FILED
MAY 18 2004

IN THE UNITED STATES DISTRICT COURT

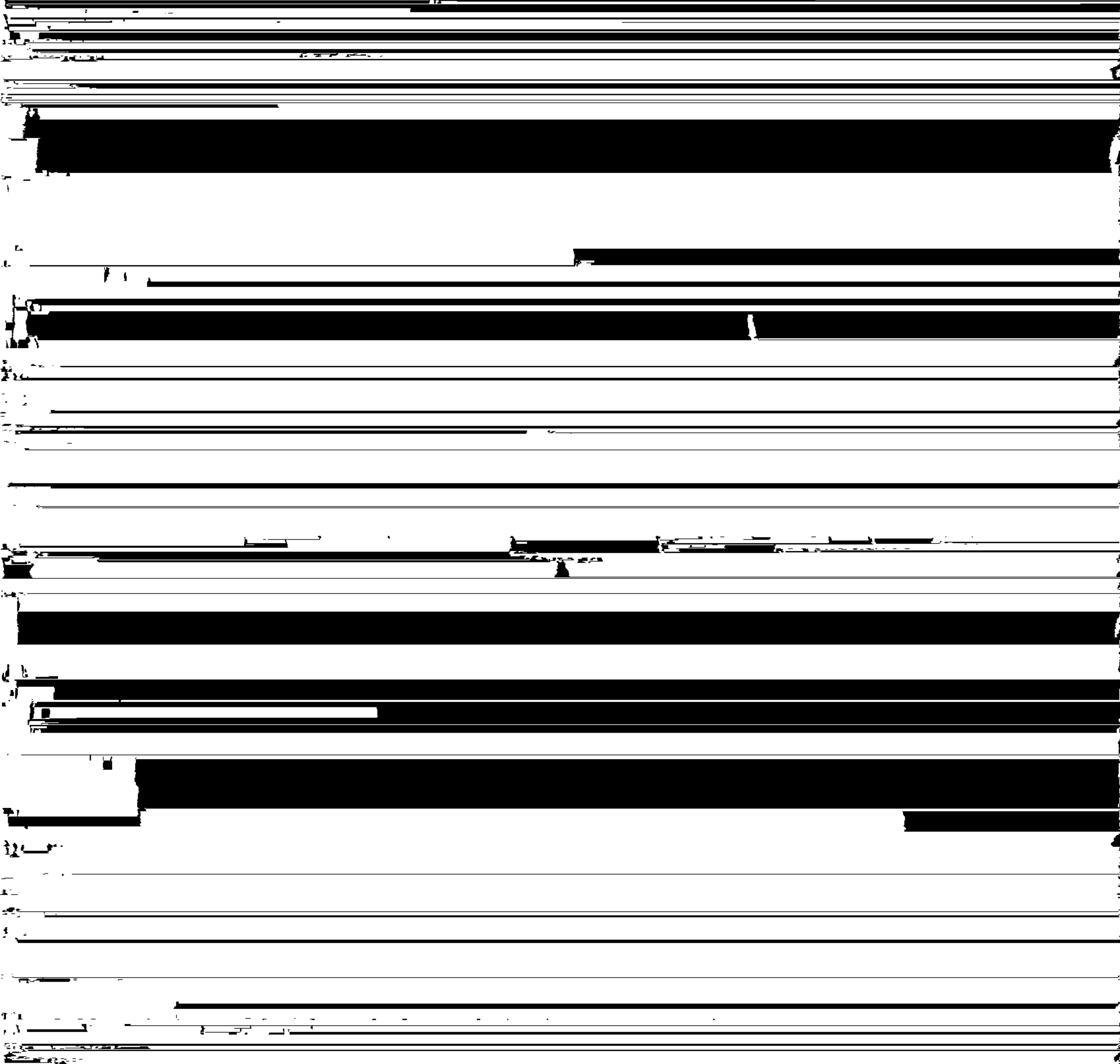
Plaintiff,

States, Inc., 36 F.3d 8, 11 (4th Cir. 1994). However, because the

matter waiver are similar in effect and because Rambus has advised

collection and production of documents in this litigation. Those topics were addressed to some extent in a Memorandum Opinion issued on March 17, 2004 (the "March 17 Opinion").[1]

