

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

Public Version

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**OPPOSITION TO RAMBUS INC.'S REQUEST FOR RECONSIDERATION
AND/OR CLARIFICATION OF MAY 13, 2003, ORDER
REGARDING DOCUMENTS FOR WHICH RAMBUS ASSERTS PRIVILEGE**

Through its Request for Reconsideration and/or Clarification of the May 13, 2003, Order Regarding Rambus's Privileged Documents (filed May 19, 2003) ("Rambus Mem."), Rambus asks for reconsideration of an issue that has already been briefed, re-briefed, and re-briefed yet again. Motions for reconsideration, especially on issues as important as attorney-client privilege, are properly taken seriously. Motions for reconsideration, however, even when concerning attorney-client privilege, must meet a high threshold to warrant reopening matters that already have been fully briefed and ruled upon multiple times. That threshold has not been met in this case. Indeed, Rambus's Memorandum fails to identify any substantial basis that would justify reconsideration of this matter yet again.

Rambus has failed to demonstrate that the May 13, 2003, Order on Reconsideration of Complaint Counsel's Motion to Compel Discovery Relating to Subject Matters for Which Respondent Asserts Privilege ("Waiver Order") contains any clear error, creates any manifest injustice, or predates any material change in law or discovery of new evidence. For these

reasons alone, reconsideration simply is not appropriate. Even if reconsideration were appropriate, Rambus has failed to provide any persuasive argument to demonstrate that the Waiver Order reached an incorrect result.

The weakness in Rambus's argument is underscored by the fact that it is forced to stretch the applicable law beyond its proper limits in order to articulate a basis for challenging Your Honor's ruling. Rambus's central attack on the Waiver Order is predicated on the notion that subject-matter waivers are not warranted except when a party "selectively" discloses privileged materials in order to gain "tactical" advantage or prejudice its opponents. To the contrary, as explained below, the law is not so limited, as made clear by the holdings of the very cases that Rambus advances for this unsupported proposition. Quite simply, the law holds that the motivations for a party voluntarily disclosing attorney-client privileged materials – tactical or otherwise – is but one factor courts may, in their discretion, consider in finding subject-matter waiver. The law also squarely holds that the scope of the waiver in such circumstances extends to the entire subject matter at issue, without temporal limitation. The ruling is therefore firmly supported by the applicable law. Moreover, to the extent the law affords discretion to the court to resolve such issues consistent with principles of fairness, it is clear that the Waiver Order ruling falls well within the scope of that discretion. Indeed, as explained herein, a more limited subject-matter waiver ruling would cause substantial unfairness to Complaint Counsel in this case.

In addition to seeking reconsideration of the Waiver Order, Rambus has also requested clarification of the Order. Most of what Rambus seeks by way of "clarification," however, really amounts to further efforts to obtain reconsideration of the substance of the ruling. Rambus's requests for substantive clarification of the Waiver Order should also be rejected. On the other

hand, Complaint Counsel would not object to two minor clarifications of the Waiver Order to address issues raised by Rambus. First, Rambus has asked for clarification of the Order insofar as it provides that Rambus may assert work-product protection for materials that came into existence on or before January 1, 2000. Although any earlier date has yet to be justified by Rambus's filings, for reasons explained below, Complaint Counsel would not object to a modification of the Waiver Order to designate October 1, 1999, as the date on which work-product protection commences. In addition, Complaint Counsel would not object to a modification of the Waiver Order to clarify the third subject-matter topic on which document production is compelled, insofar as it relates to the issue of foreign patents.¹

I. RAMBUS'S REQUEST FOR RECONSIDERATION SHOULD BE DENIED

A. Rambus Has Failed to Meet the Legal Criteria for Reconsideration

Rambus's request for reconsideration falls far short of establishing a sound basis for reopening the issues resolved in the Waiver Order. As Your Honor explained in ruling on Rambus's first request for reconsideration of this issue:

Motions for reconsideration should be granted only sparingly. *Karr v. Castle*, 768 F. Supp. 1087, 1090 (D. Del. 1991). Such motions should be granted only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest injustice. *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F. Supp. 2d 1 (D.D.C. 2002). Reconsideration motions are not intended to be opportunities "to

¹ Given the expedited schedule for briefing on this matter, Complaint Counsel has responded only to Rambus's central arguments. Failure to respond to any given issue is by no means a concession as to its accuracy or applicability. Specifically, Complaint Counsel does not concede that October 1, 1999, is the earliest date on which Rambus anticipated JEDEC-related litigation.

Although Complaint Counsel disagrees with the ruling as to the crime-fraud exception, it believes this issue is more properly addressed in any subsequent appeals in this matter.

take a second bite at the apple” and relitigate previously decided matters. *Greenwald v. Orb Communications & Marketing, Inc.*, 2003 WL 660844, at *1 (S.D.N.Y. Feb. 27, 2003).²

Rambus’s request for reconsideration fails to establish that any one of these bases for reconsideration exists here. Indeed, the only express discussion of these requirements for reconsideration is relegated to a single, introductory footnote in Rambus’s 21-page memorandum. *See* Rambus Mem. at 1 n.1.

