
JAMES L. WOOD
DANIEL F. COHEN
ERIC J. LORENZINI
NEILAN M. LA BELLA
ANTHONY E. HANCOCK
SAMUEL BRYNE
NATHANIEL H. FORSTER
ROBERT W. T. BIRD
JOSEPH J. YAMANO
AMIC H. MOYTS
ALBA W. CHANG
ANDREA SCHREIBER
BARBARA FREDERICK YOUNG

ROBERT S. BARTON
GREGORY D. MCCABELL
MELISSA H. GUN
KATE S. ANDERSON
ALAN J. HARRIS
LORNA K. HARRIS
K. DANIEL MERRI
DANIEL H. HENNING
FRANK H. HENNING
WY. AUGUSTINE
JAY E. SHAW
SUSAN THOMAS BIRD
JOHN C. BAY
JENNIFER L. WELLS
YVES J. BROWN
DANIEL J. STEIN
DANIEL H. HODGSON
DEAN H. HANCOCK
DAVID A. BARNSTON
I. WALTER STRANDBERG
JANIS ROYLAND
AMY C. WONG
REBECCA GREG LYNCH
JOHNATHAN H. SHAW
JOHN S. BRYNE
DANIEL S. BRYNE
MARCUS J. FREDERICK
MICHAEL T. FREDERICK
MICHAEL T. FREDERICK
LISA C. STONE
MELISSA BAKER WELSH
RICHARD D. ESCALANTE
OF COUNSEL
E. LEROY TOLLES
MATHIAS

Writer's Direct Dial:
(213) 683-9255
(213) 683-3155 FAX
ETC@MUNGER.TOLLES&OLSON.COM

Via Facsimile (408.535.5329) and Federal Express

The Honorable Ronald M. Whyte
United States District Court
for the Northern District of California
280 South First Street, Courtroom Six
San Jose, California 95113

Re: Hynix Semiconductor Inc., et al. v. Rambus Inc., et seq.
United States District Court, Northern District of California,
Case No. CV-00-20905 RMW

Dear Judge Whyte:

On March 17, 2005, while I was interviewing a witness in preparation for the May 9, 2005 trial in the above-referenced action, I learned that Rambus might still be in possession of back-up tapes that might contain recoverable information responsive to Hynix's discovery requests. Since that time we have been intently investigating this possibility. We have, as a result of searching in various storage areas, including a locked computer equipment "cage" in the garage at Rambus's offices, located 164 back-up tapes, many of which contain information copied (backed up) from Rambus' computers during at least 1996 and 2000. Some of these tapes are blank and others are in a condition such that they cannot even be read to determine if they have data on them or not. At the present time, we do not have an exact count of the number of tapes that contain data, nor do we know for each of the tapes that do contain data the date on which the back-up was performed.

Because Rambus does not have all the necessary resources, including software and equipment, required to access, read and preserve the data on these now-obsolete tapes, we retained a firm that specializes in recovering and preserving data stored in obsolete formats on obsolete media. Their efforts are ongoing and they are providing us with status reports on a regular basis.

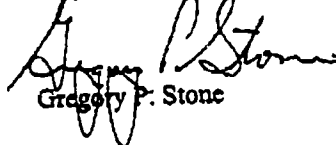
The Honorable Ronald M. Whyte
April 4, 2005
Page 2

As of the report I received yesterday afternoon, we have been able to determine that at least a majority of these tapes do contain data that can be recovered. We also have been able to determine that much of that data is not responsive to any of Hynix' discovery requests; quite a bit of it is highly technical, such as device schematics or layouts, and other data comprises software programs and applications. However, we do know that some of the data from some of these tapes constitutes text files, such as Word documents, e-mails, Excel spreadsheets, and PowerPoint slides that might be responsive to Hynix' discovery requests. Unfortunately, because the recovery process is still ongoing, we have not yet been able to determine the volume of these text files.

