

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

Public Version

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S APPLICATION FOR
REVIEW OF THE FEBRUARY 28, 2003 ORDER GRANTING COUNSEL'S MOTION TO
COMPEL DISCOVERY RELATING TO SUBJECT MATTERS AS TO WHICH
RAMBUS'S PRIVILEGE CLAIMS WERE INVALIDATED ON CRIME-FRAUD
GROUNDS AND SUBSEQUENTLY WAIVED, PURSUANT TO RULE 3.23(b) OR, IN THE
ALTERNATIVE, REQUEST FOR RECONSIDERATION OF THAT ORDER**

Rambus's Application for Review or Request for Reconsideration suffers from a number of defects. First, Rambus has failed to satisfy the legal standard for either interlocutory appeal or for reconsideration. Second, and perhaps most importantly, Rambus is wrong on the facts. Judge Timony correctly applied the crime-fraud exception to the attorney-client privilege to the facts in this case. Finally, Judge Timony's ruling can, and should, also be upheld on the grounds of waiver.

More fundamentally, Rambus's Application for Review or Request for Reconsideration is based on a flawed interpretation of the Complaint in this case as well as what the facts here show. Rambus portrays the Complaint as narrowly as possible, arguing that it involves only silence. Rambus ignores its affirmatively misleading conduct while it was a JEDEC member, and assumes that, from the

moment it withdrew from JEDEC, it was free to engage in whatever conduct it desired. In fact, the Complaint in this matter is considerably broader than Rambus contends. The Complaint alleges that Rambus has engaged, and continues to engage today, in an on-going, unlawful course of conduct that has led to Rambus's monopoly power. The Complaint is not limited to Rambus's failure to disclose relevant patent applications to JEDEC while it was a JEDEC member (even as it sought to amend certain of its applications for the specific purpose of covering synchronous DRAMs). The Complaint also references "other bad-faith, deceptive conduct" through which Rambus "purposefully sought to and did convey to JEDEC the materially false and misleading impression that it possessed no relevant intellectual property rights." Complaint at ¶¶ 2, 54, 71; *see also* Complaint at ¶¶ 72-73, 76, 86-87.

Importantly, the Complaint also alleges that Rambus continued to prosecute patent applications covering the same technologies after it left JEDEC, obtained a series of issued patents containing claims covering the technologies in question and, after waiting until the JEDEC standards incorporating these technologies had been adopted and the industry was committed to their use, aggressively began to assert its issued patents against industry members in order to extract large royalty payments. Complaint at ¶¶ 91-102. The theory of fraud advanced by Infineon and Micron in their respective private litigations, although differing in many important respects from the antitrust allegations at issue in this case, also included as essential elements Rambus's post-JEDEC patent prosecution and ultimate enforcement of its patents against industry members.

Phrased differently, if Rambus had abandoned its '327 patent and ceased all efforts to obtain patents covering the technologies in question when it withdrew from JEDEC, or even if Rambus had continued its prosecution efforts and obtained patents covering the technologies in question but

determined never to enforce them, there would have been no antitrust violation and no grounds to allege fraud. Rambus's post-JEDEC conduct is a necessary element of any violation.

Rambus does not contest here that the requirements of the crime-fraud exception have been established and that it has lost privilege to a wide variety of materials, including attorney notes and billing records, communications between attorneys and Rambus representatives, and communications among Rambus representatives relating to attorney communications. Rambus Memorandum in Opposition to Complaint Counsel's Motion to Compel Discovery Relating to Subject Matters as to Which Rambus's Privilege Claims Were Invalidated on Crime-Fraud Grounds and Subsequently Waived, January 21, 2003, at 1 ("Rambus does not oppose Complaint Counsel's request for the document discovery ordered by Judge Payne and Judge McKelvie, or their request to question witnesses concerning the subject matter of such documents."). Rather, Rambus seeks to draw an artificial line between its conduct while a JEDEC member (including its efforts to broaden its patent applications) and its post-JEDEC conduct of continuing to broaden its patent applications and ultimately enforcing patents covering the identical technologies. Rambus's contrived distinction does not withstand scrutiny; Judge Timony correctly ruled that the crime-fraud exception to the attorney-client and work product privileges applies equally to Rambus's on-going course of conduct after June 1996.

I. RAMBUS HAS FAILED TO ESTABLISH GROUNDS FOR INTERLOCUTORY

APPEAL OR FOR RECONSIDERATION OF JUDGE TIMONY'S ORDER REGARDING DISCOVERY.

A. Rambus Has Failed To Demonstrate That Judge Timony's Discovery Order Involves A Controlling Question of Law or Policy, That There Is Substantial Ground For Difference of Opinion, That An Interlocutory Appeal Would Advance The Ultimate Litigation, Or That Subsequent Review Will Be Inadequate

Certification of an application for interlocutory review requires a showing of (1) a controlling question of law or policy (2) as to which there is substantial ground for difference of opinion and (3) that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or (4) subsequent review will be an inadequate remedy. Commission Rule 3.23(b), 16 C.F.R.

§ 3.23(b). Rambus fails to satisfy any of these requirements.

The standards for interlocutory review are stringent. As Rambus itself has noted, “[t]he Commission generally looks with disfavor on interlocutory appeals, particularly those seeking review of discovery rulings of an administrative law judge.”¹ “Interlocutory appeals from discovery rulings merit a particularly skeptical reception because they are particularly suited for resolution by the Administrative Law Judge on the scene and particularly conducive to repetitive delay.” *Schering-*

¹ *In re Rambus Inc.*, Dkt. No. 9302, 2002 WL 31840363 (F.T.C.), Rambus Inc.’s Answer to Non-Party Mitsubishi Electric & Electronics USA, Inc.’s Interlocutory Appeal of Order Denying Motion to Quash Subpoena or in the Alternative for Protective Order (Nov. 24, 2002), at 1, (*quoting In re Automotive Breakthrough Sciences, Inc.*, Dkt. No. 9275, 1996 FTC LEXIS 367 *5 (Aug. 16 1996)); *see also In re Gillette Co.*, 98 F.T.C. 875, 875 (Dec. 1, 1981); *In re Schering-Plough Corp.*, Dkt. No. 9297, 2002 WL 31433937 (F.T.C.), Order Denying Motion of American Home Products Corporation to Stay Order, for Certification for Interlocutory Appeal and Application for Full Commission Review (Feb. 12, 2002)(*citing Gillette*). Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. *Bristol- Meyers Co.*, 90 F.T.C. 273 (1977); *Schering-Plough, supra*; *In re Int'l Assoc. of Conf. Interpreters*, Dkt. No. 9270, 1995 WL 17003147 (F.T.C.), 1995 FTC LEXIS 452, Order Denying Motion to Certify Interlocutory Appeal (Feb. 15, 1995).

