UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC

In the Matter of **RAMBUS INC.,** **a corporation.**	**Docket No. 9302**

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

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I. INTRODUCTION

On February 28, 2003, Judge Timony issued an Order, and then some time later that same day issued a revised Order (a copy of which is attached at Tab A), 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 ("Motion"). Rambus requests that Your Honor certify this Order to the Commission, pursuant to Rule 3.23(b), , so that the Commission may review it and correct its fatal and fundamental errors or, alternatively, that Your Honor reconsider the Order and reverse it.

II. SUMMARY OF ARGUMENT

In order to successfully challenge the attorney-client privilege based on the crime-fraud exception, the party challenging the privilege must make a *prima facie* showing that the privileged communication in question was made "in furtherance of" a crime or fraud. *E.g., In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 807 (Fed. Cir. 2000).[1] Because "[d]ocuments within the scope of the attorney-client privilege are 'zealously protected,'" the "seal of secrecy" between lawyer and client is broken only when the "communications from the *lawyer* to the client [are] made by the *lawyer* for the purpose of giving advice for the commission of a fraud or crime. The seal is broken when the lawyer's communication is meant to facilitate future wrongdoing by the client." *Haines v. Liggett Group Inc.*, 975 F.2d 81, 90 (3rd Cir. 1992). Thus, before a tribunal can find that the crime-fraud exception applies to vitiate the attorney-client privilege, it first must find that the party challenging the privilege has made a *prima facie* showing that the client engaged in a crime or fraud, and then that the attorney's advice was

[1] It is well-settled that a privileged document, prepared after the wrongdoing has occurred, retains its privilege even if it discloses that the wrongdoing occurred. *See, e.g., United States v. Zolin*, 491 U.S. 554 (1989); *In re Sealed Case*, 107 F.3d 46, 51 (D.C. Cir. 1997).

provided in order to further that wrongdoing. In the instant case, Complaint Counsel were therefore required to make a *prima facie* showing that, after June 1996, Rambus was engaged in a fraud and that its attorneys provided legal advice to Rambus in furtherance of that fraud. Because this showing was not made, and could not be made, the Order must be reversed.

First, Complaint Counsel expressly did **not** attempt to make such a showing, stating that "this Motion to Compel is based solely on the ground of waiver."[2]

Second, since the first prong of a fraud claim is that there was a duty to disclose, since the duty to disclose is alleged to have arisen from membership in JEDEC, and since Rambus ceased to be a member of JEDEC in June 1996, there is no basis for finding that Rambus committed fraud after June 1996, or that its attorneys provided advice in furtherance of a fraud.

Third, the Federal Circuit has concluded that Rambus did **not** commit fraud prior to June 1996, thereby gutting Judge Payne's original conclusion that there had been a *prima facie* showing of fraud while Rambus was a JEDEC member. *Rambus Inc. v. Infineon Technologies AG*, 318 F.3d 1081, 1105 (Fed. Cir. 2003) (attached at Tab B). Since there was no fraud during the time Rambus *was* a JEDEC member, there surely was no fraud later.

Fourth, because of the historical sanctity of the attorney-client privilege and its compelling importance in our adversary system, it must be jealously guarded. Thus, due process requires, before the crime-fraud exception is applied, that a three-step process be followed to ensure that the party asserting the privilege is able to fully present its evidence and be heard.

[2] In footnote 1 of his Order, Judge Timony states that Rambus's production to Hynix of materials ordered disclosed by Judge Payne and Judge McKelvie might constitute a waiver of the privilege for those materials. Apparently since those same materials already have been produced to Complaint Counsel, Judge Timony does not rely on waiver to support his conclusion that materials created after June 1996, and thus not subject to the orders entered by either Judge Payne or Judge McKelvie, should be produced in this case. For that proposition he relies solely on his conclusion that an independent showing has been made that "post-June 1996 issues … are subject to the crime-fraud exception and, therefore, not privileged without regard to waiver issue." Order at n. 1. It is for this reason that the issue of waiver is not addressed in this Application – it simply was not relied on by Judge Timony to support his Order.

Haines v. Liggett Group, Inc., 975 F.2d at 96-97. Although Rambus alerted Judge Timony to each of these three protections guaranteed to it by the Constitution (*See* Tab F at 15-16), he afforded Rambus none of them.

