

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

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

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

PUBLIC

**COMPLAINT COUNSEL’S
SUPPLEMENTAL PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Complaint Counsel submit these supplemental proposed findings of fact and conclusions of law pursuant to the Order of the Commission dated June 20, 2005. The numbered findings (referred to hereafter as “CCSF”) are intended to supplement and amend the proposed findings and reply findings submitted by Complaint Counsel to the Administrative Law Judge below.¹ The numbered proposed conclusions of law are intended to supplement those submitted by Complaint Counsel to the Administrative Law Judge below.

¹ Complaint Counsel’s proposed findings and reply findings submitted to the Administrative Law Judge below are referred to respectively as “CCFF” and “CCRF.” References to the evidence admitted by the Commission pursuant to its June 20, 2005, Order (the “Supplemental Evidence”) are by exhibit number and prefix as designated by Complaint Counsel and Respondent in the submissions preceding the Commission’s June 20 Order.

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COMPLAINT COUNSEL’S SUPPLEMENTAL PROPOSED

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litigation.” Order on Complaint Counsel’s Motions for Default Judgement and for Oral Argument (2/26/2003) at 6.

6. ALJ Timony instituted a rebuttable adverse presumption that “Rambus knew or should have known from its participation in JEDEC that litigation over the enforcement of its patents was reasonably foreseeable.” *Id.* at 9.
7. Judge Payne concluded that “the Court has already found, as a matter of fact, that Rambus anticipated litigation when it instituted its document retention program.” *Rambus v. Infineon*, 220 F.R.D. 264, 286 (E.D. Va. 2004); *see also* Order Granting Complaint Counsel’s Motion for Collateral Estoppel (Timony, J., February 26, 2003) at 5 (collateral estoppel applies to Judge Payne’s earlier findings).

A. Evidence Available at Initial Decision.

8. Rambus was planning litigation relating to its JEDEC-related intellectual property when it was also planning its document retention program. CCFF 1718, 1755-1758.

B. Evidence Developed since the Initial Decision.

1. Rambus Reasonably Anticipated Litigation Before “Shred Day 1998.”

9. Rambus reasonably anticipated litigation against makers of JEDEC standard complaint DRAM over patent infringement by early 1998. CCSF 8, 10-20; CX5048 at 3 (“Top Level Key Results for 1998 . . . 18. Develop and enforce IP . . . C. Get all infringers to license our IP with royalties > RDRAM (if it is a broad license) or sue.”); *see also* CX5055 (email from Karp dated January 6 1998 re obtaining DDR SDRAM samples).
10. By February 12, 1998, Rambus’s Vice President of Intellectual Property Joel Karp had contacted outside counsel to discuss, among other things, patent licensing and infringement litigation against DRAM manufacturers complying with JEDEC standards. CX5007 (Notes of “LICENSING/LITIGATION STRATEGY” meeting between Karp and lawyers from Cooley Godward).
11. In a meeting held on February 12, 1998, Rambus Vice President of Intellectual Property Joel Karp, outside counsel Dan Johnson and others discussed a proposed license program for Rambus and concluded that “Royalty rates will probably push us into litigation quickly.” CX5007.
12. In February 1998, as part of Rambus’s litigation and licensing plans for its cases against the DRAM manufacturers, Rambus planned to simultaneously gather critical documents

into an electronic database and develop a document retention policy. CX5007 (“Make ourselves battle ready. Start gathering critical documents in company so we can start putting together an electronic da

event that licensing discussions do not result in resolution, the following is a litigation strategy for Rambus.”)

21. In a “proposed licensing and litigation strategy” memorandum dated February 23, 1998, Rambus’s outside counsel described for Rambus a “tiered litigation strategy” needed by Rambus because of the “number of potential disputants.” CX5005 at 2. That memorandum describes potential litigation timing and potential legal theories for Rambus that differentiates between current licensees of RDRAM and “unlicensed competitors.” *Id.*
22. Vice President Karp noted two additional issues on Rambus outside counsel’s proposed licensing and litigation strategy memorandum: “document retention policy” and “patent attorney files.” CX5005 at 3; CX5069 at 16.
23. On March 4, 1998, Rambus Vice President of Intellectual Property Joel Karp made a presentation to Rambus’s Board of Directors of Rambus’s “licensing and litigation strategy”. CX0613 at 2 (“Intellectual Property: At this point Joel Karp joined the meeting and updated the Directors on the Company’s strategic licensing and litigation strategy.”).
24. In his March 4, 1998, presentation to Rambus’s Board of Directors, Vice President Joel Karp described some “Near Term Actions” as part of the “Licensing and Litigation Strategy,” including “[n]eed to create document retention policy” “[n]eed to prepare discovery database,” and “[n]eed to organize prosecuting attorney’s files for issued patents.” CX5006 at 8.
25. Rambus withheld from production to Infineon, under claims of privilege, the March 4, 1998, presentation by Vice President Joel Karp to the Rambus Board of Directors. Rambus asserted that Vice President Karp’s presentation constituted both an attorney-client communication and attorney work product prepared in anticipation of litigation. CX5000 at 18, item 317; *see also* CX5069 at 16-17.
26. In his March 4, 1998, presentation to Rambus’s Board of Directors, Vice President Joel Karp described a licensing and litigation strategy for DDR SDRAM, among other products. CX5006 at 1.
27. In his March 4, 1998, presentation to Rambus’s Board of Directors, Vice President Joel Karp described Cooley Godward’s “tiered litigation strategy” which was intended to kick-in if negotiations do not lead to licenses, and timing issues for proposed litigation. *Id.* at 3-7. The presentation also described a “Potential legal action against SLDRAM, Inc.” *Id.* at 5.
28. In an October 1998 presentation, which either went to Rambus’s Board of Directors or to CEO Geoff Tate’s immediate staff, Vice President Karp asserted that Rambus would be

