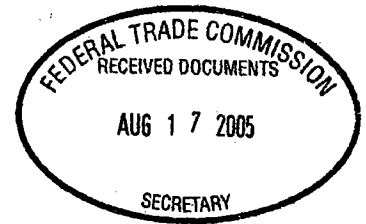


PUBLIC

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

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



In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**RESPONSES BY RESPONDENT RAMBUS INC.
TO COMPLAINT COUNSEL'S
SUPPLEMENTAL PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Respondent Rambus Inc. (“Rambus”) respectfully submits these responses to Complaint Counsel’s “Supplemental Proposed Findings of Fact and Conclusions of Law.”

I. Rambus, Intentionally and in Bad Faith, Destroyed Relevant Documents in Anticipation of Litigation.

CCSF NO. 1:

A party seeking sanctions for spoliation must demonstrate (1) that the party having control over the evidence had an obligation to preserve the evidence when it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was “relevant” to the party’s claim or defense such that a reasonable trier of fact could find that the evidence would support that claim or defense.

Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 107 (2d Cir. 2002); *Kronish v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

RAMBUS’S RESPONSE TO CCSF NO. 1:

This is not a proper “finding of fact,” for it addresses legal issues. It also understates Complaint Counsel’s burden on this motion, as set out in more detail in Rambus’s Response to Complaint Counsel’s Motion for Sanctions Due to Spoliation of Documents. For example, this proposed finding fails to acknowledge that a terminating sanction such as the one sought here is viewed as an “extreme,” “harsh” and “draconian” remedy, available only in the most egregious cases and requiring clear and convincing evidence of wrongdoing. *See generally Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003); *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1475 (D.C.Cir. 1995); *U.S. v. Shaffer Equipment Co.*, 11 F.3d 450, 462 (4th Cir. 1993).

CCSF NO. 2:

Without having seen the materials admitted to the record pursuant to the Commission's Order of July 20, 2005 (the "Supplemental Evidence"), ALJ Timony concluded that "Rambus's actions, regardless of its intent, amount to spoliation of evidence. Rambus destroyed or failed to preserve evidence for another's use ... in reasonably foreseeable litigation." Order on Complaint Counsel's Motions for Default Judgement and for Oral Argument (2/26/2003) at 4.

RAMBUS'S RESPONSE TO CCSF NO. 2:

This is not a proper "finding of fact." Moreover, Complaint Counsel fail to acknowledge that the only reason why Judge Timony had not seen many of the documents they moved to admit as part of the Supplemental Evidence is that they had failed to bring those documents to Judge Timony's attention. At least eight of the "CX" exhibits contained in the Supplemental Evidence and cited in Complaint Counsel's proposed supplemental findings were produced by Rambus prior to Judge Timony's ruling.

In any event, Judge Timony's ruling was mooted by Judge McGuire's determination, after a full trial, that there was no evidence of prejudice to Complaint Counsel or to the adjudicative process as a result of any alleged document destruction, as well as by his determination that Complaint Counsel had failed to meet their burden of proof on many essential issues where the proof was *necessarily* unaffected by *any* destruction of *any* Rambus document.

CCSF NO. 3:

After having reviewed all of the evidence including the Supplemental Evidence, Judge Payne concluded: “on the basis of the record and the law, 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. ...” *Infineon*, Transcript of March 1, 2005 at 1138-39.

RAMBUS’S RESPONSE TO CCSF NO. 3:

This is not in any sense a “finding of fact.” Moreover, Judge Payne’s few sentences about spoliation are in no sense a “final judgment” that can be given preclusive effect here, as Judge Whyte has already held in the *Hynix v. Rambus* case. *See* Order Denying Hynix’s Motion to Dismiss Patent Claims for Unclean Hands on the Basis of Collateral Estoppel (April 25, 2005) (“Hynix Collateral Estoppel Order”). Finally, Complaint Counsel cannot show and have not even tried to show that Infineon’s allegations of spoliation and prejudice are the same as those advanced by Complaint Counsel here. They are not. *See generally* Rambus’s Response to Complaint Counsel’s Motion for Sanctions Due to Rambus’s Spoliation of Documents, pp. 41-43.

II. Rambus Had an Obligation to Preserve Evidence When it Destroyed the Documents.

CCSF NO. 4:

The obligation to preserve evidence arises when the party has notice that the evidence may be relevant to future litigation. *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 107 (2d Cir. 2001); *Kronish v. United States*, 150 F.3d 112, 126

(2d Cir. 1998).

RAMBUS'S RESPONSE TO CCSF NO. 4:

This is not a proper “finding of fact” and in any event misstates the applicable legal standard. Complaint Counsel must show that Rambus knowingly destroyed evidence at a time that litigation against Complaint Counsel was “reasonably foreseeable.” *Silvestri v. General Motors Corp.*, 271 F.3d at 583, 590 (4th Cir. 2001). Courts applying the reasonable foreseeability standard to precomplaint destruction of evidence have adopted the following test: “The proper inquiry here is whether defendant, *with knowledge that this lawsuit would be filed*, willfully destroyed documents which it knew or should have known would constitute evidence relevant to this case.” *Struthers Patent Corp. v. Nestle Co.*, 558 F. Supp. 747, 765-66 (D.N.J. 1981) (emphasis added) (quoting *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed. R. Serv. 2d 423, 427 (N.D. Ind. 1977)). *See also* Gorelick, *supra*, § 3.12, at 104 (quoting standard and noting that “[o]ther courts have adopted similar standards”). “[T]he duty to preserve evidence prior to the filing of a lawsuit typically arises when the party is on notice that the litigation is ‘likely to be commenced,’” and “[t]here appear to be no cases extending the foreseeability requirement to a remote possibility of future litigation.” Jeffrey S. Kinsler & Anne R. Keyes MacIver, *Demystifying Spoliation of Evidence*, 34 Tort & Ins. L.J. 761, 764 (1999). *See also* American Bar Association, Section of Litigation, Civil Discovery Standards, August 1999, Standard No. 10 (“For the duty [to preserve evidence] to attach *before* a suit has been filed . . . the litigation must be *probable, not merely possible.*”) (emphasis added).

CCSF NO. 5:

Even without having seen the Supplemental Evidence, ALJ Timony concluded that “Here all credible evidence indicates that Rambus knew or should have known that it could reasonably anticipate litigation concerning patent infringements from the proposed JEDEC standards for RAM. ... Certainly by the time Rambus chose to commence its document retention program in 1998, it knew or reasonably could anticipate RAM-related litigation.” Order on Complaint Counsel’s Motions for Default Judgement and for Oral Argument (2/26/2003) at 6.

RAMBUS’S RESPONSE TO CCSF NO. 5:

This is not a proper finding of fact, and the quoted opinion was both interlocutory in nature and incorrect on this issue, and it did not address anticipation of this litigation.

CCSF NO. 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.

RAMBUS’S RESPONSE TO CCSF NO. 6:

This is not a proper finding of fact, and the quoted presumption is moot and irrelevant for the reasons set forth in the Initial Decision at pp. 244-245. The presumption was also rebutted at trial, *see* Rambus’s Responses to Complaint Counsel’s Supplemental Findings (“RRSF”), No. 67, and does not in any event address anticipation of this litigation.

CCSF NO. 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).

RAMBUS’S RESPONSE TO CCSF NO. 7:

This is not a proper finding of fact. Moreover, for the reasons set out in Rambus’s Response to Complaint Counsel’s Motion for Sanctions Due to Rambus’s Spoliation of Documents, Judge Payne’s interlocutory orders on discovery issues do not and cannot have preclusive effect here and do not in any event address anticipation of this litigation.

A. Evidence Available at Initial Decision.

CCSF NO. 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.