1. Rambus Has Identified No Clear Error in the Waiver Order

The standard for clear error to warrant reconsideration of an earlier decision is “stringent.” *Gindes v. United States*, 740 F.2d 947, 950 (Fed. Cir.), *cert. denied*, 469 U.S. 1074 (1984). As one court has described the applicable test, “[t]o be clearly erroneous, a decision must strike [the court] as more than just maybe or probably wrong; it must . . . strike [it] as wrong with the force of a five-week-old, unrefrigerated dead fish.” *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988), *cert. denied*, 493 U.S. 847 (1989). Furthermore, the error must not only be obvious to warrant reconsideration, it must be a “manifest error” of law or fact. *Harso Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (emphasis added), *cert. denied*, 476 U.S. 1171 (1986). “To grant motions for reconsideration for lesser causes not only wastes judicial resources, but is also unjust to the parties that have invested the time and effort arguing on the original papers.” *First Options of Chicago, Inc. v.*

² Order Denying Respondent’s Applications for Review of February 26, 2003, Order (granting Complaint Counsel’s Motion for Collateral Estoppel) and February 28, 2003, Order (granting Complaint Counsel’s Motion to Compel Discovery Relating to Subject Matters as to Which Respondent’s Privilege Claims Were Invalidated on Crime-Fraud Grounds and Subsequently Waived); Denying Respondent’s Request for Reconsideration of the February 26 Order; and Granting Respondent’s Request for Reconsideration of the February 28 Order at 8 (Mar. 26, 2003) (“Reconsideration Order”).

Kaplan, 198 B.R. 91, 92 (E.D. Pa. 1996). The Waiver Order contains no such obvious or manifest errors.

Rambus does not identify a single controlling authority in which a court faced with analogous facts reached a result different from the manner in which Your Honor resolved these issues in the Waiver Order. To the contrary, established law firmly empowers Your Honor with the discretion to define the extent to which Rambus's voluntary disclosure of privileged information has waived its attorney-client privilege. The Waiver Order lies well within that discretion.

Although Rambus identifies four fact issues that it claims "do not appear to have been fully considered" in the Waiver Order (Rambus Mem. at 1-3), each of these factual propositions is either unsupported, irrelevant, or untrue.

First, Rambus makes the wholly immaterial point that it has produced to Complaint Counsel the same formerly privileged information that it has produced to other litigants. Yet Complaint Counsel's position *vis-à-vis* other parties with whom Rambus is in litigation has no bearing here.

Similarly, Rambus places emphasis on the precise scope of the compelled disclosures in the *Micron* and *Infineon* cases, suggesting that these disclosures should somehow delimit Rambus's disclosure obligations here. However, as explained in more detail below, the issue here relates not to Rambus's compelled disclosures in those cases, but rather to its subsequent, voluntary disclosure to Hynix and the resulting waiver of the attorney-client privilege relating to the subject matters of what was voluntarily disclosed.

Next, Rambus attempts to argue that it has not sought to use the privilege for tactical advantage. But as discussed in more detail below, this assertion is both legally irrelevant and factually untrue.

Finally, Rambus contends that it anticipated JEDEC-related litigation with Hitachi as early as mid-1999. However, it has offered no evidence of any kind to support either the date it began to prepare for the Hitachi litigation or that the litigation was in fact related to its misconduct at JEDEC. Moreover, it has failed even to provide a date more specific than “mid-1999.” Accordingly, Rambus fails to establish that the date set by Your Honor is clearly erroneous. Even assuming the truth of Rambus’s unsupported assertions about the date on which it first anticipated litigation with Hitachi, it is not apparent to Complaint Counsel that there would be any basis for applying a date earlier than October 1, 1999. In the interest of resolving this issue, Complaint Counsel would not object to the Waiver Order’s being amended to reflect this earlier date.

2. Rambus Has Identified No Manifest Injustice That Results from the Waiver Order

The Waiver Order, which correctly applies applicable law to the relevant facts, and was issued only after both parties had ample opportunities to brief the relevant issues, in no way causes injustice – let alone “manifest” injustice – to Rambus. Rambus argues that the manifest injustice at issue is a function of the “clear errors of law and fact” underlying the Waiver Order. Rambus Mem. at 1 n.1. Yet as summarized above and demonstrated throughout this Opposition, Rambus has failed to demonstrate the existence of any such clear errors. Accordingly, Rambus has no basis to claim any actual injustice.

The circumstances here bear no resemblance to those surrounding the initial grant of reconsideration on the issue of attorney-client privilege. In that instance, Judge Timony had

based his ruling, *sua sponte*, on a rationale that Your Honor determined Rambus had not yet had an adequate opportunity to brief. Reconsideration Order at 13. Accordingly, Your Honor concluded that Rambus's inadequate opportunity to be heard on this issue threatened manifest injustice and warranted reconsideration. *Id.* at 14.

In marked contrast, Rambus has been on notice of Complaint Counsel's waiver theory at least from the time Complaint Counsel first filed its Motion to Compel in January. Rambus has since enjoyed three separate opportunities to submit briefs addressing whether and to what extent its voluntary disclosure of privileged information to Hynix constituted a waiver of privilege.³ Indeed, weeks before Your Honor's Waiver Order was issued, Rambus admitted that "the issue [of whether Rambus has waived the attorney-client privilege . . . by virtue of its production . . . to Hynix] has been fully briefed by the parties." Response of Rambus Inc. to Complaint Counsel's Supplemental Memorandum in Support of Their Motion to Compel Discovery on Crime-Fraud and Waiver Grounds at 20 (filed Apr. 17, 2003) (emphasis added). Rambus's claims of manifest injustice are therefore utterly without merit.

