PUBLIC

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

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

MEMORANDUM BY RAMBUS INC. IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL DISCOVERY RELATING TO RAMBUS'S DOCUMENT DESTRUCTION

I. INTRODUCTION

By their present motion, Complaint Counsel once again seek to lead Your Honor far afield from the merits of this case. Here, bootstrapping one distraction on top of another, they seek to use Rambus's Opposition to Complaint Counsel's meritless motion for default judgment (itself unrelated to the merits of Complaint Counsel's antitrust claims) as a vehicle for obtaining permission to rummage through Rambus's confidential attorney-client communications as to litigation strategy and document retention planning.

There are three obvious flaws to Complaint counsel's motion: (1) Rambus has *not* asserted an advice of counsel defense; (2) Rambus has *not* disclosed any privileged information in opposition to Complaint Counsel's motion for default judgment; and (3) Rambus has *not* disclosed any information regarding its litigation strategy.

The time for Complaint Counsel's evasions of the merits is long past. The present motion should be denied and we should turn, instead, to whether Complaint Counsel have any claims left to pursue after the Federal Circuit's well-reasoned opinion in *Rambus Inc. v. Infineon Technologies AG*.

II. SUMMARY OF ARGUMENT

Complaint Counsel's motion is overreaching and misguided. Rambus has not asserted an advice of counsel defense, and therefore has not *implicitly* waived privilege as to the broad subject matter of all attorney-client communications regarding its document retention policy. Nor does Complaint Counsel point to a single instance where Rambus's opposition to Complaint Counsel's motion for default judgment *explicitly* waived privilege by disclosing any privileged communications. Under these circumstances, no waiver of privilege, express or implied, has occurred, and thus there is no basis for

allowing inquiry into Rambus's confidential attorney-client communications regarding its document retention policy.

To the extent Complaint Counsel seek communications concerning Rambus's litigation strategy, their motion is even more attenuated. Complaint Counsel do not point to a single statement in Rambus's opposition memorandum that even mentions litigation strategy. They therefore offer no ground for a finding that Rambus has waived privilege as to such communications, which are protected not only by the attorney-client privilege, but also by the work product doctrine.

Complaint Counsel's alternative argument – that Rambus waived privilege as to its litigation strategy by allowing its outside counsel to testify on this issue at deposition in the *Micron* litigation – fares no better. The testimony upon which Complaint Counsel rely (besides revealing virtually no information about Rambus's strategies): (i) was elicited by Rambus's litigation adversary rather than by Rambus; (ii) was provided, over Rambus's privilege objections, by a former outside attorney whom Rambus did not represent at the deposition; and (iii) has not been relied on by Rambus in this case. Under such circumstances, the law does not support a finding that Rambus has waived privilege as to its litigation strategy in this proceeding.

Accordingly, Complaint Counsel's motion should be denied in its entirety, and the parties should turn to adjudicating the present dispute on the merits.

III. ARGUMENT

A. Rambus Does Not Rely On An Advice Of Counsel Defense.

Complaint Counsel's motion is predicated upon a faulty premise. Complaint Counsel argue that "Rambus has employed the advice of counsel as a sword, affirmatively asserting that the document destruction program was adopted and

implemented on advice of counsel, and selectively allowing testimony about attorney-client communications where it believed such revelations would be of benefit to itself." Memorandum In Support Of Complaint Counsel's Motion To Compel Discovery Relating To Rambus's Document Destruction ("Complaint Counsel Memorandum"), at 11. As demonstrated below, Complaint Counsel's characterizations of both the nature of Rambus's opposition to its default judgment motion, and Rambus's position regarding disclosure of its privileged communications, are simply wrong.