RAMBUS’S RESPONSE TO CCSF NO. 8:

This “supplemental” finding simply summarizes several proposed findings that Complaint Counsel had previously submitted to Judge McGuire. Rambus previously demonstrated why the proposed findings cited in this “supplemental” finding were inaccurate. *See* Rambus’s Responses to Complaint Counsel’s Proposed Findings of Fact

(“RRFF”), ¶¶ 1718, 1755-1758.

B. Evidence Developed since the Initial Decision.

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

CCSF NO. 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).

RAMBUS’S RESPONSE TO CCSF NO. 9:

Complaint Counsel falsely state that the cited evidence was “developed since the Initial Decision.” *Both* of the two documents cited, CX5048 (RF0627714-731) and CX5055 (R222926), had been produced to Complaint Counsel *before* trial began in this case. The fact that Complaint Counsel may have overlooked this evidence in the past is no excuse for their assertion that the evidence is “new,” and this proposed finding should be stricken or ignored.

The proposed finding is also just plain wrong. The most that can fairly be said is that in early 1998, Rambus was generally aware that *if* some of Rambus’s patent applications ripened into patents, and *if* the claims of those patents covered SDRAM or DDR SDRAM devices, and *if* licensing negotiations fell apart, there was “a *chance* of litigation.” RX-2516; RX-2517 (PTX9526) at 4 (339:18-23) (Karp 8/7/01 *Micron Dep.*)

(emphasis added). A mere general awareness of the possibility of litigation is not the equivalent of “anticipating litigation.”

The earliest-issued patents that Rambus has asserted against DRAM manufacturers did not issue until June 22, 1999. RX-1472 at 1 (U.S. Patent No. 5,915,105). Rambus executives were well aware in the late 1990s 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.*, CX0919 (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. . . .’); CX5005 (DTX3678) at 2 (2/98 document stating that “[o]nce on the market, Rambus will purchase the competing product” before “determin[ing] what its next steps will be.”). It is undisputed that the convergence of “hard data,” “silicon” and issued Rambus patents covering the accused devices did not occur until late 1999.

Moreover, the evidence cited by Complaint Counsel does not support this conclusion. The portion of CX5048 quoted by Complaint Counsel is from a section of that document titled “Position Rambus *for the Future* Including IP” and speaks only in general conceptual terms about developing and enforcing intellectual property rights. CX5048 at 3 (emphasis added). The description of Joel Karp’s January 6, 1998 email is also misleading and fails to support a conclusion that Rambus was anticipating litigation in early 1998. In that email, Mr. Karp says only that he is aware that a company has sent samples to certain other companies and that this might be an opportunity to obtain some

parts. *See* CX5055.

At most, this evidence shows that one Rambus employee, Joel Karp, was investigating hypothetical scenarios that Rambus might someday face. But to actually adopt any licensing or litigation plan required approval of the Board of Directors. *See* RX-2543 at 2 (34:13-20) (Mooring 10/14/04 *Infineon* Dep.) (“to undertake something of the extent that Joel was proposing, it would have required other people’s buy in”). In 1998, Mr. Karp’s ideas had not been embraced by Rambus. *See* RX-2521 at 15 (114:23-115:4) (Johnson 11/23/04 *Infineon* Dep.) (“Mr. Karp was always talking about issues like this. As you see from the document, this – he’s now well into 1999 and he was still trying to get management approval.”). Because Rambus’s principal focus in 1998 and 1999 was the successful market introduction of the RDRAM device, and because Rambus believed that it had no issued patents at that time that would be infringed by either SDRAM or DDR SDRAM devices, Rambus was not interested at that time in considering litigating against DRAM manufacturers, who were (they claimed) working to introduce the RDRAM device. RX-2543 at 1-2 (33:21-34:3) (Mooring 10/14/04 *Infineon* Dep.); *see* RRSF Nos. 23 & 29, which are incorporated by reference herein.

CCSF NO. 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).

RAMBUS'S RESPONSE TO CCSF NO. 10:

Complaint Counsel overstate the import of the notes by asserting that they show that by February 12, 1998, Joel Karp had contacted outside counsel to discuss “infringement litigation against DRAM manufacturers complying with JEDEC standards.” Dan Johnson, an attorney who was at Cooley Godward in early 1998, testified that the purpose of his first meeting with Joel Karp was for “us at Cooley Godward to introduce ourselves, for us to gain some understanding of the level of sophistication of Rambus, and for us to develop some things to do for future activities.” RX-2522; RX-2523 at 1 (12:24-13:3) (Johnson 11/23/04 *Infineon* Dep.).

Mr. Johnson testified that he and Joel Karp discussed the “development of a licensing strategy” for Rambus’s intellectual property. *Id.* at 1 (13:10-13). As Mr. Johnson explained, at that time “Rambus had very few patents. They had a lot of – a lot of applications. What Rambus had was intellectual property, and they had a series of contracts wit the memory manufacturers. So the licensing strategy related to the series of contracts, but there wasn’t any patents to – at that point that I was aware of, or if there were, they were not something that they were talking to us about.” RX-2522; RX-2523 at 1-2 (13:18-25) (Johnson 11/23/04 *Infineon* Dep.). The mere fact that someone may have mentioned the possibility of litigation if, well into the future after patents issued and licensing negotiations proved unsuccessful, is not evidence that litigation was “reasonably foreseeable.”

Finally, if Complaint Counsel are correct that the meeting included a discussion of possible infringement litigation, then the fact that Mr. Johnson was present

for that discussion, and that he obviously did not feel that it presented any impediment to Rambus's subsequent adoption of the document retention policy that Mr. Johnson proposed, is strong evidence of Rambus's good faith in adopting that policy. *See, e.g., Lucent Information Management, Inc. v. Lucent Technologies, Inc.*, 186 F.3d 311, 318 (3d Cir. 1999) ("courts have found that reliance on the advice of counsel after conducting a trademark search is sufficient to defeat an inference of bad faith"); *State Farm Mutual Automobile Ins. Co. v. Johnson Kinsey Inc.*, 228 Cal.App.3d 721, 725, 279 Cal.Rptr. 116, 118 (1991) ("[i]n response to a plaintiff's allegations of bad faith and malice, a defendant is entitled to show it acted reasonably and with proper cause based on the advice of its counsel.").

CCSF NO. 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.

RAMBUS'S RESPONSE TO CCSF NO. 11:

Joel Karp testified that the quotation cited by Complaint Counsel was not a "conclusion," as Complaint Counsel suggest, but was simply his attempt to capture an unattributed comment made during that meeting. CX5069 at 10 (371:10-14) (Karp 10/8/04 *Infineon* Dep.) ("my style would have been to have captured things that people said. So someone would have -- would have made that comment, and I just don't know who."). Assuming that the statement was made, however, it supports *only* a finding that

Rambus adopted its document retention policy in *good* faith, not bad faith. The comment was allegedly made at a meeting between Rambus and a well respected law firm. Present was Dan Johnson, a lawyer with considerable expertise in advising companies about the appropriate way to create and implement a document retention policy. The fact that the comment (if made) was made in Mr. Johnson's presence and that he then proceeded to advise Rambus on the creation and implementation of a document retention policy shows that neither Mr. Johnson, nor his colleagues at Cooley Godward, nor Rambus's managers believed that litigation was reasonably foreseeable under the circumstances or that there was anything at all improper about adopting a document retention policy.

CCSF NO. 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 database.... Need company policy on document retention policy.").