3. Rambus Has Identified No Legal or Evidentiary Change Since the Waiver Order Issued

Rambus has not cited to any changes in the law or to any newly discovered evidence that would justify reconsideration of the Waiver Order. The closest that Rambus's request for

³ See Memorandum by Rambus Inc. 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 (filed Jan. 21, 2003); Brief in Support of Respondent's Application for Review of the February 28, 2003 Order Granting 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, Pursuant to Rule 3.23(b) or, in the Alternative, Request for Reconsideration of that Order at 12-15 (filed Mar. 7, 2003); Response of Rambus Inc. to Complaint Counsel's Supplemental Memorandum in Support of Their Motion to Compel Discovery on Crime-Fraud and Waiver Grounds at 20-22 (filed Apr. 17, 2003).

reconsideration comes to identifying new evidence is the fact that Rambus now makes assertions, without citation to supporting evidence, concerning the timing of the commencement of the *Hitachi* litigation and the issuance of a pre-litigation demand letter. Rambus's failure to identify this information in prior briefing is not good cause for reconsideration of Your Honor's ruling, and does not appear to bear upon the core substance of the ruling. In short, that information is not "new," but rather only newly presented.

B. Rambus Has Demonstrated No Error in the Subject-Matter Waiver Ruling

Rambus has failed to demonstrate any clear errors of law or fact contained in, or any manifest injustice stemming from, the Waiver Order. Consequently, Rambus is not entitled to reconsideration of the ruling. This is not, however, a situation in which an arguable error rises to the level of clear error. The fact is that Rambus has failed to demonstrate any error whatsoever in the ruling.

As a threshold matter, Rambus's request for reconsideration fails to rebut what has now been established conclusively, as acknowledged in the Waiver Order: Rambus waived the attorney-client privilege through its voluntary disclosure of attorney-client communications in the context of the *Hynix* litigation. *See* Waiver Order at 4 ("Voluntary disclosure means the documents were not judicially compelled.") (quoting *Chubb Integrated Sys. Ltd v. Nat'l Bank of Washington*, 103 F.R.D. 52, 63 n.2 (D.D.C. 1984)); *id.* ("Short of court-compelled disclosure, or other equally extraordinary circumstances, we will not distinguish between various degrees of 'voluntariness' in waivers of the attorney-client privilege.") (quoting *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989)). Because Rambus does not offer any reasons to disturb the conclusion that its waiver was voluntary, the only remaining question is how broad a waiver

resulted from Rambus's voluntary disclosure.⁴ The Waiver Order resolves this question in a well-reasoned and appropriate manner, and Rambus's request for reconsideration fails to identify any error whatsoever in this Court's application of governing legal principles.

1. Disclosure for Tactical Advantage, While Present Here, Is Not a Prerequisite for Subject-Matter Waiver

Rambus's entire argument hinges upon an effort to supplement the doctrine of subject-matter waiver by adding a new element not supported by the case law. Specifically, Rambus now contends (despite having not argued this in prior briefing on the issue) that subject-matter waivers cannot result from the voluntary disclosure of privileged materials unless the disclosure was made for the purpose of securing some identifiable "tactical advantage." Rambus Mem. at 6-10.⁵ Furthermore, according to Rambus, the party seeking a holding of waiver must suffer

⁴ Rambus restates, but does not reargue at any length, its previous position that its disclosure to Hynix was not in fact a "willing[] sacrifice" of confidentiality, because – as Rambus claims – the prior productions to Infineon and Micron waived any claim of confidentiality in these materials. See Rambus Mem. at 5 n.4. Rambus's argument appears to be that Rambus could not, in good faith, have disputed the continued applicability of the attorney-client privilege to these materials in the *Hynix* litigation, having twice produced the same material subject to compulsion in the *Infineon* and *Micron* cases. *Id.* This argument is directly contrary to positions that Rambus has previously taken in this litigation. Specifically, Rambus initially took the position that it was "entitled to assert fully the attorney-client privilege, and all other privileges, in this case," even as to the documents that were previously produced in the *Infineon* and *Micron* cases. See Complaint Counsel's Memorandum in Support of Motion to Compel Discovery Relating to Subject Matters as to Which Rambus's Privilege Claims Were Invalidated on Crime-Fraud Grounds and Subsequently Waived at 21 (filed Jan. 7, 2003) (quoting Letter from Gregory P. Stone to M. Sean Royall (Dec. 31, 2002)) ("Initial Waiver Motion"). If there was a good-faith basis for Rambus's counsel to take this position in this proceeding in December 2002, there was, *a fortiori*, a good-faith basis to resist production to Hynix in 2001.

⁵ Rambus does not appear to have made this argument in its previous briefing on this issue. The fact that the argument is being raised for the first time in a motion for reconsideration, despite multiple earlier opportunities to brief the issue, is in itself sufficient grounds to deny reconsideration. See, e.g., *Potter v. Potter*, 199 F.R.D. 550, 553 (D. Md. 2001) ("Hindsight being perfect, any lawyer can construct a new argument to support a position previously rejected by the court, especially once the court has spelled out its reasoning in an order.").

some prejudice or unfairness for subject-matter waiver to apply. *Id.* As explained below, the law imposes no such limitation on the rule of subject-matter waiver. Yet, even if Rambus's proposed limitation were legally correct, reconsideration still would not be warranted. Rambus did make its initial, partial disclosure for tactical reasons, and that disclosure, if limited to what has already been disclosed, would be both unfair and prejudicial to Complaint Counsel.