Rambus recognizes that the assertion of an advice of counsel defense results in an implied waiver of privilege with regard to the advice upon which the defense is based. *See Minnesota Specialty Crops, Inc. v. Minnesota Wild Hockey Club, L.P.*, 210 F.R.D. 673, 675 (D. Minn 2002) ("The general rule is that the assertion of an advice-of-counsel defense waives that privilege 'as to communications and documents relating to the advice.'") (*quoting SNK Corp. of America v. Atlus Dream Ent. Co. Ltd.*, 188 F.R.D. 566, 570 (N. D. Cal. 1999)). A party defending a claim to which an advice of counsel defense could be asserted thus faces a choice: either waive attorney-client privilege or waive the advice of counsel defense. *See Vicinanzo v. Brunschwig & Fils, Inc.*, 739 F. Supp. 891, 894 (S.D.N.Y. 1990) ("A party who intends to rely at trial on the advice of counsel must make a full disclosure during discovery; failure to do so constitutes a waiver of the advice-of-counsel defense."); *F & G Scrolling Mouse, LLC v. IBM Corp.*, 190 F.R.D. 385, 391 (M.D.N.C. 1999)("[B]y maintaining attorney-client privilege, the alleged infringer, in effect, waives his advice-of-counsel defense.").

Complaint Counsel erroneously assume that Rambus has elected to assert an advice of counsel defense, thereby implicitly waiving its attorney-client privilege. In

fact, Rambus has done just the opposite: it has foregone its potential advice of counsel defense so as to retain its right to assert privilege.

Consideration of Rambus's opposition to Complaint Counsel's Motion for Default Judgment makes clear that Rambus has not raised an advice of counsel defense. Typically, a party asserts such a defense to demonstrate that it undertook actionable or unlawful conduct in good faith, rather than with knowledge of its illegality. Thus, in the patent context, advice of counsel commonly is invoked as a defense to a claim that a party's infringement was willful in nature. The necessary elements of the defense are "(1) full disclosure of all pertinent facts to counsel; and (2) good faith reliance on counsel's advice." *United States v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994).

Rambus has not asserted such a defense here. Rambus's Opposition Memorandum does not:

- purport to disclose *any* facts that Rambus communicated to counsel in connection with its document retention policy;
- disclose the specific nature of Rambus's counsel's advice regarding document retention; or
- undertake to prove that, in adopting and implementing its document retention policy, its employees were relying on specific communications from outside counsel.

Rambus's evidence of attorney consultation was far more limited than that which would be introduced to establish an advice of counsel defense, and was directed toward a different and more limited purpose. Specifically, Rambus introduced such evidence solely in response to a false contention advanced by Complaint Counsel, namely, that the

idea to create a document retention policy arose from an insidious motive, rather than from a simple desire to implement a prudent business practice. Stating that "the idea for [Rambus's] document destruction effort first originated" with either Rambus CEO Geoff Tate or Rambus's former Vice President of Intellectual Property, Joel Karp, *see* Memorandum in Support of Complaint Counsel's Motion For Default Judgment at 50, Complaint Counsel argued that the desire to destroy evidence potentially relevant to future litigation prompted Rambus to adopt a document retention policy:

> In light of its past involvement with JEDEC, what could Rambus do to maximize the chances of successfully enforcing patents against DRAMs built in compliance with JEDEC standards? The solution ultimately approved by Rambus's senior management, in mid-1998, was to launch a corporate-wide document destruction campaign, under the guise of a so-called "document retention" policy.
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> . . . . . .
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> [W]hether it was [Rambus Chief Executive Officer Geoffrey] Tate or [Joel] Karp who initially conceived of Rambus's document destruction plan is largely immaterial. The fact is that all of Karp's actions in this regard were done with Tate's blessing and approval, if not pursuant to his controlling directives. Even if it was Karp's idea in the beginning, Tate adopted the idea as his own and made the destruction of documents one of his personal "goals."

Id. at 30, 53.

The only way for Rambus to rebut this misrepresentation was to demonstrate that the idea to develop a document retention policy came from Mr. Johnson, someone outside the company. Instead of citing to Mr. Johnson's involvement for purposes of assigning responsibility for the document policy to him, as would occur in a typical advice of counsel scenario, Rambus cited to his involvement merely for purposes of explaining the true context in which the policy came to be created. Accordingly, Rambus

introduced evidence: that Mr. Johnson, not Mr. Tate or Mr. Karp, originally suggested that Rambus create a document retention policy; that Mr. Johnson participated in communicating the policy to Rambus employees; and that the policy was based upon samples Mr. Johnson's firm had prepared for other businesses.[1]

None of this information disclosed the *substance* of any confidential attorney-client communications. Rambus did not disclose any actual advice it received from Mr. Johnson about its document retention policy, nor did it disclose any confidential communications upon which he relied in formulating his advice. Thus, Rambus did not raise an advice of counsel defense, or subject itself to the implied waiver that accompanies such a defense.