Plough, supra (citing *In re Bristol Myers Co.*, 90 F.T.C. 273, 273 (Oct. 7, 1977)). Such is the case here. A ruling regarding privilege constitutes a discovery ruling. *See Schering-Plough, supra; In re Atlantic Richfield Co.*, 1978 FTC LEXIS 562, * 7-8 (July 20, 1978). In addition, Your Honor should also note that an Administrative Law Judge has broad discretion to rule on discovery requests, and his determinations will be reversed only on a showing of clear abuse.²

Rambus has failed to demonstrate that Judge Timony’s discovery order presents a “controlling question of law or policy” as to which there is “substantial ground for difference of opinion” pursuant to Rule 3.23(b). A question of law or policy is deemed controlling *only if* it may contribute to the determination, at an early stage, of a wide spectrum of cases.” *In re Automotive Breakthrough Sciences, Inc.*, Dkt. No. 9275; Dkt. No. 9277, 1996 FTC LEXIS 478, *1, Order Denying Interlocutory Appeals (Nov. 5, 1996) (emphasis added).³

Commission precedent is clear; rulings regarding privileges do not involve a controlling question of law or policy.⁴ Such is the case here – there is no controlling question of law or policy. Both the

² *In re Thompson Medical Co.*, 101 F.T.C. 385 (Mar. 11, 1983); *see also In re Ford Motor Co.*, Dkt. No. 9073, Order Denying Application for Review, 91 F.T.C. 502 (Mar. 16, 1978) (even if order denying respondent’s motion to stay the proceedings and to consider other motions were subject to interlocutory review under Section 3.23, “it would be reversible only if there had been a clear abuse of discretion by the ALJ.”).

³ *See also Schering-Plough, supra* (quoting *Breakthrough Sciences*); *In re Hoechst Marion Roussel, Inc.*, Dkt. No. 9293, 2000 FTC LEXIS 155, *16, Order Denying Motion for Interlocutory Appeal (Oct. 25, 2000) (quoting *Breakthrough Sciences*).

⁴ *See, e.g., In re Atlantic Richfield Co.*, 1978 FTC LEXIS 568, *1 (Oct. 3, 1978) (order requiring Complaint Counsel to return documents to respondent which respondent had inadvertently produced would not involve a controlling question of law or policy); *In re R.J. Reynolds Tobacco Co.*, 1998 WL 34060098 (F.T.C.) (Sept. 24, 1998) (Order Denying Respondents’ Motion to Compel Complaint Counsel to Provide a More Complete Privilege Log did not involve a controlling question of law or policy as to which there is substantial ground for difference of opinion).

attorney-client privilege and the crime-fraud exception are well-settled doctrines of law. Judge Timony's ruling simply involves the discretionary application of those well-settled legal doctrines to the facts of this case. See *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 280 (8th Cir. 1984) (“application of the crime-fraud exception is committed to the district court’s discretion.”).⁵ Interlocutory review is not appropriate where the ruling in question was simply committed to the trial judge’s discretion and did not involve disputed and controlling questions of law. See 9 J. Moore, *Moore's Federal Practice* ¶ 110.22[5] (2d ed. 1986) (review for abuse of discretion not suited to § 1292(b) because there is no controlling question of law).

Rambus also cannot satisfy the requirement of section 3.23(b) that there be “substantial ground for difference of opinion.” That element requires a finding that “the question presents a novel or difficult legal issue. It is this unsettled state of the law that creates a ‘substantial ground for difference of opinion’ and triggers certification.” *Int'l Assoc. of Conf. Interpreters, supra; Schering-Plough, supra* (quoting *Conf. Interpreters*). As previously noted, both the attorney-client privilege and the crime-fraud exception are well-settled legal doctrines.

The section 1292(b) cases cited by respondent do not support interlocutory review here. For example, *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), involved the “availability vel non” of the attorney-client privilege of the corporation as against its stockholders. While that issue was deemed to be a controlling question of law as opposed to a question of fact or matter for the discretion of the trial court, no such issue as to the applicability of the attorney-client privilege “vel non” is involved

⁵ The court in *Pritchard-Keang* did not find a controlling question of law, and the opinion does not discuss why interlocutory review was proper under § 1292(b).

here. Similarly, in *Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002), there was substantial diversity of views among the circuits as to the availability and scope of a “selective waiver” theory regarding the attorney-client privilege. In contrast, the crime-fraud exception to the attorney-client privilege is well established.⁶

Rambus has not demonstrated that an immediate appeal will materially advance the ultimate termination of the litigation or that subsequent review will be an inadequate remedy. An appeal at this stage would serve only to delay this litigation. Subsequent review would be an adequate remedy because the Commission will be presented with a full evidentiary record (minus the destroyed documents) and can make *de novo* factual determinations based on what it deems to be properly admitted evidence. *Cf. In re Herbert R. Gibson, Sr.*, Dkt. 9016. 90 F.T.C. 275, Order Granting Respondents’ Appeal of Administrative Law Judge’s Refusal to Certify Motion to Dismiss for Lack of Public Interest, and Denying Aforesaid Motion (Dec. 12, 1997) (respondents were not prejudiced by the law judge’s refusal to certify their motion to dismiss, because the matter was now before the