a. The Law Does Not Require a Showing of Tactical Advantage or Unfairness

Rambus's argument is predicated upon mischaracterization of the law of the D.C. Circuit. Rambus cites to a footnote in a 1982 decision purportedly to establish the proposition "that a court should 'not . . . impose full waiver as to all communications on the same subject matter where the client has merely disclosed a communication to a third party, as opposed to making some use of it.'" Rambus Mem. at 7-8 (citing *In re Sealed Case*, 676 F.2d 793, 809 n.54 (D.C. Cir. 1982)) (ellipsis in Rambus Mem.). Rambus fails, however, to include the qualifying clause at the beginning of the cited sentence, which reads in full: "Courts apparently retain discretion not to impose full waiver as to all communications on the same subject matter where the client has merely disclosed a communication to a third party, as opposed to making some use of it." *Sealed Case*, 676 F.2d at 809 n.54 (emphasis added). Relying on these dicta to assert that this Court lacks discretion to find that Rambus's voluntary disclosure to Hynix constitutes a subject-matter waiver misstates the principle of *Sealed Case*. Indeed, the D.C. Circuit in that case imposed a subject-matter waiver in response to the disclosure of privileged information without a finding that a party sought to gain a tactical advantage or that its opponent suffered any prejudice because of the partial disclosure. Thus, rather than supporting its argument, the 1982 *Sealed Case* decision fundamentally undermines the basis for Rambus's request for reconsideration.

Subsequent to its *Sealed Case* decision in 1982, the D.C. Circuit has consistently described and applied the rule of subject-matter waiver without any reference to Rambus's proposed "tactical advantage" requirement. Indeed, the circuit has specifically held that subject-matter waiver is not limited to cases in which a party has attempted to secure some "tactical advantage" from its waiver of the privilege. In *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), the court confirmed that the subject-matter-waiver doctrine extends to situations involving the inadvertent (and hence not tactical) disclosure of privileged communications. In noting that the document at issue had been disclosed inadvertently, the court reasoned, "we will not distinguish between various degrees of 'voluntariness' in waivers of the attorney-client privilege." *Id.* at 980 (citations omitted). The court went on to hold that "a waiver of the privilege in an attorney-client communication extends 'to all other communications relating to the same subject matter.'" *Id.* at 980-81 (quoting *Sealed Case*, 676 F.2d at 809). Indeed, even where the disclosure is detrimental to the disclosing party – as opposed to being a means of achieving tactical advantage – subject-matter waiver still applies. *See In re Sealed Case*, 29 F.3d 715, 719-20 (D.C. Cir. 1994) (holding subject-matter waiver applied where disclosure was admitting lawyer advised against participation in potentially illegal scheme). The law is therefore clear: no showing of tactical advantage or prejudice is required to establish subject-matter waiver.

Rambus's characterization of *Weil v. Investment/Indicators Research & Mgmt., Inc.*, 647 F.2d 18 (9th Cir. 1981), is also incorrect. *Weil*, also cited in the Waiver Order, did not, as Rambus contends, "specifically h[o]ld" that the waiver there would not extend to other communications on the same subject "where opposing counsel was not prejudiced by the initial disclosure." Rambus Mem. at 8. To the contrary, *Weil* held that the privilege was waived with

respect to all “communications about the matter actually disclosed.” *Weil*, 647 F.2d at 25 (emphasis added). The subject-matter waiver applied without any showing of prejudice or tactical advantage. More recent Ninth Circuit cases confirm that a subject-matter waiver does not require a showing that the disclosing party sought a tactical advantage. *See, e.g., United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir. 1990) (“Plache voluntarily disclosed his privileged attorney communication, thereby waiving the privilege on all other communications on the same subject.”) (citing *Weil*, 647 F.2d at 25). Other courts confirm that subject-matter waiver is not limited to instances in which the disclosing party sought a tactical advantage, or the discovering party has suffered some demonstrated form of prejudice. *See, e.g., In re Grand Jury Proceedings*, 219 F.3d 175, 189-90 (2d Cir. 2000) (deferring to the district court to determine whether a broad waiver was appropriate, even though it was unclear whether defendant used the advice of counsel as a sword and the court could discern no prejudice to the government); *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 485 (S.D.N.Y. 1993) (emphasizing that cases finding subject-matter waiver “do not require the discovering party to demonstrate prejudice, such as, for example, proof that the privilege holder has disclosed only favorable materials”).

The cases relied upon by Rambus do not in fact support the legal propositions that it has advanced in its request for reconsideration, much less demonstrate that Your Honor’s Waiver Order errs in applying the applicable law. As the above discussion makes clear, the Waiver Order is perfectly consistent with applicable law on this issue.

b. Rambus Sought to Gain a Tactical Advantage Through Its Voluntary Disclosure

Even if Rambus’s characterization of the law were correct – and it plainly is not – Rambus’s argument would still fail because it is readily apparent from the circumstances that

Rambus did seek to gain tactical advantage through its voluntary disclosure of privileged materials in the *Hynix* litigation. It safely can be assumed that any party with competent legal counsel would zealously guard its attorney-client privilege and would not voluntarily agree to waive the privilege absent a significant countervailing benefit. *See, e.g., In re Consolidated Litigation Concerning Intern. Harvester's Disposition of Wisconsin Steel*, 666 F. Supp. 1148, 1153 (N.D. Ill. 1987) (“Whenever a party discloses information which it could have withheld on the basis of privilege, an implicit determination of benefit has been made by the party, through its attorney.”); *see also In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (“If a [party] wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels – if not crown jewels.”) (quoted with approval in Waiver Order at 4); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992) (party must “zealously protect” the privileged material) (quoted with approval in Waiver Order at 4).⁶ Thus, the fact that Rambus, in the *Hynix* case, voluntarily disclosed privileged information, without litigating the need for or scope of any such disclosures, itself implies that Rambus perceived some tactical benefit. It strains credulity for Rambus now to claim that the company and its attorneys had no good reason for disclosing to Hynix this subset of its privileged communications.

