

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

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**RAMBUS INC.'S MOTION TO COMPEL
SAMSUNG ELECTRONICS AMERICA, INC. TO PRODUCE
CERTAIN DOCUMENTS WITHHELD ON PRIVILEGE GROUNDS**

To the Honorable James P. Timony, Chief Administrative Law Judge:

Respondent Rambus Inc. (“Rambus”) respectfully submits this Motion to Compel Samsung Electronics America, Inc. to Produce Certain Documents Withheld on Privilege Grounds in accordance with Commission Rule § 3.38(a)(2). An Order granting this motion and requiring prompt compliance with Rambus’s discovery requests is attached as Appendix A.

I.

INTRODUCTION

In response to a subpoena served on it by Rambus, Samsung Electronics America, Inc. (“Samsung”) has withheld numerous documents from production because they are supposedly subject to a “joint defense” privilege. Samsung’s privilege claims are without merit. Samsung has not identified a *single* attorney who was an author or even a recipient of *any* of the documents, and it has not shown that any of the documents contain communications whose principal purpose was obtaining legal advice from a lawyer. Instead, all that Samsung has done is list the dates, authors and recipients of the communications in question. *See* Declaration of Steven M. Perry (“Perry

Decl.”), ¶¶ 2-3; exhibit A. The log’s description of most of the documents is the same: “confidential communications re: alternative technology.” *Id.*

According to Samsung’s counsel, these so-called “joint defense” documents relate to the work of a multi-party industry group called Advanced DRAM Technology (“ADT”), which was formed in 1999 or 2000 to develop future generations of memory technology. *Id.*, ¶¶ 6-7; exhibit D. Based on Rambus’s review of the log entries, the withheld documents appear to consist of communications between engineers and other individuals employed by Samsung, Intel, Elpida, Micron, Hynix, Infineon, and IBM – most of whom are or were ADT members. *Id.*, ¶¶ 7-9.

ADT’s design and development efforts are highly relevant to the issues in this case. The Complaint alleges that DRAM manufacturers are “locked in” to the use of Rambus’s patented technology and cannot design around Rambus’s technology to avoid payment of royalties to Rambus. Complaint, ¶¶ 91, 105. Rambus believes that *if* such “lock-in” exists, it is not because DRAM manufacturers were ever “lulled” into believing that Rambus did not have intellectual property claims involving features used in DRAM devices, but because there are not now, and have never been, economically feasible alternatives that would meet the industry’s performance needs. In other words, Rambus believes that any “market power” surrounding its DRAM patents flows not from any alleged misconduct but from the same market forces that make *any* breakthrough technology extremely valuable.¹

It is evident that questions relating to alternative technologies are highly likely to be at the forefront in the hearing in this case. Moreover, Rambus believes that Complaint Counsel are highly likely to call engineers and executives from many of ADT’s member companies as witnesses on issues relating to alternative technologies. In sum, the multi-party discussions “re: alternative technology” that Samsung has withheld from production are both highly relevant and, as set forth below, are not properly the subject of any legitimate claim of privilege. The

¹ In addition, Rambus’s document subpoenas to third parties are resulting in increasing amounts of evidence that the DRAM manufacturers were well aware that Rambus might claim patent protection for features included in SDRAM and DDR SDRAM devices. The ADT documents are likely to shed light on these issues as well.

documents should be produced forthwith.²

II.

ARGUMENT

A. The Joint Defense Privilege Is Inapplicable To The Withheld Documents.

The joint defense privilege is a narrow exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to third parties. It applies when two or more clients consult an attorney on matters of common interest, or when a client or client's lawyer communicates with a lawyer representing a different client in a matter of common interest. *See Cavallaro v. United States*, 284 F.3d 236, 249-50 (1st Cir. 2002); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). The exception creates an 'implied' attorney-client privilege between one individual and an attorney for another individual. *See In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001); *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000). In other words, the joint defense privilege is intended to protect only those communications (1) between a *lawyer* and a (non-client) third party that are (2) in connection with a joint defense effort, agreement or strategy (3) that has been both (a) decided upon and (b) undertaken. *Schwimmer*, 892 F.2d at 237, 243.

