

Supplemental Proposed Findings of Fact filed August 10.¹ In addition, the following forms of citation are used:

- Complaint Counsels' Proposed Supplemental Findings of Fact are cited as follows: (CCSF 50) or (CCSF 143-145).
- Complaint Counsels' Responses to Rambus's Amended Proposed Findings of Fact are cited as follows: (CCRF 1619) or (CCRF 1620-1625).

II. RAMBUS'S AMENDED PROPOSED FINDINGS OF FACT

¹ Complaint Counsels' 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 Rambus in the submissions preceding the Commission's June 20 Order.

in that meeting, Mr. Johnson told Mr. Karp that Rambus needs to “litigate against someone to

was unlikely to consist solely of routine patent infringement analysis, which would involve primarily a comparison of patent claims against an allegedly infringing prod

against the DRAM manufacturers. CCSF 9-18. Furthermore, Mr. Johnson never instructed Rambus that it was appropriate to destroy documents relevant to anticipated litigation. CCSF 92. Instead, Mr. Johnson made it clear to Rambus that they *could not* adopt a document retention policy in bad faith or use a document retention policy to destroy documents relevant to upcoming litigation. CCSF 90-92. Finally, Mr. Johnson made recommendations regarding a document retention policy without knowing that, in its planned patent litigation, Rambus would likely face the affirmative defense of equitable estoppel and allegations of antitrust violations based on its conduct at JEDEC. CCSF 85-86 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”).

Furthermore, this proposed finding is misleading to the extent it implies that Rambus adopted the policy due primarily to concerns other than concerns regarding the content of its files. For example, the instructions Mr. Karp gave to Mr. Vincent, to destroy specific categories of documents in his patent prosecution files, demonstrate that Rambus’s document retention policy was concerned with the content of the documents. CCF 1746-1747; CCSF 117, 128-133. In addition, the unguarded statement of Vice President Neil Steinberg regarding Infineon’s use of Rambus’s 1992 Business Plan confirms that Rambus implemented its document retention policy to resolve its concerns with the content of its files. CCSF 108 (“Once we get through our legal wrangling, I would like to implement the new document retention policy. As I have stated in the past, this new policy is similar to the previous policy – however, this time the IP group will attempt to execute the policy more effectively.”).

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

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

Response to Finding No. 1623: This proposed finding is incomplete and misleading. The memorandum that Ms. Savage sent to Mr. Karp was never intended to be Rambus's document retention policy. CCSF 82. In particular, the memorandum sent by Ms. Savage was not intended to address any of Rambus's specific litigation-oriented issues. CCSF 83

either: (a) printed in hard copy

all internal drafts and any materials used during negotiations that are not part of the final contract.” RX 2502 (DTX 3676) at 6 (March 19, 1998 Memorandum re: Document Retention Policy Guidance).

Response to Finding No. 1627: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

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

Response to Finding No. 1628: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

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

Response to Finding No. 1629: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

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

Response to Finding No. 1630: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

1631. As to press releases and public filings such as 10-K's, the Cooley Godward lawyers recommended that Rambus "retain permanent copies of all press releases and publicly filed documents" but that "[a]ll drafts of publicly disseminated documents should be destroyed upon publication of the document." RX 2502 (DTX 3676) at 4 (March 19, 1998 Memorandum re: Document Retention Policy Guidance).

Response to Finding No. 1631: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

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

Response to Finding No. 1632: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

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

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

Response to Finding No. 1633: This proposed finding is contradicted by the record evidence. Rambus's two page document retention policy is not content neutral. The policy requires the retention of documents that would help Rambus in its anticipated litigation. CCSF 100-102. In sharp contrast, the policy encourages the destruction of all other documents,

including documents that are relevant to the same anticipated litigation, but that might establish that Rambus should be equitably estopped from asserting its patents or that Rambus should be investigated by the Commission under the theory of the *Dell* consent. CCSF 103. As a result of Rambus's document retention policy, when Rambus executed its shred days in 1998, 1999, and 2000, documents favorable to its anticipated litigation against the DRAM manufacturers were retained but documents unfavorable to that litigation were destroyed. CCSF 112-144.

Furthermore, to the extent this proposed finding implies that Rambus's document retention policy was recommended by counsel, the proposed finding is incomplete and misleading for the reasons stated in CCRF 1625.

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

Response to Finding No. 1634: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1625. Furthermore, this proposed finding is also misleading as there is no evidence in the record to indicate that any of the document retention policies described by these witnesses were adopted as part of the firm's litigation strategy.