Given that Rambus has not asserted an advice of counsel defense, Complaint Counsel's arguments for a finding of a broad subject matter waiver fall flat. Most of the cases cited in Complaint Counsel's memorandum involve situations where a party asserted an advice of counsel defense. *United States v. Workman*, 138 F.3d 1261 (9th Cir. 1998); *United States v. Exxon Corp.*, 94 F.R.D. 246, 249 (D.D.C. 1981); *Minnesota Specialty Crops, Inc. v. Minnesota Wild Hockey Club, L.P.*, 210 F.R.D. 673, 676-77 (D. Minn 2002); *Thermos Co. v. Starbucks Corp.*, 1998 WL 781120 (N.D. Ill. 1998); *SNK Corporation of America v. Atlus Dream Ent. Co.*, 188 F.R.D. 566 (N. D. Cal. 1999). These cases therefore do not support a waiver of privilege under the circumstances in this proceeding. *See, e.g., Minnesota Specialty*, 210 F.R.D. at 679 ("But for the Defendants' adoption of an advice-of-counsel defense, they would have been entitled to shield these

[1] It was in this limited context of describing the genesis of its document retention policy that Rambus indicated that it was adopted "on counsel's advice." Rambus Opposition Memorandum at 3.

advices from the Plaintiff's scrutiny. . . . "); *Kirschner v. Klemons*, 2001 WL 1346008, *4 (S.D.N.Y. 2001)(finding subject matter waiver improper where party did not assert advice of counsel defense).[2]

Not having recourse to the implied waiver that accompanies an advice of counsel defense, Complaint Counsel cannot otherwise justify invasion of Rambus's privilege. Indeed, Rambus is amazed at Complaint Counsel's effrontery even to argue for privilege waiver under these circumstances. Complaint Counsel themselves made a flatly erroneous representation to Your Honor about the origin of Rambus's document retention policy, well aware that the only way Rambus could refute that representation was by disclosing that its outside attorneys first suggested the policy. For Complaint Counsel now to argue that, in correcting the misimpression they had created, Rambus thereby effectuated a broad subject matter waiver of attorney client privilege, is frankly astounding. In any event, by refuting Complaint Counsel's false contentions, Rambus did not surrender its right to claim privilege. "To waive the attorney-client privilege by voluntarily injecting an issue in the case, a defendant must do more than merely deny a

[2] The other cases cited in Complaint Counsel's Memorandum support a subject matter waiver where the party claiming privilege has affirmatively disclosed privileged communications for its own benefit in litigation. *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("When a party *reveals part of a privileged communication* in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter. . . .")(emphasis added); *United States v. Bilzerian*, 926 F.2d 1285, 1291 (2d Cir. 1991) (purpose for expanding scope of waiver is "to avoid a defendant's use of the privilege to prejudice his opponent's case or *to disclose some selected communications for self-serving purposes*")(emphasis added); *McLaughlin v. Lunde Truck Sales, Inc.*, 714 F. Supp. 916 (N.D. Ill 1989)(finding privilege waived where defendants introduced affidavit from their attorney to prove good faith reliance). As noted in the next section, Rambus has not disclosed any of its confidential communications in response to Complaint Counsel's Motion for Default Judgment.

plaintiff's allegations." *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987).

Nor can Complaint Counsel argue that invasion of the privilege is justified because its Motion For Default Judgment implicates the state of mind of Rambus employees in adopting and implementing its document retention policy, and disclosure of attorney-client communications could be relevant to determine their state of mind. Such an argument was flatly rejected in *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851 (3d Cir. 1994). In *Rhone-Poulenc*, the district court had found that, by filing an insurance coverage action, the plaintiff had placed "at issue" legal advice relating to its knowledge of its pre-existing claims when it purchased the insurance, thereby waiving privilege as to such advice. The Third Circuit reversed, finding that, as the plaintiffs had "not interjected the advice of counsel as an essential element of a claim in this case," *id.* at 864, a finding of waiver was improper:

> Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by *disclosing or describing an attorney client communication*.