It is settled that communications must *initially* fall within the attorney-client privilege in order to qualify for the joint defense privilege. *Cavallaro*, 284 F.3d at 249-51. As Complaint Counsel recently pointed out in the *Schering-Plough* matter, "[t]he attorney-client privilege, like all privileges, should be 'narrowly construed.'" Complaint Counsel's Opposition to AHP's Motion for Protective Order, *In the Matter of Schering-Plough Corporation*, Docket No. 9297, 2001 FTC LEXIS 188, *15 (Oct. 23, 2001)(citations omitted). Complaint Counsel explained that:

"Narrow construction is necessary because the privilege withholds relevant information from the fact finder, see *United States v. Zolin*, 491 U.S. 554, 562 (1989), and is in derogation of the search for truth, see *In re Sealed Case*, 121

² Counsel for Rambus and counsel for Samsung met and conferred on December 5, 2002 regarding the "joint defense" documents. Perry Decl., ¶¶ 5-6. Samsung's counsel stated that Samsung was not likely to oppose the motion and that Samsung would instead notify other potentially interested parties of Rambus's intentions to file the motion. *Id.*, ¶ 6; exhibit C.

F.3d 729, 749 (D.C. Cir. 1997). The burden of establishing that the challenged documents are privileged and thus exempt from disclosure falls on . . . the party seeking to invoke the privilege. See *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) ('the burden falls on the party seeking to invoke the privilege to establish all the essential elements'). . . . This burden must be met on a document-by-document basis, . . . [and the] party seeking to assert the attorney client privilege . . . 'must offer more than just conclusory statements' . . .and 'broadly stated affidavits' that simply parrot the legal elements of the privilege."

Id. at *15, *16 (some citations omitted).

Under the cases cited above, Samsung has not met its burden in connection with the "joint defense" documents. Samsung has not even attempted to make the necessary threshold showing of an underlying attorney-client privilege. Such a showing would be in any event difficult, if not impossible, given that none of the 112 "joint defense" documents listed in Samsung's privilege log involve communications with an attorney. See *Perry Decl.*, ¶¶ 4-5, 8. Samsung has also failed to show that these communications are between third parties and counsel in furtherance of a joint legal strategy so as to come within the "joint defense" doctrine.

The mere fact that the *commercial interests* of ADT's members in designing alternative DRAM technologies may coincide is insufficient to coat these documents with any privilege. See *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 446-8 (S.D.N.Y. 1995) (holding that "the common interest doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation."). Moreover, even if the documents were at some point transmitted to a lawyer, that would not make the documents privileged. As Judge Haight explained in *Renner v. Chase Manhattan Bank*, 2001 WL 1356192, at *5 (S.D.N.Y. Nov. 2, 2001), "clients and their attorneys often assume, erroneously, that merely conveying something to an attorney will cloak the underlying facts from disclosure. It will not.' (citation omitted). . . Were the rule otherwise, a party could shield quantities of highly relevant and fully discoverable documentary evidence through the simple expedient of conveying copies to his attorney." *Id.*, quoting Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* (ABA Section of Litigation, 4th ed. 2001), at 48.

It is clear that there is no privilege attached to the withheld documents. In addition, as discussed below, the ADT documents are highly relevant to disputed issues in this case.