It should not be Complaint Counsel’s burden, in opposing a second motion for reconsideration, to divine with precision the nature of the benefit that Rambus and its lawyers had in mind when they elected voluntarily to disclose privileged documents to Hynix. Nevertheless, Rambus achieved at least two fairly obvious benefits from its disclosure.

⁶ This common-sense observation is premised on the critical importance of any lawyer protecting his or her client’s attorney-client privilege, which is something that Rambus, in its recent arguments, has itself repeatedly stressed. *See, e.g.,* 10 Trial Tr. 1737 (May 14, 2003) (Mr.

First, Rambus avoided the possibility of having to litigate for purposes of its suit against Hynix the merits of requiring a broader scope of production of privileged materials than it was compelled to disclose in *Infineon* and *Micron*.⁷ That alone establishes that Rambus obtained some tactical advantage through its partial disclosure.

Second, limiting its voluntary disclosure to materials Rambus previously produced in the *Infineon* and *Micron* cases permits Rambus to advance arguments relating to the involvement of its own lawyers in amending patent applications to cover JEDEC's SDRAM standards, while preventing effective challenge to those arguments. This strategy has prejudiced Complaint Counsel and all of Rambus's future litigation opponents.

Specifically, Rambus has sought in this proceeding to distinguish between its attempts to broaden its patent applications to cover on-going work at JEDEC from late 1991 to June 1996, when it was a JEDEC member, from its follow-on, post-June 1996 efforts to broaden its patent applications to obtain patents containing claims covering JEDEC-compliant SDRAM and DDR SDRAM. Complaint Counsel, on the other hand, maintains that Rambus engaged in a continuous anticompetitive scheme to modify its patent applications to ensure that they covered JEDEC-compliant SDRAM and DDR SDRAM. This practice was a central element of Rambus's strategy from the outset, and has continued seamlessly through its current patent litigation efforts.

Stone: “[A]n order that says we have to produce privileged material is an order of some great moment . . . we need to take all appropriate steps to protect privileged material . . .”).

⁷ The fact that at some later point, Rambus might be compelled by the *Hynix* court to produce additional documents has no relevance; what matters is that Rambus sought to gain a tactical advantage through its disclosure. Tellingly, Hynix apparently has not subsequently sought further discovery of ostensibly privileged materials, which further supports the inference that Rambus's agreement with Hynix for partial voluntary disclosure secured a tactical advantage by forestalling Hynix from seeking further disclosure.

To rebut this argument, Rambus will likely contend that a patent attorney who joined Rambus after June 1996 (Neil Steinberg) successfully developed a way to broaden Rambus's patent claims to cover JEDEC technology without any knowledge of Rambus's anticompetitive scheme. *See, e.g.*, Rambus Resp. to Interrog. 4(e) at 17-18 (

) [**Tab**

1]. Rambus also will likely seek to distinguish between its understanding of the potential scope of its patent claims while it was a JEDEC member and its understanding after it left JEDEC in June 1996. *See id.* at 18 (

) [**Tab 1**]. In

particular, Rambus likely will use the testimony of Neil Steinberg to try to demonstrate that it was not until after June 1996, rather than well before then as the facts will show, that Rambus's lawyers realized that they could amend its patent claims to cover the JEDEC standards. *See* Steinberg Dep. Tr. at 55:21-58:16 (Jan. 22, 2003) (

) [**Tab 2**].⁸

Rambus's arsenal, in short, is filled with potential distinctions between its conduct while at JEDEC, and its post-June 1996 conduct after it terminated its membership in JEDEC. By

⁸ Rambus previously set out this argument more fully in one of its White Papers submitted to the Commission prior to the filing of the complaint in this matter. There, Rambus argued

. *See* Memorandum of Rambus Inc. for the Federal

disclosing privileged information created only through June 1996, but not privileged information created at any later period, Rambus prejudices Complaint Counsel's ability to demonstrate the continuing and ongoing nature of Rambus's scheme. Likewise, such selective disclosure prejudices other litigants' ability to show ongoing fraud or inequitable conduct in related patent litigation.

The foregoing are merely examples of the strategic advantage that Rambus would gain were it able to limit its production of privileged documents to the pre-June 1996 period. Rambus's exhibit list suggests that there are other strategic advantages that Rambus hopes to achieve through the selective disclosure of privileged materials, inasmuch as it appears that Rambus plans to introduce into evidence several of the privileged documents it voluntarily produced to Hynix, including the notes of its attorney Lester Vincent.⁹ Rambus would not place such documents into evidence unless it perceived some benefit to doing so. Such an advantage should not be permitted.¹⁰

Trade Commission at 12-13 (May 29, 2002) [**Tab 3**].

⁹ Rambus's exhibit list includes exhibits RX-2279, RX-0253, RX-0295, and RX-0328, which are described as the notes of Lester Vincent.