RAMBUS'S RESPONSE TO CCSF NO. 12:

Rambus disagrees that "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." Outside counsel Dan Johnson testified that he advised Mr. Karp that Rambus needed a document retention policy after he discovered that Rambus "had no practice or policies

that related to the gathering of documents, and storing these documents, and getting rid of documents that were simply accumulating over time.” RX-2521 at 5-6 (34:8-12)

(Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson testified that he advised Rambus to adopt a document retention policy for a number of reasons. First, Rambus needed to reduce paper document search costs in the event that Rambus was someday required to respond to subpoenas or document requests that might possibly be issued in connection with future lawsuits or investigations, including those in which Rambus was not a party. RX-2521 at 5-7 (Johnson 11/23/04 *Infineon* Dep.). Second, Mr. Johnson advised Rambus to adopt a document retention policy to reduce search costs for electronic documents in the same situation, particularly in light of the problems that arise from having to search obsolete or corrupted back-up media. *Id.* Third, Mr. Johnson felt it would be useful for Rambus to have a company-wide standard for the retention and destruction of documents, because the absence of such a standard might be cited by a future litigant as evidence of spoliation. *Id.* at 6-7; RX-2522; RX-2523 at 17-18 (Johnson 11/23/04 *Infineon* Dep.).

CCSF NO. 13:

As early as February 1998, Rambus planned its litigation strategies, including developing its legal theories and its strategies for selecting experts for the litigation. CX5007 (“Select experts in advance. Other approach is breach of contract. Dan contends that breach of contract is much easier to prove than patent infringement.”).

RAMBUS’S RESPONSE TO CCSF NO. 13:

The notes cited by Complaint Counsel – Joel Karp’s notes from his February 12, 1998 meeting with Cooley Godward – fail to support the conclusion that by

February 1998, Rambus had planned its litigation strategies, developed its legal theories, or developed its strategy for selecting experts. The notes appear to be very preliminary comments about hypothetical circumstances that might arise far into the future, after patents (perhaps) issued, after infringement analyses (perhaps) resulted in a conclusion that issued claims had been infringed, and after licensing negotiations (perhaps) had broken down irretrievably.

Moreover, as noted above, the presence at this meeting of outside counsel Dan Johnson, and the fact that the remark about “breach of contract” is attributed directly to him, are strong indicia of good faith on Rambus’s part. Complaint Counsel do not even try to rebut Mr. Johnson’s testimony about his expertise in the legal aspects of document retention practices, and they certainly do not suggest that he was engaged in any conspiracy to destroy evidence or obstruct justice. As a result, no inference can be drawn from the discussion at this meeting that Rambus was acting in bad faith in subsequently adopting a document retention policy proposed by the same lawyers who were at the meeting. To the contrary: the fact, if it is a fact, that Rambus was being advised by the same respected law firm, at the same moment in time, about issues involving future licensing, possible future litigation and the contours of a document retention policy is strong evidence of *good faith*. See *Lucent Information Management Inc.*, 186 F.3d at 318. In other words, the evidence that Complaint Counsel rely on so heavily in fact shows conclusively that Rambus had no reason to believe in February 1998 that the document retention policy that their counsel was suggesting to them was in any way improper or wrongful.

CCSF NO. 14:

In February 1998, Rambus asked its lawyers to review Rambus's contracts with its licensees to help formulate a litigation strategy. CX5007.

RAMBUS'S RESPONSE TO CCSF NO. 14:

Complaint Counsel overstate the contents of the notes, which do not show or even suggest that Rambus *asked* Mr. Johnson and his colleagues to review the license agreements in question. *See* CX5007 (stating only that "they are going to review" and that "they will review" four contracts). In any event, for the reasons stated above, the cited language supports only the conclusion that Rambus acted in good faith in 1998 in adopting a document retention policy on its counsel's advice.

CCSF NO. 15:

In February 1998, as part of Rambus's litigation and licensing plans for its cases against the DRAM manufacturers, Rambus considered whether to develop and implement a document retention program by itself or to have its lawyers develop the plan. CX5007.

RAMBUS'S RESPONSE TO CCSF NO. 15:

This proposed finding is inconsistent with the cited exhibit and inconsistent with the weight of the evidence. Outside counsel Dan Johnson testified that he advised Mr. Karp that Rambus needed a document retention policy after he discovered that Rambus "had no practice or policies that related to the gathering of documents, and storing these documents, and getting rid of documents that were simply accumulating over time." RX-2521 at 5-6 (34:8-12) (Johnson 11/23/04 *Infineon* Dep.). Mr. Johnson

testified that he advised Rambus to adopt a document retention policy for a number of reasons. First, Rambus needed to reduce paper document search costs in the event that Rambus was someday required to respond to subpoenas or document requests that might possibly be issued in connection with future lawsuits or investigations, including those in which Rambus was not a party. RX-2521 at 5-7 (Johnson 11/23/04 *Infineon* Dep.).

Second, Mr. Johnson advised Rambus to adopt a document retention policy to reduce search costs for electronic documents in the same situation, particularly in light of the problems that arise from having to search obsolete or corrupted back-up media. *Id.*

Third, Mr. Johnson felt it would be useful for Rambus to have a company-wide standard for the retention and destruction of documents, because the absence of such a standard might be cited by a future litigant as evidence of spoliation. *Id.* at 6-7; RX-2522; RX-2523 at 17-18 (Johnson 11/23/04 *Infineon* Dep.).

CCSF NO. 16:

In the meeting held on February 12, 1998, Rambus outside counsel Dan Johnson stated that Rambus needs “to litigate against someone to establish royalty rate and have court declare patent valid.” *Id.*; *see also* CX5076 at 7 (Deposition testimony of Dan Johnson); CX5069 at 11-12 (Deposition of Joel Karp “the overall idea was that at some point in order to really establish the validity of a patent, it’s something that would have to happen in court.”).

RAMBUS’S RESPONSE TO CCSF NO. 16:

Complaint Counsel overstate the import of the testimony if they are suggesting that Mr. Johnson believed, or advised Rambus, that litigation was necessary,

recommended or even *available* at that time. As Mr. Karp's cited testimony makes clear, Mr. Johnson's statement was only a general observation that the validity of a patent can only be finally established by a court. In any event, as noted above, if the statement *was* made, it can only have been part of a hypothetical set of circumstances far off in the future, given that Rambus had no issued patents to assert. Moreover, Mr. Johnson obviously did not feel at the time that litigation was sufficiently foreseeable that he could not propose to Rambus – as he says he did – that it adopt a document retention policy.

CCSF NO. 17:

When asked about his statement that Rambus needs “to litigate against someone to establish royalty rate and have court declare patent valid,” outside counsel Dan Johnson was instructed not to answer in part on the ground that the statement was attorney work product prepared in anticipation of litigation. CX5076 at 7-8 (“And I would add a further objection on the grounds of attorney work product privilege to the extent it’s calling for his mental impressions.”). *See also id.* at 8-9, 12.

RAMBUS'S RESPONSE TO CCSF NO. 17:

Rambus does not dispute that Dan Johnson was instructed not to answer this question in part on the ground that the statement reflects privileged attorney work product. Rambus does not agree that Dan Johnson was instructed not to answer because the statement was attorney work product *prepared in anticipation of litigation*. The transcript portions cited do not contain any reference to anticipation of litigation. Rambus further disagrees with Complaint Counsel's implicit suggestion that this work product objection constitutes an admission that this statement was made in anticipation of

litigation.