We also do not know whether the text files contained on these back-up tapes are in fact responsive to any of Hynix' document requests or, if they are responsive, whether they are duplicates of documents previously produced. We have an outside vendor and a team of attorneys and paralegals prepared to begin the review of these text files as soon as they are recovered and made available to us for such a review. At the present time, we do not know whether the end result of our efforts will be the production to Hynix of only a few additional documents or the production of a very large volume of documents that have not previously been produced. We hope to have substantially more information in this regard by early next week. I will be out of the country this week, and my suggestion is that we have a conference with the Court, either in person or by telephone, on Monday, April 11, or later that week depending on the Court's schedule and availability. At that time, we should be in a position to update the Court on what we have learned about the contents of these back-up tapes. In the meantime, we will undertake to keep Hynix' counsel advised of any material developments that may arise. For instance, if it turns out that these back-up tapes do contain responsive documents not previously produced to Hynix, we will so advise Hynix' counsel. We also will begin production of any such documents as soon as practicable and we will continue the production on a rolling basis thereafter until all such documents are produced.

I appreciate that this unexpected development may adversely affect the trial date that Rambus has urged the Court to set, and I can assure the Court that we will do everything we can to resolve the uncertainty introduced by this development as quickly as possible. I also can assure the Court that Rambus's efforts to resolve these issues has been ongoing night and day and that we will continue to address these issues on a fully-committed basis until these issues are resolved.

Very truly yours,



Gregory P. Stone

GPS:cbb

cc: Patrick Lynch, Esq.
Theodore G. Brown, III, Esq.
Kenneth L. Nissly, Esq.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Anticompetitive Practices Division
Bureau of Competition

Geoffrey Oliver
Assistant Director

Direct Dial
(202) 326-2275

June 6, 2005

Gregory P. Stone, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071-1560

FAX: (213) 687-3702

Re: *In the Matter of Rambus Incorporated*
FTC Docket Number 9302

Dear Greg:

I am writing to confirm our agreement as per our discussions on Thursday and Friday.

With the exception of documents as to which Rambus claims privilege, you have agreed to produce to us all documents that you have produced or will produce to Hynix from the newly discovered back-up media. You agreed to produce the first set of these documents this week. Because your production to Hynix is proceeding, you have also agreed to keep your production to the Commission up to date on a rolling basis. I understand that you expect this process to continue through sometime in July.

We agreed that Rambus need not conduct a separate review of documents from the newly discovered back-up media to determine whether there are any additional documents responsive to our discovery requests. We also agreed to treat all documents so designated by Rambus as Confidential Discovery Material or as Restricted Confidential Discovery Material pursuant to the

Protective Order entered by Judge Timony on August 5, 2002, with the following caveat: if any of the documents produced by Rambus are proposed to be added to the record in this matter, the confidentiality of such documents will be governed by Commission Rule 4.9(c).

I understand that Rambus will not produce to us any documents as to which it asserts claims of privilege, including documents (if any) as to which its assertions of privilege might be rejected by the U.S. District Court for the Northern District of California. Rambus will produce a log of all documents withheld on grounds of privilege. Complaint Counsel reserves the right to seek to compel production of some or all documents withheld on grounds of privilege, should it conclude that such action is warranted.

Please let me know if this summary of our agreement is not accurate or if I have omitted any material aspect of our agreement.

Sincerely,


Geoffrey D. Oliver

cc: A. Douglas Melamed, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1402
FAX: (202) 663-6363

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
)

RAMBUS INCORPORATED,)
a corporation.)
)

Docket No. 9302

DECLARATION OF GREGORY P. STONE

DECLARATION OF GREGORY P. STONE

1. I, Gregory P. Stone, have personal knowledge of the facts set forth in this declaration and, if called as a witness, I could and would testify competently under oath to such facts.