Id. at 863 (emphasis added). Thus, the Court held, a "party does not lose the privilege to protect attorney client communications from disclosure in discovery when his or her state of mind is put in issue in the action. While the attorney's advice may be relevant to the matters in issue, the privilege applies as the interests it is intended to protect are still served by confidentiality." *Id*. at 864.

Here, Complaint Counsel are entitled to inquire, and have inquired, into the state of mind of non-attorneys with regard to the development or implementation of Rambus's

document retention policy. They cannot, however, further probe into Rambus's confidential attorney client communications. As the Court noted in *Rhone-Poulenc*,

> Facts are discoverable, the legal conclusions regarding those facts are not. A litigant cannot shield from discovery the knowledge it possessed by claiming it has been communicated to a lawyer; nor can a litigant refuse to disclose facts simply because that information came from a lawyer.

Id.; *see also Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc.*, 111 F.R.D. 76, 81-82 (S.D.N.Y 1986) (["I]t would be useful and convenient for [plaintiff] to obtain [defendant's] privileged material, and the substance of its confidential communications with its attorneys might reveal some of what [defendant] knew. *But those are not reasons to void the attorney-client privilege*. . . . [Plaintiff] is not entitled to learn from [defendant] what [defendant's] lawyers told it[, b]ut may ask [about defendant's] belief or understanding . . . , for [defendant] is required to disclose its thoughts and knowledge, whether or not acquired from conversations with its attorneys.")(emphasis added); *Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co.*, 1994 WL 510043 (S.D.N.Y. 1994) ("Even where a party's state of knowledge is particularly at issue, . . . waiver of the privilege should not be implied because the relevant question is not what legal advice was given or what information was conveyed to counsel, but what facts the party knew and when.").

In sum, Complaint Counsel's reliance on cases involving an advice of counsel defense to justify disclosure of Rambus's attorney-client communications is misplaced, and does not support the compelled disclosure of privileged communications sought by its present motion.

B. Rambus Did Not Waive Privilege In Its Opposition To Complaint Counsel's Motion.

Complaint Counsel also purport to identify specific "assertions from Rambus's [Opposition] Memorandum" which "must be said, in fairness, to have opened the door" to discovery of all privileged communications relating to document retention policy and litigation strategy. Complaint Counsel Memorandum at 5. As demonstrated below, however, not a *single* statement cited by Complaint Counsel discloses a privileged communication, and thus none of these "assertions" supports Complaint Counsel's claim of waiver.

Rambus's Assertion	**Why It Does Not Support Complaint Counsel's Waiver Claim**
"[redacted], Rambus hired Cooley Godward, a highly regarded Silicon Valley law firm with many clients in the technology industry, [redacted]" Rambus Opp. at 3.	Information concerning the date when Rambus met with outside counsel is simply part of the "structural framework" of the relationship, and is not privileged. *Condon v. Petacque*, 90 F.R.D. 53, 53 (N. D. Ill. 1981) ("The privilege does not foreclose inquiry into the fact of representation itself or the dates upon which services are rendered as long as the substance of the attorney- client relationship is shielded from disclosure. Thus, while the 'structural framework' of the attorney-client relationship may be discovered, the substance of that relationship must remain confidential.") The statement concerning the purpose for which Cooley Godward was retained also does not divulge confidential communications. "[T]he attorney-client privilege has never been construed to prevent the disclosure that a person retained the attorney for a particular purpose." *Evans v. Atwood*, 177 F.R.D. 1, 4 (D.D.C. 1997) (*citing Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977)).