A work product objection is not a binding admission that litigation was anticipated when a statement was made or a document prepared especially where, as here, the statement was made by a California lawyer. Under California law, unlike federal law, the protection afforded to an attorney's work product is denominated a "privilege." See *State Farm Fire & Cas. Co. v. Sup. Ct.*, 54 Cal. App. 4th 625, 650 (1997). Moreover, California law also differs from federal law in that it protects a lawyer's work product prepared "in a nonlitigation capacity." *County of Los Angeles v. Sup. Ct.*, 82 Cal. App. 4th 819, 833 (2000) ("The protection afforded by the privilege is not limited to writings created by a lawyer in anticipation of a lawsuit. It applies as well to writings prepared by an attorney while acting in a nonlitigation capacity."). While federal courts resolving state law claims often hold under Fed. R. Evid. 501 that the federal work product *doctrine* applies to work product issues, Rambus has located no case analyzing the applicability of Rule 501 given California's use of the "privilege" language and the absolute nature of the protection afforded by the privilege. Given the clear language of Rule 501 (when construing state law claims, "the privilege" of a person "shall be determined in accordance with State law"), a strong argument exists that California law affords a work product "privilege" to the work of the California lawyers in this case, at least with respect to the state law claims at issue here. See, e.g., *Saldi v. Paul Revere Life Ins. Co.*, 224 F.R.D. 169, 193 (E.D. Pa. 2004) (applying Pennsylvania law of work product in diversity case).

CCSF NO. 18:

In a meeting held on February 12, 1998, Rambus Vice President of Intellectual Property Joel Karp, outside counsel Dan Johnson and others also discussed possible litigation approaches. Cooley Godward was tasked to “review Micron, Fujitsu and Samsung and Hyundai contracts and formulate litigation strategy driven by results of the analysis – breach-scope of license, NDA or patent infringement.” CX5007.

RAMBUS’S RESPONSE TO CCSF NO. 18:

This proposed finding is duplicative of CCSF 14, and Rambus’s response to CCSF 14 is incorporated herein by this reference.

CCSF NO. 19:

Following the February 12, 1998, meeting, Rambus’s outside counsel at Cooley Godward prepared a “litigation strategy memorandum” for Rambus. CX5008 at 2.

RAMBUS’S RESPONSE TO CCSF NO. 19:

Complaint Counsel’s reference comes from a shorthand statement in a Cooley Godward bill dated March 25, 1998. The actual memorandum states that it is a “*proposed* licensing and litigation strategy for Rambus,” and it states that “[i]n the event that licensing discussions do not result in resolution, the following is a litigation strategy for Rambus.” CX5005 at 1-2 (emphasis added). It is thus clear that licensing was the principal goal. The contingent and distant nature of any litigation was also made clear by the statement that:

“... Rambus will not initiate any action until a competing product enters the market. Once on the market, Rambus will purchase the competing product, reverse engineer it to determine if it infringes the patent, *and then determine what its next steps will be.*”

Id.

Moreover, as with the above proposed findings, it is clear that Rambus had no reason to believe that these discussions with outside counsel of possible future litigation meant that it could not, or should not, adopt the document retention policy that was being simultaneously proposed by those *same* lawyers. The proposed finding thus supports a conclusion that the policy was adopted in good faith.

CCSF NO. 20:

In late February 1998 Rambus’s outside attorneys recommended a litigation and licensing program to Rambus regarding “manufacturers who ... have plans to build competing products without paying royalties to Rambus.” CX5005 at 1; *see also id.* at 2 (“In the event that licensing discussions do not result in resolution, the following is a litigation strategy for Rambus.”)

RAMBUS’S RESPONSE TO CCSF NO. 20:

Complaint Counsel’s quotations from the “*proposed* licensing and litigation strategy for Rambus” are misleading. CX5005 at 1 (emphasis added). The document does not state that it is a litigation strategy regarding “manufacturers who ... have plans to build competing products without paying royalties to Rambus” as Complaint Counsel suggest. The full text from which Complaint Counsel selectively quote states: “Rambus faces global competition for its technology from DRAM manufacturers of two types.

The first includes licensed manufacturers *who having received proprietary information and training pursuant to a license from Rambus*, have plans to build competing products without paying royalties to Rambus.” CX5005 at 1 (emphasis added). Moreover, the document further states that “Given that various DRAM manufacturers may not be aware of Rambus’ patent portfolio and the fees that Rambus would charge for licensing its patents for non-Rambus compatible systems, *Rambus will develop a non-discriminatory licensing program.*” *Id.* (emphasis added). In addition, the document “assumes that Rambus will not initiate any action until a competing product enters the market. Once on the market, Rambus will purchase the competing product, reverse engineer it to determine if it infringes the patents, *and then determine what its next steps will be.*” *Id.* at 2 (emphasis added).

Litigation was thus clearly described as a far-off contingency, to be considered as a last option only if *all* of the following occurred: (1) issued patents; (2) infringing products; and (3) failed licensing negotiations. None of these three elements were present as of February 1998, which likely explains why none of those involved in the discussion, including outside counsel, believed that there was any impediment to the development of a content-neutral document retention policy.

CCSF NO. 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.*

RAMBUS’S RESPONSE TO CCSF NO. 21:

Complaint Counsel’s continual efforts to mine the same short memo for evidence of bad faith are unavailing. The memo cuts the other way. It describes a proposed *licensing* strategy for Rambus and then refers to a possible litigation strategy “[i]n the event that licensing discussions do not result in resolution.” CX5005 at 2. The document does not state that Rambus “needed” a tiered litigation strategy due to the number of potential disputants, but instead states merely that Cooley Godward had developed a “tiered” strategy for that reason. *See id.* The document is preliminary, conceptual and hypothetical in that it “assumes that Rambus will not initiate any action until a competing product enters the market. Once on the market, Rambus will purchase the competing product, reverse engineer it to determine if it infringes the patents, *and then determine what its next steps will be.*” *Id.* (emphasis added). Complaint Counsel have cited no evidence that as of February 1998 any competing product had entered the market or that Rambus had reverse engineered any such product to determine if it infringed any patent that had issued at that time. *See* RRSF No. 9. Moreover, the fact that this document was prepared by the same lawyers who were simultaneously advising Rambus on the adoption of a document retention policy is strong evidence of Rambus’s good faith in adopting that policy.

CCSF NO. 22:

Vice President Karp noted two addition 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.

RAMBUS’S RESPONSE TO CCSF NO. 22:

Rambus does not dispute that the handwritten notations on CX5005 at 3 were made by Joel Karp. Rambus does not agree with Complaint Counsel’s characterization of those notes as “addition[al] issues.” Mr. Karp’s notations reflected advice that Dan Johnson had provided at their earlier meeting that Rambus should adopt a document retention policy and conform its patent attorney’s prosecution files so the file is the same as the official file. CX5007; RX-2521 at 5 (33:13-21) (Johnson 11/23/04 *Infineon* Dep.); CX5069 at 11 (376:4-23) (Karp 10/8/04 *Infineon* Dep.). As stated above, counsel’s simultaneous involvement in these “strategy” discussions and in the promulgation of a document retention policy is strong evidence of good faith on Rambus’s part in the adoption of the policy.

CCSF NO. 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.”).

RAMBUS’S RESPONSE TO CCSF NO. 23:

Mr. Karp testified that his presentation was a “trial balloon” regarding a “*proposed* licensing and litigation strategy for Rambus.” CX5069 at 15 (391:22-392:3)

(Karp 10/8/04 *Infineon* Dep.). Mr. Karp also testified that he gave the presentation not to present an actual licensing or litigation strategy, but “to give a presentation of what my activities had . . . been over the few months that I had been . . . at the company at that point.” *Id.* at 19 (403:1-5) (Karp 10/8/04 *Infineon* Dep.). Mr. Karp further testified that the presentation was only a “first cut” at a possible licensing program. *Id.* at 19 (402:16-18) (Karp 10/8/04 *Infineon* Dep.).