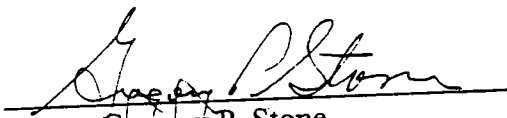
2. I am a member of the law firm of Munger, Tolles & Olson LLP, counsel for Rambus Inc. in this proceeding. On December 18, 2002, I met and conferred with Complaint Counsel regarding, *inter alia*, the scope of discovery into privileged attorney-client communications and work product materials in this proceeding. During that discussion, Complaint Counsel asserted the position that a discovery order entered by Judge Payne in Rambus's civil lawsuit with Infineon, which required Rambus to produce certain documents containing attorney-client communications and to allow witnesses to testify regarding such communications, was entitled to preclusive effect in this proceeding. Complaint Counsel argued that, based on the doctrine of collateral estoppel, they were entitled to use the documents Rambus had produced pursuant Judge Payne's discovery order, and to question witnesses in this proceeding concerning the topics addressed in such documents.

3. Deposition discovery of current and former Rambus employees began on January 7, 2002. At the first deposition I attended, I notified Complaint Counsel that, after consideration of Complaint Counsel's position, Rambus had decided not to assert privilege in this proceeding as to the documents subject to the prior discovery order entered by Judge Payne in the *Infineon* litigation, but that Rambus would assert privilege as to privileged communications, whether oral or written, that were outside the temporal and subject matter scope of Judge Payne's order.

4. Specifically, I made a statement on the record at the deposition of Dr. Michael Farnwald as follows: "If you're going to delve into the patent prosecution area, I just want to make clear that we do not contend that documents or testimony regarding conduct or communications during the time period '91 through June of '96 that were covered by Judge Payne's ruling that the privilege was vitiated are privileged. Was that clear? We do not contend that the attorney-client privilege still protects the areas as to which Judge Payne ruled the privilege had been vitiated." After a brief discussion, I restated Rambus's position as follows: "Rambus will not contend that the attorney-client privilege still protects the documents and testimony previously privileged as to which Judge Payne had found the privilege to be vitiated."

Executed this 20th day of January, 2003, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.



Gregory P. Stone

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
)

RAMBUS INCORPORATED,)
a corporation)
_____)

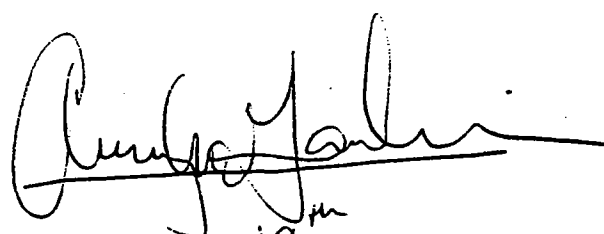
) Docket No. 9302
)
)
)
)
)

AFFIDAVIT OF AVERY W. GARDINER

Before me, the undersigned authority personally appeared Avery W. Gardiner who, after being duly sworn, says:

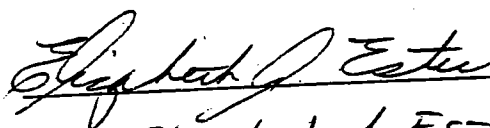
1. I am a lawyer with Kirkland & Ellis, counsel for Infineon Technologies.
2. I have reviewed the list of all Bates numbered documents produced by Rambus, Inc. to Infineon Technologies in the case of *Rambus, Inc. v. Infineon Technologies*, 155 F.Supp. 2d 668, 683 (E.D. Va. 2001). To the best of my knowledge after consultation with my colleagues, the list that I reviewed is full and complete.
3. The list of Bates numbered documents produced by Rambus, Inc. to Infineon Technologies in the case of *Rambus, Inc. v. Infineon Technologies*, 155 F.Supp. 2d 668, 683 (E.D. Va. 2001) that I reviewed does not contain any documents with any of the following Bates numbers:
 - (a) R 208371
 - (b) R 208394
 - (c) R 221422
 - (d) R 233738
 - (e) R 233742
 - (f) R 233749
 - (g) R 233733

- (h) R 233785
- (i) R 233819
- (j) R 233835
- (k) R 233836
- (l) R 233837
- (m) R 233843
- (n) R 233871
- (o) R 234245
- (p) R 234250
- (q) R 234377
- (r) R 234662



DISTRICT OF COLUMBIA

The foregoing instrument was acknowledged before me on this 19th day of February, 2003, by Avery W. Gardiner, who is personally known to me.