Since then, the parties have tendered additional briefs addressed to whether Rambus has waived its claimed privileges and,



document retention policy.[2] Karp also testified that he drafted the Rambus document retention policy based on the advice he got on the topic from Cooley Godward, stating in deposition that the ultimate two page Rambus policy "basically was a result of the

policies I got from the law firm."[3] In his deposition in the Micron litigation, Karp testified that, on July 22, 1998, Rambus conducted a meeting of managers in which Karp and Johnson explained the new policy and the reasons why it was being adopted.[4] At the July 22 meeting and thereafter, Karp used a slide presentation to

slide presentation.[6] Karp and Johnson, however, were allowed to provide testimony in their depositions in the Micron case respecting the reasons why Rambus had adopted a document retention policy. Karp testified that the policy was instituted over concern about the volume of documents that might need to be reviewed and produced in future litigation generally.[7]

the Rambus' executives respecting one of the reasons he gave them for adopting the document retention policy, stating, in his testimony, that "I gave them a horror story about a client of mine who spent $100,000 because they didn't have a document retention

was made pursuant to its document retention policy which assertedly was adopted for legitimate business purposes.[10] In making that argument in the FTC proceedings, Rambus selectively disclosed certain privileged communications about the purpose, scope, and implementation of the company's document retention policy. For instance, as it had done in the Micron litigation, Rambus pointed to part of the slide presentation from the July 22, 1998 meeting. Those documents previously had been withheld from Micron and

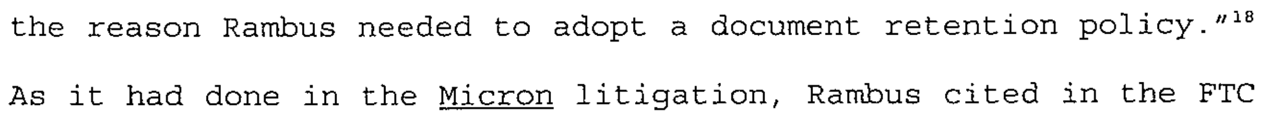
original and the revised privilege lists filed in this case as

subject to the attorney-client privilege and Johnson and Karp are listed as the authors of that presentation. The presentation is Document No. 327 on the privilege list filed in this action and dated February 12, 2004.

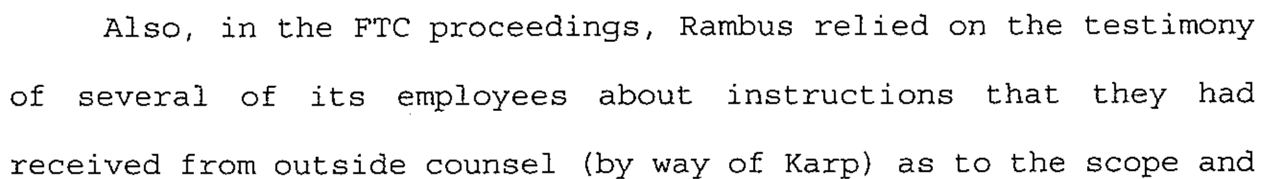
Rambus asserted, however, in the FTC action, that the slides attached to Karp's affidavit in the FTC proceedings had not been

prepared by outside counsel but were created by Karp.[14] Rambus offered no evidence to support this assertion.