Rambus's Assertion	**Why It Does Not Support Complaint Counsel's Waiver Claim**
"[redacted] Thus, Complaint Counsel are wrong when they assert that the idea of adopting a document retention policy 'first originated' with Mr. Karp or Rambus's CEO Geoff Tate." Rambus Opp. at 3-4 (citations omitted).	These passages relate to (i) [redacted]; and (ii) [redacted] Neither statement involved any Rambus confidential information, and thus neither is privileged. *See Evans*, 177 F.R.D. at 3 ("[T]he attorney-client privilege protect[s] from disclosure the communications made *by* the client *to* the attorney for the purpose of seeking legal advice. . . . The privilege protects the communications made by the attorney to the client only insofar as the attorney's communications disclose the confidential communications from the client.")(emphasis added). [redacted] They thus did not disclose any privileged communications.[3]
"[redacted]" Rambus Opp. at 4.	Again, this anecdote concerning Mr. Johnson's experience with *another* client does not disclose any confidential communications concerning Rambus, and is not privileged.

[3] Complaint Counsel suggest that Mr. Johnson's description of his "experiences" is analogous to the attorney disclosures which were found to support a subject matter waiver in *McLaughlin v. Lunde Truck Sales, Inc.*, 714 F.Supp. 916 (N. D. Ill. 1989). *See* Complaint Counsel Memorandum at 10. Nothing could be further from the truth. In *McLaughlin*, the disclosures involved the very same representation as to which the party had asserted privilege. Here, the "experiences" that Dan Johnson recounted involved his earlier representation of a third party, not Rambus.

Rambus's Assertion	**Why It Does Not Support Complaint Counsel's Waiver Claim**
"Mr. Karp, who is not a lawyer, drafted the document retention policy Rambus adopted in July 1998 in reliance on the sample policies he received from the Cooley Godward firm. The various provisions of the policy reflect standard features found in many document retention policies." Rambus Opp. at 5 (citations omitted).	This statement also does not implicate privilege issues. First, it refers to a non-lawyer, Joel Karp. Second, it merely states unprivileged facts: (i) that Mr. Karp drafted the document retention policy; (ii) that he did so based upon samples provided him by lawyers; and (iii) that Rambus's document retention policy has provisions common to many companies' document retention policies. The only fact that even touches upon legal communications is the fact that Mr. Karp modeled the policy on samples he received from lawyers. However, this statement merely indicates that a communication (in the form of the provision of the samples to Mr. Karp) was made – it does not disclose the contents of the communication.
". . . Mr. Karp, the individual at Rambus primarily responsible for drafting the document retention policy, ... was most concerned about a 'third-party type request,' in which Rambus, even though not a party to litigation, would be served with broad requests for documents." Rambus Opp. at 8. ". . . Rambus was motivated by legitimate business concerns in adopting its document retention policy." Rambus Opp. at 9.	This statement has nothing to do with attorney-client privilege. It relates solely to the state of mind of Joel Karp, who is not an attorney. As noted earlier, Complaint Counsel is entitled to inquire about Rambus witnesses' state of mind, but not about their privileged communications. *Rhone Poulenc*, 32 F.3d at 864; *Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc.*, 111 F.R.D. at 82. This statement also has nothing to do with attorney-client privilege. It relates to the state of mind of those Rambus employees involved in developing and implementing Rambus's document retention policy, and does not disclose any attorney-client communications.
"After the document retention policy had been finalized in July 1998, Mr. Karp began the process of making sure that all of the company's employees were familiar with it. As Mr. Karp's notes reflect, that	These passages again relate to the activities of Mr. Karp, a non-lawyer, and do not disclose confidential attorney-client communications. They reflect the process by which Mr. Karp implemented the