⁶ The mandamus cases cited by Rambus likewise are inapposite. The issuance of a writ of mandamus requires a showing “(1) that petitioner have no other ‘adequate means to attain the [desired] relief,’ and (2) that petitioner meet its burden of showing that its right to the writ is ‘clear and indisputable.’” *Haines v. Liggett Group Inc.*, 975 F.2d 81, 89 (3rd Cir. 1992), *quoting Kerr v. United States Dist. Court*, 426 U.S. 394, 403 (1976)). Further, once these two prerequisites are met, “the court’s decision whether to issue the writ is largely one of discretion.” *Haines v. Liggett*, 975 F.2d at 89, *citing Kerr*, 426 U.S. at 403. Thus, a petition for a writ of mandamus does not require any showing that the issue involves a “controlling question of law.” Nevertheless, Rambus fails to satisfy even the standards for a writ of mandamus. *See, e.g., In re Rambus Inc.*, 7 Fed.Appx. 925, 2001 WL 392085 (Fed. Cir. 2001) (cited by Rambus in its motion) (holding that Rambus had not shown entitlement to a writ of mandamus).

Commission for de novo consideration and determination).⁷

B. Rambus Has Failed To Show That Reconsideration of Judge Timony’s Discovery Order Is Necessary To Correct A Clear Error Or To Prevent Manifest Injustice

Reconsideration is limited to “exceptional circumstances.” *Bhatnagar v. Surrendra Overseas Limited*, 52 F.3d 1220, 1231 (3rd Cir. 1995); *see also Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (motions to reconsider should be rare).⁸ Rambus has not stated a case for reconsideration.

Rambus fails to satisfy any of the three bases on which a motion for reconsideration may be entertained. Reconsideration is appropriate *only*: (1) if the court is presented with newly discovered evidence, (2) if there is an intervening change in controlling law, or (3) the court committed clear error or the initial decision was manifestly unjust. *School District No. 13, Multnomah County, Oregon v. AD and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). First, Rambus’s Application presents no “newly discovered evidence.” Second, there has been no “intervening change in controlling law.”

Thus, reconsideration of Judge Timony’s discovery order would be appropriate only if Rambus

⁷ In *Gibson*, respondents filed a direct appeal to the Commission after the ALJ refused to certify the matter; and the Commission accepted the appeal because the ALJ did not have authority to rule on the motion in question (to dismiss for lack of public interest).

⁸ We also note the recent observation of Judge Posner, then sitting by designation as a trial judge, that a judge succeeding another trial judge midstream during a case “may not reconsider his predecessor’s rulings with the same freedom that he may reconsider his own rulings.” *SmithKline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952 (N.D. Ill. Mar. 3, 2002), Slip Op. at 3. The law of the case doctrine in these circumstances “reflects the rightful expectation of litigants that a change of judges mid-way through a case will not mean going back to square one.” *Id.* Thus, the successor judge “is not free to [alter rulings of the previous judge] merely because he has a different view of the law or facts from the first judge.” *Id.*, quoting *Williams v. C.I.R.*, 1 F.3d 502, 503 (7th Cir. 1993).

could show that Judge Timony made a “clear error” or that reconsideration of his ruling is necessary to “prevent manifest injustice.” As this last factor relates to the merits of Rambus’s Application, it is more fully addressed in Section II, below. It is clear, however, that Judge Timony’s Order reached the correct result, and certainly does not work a “manifest injustice.”

Whether an order results in “manifest injustice” depends in part on the consequences of the ruling. *United States v. Roberts*, 987 F.2d 17, 21-22 (1st Cir. 1992) (district court should consider, among other things, the nature of the case and “the effect of granting (or denying) the motion on the administration of justice”). The cases cited by Rambus do not demonstrate that Judge Timony’s ruling resulted in manifest injustice. For example, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the issue before the Court was “whether a State may *terminate a complainant’s cause of action* because a state official, for reasons beyond the complainant’s control, failed to comply with a statutorily mandated procedure.” 455 U.S. at 424 (emphasis added). The Court held that dismissal was improper because a cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause, and “the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.” *Id.* at 428, 434. Judge Timony’s ruling does not destroy a property right.

Similarly, in *Greene v. Union Mutual Life Insurance Co. of America*, 764 F.2d 19 (1st Cir. 1985), the order in question resulted in *dismissal of the entire complaint*, possibly as a result of clerical error or because the plaintiff’s choice of words inadvertently led the judge into using the incorrect legal standard. That order caused far more drastic consequences than at issue here. The

First Circuit held that the district court should consider whether its ruling resulted in an injustice.⁹

Finally, the ruling in *School District No. 13 v. ADandS, Inc.*, 5 F.3d 1255, resulted in summary judgment in favor of defendants. The Ninth Circuit held that the district court's refusal to reconsider its ruling on the basis of 21,000 pages of documents not previously presented to the court "may have been harsh," but, under the circumstances, was not an abuse of discretion. 5 F.3d at 1263.

Simply put, Judge Timony's discovery order was not an abuse of discretion, and Rambus has presented nothing here that justifies reconsideration of Judge Timony's Order. To reconsider Judge Timony's ruling would be inefficient, and likely encourage Rambus to seek reconsideration of every order Judge Timony issued. "It is hard to imagine a less efficient means to expedite the resolution of cases than to allow the parties unlimited opportunities to seek the same relief simply by conjuring up a new reason to ask for it." *Potter*, 199 F.R.D. at 553. Should Your Honor grant Rambus's Application, "there would be no conclusion to motions practice, each motion becoming nothing more than the latest installment in a potentially endless serial that would exhaust the resources of the parties," as well as the time and "patience" of Your Honor. *Id.*

II. JUDGE TIMONY'S RULING REGARDING CRIME-FRAUD WAS CORRECT.

In order to make a *prima facie* showing that the crime-fraud exception to the attorney-client privilege applies, the moving party must demonstrate that there is "reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme." *United States v.*

Martin, 278 F.3d 988, 1001 (9th Cir. 2002) (*quoting In re Grand Jury Proceedings*, 87 F.3d 377,

⁹ See also *United States v. Roberts*, 978 F.2d 17. *Roberts* (cited by respondent) was a criminal case in which the ruling in question called for the suppression of evidence that the defendant manufactured a controlled substance with intent to distribute.