For these and other reasons described below, Judge Timony's Order must be reversed, either upon reconsideration by Your Honor or upon interlocutory review by the Commission.

III. FACTUAL BACKGROUND

On March 7, 2001, Judge Payne ruled in the *Infineon* litigation that Rambus forfeited its attorney-client privilege under the crime-fraud exception for various communications relating to patent applications on SDRAM between 1991 and the end of June 1996. (A copy of this order is attached at Tab C.) On April 4, 2001, the Federal Circuit denied a petition for mandamus challenging Judge Payne's crime-fraud order. *In re Rambus Inc.*, 7 Fed. Appx. 925 (Fed Cir. 2001) (a copy is attached at Tab D). The *Infineon* case then proceeded to trial and the jury returned a fraud verdict in favor of Infineon. Rambus moved for JMOL, and Judge Payne granted the motion as to DDR-SDRAM, agreeing that Rambus could not have committed fraud after leaving JEDEC in June 1996[3] because it owed no duty to disclose patents or patent applications after its departure, and because formal work on DDR-SDRAM standards did not begin until after Rambus had left. *Rambus, Inc. v. Infineon Technologies AG*, 164 F. Supp. 2d 743, 765-67 (E.D. Va. 2001). Judge Payne denied the motion as to SDRAM, noting, *inter alia*, that "[c]onsideration of the SDRAM standard began in 1991 and a standard was eventually adopted in 1993" (*id.* at 748), within the period of Rambus's membership in JEDEC. Judgment was entered on August 21, 2001. Rambus appealed the next day.

[3] Rambus attended its last JEDEC meeting on December 6, 1995, and formally withdrew from JEDEC by letter dated June 17, 1996. *Rambus, Inc. v. Infineon Technologies AG*, 164 F. Supp. 2d 743, 765 (E.D. Va. 2001); Complaint in *In the Matter of Rambus Incorporated*, Docket No. 9302 ("Complaint") at ¶ 41.

On January 7, 2003, Complaint Counsel filed the Motion here at issue. A copy of the Motion and the papers filed in its support are attached at Tab E.[4] Complaint Counsel expressly stated that they were seeking relief "solely on the ground of waiver," and expressly reserved the right to later present evidence and then to ask Your Honor to find that they had made a *prima facie* showing that the crime-fraud exception should be applied. Motion at 4-5.[5]

On January 21, 2003, Rambus filed a Memorandum in Opposition to Complaint Counsel's Motion to Compel ("Opposition"), attached at Tab F. On January 28, 2003, Complaint Counsel filed a Response to Rambus Inc.'s Opposition ("Reply"), attached at Tab G. On January 31, 2003, Rambus filed a Memorandum in Opposition to Complaint Counsel's Motion to File a Reply Memorandum In Support of Their Motion to Compel ("Sur-Reply"), attached at Tab H.

On January 29, 2003, while the briefing on this motion was ongoing, the Federal Circuit ruled on the *Infineon* appeal. *See* Tab B. Significantly, the Court reversed the only portion of the jury's fraud verdict that had survived the motion for JMOL, holding that Rambus had not breached any duty to disclose patents or patent applications to JEDEC.

> In sum, substantial evidence does not support the jury's verdict that Rambus breached its duties under the EIA/JEDEC [patent disclosure] policy. Infineon did not show the first element of a Virginia fraud action and therefore did not prove fraud associated with the SDRAM standard. No reasonable jury could find otherwise. The district court erred in denying JMOL of no fraud on the SDRAM verdict.

[4] Because the documents attached at Tabs E, G and H contain confidential information, they are being filed in a separate Confidential Appendix.

[5] Complaint Counsel's motion and supporting papers are quite voluminous. The entirety of their submission, except for the portion that was provided in an alternative media format, is attached at Tab E. Throughout this Application the citation to the materials that are attached at Tab E will be to the supporting memorandum that follows immediately after the two-page motion itself, and for simplicity, that memorandum will simply be cited as "Motion."

Rambus, 318 F.3d at 1105.[6] The Court affirmed the grant of JMOL of no fraud on the DDR-SDRAM standard. *See id.* ("Because Infineon did not show that Rambus had a duty to disclose before the DDR-SDRAM standard-setting process formally began, the district court properly granted JMOL of no fraud in Rambus's favor on the DDR-SDRAM verdict.").

