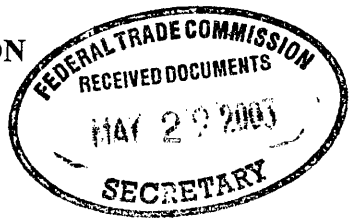
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

ORDER GRANTING REQUEST FOR RECONSIDERATION

I.

On May 13, 2003, the Court entered an Order on Reconsideration of Complaint's Counsel's Motion to Compel Discovery Relating To Subject Matters For Which Respondent Asserts Privilege ("May 13, 2003 Order"). The May 13, 2003 Order ruled, *inter alia*, that Rambus, by producing in other litigation privileged documents from December 1991 to June 1996, waived its right to continue to assert the attorney client privilege for other, undisclosed attorney client communication, including from June 1996 to present.

On May 19, 2003, Respondent Rambus Inc., ("Rambus") filed its Request for Reconsideration and/or Clarification of the May 13, 2003 Order Regarding Rambus's Privileged Documents. Complaint Counsel filed its Opposition on May 27, 2003. For the reasons and in the manner set forth below, Rambus's motion for reconsideration is **GRANTED.**

II.

Rambus asks the Court to reconsider the following determinations of the May 13, 2003 Order: (1) whether the production of documents from December 1991 through June 1996 waived the privilege for documents from June 1996 to present; (2) whether the work product doctrine may be asserted with respect to any materials coming into existence prior to January 1, 2001. In addition, Rambus seeks clarification in certain specific respects of what additional privileged documents must be produced if production of privileged materials other than the December 1991 through June 1996 documents is compelled.

Complaint Counsel opposes reconsideration, arguing that Rambus has failed to demonstrate that the May 13, 2003 Order contains any clear error, creates any manifest injustice, or predates any material change in law or discovery of new evidence.

III.

A motion for reconsideration may be granted only "where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest injustice." *In re Rambus*, Docket 9303, 2003 FTC LEXIS 49 (March 26, 2003) (citing *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F. Supp.2d 1, 3 (D.D.C. 2002)). Upon review of Rambus's Request for Reconsideration, the Opposition thereto, and upon further reconsideration of the pertinent case law, it is apparent that the May 13, 2003 Order contains clear error of law regarding subject matter waiver.

In the *Infineon* litigation and the *Micron* litigation, Rambus was ordered, based on the crime-fraud exception, to produce materials otherwise protected by the attorney-client and attorney work product privileges.[1] In both cases, the materials ordered to be produced were limited in scope to materials created and communications that occurred prior to June 1996. In the *Hynix* litigation, there was no judicial order compelling discovery.[2] Respondent asserts in this litigation, that rather than litigating the privilege issue a third time and facing a likely adverse ruling, it permitted discovery in *Hynix* that tracked the judicially compelled discovery in *Infineon* and *Micron*.

In this litigation, Rambus has produced to Complaint Counsel all of the privileged documents that Judge Payne required Rambus to produce to Infineon, that Judge McKelvie ordered Rambus to produce to Micron, and that Rambus produced to Hynix ("the 1991 to June 1996 privileged documents"). The May 13, 2003 Order found that the production of the 1991 to June 1996 privileged documents to Hynix waived the privileges as to all additional documents - from June 1996 to present - that address the same subject matter as the 1991 to June 1996 privileged documents. As set forth below, this finding is clearly erroneous and is reversed.

Under the controlling legal principles, subject matter waiver is not present in the circumstances presented here. For privilege to be extinguished by subject matter waiver, very specific types of fairness concerns must be demonstrated in the record. Those concerns do not exist here. Complaint Counsel has suffered no prejudice from Rambus's disclosure to Hynix. To the contrary, access to Rambus's attorney-client communications previously disclosed clearly inures to Complaint Counsel's benefit.

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[1] *Rambus Inc. v. Infineon Technologies AG*, No. 3:00cv524 (E.D. Va. Complaint filed on Aug. 8, 2000); *Micron Technology, Inc. v. Rambus, Inc.*, No. Civ 00-792-RRM (D. Del. Complaint filed on Aug. 28, 2000).

[2] *Hynix Semiconductor Inc. v. Rambus, Inc.*, Civ. 00-20905-RMW (N.D. Cal. Complaint filed on Aug. 29, 2000).

The implied subject matter waiver rule is applied in light of its purpose: to prevent parties from gaining tactical advantage by using attorney-client privilege as both a sword and a shield. "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 because 'the privilege of secret consultation is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.'" *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) (emphasis added). Subject matter waiver is "based on fairness considerations" and "aim[s] 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 94, 101 (2d Cir. 1987). A court need not "impose full waiver as to all communications on the same subject matter where the client has merely disclosed a communication to a third party, as opposed to making some use of it." *Sealed Case*, 676 F.2d at 809 n.54; *see also In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 159 F.R.D. 307, 308 (D.D.C. 1994) (noting that under D.C. Circuit case law, judges have discretion to define the subject matter of the disclosed documents narrowly "to prevent the scope of the subject-matter waiver from being unduly broad.").

The pertinent and critical question, then, is whether Rambus's production of the 1991 to June 1996 privileged documents in *Hynix* was made in order to gain a tactical advantage in the litigation. If it was not, then the implied subject matter waiver rule is not applicable. Rambus did not produce the documents at issue to any litigation adversary. Rambus would have preferred to preserve the confidentiality of the documents, but that confidentiality was lost when production of the documents was compelled in the *Infineon* and *Micron* litigations. Rambus obtained no tactical advantage through the production of those documents. Accordingly, Complaint Counsel will incur no prejudice or disadvantage that necessitates the sweeping disclosure of privileged materials sought here.

The concern underlying subject matter waiver is ensuring that a party may not "selectively disclos[e] privileged communications to an adversary, revealing those that support the cause while claiming the shelter of the privilege to avoid disclosing those that are less favorable." *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340-41 (9th Cir. 1996). In *Stratagem Dev. Corp. v. Heron Int'l N.V.*, 153 F.R.D. 535 (S.D.N.Y. 1994), the court rejected subject matter extension of privilege waiver where disclosure was not intended to provide a tactical advantage in litigation.

> 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 [disclosed] [d]ocuments in this litigation, but rather, has merely disclosed them in response to [plaintiff's] broad discovery requests. In fact, it is [plaintiff], not [defendant] that wishes to use this material. "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."

Id. at 544-45 (citations omitted).

Rambus did not selectively reveal favorable confidential documents while shielding less helpful ones behind the privilege. Thus, there was no intended or actual prejudice to Complaint Counsel, and no proper legal basis for the harsh resort to subject-matter waiver. Accordingly, the determination of subject matter waiver in the May 13, 2003 Order is clearly erroneous.

Because, by this Order, the May 13, 2003 determination of subject matter waiver is reversed, it is no longer necessary to determine the scope of the work product protection that Rambus is entitled to assert during the post June 1996 time period. Accordingly, the portion of the May 13, 2003 Order relating to work product is also reversed. In addition, the further clarification that Rambus seeks at pages 19 through 20 of its Request for Reconsideration and/or Clarification, is not necessary.

IV.

It is HEREBY ORDERED that the production of documents to Hynix does not constitute subject matter waiver of the attorney client privilege in this case. The scope of discovery to which Complaint Counsel is entitled is HEREBY LIMITED to the documents created between December 1991 and June 1996 and which were previously produced in the *Hynix* litigation.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

May 29, 2003