381 (9th Cir. 1996)); *see also United States v. Zolin*, 491 U.S. 554, 563 (1989).

A. Judge Timony Correctly Found That Complaint Counsel Made a Prima Facie Case for the Application of the Crime-Fraud Exception

Judge Timony had ample evidence at his disposal to support his ruling that a *prima facie* case for the application of the crime-fraud exception had been made. Indeed, while the documentary and testimonial evidence attached to Complaint Counsel’s Motion To Compel Discovery Relating To Subject Matters As To Which Rambus’s Privilege Claims Were Invalidated On Crime-Fraud Grounds And Subsequently Waived (“Waiver Motion”) was sufficient, Complaint Counsel also submitted additional directly relevant evidence in support of its Motion for Default Judgment Relating to Respondent Rambus Inc.’s Willful, Bad-Faith Destruction of Material Evidence (“Motion for Default Judgment”) and Motion To Compel An Additional Day Of deposition Testimony of Richard Crisp (“Crisp Motion”). This evidence clearly establishes the two elements of the crime-fraud exception, that there be *prima facie* evidence of fraud and that the attorney-client communications or attorney work product in question be somehow related to the alleged fraud.

1. Rambus’s Communications with Its Counsel Were in Furtherance of Its Unlawful Scheme to Monopolize By Withholding Relevant Information from JEDEC, Obtaining Patents Covering Technology Incorporated In JEDEC’s Standards and Enforcing Those Patents Against Industry Members

Documents and testimony reviewed by Judge Timony establish that Rambus pursued a scheme, contrary to its obligations as a JEDEC member and to duties imposed under the patent and antitrust laws, to continue to prosecute existing patent applications containing claims covering, and to amend pending patent applications to add claims to cover, technologies under consideration by JEDEC, all

without informing JEDEC, and later to enforce its patents against the industry in order to collect royalties.

At the time Rambus was a member of JEDEC, the EIA Legal Guides (which also applied to JEDEC) established a “basic rule” that standardization programs conducted by the organization “shall not be proposed for or indirectly result in . . . restricting competition, giving a competitive advantage to any manufacturer, [or] excluding competitors from the market.” EIA Legal Guides, March 14, 1983, JEDEC0009277-9285 at JEDEC0009282 [Tab 1] [quoted in Complaint, ¶ 19.] Consistent with this commitment, JEDEC has sought to avoid, where possible, use of patented technologies in its standards, and has imposed an obligation on all JEDEC participants that they “inform the meeting of any knowledge they may have of any patents, or pending patents, that might be involved in the work [JEDEC is] undertaking.” JEDEC Manual of Organization and Procedure JEP21-I, October 1993, JEDEC0009323-9351 at JEDEC0009341 [Tab 2] [quoted in Complaint, ¶ 21; see also Complaint, ¶ 20]. Rambus representatives understood that participating in JEDEC, while failing to disclose the existence of relevant patent applications, created a risk that the patents might be rendered unenforceable. Lester Vincent, Handwritten Notes, March 27, 1992, R203254 [Tab 3]; May 4, 1993, Letter from Vincent to Crisp, Attaching Presentation Entitled “Patents and Industry Standards,” V1231 at V1242 [Tab 4]; [*****
*****][Tab 5]; Vincent Dep. (4/11/01) 320:6-321:5, *Rambus v. Infineon* and Vincent Dep. (3/14/01) 191:3-192:16, 198:14-23, *Rambus v. Infineon* [Tab 6]; Diepenbrock Dep. (3/14/01) 147:22-148:25, *Rambus v. Infineon* and Diepenbrock Dep. (4/11/01) 262:8-263:12, *Rambus v. Infineon* [Tab 7].

In February and April 1992, Billy Garrett and Richard Crisp respectively observed proposals at JEDEC to incorporate various technologies into the proposed SDRAM standard. Shortly thereafter, Richard Crisp apparently discussed with his boss, Allen Roberts, Rambus's Vice President responsible for intellectual property, a proposal to add claims to Rambus's pending patent applications covering certain of the technologies that had been presented at JEDEC. Mr. Roberts, in turn, met with outside patent counsel Lester Vincent to discuss adding claims covering these technologies to Rambus's pending patent applications. *See* Lester Vincent, Handwritten Notes, May 2 [or 12], 1992, R202989 [Tab 8]. Shortly thereafter, Rambus CEO Geoff Tate prepared a draft five year business plan, in which he wrote:

For about 2+ years a JEDEC committee has been working on the specifications for a Synchronous DRAM. No standard has yet been approved by JEDEC. Our expectation is a standard will not be reached until end of 1992 at the earliest . . . [W]e believe that Sync DRAMs infringe on some claims in our filed patents; and that there are additional claims we can file for our patents that cover features of Sync DRAMs. Then we will be in position to request patent licensing (fees and royalties) from any manufacturer of Sync DRAMs.

June 1992 Draft of Rambus Business Plan, R46394 at R46408-410 [Tab 9].

In the final version of the business plan, prepared in September 1992, Mr. Tate further explained:

Rambus expects the patents will be issued largely as filed and that companies will not be able to develop Rambus-compatible or Rambus-like technology without infringing on multiple fundamental claims of the patents Rambus' patents are likely to have significant applications other than for the Rambus Interface.

September 1992 Rambus Business Plan, R169923 at R169929 [Tab 10].

Shortly thereafter, Richard Crisp was asked to address Rambus's Board of Directors concerning "the SDRAM status at JEDEC, the Rambus patent strategy and system level difficulties with SDRAMs."