On February 28, 2003, his last day in office, Judge Timony granted the Motion and issued the three-page Order at issue here.[7] The Order explains that the Motion was granted because Judge Timony found that Complaint Counsel had "made a sufficient *prima facie* showing that Rambus was involved in an ongoing fraud post-June 1996." In granting the Motion, Judge Timony did not rely on the waiver argument, the sole ground asserted by Complaint Counsel in support of the Motion. There was no hearing on the Motion.

The Order first recites four facts in support of a *prima facie* showing of fraud warranting application of the crime-fraud exception for "[JEDEC] and computer random access memory ("RAM") patents and patent application related discussions and documents otherwise protected by the attorney-client or the attorney work product privileges that occurred or were generated after June 1996."

a. Rambus participated in JEDEC through June 1996;

b. Through this participation, Rambus knew or should have known the JEDEC standards for RAM, as developed through June 1996, would infringe on patents held or applied for by Rambus;

c. Rambus knew or should have known that these infringements could potentially lead to substantial licensing fees or damages for Rambus; and

[6] Earlier in its opinion the Federal Circuit had described the first element of a Virginia fraud action as being "a false representation (or omission in the face of a duty to disclose)." *Id.* at 1096.

[7] In fact, two versions of the Order were issued, but it appears that the Commission's records contain only the second version, and it is that version that is attached at Tab A and that is addressed herein. The Order here at issue was the seventh of eight orders issued in Judge Timony's last three days on the bench, a compressed schedule necessitated by Complaint Counsel's selective timing of these motions, some of which, such as the Motion here at issue, could have been filed months earlier and considered by Judge Timony without the press of imminent retirement.

d. Rambus, before it ceased participation in JEDEC in June 1996, failed to disclose the existence of the patents it either held or had applied for that could be infringed by the proposed JEDEC standards to the other JEDEC participants.

Order at 2. Judge Timony then went on to find that "[e]ven after Rambus left JEDEC in June 1996, it apparently continued to prosecute patents and patent applications that it knew or should have known from its participation in JEDEC could be of significant value to it." Order at 3. Based on these "facts," Judge Timony concluded that "Complaint Counsel has made a sufficient *prima facie* showing that Rambus was involved in an ongoing fraud post-June 1996 concerning the RAM patents it held and had applied for to permit discovery under the crime fraud exception. Consequently, there is no reason why discovery under the crime-fraud exception must be limited only up to June 1996, the date when Rambus dropped out of JEDEC." Order at 3.

IV. ARGUMENT

That the Order grants the Motion on a ground not advanced by Complaint Counsel (and thus not briefed by Rambus), that it fails to disclose any factual basis for the existence of a duty to disclose patents or patent applications to JEDEC after Rambus ceased to be a member of JEDEC, that it utterly fails to account for, or even mention, the Federal Circuit's conclusive rejection of the fraud theory in *Infineon*, and the manifest injustice – of Constitutional moment – worked by the failure to afford Rambus the evidentiary hearing to which it is entitled, each, standing alone, justify reconsideration and reversal. *See, e.g., In re Intel*, 1998 FTC LEXIS 188, *1 (Jul. 31, 1998); *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 126, *1 (Apr. 12, 1996).[8] But, these errors do not stand alone. They are all combined in a single three-page

[8] As the federal courts recognize, a tribunal has the inherent power to reconsider orders where the court committed clear error or the initial decision was "manifestly unjust." *See School Dist. No. 1J v. AC&S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (reconsideration proper to correct clear error or manifest injustice); *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1231 (3d Cir. 1995) (reconsideration of non-final orders within inherent power of the court); *United States v. Roberts*, 978 F.2d 17, 21 (1st Cir.

Order that reflects an utter disregard for the law, for the facts and for Rambus's due process rights. We implore Your Honor to set right this injustice.

If Your Honor declines to reconsider Judge Timony's Order, then we ask, pursuant to Commission Rule of Practice 3.23(b), that you certify the Order to the Commission for its interlocutory review. As explained further below, the Order "involves a controlling question of law as to which there is substantial ground for difference of opinion and … an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b).