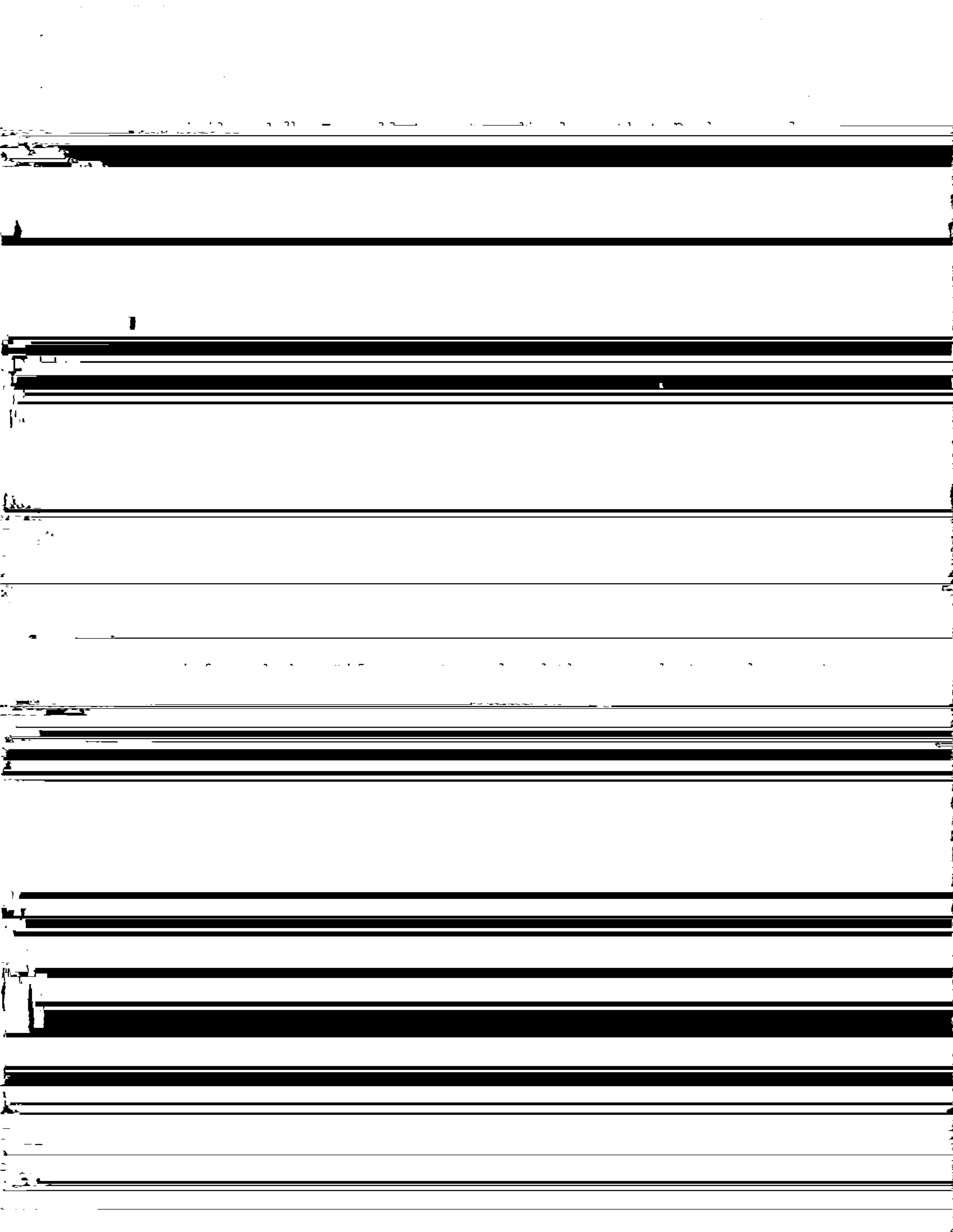
FTC affidavit is a part of Doc. No. 327[16] which until recently Rambus has claimed to be privileged in its entirety. Rambus' recently stated position on that issue is also contradicted by



the reason Rambus needed to adopt a document retention policy."[18] As it had done in the Micron litigation, Rambus cited in the FTC



Also, in the FTC proceedings, Rambus relied on the testimony of several of its employees about instructions that they had received from outside counsel (by way of Karp) as to the scope and



reasons set forth below, Rambus has waived its privileges respecting the conception, adoption, and implementation of its document retention program. Infineon is entitled to the documents and testimony that show the complete picture.

DISCUSSION

In a civil action that is based upon a federal claim, Fed. R. Evid. 501 dictates that issues of privilege are to be decided by applying "the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." Hawkins v. Stables, 148 F.3d 379, 382 (4th Cir.

law of the regional circuit is controlling. Wang Labs., Inc. v. [illegible] 958 F.2d 355, 357 (Fed. Cir. 1992).

the client's reasons for seeking representation if the professional

[illegible] out." Trammel v. United States, 445 U.S.

communication between lawyer and client encourages observance of the law and aids in the administration of justice." Hawkins, 148 F.3d at 382-83.