See Rambus Board of Directors Minutes, October 22, 1992 , R28106 at R28107 [Tab 11].

While Richard Crisp and other Rambus representatives were attending JEDEC meetings on a regular basis, Mr. Crisp and others at Rambus were working to broaden Rambus’s pending patent applications to cover the technologies discussed in JEDEC. Vincent Notes, September 25, 1992, R203940 [Tab 12] (“– What to include in divisional applications: . . . 2) DRAM - programmable latency via control reg[ister] . . . => so cause problem w/ synch[ronous] DRAM . . . 4) using phase lock loops on DRAM,”); *Id.* at R203943 (“Richard => will get me copy of the . . . synch DRAM spec[ification]”); [***** [Tab 13]

*****]; Fred Ware e-mail, June 18, 1993,

R202996¹⁰ [Tab 14]. The effort to develop patent claims that could be enforced against synchronous

¹⁰ Crisp testified at the Infineon Trial:

Q And the ideas that you had to add claims to the Rambus patent applications for the mode register and for programmable CAS latency, those were ideas that were spurred on by your attendance at the JEDEC meeting in April and May and participating in this SDRAM standardization effort, right?

A Yeah. Those were our inventions. We had invented those for the RDRAM. . . .

THE COURT: I think the question, Mr. Crisp, is was it your objective in meeting with the lawyer to add those claims if they weren’t already there?

THE WITNESS: That’s correct.

DRAMs reached the highest levels of the company. *See e.g.*, Handwritten Notes of Vincent, dated January 10, 1994 at R203314 [Tab 16] (reporting on conference with Tate and others concerning “Enforcement: Sync DRAMs . . . - config registers, - programmable latency, - PLLs”).

On multiple occasions, Richard Crisp observed discussions within JEDEC of technologies that he believed were covered by claims in Rambus’s pending patent applications; although he promptly informed officers and employees of Rambus on each occasion, he did not inform JEDEC. Richard Crisp e-mail, September 14, 1994, at R69546 [Tab 17] (“NEC PROPOSES PLL ON SDRAM!!!”); Crisp e-mail, May 24, 1995, R69579 [Tab 18] (“As far as intellectual property issues go here are a few ideas: . . . DRAM with programmable access latency”). Indeed, a number of documents written while Rambus was still participating in JEDEC reflect

[*****

***** [Tab 19]*****
*****]; Crisp e-mail, May 24, 1995, R69579 [Tab 18] (“I think it makes sense to review our current issued patents and see what we have that may work against them”).

[*****
***** [Tab 20] *****

Testimony of Richard Crisp, *Infineon* Trial, May 2, 2001 at 132-134 [Tab 15].

***** [Tab 21]*****
***** [Tab 22] *****

*****]; Tate Trial testimony.¹¹

After it withdrew from JEDEC, Rambus continued with its scheme of developing and prosecuting patent applications in order to obtain issued patents containing claims covering the JEDEC standards. Rambus continued to prosecute its pending Application No. 07/847,692, for example; this application, which contained claims relating to on-chip PLL/DLL technology, issued as U.S. Patent No. 5,657,481 in August 1997. Rambus also filed new patent applications intended to cover the same technologies that had been the subject of earlier patent applications. For example, in February 1997, Rambus filed Application No. 08/798,525, specifically described as a continuation of Application Nos.

¹¹ At the recent *Infineon* trial, Mr. Tate testified:

Q '91, '92, '93, '94, '95, Richmond Crisp and the other representatives of Rambus are sitting at JEDEC meetings, they were watching standardization proposals, they are reporting back to you and everybody else at Rambus about the futures of the SDRAM standardization effort, and it is those features that Rambus was trying to cover in the claims that it was filing; don't you know that, sir? . . .

A: Okay. Yes.

4/25/01 *Infineon* (Tate) Trial Tr. 143:15-144:1 [Tab 23].

07/847,961 and 08/469,490, both of which were pending while Rambus was a member of JEDEC and which had been amended to add claims relating to technologies discussed at JEDEC. Following amendment, the '525 application issued as U.S. Patent No. 5,954,804, which Rambus asserted in its patent litigation against Hitachi, Infineon, Micron and Hynix. *See* Response of Complaint Counsel to Rambus Inc.'s Opposition to Complaint Counsel's Motion to Compel, January 28, 2003, at 8-10.

2. Rambus's Communications with Counsel Were Directly Related to Its Illegal Scheme to Monopolize and Maintain a Monopoly in the SDRAM Technology Markets

Throughout the period from 1992 to the present, Rambus communicated with its lawyers in furtherance of its illegal scheme. Documents and testimony reviewed by Judge Timony confirm that Rambus's lawyers were centrally involved in these events.

Rambus outside counsel Lester Vincent and in-house counsel Anthony Diepenbrock were fully aware that Rambus intended to enforce its patents against industry members in the future,

[*****
***** **[Tab 24]** *****
*****]. They also provided legal advice with respect to Rambus's participation in JEDEC, and both recommended that Rambus not participate in JEDEC because of concerns about equitable estoppel. Lester Vincent, Handwritten Notes, March 27, 1992, R203254 **[Tab 3]**; May 4, 1993, Letter from Vincent to Crisp, Attaching Presentation Entitled "Patents and Industry Standards," V1231 at V1242 **[Tab 4]**;

*******[Tab 5]**; Lester Vincent, Handwritten Notes,

undated, R203881 [Tab 25]; Vincent Dep. (4/11/01) 320:6-321:5, *Rambus v. Infineon* and Vincent Dep. (3/14/01) 191:3-11, 198:14-28, *Rambus v. Infineon* [Tab 6]; Diepenbrock Dep. (3/14/01) 147:22-148:25, *Rambus v. Infineon* and Diepenbrock Dep. (4/11/01) 262:8-263:12, *Rambus v. Infineon* [Tab 7].