Name: Elizabeth A. ESTER

Notary Public - District of Columbia

Commission No. N/A

My Commission Expires: 7-14-07

Elizabeth A. Ester
Notary Public, District of Columbia
My Commission Expires 07-14-2007

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

Docket No. 9302

RAMBUS, INC., a corporation

AFFIDAVIT OF KARMA M. GIULIANELLI

1. My name is Karma M. Giulianelli. I am a partner at the law firm of Bartlit Beck Herman Palenchar & Scott ("Bartlit Beck"). Bartlit Beck represents Micron Technology Inc. in a civil case against Rambus Inc. filed in the United States District Court for the District of Delaware. That case is captioned *Micron Technology Inc. vs. Rambus Inc.*, C.A. No. 00-792-RRM.
2. Rambus has produced documents to Micron Technology in response to document requests issued in *Micron vs. Rambus*.
3. Lawyers for Micron Technology have also deposed various Rambus witnesses, including Mr. Richard Crisp, using documents that had been previously produced by Rambus. Mr. Crisp was last deposed in the *Micron vs. Rambus* case on August 10, 2001.
4. Almost a year after Mr. Crisp's deposition, Rambus produced ten boxes of additional documents.
5. In particular, Rambus produced the following documents on the following dates:

BATES RANGE	DATE PRODUCED
R 208371	5/22/02
R 208394	5/22/02
R 221422	6/12/02
R 221745	6/12/02
R 233738	7/23/02
R 233742	7/23/02
R 233749	7/23/02
R 233773	7/23/02
R 233785	7/23/02
R 233787	7/23/02
R 233816	7/23/02
R 233819	7/23/02
R 233835	7/23/02
R 233836	7/23/02
R 233837	7/23/02
R 233843	7/23/02

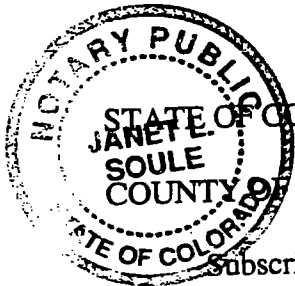
R 233871	7/23/02
R 234245	7/23/02
R 234250	7/23/02
R 234377	7/23/02
R 234662	7/23/02

6. I was personally involved in the review of the documents produced by Rambus to Micron Technology. To the best of my knowledge, Rambus had not previously produced the same documents as those listed above, either with the bates numbers listed above or under different bates numbers as those listed above, before the dates listed above.

7. Micron Technology also obtained documents that Rambus had produced to Infineon Technologies ("Infineon"), through a subpoena that Micron Technology issued to the lawyers for Infineon on March 7, 2001. I was personally involved in the review of these documents. To the best of my knowledge, the above listed documents were not included in the documents produced by Infineon in response to the subpoena.



 Karma M. Giulianelli



STATE OF COLORADO)
 JANET E. SOULE) ss.
 COUNTY OF DENVER)

Subscribed and Sworn to Before Me This 20th day of February, 2003.



 Notary Public

Commission Expires: 8/21/03

PUBLIC

APPENDIX

TIMELINE

This appendix is a Timeline intended to place the limited number of offered Backup Tape Documents in the context of both the key documents in the record and the documents that remain missing or unavailable.

The Timeline has been organized in two large parts. The central line, running from left to right, tracks the relevant time period in this case, from 1989 to 2001. Each box below the central line reflects a document in the record before the ALJ in this matter. Each box above the central line reflects a document that was not available at the time of trial, and was not included in the record before the ALJ. The different colors on the Timeline illustrate the overall impact of Rambus's document destruction (to the extent Complaint Counsel is able to reconstruct it).