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

Response to Finding No. 1635: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1634.

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

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

Response to Finding No. 1636: This proposed finding is incomplete and misleading. First, the Cooley Godward firm did not recommend any specific policy language to Rambus. CCRF 1623, 1625. Second, any advice given by the Cooley Godward firm is limited by the fact that Cooley Godward attorneys could not have given Rambus legal advice regarding documents relating to Rambus’s anticipated litigation because they never knew about the likelihood that such litigation would involve claims of equitable estoppel or antitrust violations based on Rambus’s conduct at JEDEC. CCSF 85-86 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”). Finally, Mr. Karp specifically refused Mr. Johnson’s offer to assist Rambus in its implementation of the document retention policy. CCSF 93-96. Instead, Mr. Karp and others at Rambus planned, supervised and implemented Rambus’s document retention policy, including “Shred Day 1998,” the 1999 “shredding party” at Rambus and the 2000 “housecleaning.” CCSF 93-96, 106-107.

1637. Mr. Johnson advised Rambus that: (1) it should “have a program where they communicated to all their managers the scope of the policy”; (2) it needed to have someone “who would be responsible for the policy, because engineers are typically a very independent

bunch”; and (3) it should “clearly identify” for employees those categories of documents that “should and should not” be kept. *Id.*

Response to Finding No. 1637: This proposed finding is incomplete. Mr. Johnson also instructed Rambus that a document retention policy could not be adopted in bad faith, that Rambus could not adopt a document retention program that was intended to destroy documents that might be relevant to anticipated litigation, and that a firm should not destroy documents that might be relevant to anticipated litigation. CCSF 90-92 (“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.”); *see also* RX-2523 at 17 (“If you’re trying to get rid of documents to keep someone from getting them, that doesn’t work. You’re going to be liable. You’ve got to have a document retention policy that you believe in for all of the right reasons, and you want to make sure they know if they’re playing a game, they’re in trouble.”).

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

Response to Finding No. 1638: This proposed finding is incomplete and misleading. Mr. Johnson gave one presentation to a small number of Rambus managers. The presentation that Mr. Johnson gave was a generic presentation that took no account of Rambus’s specific situation. CCSF 89; RX-2523 at 10 (The presentation Johnson gave to Rambus managers “is generic. It’s not specific to Rambus.”). Mr. Johnson was not involved in the meetings in which Mr. Karp described the document retention policy to Rambus employees.

CCSF 93. Mr. Johnson offered to have his firm assist Rambus in implementing the document retention program, but Mr. Karp declined. CCSF 94-96.

1639. At the managers meeting, Mr. Johnson presented an “overview” of the policy, emphasizing its “g

months later got sued for sexual harassment, and the claim was [they] destroyed all of this material six months ago. It must have been timed to the harassing activity. So therefore, that's going to be evidence in this case of sexual harassment.... So without a policy, ... this deleted email results in an inference being created..."). This proposed finding is also incomplete and misleading for the reasons set forth in CCRF 1637.

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

Response to Finding No. 1642: This proposed finding is incomplete and misleading for the reasons described in CCRF 1637.

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

Response to Finding No. 1643: This proposed finding is incomplete and misleading for the reasons described in CCRF 1620.

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

"when you tell folks to look for things to keep, they're going to keep more stuff than they might otherwise. So in effect what he had done was that he had gotten a document retention program and essentially undercut it. And I said okay. You know, they were so concerned about throwing something out erroneously, that he put in the language about "Look for things to keep," and I said okay, what that's going to mean is you're going to have a very narrow policy here."

Id. at 159:15-23.

Response to Finding No. 1644: This proposed finding is misleading and incomplete. The slides produced by Mr. Karp, like the document retention policy itself, makes no mention of Rambus's presence or co

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

Response to Finding No. 1645: This proposed finding is incomplete and misleading. When Mr. Johnson reviewed Rambus’s document retention policy, he was unaware that Rambus’s anticipated litigation was unlikely to consist solely of routine patent infringement analysis, which would involve primarily a comparison of patent claims against an allegedly infringing product, but was also likely to involve allegations of inequitable and anticompetitive conduct at JEDEC, the resolution of which would implicate large volumes of Rambus’s business records and emails. CCSF 85-86 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”). As a result, he could not have provided advice regarding the appropriateness of Rambus’s document retention policy with respect to documents relating to Rambus’s conduct at JEDEC.