Likewise, Lester Vincent and his law firm, whether with complete knowledge or not, were central to Rambus's efforts to broaden its pending patent applications to cover technologies that Rambus representatives had observed being presented at JEDEC meetings. Lester Vincent, Handwritten Notes, May 2 [or 12], 1992, R202989 [Tab 8]; Vincent Notes, September 25, 1992, R203940 [Tab 12]; Fred Ware e-mail, June 18, 1993, R202996 [Tab 14]; Letter from Vincent to Farmwald, Roberts and Crisp, April 22, 1993 at R171671 [Tab 26]; Letter from Roberts to Barth, Ware and Dillon, attaching draft of '646 amendment, August 1, 1994 at R204436 [Tab 27] ("This is Lester's attempt to write claims for the MOST/SDRAM defense"); Amendment to 07/847,961 Patent Application, filed January 6, 1995 at R14454 [Tab 28]; Preliminary Amendment to 08/469,490'490, filed June 23, 1995 at R14496 [Tab 29].

After Rambus withdrew from JEDEC, Lester Vincent and his firm continued to prosecute the previously filed patent applications, and also filed new continuation applications as well as amendments to the existing applications. Lester Vincent's firm, for example, continued to prosecute pending Application No. 07/847,692, which resulted in the issuance of U.S. Patent No. 5,657,481 in August 1997. When Neil Steinberg arrived at Rambus in 1998, he took over prosecution of the existing patent applications and also drafted and filed new patent applications covering the same technologies that

JEDEC representatives had seen discussed at JEDEC. Neil Steinberg took over prosecution of Application No. 08/798,525, for example, which resulted in the issuance of U.S. Patent No. 5,954,804, which Rambus asserted against Hitachi, Infineon, Micron and Hynix in their respective patent litigations. Indeed, Neil Steinberg was largely responsible for completing the efforts of Rambus to obtain issued patents containing claims covering the technologies at issue in this matter, patents which Rambus used to threaten multiple industry members and which it asserted against Hitachi, Infineon, Micron and Hynix in 2000.

When he arrived at Rambus, Neil Steinberg also took over responsibility for implementing Rambus's patent enforcement plan. Rambus's privilege log lists numerous communications among Neil Steinberg, Joel Karp, Lester Vincent and various foreign attorneys regarding amendment and prosecution of Rambus's U.S. and foreign patent applications, Rambus's "Strategic Patent Acquisition Program," and Rambus's IP strategy. Indeed, documents listed on Rambus's privilege log indicate that, in late 1998 and 1999 alone, Neil Steinberg made at least 7 presentations to Rambus's Board of Directors and 6 presentations to Rambus executives regarding Rambus's patent strategy, licensing, intellectual property and litigation strategies.

In total, Rambus's privilege log lists over 1600 documents that Rambus has not produced. *See* In the Matter of Rambus Inc. Privilege Log [**Tab 30**]. The vast majority of these documents relate to Rambus's patent or IP strategy or the prosecution of U.S. or foreign patent applications. The entries on this privilege log highlight the central role played by Rambus's lawyers in Rambus's scheme to broaden the claims contained in its patent applications and in Rambus's planning of its "patent strategy"

and the ultimate enforcement of its patents.¹² Likewise, this privilege log demonstrates the continuity of both Rambus's patent prosecution efforts and its strategic planning from the early 1990's through the present.¹³

3. Rambus Misinterprets the Federal Circuit Ruling

Rambus attempts to argue that there can be no *prima facie* showing of fraud because of the Federal Circuit ruling. This misinterprets the Federal Circuit decision on two grounds. The Federal Circuit ruling was limited to the theory of fraud advanced by Infineon in that case as well as by the facts contained in the record in that case. In the present matter, both the allegations of the Complaint and the facts developed to date support a *prima facie* finding of fraud.

First, as explained at pages 1-2 above, the Complaint in this matter does not allege mere silence, but an on-going pattern of conduct intended to mislead and deceive JEDEC members. As a result, Rambus's arguments with respect to the strict need to find a specific duty, while they may have

¹² As described in detail in Complaint Counsel's Motion for Default Judgment, Rambus engaged in the indiscriminate destruction of a large volume of documents in order to mitigate the risks of its failure to disclose relevant information while it was a member of JEDEC. As described in that motion, various communications involving Rambus's counsel also related to Rambus's implementation of its willful, bad faith document destruction policy. *See generally*, Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus, Inc.'s Willful, Bad-Faith Destruction of Material Evidence.

¹³ Rambus has refused to produce not only all communications involving attorneys dated after June 1996, but also almost all communications involving foreign counsel or relating to foreign patent applications between 1991 and June 1996. Nothing in Judge Payne's or Judge McKelvie's orders requiring Rambus to produce attorney-related materials regarding Rambus's efforts to broaden its patent applications excluded foreign patent applications. Complaint Counsel informed counsel for Rambus in a meet-and-confer conference held shortly after Judge Timony's ruling was issued that it believes there are no legitimate grounds to withhold these materials and it expects these materials to be produced promptly. Rambus subsequently filed the subject Motion for Reconsideration, but has yet to inform Complaint Counsel whether it will produce these materials.

been appropriate in the *Infineon* litigation, are misplaced here. Precedent clearly establishes that there is no need to search for a strict duty to disclose if the conduct at issue goes beyond silence, and includes conduct such as statement of half-truths or concealment of material information. *See United States v. Keplinger*, 776 F.2d 678, 697 (7th Cir. 1985) (“Omissions or concealment of material information can constitute fraud ... without proof of a duty to disclose the information pursuant to a specific statute or regulation.”); *see also Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1222 (9th Cir. 1999) (“One who makes a representation that is misleading because it is in the nature of a ‘half-truth’ assumes the obligation to make a full and fair disclosure of the whole truth.”) (*quoting Gregory v. Novak*, 121 Ore. App. 651, 855 P.2d 1142, 1144 (Or. Ct. App. 1993)).¹⁴ Thus, Rambus’s arguments about the need to find a strict duty, partially based on the Federal Circuit ruling, do not apply to the allegations set forth in the Complaint in this matter.