ready to initiate litigation against manufacture

34. In or around June of 1999, either Vice President Joel Karp or in-house IP lawyer Neil Steinberg presented mid-year 1999 “Key Results” to Rambus’s executives. That presentation described Rambus’s efforts to obtain SDRAM and DDR SDRAM related patents. That presentation also set as a Rambus goal the selection of a company against which to litigate during the first quarter of 2000 and the commencement of litigation against that company in the second quarter of 2000. CX5012 at 13 (“KR99.5 UPDATE FOR IP,” corresponding to bates numbers R401172-173); CX5069 at 51.
35. Rambus continued to anticipate and prepare for litigation throughout the summer of 1999. *See, e.g.*, CX5025 (“IP Q3’99 Goals – Final 7/1/99 ... 2. Infringing Devices. A. Initiate reverse engineering of infringing devices as required for litigation prep.”); CX5026 (“IP Q3’99 Goals – Final 7/1/99 ... 3. Licensing/Litigation Readiness... G. Prepare litigation strategy against 1 of the 3 manufacturers... H. Ready for litigation with 30 days notice.”); CX5027-CX5029; CX5027-CX5029; CX5069 at 53 (describing the I

The first target was to be chosen by “early Q4’99.” *Id.* at 29 (corresponding to bates number R401188).

40. In October 1999, either Vice President Joel Karp or in-house IP lawyer Neil Steinberg made a presentation to Rambus’s Board of Directors entitled “Target Selection.” The presentation discussed Rambus’s plans for initiating negotiations and litigation against DRAM manufacturers with respect to their manufacture of JEDEC-compliant SDRAMs and DDR SDRAMs. CX5003 at 2-6; CX5069 at 53-54. Among the factors considered for target selection was a DRAM manufacturer’s “experience in battle,” “litigation story,” “venue flexibility,” and Rambus’s exposure to a counterclaim by the manufacturer. *Id.*
41. In the October 1999 presentation to Rambus’s Board of Directors, either Vice President Joel Karp or in-house IP lawyer Neil Steinberg presented a time-line for negotiations and litigation that contemplated filing a complaint in Delaware by February 1 of 2000. *Id.* at 7-8 (“File suit in Delaware ASAP, if no closure.”). In the Presentation either Mr. Karp or Mr. Steinberg suggested that the first target for Rambus’s patent litigation should be Hitachi.

47. In August 2000, Hynix sued Rambus in federal district court in California seeking a declaratory judgment that its manufacture and sale of JEDEC-complaint SDRAM did not infringe Rambus's patents. CCF 2019.

III. Rambus Intentionally Destroyed its Documents.

48. ALJ Timony found that Rambus destroyed its documents intentionally. Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument (2/26/2003) at 8.
49. Judge Payne concluded that "[i]t is beyond question that Rambus instituted a document retention policy and thereby intentionally destroyed documents." *Rambus v. Infineon*, 220 F.R.D. at 283.

A. Evidence available at Initial Decision.

50. Rambus intentionally destroyed its hard copy documents. CCF 1719, 1723-1727, 1731, 1734-1742, 1745-1750, 1752.
51. Rambus intentionally destroyed its electronic documents. CCF 1720-1727, 1731-1732, 1734-1735, 1743, 1745, 1750-1753.

B. Evidence Developed since the Initial Decision.

1. Rambus Intentionally Destroyed Documents on "Shred Day 1998."

52. Rambus intentionally destroyed electronically stored documents as part of its 1998 "document retention" scheme, reversing its practice of

(corresponding to R400812). It took ProShred Security, a professional document destruction company, 10 hours to destroy the Rambus documents. *Id.*

54. In preparation for Shred Day 1998, Rambus employees were informed that they had to review the documents in their possession for compliance with Rambus's document retention policy. CX1044; CX1051.
55. On October 14, 1998, Vice President Joel Karp, as part of a presentation, including Rambus's DDR SDRAM licensing activities, informed Rambus's Board of Directors of the "all day shredding party" as part of his "IP Update" to the Board. CX5023 at 5; CX5057 at 2 (Rambus Board minutes "Intellectual Property Mr. Karp reviewed the Company's current patent status and its strategic licensing plans."); CX5069 at 46 (Q. "This is listed on Rambus's privilege log as a Karp presentation to the board of directors. Is that accurate? A. I don't have a recall of the actual presentation, but it looks very much like the form of stuff that I would have presented to the Board.").

2. Rambus's Outside Counsel Was Instructed by Rambus to Destroy Documents by April 1999.

56. Vice President Joel Karp intentionally instructed Rambus's outside counsel for patent prosecution, Lester Vincent, to destroy documents. CX5033 ("Meeting w/ Joel Karp... File clearance ... document retention policy: 11 of 49 issued patent files for BSTZ [Vincent's law firm Blakely Sokoloff] have been cleared another 5 are awaiting my review. Doing 2 a day. Secretary assigned full time to file clearance."); CX5069 at 49 ("I can generally recall that I had discussions – or at least a discussion with him about the policy, but I have no independent recollection of the date, other than what this document says. Q. But you did instruct them to follow it, follow the document retention policy at least as far as their files for Rambus; right? A. Right.").
57. Outside patent counsel Lester Vinc

Database... D. Document retention checkups.”); *see also* CX5025 (“3. Licensing/Litigation Readiness . . . C. Organize document retention compliance day.”); CX5026 at 2 (“5. Database Maintenance . . . D. Organize document retention compliance event.”); CX5028.