David Mooring, who then was Rambus’s Vice President of the Personal Computer Division (and later Rambus’s President), testified that he remembered Mr. Karp “coming forward with his kind of first volley” on a potential licensing program, which Rambus did not adopt. RX-2542; RX-2543 at 1 (33:3-6) (Mooring 10/14/04 *Infineon* Dep.). He explained that “to undertake something of the extent that Joel was proposing, it would have required other people’s buy in” and “this proposal fell on deaf ears at the time.” *Id.* at 2 (34:13-20) (Mooring 10/14/04 *Infineon* Dep.). *See* RRSF Nos. 9 & 29, which are incorporated by reference herein.

It is also important to note that the presentation by Mr. Karp borrows extensively from, and appears to be based upon, the memorandum previously prepared for Rambus by the Cooley Godward firm. *Compare* CX5006 (presentation) with CX5005 (memorandum). Finally, the Supplemental Evidence demonstrates that Rambus’s outside counsel were fully aware of, and possessed a copy of Mr. Karp’s March 1998 presentation. *Compare* CX5006 (produced from Rambus’s files) *with* CX5054 (produced from Mr. Johnson’s files). This demonstrates that all involved understood the prospect of litigation at this time, prior even to the issuance of relevant

patents, to be a distant one that presented no legal impediment to Rambus's adoption of a document retention policy.

CCSF NO. 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.

RAMBUS'S RESPONSE TO CCSF NO. 24:

See RRSF 23, above, for a full description of the referenced document.

Mr. Karp also testified that the reference to "near term actions" represented a status report on activities that Mr. Karp was then pursuing – not a request for Board approval of any policy or strategy. CX5069 at 20 (404:22-24) (Karp 10/8/04 *Infineon* Dep.).

CCSF NO. 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.

RAMBUS'S RESPONSE TO CCSF NO. 25:

Item 317 of Rambus's privilege log identified Joel Karp and Dan Johnson as authors of Mr. Karp's presentation and asserted the attorney-client and attorney work

product privileges. In light of the applicability of California law, Rambus disagrees with Complaint Counsel's implicit suggestion that the "work product" designation on Rambus's privilege log constitutes an admission that this document was prepared in anticipation of litigation. *See* RRSF No. 17.

CCSF NO. 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.

RAMBUS'S RESPONSE TO CCSF NO. 26:

Mr. Karp's "trial balloon" presentation does not explicitly mention litigation (rather than licensing) with respect to DDR SDRAM, and it certainly makes clear that licensing is the first, and preferred, option. CX5006 at 1-3. The presentation also confirms that *no* licensing *or* litigation would occur until after parts had been located and reverse engineered and infringement analyses had been prepared. *Id.* at 7.

CCSF NO. 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.

RAMBUS'S RESPONSE TO CCSF NO. 27:

The proposed finding is not supported by the cited exhibit if the finding is

intended to suggest that a litigation strategy had been adopted by Rambus as of March 4, 1998 or that any litigation strategy “was intended to kick-in” at any point in time. *See* RRSF Nos. 9, 21 & 23, which are incorporated by reference herein. Although the document includes a line that reads “potential legal action against SDRAM, Inc.,” it refers to unfair competition and trade secret claims. Complaint Counsel have not explained the relevance of these claims to this action, nor have they cited any evidence that any such legal action was approved, rejected, or even discussed.

CCSF NO. 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 manufacturers of SDRAM for patent infringement in the first quarter of 1999 and to initiate litigation regarding DDR SDRAM the quarter after that. CX5011 at 3; CX5069 at 44-45.

RAMBUS’S RESPONSE TO CCSF NO. 28:

Complaint Counsel mischaracterize the evidence in saying that Joel Karp asserted that Rambus “would be ready” to initiate litigation against manufacturers of SDRAM for patent infringement in the first quarter of 1999 or that it “would be ready” to initiate litigation regarding DDR SDRAM the quarter after that. The document plainly states only that Rambus “*Could* be ready to go in Q1 ’99 (*if access time patent issues*).” CX5011 at 3 (emphasis added). In the very next sentence, the document shows that Rambus was not anticipating litigation or intending to get itself ready by the first quarter of 1999, asking “however, big question is – what’s the rush? What is compelling

business reason? I can't think of any." *Id.* The document also evidences Rambus's belief that it was not in a position to contemplate litigation until it had strengthened its patent portfolio and completed its reverse engineering efforts, tasks that it did not contemplate finishing until calendar year 2000. *See id.* at 1-2.

Mr. Karp's preliminary suggestions were not embraced by Rambus as of October 1998 because, among other things, Rambus believed that it had no issued patents at that time that would be infringed by either SDRAM or DDR SDRAM devices and because Rambus's principal focus at that time was the successful market introduction of the RDRAM device. *See* RRSF Nos. 9, 23, & 29.

CCSF NO. 29:

Throughout the Summer and Fall of 1998, Rambus Vice President of Intellectual Property Joel Karp continued to anticipate litigation against manufacturers JEDEC compliant DRAM. *See, e.g.,* CX5017 ("IP Q3'98 Goals (First Cut) ... 2. Infringement Activity... Prepare claim chart for Micron SDRAM...3. IP Litigation Activity."); CX5014 ("IP Q3'98 Goals (Final)... 2. Infringement Activity... Prepare claim chart for Micron SDRAM...3. IP Litigation Activity."); CX5011 at 3 ("Strategy Update 10/98 - 1 ... Taiwan Strategy Is Best Course Of Action For Near Term (Next 2 or 3 Quarters) Mosel and Nanya for SDRAM ... Acer SIS VIA for SDRAM, DDR..."); *see also* CX5069 at 44-45 (CX5017 was likely created in June of 1998; CX5014 was likely created in September or October of 1998; CX5011 was either presented to Rambus Board of Directors or to Geoff Tate's immediate staff).

RAMBUS'S RESPONSE TO CCSF NO. 29:

Rambus disagrees that the documents cited by Complaint Counsel demonstrate that Rambus was anticipating litigation during the summer and fall of 1998. These documents address the potential licensing of Rambus's (then unissued) patents for non-compatible uses (such as SDRAM). Many of these documents also discuss and explore strategic issues surrounding potential litigation in the event that the patents issued, licensing negotiations were unsuccessful, and the company made the decision to proceed to litigation. But the evidence also reflects that executive board approval was required for any of these plans to move forward and that, as late as mid-1999, such approval had not been provided. *See, e.g.* CX5012 at 13 (R401172) (listing under "add/amend above goals" "commence litigation during Q2/00, upon exec/board approval. (New)") (emphasis added); RX-2521 at 15 (114:23-115:4) (Johnson 11/23/04 *Infineon Dep.*) ("Mr. Karp was always talking about issues like this. As you see from the document, this – he's now well into 1999 and he was still trying to get management approval.").

As of the summer and fall of 1998, Mr. Karp's suggestions had not been embraced by Rambus, both because of a concern that such efforts would distract from Rambus's principal focus (namely, RDRAM licensing and support) and, perhaps more importantly, because of Rambus's general belief that it had no issued patents at that time that would be infringed by either SDRAM or DDR SDRAM devices. RX-2542; RX-2543 at 1-2 (33:21-34:3) (Mooring 10/14/04 *Infineon Dep.*); *see also* RRSF No. 9, which is incorporated by reference herein.

Moreover, Complaint Counsel has presented no evidence to support its suggestion that Joel Karp or Rambus ever targeted DRAM manufacturers based on their compliance with JEDEC standards. *See* RRSF No. 10. Indeed, none of the cited exhibits even refers to JEDEC.

Finally, it is clear from the Supplemental Evidence that Mr. Karp continued to discuss licensing and (possible) litigation with Dan Johnson in 1998 and 1999, without any suggestion by Mr. Johnson that those discussions meant that Rambus should suspend or modify the document retention policy it had adopted on advice of counsel. RX 2521 at 15 (114:23-115:4) (Johnson 11/23/04 *Infineon* Dep.). These facts negate any inference of bad-faith that Complaint Counsel would like to draw from the cited documents.