¹⁰ Rambus was previously found to have mischaracterized its communications with its attorneys. Specifically, in the *Infineon* litigation, after Rambus's privilege claims were pierced on the ground that they were part of a crime or fraud, both Richard Crisp and Geoffrey Tate were forced to recant testimony regarding their involvement in drafting Rambus's patent claims. *See Rambus Inc. v. Infineon Technologies AG*, 155 F. Supp. 2d 668, 681-82 (E.D. Va. 2001), *affirmed in part and vacated in part*, 319 F.3d 1081 (Fed. Cir. 2003). Without access to the post-June 1996 materials at issue here, Complaint Counsel will have no means to determine whether Rambus's present representations regarding communications with Mr. Steinberg are similarly subject to challenge.

2. Rambus's Waiver Properly Extends to All Documents on the Subject Matter, and Is Not Limited in Temporal Scope

Complaint Counsel has established in its previous briefing the proposition that “a waiver of the privilege in an attorney-client communication extends ‘to all other communications relating to the same subject matter.’” *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)); *accord Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). Complaint Counsel also has previously established conclusively that this legal principle applies here.¹¹ Indeed, the Waiver Order specifically concludes that this principle is a “well-established proposition” that applies in these circumstances, Waiver Order at 5, and Rambus does not contend otherwise.

The scope of subject-matter waiver falls well within this Court’s discretion. *In re Sealed Case*, 877 F.2d at 981 (“Since such determinations [of whether to impose a subject-matter waiver upon finding an inadvertent disclosure of privileged information] properly depend heavily on the factual context in which the privilege is asserted, we will not disturb a district court’s decision as to the question unless it can be shown the court abused its discretion.”); *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994) (same); *accord In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 159 F.R.D. 307, 309 (D.D.C. 1994) (“[A] trial court retains broad discretion in deciding the appropriate scope of a waiver.”). Furthermore, that discretion permits, but does not require, a narrowing of the scope of subject-matter waiver in certain circumstances. *See In re Sealed Case*, 676 F.2d at 809 n.54 (“Courts apparently retain discretion not to impose full waiver as to all communications on the same subject matter . . .”). Accordingly, the Order’s holding

¹⁰ See Initial Waiver Mem. at 22-23; Response of Complaint Counsel to Rambus Inc.’s Opposition to Complaint Counsel’s Motion to Compel at 6, 11-13 (filed Jan. 28, 2003).

that Rambus's waiver of privilege for pre-June 1996 documents concerning the identified subject matters also waived the privilege for documents from post-June 1996 on the same subject matters is well within the Court's authority. Nowhere in its Motion for Reconsideration does Rambus demonstrate that Your Honor clearly erred in exercising discretion not to limit the scope of waiver.

Declining to limit the scope of Rambus's subject-matter waiver to a defined time period is entirely appropriate. Subject-matter waiver is a function of the topic, not a time period. As recognized in the Order, a privilege waiver extends to "all communications on the same subject matter." *Chiron Corp. v. Genentech, Inc.*, 179 F. Supp. 2d 1182, 1186-87 (E.D. Cal. 2001) (quoting *Micron Separations, Inc. v. Pall Corp.*, 159 F.R.D. 361, 363 (D. Mass. 1995)). Accordingly, courts have rejected attempts to inject a temporal element into the subject matters covered by a waiver. As one court has stated, "[I]t is not appropriate . . . for the . . . judge to limit the waiver on a temporal basis," as "voluntary disclosure of a privileged attorney/client communication constitutes a waiver of the attorney-client privilege as to all communications on the same subject matter." *McCormick-Morgan, Inc. v. Teledyne Industries, Inc.*, 765 F. Supp. 611, 613-14 (N.D. Cal. 1991); *see also Gabriel Capital, L.P. v. Natwest Finance, Inc.*, 2001 WL 1132050, at *1 (S.D.N.Y. 2001) ("[T]he temporal restriction urged by NatWest . . . is rejected. . . . [C]ommunications are discoverable, regardless of when they occurred."); *Chiron*, 179 F. Supp. 2d at 1188 (declining to limit subject matter waiver to pre-complaint time period); *Bowne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 487 (S.D.N.Y. 1993) (finding "no basis for imposing" limits on "the temporal scope of the waiver," even though the waiving party purported to have limited the time frame covered by its waiver). Therefore, there is no basis to limit the temporal scope of Rambus's waiver.

Here, Rambus disclosed to Hynix only a portion of the documents on the applicable subject matters – specifically, documents dated June 1996 or earlier – but failed to disclose the remainder. The Waiver Order establishes a subject-matter waiver as to six topics.¹² The subject matters for two of these topics, efforts by Rambus to broaden its patent claims (“topic 3”) and the September 2000 Presentation (“topic 4”), are clearly not limited to the pre-June 1996 time period. Because Rambus has disclosed only documents created through June 1996, Rambus has not yet disclosed all of the documents that relate to those subject matters. With respect to the other four topics, to the extent Rambus has any documents that relate to these subject matters, the law compels disclosure of those as well, regardless of the dates on which those documents were created.¹³

¹² The topics are:

Topic 1: “Disclosure of patents and patent applications to JEDEC by Rambus.”

Topic 2: “The disclosure policy of JEDEC.”

Topic 3: “The efforts by Rambus to broaden its patents to cover matters pertaining to the JEDEC standards.”

Topic 4: “The September 2000 presentation made to stockholders, financial analysts and members of the public.”

Topic 5: “The preparation of withdrawal letters to JEDEC.”

Topic 6: “The drafting of letters relating to patent disclosures to JEDEC and IEEE, the information and documents relied upon in drafting those letters, patent disclosures to JEDEC and IEEE and the efforts by Rambus to broaden its patent claims to the extent that any of those conversations took place within the context of the drafting of the withdrawal letters.”