59. Part of Vice President Joel Karp’s plan was to organize another “shredding party.” CX5027 at 1-2 (“3. Licensing/Litigation Readiness... I. Organize 1999 shredding party at Rambus.”); CX5045 at 1 (“3. Licensing/Litigation Readiness ... G. Organize 1999 shredding party at Rambus.”).
60. Rambus’s CEO Tate was aware of the 1999 document shredding day at Rambus. CX5034 (“I’m sorry I’ll miss the shredder party tomorrow – besides the nice party there will be a fun announcement.”).
61. In its 1999 shred day, Rambus intentionally destroyed approximately 150 burlap bags of documents. CX5052 at 1. The professional document destruction company took approximately four and a half hours to complete the task. *Id.* *See also* CX5046 (“Leave your burlap bags outside your cube before you leave tonight . . . the shredding company will start collecting bags at 9:00 am tomorrow . . .”).

4. Rambus Intentionally Destroyed Documents in 2000.

62. Mr. Vincent, Rambus’s outside patent counsel, after briefly ceasing his file cleaning when the Hitachi case was filed, began destroying documents once again as soon as the case settled in June 2000. *See* CX5036 (listing patent files cleaned up and “reviewed” by Vincent on June 23, 2000).
63. On July 17, 2000, Vice President Neil Steinberg instructed Rambus executives to destroy all drafts of contracts and negotiation materials. CX5020 at 2.
64. On December 28, 2000, Sure Shred, a professional document destruction company, destroyed 410 burlap bags of Rambus documents. CX5053; *see also* CX5020 at 1-2 (email from Steinberg to the exec distribution list quoting the document retention policy and stating that “you and your team are to destroy or systematically discard” drafts and materials used in contract negotiations.).

IV. Rambus Destroyed its Documents in Bad Faith, in Order to Get Rid of Documents That Might Be Harmful to it in Litigation.

65. Judge Payne concluded that “the record in this case shows that Rambus implemented a ‘document retention policy,’ in part, for the purpose of getting rid of documents that might be harmful in litigation.” *Rambus v. Infineon*, 155 F.Supp 2d 668, 682 (E.D.Va.

2001); *see also* Order Granting Complaint Counsel's Motion for Collateral Estoppel (2/26/03) at 5 (granting full collateral estoppel effect to Judge Payne's finding of fact that

B. Evidence Developed since the Initial Decision.

75. Rambus developed its document retention policy in anticipation of litigation over whether JEDEC-compliant DRAM infringed its patents but while the document retention policy instructed Rambus employees to maintain documents that would be helpful to it in that litigation, the document retention policy failed to instruct employees to maintain documents relevant to its attendance and conduct at JEDEC. CCSF 76-109.
76. In October 1997, Joel Karp joined Rambus as Vice President of Intellectual Property in order to assist Rambus in obtaining patents that cover JEDEC compliant DRAM and to enforce those patents against the industry. CCFF 1701-1706.
77. Prior to joining Rambus, Vice President Karp had participated in a litigation between Samsung and Texas Instruments in which Samsung, his employer at the time, asserted an equitable estoppel defense to a patent infringement suit by TI relating to a JEDEC standard. Karp submitted a declaration in support of Samsung's position. CX2957 at 2 ("It is contrary to industry practice and understanding for an intellectual property owner to remain silent during the standard setting process - and then after a standard has been adopted and implemented - later attempt to assert that its intellectual property covers the standard and allows it to exclude others from practicing the standard.").
78. When Karp arrived at Rambus as Vice President of Intellectual Property, the possibility that Rambus's conduct at JEDEC could lead to collateral estoppel being a defense to Rambus's assertion of its patents against the DRAM industry was already familiar to Rambus employees such as JEDEC representative Crisp, in-house counsel Diepenbrock and Rambus's outside patent counsel Vincent. CCFF 422, 821, 849-85, 889, 891, 956-957.
79. In late 1997 or early 1998 Vice President Karp contacted Diane Savage, a partner at Rambus's law firm Cooley Godward, and told her that he was looking for someone to provide him with "litigation assistance." CX5068 at 1-2; *see also* CX5008 at 1 (Cooley Godward bill for services rendered through 2/28/98 indicates a meeting between Karp and Peter Leal, another Cooley lawyer, on January 15, 1998). Karp never described to Savage the nature of the litigation Rambus was preparing for. CX5068 at 2.
80. Ms. Savage introduced Vice President Karp to Dan Johnson, a litigation partner at the Cooley firm, and set up a meeting between Karp and Johnson. CX5068 at 2.
81. At some point Vice President Karp also contacted Ms. Savage of the Cooley firm and requested information regarding document retention policies, because "Rambus was considering adopting a document retention policy." *Id.* Savage notified Karp that Cooley

had a “template agreement” that he could use as a “starting place for his consideration.” *Id.* at 2-3.