Furthermore, this proposed finding is incomplete because it omits that the document retention policy aimed to preserve documents that were “of great value” to Rambus in anticipated litigation while allowing the elimination of documents that were unfavorable to

Rambus in the same litigation. CCSF 100-108. Rambus employees were told that some Rambus documents were “discoverable in litigation or pursuant to a subpoena.” RX-2505 at 1. But Rambus employees were never told to retain documents that might be relevant to its anticipated litigation against the DRAM manufacturers. CCRF 1644. I

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

Response to Finding No. 1649: Complaint Counsel have no comment.

1650. The record contains no evidence of the “normal” or “expected” volume of materials that a company of Rambus’

Crisp and Billy Garrett possessed substantial quantities of business records, including records relating to Rambus's conduct at JEDEC. CCSF 121, 123-124. Mr. Crisp destroyed "anything he had on paper" in his office. CCSF 114. Mr. Garrett also destroyed all of his JEDEC-related records as a result of Rambus's document retention policy. CCSF 124 ("got rid of all the stuff – doc retention policy – jedec stuff all went away."). Furthermore, the amount of bulky material at Rambus does not explain why Rambus outside counsel Lester Vincent was instructed to destroy his documents as well. CCSF 117; CCF 1746-1747 (Vincent destroyed "prosecution documents," correspondence between Rambus and his law firm, and his own drafts and notes).

1652. The evidence presented at trial establishes that Rambus employees followed the guidelines of the policy adopted on the advice of counsel in determining what documents to keep and what to throw away during the 1998 and 1999 shred days (and on a day to day basis). RX 2524; RX 2525 (PTX 9503) at 258:12-259:25, 276:17-24, 301:14-302:23 (Barth, 2/26/04 *Infineon* Dep.); RX 2534; RX 2535 (PTX 9514) at 392:3-397:14 (Roberts 10/14/04 Dep.); RX 2536; RX 2537 (PTX 9515) at 97:4-98:24 (Hampel 5/28/04 *Infineon* Dep.); RX 2546; RX 2547 (PTX 9522) at 85:7-12 (Kaufman 5/18/04 *Infineon* Dep.); CX 2082 at 841:16-18 (Crisp 4/13/01 *Infineon* Dep.) ("I definitely made an attempt to go through my files and look for things to keep as [Karp] had directed us to do.").

Response to Finding No. 1652: This proposed finding is incomplete. The evidence presented at trial also establishes that Rambus's employees followed Rambus's document retention policy in December of 2000 as well. CCSF 107.

This proposed finding is also misleading. To the extent that Rambus followed the "advice of counsel" in adopting its document retention policy, it rendered that advice ineffective by not providing that counsel all of the information that was relevant. In particular, Rambus never gave its outside counsel reason to believe that Rambus had attended JEDEC and therefore anticipated possible equitable estoppel claims and might be subject to an investigation by the

1654. Consistent with the advice of its counsel, Rambus also instituted a policy of overwriting its back up tapes every three months. CX 5018 (DTX 3697) at 1. When this occurred, Rambus employees were reminded to make sure they took steps to archive important e-mails because they could not depend on the company

irrelevant data to try to find something that might be germane. And over time the costs would go up dramatically.

“So that is - that’s - that has happened enough - it happened to enough clients so if you say it enough, people start to figure it out. “The first time they get a bill when someone says \$150,000 because we can’t - you’ve got this corrupted data, and the g

Response to Finding No. 1657: This proposed finding is misleading and contrary to the record evidence. The presentation that Mr. Karp gave to Rambus employees described Rambus's document retention policy with respect to email: "In general, email messages should be deleted as soon as they are read. Don't forget to 'empty trash' occasionally. Make sure settings delete email from the server (at least every few days)." RX-2505 at 1.

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

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

Response to Finding No. 1658: This proposed finding is argument unsupported by any record evidence. Furthermore, this proposed finding is misleading. Rambus's document retention policy was designed as part of its patent litigation strategy against DRAM manufacturers for their manufacture of JEDEC-compliant SDRAM and DDR SDRAM. CCRF 1619; CCSF 9-29, 75-109. The policy was designed and implemented by Rambus employees who well understood the implications that equitable estoppel and an FTC investigation pursuant to the theory in the *Dell* consent could have for that litigation. CCSF 76-78. Yet neither the document retention policy, nor the presentation made in support of that policy, instruct Rambus employees or outside patent counsel to maintain documents that might be relevant to whether Rambus's conduct at JEDEC could support either an equitable estoppel defense or a *Dell*-type investigation by the Commission despite requiring the retention of documents that might be useful to Rambus in its litigation against the DRAM manufacturers. CCSF 100-108.