Blue Boxes: These boxes, below the central line, represent key documents that were found in Rambus's active business files and were produced in a timely basis. Three of these documents in particular strongly support liability: CX0543 and CX0545, the Rambus business plans showing that it believed it had pending patent applications that covered SDRAMs and planned to file more such applications;¹ and CX0208A, the JEDEC Manual setting forth the obligation of JEDEC members to disclose patents and pending patents that might be involved in the work JEDEC was undertaking. But the documents found in Rambus's business files failed to reflect the extent of the careful planning and effort that Rambus put into its decade-long scheme,

¹ Rambus apparently intended that these business plans would be destroyed during the course of "Shred Day 1998" or the "1999 shredding party at Rambus." See CX5031 (Steinberg e-mail (1/12/01)).

or the deliberate intent with which Rambus representatives acted.

Green Boxes: The green boxes, below the central line, represent the JEDEC-related documents that were purged from Rambus's working files, but were found on an abandoned hard drive in Richard Crisp's attic.² These documents demonstrated that Rambus had pending patent applications covering specific aspects of JEDEC's work, that Rambus's JEDEC representative Richard Crisp was fully aware of this, and that Mr. Crisp repeatedly informed his colleagues at Rambus of the specific JEDEC work subject to Rambus patent rights without ever disclosing Rambus's patent position to JEDEC.

Orange Boxes: The orange boxes, below the central line, refer to the documents that Rambus's outside patent counsel Lester Vincent did not purge because they were located in his chron file instead of in the Rambus patent files.³ Upon learning of the survival of these documents, Rambus refused to produce them until Judge Payne pierced the attorney-client and attorney work product privileges and ordered their production. These documents revealed that Rambus's outside patent counsel Lester Vincent had warned Rambus repeatedly about equitable estoppel and antitrust risks if Rambus misled JEDEC into thinking that Rambus would not seek to assert patents against the JEDEC standards. These documents also proved that Richard Crisp and others at Rambus were actively seeking to extend Rambus's patent applications to cover JEDEC work while Rambus was a JEDEC member. This evidence exposed as untrue assertions in Rambus's White Paper to FTC staff that Rambus was only seeking to patent its RDRAM

² See CX5078 at 124; CX5075 at 297, 299, 302-303; CCSF 121-123, 163.

³ See CX3126 at 416-422 (Vincent's surviving letters and correspondence came from "a general file").

architecture, and not JEDEC-compliant SDRAMs.

Yellow Boxes: The yellow boxes, below the central line, are – as best Complaint Counsel is able to determine – the documents from a forgotten file discovered on one of Rambus’s servers or from another forgotten source.⁴ These documents were not produced in the initial Infineon litigation (and thus were not available to the Federal Circuit) or during the Commission’s Part II investigation; rather, they were produced for the first time well into the Part III litigation.⁵ These documents show that Rambus’s tracking of JEDEC’s work and its filing of patent applications covering on-going JEDEC work was not merely an abstract exercise – Rambus specifically planned to sue JEDEC members for patent infringement based on technologies used in JEDEC standards. These documents also show that Rambus representatives were acutely aware of JEDEC’s desire to avoid patent hold-up and the equitable estoppel risks they ran by not disclosing, and, as a result, Rambus representatives debated whether they should make patent disclosures to JEDEC.

Pink Boxes: These boxes, above the central line, refer to documents relating to spoliation of evidence that Rambus initially refused to produce to Complaint Counsel, and that Complaint Counsel was first able to obtain when they became public in connection with the *Infineon*

⁴ Relevant documents were also located on Allen Roberts’ home computer and Michael Farmwald’s house or garage. CX5078 at 184-185, 192-204, 220-221.