Rambus's Assertion	**Why It Does Not Support Complaint Counsel's Waiver Claim**
process proceeded in two steps. First, Mr. Karp and [redacted] After that meeting, Mr. Karp then made a presentation to each of Rambus's operating divisions, during which he explained the terms of the policy, provided further guidance on how each division should go about implementing the policy, and answered any questions employees had about the policy." Rambus Opp. at 12 (citations omitted).	document retention policy and disclosed it to Rambus's employees. The only mention of an attorney is the reference to [redacted] Again, however, this general reference merely discloses the *existence* of a meeting at which privileged communications took place – it does not disclose the content of any such confidential communications. Moreover, disclosure of this type of information cannot waive the privilege because it is precisely the type of information that must be disclosed in a privilege log in order for a party to claim and thus preserve the privilege. Rambus would be required to disclose the fact of [redacted] as a foundation to asserting privilege with regard to any confidential discussions that took place at that meeting. The statement that [redacted] therefore is merely part of the "structural framework" of the attorney-client relationship, and reveals no more than Rambus would necessarily have to disclose to demonstrate the privileged nature of the communications at the meeting.
"Nor did Mr. Karp, *or anyone else at Rambus,* direct employees to target the elimination of either JEDEC-related documents or any other category of documents . . ." Rambus Opp. at 13 (emphasis added).	This passage focuses on the activities of Rambus employees, stating that no one "at Rambus" directed employees to eliminate any category of documents. Again, it does not disclose any confidential attorney-client communications.
The discoverability of documents and the cost of reviewing them was [redacted]	As an initial matter, Complaint Counsel's paraphrase is highly misleading, as it incorrectly suggests that Rambus agrees with Complaint Counsel's baseless contention that it adopted its document

Rambus's Assertion	**Why It Does Not Support Complaint Counsel's Waiver Claim**
[redacted]" Rambus Opp. at 19.	retention policy to avoid documents from being discovered. The cited page from Rambus's Opposition says nothing of the sort, nor have Complaint Counsel cited any evidence in support of this contention. Leaving aside the misleading preamble, the passage quoted from Rambus's opposition merely notes the congruity between the focus of Rambus's ultimate document retention policy and the statements [redacted] Again, it does not disclose any confidential communications.
"[I]f called as a witness, I could and would testify competently under oath to [the] facts [set forth in this declaration] . . . . [redacted] a formal document retention policy, [redacted], and that policy was eventually adopted in July 1998." Karp Decl. ¶ 3 (Attachment to Rambus Opp.).	These statements merely summarize the facts set forth above: the purpose of the Cooley Godward retention; [redacted]; Mr. Karp's role in preparing such a policy, aided by Cooley; and the date when the policy was adopted. Again, no privileged communication is disclosed in this passage.
"[redacted]	[redacted], does not disclose any confidential information pertaining to Rambus, and thus is not a privileged communication.

Rambus's Assertion	Why It Does Not Support Complaint Counsel's Waiver Claim
[redacted], *Id.* at 42." Rambus Opp. at 4.	

In sum, Complaint Counsel cannot point to a *single* statement contained in Rambus's Opposition Memorandum that either (i) discloses a confidential communication by Rambus to its counsel, or (ii) discloses a communication by counsel to Rambus that contained confidential Rambus information. Thus, just as Rambus did not implicitly waive privilege through assertion of an advice of counsel defense, so did it not expressly waive privilege through the voluntary disclosure of privileged communications in response to Complaint Counsel's Motion for Default Judgment.[4]

C. Dan Johnson's Testimony In Another Lawsuit Does Not Justify Complaint Counsel's Request To Invade Rambus's Attorney-Client Privilege In This Case.

As a further ground for delving into Rambus's privileged communications concerning its litigation strategy, Complaint Counsel argue that Rambus waived privilege as to this topic through deposition testimony given *in another case* by Dan Johnson. As shown below, Mr. Johnson's testimony does not support a finding of waiver as to Rambus's litigation strategy.

[4] Moreover, the absence of even a single reference to Rambus's litigation strategy in any of the "assertions" upon which Complaint Counsel rely demonstrates the speciousness of Complaint Counsel's contention that Rambus waived privilege as to that subject matter.

First, and perhaps most fundamentally, Rambus's counsel did not represent Mr. Johnson at his deposition.[5] Johnson Dep., *Micron v. Rambus* (7/28/01), at 21:8-9 **[Tab 1]**. The transcript reflects that Rambus asserted privilege as to virtually every question concerning Rambus's litigation plans. *Id*. at 37:22-39:20; 50:12-51:17 **[Tab 1]**. On some occasions, Mr. Johnson refused to answer the question on grounds of privilege, while on others, he testified notwithstanding the privilege objection.[6] Because the privilege belongs to Rambus, not Mr. Johnson, his testimony on the general subject matter of Rambus's litigation strategy could not, as a matter of law, constitute a waiver of Rambus's attorney-client privilege. *See In re von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987) ("the [attorney-client] privilege belongs solely to the client and may only be waived by him").