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

Response to Finding No. 1659: This proposed finding is argument unsupported by any record evidence. Furthermore, this proposed finding is misleading for the reasons stated in CCRF 1658.

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

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

Response to Finding No. 1660:This proposed finding is misleading and incomplete. To the extent that Rambus followed the “advice of counsel” in adopting its document retention policy, it rendered that advice ineffective by not providing that counsel all of the information that was relevant. In particular, Rambus never told its outside counsel that Rambus’s anticipated litigation was unlikely to consist solely of routine patent infringement analysis, which would involve primarily a comparison of patent claims against an allegedly infringing product, but was also likely to involve allegations of inequitable and anticompetitive conduct at JEDEC, the resolution of which would implicate large volumes of Rambus’s business records and emails as well as notes and correspondence from patent counsel’s files. CCSF 85-86 (“When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.”).

1661. The trial record shows that the standard practice for maintenance of patent prosecution files is to conform the files for issued patents to the PTO file. Mr. Johnson described this policy as “standard operating procedure.” RX 2521 (DTX 9023) at 182:3-8 (Johnson 11/23/04 *Infineon* Dep.). Rambus’s former patent counsel, Mr. Vincent, testified that Rambus’s direction to clean out its patent files was the “accepted norm.” RX 2532; RX 2533 (PTX 9511) at 106:13-20 (Vincent 10/15/04 *Infineon* Dep.). Peter Leal, an attorney specializing in licensing who participated in meetings with Rambus regarding its licensing strategy, testified that he “typically advise[d] a client” to follow this procedure. RX 2544; RX 2545 (PTX 9519) at 47:213 (Leal 10/13/04 *Infineon* Dep.). He also testified that this was the practice at IBM when he worked there. *Id.* at 47:17-48:1 (“[t]hat’s the way we did it back at IBM.”). Rambus’s former in-house patent counsel, Anthony Diepenbrock, testified that, based upon his experience as a patent attorney, it is the “standard policy” for maintaining patent files. RX 2528; RX 2529 (PTX 9509) at 575:23-576:22 (Diepenbrock 10/11/04 *Infineon* Dep.).

Response to Finding No. 1661: This proposed finding is incomplete and misleading for the reasons stated in CCRF 1660.

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

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

Response to Finding No. 1662: The assertion in this proposed finding that “Mr. Vincent’s cleaning of Rambus’s patent files did not destroy relevant documents” is unsupported by record evidence. Furthermore, this assertion is contrary to the record evidence. The record evidence is clear that documents destroyed by Mr. Vincent include legal advice to Rambus regarding: (1) JEDEC’s patent disclosure policy, (2) Rambus patent applications relating to the JEDEC standard while Rambus was still a member of JEDEC, (3) statements to be made by Rambus representatives to JEDEC regarding Rambus’s patent applications relating to the

JEDEC standard, (4) Rambus's exit from JEDEC in the wake of *Dell*, and (5) equitable estoppel issues relating to Rambus's attendance and conduct at JEDEC. CCSF 135-144. The supplemental evidence confirms that he destroyed such materials from his files for Rambus's '651 application, '961 application, '490 application, '692 application, '646 application and '327 patent, which are precisely the files most likely to contain evidence relevant to this matter. CCSF 128-133.

1663. Moreover, Mr. Vincent cleaned only the patent files and not his general files relating to his work for Rambus; no documents in his Rambus general files were destroyed. Materials relating to JEDEC and Mr. Vincent's advice to Rambus regarding equitable estoppel were not specific to the prosecution of any particular patent application and, therefore, were kept in Mr. Vincent's general files and produced. *Id.* See RX 2530; RX 2531 (PTX 9510) at 530:1317; DTX 4264 (Mr. Vincent's spreadsheet showing files cleaned); CX 5072 (DTX 9018) at 54:19-57:21 (Vincent 11/30/04 *Infineon* Dep.).