82. By March 19, 1998, outside counsel Savage forwarded a “Document Retention Policy Guidance” to Vice President Karp. CX5004. By its own terms, the document was not intended to be Rambus’s own customized document retention policy, but instead was “intended for information purposes only.” *Id.* (“The Company should be advised, however, that a comprehensive document retention policy must be customized to conform to the Company’s business practice and needs. This memorandum is not intended to address the Company’s business in particular, but is intended for information purposes only. The Company should review this memorandum with management as part of the process of designing a customized document retention policy...”).
83. In particular, the document that outside counsel Savage sent Vice President Karp explicitly did not address litigation-oriented issues. *Id.* (“If you have specific litigation-oriented issues please feel free to contact David Lisi of our office..., as he is the litigator who is the principal author of the guidelines set forth herein.”); CX5068 (“... I said this is a form memo, essentially, and he would have to design a customized document retention policy that met your needs, and if you have specific litigation oriented issues, the right person to contact is David Lisi.”).
84. On February 12, 1998, Vice President Karp met with outside counsel Johnson and other Cooley Godward attorneys. CX5007; CX5008 at 1. In that meeting, Johnson advised Karp that Rambus needed a document retention policy. RX-2523 at 1; CX5007. However, it is unclear from the record whether Johnson first suggested the idea of Rambus adopting such a policy or whether Ms. Savage had spoken to Rambus about it first. RX-2523 at 15-16 (“Q. And do you know who first suggested the idea to Rambus of adopting the document retention policy? A. Well, I know that I clearly talked with them about it in the first meetings.... Now I can’t remember if Diane talked to them about it and mentioned it to me, or if I brought it up on my own volition. I just don’t remember.”).
85. Outside counsel Johnson was never made aware of Rambus’s attendance at JEDEC or of any possible issues that might arise in the planned litigation relating to Rambus’s conduct at JEDEC. RX-2523 at 4-5 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted. It honestly, not only it never came up when I was involved in any input with the client, but when I read about it, I was scratching my head because I couldn’t figure out what the issue was... But to answer your question unequivocally, let me make sure I make it clear, I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”).
86. Neither Vice President Karp nor in-house patent counsel Steinberg ever mentioned Johnson that they had used JEDEC-related defenses to defend a patent lawsuit while they

were at Samsung. *Id.* at 5. The first time that outside counsel Johnson heard that both had used JEDEC-related defenses to patent infringement allegations while they were at Samsung was at the deposition for the unclean hands hearing in the Infineon case. *Id.*

87. Despite the fact that the memorandum sent by outside counsel Savage to Vice President Karp was a generic document retention program that did not take into account any litigation-related issues that Rambus might have, Karp drafted Rambus's document retention policy "pretty much word-for-word from" that memorandum. CX5069 at 21; *see generally*, RX-2553 at 2-4.
88. That document retention policy was emailed to Rambus managers and employees on July 22, 1998. CCF 1723. As late as August of 2001, all new employees of Rambus received a copy of the document retention policy. CX5085 at 7.
89. Also on July 22, 1998, Vice President Karp organized a meeting between himself, outside counsel Johnson and Rambus's managers to allow Johnson to make a presentation regarding document retention at Rambus. CX5069 at 27-29. At the meeting, Johnson made the main presentation and Karp said little. RX-2523 at 11.
90. Outside counsel Johnson, in his presentation, made clear that a document retention policy could not be adopted in bad faith. CX5010 at 3 (corresponding to R401138) ("A formal document retention policy will likely shield a company from any negative inferences or defaults due to destruction of documents, unless the policy was instituted in bad faith or exercised in order to limit damaging evidence available to potential plaintiffs."); *see also id.* at 11 (corresponding to R401146) ("A negative inference does not arise where the destruction was a matter of routine with no fraudulent intent. But, if the party knew or should have known that the documents would become material at some point in the future, such documents should be preserved.").
91. In particular, outside counsel Johnson made it clear that Rambus could not start a program that was intended to destroy documents that might be relevant to anticipated litigation. RX-2523 at 10 ("Made it clear that they couldn't start a program if they were anticipating filing some lawsuit and they needed – they could not be engaged in conduct which in my view was unacceptable, which is, okay, you guys are going to go out and willy nilly destroy documents to clean your files. I corresponding to R401146 (a for CX5069 .120(rt a)"))

reasonably anticipated litigation before the litigation has commenced. *Id.* at 17-18 (“The reason is with a document retention program, what should happen is you’ve got a lot of extraneous material that you generate throughout the course of your business, that you don’t want to end up having to search for constantly. If you’ve got a transaction or some issues that you are aware of that are going to lead to litigation, then you keep it.”).

93. After the presentation by outside counsel Johnson to Rambus’s managers, Vice President Karp implemented the policy by scheduling meetings throughout the company to describe Rambus’s new document retention policy. CX5069 at 33-34. In those meetings, Karp, without Johnson or any other Cooley Godward attorney, presented relevant portions of a presentation he generated from Rambus’s document retention policy – RX-2505 (already admitted as CX-1264); CX5069 at 34. [The presentation was identified in the Karp deposition as Defendant’s Trial Exhibit Number 4134, but was admitted at the unclear hands hearing as DXT-4024. *See* DX0504 at 2.]
94. Rambus’s outside law firm Cooley Godward was never involved in the implementation of the document retention program. CX5076 at 10, 18.
95. After leaving Cooley Godward, outside counsel Johnson went to the law firm Fenwick and West. RX-2523 at 15. Fenwick and West’s only role in the implementation of Rambus’s document retention program was to send a legal assistant over to Rambus to help Rambus organize its patent files. *Id.* at 19 (“The only activity we – we – as best I can recall, we did the following: one they asked us to send a legal assistant over to help them get organized. We did that. Two, we told them they should put their most critical documents on – in some kind of a database so that they’d be able to access it, ... and ... they wouldn’t lose it.”).
96. Rambus declined outside counsel Johnson’s offer to help implement the document retention program. *Id.* (“We offered to bring over our people to help them go through and execute on their document retention policy. They declined that. That’s it.”).
97. In Vice President Karp’s quarterly IP goals lists, organizing shred days was often one of the tasks described as part of Rambus’s “Licensing/Litigation Readiness” program. *See, e.g.*, CX5027 at 1-2; CX5045.
98. The concepts of document destruction and document retention appear to ~~transmitting~~ ~~litigation~~ ~~readiness~~ ~~program~~ ~~RTD~~ ~~16~~ ~~0300~~

item under licensing/litigation readiness and where there is no other mention of “document retention.”).