Even if it were necessary to find a strict duty to speak, the Federal Circuit ruling is not relevant to the factual record of this case. First, Complaint Counsel expects to have a large volume of evidence regarding the JEDEC duty to disclose that was not part of the *Infineon* record, and thus not available to the Federal Circuit. Second, even if Your Honor were to find, based on the full factual record of this case, that the duty found by the Federal Circuit based on the *Infineon* record is also consistent with all of the evidence in this matter, Complaint Counsel expects to present evidence (which was not presented in the *Infineon* litigation) that Rambus had patent applications pending at the time it was a

¹⁴ *See also United States v. Autuori*, 212 F.3d 105, 119 (2d Cir. 2000) (*citing Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478, 1484 (2d Cir. 1995)) (“A duty to disclose can also arise in a situation where a defendant makes partial or ambiguous statements that require further disclosure in order to avoid being misleading.”).

member of JEDEC that would satisfy the federal Circuit's standard.

For these reasons, the Federal Circuit ruling is not applicable to the question of whether there is *prima facie* evidence, for purposes of the crime-fraud exception, that Rambus engaged in a fraudulent scheme and that its attorneys' communications were related to that scheme.

B. Rambus's Requests For A Hearing And In Camera Review Are Inapposite Where Rambus Has Had Full And Fair Opportunity For Briefing, The Evidence Has Been Carefully Reviewed And The Elements of the Crime-Fraud Exception Are Clearly Satisfied

In its motion, Rambus relies heavily on the absence of certain formalities, namely a hearing and an *in camera* review of documents. Rambus incorrectly implies that these are somehow necessary steps, and in doing so, misstates the procedure for determining whether the crime-fraud exception applies. The moving party must establish a *prima facie* showing that the communications with the lawyer were “in furtherance of an intended or present illegality and that there is some relationship between the communications and the illegality.” *United States v. Bauer*, 132 F.3d 504, 509 (9th Cir. 1997) (quoting *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996)). As discussed in detail above in Section II., Complaint Counsel has clearly made the *prima facie* showing that Rambus was engaged in a fraud and that it had and continues to have communications with its attorneys in furtherance of that fraud.

Thus, the crime-fraud exception requires *prima facie* evidence of a fraudulent scheme and a connection between the attorney communications or other privileged material and that fraudulent scheme. The crime-fraud exception does not, however, require that this *prima facie* showing be made

in any particular manner. Specifically, there is no requirement of an oral hearing; so long as the requisite *prima facie* showing is made, a showing based on documentary evidence and sworn testimony is sufficient. *In re Vargas*, 723 F.2d 1461, 1467 (10th Cir. 1983); *Zolin*, 491 U.S. at n.7 (*quoting Gardner, The Crime or Fraud Exception to the Attorney Client Privilege*, 47 A.B.A.J. 708, 710-711 (1961)) (“In the context of the fraud exception, however, the standard is used to dispel the privilege altogether without affording the client an opportunity to rebut the *prima facie* showing.”)); *In re September 1975 Grand Jury Term*, 532 F.2d 734, 737-738 (10th Cir. 1976).

Rambus’s insistence on an oral hearing elevates form over substance. Rambus has had more than ample opportunity to be heard on this issue. In addition to two rounds of briefing before Judge Timony, Rambus had full opportunity to brief and argue the issue of whether the crime-fraud exception was satisfied in both the *Infineon* and *Micron* litigations, and in fact attached portions of the relevant transcripts in these two cases to its filings in this matter. In short, Rambus has been heard on this issue; Rambus has not established that oral argument would add anything to the consideration that has already been given to this issue.

Rambus’s insistence on *in camera* review is similarly misplaced. If a moving party is able to show some evidence of a fraudulent scheme and a connection between the attorney communications at issue and the fraudulent scheme, but is unable fully to establish a *prima facie* case, *in camera* review of certain materials may be appropriate. This permits the court to determine, based on a review of all the evidence, whether there is in fact *prima facie* evidence of a fraudulent scheme and a connection between the attorney communications and that scheme. *See, e.g., Zolin*, 491 U.S. at 574-75 (1989) (an *in camera* review of documents to a party unable to establish a *prima facie* case is appropriate if

the party shows facts adequate to support a good-faith belief by a reasonable person that such a review may reveal evidence to establish that the crime-fraud exception applies); *Haines v. Liggett*, 975 F.2d 81, 96 (3rd Cir. 1992) (“For *in camera* inspection, it would be sufficient for the district court, in its discretion, to consider only the presentation made by the party challenging the privilege. The court may decide on this submission alone whether a factual basis is present to support a good faith belief by a reasonable person that the materials may reveal evidence of a crime or fraud.”) *United States v. de la Jara*, 973 F.2d 746, 748 (9th Cir. 1992).

Here, there is no need for such a review. As explained above, there is ample evidence to support Judge Timony’s ruling that Complaint Counsel have established a *prima facie* case of the existence of a fraudulent scheme, that this on-going fraud continued post-June 1996 with respect to the RAM patents it held and had applied for, and that discovery of Rambus’s attorneys’ involvement in this scheme is appropriate. Even if, however, Rambus were correct that some form of judicial or *in camera* review of certain discovery materials were appropriate to confirm, for example, that there was a relationship between attorney communications and the fraudulent scheme at issue, such review has already occurred. Judge Timony reviewed numerous examples of formerly privileged materials, including handwritten notes of Rambus’s outside patent attorney, Lester Vincent, communications between Mr. Vincent and representatives of Rambus, internal communications within Rambus reflecting conversations with Mr. Vincent, and testimony of Mr. Vincent, in-house counsel Mr. Anthony Diepenbrock, and others concerning legal advice provided by Messrs. Vincent and Diepenbrock. These materials establish beyond doubt that Mr. Vincent and his law firm, whether knowingly or not, were integrally involved in Rambus’s scheme to broaden its patents to cover technologies under

consideration by JEDEC for inclusion in its standards, and that Messrs. Vincent and Diepenbrock provided advice relating to the potential enforceability of Rambus's patents with respect to JEDEC members. Furthermore, the combination of the formerly privileged material from before June 1996, non-privileged materials from post-June 1996 and Rambus's privilege log clearly establish that Mr. Vincent and in-house attorney Neil Steinberg were involved in continuing efforts after June 1996 to broaden Rambus's patents to cover technologies under consideration by JEDEC. Thus, the safeguards provided by an *in camera* review have already been satisfied here.