Response to Finding No. 1663: This proposed finding is contrary to the record evidence. The record evidence is that much of Mr. Vincent's advice to Rambus regarding JEDEC was destroyed by Mr. Vincent as part of his implementation of Rambus's document retention policy. CCRF 1662. Furthermore, the documents that Mr. Vincent did produce were not from Mr. Vincent's "Rambus general files" but from his chron file. *See* CX5066 at 2 (corresponding to GCWF03448) ("Lester also found notes on a 1992 meeting with Crisp and Allen Roberts re: standard setting. Despite a document retention policy that [K]arp began upon joining R (the policy dictated that correspondence be shredded?), these newly found documents were not shredded and thus still exist because they were in Lester's own chron file and not Blakely's official Rambus files."). The record evidence establishes that this partial evidence from Mr. Vincent's files survived only by accident; the only reason Mr. Vincent failed to clean

out his chron file was because of his mistaken belief that they “should not have much R material.” CX5060 at 3 (corresponding to GCWF03484).

1664. Mr. Vincent’s cleaning of the files in July 2000 had no impact on the documents produced in this litigation. Copies of the files cleaned by Mr. Vincent in July 2000 had already been provided to Rambus and its litigation counsel in connection with the *Hitachi* litigation in January 2000. RX 2530; RX 2531 (PTX 9510) at 543:8-12 (Vincent 10/9/01 *Micron* Dep.); RX 2508 (DTX 3791), Feb. 1, 2000 Letter from Lester Vincent to Neil Steinberg at BSTZ 00060 (enclosing copies of patent files).

Response to Finding No. 1664: This proposed finding is unsupported by the record evidence. Because Mr. Vincent had already cleaned out the files relating to Rambus’s ‘651 application, ‘961 application, ‘490 application, ‘692 application, ‘646 application and ‘327 patent, the evidence most likely to be of direct relevance to this matter had already been destroyed by January 2000. CCSF 128-133. There is some evidence that Mr. Vincent forwarded some portions of prosecution files to Mr. Steinberg on February 1, 2000. However, that does not support the conclusion that the July 2000 file cleaning by Mr. Vincent “had no impact on the documents produced in this litigation” because the record does not indicate what documents were sent to Mr. Steinberg in February 2000. Furthermore, the record does not indicate what documents were destroyed by Mr. Vincent in July 2000.

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

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

Response to Finding No. 1665: This proposed finding is incomplete and misleading to the extent that it suggests that it is the “accepted practice” to remove evidence relating to conduct that is likely to lead to an equitable estoppel defense in anticipated litigation to enforce the patents, or that might cause the company to be subject to an investigation by the Commission. Furthermore, this proposed finding demonstrates that Mr. Diepenbrock may have destroyed documents relevant to Rambus’s anticipated litigation against the DRAM manufacturers. The record evidence demonstrates that Mr. Diepenbrock was never instructed, and failed to instruct others, to maintain documents relevant to that anticipated litigation. CCSF 105.

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

Response to Finding No. 1666: This proposed finding is incomplete and misleading to the extent that it suggests that it is the “accepted practice” to remove evidence relating to conduct that is likely to lead to an equitable estoppel defense in anticipated litigation to enforce the patents, or that might cause the company to be subject to an investigation by the Commission. Furthermore, this proposed finding demonstrates that Mr. Diepenbrock may have destroyed documents relevant to Rambus’s anticipated litigation against the DRAM manufacturers. The record evidence demonstrates that Mr. Diepenbrock was never instructed, and failed to instruct others, to maintain documents relevant to that anticipated litigation. CCSF 105.

4. Relevant Patent-Related Documents Were Maintained.

The supplemental evidence does not show that Rainforest targeted

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

Response to Finding No. 1670: To the extent that this proposed finding implies that Rambus's destruction of documents relating to its conduct at JEDEC is "highly unlikely to have affected counsel's ability to present relevant arguments and evidence at trial," this proposed finding is argument that is unsupported by any record evidence.

Furthermore, Rambus's destruction of patent-related documents harmed Complaint Counsel's ability to show that a patent (the '327) and number of patent applications Rambus had on file while it was at JEDEC (in particular, the '961, '490, '692, and '646 applications) related to, and may have covered, the standards JEDEC was working on while Rambus was there.

