UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC

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

REPLY 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

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Until their opposition to Rambus's application,[1] Complaint Counsel's claim of entitlement to Rambus's attorney-client communications was tethered to Judge Payne's crime-fraud ruling and the jury's fraud verdict in the *Infineon* litigation. Thus, in their original motion to compel, Complaint Counsel argued that they should be granted the same discovery Judge Payne deemed appropriate in that case.[2] Then the Federal Circuit reversed the jury's fraud verdict in *Infineon*, and Complaint Counsel's rationale for obtaining Rambus's privileged communications came crashing down like a house of cards.

Or so one would have expected. On February 28, 2003, notwithstanding the Federal Circuit's decision, Judge Timony granted Complaint Counsel's motion to compel production of Rambus's privileged documents on the never-previously-asserted ground that Complaint Counsel had demonstrated a *prima facie* case of fraud in *this* proceeding. The rulings of the Federal Circuit and Judge Timony, made on virtually identical records, are fundamentally inconsistent. As a result of this inconsistency, Complaint Counsel have been forced to go to elaborate lengths to defend Judge Timony's ruling.

First, Complaint Counsel now purport to make a showing in opposition to Rambus's application that they expressly conceded was *not* a basis for their motion below – *i.e.*, that

[1] The FTC's Rules of Practice provide that answers to applications for review must be filed within 5 days of the filing of the application. Rambus filed its application on March 7, 2003. Complaint Counsel did not file their opposition until March 18, 2003, and thus their opposition is untimely. The present reply assumes that Your Honor will consider Complaint Counsel's opposition notwithstanding its untimeliness.

[2] More specifically, Complaint Counsel argued that, by producing the documents Judge Payne had ordered it to produce in *Infineon* in a separate civil action against Hynix, Rambus had waived its right to challenge the applicability of his order to other proceedings such as this. Based on their *mistaken* belief that Judge Payne's order was unlimited as to time, *see* pp. 13-15 infra, Complaint Counsel further submitted that his order justified production of documents in addition to those which Rambus had produced in *Infineon*. *See* Tab E to Rambus's application, 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 ("Motion to Compel Mem."), at 24.

application of the crime-fraud exception is appropriate in the present proceeding, separate and apart from the finding in the *Infineon* litigation. As shown below, Complaint Counsel fail to suggest how any fraud claim in this proceeding can survive the Federal Circuit's ruling in *Infineon*, and in fact effectively concede that the record before Judge Timony did not support his *prima facie* fraud determination

Second, in attempting to establish a new and a separate basis for applying the crime-fraud exception in this proceeding, Complaint Counsel gloss over the due process requirement that, before such a determination properly could have been made, Rambus would have been entitled to a full and fair opportunity to be heard, including an evidentiary hearing and *in camera* inspection of all privileged documents claimed to fall within the exception.

Third, as an alternative ground for Judge Timony's ruling, Complaint Counsel resurrect a subject matter waiver argument that was not the basis for Judge Timony's ruling and that, in any event, improperly redefines the subject matter of his order to include post-JEDEC communications that clearly fall outside the scope of his crime-fraud ruling.

At present, there is a grave injustice in this case requiring immediate attention. An order from Judge Timony (issued on his the last day on the bench in response to a flurry of last minute papers filed by Complaint Counsel) remains outstanding, holding that Rambus, through its purported fraudulent conduct, has forfeited its right to claim privilege over confidential attorney-client communications, even though: (i) the Federal Circuit has expressly found that Rambus committed no fraud; (ii) Complaint Counsel never made an independent showing of fraud in the proceedings before Judge Timony; (iii) Rambus was never afforded a hearing on the propriety of applying the crime-fraud exception in this proceeding; and (iv) even now, Complaint Counsel identify no evidence that would establish a basis for application of the crime-fraud exception in

this proceeding. To force Rambus to forfeit its privilege under the foregoing circumstances would be an egregious miscarriage of justice. Rambus's motion for reconsideration should be granted and Judge Timony's decision reversed, or in the alternative, the issue should be certified for immediate interlocutory appeal.[3]

II. ARGUMENT

A. Complaint Counsel Cannot Defend Judge Timony's Ruling On The Basis Of A Crime-Fraud Showing They Expressly Disclaimed Making In The Proceedings Below.