A. It Was Clear Error To Grant The Motion On A Ground Not Argued By Complaint Counsel.

As noted earlier, Complaint Counsel expressly stated that the Motion was "based solely on the ground of waiver." Motion at 4. Consequently, Rambus did not present briefing, argument or evidence to demonstrate that a *prima facie* showing cannot be made to support extension of the crime-fraud exception beyond June 1996. *See, e.g.*, Opposition at 4-5.

Due process fundamentally requires notice and a meaningful opportunity to be heard. *See Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). The Order plainly fails the test.[9] Judge

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1992) ("requests for reconsideration rely, in the last analysis, on the trial court's inherent power to afford relief from interlocutory decisions"); *Greene v. Union Mut. Life Ins. Co.*, 764 F.2d 19, 22-23 (1st Cir. 1985) (Breyer, J.) (court has inherent power to reconsider interlocutory order as justice requires). Deciding a matter not briefed by either party also is grounds for reconsideration. *See Above The Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) ("The motion to reconsider would be appropriate where … [the Court] has made a decision outside the adversarial issues presented to the Court by the parties….").

[9] Normally, the adequacy of a particular hearing procedure is determined by balancing three factors: the nature of the individual interest at stake; the risk of erroneous deprivation and probable value of additional safeguards; and the nature of the governmental interest involved. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). But, when there is no notice given and no hearing provided, and when the interest at stake is one's right to protect privileged attorney-client communications, we need spend no more time on the balancing test. The scales here tip entirely in favor of Rambus, who must be given some notice and some right to be heard, rather than none.

Timony decided the Motion on a ground that was not briefed and which Complaint Counsel expressly stated that they were not arguing, and he did so without giving Rambus any notice of his intent to adopt this independent ground as the basis for the Order. The Order must, therefore, on this ground alone, be reversed.

B. Rambus Was Under No Duty To Disclose Patents Or Patent Applications After June 1996, And Thus There Could Be No Fraud After That Date.

Complaint Counsel allege that JEDEC members had a certain duty to disclose patents and patent applications. *See, e.g.*, Complaint at ¶ 24. Complaint Counsel further allege that, while a member of JEDEC, Rambus violated this duty. Complaint at ¶ 80. Complaint Counsel make no allegation that Rambus had a duty to disclose patents or patent applications to JEDEC after its membership in JEDEC came to an end in June 1996. In granting Rambus's motion for JMOL as to DDR-SDRAM, Judge Payne reached the same conclusion, holding that there was no duty to disclose once Rambus's membership in JEDEC ended. *Rambus*, 164 F. Supp. 2d at 765-67. Most recently, the Federal Circuit affirmed the grant of JMOL as to DDR-SDRAM, again making plain that Rambus had no disclosure duty under JEDEC's rules after its membership in JEDEC ended. *See Rambus*, 318 F.3d at 1105.

It is thus not surprising that the Order fails to identify any duty to disclose patents or patent applications that was imposed on Rambus after June 1996. There was no such duty. Judge Timony's silence on this point – his failure to state that Rambus had a duty to disclose patents or patent applications after June 1996 and his failure to identify the source of any such duty – speak volumes. In the absence of a duty to disclose there can be no fraud[10] and, in the

[10] The first element of fraud is "a false representation (or omission in the face of a duty to disclose)." *Rambus v. Infineon*, 318 F.3d at 1096 "A party's silence or withholding of information does not constitute fraud in the absence of a duty to disclose that information." *Id. See also Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478, 1483 (2d Cir. 1995) ("a concealment of a fact

absence of any fraud, the crime-fraud exception cannot be applied.[11] For this additional reason, the Order must be reversed.

C. Judge Payne's Prior Finding That A *Prima Facie* Showing Of Fraud Had Been Made Is Of No Further Force In Light Of The Federal Circuit's Reversal Of The *Infineon* Fraud Judgment.

To the extent the Order relies on Judge Payne's crime-fraud ruling in *Infineon* and then seeks to extend it beyond June 1996, the Order is clearly erroneous and an abuse of discretion. The Federal Circuit has now conclusively established that Rambus did not commit fraud prior to June 1996.