2. Rambus Reasonably Anticipated Litigation Before the “1999 Shredding Party at Rambus.”

CCSF NO. 30:

Rambus reasonably anticipated litigation against manufacturers of JEDEC-complaint SDRAMs and DDR SDRAMs for patent infringement by early 1999. CCSF 9-29.

RAMBUS’S RESPONSE TO CCSF NO. 30:

This proposed finding is irrelevant because Complaint Counsel do not contend that JEDEC-related documents or other relevant documents were created or destroyed *after* the summer 1998 “shred day” event. Complaint Counsel’s proposed findings about post-1998 litigation strategies and document retention issues simply have no bearing on the issues raised by the pending motion. Moreover, the evidence cited by Complaint Counsel in CCSF 9-29 does not support the conclusion stated in this finding.

See RRSF Nos. 9-29, which are incorporated by reference herein.

CCSF NO. 31:

Rambus considered initiating litigation against manufacturers of JEDEC-compliant SDRAMs and DDR SDRAMs as a response to Intel's anticipated withdrawal from its relationship with Rambus. CCSF 32-33.

RAMBUS'S RESPONSE TO CCSF NO. 31:

This proposed finding is irrelevant for the reasons set out in RRSF No. 30. In addition, the evidence cited by Complaint Counsel does not support this conclusion. See RRSF Nos. 32-33, which are incorporated by reference herein.

CCSF NO. 32:

In late 1998 or January 1999, Rambus Vice President of Intellectual Property Joel Karp and outside counsel Dan Johnson developed a strategy memorandum for dealing with Rambus's deteriorating relationship with Intel. CX5069 at 47-49. That memorandum, entitled "Nuclear Winter Scenario," described a litigation strategy against DRAM manufacturers of JEDEC-compliant SDRAMs and DDR SDRAMs. CX5013 at 2 (describing patents available to Rambus in the 1999 timeframe); *Id.* at 4-6 (describing "Complaints against DRAM Companies," "Picking Litigation Targets," "Potential Litigation Forums," and "Preparation for Litigation"). The Nuclear Winter Scenario also included plans for litigation against Intel over its use of JEDEC-compliant SDRAM and DDR SDRAM technology. *Id.* at 3 ("Legal Action Against Intel").

RAMBUS'S RESPONSE TO CCSF NO. 32:

This proposed finding is irrelevant for the reasons set out in RRSF No. 30.

Complaint Counsel also have not established that Rambus's relationship with Intel was deteriorating as of late 1998 or early 1999. The only evidence cited by Complaint Counsel, Joel Karp's testimony, shows only that as of late 1998 or early 1999, there were contract discussions between Rambus and Intel that were "getting a bit touchy." CX5069 at 47 (535:20-25) (Karp 10/8/04 *Infineon* Dep.).

The evidence also shows that the "Nuclear Winter Scenario" document was purely a hypothetical exercise. Joel Karp testified that he was asked to prepare the document as a "what happens if Intel tells us to take a walk, kind of thing," "a strawman kind of scenario." *Id.* at 47 (536:2-8) (Karp 10/8/04 *Infineon* Dep.). The document itself states clearly that "at this time that *this is a very unlikely scenario*, even for something that's purely hypothetical." CX5013 at 2 (emphasis added). Accordingly, this document does *not* show that any litigation by Rambus was likely, and the reference to a "nuclear winter" certainly shows that such a prospect was considered highly *undesirable* to Rambus and as something that should be avoided if at all possible. Moreover, Mr. Karp testified that after he prepared the document, "they worked everything out with Intel and so it got – it got tabled or put on the shelf somewhere, and nothing ever happened to it." CX5069 at 49 (539:11-15) (Karp 10/8/04 *Infineon* Dep.).

Finally, outside counsel Dan Johnson was aware of Mr. Karp's preparation of the "scenario" exhibit and "provided information which found its way into [the] document." RX 2521 at 13-14 (96:07-96:09; 96:24-97:05; 97:16-20; 98:3-9; 98:11-13) (Johnson 11/23/04 *Infineon* Dep.). This is strong evidence of Rambus's good faith in its continued implementation of the document retention policy that Mr. Johnson had

proposed.

CCSF NO. 33:

Rambus's concerns about Intel and Rambus's preparations for litigation against Intel and the DRAM manufacturers over JEDEC-complaint SDRAM and DDR SDRAM continued at least through September of 1999. *See* CX5019 at 1-2 ("Question: Is there life at Rambus after Intel? Answer: There's better be because Intel has already started to let go.").

RAMBUS'S RESPONSE TO CCSF NO. 33:

The evidence cited by Complaint Counsel fails to support their conclusion. As stated above, Joel Karp testified that shortly after he drafted the "Nuclear Winter Scenario" document in late 1998 or early 1999, "they worked everything out with Intel and so it got – it got tabled or put on the shelf somewhere, and nothing ever happened to it." CX5069 at 49 (539:11-15) (Karp 10/8/04 *Infineon* Dep.). Because the evidence demonstrates that this document was nothing more than a "purely hypothetical," "strawman kind of scenario," there is no support for Complaint Counsel's assertion that Rambus ever "prepar[ed] for litigation against Intel and the DRAM manufacturers" or that the "preparations" "continued." *See* RRSF No. 32, which is incorporated by reference herein. Moreover, this proposed finding is irrelevant for the reasons set out in RRSF No. 30. Finally, Mr. Johnson testified that although he had not seen the presentation in question, he was aware of what it was about. RX2521 at 16 (120:5-9).

CCSF NO. 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.

RAMBUS’S RESPONSE TO CCSF NO. 34:

The cited presentation does not set any goals. The document makes clear that to set a “new” goal of this sort, executive board approval was required for any of these plans to move forward and that, as of the summer of 1999, such approval *had not been provided*. See CX5012 at 13 (R401172) (listing under “add/amend above goals” “commence litigation during Q2/00, upon exec/board approval. (*New*)”) (emphasis added). The document also makes clear that *licensing* was the first option, that it had not begun, and that no litigation would commence unless negotiations failed. *Id.* A later slide confirms this point by referring to “negotiations” in “Q4/99” and “possible” litigation in “Q2/00.” *Id.* at 16 (R401175). Finally, this proposed finding is irrelevant for the reasons set out in RRSF No. 30.

CCSF NO. 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; CX5069 at 53 (describing the IP Q3’99 Goals as “various versions” of the document.); *see also* CX5045.

RAMBUS’S RESPONSE TO CCSF NO. 35:

The cited evidence does not support the conclusion that Rambus anticipated or prepared for litigation during the summer of 1999. These documents address the potential licensing of Rambus’s patents for non-compatible uses (such as SDRAM). And many of these documents also discuss and explore strategic issues surrounding potential litigation in the event that the patents issued, licensing negotiations were unsuccessful, and the company made the decision to proceed to litigation. But the evidence also reflects that executive board approval was required for any of these plans to move forward and that, as of the summer of 1999, such approval had not been provided. *See* RRSF 9, 23, 29, & 34 which are incorporated by reference herein. Finally, this proposed finding is irrelevant for the reasons set out in RRSF No. 30.

3. Rambus Reasonably Anticipated Litigation Before its Document Shredding Session in December 2000.

CCSF NO. 36:

Rambus reasonably anticipated litigation against makers of JEDEC standard complaint DRAM over patent infringement by early 2000. CCSF 9-35.

RAMBUS’S RESPONSE TO CCSF NO. 36:

This proposed finding is irrelevant because, as of early 2000, Rambus had put in place a “litigation hold” to preserve potentially relevant documents. *See* RSF 1677-1682.