Complaint Counsel defend Judge Timony's ruling primarily on the ground that he "had ample evidence at his disposal to support his ruling that a *prima facie* case for the application of the crime-fraud exception has been made."[4] Opp. at 9. It was improper, however, for Judge Timony to rely on this ground, which Complaint Counsel specifically stated was *not* a basis for their motion to compel.

In their Opening Brief before Judge Timony, Complaint Counsel stated in no uncertain terms that "this Motion to Compel is based *solely* on the ground of waiver. . . ." Motion to Compel Mem. at 4 (emphasis added). Complaint Counsel mentioned possible alternative grounds of collateral estoppel and crime-fraud, but indicated that there was *"no reason* Your Honor needs to reach these alternative grounds," and that they had "chosen to reserve them to be raised, *if at all*, at a later time." (emphasis added). *Id*. Rambus relied on these explicit

[3] Complaint Counsel's suggestion that Your Honor should be loath to reconsider Judge Timony's ruling is disingenuous. The case Complaint Counsel cites, *SmithKline Beecham Corp. v. Apotex Corp.*, ___ F.Supp.2d ___, 2003 WL 728889, No. 98 C3952 (N.D. Ill. May 3, 2002), in fact confirms that a second judge "may alter previous rulings if he is convinced they are incorrect." Rambus has demonstrated that Judge Timony's crime-fraud ruling was clearly incorrect, and thus it should be reversed.

[4] Complaint Counsel's Opposition To Respondent's Application For Review Of The February 28, 2003 Order Granting Counsel's Motion To Compel Discovery Relating To Subject Matters As To Which Rambus's Privilege Claims Were Invalidated On Crime-Fraud Grounds And Subsequently Waived, Pursuant To Rule 3.23(b), Or, In The Alternative, Request For Reconsideration Of That Order ("Opp.") at 9.

statements from Complaint Counsel in limiting its opposition to Complaint Counsel's motion to the waiver issue. *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 ("Mot. To Compel Opp."), at 3 ("Complaint Counsel . . . expressly disclaim any intent to make . . . a [crime-fraud] showing").

Complaint Counsel now purport not only to defend the propriety of a crime-fraud finding they never requested, but to do so with evidence outside the record on their motion to compel. *See* Opp. Mem. at 10 (citing evidence from Motion for Default Judgment and Motion to Compel An Additional Day of Deposition Testimony of Richard Crisp). Fairness dictates that Complaint Counsel not be permitted to disavow any intent to rely on a specific ground for a motion, and then turn around and cite that very ground (and newly-asserted evidence) as support for a ruling already made. *Cf. FTC v. Glaxosmithkline*, 294 F.3d 141, 145-47 (D.C. Cir. 2002) (precluding FTC from relying on new argument in support of petition for enforcement of subpoena calling for privileged communications).

B. Due Process Would Entitle Rambus To A Hearing Before A Determination That The Crime-Fraud Exception Applies.

When judges decide motions on grounds not raised by the parties, the likelihood of error is high. The motion here was no exception. Judge Timony reached out to make a crime-fraud finding based *not* on the evidence introduced by Complaint Counsel in support of its motion to compel, but rather based upon findings made in connection with Complaint Counsel's motion for default judgment. Order Concerning Complaint Counsel's Motion To Compel Discovery Relating To Subject Matter As To Which Rambus's Privilege Claims Were Invalidated On

Crime-Fraud Grounds And Subsequently Waived ("Order"), at 2. In so doing, he short-circuited Rambus's due process right to be heard on the crime-fraud issue.