99. Rambus’s document retention program in conjunction with its “shred days,” “all day shred parties,” and “house cleanings” ensured that documents favorable to Rambus’s upcoming litigation was maintained but that documents unfavorable to that litigation was destroyed. CCSF 100-107.
100. Both the document retention policy itself and the presentation that Vice President Karp gave to Rambus employees describing the document retention program required that information relating to patent disclosures and proof of invention dates be kept permanently. RX-2505 at 4.
101. Both the document retention policy itself and the presentation that Vice President Karp gave to Rambus employees describing the document retention program required that documents containing trade secret information be kept for the life of the trade secret. *Id.* at 3.
102. Both the document retention policy itself and the presentation that Vice President Karp gave to Rambus employees describing the document retention program required that final execution copies of all contracts should be kept indefinitely. *Id.* at 8.
103. Neither the document retention policy itself nor the presentation that Vice President Karp gave to Rambus employees describing the document retention program required that Rambus employees maintain documents that might be relevant to Rambus’s conduct at JEDEC or that might otherwise help an alleged infringer establish equitable estoppel. CCF 1728-1730. *See generally*, RX-2503, RX-2505.
104. Joel Karp gave a presentation to Rambus employees about the document retention policy that stated that email is “discoverable in litigation or pursuant to a subpoena” and that Rambus employees should throw email away. RX-2505 at 1. But that presentation fails to warn Rambus employees that they should not destroy documents relevant to anticipated litigation. *Id.*
105. Anthony Diepenbrock, Rambus’s in-house counsel involved in prosecuting patents relating to the JEDEC standard (CCFF 1056 et seq.), was never told to retain documents that might be relevant to the litigations that Rambus was planning against the DRAM manufacturers over infringement of JEDEC-related patents. CX5080 at 20 (corresponding to transcript page 655).
106. As in the 1998 shred days, in the 1999 shred day, Rambus employees were referred to the Rambus document retention policy to understand what types of documents they should keep. CX5071 at 11 (“... the instructions were to, you know, make sure that people

referred to the document retention policy to look for which documents they needed to keep.”).

107. As late as the December 2000, document destruction, Rambus employees were told to refer to the document retention policy to understand what to keep and were not told to

from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party.”).

A. Evidence Available at Initial Decision.

112. Rambus destroyed documents that might be discoverable in litigation. CCF 1732-1733, 1754.
113. Rambus employees that destroyed documents were critically involved in Rambus’s JEDEC-related IP litigation plans. CCF 1737-1750, 1752-1754.
114. Rambus JEDEC representative Richard Crisp destroyed “anything he had on paper” in his office. CCF 1738.
115. Many of Richard Crisp’s JEDEC-related emails were purged from Rambus’s business files, computers and active server files. CX5078 (Gonzales testimony (2/22/05) at 14 (page 124:9-13: “Q. Now did you find in your discovery collections at Rambus copies of those JEDEC e-mails from Richard Crisp mailbox in anyone else’s files throughout the company? A. No, we did not.”); *see also* CCSF 118-123. Although some of Mr. Crisp’s individual JEDEC-related e-mails were discovered accidentally two-and-a-half years later in an unused and forgotten server file, the only organized (although incomplete) set of Crisp’s JEDEC-related e-mails that was located and produced at the time of Rambus’s litigation-related search for responsive documents was not found anywhere at Rambus. Rather, it was found on an old, unused hard drive in Mr. Crisp’s attic, which Mr. Crisp subsequently discarded. CX5075 (Crisp Deposition (2/21/05)) at 3 (page 297:2-9: “Q. Where was that computer located? Within your home? A. Right. It was at my home somewhere. Q. Was it in your attic? A. That sounds vaguely familiar. I just don’t remember.”); *id.* at 4 (page 299:1-6: “it would be more accurately described as just a disk drive that had been in an old pc.”); *id.* at 5 (page 302:22-303:5: “Q. The hard drive that you found in your attic with JEDEC e-mails on it, where is it located physically today? A. I have no idea. Q. What did you do with it? A. Again, it was probably thrown away when I moved. It was a very old hard drive that was not even in use at the time with very low capacity. So I just don’t think I have it anymore.”).
116. Rambus in-house counsel Anthony Diepenbrock, Rambus’s in-house attorney responsible for patent prosecution relating to the JEDEC standard, destroyed his documents. CCF 1737.
117. Rambus’s outside counsel Lester Vincent, who was responsible for prosecuting its JEDEC-related patents and who also counseled Rambus regarding its obligations relating to JEDEC and other standard-setting organizations destroyed his Rambus-related documents. CCSF 56-57, 128-133.