Rambus has argued that it "had no undisclosed patent claims (or claims in patent applications) during the time that it was at JEDEC that read on JEDEC standards or even on presentations made at JEDEC." Brief of Appellee and Cross-Appellant Rambus, Inc. (June 2, 2004) at 27 (emphasis added); *see also id* at 28-35 (arguing that the claims in Rambus's '327 patent, '961 application, '490 application, '692 application and '646 application did not "cover []" features considered by JEDEC). As Complaint Counsel have explained, Rambus is wrong in defining this issue, wrong on the law and wrong on the facts. Rambus's course of conduct subverting the JEDEC standard-setting process involved far more than just failure to disclose. Rambus's disclosure obligation was based on its reasonable belief at the time, not on any formal, after-the-fact patent claims analysis. Even if after-the-fact claims analysis were determinative,

the record evidence establishes that claims in the patents and applications listed above did cover features under consideration for inclusion and included in the JEDEC standards. *See* Reply Brief of Counsel Supporting The Complaint (July 2, 2004) at 40-48; *see also* CCFF 1122-1237. Should the Commission reject all three of Complaint Counsel's positions, however, and determine that liability depends on showing that Rambus's pending pate

1672. The supplemental evidence shows an awareness on the part of Joel Karp
as early a

In February 2003, for purposes of withholding documents from discovery, Rambus told Complaint Counsel that Rambus **was** anticipating litigation in February and March 1998. *See* Rambus' Privilege Log (2/13/03, attached as Attachment A) at 28, entry 320 (2/12/98 document "reflecting work in anticipation of litigation"); *see also* entries 297 (assertion of work product privilege for 2/23/98 document), 315 (assertion of work product privilege for 2/23/98 document), 317 (assertion of work product privilege for 3/2/98 document).

In September 2003, for purposes of avoiding sanctions due to destruction of documents, Rambus told ALJ McGuire that Rambus **was not** anticipating litigation in February and March 1998. *See* Responses to Complaint Counsel's Proposed Findings of Fact (September 29, 2003), 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); Post-Trial Reply Brief of Respondent Rambus Inc. (Sept. 29, 2003) at 9.

In a November 2004 deposition conducted by counsel for Infineon, Rambus repeatedly objected on attorney-client and work product grounds to questioning of its former outside counsel Mr. Johnson concerning his meetings with Rambus in February and March 1998, thus asserting that Rambus **was** anticipating litigation at the time. *See generally* CX5076; CX5079 at 49 (corresponding to transcript pages 573-74 (Judge Payne: "And in every objection where an attorney-client privilege, work product claim, . . . that admits that there's anticipation of litigation [in February of 1998]").

In February 2005, for purposes of avoiding dismissal of its case against Infineon on grounds of spoliation of evidence, Rambus told Judge Payne that Rambus **was not** anticipating litigation in February and March 1998. RX-2553 at 18-20. Judge Payne rejected Rambus's arguments, which were premised on nearly identical proposed findings to those Rambus has proposed to the Commission. DX0507 at 1139 ("I have concluded that [Infineon] has proved, by clear and convincing evidence, a spoliation that warrants dismissal of this action as the only appropriate sanction after having – of the patent infringement case after having considered the alternatives.").

1673. The evidence also shows that Rambus executives were well aware in the late 1990's that before any assertion of patent rights could be made, the devices in question would have to be analyzed to determine if they infringed whatever claims might be issued by the PTO. *See, e.g.*, CX 919 (2/10/97 Tate email noting that "with so little hard data and no silicon there are no patents that we can definitely say are infringed."); *id.* (same email showing Mr. Tate's instruction to "wait on taking action til we see silicon..."); CX 5005 (DTX 3678) at 2 (2/98 "proposed strategy" reviewed at meeting with Cooley Godward, stating that "[o]nce on the market, Rambus will purchase the competing product" before "determinX.00000 0.00000 0.0ts.1 "[o]nce on the

parts (if available) - Done (Samsung DDR @ SII) ... D. Prepare claim charts for Fujitsu SDRAM
- Done E. Prepare claim charts for Micron SDRAM - Done 3. IP Litigation Activity A.
Implement document retention action plan - Done”).

1674. The evidence also shows that Rambus’s principal focus in 1998 and 1999 was the successful market introduction of the RDRAM device, and that it was therefore *not*

Response to Finding No. 1675: This proposed finding is incomplete and misleading. The record establishes that Rambus's own Vice-President in charge of IP, Joel Karp, believed that Rambus patents issued and applied for while Rambus was still at JEDEC, prior to June of 1996, w

Dep.). It is objectively unreasonable to conclude that a company is “anticipating” litigation before it has retained litigation counsel, particularly in lawsuits of the magnitude involved here.

Response to Finding No. 1676:

documents relevant to Rambus's conduct at JEDEC, because Rambus never informed him of that conduct. CCSF 85-86 ("When I read in the newspaper about the JEDEC issue, I was flabbergasted.... I never had a conversation with anybody at Rambus about anything related to JEDEC, ever.").