This is not, despite Complaint Counsel's characterization, a simple discovery motion involving routine application of the attorney-client privilege and work product doctrine. In its Opening Brief, Rambus pointed out that federal courts have consistently recognized that due process requires that a civil litigant faced with a crime-fraud charge must be afforded a full and fair opportunity to defend its privilege, including a hearing. *See, e.g.*, *Haines Liggett Group Inc.*, 975 F.2d 81, 97 (3d Cir. 1992) ("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, by evidence and argument, at the hearing seeking an exception to the privilege."). Here, Rambus was undeniably deprived of that opportunity. Indeed, given Complaint Counsel's clear statement that their motion was not based on applicability of the crime-fraud exception in this proceeding, Rambus was sandbagged. Rambus had no reason, prior to Judge Timony's Order, even to suspect that the exception was at issue.

In attempting to circumvent Rambus's well-established due process rights (which they remarkably refer to as elevating "form over substance," Opp. at 20), Complaint Counsel rely on the case cited by Judge Timony, *In re Vargas*, 723 F.2d 1461, 1467 (10th Cir. 1983) (which Complaint Counsel did not even cite in support of their motion) involving grand jury proceedings.[5] As Rambus explained in its Opening Memorandum, because of the compelling public interest in the secrecy of grand jury proceedings, courts sometimes allow the government to establish the crime-fraud exception without affording the investigative target an opportunity to be heard. Because of the importance of due process, however, such a procedure is permissible

[5] Complaint Counsel also cite *In re September 1975 Grand Jury Term*, 532 F.2d 734 (10th Cir. 1976), another grand jury case.

only when necessary to further a compelling interest such as grand jury secrecy. *In re Sealed Case*, 151 F.3d 1059, 1075 (D.C. Cir. 1998). Here, no compelling interest justified Judge Timony's refusal to grant Rambus an opportunity to be heard on whether the crime-fraud exception applied in this proceeding. Judge Timony's unsolicited resolution of this issue without benefit of a hearing – or even, for that matter, oral argument – thus violated Rambus's due process rights, and was clearly improper.

C. Complaint Counsel Cannot Articulate A Fraud Theory That Remains Viable In Light Of The Federal Circuit's Decision.

In addition to being unfair, violative of due process, and based upon an unasserted ground, Judge Timony's ruling was simply wrong. The Federal Circuit's reversal of the fraud verdict in *Infineon*, issued after Complaint Counsel filed its motion to compel, eviscerated any basis for applying the crime-fraud exception against Rambus.

Complaint Counsel attempt to evade the inevitable consequences of the Federal Circuit's ruling for their crime-fraud assertion in two ways. Neither has merit.

First, Complaint Counsel assert that they are not bound by the Federal Circuit ruling because that ruling "was limited to the theory of fraud advanced by Infineon in that case. . . ." Opp. at 18. In their motion to compel, however, Complaint Counsel made quite clear that the *only* crime-fraud theory they then understood to be applicable in this proceeding was that asserted by Infineon:

> [T]he *Infineon* court's [crime-fraud] order was clearly correct. In opposing application of the crime-fraud exception, Rambus's sole argument was that Infineon had not made a *prima facie* showing that Rambus engaged in a fraudulent scheme. This argument was never persuasive, but it is entirely unsupportable now that there has been an actual jury verdict that Rambus committed fraud, which was later upheld by the presiding federal district judge applying a clear and convincing evidence standard. Furthermore, the crime-fraud materials themselves clearly bear out the fraudulent scheme that Infineon suspected . . . .

Motion to Compel Mem. at 4-5. With the *Infineon* fraud claim now having been discredited by the Federal Circuit, Complaint Counsel now frantically try to backpedal from their earlier admission. They argue that, in contrast to Infineon's fraud theory, which they characterize as having been based on Rambus's "mere silence," the Complaint in this proceeding "support[s] a *prima facie* finding of fraud" by further alleging "an on-going pattern of conduct intended to mislead and deceive JEDEC members." Opp. at 18.

Complaint Counsel's attempt to craft a new fraud theory on the fly is unavailing. First, to the extent Complaint Counsel would now seek, after the time to amend the pleadings has passed, to change the theory of liability alleged in their Complaint (a theory, as shown below, expressly predicated upon Rambus's alleged violation of JEDEC's *disclosure* policies), any such action would necessarily be improper, as it would constitute an unauthorized and untimely attempt to amend the pleadings, and would greatly prejudice Rambus at this late stage of the proceeding.