To this end and for those reasons, the privilege, when it applies, "affords confidential communications between lawyer and client complete protection from disclosure." Hawkins, 148 F.3d at 383. The privilege, however, "'impedes [the] full and free discovery of the truth.'" Id. (quoting In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984)). The attorney-

informed (a) by his client (b)

(4th Cir. 1979) (per curiam); Chubb Integrated Sys. Ltd. v. Nat'l

Bank of Washington, 103 F.R.D. 52, 62 (D. D.C. 1984).

respecting the reasons why it adopted the program as well as how it

in this case and in the privilege lists filed on remand, Rambus claimed as privileged the slide presentation given by Karp and

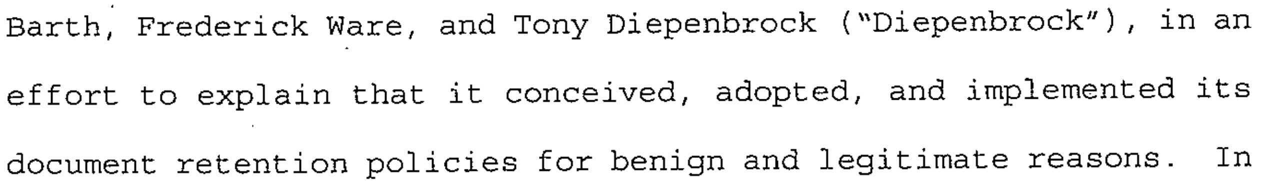
proceedings and the Micron case, Karp was allowed to testify about the document retention policy and how it was implemented. Johnson

particular, Johnson testified that he had used a "horror story"

FTC, that Rambus has made in this case and in the <u>Micron</u> case. Thus, the Court finds, as a matter of fact, that Rambus claimed the Karp exhibit of slides to be privileged until Rambus foreswore the privilege and allowed Karp to use it in the FTC proceeding.

In fact, the entire slide presentation, including the pages given to the FTC, was claimed as privileged in the list filed in this Court on January 29, 2004 and revised on February 12, 2004. [28]

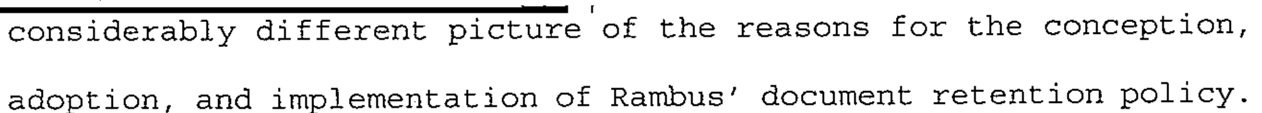
claimed by permitting Karp to use that presentation in the FTC proceeding in an effort to defeat the motion to dismiss based on the charges of evidence spoliation. Johnson was allowed to testify in the Micron litigation as part of an effort to defeat charges of



Barth, Frederick Ware, and Tony Diepenbrock ("Diepenbrock"), in an effort to explain that it conceived, adopted, and implemented its document retention policies for benign and legitimate reasons. In

on otherwise privileged topics and to produce otherwise privileged documents in an effort to defeat charges of spoliation. In so doing, it has waived whatever privilege attached to those communications and to others that pertain to the same subjects.

Moreover, the documents reviewed in camera paint a



considerably different picture of the reasons for the conception, adoption, and implementation of Rambus' document retention policy.

documents that demonstrate a different motivation and purpose for the document retention plan that has resulted in the destruction of more than two million documents. Once Rambus made the tactical decision to disclose some parts of the advice it received respecting its document retention program, why it was conceived,

how it was implemented, and the circumstances of its adoption, the rest of the assertedly privileged material must be disclosed to make the record complete and accurate.

As recognized by the Fourth Circuit, the subject matter waiver

matter. Jones, 696 F.2d at 1072; Rambus, Inc., 220 F.R.D. at 288-89. It is not always clear, of course, in any given context what constitutes the "same subject matter." Jones, 696 F.2d at 1072. Nonetheless, the Fourth Circuit articulates that the other communications which are waived must be "directly related to the [disclosed] subject." United States v. (Under Seal), 748 F.2d 871, 875 n.7 (4th Cir. 1984).

In United States v. Skeddle, 989 F. Supp. 917, 919 (N.D. Ohio 1997), the court articulated a list of flexible, non-exhaustive

Dream Entm't Co., Ltd., 188 F.R.D. 566, 571 (N.D. Cal. 1999).