B. Evidence Developed since the Initial Decision.

1. General Absence of Historical Documents.

118. Rambus's attorneys attempting to comply with document requests in a JEDEC DRAM-related litigation against Hitachi in 2001 found a general lack of historical documents in the Rambus files. CX5078 at 13 (Corresponding to transcript page 120) ("Q. And how would you categorize the types of documents that you were looking for that you couldn't find? A. It would be difficult to characterize them to any specific grouping. It was more historical documents prior to a certain date, were – either didn't exist or seemed to be incomplete.").
119. Rambus's attorneys found that the document retention policy caused the loss of the historical documents. *Id.* at 14 (Corresponding to transcript pages 122) ("In looking for documents that would be responsive to the Hitachi document requests, there were requests for some historical documents that the company simply did not have because of this document retention policy that had been adopted in '98 and which had resulted in the destruction of certain documents.").
120. Among the documents that Rambus's attorneys found missing were JEDEC-related documents. *Id.* at 20 (Corresponding to transcript page 146).

2.

123. Prior to the creation of the document retention policy at Rambus, Richard Crisp was a “packrat.” CX5069 at 33 (“I have a picture in my mind of his office before, and that’s – you couldn’t even get into his office.”).
124. Billy Garrett, Rambus’s other primary JEDEC representative, also destroyed all of his JEDEC-related hard copy and computer stored documents as a result of the document retention policy. CX5062 at 11 (corresponding to GCWF 3422) (“got rid of all the stuff – doc retention policy jedec stuff all went away.”). Prior to the document retention policy, Garrett was a “packrat.” *Id.* at 5 (corresponding to GCWF 3416). But when he searched his files in 2001 for Rambus’s case against Hitachi, Garrett “didn’t find anything relating to JEDEC.” *Id.*
125. Rambus President David Mooring also apparently had no documents relating to his attendance at JEDEC. CX5063 at 12 (corresponding to GCWF 3412). When asked by Rambus’s attorneys for documents relating to JEDEC he pointed them to Richard Crisp and Billy Garrett and mentioned the document retention policy. *Id.* (“go to [Crisp because] he had a tendency to save things. Billy Garrett – would also have docs.”).
126. Unlike Richard Crisp and Vice President Allen Roberts, who were able to produce documents from their personal files after leaving Rambus, in-house counsel Tony Diepenbrock did not keep any of his files after leaving Rambus. CX5064 (“2. What docs / files do you have -

131. It appears that, at some point in 1999 or 2000, Rambus's outside patent counsel Lester Vincent completed "clean-up" of his files labeled P010D. CX5036 at 2; *see also* CCF 1745-1748. The P010D files related to Rambus's '961 patent application. DX0014; *see also* CCF 900-901, 932-934, 947-948, 955-958, 962, 1028, 1125-1163.
132. On or before June 23, 2000, Rambus outside patent counsel Lester Vincent completed "clean-up" of his files labeled P010DC. CX5036 at 2; *see also* CCF 1745-1748. The P010DC files related to Rambus's '490 patent application. DX0014; *see also* CCF 900-901, 932-934, 947-948, 955-958, 962, 1028, 1049, 1164-1182.
133. On or before May 13, 1999, Rambus outside patent counsel Lester Vincent completed "clean-up" of his files labeled P014D. CX5036 at 2; *see also* CCF 1745-1748. The P014D files related to Rambus '651 patent application. DX0014; *see also* CCF 900-901, 932-934, 947-948, 955-958, 962.

4. Further Confirmation of Document Destruction.

134. Recently discovered back-up tapes confirm that a substantial volume of relevant documents disappeared from Rambus's business files and, as a result, are missing from the record in this matter. CCSF 135-144.
135. In March and April 2005, Rambus found approximately 1,400 back-up tapes and other removable electronic media. The vast majority of these back-up tapes and electronic media have been erased, are blank, or otherwise cannot be read. Letter from Geoffrey D. Oliver to Donald S. Clark (June 14, 2005) at Attachment 1 (Supplemental Case Management Statement of Rambus Inc., *Hynix Semiconductor Inc. v. Rambus Inc.* (May 20, 2005) 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.")).
136. A number of the readable back-up tapes and electronic media recently discovered by Rambus apparently contain copies of documents relevant to Rambus's on-going patent-infringement and antitrust litigation with Hynix that had disappeared from Rambus's business files and servers. It appears that 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. *See* Letter from Geoffrey D. Oliver to Donald S. Clark (May 5, 2005) at Attachment 1 (Letter from Gregory P. Stone to The Honorable Ronald M. Whyte (April 4, 2005) at 2 ("some of the data from some of these tald M. Why

137. In connection with its production to Hynix of documents from its newly-found back-up tapes, Rambus has asserted privilege with respect to at least 58 documents that were not found in Rambus's business files or on its servers, and thus "not reviewed and produce

VI. The Supplemental Evidence Reveals Misstatements and Misrepresentations of Fact by Rambus and its Executives in the Course of this Matter.