Second, precisely because they are constrained by the allegations in their Complaint, Complaint Counsel fail to identify any purportedly fraudulent activity by Rambus other than the non-disclosures that underlay Infineon's fraud claim. Thus, while citing case law for the non-controversial proposition that fraud liability may lie without an express duty to disclose where "the conduct at issue goes beyond silence, and includes conduct such as statements of half-truths,"[6] Opp. at 18, Complaint Counsel do not identify any representations by Rambus that could be characterized as "half-truths" supporting a fraud determination in this proceeding. The "on-going pattern" of misleading and deceptive conduct by which they seek to distinguish their claims from Infineon's consists merely of Rambus's prosecution of patent applications and

[6] The only case that Complaint Counsel cite for the broader proposition that mere "[o]missions or concealment of material information can constitute fraud" absent a disclosure duty is *United States v. Keplinger*, 776 F.2d 678, 697 (7th Cir. 1985). This case involves the specific elements of the federal mail fraud statute, and thus is inapposite to the antitrust claims here.

enforcement of the resulting patents against computer memory manufacturers. *Id*. at 2; 14-15; 16. Complaint Counsel does not, and cannot, explain how the non-communicative acts of prosecuting and enforcing patents could ever constitute a "half-truth" or otherwise support a finding of fraud.[7]

Finally, and not surprisingly given that their allegations were based on the same theory asserted by Infineon, Complaint Counsel's purported new "fraud" theory is not "new" at all, as it was also asserted by Infineon:

> Rambus' fraud included not only its silence *and other misleading conduct* at JEDEC related to the development and adoption of the JEDEC SDRAM and DDR SDRAM standards, but also the *subsequent assertions of its patents* against JEDEC members such as Infineon who sell products based on these standards. Both Rambus' conduct at JEDEC, and later assertions of its patents against JEDEC standard based products, were necessary for Rambus to profit from its fraudulent scheme.

Supplemental Opposition to Renewed JMOL, *Rambus v. Infineon*, **[Tab 1]** at 2 (emphasis added).

Further confirmation that Complaint Counsel's fraud theory is simply a warmed-over version of the theory rejected in *Infineon* is provided by their description of the evidence supporting Judge Timony's fraud ruling:

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[7] Nor do Complaint Counsel's citations to their Complaint provide such a basis. Complaint, ¶ 2 (containing only vague and conclusory allegation of "other bad-faith, deceptive conduct" in addition to concealment of information); *Id*., ¶ 54 (alleging that communications between Rambus JEDEC attendees and Rambus executives or patent counsel constituted "bad faith," not that such communications – none of which were made to JEDEC – were fraudulent); *id*., ¶ 71 (alleging that "Rambus's very participation in JEDEC, coupled with its failure to make patent-related disclosures [in other words, Rambus's silence while a JEDEC member, the conduct found not to constitute fraud in *Infineon*], conveyed a false and misleading impression"); ¶ 72 (alleging that Rambus did not "elect to make . . . disclosures"); ¶ 73 (alleging that Rambus JEDEC letter "said nothing" concerning Rambus's patent position and "made no reference" to certain allegedly material facts); ¶ 76 (Rambus's disclosure of an issued patent "did nothing to alert JEDEC's members to" Rambus's state of mind); ¶ 86 ("[m]ore important than what the June 1996 withdrawal letter said is what it failed to say"); ¶ 87 (further describing what the June 1996 letter allegedly "failed to disclose").

> Documents and testimony reviewed by Judge Timony establish that Rambus pursued a scheme, contrary to its obligations as a JEDEC member and to duties imposed under the patent and antitrust laws, to continue to prosecute existing applications containing claims covering, and to amend pending patent applications to add claims to cover, *technologies under consideration by JEDEC*, all without informing JEDEC, and later to enforce its patents against the industry to collect royalties.

Opp. at 10 (emphasis added).