Second, the testimony upon which Complaint Counsel rely was elicited by Micron, not by Rambus. Thus, this is not a situation where a party seeks to make affirmative use of testimony concerning privileged communications, and then seeks to prevent the other party from inquiring into those same communications. Mr. Johnson's statements concerning his representation of Rambus all were in response to adverse questioning by Rambus's litigation opponent.

Throughout this questioning, Mr. Johnson attempted to be responsive while at the same time not disclosing any privileged communications, a task made difficult by the

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[5] Mr. Johnson's deposition was designated as "Confidential – Outside Counsel Only" pursuant to the protective order in the *Micron* litigation. A copy of the protective order in this case, which accords confidential treatment in this proceeding to documents designated confidential in *Micron*, is attached hereto at Tab 2.

[6] As reflected in the passages cited by Complaint Counsel, even Mr. Johnson's limited testimony concerning his consultation with Rambus disclosed no specific strategies, but merely described his representation in the most general terms.

manner of the examination.[7] Mr. Johnson was first asked a very broad and relatively innocuous question, *i.e.*, [redacted] After Mr. Johnson answered this question in the affirmative, Micron's counsel further and further narrowed the scope of her questions, thereby encroaching closer and closer upon the substance of [redacted], and thus upon confidential matters. She asked whether [redacted] As the transcript reflects, Mr. Johnson frequently found it difficult to determine which questions he properly could answer without revealing attorney-client confidences. *Id*. at 38:4-7 ("I don't know how to answer that without certainly implicating, in some way, the attorney-client privilege. I don't think I can answer that."); *id*. at 40:12-14 ("The answer is likely to be – or regards to that point in time – I can't answer that without invading the privilege") [Tab 1]; *id*. at 51:14 ("I can't [answer] without invading attorney-client privilege").

[7] Mr. Johnson's deposition was taken on July 28, 2001, shortly after Judge McKelvie had adopted Judge Payne's crime-fraud ruling in the *Infineon* case, and Micron's counsel told Mr. Johnson early in the deposition that **"**there may be topics in the questions that I'm asking you today where the attorney-client privilege has been waived pursuant to the crime-fraud waiver." Johnson Dep., *Micron v. Rambus*, at 19:22-23 **[Tab 1]**. Since the basis for Mr. Johnson's deposition was Judge McKelvie's adoption of Judge Payne's crime-fraud ruling, which in turn derived from a fraud claim the Federal Circuit recently found to be without merit, equity demands that Your Honor take particular care not to extend the unfair harm Rambus has suffered through compelled disclosure of its confidential communications.

Most importantly, Mr. Johnson was not affirmatively offering direct testimony to support Rambus's position and then refusing to submit to cross-examination, which would raise fairness concerns. Instead, he was simply responding to questions posed to him by Rambus's litigation antagonist.

Finally, Mr. Johnson's testimony was given in the *Micron* case, not in this proceeding. In its Opposition to Complaint Counsel's Motion For Default Judgment, Rambus did not cite a word of Mr. Johnson's testimony as to Rambus's supposed "litigation strategy."

The law provides no basis under such circumstances for allowing further inquiry into privileged communications concerning Rambus's litigation strategy. The question of waiver always depends on whether consideration of "fairness negates [the] assertion of privilege." *In re Sealed Case*, 676 F.2d at 817. Concerns of fairness thus will require additional disclosure of privileged communications "to prevent prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective disclosure *during litigation* of otherwise privileged information." *In re Von Bulow*, 828 F.2d at 101 (emphasis added). Where, however,

> disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed. Matters actually disclosed in public lose their privileged status because they obviously are no longer confidential. The cat is let out of the bag, so to speak. But related matters not so disclosed remain confidential. Although it is true that disclosures in the public arena may be "one-sided" or "misleading," so long as such disclosures are and remain extrajudicial, there is no legal prejudice that warrants a broad court-imposed subject matter waiver. The reason is that disclosures made in public rather than in court-- even if selective--*create no risk of legal prejudice until put at issue in the litigation by the privilege-holder*.