As outlined fully in the Spoliation Opinion, the assignment of Cooley Godward in 1998 was to formulate a patent licensing and

a document retention policy. Cooley Godward continued to advise

document retention program--calling it the "document destruction policy," [illegible] July 17, 2000.[29]

Many of the undisclosed documents, like some of the disclosed documents, mention the document retention program as part and parcel of the company's patent licensing and litigation strategy. Other undisclosed documents discuss the very same litigation strategy of which the document retention program is a core part, but do not actually mention the document retention program. That

strategy, however, was in play in 1999 and 2000 when, as shown by

information that already has been disclosed, the document retention program was in operation.

The privileged communications that have been disclosed for [illegible] closely related to a number of documents that

With the privilege having been claimed and discovery on the scope of the document destruction having been shielded by virtue of the privileges that have been claimed, it is difficult to ascertain with specificity exactly how that document destruction program operated in tandem with the overall patent litigation strategy. It is undeniable, however, that Rambus linked the two inextricably and discussed the two as part of a piece. Rambus, therefore, has waived the attorney-client privilege on the subject of how its

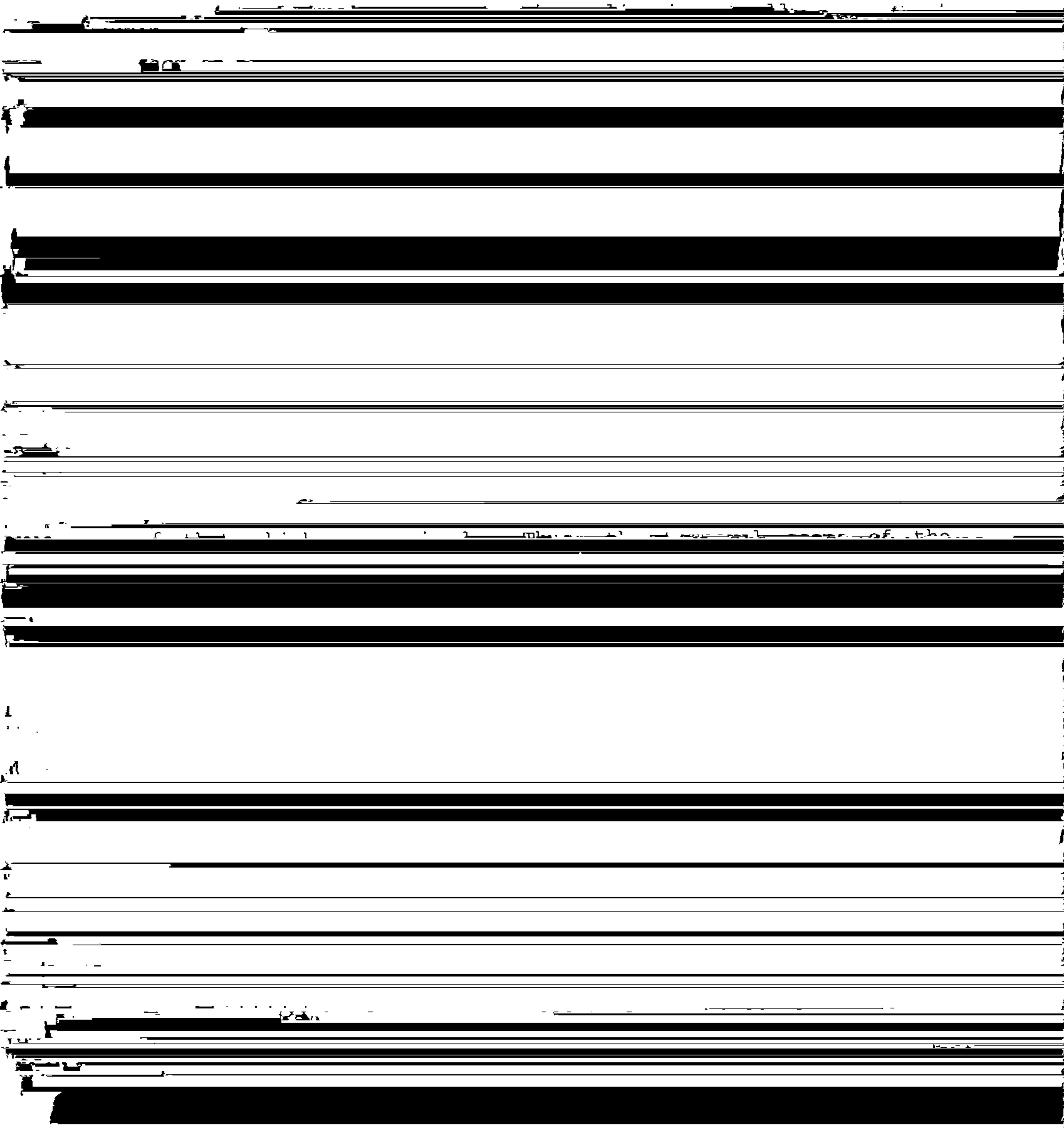
litigation strategy. Accordingly, Infineon is entitled to conduct