The Federal Circuit expressly rejected the notion that Rambus owed any duty to inform JEDEC that it was prosecuting applications with claims covering "technologies under consideration by JEDEC." Instead, the Court held:

> [A] reasonable jury could find only that the duty to disclose a patent or application arises when a license under its claims reasonably might be required *to practice the standard*. . . . [¶] [T]he disclosure duty does not arise for a claim that recites individual limitations directed to a feature of the JEDEC standard as long as that claim also includes limitations not needed to practice the standard. . . . . [¶] To hold otherwise would contradict the record evidence and render the JEDEC disclosure duty unbounded. Under such an amorphous duty, any patent or application having a vague relationship to the standard would have to be disclosed.

Rambus, Inc. v. Infineon Technologies AG, 318 F.3d 1081, 1100-01 (Fed. Cir. 2003) (emphasis added). Because Rambus, during the time it was a JEDEC member, had no patents or patent applications with claims covered by a JEDEC standard, the Federal Circuit found that it had no obligation to make any disclosures:

> The record shows that Rambus's claimed technology did not fall within the JEDEC disclosure duty. . . . . Because there is no expectation that the . . . claims [which Rambus did not disclose] are necessary to implement the [JEDEC] standard, these claims did not trigger Rambus's disclosure duty.

Id. at 1104-05. The Court accordingly concluded that Rambus's actions "do not constitute fraud under [JEDEC's] policy." *Id*. at 1105.

Complaint Counsel make no attempt to link any of Rambus's purported non-disclosures at JEDEC to the disclosure obligation articulated by the Federal Circuit. Instead, they continue to describe the JEDEC policy as requiring disclosure of any patents or applications "that might be involved in the work [JEDEC is] undertaking" – precisely the vague and amorphous standard that the Federal Circuit rejected. Opp. at 10. Complaint Counsel again must adhere to this now discredited position because their Complaint alleges that JEDEC's policy imposed a duty upon members to "disclose the existence of any patents or pending patent applications it knew or believed 'might be involved in' the standard setting work that JEDEC was undertaking. . . ." Complaint, ¶ 79.

Further reflecting their allegiance to Infineon's failed fraud theory, Complaint Counsel advance another position expressly rejected in *Infineon*, seeking to charge Rambus with culpability on the purported ground that their JEDEC representative "believed [certain technologies discussed at JEDEC] were covered by claims in Rambus's pending patent applications." *Id*. at 13. As the Federal Circuit held, however, a "member's subjective beliefs, hopes, and desires are irrelevant. Hence, Rambus's mistaken belief that it had pending claims covering the standard does not substitute for the proof required by the objective patent policy." 318 F.3d at 1104.

Lastly, Complaint Counsel characterize Rambus's post-JEDEC patent activity as part of its fraudulent conduct. Opp. at 14 ("After it withdrew from JEDEC, Rambus continued with its scheme of developing and prosecuting patent applications in order to obtain issued patents containing claims covering the JEDEC standards. . . . Rambus also filed new patent applications intended to cover the same technologies that had been the subject of earlier patent applications"). Again, the Federal Circuit expressly rejected the notion that Rambus's disclosure obligations to

JEDEC extended to future activities, such as patent prosecution after Rambus left JEDEC: "[T]he patent policy requires disclosure of certain 'patents or pending patents' – not disclosure of a member's *intentions to file or amend* patent applications. . . . Thus, the record supports only the conclusion that a member's intentions to file or amend applications do not fall within the scope of JEDEC's disclosure duty." 318 F.3d at 1102. Any filing or amendment of patent claims after Rambus left JEDEC accordingly would not be subject to any disclosure obligation, and thus could not constitute fraudulent conduct. *Id.* ("Because the patents-in-suit were filed *after Rambus left JEDEC* in 1996, Infineon relies [for its fraud claim] on [non-disclosure of] *other* applications Rambus had pending *before* its 1996 withdrawal from JEDEC") (emphasis added).[8]

[8] The critical fact that Rambus had no disclosure obligations once it left JEDEC highlights the flawed and overreaching nature of Judge Timony's ruling. Judge Payne's crime-fraud ruling in *Infineon* required Rambus to produce documents reflecting legal advice concerning: (i) Rambus's efforts to broaden its patents to cover matters pertaining to the JEDEC standards; (ii) Rambus's disclosure of patents and patent applications to JEDEC; and (iii) JEDEC's disclosure policy. Judge Timony's order expanded that ruling to the time period after Rambus withdrew from JEDEC. March 7, 2001, Order, *Rambus v. Infineon* **[Tab 2]**. Whatever the appropriateness of Judge Payne's original order permitting inquiry into these areas for the time period Rambus was a member of JEDEC, there was absolutely no basis for allowing inquiry into such matters after Rambus left JEDEC, and thus no longer had any disclosure obligations.