Waiver Order at 6.

¹³ We should note that it is entirely conceivable that Rambus possesses documented attorney-client communications, post-dating June 1996, that relate directly to these four topics.

The original limitation in the *Infineon* case to documents only from December 1991 through June 1996 is of no relevance for two reasons.

First, it is clear from the transcript of the *Infineon* hearing that the temporal limitation in that case arose only from the suggestion of counsel, who was pressed to identify a time period extemporaneously, not because the subject matter of the relevant documents was cabined within the specified dates. See Transcript of Telephone Conference, *Rambus Inc. v. Infineon Technologies AG* at 9 (Apr. 6, 2001) (attached to Rambus Mem., Tab D). Accordingly, the subject matter at issue is not inherently limited to the documents already produced, as Rambus now argues. See Waiver Order at 6 n.9 (“The Court does not read the transcript to establish that the *Infineon* court would not have permitted post-1996 discovery had counsel so requested.”).

Second, the cases cited by Rambus do not support the proposition that the subject matter as to which privilege was waived is confined by Judge Payne’s date limitation in *Infineon*. Rambus voluntarily disclosed to Hynix documents relating to the six topics identified in the

Even though Rambus’s direct participation in JEDEC ended in that time period, the record makes clear that Rambus continued to monitor JEDEC activities closely for years thereafter. The record also demonstrates that Rambus’s JEDEC-related activities created substantial legal concerns within the company and, in particular, in the minds of Rambus’s in-house and outside counsel. One of the principal legal concerns, as we have explained elsewhere, was that the misleading nature of Rambus’s conduct could render the company’s JEDEC-related patents unenforceable on equitable estoppel grounds. Such concerns might have been mitigated to some extent by Rambus’s June 1996 withdrawal from JEDEC, but there is no reason to believe that such concerns would have ceased to exist after Rambus withdrew from the organization. (As Your Honor knows, it was not until several years later that Rambus began to enforce its JEDEC-related patents.) In fact, Complaint Counsel has alleged that such concerns may have contributed to Rambus’s decision to initiate a “document retention” policy in mid-1998. In any event, if – as Complaint Counsel suspects – there are post-June 1996 attorney-client communications relating to Rambus’s participation in JEDEC that have not previously been disclosed, the Waiver Order establishes Complaint Counsel’s right to obtain such communications as a consequence of Rambus’s voluntary waiver of privilege on these JEDEC-related subject matters. To deny Complaint Counsel access to such documents under the circumstances present here would indeed cause a manifest injustice.

Waiver Order, but only those that had been created prior to June 1996. That in no way changes the fact that documents created subsequent to that date may also relate to that very same subject matter.¹⁴ In short, “subject matter” is inherently defined by content, not temporal limitation. The cases Rambus cites to support its argument, *Applied Telematics, Inc. v. Sprint Corp.*, 1995 WL 567436, at *2 (E.D. Pa. 1995), and *Saint-Gobain/Norton Industries Ceramics Corp. v. General Electric Co.*, 884 F. Supp. 31, 33-34 (D. Mass. 1995), stand only for the uncontroversial proposition, discussed above, that a waiver is limited to the subject matter disclosed. That is precisely what Complaint Counsel seeks here: disclosure of *all* documents relating to the subject matter for which Rambus has thus far only made a partial disclosure of attorney-client privileged material.

3. Public Policy Requires the Disclosure of Privileged Information Under These Circumstances

Rambus’s newly developed “general policy” argument, Rambus Mem. at 15, is without logical or legal support. The thrust of the argument appears to be that Rambus is being made to suffer from its production to Complaint Counsel of the pre-June 1996 documents that were previously produced to Hynix. But clearly this is not the case. Complaint Counsel has never argued that Rambus’s production in this case creates a subject-matter waiver. Complaint Counsel’s argument is that Rambus’s voluntary production to Hynix creates a subject-matter waiver. *See* Initial Waiver Motion at 2 n.2 (“Complaint Counsel is not arguing that the production to Complaint Counsel independently waived Rambus’s privilege.”). Rambus’s subsequent production to Complaint Counsel is therefore of no moment.

¹⁴ Indeed, such documents must exist, or Rambus would not have twice sought reconsideration of orders compelling production of those documents.

The sole case cited by Rambus does not support its policy argument. It supports only the limited policy argument that victims of crimes would be reluctant to provide relevant information if doing so potentially waived privilege claims in subsequent civil litigation. *See Nolan v. City of Yonkers*, 1996 WL 120685, at *3 (S.D.N.Y. 1996). Here, however, Rambus was not voluntarily providing documents to Hynix as a victim in order to aid a prosecution. Furthermore, Rambus's cooperation with a government agency was not the act that constituted the waiver. Accordingly, the principle in *Nolan* has no "implications for Commission practice" in this case.

C. The First Date at Which Rambus May Claim Work-Product Protection Is Not Clearly Erroneous

Rambus's request to advance the date on which work-product protection applies is without support. Indeed, Rambus does not even propose a specific date, but rather submits only "mid-1999" as the correct point at which it can begin to assert work-product protection. As the party seeking to invoke the work-product doctrine, Rambus bears the burden to show that the doctrine's protection applies. *See United States v. Philip Morris Inc.*, 212 F.R.D. 421, 424 (D.D.C. 2002). Rambus has not met its burden. The Waiver Order specifically admonishes Rambus for its "obfuscation . . . as to when it anticipated" JEDEC-related litigation and has noted that Rambus's filings on this issue "pointedly do *not* address when Respondent first anticipated litigation." Waiver Order at 8-9. Even now, Rambus has failed to demonstrate when it began to anticipate litigation concerning its misconduct at JEDEC, and requests only a vague "mid-1999" date for the beginning of its protection. In support, Rambus points only to its filing of a lawsuit against Hitachi in early 2000 and asserts (without supplying documentary support) that it sent a demand letter to Hitachi in October 1999.