CCSF NO. 37:

In a presentation to Rambus management on September 24, 1999, Rambus Vice President Joel Karp and in-house IP lawyer Neil Steinberg described a litigation strategy designed to increase the industry's respect for Rambus's IP. CX5019 at 3-4 ("we must increase the industry's perception of our value through aggressive assertion of our IP rights.... Currently industry does not have respect for Rambus IP. We have to earn that respect by substantiating our claims that cover pioneering technology. This is the main goal and must be achieved!!").

RAMBUS'S RESPONSE TO CCSF NO. 37:

The proposed finding is misleading to the extent it characterizes the exhibit as "describ[ing] a litigation strategy." Rather, it reflects the need to "earn [industry] respect by substantiating our claims that cover pioneering technology," which the document describes as "the main goal." The record shows that Rambus did indeed seek to license its technology and did indeed sign licenses with many in the industry.

CCSF NO. 38:

In their September 24, 1999 presentation to Rambus management, Vice President Joel Karp and in-house IP lawyer Neil Steinberg emphasized that Rambus's IP strategy was premised on the understanding that Rambus was eventually going to have to litigate in order to enforce its DRAM patents. *Id.* at 4 ("Even if we gain some initial settlements, we will have to ultimately pursue remedies in court. Companies like Micron will fight us tooth and nail and will never settle. Best route to IP credibility is through victory over a major DRAM manufacturer.").

RAMBUS'S RESPONSE TO CCSF NO. 38:

The proposed finding is misleading to the extent that it states that “Rambus’s IP strategy was premised on the understanding that Rambus was eventually going to have to litigate in order to enforce its DRAM patents.” First, as demonstrated above, this presentation was not a description of a litigation strategy. *See* RRSF No. 37, which is incorporated by reference herein. Second, the document states that patent claims are initially substantiated either by signing a lucrative license deal or winning in court. CX5019 at 5. In the portion quoted by Complaint Counsel, the document merely recognizes that some companies are particularly litigious and that Rambus might ultimately have to pursue its remedies against such companies in court. *Id.* at 6.

CCSF NO. 39:

In the fourth quarter of 1999, either Vice President Joel Karp or in-house IP lawyer Neil Steinberg prepared a presentation for Rambus’s executive staff entitled “SDRAM Targets.” CX5012 at 27 (corresponding to bates numbers R401186-189); CX5069 at 51-52. According to the presentation, Rambus was to “Prepare Infringement Case For 3 SDRAM Targets in Q4’99.” CX5012 at 27 (corresponding to bates number R401186). The first target was to be chosen by “early Q4’99.” *Id.* at 29 (corresponding to bates number R401188).

RAMBUS'S RESPONSE TO CCSF NO. 39:

The cited evidence is irrelevant to the issues presented by this motion.

CCSF NO. 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.*

RAMBUS'S RESPONSE TO CCSF NO. 40:

This proposed finding is misleading to the extent it describes the presentation as discussing "plans for initiating ... litigation." First, the document describes a plan for initiating negotiations and merely recognizes the *possibility* that if negotiations are unsuccessful, litigation may result. *See* CX5003 at 8 (file suit "*if no closure*") (emphasis added). Second, to the extent that this finding suggests that this document reflect a "plan" that had been adopted by Rambus, it is unsupported by the evidence. The document on its face states that it is a "recommendation" that remained subject to Board approval. CX5003 at 8. Finally, Complaint Counsel have presented no evidence to support its suggestion that Rambus ever targeted DRAM manufacturers based on their compliance with JEDEC standards. *See* RRSF No. 10. Indeed, the cited exhibit does not even refer to JEDEC.

CCSF NO. 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. *Id.* at 8. The presentation suggested that Rambus plan to approach Hitachi during the fourth quarter for settlement negotiations. *Id.* If no settlement was reached, Rambus planned to sue Hitachi six weeks later. *Id.*

RAMBUS’S RESPONSE TO CCSF NO. 41:

The proposed finding is irrelevant, misleading and unsupported by the evidence cited, for the reasons set out in RRSF No. 40.

CCSF NO. 42:

In November 1999, Rambus had a company-wide off-site meeting at which Vice President Joel Karp discussed Rambus’s “Lexington” patent enforcement initiative against SDRAMs and DDR SDRAMs. CX5002 at 4 (“Three product categories are first targets for enforcement • DDR SDRAMs • SDR SDRAMs • Processors with memory interfaces”).

RAMBUS’S RESPONSE TO CCSF NO. 42:

The cited evidence is irrelevant to the issues presented by this motion.

CCSF NO. 43:

On January 18, 2000, Rambus initiated litigation against Hitachi in federal district court in Delaware, alleging that Hitachi’s SDRAMs and DDR SDRAMs infringed Rambus patents. CCF 1995.

RAMBUS’S RESPONSE TO CCSF NO. 43:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission’s July 20, 2005 Order.

CCSF NO. 44:

Lester Vincent understood in January of 2000 that Rambus had begun suing the DRAM manufacturers over their manufacture of JEDEC-compliant SDRAM and DDR SDRAM. CX5040 (“Filed suit against Hitachi. P001 case”).

RAMBUS’S RESPONSE TO CCSF NO. 44:

The proposed finding is misleading since the cited documents indicate only that Lester Vincent was aware in January 2000 that Rambus had filed suit against Hitachi. The document makes no reference to “DRAM manufacturers” in the plural sense, nor does it refer to “JEDEC-compliant devices.” *See* CX5040.

CCSF NO. 45:

On August 8, 2000, Rambus filed a patent infringement lawsuit against Infineon Technologies in federal district court in Virginia. CCF 2016.

RAMBUS’S RESPONSE TO CCSF NO. 45:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission’s July 20, 2005 Order.

CCSF NO. 46:

In August 2000, Micron sued Rambus in federal district court in Delaware seeking a declaratory judgment that its manufacture and sale of JEDEC-complaint SDRAM did not infringe Rambus’s patents. CCF 2020.

RAMBUS'S RESPONSE TO CCSF NO. 46:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission's July 20, 2005 Order.

CCSF NO. 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. CCFF 2019.

RAMBUS'S RESPONSE TO CCSF NO. 47:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission's July 20, 2005 Order.

III. Rambus Intentionally Destroyed its Documents.

CCSF NO. 48:

ALJ Timony found that Rambus destroyed its documents intentionally. Order on Complaint Counsel's Motions for Default Judgement and for Oral Argument (2/26/2003) at 8.

RAMBUS'S RESPONSE TO CCSF NO. 48:

This is not a proper finding of fact under the Commission's July 25, 2005 Order, as it is not based upon the supplemental evidence in any way. It is also misleading, since Judge Timony appears to have been using the word "intent" to refer simply to the purposeful act of discarding a document, without determining whether the underlying motivation was an improper one. Judge McGuire subsequently determined that the evidence was insufficient to show that Rambus "specifically intended to destroy

documents in an effort to assist in its defense strategies.” Order Denying Complaint Counsel’s Motion for Additional Adverse Inferences and Other Appropriate Relief (April 15, 2003) at 5, n.2. Judge McGuire’s finding was correct when made and remains correct today, for the reasons set forth in Rambus’s Amended Proposed Findings of Fact and in these responses to Complaint Counsel’s Supplemental Proposed Findings of Fact.

CCSF NO. 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.