This becomes apparent upon consideration of the types of communications that would be subject to Judge Timony's expanded order. Legal advice concerning Rambus's efforts *after leaving JEDEC* to broaden its patents to cover matters pertaining to the JEDEC standards could not be in furtherance of fraudulent activity because Rambus was not subject to any disclosure obligation once it left JEDEC, and thus was free to broaden and amend its patent claims as it saw fit. Rambus's post-JEDEC legal advice concerning its disclosures to JEDEC and JEDEC's disclosure policy, meanwhile, by definition would be legal advice relating to Rambus's *past* acts while a JEDEC member, and thus also would not be part of any *ongoing* fraudulent activity. *See United States v. Zolin*, 491 U.S. 554, 562-63 (1989) (crime-fraud exception applies "where the desired advice refers to . . . future wrongdoing," not "prior wrongdoing") (quoting 8 J. Wigmore on Evidence § 2298, p. 573); *In re Federal Grand Jury Proceeding* 89-10, 938 F.2d 1518, 1581 (11th Cir. 1991) ("the crime-fraud exception does not operate to remove communications concerning past or completed crimes or frauds from the attorney-client privilege"); *In re Sealed Case*, 754 F.2d 395, 402 (D.C. Cir. 1985).

In short, despite their attempt to deck out their fraud theory in new clothing, Complaint Counsel merely parrot the same non-disclosure theory that the Federal Circuit has already rejected in the *Infineon* case.

For all the reasons stated in the Federal Circuit's opinion, the evidence does not support a finding of fraud based on Rambus's failure to disclose its patent applications to JEDEC. Indeed, Complaint Counsel themselves concede as much. Complaint Counsel's second argument for avoiding the consequences of the Federal Circuit decision is that they "*expect*[] to have a large volume of evidence regarding the JEDEC duty to disclose that was not part of the Infineon record. . . . ," and "*expect*[] to present evidence (which was not presented in the Infineon litigation) that Rambus had patent applications pending at the time it was a member of JEDEC that would satisfy the Federal Circuit's standard." Opp. at 18-19 (emphasis added). Complaint Counsel's acknowledgement that they cannot identify such evidence at the present time speaks volumes. Judge Timony's crime-fraud ruling obviously could not properly have been based on Complaint Counsel's mere "expectations" concerning evidence they might some day uncover.

In sum, Complaint Counsel: (i) concede that the evidence in the record at the time of Judge Timony's ruling did not demonstrate fraud under the theory in that the Federal Circuit rejected in *Infineon*; and (ii) fail to articulate any basis for asserting fraud under a theory different than that applied in the *Infineon* case. Taken together, Complaint Counsel's opposition itself demonstrates that Judge Timony's crime-fraud ruling had no legitimate basis.

D. Judge Timony's Order Cannot Be Justified On The Basis Of Waiver.

Complaint Counsel acknowledge that Judge Timony did not "explicitly address whether or not Rambus waived its attorney-client privilege in voluntarily submitting certain documents to Hynix [in civil litigation]." Opp. at 22. Nonetheless, they contend that Your Honor could affirm

Judge Timony's ruling on the ground of waiver. As explained below, Judge Timony's order is not defensible on that ground.

First, it is important to understand Complaint Counsel's waiver argument.[9] In the *Infineon* litigation, Rambus was ordered to produce a set of privileged documents based upon Judge Payne's finding that the crime-fraud exception applied. Many of these documents were used as exhibits in the *Infineon* trial, and become part of the public record. Subsequently, in response to a motion to compel in the *Micron* litigation, Rambus argued that Judge Payne's ruling should not be extended to require production of these documents in other litigation. Rambus lost the motion, and was ordered to produce to Micron the same set of documents Judge Payne had ordered it to produce in *Infineon*.