In order to set a date certain for when Rambus may begin to claim work-product protection, Complaint Counsel submits that October 1, 1999, is an appropriate date. That date recognizes that preparation of a demand letter takes some amount of time. It does not, however, credit Rambus with a greater amount of preparation time for which it has offered no support. Accordingly, without conceding when Rambus actually began to anticipate relevant litigation, Complaint Counsel does not oppose a clarification of the Waiver Order to set October 1, 1999, as the date at which Rambus may begin to assert valid claims of work-product protection.

II. RAMBUS'S REQUESTS FOR CLARIFICATION ARE CONTRARY TO THE WAIVER ORDER

None of the bases for clarification that Rambus asserts have merit. To the contrary, the Waiver Order clearly establishes that these requests have been considered and rejected by Your Honor. Moreover, Rambus appears to be using its request for clarification as yet another mechanism to have Your Honor reconsider the substance of the Waiver Order. Accordingly, Rambus's requests should be rejected.

First, Rambus requests clarification that so long as it has already produced to Complaint Counsel documents in topics 1, 2, 5, and 6 from June 1996 or earlier, then it has satisfied its obligations under the Order. That request for "clarification" is contrary to the terms of the Order, and is, instead, a substantive attack seeking reconsideration of the Waiver Order. The entire purpose of the relief requested by Complaint Counsel, and ordered by Your Honor, is to require Rambus to disclose any documents that it has not already produced for which it has been deemed to have waived its claims of privilege. If Rambus has documents that fall within the subject matter of topics 1, 2, 5, and 6, that it has not yet produced (whether pre- or post-June 1996), then the Waiver Order clearly directs that Rambus should now produce such documents, regardless of whether Rambus was previously obligated to produce those documents in the *Infineon* litigation.

Indeed, as explained above in Section I.B.2, post-June 1996 documents bearing on topics 1, 2, 5, and 6 may well exist, and to the extent they do exist, fairness dictates that Complaint Counsel be given access to such materials. The requested clarification therefore directly contradicts the terms of the Order, and should be denied.

Second, Rambus's request to limit the temporal scope of its waiver with respect to the September 2000 Presentation (topic 4) also runs directly counter to the terms of the Order. The Order specifically holds that Rambus has waived the privilege with respect to the subject matter of that presentation. There is no time limit to that waiver: it extends to all documents – whether created before or after that presentation – that relate to that subject matter. As explained above, there is simply no support for a temporal limitation on these topics in these circumstances. *See supra* subsection I.B.2.b. Therefore, to “clarify” the order by imposing a time limitation is both contrary to the terms of the Order and legally unwarranted.

Third, and finally, Rambus's proposed limitations to the subject matter of topic 3 are misplaced. The scope of the subject-matter waiver is determined by reference to what was disclosed to Hynix, not the “issues being litigated before Judge Payne” or the scope of JEDEC's disclosure rules. That said, Complaint Counsel would not object to clarification of topic 3 along the following lines:

Topic 3 specifically includes all material relating to efforts by Rambus to cover the JEDEC work or standards by adding to or broadening the claims of any of Rambus's pending patent applications (or issued patents), including foreign patents and patent applications, that claim priority to the April 18, 1990, '898 application.

Inclusion of foreign patents, contrary to Rambus's contention, is appropriate in light of Rambus's position that other members of JEDEC were aware of its patents because of its foreign patent filings with WIPO. *See, e.g.*, 1 Trial Tr. 216:2-6 (Apr. 30, 2003) (Rambus opening

argument); 1 *id.* 219:18-25. More importantly, Rambus's foreign patents are based on identical applications as its U.S. patents and therefore relate to the same subject matter. Indeed, Rambus's enforcement of its foreign patents could have substantially the same impact on U.S. commerce as would enforcement of its U.S. patents, and for that reason the Commission has included Rambus's foreign patent rights within the scope of the relief it seeks. *See* Complaint, Notice of Contemplated Relief ¶¶ 3-4. Although Complaint Counsel does not believe that Rambus's waiver is so limited, it does believe that production consistent with the above clarification would provide it with substantially all of the privileged documents directly relevant to the allegations contained in the Commission's Complaint.

III. CONCLUSION

For the reasons stated herein, Respondent's Motion for Reconsideration and/or Clarification of the May 13, 2003, Waiver Order should be denied. Complaint Counsel would, nevertheless, not oppose two minor modifications of the Order. First, Complaint Counsel would not oppose substituting October 1, 1999, as the earliest date on which Rambus can assert work-product protection pertaining to documents encompassed by the Waiver Order. Second, Complaint Counsel would not oppose clarifying topic 3 in the manner outlined above. *See supra* p. 24-25.

Respectfully submitted,

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May 27, 2003

Tabs not included in public version.

CERTIFICATE OF SERVICE

I, Brian Beall, hereby certify that on May 28, 2003, I caused a copy of the following materials:

Opposition to Rambus Inc.'s Request for Reconsideration and/or Clarification of May 13, 2003, Order Regarding Documents for which Rambus Asserts Privilege

to be served upon the following persons:

by hand delivery to:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580

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