discovery into the relationship between the patent litigation strategy as evinced in the documents listed below and the document destruction which the record shows occurred in 1998, 1999, and

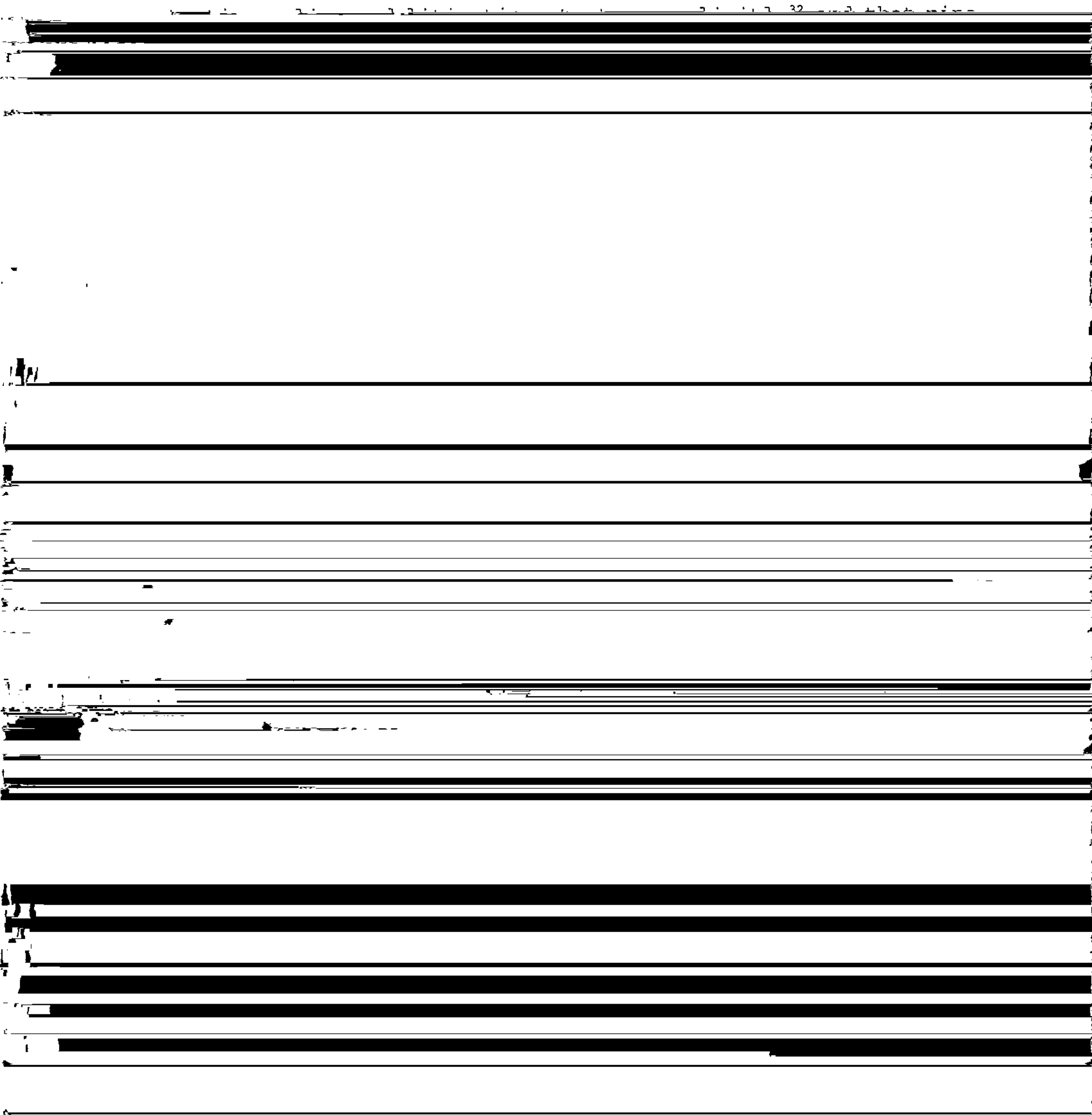
not been opened up, notwithstanding the subject matter waiver which Rambus has made.[30]