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

Response to Finding No. 1678: This proposed finding is contrary to the record evidence. The document retention policy forwarded to all Rambus employees says nothing about retaining documents relevant to litigation. *See* RX-2503. The presentation by Mr. Karp to Rambus employees instructed Rambus employees to throw email away because it is "discoverable in litigation or pursuant to a subpoena." RX-2505 at 1. To the extent Rambus employees got any "message" at all, it was to eliminate email and other documents that are "discoverable in litigation or pursuant to a subpoena." *Id.*

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

Response to Finding No. 1679: This proposed finding is contrary to the record evidence that Rambus destroyed large quantities of documents in 2000 after these alleged instructions. CCSF 62-64. Rambus's Vice President and General Counsel himself instructed Rambus employees to destroy all drafts of contracts and negotiation materials in July of 2000.

CCSF 63. Furthermore, Rambus destroyed over 400 burlap bags of documents in December of 2000. CCSF 64. Even in the December 2000 “house cleaning,” Rambus employees were given no instructions to maintain documents relevant to litigation, anticipated or otherwise, but were instructed to comply with Rambus’s document retention policy which makes no mention of documents relevant to litigation. CCSF 107. Rambus’s recently-discovered back-up tapes confirm t

preser

1681. Additional evidence that Rambus employees understood the need to

destroyed over 400 burlap bags of documents less than a week prior to the date on the email. CCSF 64. That document destruction was done without any instructions being given to Rambus employees to retain documents relevant to litigation (other than whichever employees had been contacted by outside counsel). CCSF 107. Rambus's recently - discovered back-up tapes confirm that, whether in 1998, 1999 or 2000, large numbers of documents directly relevant to this matter disappeared from Rambus's files. CCSF 134-144.

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

1683. None of the supplemental evidence affects in any way Judge McGuire's findings that Complaint Counsel failed to meet their burden of proof on numerous essential elements of their claims, including findings regarding the scope of the JEDEC patent policy, the claims contained in the patents and patent applications filed by Rambus, the reasonableness of Rambus's royalty rates and the question of whether DRAM manufacturers are "locked in" to using technologies covered by Rambus's patents, as illustrated below.

Response to Finding No. 1683: The supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. What the supplemental documents do confirm, however, in detail not known before to Complaint Counsel, Judges Timony or McGuire, or the Commission, is Rambus's spoliation of evidence in the years after it left JEDEC. This evidenced destruction was part and parcel of its patent litigation efforts directed against firms practicing the JEDEC standards, was done in bad faith in anticipation of litigation for the purpose of destroying relevant evidence, and was carried out with the effect of destroying documents relevant not only to Rambus's patent enforcement efforts, but to the

understanding of the equitable estoppel implications of its presence and conduct at JEDEC (CCSF 144).

Nevertheless, despite Rambus's document destruction, some of the supplemental documents clearly rebut Judge McGuire's factual findings. For example, the supplemental documents show that Rambus believed as late as 1999 that patents deriving from applications filed while Rambus was at JEDEC covered various aspects of the JEDEC standard, including dual-edged clocking, on-chip PLL/DLL, and programmable CAS latency. CCSF 168-170. In addition, the supplemental documents rebut Judge McGuire's finding that the industry knew of Rambus patent rights, since the documents indicate that Rambus's Vice President in charge of enforcing those rights believed, as late as November 1999, that the industry did not know of those patent rights. CCSF 171 ("We fully anticipated at that point that once people became aware that we had IP covering sync DRAM, DDR, that it was going to make some noise."). Finally, the supplemental documents illustrate that Rambus's patent litigation strategy was premised in part on waiting for the industry to become locked in to a DRAM standard before suing in order to ensure that the industry did not switch away from that standard. CCSF 172 ("[R]isks of damaging establishment of dominant standard outweigh potential return.").

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

Response to Finding No. 1684: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 31-60; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 13-53.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the JEDEC disclosure policy. Indeed, it appears that Rambus's broad-ranging purge of documents from its files destroyed documents relating to Rambus's understanding of the JEDEC patent disclosure policy as early as 1992. *See* CCSF 139. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference, applied to this issue, would indicate that the destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace.