A few months later, Rambus agreed to produce the exact same set of documents that previously had been produced in *Infineon* and *Micron* to both Hynix and Complaint Counsel. Complaint Counsel now argues that Rambus's production of these documents to Hynix (pursuant to agreement between the parties rather than court order) constitutes a broad subject matter waiver, justifying compelled production of *all* attorney-client communications involving Rambus's post-JEDEC patent prosecutions.

Complaint Counsel's argument is plainly overreaching and should be rejected. Even assuming *arguendo* that Rambus's production of documents to Hynix constituted a "subject matter" waiver (rather than what it was, given the earlier *Infineon* and *Micron* orders and the publication of many of the documents as trial exhibits in the *Infineon* case, *i.e.*, a *de facto* compelled production), that waiver was necessarily limited to the "subject matter" which Judge

[9] A fuller response to Complaint Counsel's waiver argument is contained in Rambus's Memorandum 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. *See* Tab F to Rambus's application.

Payne himself delineated, or communications from December 1991 through June 1996, when Rambus was at JEDEC. *See* April 6, 2001 Telephone Conference, *Rambus v. Infineon*, at 8:1-18 **[Tab 3]**. As Judge McKelvie explained in rejecting a similar request for broader disclosure in the *Micron* litigation, inquiring into communications beyond those dates could not be based merely on Judge Payne's order, but would instead require a showing of an *independent basis* for further intrusion into Rambus's privileged communications:

> [T]o the extent that Micron wants to go beyond that . . . to expand it beyond the June '96 date, under the theory that there's no privilege and that Micron shouldn't be bound by the time limitation set by Judge Payne . . . . I think Micron has to re-establish here, in front of me, a basis for finding no privilege, either under a theory similar to collateral estoppel and an expansion of that, or under a theory that they want to take it head-on and show, in this case, that I could reach the same conclusion Judge Payne did and expand the concept of an exception to the privilege and find that documents beyond June of '96 are not protected.

November 7, 2001 Telephone Conference, *Micron v. Rambus*, at 43:3-8; 43:14-44:7 **[Tab 4]**.

Determination of the scope of the crime-fraud exception is within the trial court's discretion, and courts should err on the side of limiting compelled disclosure. *In re Grand Jury Subpoenas*, 144 F.3d 653, 663 (10th Cir. 1998)("district courts should define the scope of the crime-fraud exception narrowly enough so that information outside of the exception will not be elicited. . . ."); *In re Richard Roe, Inc.*, 68 F.3d 38, 41 (2d Cir. 1995)("The district court shall determine which, if any, of the documents or communications were in furtherance of a crime or fraud, as discussed above. If production is ordered, the court shall specify the factual basis for the crime or fraud that the documents or communications are deemed to have furthered. . . . "). Here, Judge Payne reasonably limited the permissible scope of discovery to the time period during which Rambus was alleged to have committed fraudulent non-disclosures, *i.e.*, the December 1991 through June 1996 time period when Rambus was a member of JEDEC. Judge

McKelvie, taking a separate look at the issue, determined that Judge Payne's definition of the scope of the exception was binding, and should be applied in the *Micron* litigation as well.

Complaint Counsel's present waiver argument is effectively an attempt to re-define the subject matter of Judge Payne's order to extend to the time period *after* Rambus had left JEDEC, when it no longer had *any* disclosure obligations that could even give rise to a fraud claim. Judge Payne, however, who was responsible for defining the subject matter of Rambus's discoverable attorney-client communications, never defined them so broadly. Moreover, as Judge McKelvie noted, any expansion of Judge Payne's order would require an *independent* showing of the applicability of the crime-fraud exception to the post-JEDEC time period, which, for the reasons stated above, has not been and cannot be made on this record. Accordingly, Judge Timony's order cannot be upheld on grounds of waiver.

III. CONCLUSION

For the reasons stated above, Rambus's application, or in the alternative, its motion for reconsideration, should be granted.

DATED: March __, 2003 Respectfully submitted,

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