RAMBUS’S RESPONSE TO CCSF NO. 49:

This is not a proper finding of fact and is simply a quote from a district court’s discovery opinion. In the absence of a final judgment, intermediate opinions on discovery matters cannot be afforded preclusive effect. *See, e.g., In Re 949 Erie Street*, 824 F.2d 538, 541 (7th Cir. 1987) (holding that collateral estoppel does not apply “to an interlocutory order, which may be changed by the district court at any time prior to final judgment”); *Luben Indus., Inc. v. U.S.*, 707 F.2d 1037, 1040 (9th Cir. 1983) (holding that collateral estoppel does not apply in the absence of a final judgment).

A. Evidence available at Initial Decision.

CCSF NO. 50:

Rambus intentionally destroyed its hard copy documents. CCFF 1719, 1723-1727, 1731, 1734-1742, 1745-1750, 1752.

RAMBUS'S RESPONSE TO CCSF NO. 50:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission's July 20, 2005 Order. Rambus responded to these prior proposed findings at RRF 1719, 1723-1727, 1731, 1734-1742, 1745-1750, 1752.

CCSF NO. 51:

Rambus intentionally destroyed its electronic documents. CCFF 1720-1727, 1731-1732, 1734-1735, 1743, 1745, 1750-1753.

RAMBUS'S RESPONSE TO CCSF NO. 51:

This proposed finding is not based in any way upon the supplemental evidence and is not proper under the Commission's July 20, 2005 Order. Rambus responded to these prior proposed findings at RRF 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."

CCSF NO. 52:

Rambus intentionally destroyed electronically stored documents as part of its 1998 "document retention" scheme, reversing its practice of using full system backups for archival purposes. CX5018 ("Effective immediately, the policy is that full system backup tapes will be saved for 3 months only. Therefore, you can no longer depend on the full system backups for archival purposes."); *see also* CX5069 at 36-37 ("Q. And there were Macintosh backup tapes that Rambus had saved for quite a while; right, from

the early days? The Witness: Yes, that's – that's correct.... Q. And those Macintosh backup tapes were destroyed entirely as part of the implementation of the document retention policy; right? A. I – I didn't witness stuff being destroyed. That's my understanding is that they were being destroyed."); CX5085 at 11-12.

RAMBUS'S RESPONSE TO CCSF NO. 52:

The proposed finding is unsupported by the evidence cited if it is intended to suggest that Rambus had a "practice" of using full system backup tapes for archival purposes prior to its adoption of a document retention policy. Instead, the cited exhibit reflects notice to Rambus employees that, *if* any given employee was relying upon backup tapes for archival purposes, that employee should no longer do so. *See* CX5018.

The proposed finding is also misleading and argumentative in its characterization of Rambus's document retention policy as a "scheme;" the policy's provisions relating to electronic discovery (like the remainder of the policy) were initially suggested, recommended, and approved by experienced outside counsel. *See* RSF 1653-1656.

Finally, Allen Roberts who at the time was Rambus's Vice-President of Engineering and who was responsible for the information technology and computer systems in the company, testified that during his time at Rambus, there was *no* procedure put into place that automatically deleted files from Rambus's server or from individual computers. Thus, unless a user took affirmative action to delete a file or e-mail from Rambus's server or individual computers, that file or e-mail would be maintained, and Rambus did not implement any procedure that would have automatically deleted files or e-mails based on how old they were or other criteria. RX-2535 at 1, 7 (354:9-18; 428:12-15) (Roberts

10/14/04 *Infineon* Dep.).

CCSF NO. 53:

Rambus Vice President Joel Karp organized an “all day shredding party” on September 3, 1998. CX5023 at 1. In that “all day shredding party,” Rambus intentionally destroyed 185 burlap bags and 60 boxes full of documents. CX5050 at 1; CX5047 at 27 (corresponding to R400812). It took ProShred Security, a professional document destruction company, 10 hours to destroy the Rambus documents. *Id.*

RAMBUS’S RESPONSE TO CCSF NO. 53:

The proposed finding is not supported by the cited evidence to the extent it states that Mr. Karp was the organizer of the 1998 shredding event, or that the bags and boxes that were destroyed were “full of documents.” None of the cited exhibits so state. In fact, the evidence demonstrates that the bags and boxes contained a wide variety of materials, not just documents. *See* CX5069 at 42 (510:9-19) (Karp 10/8/04 *Infineon* Dep.) (“I wouldn’t necessarily characterize it as documents ... because I know there was just all sorts of stuff. You know, loose leaf binders and mostly lots of printouts of computer runs, stacks and stacks and stacks. I would say that was probably the bulk of it, and phone books that went back eight years. . . . as something I would characterize as being a document, I would say is a very small portion of that.”); RX-2550; RX-2551 at 2 (117:22-118:8) (Stark 5/28/04 *Infineon* Dep.) (“old data books from Motorola that you could get from the web or through their literature service,” “three-ring binders” and “stacks of magazines and photocopies of articles”).

CCSF NO. 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.

RAMBUS'S RESPONSE TO CCSF NO. 54:

Complaint Counsel misstate the record when they describe this proposed finding as "[e]vidence developed since the Initial Decision." The finding does not cite to, and is not based on, any of the supplemental evidence. The proposed finding is, therefore, inappropriate under the Commission's July 20 Order. In any event, it supports no inference of bad faith.

CCSF NO. 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.").

RAMBUS'S RESPONSE TO CCSF NO. 55:

The proposed finding is not supported by the cited evidence. Exhibit CX5023 does not state that it is a Board of Directors presentation, and Mr. Karp was

unable to confirm that he actually presented the information in CX5023 to the Board of Directors. *See* CX5069 at 46 (526:20-24) (Karp 10/8/04 *Infineon* Dep.) (“I don’t have a recall of the actual presentation . . .”). Moreover, although the minutes of the October 14, 1998 Board of Directors meeting state that “Mr. Karp reviewed the Company’s current patent status and its strategic licensing plans,” those minutes do not reflect that Mr. Karp made any presentation regarding a “shredding party,” or make any other reference to that topic. *See* CX5057 at 2.

The proposed finding is also misleading. The document cited by Complaint Counsel, CX5023, does not discuss any “shredding party” in the context of licensing activities; that reference is on a separate page entitled “other activities.” CX5023 at 1. The page entitled “licensing activity overview” makes no reference to any shredding. Indeed, contrary to Complaint Counsel’s suggestion, it does not even indicate that Rambus had actually engaged in any licensing activity at that point in time. *Id.* at 4.

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

CCSF NO. 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.”).

RAMBUS’S RESPONSE TO CCSF NO. 56:

The proposed finding is entirely irrelevant to the issues in this case, and Complaint Counsel cannot contend that any “missing” documents from Mr. Vincent’s prosecution files would have helped them establish the essential elements of their claims. As noted elsewhere, Complaint Counsel have always conceded, for purposes of this case, that the Rambus patents at issue are valid in all respects. The proposed finding is also misleading to the extent it suggests that Mr. Karp specifically advised Mr. Vincent to “destroy” documents. As the cited document and testimony make clear, Mr. Vincent was simply instructed to comply with Rambus’s document retention policy. *See* CX5069 at 49 (541:15-18) (Karp 10/8/2004 *Infineon* Dep.) (“Q: But you did instruct [Blakely Sokoloff] to follow it, follow the Rambus document retention policy, at least as far as their files for Rambus; right? A: Right.”). Moreover, to the extent that Complaint Counsel intends to suggest through this proposed finding that there was anything unusual or improper about this instruction, such a suggestion is not supported by the evidence. *See, e.g.*, RX-2530; RX-2531 at 5-6 (539:5-13) (Vincent 10/9/2001 *Micron* Dep.) (testifying that other clients had similarly requested that Mr. Vincent comply with their document retention policies, and that he had done so). *See also* RSF 1661 (recommendation that Rambus’s patent files be conformed to official Patent Office file had originated with Rambus’s outside counsel and was consistent with approach taken at