When Rambus sought mandamus on Judge Payne's crime-fraud ruling, the Federal Circuit denied the writ, noting that Rambus's argument was "premised on its factual assertion that it was under no duty pursuant to its membership in JEDEC to disclose the applications." *In re Rambus Inc.*, 7 Fed. Appx. 925, 927 (Fed. Cir. 2001). In order to prevail, the Court ruled, Rambus would have had to show that Judge Payne's preliminary *factual* finding that this duty existed was a "clear abuse of discretion or usurpation of judicial power." *Id.*, at 926.

Whether Judge Payne's preliminary factual finding was correct at the time, based on the evidence then presented, we now know that it was incorrect based on the full evidentiary record at trial. "Infineon did not show the first element of a Virginia fraud action and therefore did not prove fraud associated with the SDRAM standard. No reasonable jury could find otherwise.

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supports a cause of action for fraud only if the non-disclosing party has a duty to disclose"); *In re Eashai*, 87 F.3d 1082, 1089 (9th Cir. 1996) ("Under common law, a false representation can be established by an omission when there is a duty to disclose.").

[11] Before a court can vitiate the attorney-client privilege with a crime-fraud ruling, the party challenging the privilege must establish a *prima facie* case of the alleged crime or fraud. *See Clark v. United States*, 289 U.S. 1, 14-15 (1933); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 95 (3d Cir. 1992); *In re Rambus Inc.*, 7 Fed. Appx. 925, 927 (Fed. Cir. 2001).

The district court erred in denying JMOL of no fraud on the SDRAM verdict." *Rambus*, 318 F.3d at 1105. The Court of Appeals similarly affirmed the JMOL of no DDR-SDRAM fraud. "Because Infineon did not show that Rambus had a duty to disclose before the DDR-SDRAM standard-setting process formally began, the district court properly granted JMOL of no fraud in Rambus's favor on the DDR-SDRAM verdict." *Id.* Thus, no vitality remains in Judge Payne's pre-trial ruling that a *prima facie* showing of fraud had been made.

Indeed, it is difficult to imagine how, on any factual record, one could today conclude that a *prima facie* showing of fraud has been made. But, the relevant question is not whether one could hypothesize evidence that would be sufficient to overcome the Federal Circuit's decision. The relevant question here is *whether* Judge Timony found such evidence existed. How did he, in light of the Federal Circuit's decision, conclude that a *prima facie* showing of fraud had been made? It is impossible to know, since in the Order he does not even mention the Federal Circuit's decision. Giving all benefit of the doubt to the Order in an effort to rationalize it with the Federal Circuit's opinion, we might assume that Judge Timony agreed with the Federal Circuit that Rambus did not have any patents or patent applications as of June 1996 that were required to be disclosed to JEDEC. If so, then he must have concluded that patents or patent applications that Rambus later obtained (after June 1996) were later required to be disclosed. But, as shown above, *supra* at 8-9, Rambus had no duty after June 1996 to disclose patents or patent applications to JEDEC. Perhaps Judge Timony was aware of this – he does not suggest there was any duty to disclose after June 1996 – or perhaps he overlooked the requirement that there must be such a duty for a claim of fraud to lie. In either set of circumstances, however, the Order cannot stand and must be reversed.

D. Failure To Follow The Settled Procedure For Evaluating A Claim That The Crime-Fraud Exception Applies Denied Rambus Its Right To Due Process.

Determining whether a crime-fraud exception applies in a civil action requires a three-step analysis: (1) the tribunal first must determine whether the party challenging the privilege has made a sufficient factual showing that the crime-fraud exception applies to justify *in camera* review of the documents in question; (2) then, the tribunal must review the documents in question, *in camera*, in order to determine if, in fact, the privileged communications from attorney to client were in furtherance of a fraud; and, (3) finally, the party invoking the privilege – here, Rambus – "has the absolute right to be heard by testimony and argument" before the crime-fraud exception is applied. *Haines v. Liggett Group, Inc.*, *supra* at 96-97; *see also In re General Motors Corp.*, 153 F.3d 714, 716 (8th Cir. 1998) ("[T]he district court may not … compel production without permitting the party asserting the privilege, to present argument and evidence."); *In re Feldberg*, 862 F.2d 622, 626 (7th Cir. 1988) (Easterbrook, J.) (party asserting privilege should have opportunity to rebut evidence of crime or fraud); *Sigma-Tau Industrie Farmaceutiche Riunite, S.p.A. v. Lonza, Ltd.*, 48 F. Supp. 2d 16, 18-19 (D.D.C. 1999); *Laser Indus., Ltd. v. Reliant Tech., Inc.*, 167 F.R.D. 417, 431 (N.D. Cal. 1996). "The importance of the privilege … as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard." *Haines*, 975 F.2d at 97. The Third Circuit reasoned in *Haines* that the reliability of a crime fraud ruling could only be assured by committing the weighing of the evidence to the adversarial process. *Id.* Judge Timony committed clear error by refusing Rambus a hearing and choosing, instead, to weigh, on his own and without Rambus's input, the crime-fraud "evidence" referenced in the Order.