1685. None of the supplemental evidence affects in any way Judge McGuire's finding that "the disclosure of intellectual property interests [by JEDEC members] was encouraged and voluntary, not required or mandatory." Initial Decision, p. 265. This finding was largely based on "the manuals which discuss the patent policy, a March 1994 memorandum by JEDEC's secretary, the EIA's comments to the FTC in connection with the

JEDEC's internal memoranda, the ANSI patent policy guidelines, the actions of other JEDEC members in not disclosing patents and JEDEC's reaction thereto, the ballot for voting on technology, and the patent tracking list, which are all "evidence that disclosure of intellectual property under the EIA/JEDEC patent policy was not mandatory." *Id.*

Response to Finding No. 1685: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 31-60; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 13-53.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the JEDEC disclosure policy. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See*

largely based on JEDEC's own official minutes and the testimony of JEDEC Council Chairman Gordon Kelley. *Id.*, ¶¶ 783-785 and pp. 273-274.

Response to Finding No. 1686: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 31-60; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 13-53.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the JEDEC disclosure policy. Indeed, it appears that Rambus's broad-ranging purge of documents from its files destroyed documents relating to Rambus's understanding of the JEDEC patent disclosure policy as early as 1992. *See*

claims contained in patent applications were improper, either under patent law or EIA/JEDEC rules. *Id.*, p. 331.

Response to Finding No. 1687: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 31-60; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 40-53.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the propriety of Rambus's efforts to expand the scope of its pending patent applications to cover the work of JEDEC. Indeed, it appears that Rambus's broad-ranging purge of documents from its files destroyed documents relating to Rambus's efforts to obtain patent claims covering the ongoing work of JEDEC (*see* CCSF 140), the actual or anticipated scope of coverage of Rambus's pending patent applications while Rambus was a member of JEDEC (CCSF 141), and whether Rambus put other JEDEC members on notice that its patent applications were relevant to JEDEC's on-going work (CCSF 142). Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference,

applied to this issue, would indicate that the destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace.

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

Response to Finding No. 1688: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 61-73; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 58-88.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the availability of alternative technologies to those within the scope of Rambus's constantly amended patent applications at the time when JEDEC was considering the content of the proposed standards. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference, applied to this issue, would indicate that the

destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace.

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

Response to Finding No. 1689: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 74-96; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 58-84.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the availability of alternative technologies to those within the scope of Rambus's constantly amended patent applications at the time when JEDEC was considering the content of the proposed standards. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference, applied to this issue, would indicate that the

destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace.

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

Response to Finding No. 1690: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC during the time from 1992 to 1996 when Rambus was a member. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 82-96; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 58-72.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the availability of alternative technologies to those within the scope of Rambus's constantly amended patent applications at the time when JEDEC was considering the content of the proposed standards. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference, applied to this issue, would indicate that the

destroyed documents would have contradicted the Judge McGuire findings that Rambus continues to embrace.

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

Response to Finding No. 1691: As noted in response to proposed finding 1683, the supplemental documents relate to Rambus's bad faith spoliation of evidence during the period 1998 through 2000. As such they are generally unrelated to Rambus's misconduct at JEDEC, or other issues concerning JEDEC. Complaint Counsel have explained previously that ALJ McGuire erred in applying the wrong legal standard to this issue and erred in his interpretation of the facts. *See* Appeal Brief of Counsel Supporting the Complaint (April 16, 2004) at 65-71; Reply Brief of Counsel Supporting the Complaint (July 2, 2004) at 89-95.

Rambus's wholesale destruction of evidence, conducted in anticipation of litigation and in bad faith, was not designed to preserve contemporaneous evidence in Rambus's files concerning the power of JEDEC standards and the effect of such standards to lock in the industry to the technologies specified in the standards. Where a party intentionally destroys relevant evidence, a trier of fact may justifiably infer that the documents were destroyed because their contents were unfavorable. *See* Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents (filed Aug. 10, 2005) at 10-16, 22-23. Such an inference, applied to this issue, would indicate that the destroyed documents would have contradicted the Judge

McGuire findings that Rambus continues to embrace the supplemental documents re200 0.00-0c00 0.0000 0.00late t1.00000 0.0

industry to become locked in to a DRAM standard before suing in order to ensure that the industry did not switch away from that standard. CCSF 172 (“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.”).

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

Response to Finding No. 1692: This proposed finding is argument, and is incorrect for all the reasons set forth in response to proposed findings 1683-1691.

CERTIFICATE OF SERVICE

I, Beverly A. Dodson, hereby certify that on August 17, 2005, I caused a copy of the attached, *Complaint Counsels' Replies to Rambus's Amended Proposed Findings of Fact and Conclusions of Law in Response to the Commission's July 20, 2005 Order*, 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

and by electronic transmission and overnight courier to:

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