⁵ See Affidavit of Avery W. Gardiner (2/19/03) (Attachment G) and Affidavit of Karma M. Giulianelli (2/20/03) (Attachment H) (originally filed with Memorandum In Support of Complaint Counsel’s Motion to Compel an Additional Day of Deposition Testimony of Richard Crisp (2/21/03)); see also CX5079 at 444-445 (Arovos: Rambus produced approximately 59 boxes of documents to Infineon prior to trial, and an additional 38 boxes of documents after remand from the Federal Circuit); DX0506 at 879-880 (late-produced boxes of documents), 886-887 (235 e-mails from Vice President Allen Roberts that were produced late).

litigation in February and March 2005. The Commission has now added these documents to the record. These documents establish that, contrary to Rambus's prior assertions, Rambus was actively planning to sue SDRAM manufacturers for patent infringement at the time that it planned and implemented its document destruction campaigns, and had even identified the most likely target companies and judicial districts in which to sue. They show that Rambus organized a data base of selected documents that would be helpful to it during its anticipated litigation, while simultaneously destroying large volumes of documents without preserving other documents (including harmful documents) relevant to that anticipated litigation.

Purple Boxes: The purple boxes, above the central line, represent the proposed exhibits from the Backup Tape Documents that are the subject of this motion to reopen the record. The documents identified are only a small sample of the relevant documents found on Rambus's back-up tapes. These documents were not available to Complaint Counsel during the course of this litigation because Rambus purged them from its business files. They were discovered earlier this year on certain of Rambus's back-up tapes that had not been erased. Although Complaint Counsel has never had the opportunity to explore these documents with witnesses, they appear to indicate on their face that Rambus's top executives [

], that within three months of joining JEDEC [

] and that top executives [

].

White Boxes: The white boxes with question marks, above the central line, indicate known or suspected documents that were purged from Rambus's business files and are still

unavailable to Complaint Counsel and the Commission. These include certain documents that appear to have disappeared entirely (such as the slides that Richard Crisp used in his November 1995 presentation to Rambus personnel regarding litigation tactics and who Rambus should sue first). The white boxes also include documents that would have been produced to Complaint Counsel had they been found in Rambus's business files on a timely basis; after having discovered these documents recently on its back-up tapes, Rambus has refused to produce to Complaint Counsel and the Commission. According to the descriptions provided in Proposed Exhibit CX5117, the documents purged from Rambus's business files, and now (after being found on the back-up tapes) being withheld by Rambus, indicate that Rambus consulted extensively with and sought legal advice from outside patent counsel Lester Vincent regarding the JEDEC disclosure policy in 1992, and that in-house legal counsel Tony Diepenbrock conducted extensive analysis of Rambus's pending patent applications and defenses to patent infringement claims in early 1996. Other sources of information indicate that certain specific documents very likely existed at one point in time, but since have disappeared.⁶

⁶ For example, Richard Crisp made a presentation to the Board of Directors in October 1992 regarding standardization of SDRAMs at JEDEC and Rambus's patent development efforts. CCF 938. That presentation has never been identified. Similarly, Mr. Crisp [

] Proposed Exhibit CX5114. He apparently [] using 10-12 slides, *id.*, but those slides apparently have disappeared. We have no way of knowing what documents disappeared from Lester Vincent's files regarding the patent applications that Rambus developed for the specific purpose of covering technologies used in JEDEC-compliant SDRAMs.

**Proposed Exhibits CX5100 through CX5116 and the
Timeline are temporarily under seal in accordance with
Commission Rule 4.10(g), 16 C.F.R. § 4.10(g).**

CERTIFICATE OF SERVICE

I, Lourine K. McDuffie, hereby certify that on October 6, 2005, I caused a copy of the attached, Public Version of, *Complaint Counsel's Motion To Reopen The Record To Admit Documents From Rambus's Newly-Found Back-Up Tapes Pertaining To Rambus's Spoliation Of Evidence*, to be served upon the following persons:

by hand delivery to:

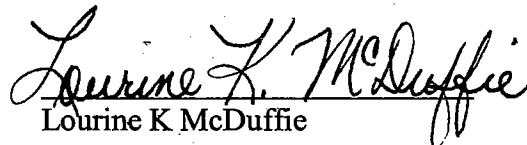
The Commissioners
U.S. Federal Trade Commission
Via Office of the Secretary, Room H-135
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

A. Douglas Melamed, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
2445 M Street, N.W.
Washington, DC 20037-1402

and overnight courier to:

Steven M. Perry, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071

Counsel for Rambus Incorporated


Lourine K. McDuffie