In the Order, Judge Timony sought to justify his failure to allow Rambus to be heard. He

wrote that "[a] determination of whether a *prima facie* case of fraud is established can be made based on documentary evidence and sworn testimony, without a hearing," citing *In re Vargas*, 723 F.2d 1461, 1467 (10th Cir. 1983). Order at 3, n. 2. *Vargas*, however, is inapposite. It arose in the context of a grand jury proceeding, where different public interests – secrecy, prompt administration of the criminal laws, and the investigative rather than adversarial nature of the grand jury – are balanced against due process concerns and the zealous protections afforded the attorney-client relationship and the privilege that lies at its core. Plainly, different standards for determining the existence of the crime-fraud exception are applied in the context of grand jury proceedings than in adversarial civil litigation.[12] The D.C. Circuit, for instance, recognizes that an *in camera* proceeding to determine the existence of a crime-fraud exception is *only* proper "when such proceedings are *necessary to ensure the secrecy* of the ongoing grand jury proceedings." *In re Sealed Case*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (emphasis added) (observing that *in camera, ex parte* proceedings "generally deprive one party to a proceeding of a full opportunity to be heard on an issue and thus should only be used where a compelling interest exists" (citation omitted)). No compelling interest, such as the interest in grand jury secrecy, is present here that would justify depriving Rambus of a hearing.

In adversarial civil cases the courts uniformly require the three-step process outlined in *Haines*. Indeed, in the Tenth Circuit, where *Vargas* was decided, the courts hold that, in an adversarial civil case "[w]here a fact finder undertakes to weigh evidence in a proceeding seeking an exception to the privilege, the party invoking the privilege has an absolute right to be

[12] *See In re Impounded*, 241 F.3d 308, 317 n.9 (3d Cir. 2001) ("Because the need for secrecy in grand jury proceedings prohibits an adversarial proceeding regarding ex parte, in camera evidence, courts may rely exclusively on ex parte materials in finding sufficient prima facie evidence to invoke the crime fraud exception …."); *In re Grand Jury Subpoena*, 223 F.3d 213, 218 (3d Cir. 2000) (distinguishing crime fraud challenge in grand jury proceeding); *cf. In re Grand Jury Proceedings*, 183 F.3d 71, 79 (1st Cir. 1999).

heard by testimony and argument." *See In re M & L Business Machine Co., Inc.*, 167 B.R. 937, 942 (D. Colo. 1994) (quoting *Haines*). In relying on *Vargas*, Judge Timony clearly applied the wrong law, in the wrong situation and, not surprisingly, arrived at the wrong result. His failure to allow Rambus a hearing in accordance with the procedures outlines in *Haines* is reason enough to reverse the Order.

E. The Order Meets The Standard For Interlocutory Appeal To The Full Commission Set Forth In Rule 3.23(B).

There are two prongs to Rule 3.23(b). Interlocutory appeal to the Commission may be allowed only if (1) "the ruling involves a controlling question of law … as to which there is substantial ground for difference of opinion" and if (2) "an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." Both prongs are easily satisfied here.