III. JUDGE TIMONY'S RULING SHOULD ALSO BE UPHELD ON GROUNDS OF WAIVER.

Independently of the discussion of the crime-fraud exception above, Judge Timony's ruling can, and should, be upheld because Rambus waived any attorney-client privilege it may have had by voluntarily turning over documents to Hynix.¹⁵ Rambus did not, and does not, dispute that it provided to Hynix, its adversary in civil litigation, documents and testimony as to which it once claimed privilege. Judge Timony found that Rambus's disclosure to Hynix was voluntary. In his February 28, 2003

Order, Judge Timony stated:

¹⁵ While Judge Timony did not explicitly address whether or not Rambus waived its attorney-client privilege in voluntarily submitting certain documents to Hynix, Your Honor may uphold his ruling based on any ground supported in the record, even if it is different from Judge Timony's grounds. *See, e.g. Ruiz v. Estelle*, 161 F.3d 814 (5th Cir. 1998) (*citing United States ex rel Thompson v. Columbia/HCA Health Care Corp.*, 125 F.3d 899 (5th Cir. 1997) (appeals court may uphold judgment on any proper ground, even though ground was not relied upon by district court)); *United States v. Martinez*, 76 F.3d 1145 (10th Cir. 1996) (*citing United States v. Willie*, 941 F.2d 1384, 1396 n.9 (10th Cir. 1991) (court may uphold evidentiary rulings on any ground supported by the record, even if not relied upon by the district court)); *United States v. Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994) (court may uphold district court's decision on any ground legally supported by the record); *Garcia v. Bunnell*, 33 F.3d 1193, 1195 (9th Cir. 1994); *United States v. Lewis*, 991 F.2d 524, 526 n.2 (9th Cir. 1993).

While disclosures by Rambus in *Hynix* apparently tracked the judicially compelled disclosures of *Infineon* and *Micron*, Rambus's disclosures to an adversary in *Hynix* are nonetheless voluntary. (citations omitted). While the confidentiality agreement between Rambus and Hynix eliminated the need for judicial intervention, the bottom line is that through the agreement in *Hynix* Rambus tactically attempted to have its cake and eat it too by: (1) producing the discovery materials sought by Hynix without incurring (based on the results in *Infineon* and *Micron*) a probably third adverse ruling by the *Hynix* court; and (2) attempting to preserve the privileged nature of the documents it produced to Hynix without judicial compulsion." p. 1-2, fn. 1.

Rambus has not challenged that finding. This undisputed finding by Judge Timony establishes that Rambus has waived any privilege that it once might have sought to assert.

As explained in Complaint Counsel's January 28, 2003 Response,¹⁶ a waiver of the privilege in an attorney-client communication extends "to all other communications relating to the same subject matter."¹⁷ The scope of Rambus's waiver of attorney-client privilege extends not just to the specific documents that were disclosed, but to the subject matter of what was disclosed.

As noted above, Rambus's fraudulent monopolization scheme continued long after its departure from JEDEC. The success of Rambus's scheme depended upon Rambus continuing to prosecute patent applications before the Patent and Trademark Office and obtaining issued patents covering technologies incorporated in the JEDEC standards. Only after successfully prosecuting these patent applications and obtaining these patents could Rambus monopolize the technology markets in question

¹⁶ These arguments are explained at great length in Response of Complaint Counsel to Rambus Inc.'s Opposition to Complaint Counsel's Motion to Compel (January 28, 2003).

¹⁷ *In re Sealed Case*, 877 F.2d 976, 980-81 (D.C. Cir. 1989) (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)); see also *Chubb Integrated Sys.*, 103 F.R.D. 52, 63 (D.D.C. 1984) ("Actual disclosure of each specific document in issue is not the only means by which a waiver can occur. Voluntary production of certain privileged documents implies a waiver of *all communications on the same subject.*") (emphasis added).

and collect monopolistic royalties, or threaten to sue or in fact sue SDRAM and DDR-SDRAM manufacturers for patent infringement. Therefore, Rambus's waiver of the privilege extends to the entire subject matter of Rambus's efforts to broaden its patents to cover technologies used in JEDEC standards.

In the documents Rambus produced to Hynix, Rambus detailed its efforts to broaden its patents to cover the technologies used by JEDEC. *See supra* pp. 12-15. Rambus officers and employees, as well as its in-house and outside counsel, testified regarding communications involving in-house and outside counsel. *Id.* Rambus's waiver of privilege extends to all communications on the subject, regardless of whether specific consultations took place before or after Rambus left JEDEC. Thus, Judge Timony's ruling should also be upheld on the ground of waiver of privilege as well as on the ground of the crime-fraud exception.

V. CONCLUSION.

For the reasons stated herein, Respondent's Application for Review of the February 28, 2003 Order Granting Counsel's Motion to Compel Discovery Relating to Subject Matters as to Which Rambus's Privilege Claims Were Invalidated on Crime-fraud Grounds and Subsequently Waived, Pursuant to Rule 3.23(b) Or, in the Alternative, Request for Reconsideration of That Order, should be denied.

Respectfully Submitted,

Of Counsel:

Malcolm L. Catt
Robert P. Davis
Suzanne T. Michel
Jerome Swindell
John C. Webber
Cary E. Zuk

M. Sean Royall
Geoffrey D. Oliver

Dated: March 17, 2003

BUREAU OF COMPETITION
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580
(202) 326-3663
(202) 326-3496 (facsimile)
COUNSEL SUPPORTING THE
COMPLAINT