In re von Bulow, 828 F.2d 94 (2d Cir. 1987) (emphasis added).

Here, although Dan Johnson's statements were made in a judicial proceeding, it was not this proceeding, and Rambus has made no attempt to introduce those statements before Your Honor. Accordingly, the fairness considerations that arise when a litigant seeks to make one-sided use of privileged communications are not present, and there is no justification for allowing broader disclosure of confidential communications concerning Rambus's litigation strategy. *See United States v. Weissman*, 1996 WL 737042, *31 (S.D.N.Y. 1996) ("the 'subject matter waiver' doctrine is unnecessary when the disclosing party is not attempting to make unfairly selective use of its disclosure."); *Nolan v. City of Yonkers*, 1996 WL 120685 at *2 (S.D.N.Y. 1996) (no subject matter waiver where party asserting privilege "[did] not attempt[ ] to distort factfinding or the judicial process by selectively disclosing potentially misleading evidence"); *Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co.*, 1994 WL 392280 at * 2 (S.D.N.Y. 1994)(no subject matter waiver where defendant "has not sought to use this 'selective' waiver to its advantage in this litigation," and plaintiff did not "suggest[] how it might have been prejudiced by the partial disclosure"); *Strategem Dev. Corp. v. Heron Int'l N.V.*, 153 F.R.D. 535, 544-45 (S.D.N.Y. 1994) ("This is not a case in which the holder of the privilege affirmatively seeks to use privileged testimony while preventing his adversary from examining the remainder of the communication. . . . [Defendant] has not sought to utilize the 144 documents in this litigation, but rather, has merely disclosed them in response to [plaintiff's] broad discovery requests. . . . Thus it cannot be said that [defendant] is using the privilege as both a sword and a shield. Rather, because [defendant] has partially let down its shield, [plaintiff] insists that it must be stripped

entirely. . . . The Court will not permit such a reading of the waiver doctrine.") (quotation omitted).

Finally, independent of the attorney-client privilege, Mr. Johnson's work product is separately protected under the work product doctrine, and would not be subject to disclosure to Complaint Counsel based on his deposition testimony. Thus, even assuming *arguendo* that, by testifying at the most general level about his work for Rambus, Mr. Johnson had disclosed work product information – which he did not – such disclosure would not waive work product protection beyond the specific information already disclosed. *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 860 F.2d 844, 846 (8th Cir. 1988)("disclosure to an adversary waives the work product protection as to items *actually disclosed*.") (emphasis added); C. Wright & A. Miller, *Federal Practice & Procedure*, § 2024 at 367 ("If documents otherwise protected by the work-product rule have been disclosed to others with an actual intention that an opposing party may see the documents, the party who made the disclosure should not subsequently be able to claim protection for the documents as work product. But disclosure of some documents does not destroy work product protection for other documents of the same character."); *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1222 (4th Cir. 1976) ("broad concepts of subject matter waiver analogous to those applicable to claims of attorney- client privilege are inappropriate when applied to [the work product rule").

IV. CONCLUSION

For the reasons stated herein, Your Honor should deny the motion to compel.

DATED: February _____, 2003 Respectfully submitted,

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UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

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

PROPOSED ORDER

Having considered Complaint Counsel's Memorandum in Support of its Motion to Compel Discovery Relating to Rambus's Document Destruction, and good grounds not appearing therefor, Complaint Counsel's Motion is hereby DENIED.

DATED: _____, 2003

_____
James P. Timothy
Chief Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	Docket No. 9302
RAMBUS INCORPORATED, a corporation.	)	

CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on February 14, 2003, I caused a true and correct copy of the public version of the *Memorandum by Rambus Inc. in Opposition to Complaint Counsel's Motion to Compel Discovery Relating to Rambus's Document Destruction* and proposed order to be served on the following persons by hand delivery:

Hon. James P. Timony
Administrative Law Judge
Federal Trade Commission
Room H-112
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