1. The Questions Raised In This Application Are Controlling And There Is Substantial Ground For Difference Of Opinion.

As discussed above, the Order raises, but erroneously resolves, at least four questions of law.[13] Each of these questions is "controlling." Rule 3.23(b) borrows the "controlling" language of 28 U.S.C. § 1292(b), and "court interpretation of that statute is material." *In re BASF Wyandotte Corp.*, 1979 FTC LEXIS 77 at *2 n.1 (Nov. 20, 1979). The courts generally conclude that interlocutory appeal should be limited to "exceptional circumstances [that] justify a departure from the basic policy of postponing appellate review until after entry of a final

[13] The Commission can resolve each of these questions as abstract issues of law without reference to a trial record. These are exactly the kinds of questions that interlocutory appeal exists to resolve. *See Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 676-77 (7th Cir. 2000) (Posner, J.) (distinguishing "a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record" from a question of law requiring fact intensive review of a record, and holding that interlocutory appeal is provided to resolve these abstract issues of law in order to avoid "protracted, costly litigation").

judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). Despite this high standard, however, the federal courts routinely grant both interlocutory appeal under § 1292(b) (finding the issue to be "controlling") and mandamus under 28 U.S.C. § 1651(a) to correct clearly erroneous privilege orders such as that here.[14] Thus, the only remaining question to be answered in satisfying the first prong is whether there is a substantial difference of opinion as to how the four questions at issue should be resolved; as previously demonstrated, there is overwhelming authority at odds with how Judge Timony answered each of those questions.

2. An Immediate Appeal Will Materially Advance The Ultimate Termination Of The Litigation And Subsequent Review Will Be An Inadequate Remedy.

In January of this year, the D.C. Circuit had occasion to review a similar issue – there, whether to issue a stay and hear an emergency appeal from a ruling that an otherwise privileged document should be produced. In issuing a stay, the Court of Appeals held that release of the privileged document before the status of the privilege had been finally resolved would cause "irreparable injury," since "the general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged documents to an adverse party

[14] *See Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970) ("because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy [of] mandamus is appropriate"); *In re Regents of the University of California*, 101 F.3d 1386, 1387 (Fed. Cir. 1996) ("a writ of mandamus may be sought to prevent the wrongful exposure of privileged communications"); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 89-91 (3d Cir. 1992) (granting mandamus on crime fraud); *In re Rambus Inc.*, 7 Fed. Appx. 925, 926-27 (Fed. Cir. 2001) (observing that mandamus is proper to prevent wrongful exposure of privileged communications); *In re Columbia/HCA Healthcare*, 293 F.3d 289, 293 (6th Cir. 2002) (granting § 1292(b) appeal from order finding waiver); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 399 (8th Cir. 1987) (granting § 1292(b) appeal from privilege order); *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 278 (8th Cir. 1984) (reversing application of crime fraud exception on § 1292(b) appeal); *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1216 (4th Cir. 1976) (§ 1292(b) appeal affirming order denying discovery of work product); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1096-97 (5th Cir. 1970) (granting interlocutory appeal from order denying privilege).

is clear enough." *United States v. Philip Morris Inc.*, 314 F.3d 612, 621-22 (D.C. Cir. 2003); *see also* cases cited at n. 14. Similarly here, because of the irreparable injury that would flow from production of otherwise privileged materials, subsequent review would be an inadequate remedy. Further, since the issues raised by this application go to the heart of this proceeding – *e.g.*, there is no duty to disclose after June 1996, and the Federal Circuit's determination that there was no duty to disclose prior to June 1996 is controlling here – deciding these issues now will advance the ultimate termination of the litigation.

V. CONCLUSION

As the Complaint makes plain, as Judge Payne's rulings make plain, and as the Federal Circuit has quite emphatically held, once Rambus ceased to be a member of JEDEC it had no further duty to disclose patents or patent applications to JEDEC. In the absence of a duty to disclose, there can be no fraud, and thus there can be no crime-fraud exception after June 1996. Further, in light of the Federal Circuit's decision, Judge Payne's crime-fraud ruling no longer has any force. It has now been conclusively determined that Rambus did not commit any fraud during the time it *was* a JEDEC member. For these reasons, the Order must be reversed.

Further, the Order was entered by a process that denied Rambus its constitutionally-guaranteed due process rights. Rambus did not have notice or a fair opportunity to be heard regarding the ground on which the Motion ultimately was granted. In fact, Complaint Counsel expressly said that they were not basing their Motion on the ground on which it was decided by Judge Timony. Further, Rambus was not afforded the protection of any of the steps of the three-step process that is constitutionally required when crime-fraud issues are contested. *See Haines*, 975 F.2d at 96-97. In order to preserve and protect Rambus's constitutional rights, the Order must be reversed.

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