The temporal scope of the waiver has been the subject of some

compliance with the program thereafter. Thus, the continued



work product protection for nineteen documents.[31] The in camera review has disclosed that ten such documents mention the document



strategy, the effect of the subject-matter waiver rule on the work product privilege is different than its effect on the attorney-client privilege. Federal Election Comm'n v. Christian Coalition, 178 F.R.D. 61, 77 (E.D. Va. 1998). Specifically, although the subject-matter waiver rule applies with full force and effect to

is not so straightforward.

waiver, it should not extend to opinion work product for two reasons." 856 F.2d at 626. First, the Court held that the Supreme

Court's decision in United States v. Nobles, 442 U.S. 225 (1975), although allowing for discovery of non-opinion work product, necessarily implied "a special protection for opinion work product." 856 F.2d at 626. That special protection was found in

> ultimately and ideally further the search for truth.

856 F.2d at 626. The court, therefore, held that the subject-matter waiver rule does not extend to opinion work product

matter waiver announced in In re Martin Marietta Corp. is nearly

> waive if his intention not to abandon could alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.

Wigmore, Evidence in Trial and Common Law, § 23227 at 636 (J. McNaughton Rev. 1961); see also Micron Separations, Inc. v. Pall Corp., 159 F.R.D. 361 (D. Mass. 1995).

A. Assessment of Rambus' Claims of Work Product Protection

The distinction between opinion and non-opinion work product, the rule pertaining to opinion work product announced in In re Martin Marietta Corp., and the exception to the In re Martin Marietta Corp. rule discussed above, will control the effect of the above described subject matter waiver as to Rambus' purported work

Taylor, 329 U.S. 495 (1947):

> In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion from opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information,

purposes, some of which are related to litigation and some of which are related to ordinary business concerns. National Union Fire Ins. Co., 967 F.2d at 984. For these reasons, the Fourth Circuit

376, and 644 are not entitled to work product protection because they simply are not work product--opinion or otherwise. Thus, the claim of work product protection for those documents is rejected. And, because the protection of the attorney-client privilege respecting those documents has been vitiated by operation of the [illegible]

them.

B. Application of <u>In re Martin Marietta Corp.</u> and its Exceptions to the Actual Opinion Work Product

The <u>in camera</u> analysis, however, has also revealed that Doc. Nos. 270, 271, 279, 315, 317, 319, 364, 367, 528, 1960, and 2331 qualify as work product. Moreover, because these documents contain opinions and strategies rather than the factual results of

privileged materials and discussed otherwise privileged topics in an effort to create the impression that its document retention program was conceived, adopted, and implemented for a legitimate purpose, it cannot use the work product privilege to shield

that Rambus has disclosed. To do otherwise would be perverse because it would allow Rambus to have "a greater advantage from its control over work product then the law must provide to maintain a healthy adversary system." In re Sealed Case, 676 F.2d at 818. Indeed, to permit that result would allow use of the work product

retention plan, as well as the plan's role in the company's overall

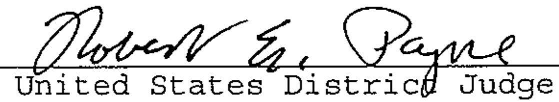
CONCLUSION

For the above stated reasons, the Court finds that Rambus has effectuated a waiver of its attorney-client privilege as to any materials pertaining to its document retention plan, including the plan's conception, development, adoption, and implementation, as well as the relationship between its patent litigation strategy and

documents are subject to the reach of the above described subject matter waiver.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.



United States District Judge

Richmond, Virginia
Date: [illegible]