145. When deposed in this matter in February 2003, Rambus Vice President for Intellectual Property Joel Karp testified that, although Rambus was aware that litigation was a possibility, it did not plan litigation or anticipate litigation before filing its lawsuit against Hitachi in late 1999. CX2114 at 161:25-162:6 (“Q . . . at that point in time, July 22nd, 1998, was Rambus anticipating potential litigation? A No.”); *id.* at 162:10-163:5 (“Once we started to put the licensing program together in the middle of 2000, we had . . . I was aware very often that if negotiations failed that there would be litigation. But there was no litigation actually planned prior to actually filing it. There was no anticipation of it at that time, but it was certainly a possibility.”).
146. Rambus quoted and relied upon Mr. Karp’s statements in its Reply Findings submitted to ALJ McGuire in September 2003. *See* Responses to Complaint Counsel’s Proposed Findings of Fact, Response to Finding No. 1732 (“as Mr. Karp testified, Rambus was *not* anticipating litigation at the time.”) (emphasis in original); *see also* Response to Finding No. 1718 (quoting Mr. Karp’s testimony). The privilege log produced to Complaint Counsel in this case indicates that Rambus had asserted privilege over, and had withheld from production in this case, documents demonstrating these statements to be untrue.
147. In fact, the Supplemental Evidence reveals that, in the first half of 1998, Vice President Karp and other Rambus officers, managers and counsel not only reasonably anticipated litigation, but actively planned to initiate litigation. CX5048 at 3 (“Top Level Key Results for 1998 . . . 18. Develop and enforce IP . . . C. Get all infringers to license our IP . . . or sue.”); CX5007 (Notes of “LICENSING/ LITIGATION STRATEGY” meeting between Karp and outside lawyers; “Royalty rates will probably push us into litigation quickly;” “Need to litigate against someone to establish royalty rate and have court declare patent valid;” Cooley Godward was tasked to “review Micron, Fujitsu and Samsung and Hyundai contracts and formulate litigation strategy driven by results of the

- developed. . . . The first option is to pursue breach of contract remedies. . . . Rambus may elect to file a patent infringement suit.”); *see also* CX5017 (“IP Q3’98 Goals (First Cut) . . . 2. Infringement Activity . . . Prepare claim chart for Micron SDRAM . . . 3. IP Litigation Activity.”); CX5014 (same).
152. In this matter, Rambus quoted and relied on 2001 deposition testimony of Vice President for Intellectual Property Joel Karp, in which Mr. Karp testified that his concern was not with the contents of the documents destroyed by Rambus, but solely with their volume. CX2102 (transcript of Karp deposition (Micron v. Rambus, 8/1/01) at 347:18-348:6 (“[M]y concern was that if I was ever asked to produce those thousands of back-up tapes, regardless of what they concerned . . . that it would be a task that would be beyond the human endurance to have to try to figure out what was on those things.”).
153. Rambus quoted prominently and relied upon Mr. Karp’s statements in this matter. Memorandum in Opposition to Complaint Counsel’s Motion for Additional Adverse Inferences (filed April 7, 2003) at 8 (“As Mr. Karp stated, his concern was not with the *contents* of the documents Rambus had accumulated during its eight-year corporate history, but with the sheer *volume* of those documents.” (emphasis in original)); *id.* at 7 (same). The privilege log produced to Complaint Counsel in this case indicates that Rambus had asserted privilege over, and had withheld from production in this case, documents demonstrating these statements to be untrue.
154. In fact, the Supplemental Evidence reveals that Rambus was concerned about the substance of documents that might affect the outcome of litigation and tailored its document destruction efforts accordingly. *See, e.g.*, CX5010 at 6 (R401139-41) (describing “horror stories” where supposedly deleted e-mails altered the outcome of litigation, resulting in liability); CX5020 (reminding employees to destroy drafts of contracts and materials used during negotiations); CX5007 (“Licensing/Litigation Strategy” contrasts need to gather documents to put together a searchable electronic database and the need for a document retention policy, and focuses on patent prosecution files: “clean out all attorney notes”); CX5022 at 4 (“Clean out all the Rambus [patent prosecution] files that have issued”); CX5033 (“File clearance re document retention policy – 11 of 49 issued patent files for BSTZ have been cleared – another 5 are awaiting my review”); CX5031 (after noting that Rambus’s June 1992 Business Plan was used against Rambus in court, “this new [document retention] policy is similar to the previous policy – however, this time the IP group will attempt to execute the policy more effectively.”).
155. Rambus’s Vice President of Intellectual Property Neil Steinberg, designated as the company representative with knowledge to testify on behalf of Rambus pursuant to F.R.C.P. 30(b)(6), testified that he didn’t believe that the July 22, 1998, presentation to Rambus employees by Mr. Karp regarding Rambus’s document retention policy used any other documents than a two page document. CX5085 at 6 (page 65:25-66-18). *See*

- CX1040. This transcript was provided to and relied upon by FTC staff during the course of its Part II investigation in this matter.
156. In fact, the Supplemental Evidence reveals a 17-page set of slides dated July 22, 1998, that set forth the background and specifics of the policy. The detailed slides described the policy as a “Document Retention/Destruction Policy.” CX5010 at 2 (R401137) (“BEFORE LITIGATION A Document Retention/Destruction Policy”). The slides make clear that Rambus focused on documents that would be discoverable in litigation, urged that “special care” be taken with e-mail and electronic documents, and sought to avoid “horror stories” where supposedly deleted e-mails are found and used to prove a case against the company. *Id.* at 4-6 (R401139-41). The slides also noted that, “If crucial documents have been destroyed intentionally, courts have entered default judgments against the destroying party.” *Id.* at 10 (R401145).
 157. Rambus’s Vice President of Intellectual Property Neil Steinberg, designated as the company representative with knowledge to testify on behalf of Rambus pursuant to F.R.C.P. 30(b)(6), testified under oath that only on one occasion, in or around July 1998, did Rambus distribute burlap sacks to employees to collect documents for shredding. CX5085 at 8 (page 75:12-20). This transcript was provided to and relied upon by FTC staff during the course of its Part II investigation in this matter.
 158. In fact, the Supplemental Evidence reveals that on at least two other occasions, in August 1999 and in December 2000, Rambus again held shred days and distributed burlap sacks to Rambus employees to collect documents for shredding. CX5045 (IP Q3’99 Goals (Steinberg was Patent Counsel): “Organize 1999 shredding party at Rambus”); CX5046 (Kaufman e-mail to all staff (8/25/99): “Leave your burlap bags outside your cube before you leave tonight . . . the shredding company will start collecting at 9:00 am tomorrow morning. And don’t forget the shredder party tomorrow at 5:00 pm ... lots of good food & a special announcement!”); CX5034 (Tate e-mail to all staff (8/25/99): “I’m sorry I’ll miss the shredder party tomorrow.”); CX5047 at 3 (400788) (SureShred Invoice and Certificate of Destruction (12/28/00): “Shred contents of 460 Shred Bags”).
 159. Despite the central importance of allegations of spoliation of evidence in this litigation (see Complaint at ¶ 121), at no time did Rambus correct the testimony of Mr. Steinberg or inform Complaint Counsel that Rambus had, in fact, held at least three separate shred days over the course of two-and-a-half years.
 160. Rambus’s primary representative at JEDEC, Richard Crisp, testified that his JEDEC-related e-mails were located on Rambus’s main server and were produced from that location. CX2082 (Crisp Deposition, *Rambus v. Infineon*, (4/13/01), pages 841:23-842:12 (“Q. Why did you still have your JEDEC mailbox e-mails collected? A. . . . there were some other documents that I had later found on our main server that I had apparently copied over to that machine as a means for converting from a Macintosh

laptop to an IBM PC laptop that they had issued us. . . . And then I forgot about the directory that was on there. So that's where the second group of documents came from."). This deposition transcript was provided to, and relied upon by, Complaint Counsel. *See generally* CX2082.

161. At trial, Rambus elicited testimony from Richard Crisp implying that he deliberately preserved JEDEC-related documents on his computer. *See* Trial Transcript at 3572-73 ("Q. Did you take any steps at any point in time to preserve electronic JEDEC-related materials? A. Yes, sir, I did. . . . Q. And did that mean that there ended up being preserved at your home JEDEC-related e-mails? A. That's correct . . ."). Rambus then cited and relied upon this testimony to argue that Mr. Crisp's JEDEC-related e-mails had been intentionally preserved as part of Rambus's document retention policy. Rambus Inc.'s Responses to Complaint Counsel's Proposed Findings of Fact, Response to Finding No. 1720 ("Rambus's JEDEC representative testified that he preserved his JEDEC-related emails pursuant to the documention polr08-g,p-troni-54I3omp03omp03omp.2800 ns T-g,p-t2.3y t

thrown away when I moved. It was a very old hard drive that was not even in use at the time with very low capacity. So I just don't think I have it anymore.”).

164. In its reply findings to ALJ McGuire, Rambus stated, “Complaint Counsel have conceded that they have not suffered any prejudice as a result of any documents that were not retained by Rambus.” Rambus Inc.’s Responses to Complaint Counsel’s Proposed Findings of Fact, Response to Finding No. 1728; *see also* Response to Finding No. 1736, No. 1745, No. 1749.
165. Rambus’s statement with respect to Complaint Counsel having “conceded” lack of prejudice was, of course, false when made: Complaint Counsel never made any such concession. *See, e.g.*, Memorandum in Support of Complaint Counsel’s Motion for Default Judgment Relating to Respondent Rambus Inc.’s Willful, Bad Faith Destruction of Material Evidence (December 20, 2002) at 91-99 (“Complaint Counsel Has Been Severely and Demonstrably Prejudiced by Rambus’s Bad-Faith Document Destruction.”).
166. Rambus stated to ALJ McGuire, “the 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. (September 29, 2003) at 8; *see also* Oral Argument (December 9, 2004) at 161 (“It is our position that [Rambus] did not destroy any of those documents” relating to the relationship of Rambus’s patent claims to JEDEC’s work or Rambus’s motivation for its conduct).
167. Complaint Counsel identified numerous documents that Rambus destroyed in the course of its deliberate and carefully planned Shred Day 1998, its 1999 Shredding Party, and its shredding event in 2000. *See* Response of Complaint Counsel to the Commission’s Order Regarding Designation of the Record Pertaining to Spoliation of Evidence By Rambus (December 22, 2004) at 16-21. Recently available evidence now confirms that Rambus did not retain and produce all materials pertinent and relevant to this matter. Rather, Rambus has discovered back-up tapes containing a substantial number of documents relevant to this matter that were purged from Rambus’s business files and servers and never produced in this matter. CCSF 134-144; *See also* Complaint Counsel’s Petition to Modify the Schedule in the Commission’s July 20, 2005 Order at 4-8, Attachment 10 (Rambus Privilege Log listing 58 documents, withheld by Rambus, that Rambus concedes would have been produced in this litigation had they existed in Rambus’s business files and been found on a timely basis).

a point of no return. Thereafter, the industry could not switch away from that architecture even if Rambus sued DRAM manufacturers for patent infringement. CX5011 at 3 (“We should not assert patents against Direct partners until ramp reaches point of no return.... [R]isks of damaging establishment of dominant standard outweigh potential return.”); *see also* CCF 2500.

**COMPLAINT COUNSEL'S
SUPPLEMENTAL PROPOSED
CONCLUSIONS OF LAW**

CERTIFICATE OF SERVICE

I, Beverly A. Dodson, hereby certify that on August 10, 2005, I caused a copy of the attached, *Complaint Counsel's Supplemental Proposed Findings of Fact And Conclusions of Law*, 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.
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