B. Communications Between ADT Members Concerning Alternative Technologies Are Highly Relevant To This Action.

As noted above, Samsung's privilege log lists communications "re: alternative technology" between various ADT members. ADT announced its formation in 2000 as a collaboration among Micron, Infineon, Hynix, NEC (later Elpida), Samsung and Intel. *See* Perry Decl., ¶ 7, exhibit D. According to the initial ADT press release, ADT's goal was to "develop a high-performance advanced DRAM technology targeting for potential applications in 2003 and beyond." *Id.* The press release stated that "the developers will work together and with industry participants to develop the architecture, electrical and physical design and related infrastructure for this advanced DRAM technology." *Id.*

ADT's design and development efforts are highly relevant here because the Complaint alleges that the industry is now "locked in" to Rambus's patented technology and cannot "work around" Rambus's technology in order to avoid payment of royalties to Rambus. Complaint, ¶¶ 91, 105. ADT's efforts in the 1999-2001 time frame to develop the next generation of memory technology necessarily required it to have considered factors involving the availability of alternatives to Rambus's patented technologies. These efforts are obviously relevant to this case. Indeed, Your Honor recently ordered Mitsubishi to produce documents relating to ADT and other "industry efforts to promulgate alternative standards . . ." Opinion Supporting Order Denying Motion of Mitsubishi Electric & Electronics USA, Inc. To Quash Or Narrow Subpoena, November 18, 2002 at 5.³

As described in Rambus's currently pending Opposition to Micron's Motion to Quash or Limit deposition subpoenas in this matter, Rambus has been obstructed in its past efforts to take discovery on ADT-related issues. The unfounded claims of a joint defense privilege that underlie this motion represent a continued pattern of resistance to this highly relevant discovery. Given the importance of this area, and the fact that discovery deadlines are drawing closer, the documents withheld by Samsung should be produced forthwith.

³ In addition, at least ten of the individuals identified on the privilege log as authors or recipients of the documents in question have been listed on one or both of the parties' witness lists. Perry Decl., ¶ 9.

III.

CONCLUSION

Samsung's claims of joint defense privilege are without merit. None of the documents in question were prepared by or addressed to an attorney. Samsung has not shown that any of the documents pertain to legal advice relating to a joint defense, nor has it shown how the withheld documents advanced such a joint defense. Your Honor should therefore overrule Samsung's privilege claims and order Samsung to produce the "joint defense" documents listed on its privilege log.

DATED: December __, 2002

Respectfully submitted,

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ORDER

Upon consideration of the Motion to Compel Samsung Electronics America, Inc. to Produce Certain Documents Withheld on Privilege Grounds, dated December 9, 2002, and any response thereto,

IT IS HEREBY ORDERED that Samsung's claims of joint defense privilege are OVERRULED and that Rambus's Motion is GRANTED.

IT IS FURTHER ORDERED that no later than 7 days from the date of this Order, Samsung shall produce all documents withheld by Samsung on grounds of a joint defense privilege.

Date: _____

James P. Timony
Chief Administrative Law Judge

PROOF OF SERVICE BY FACSIMILE/FEDERAL EXPRESS

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 355 South Grand Avenue, 35th Floor, Los Angeles, California 90071.

On December 9, 2002, I served the foregoing document described as: **RAMBUS INC.'S MOTION TO COMPEL SAMSUNG ELECTRONICS AMERICA, INC. TO PRODUCE CERTAIN DOCUMENTS WITHHELD ON PRIVILEGE GROUNDS** on the designated parties in this action by having a true copy thereof transmitted by facsimile machine to the number listed below. I caused the facsimile machine to print a record of the transmission, a copy of which is attached to this declaration.

On December 9, 2002, I also served a copy of the aforementioned document on the designated parties in this action by Federal Express overnight courier service. I am "readily familiar" with the firm's practice of collection and processing correspondence for delivery to an employee of Federal Express. Under that practice it would be delivered to an employee of Federal Express on that same day at Los Angeles, California with charges to be billed to Munger, Tolles & Olson's account for delivery to the office of the addressee on December 10, 2002 in the ordinary course of business.

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Executed on December 9, 2002, at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Eunice Ikemoto

UNITED STATES OF AMERICA
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CERTIFICATION

I, Steven M. Perry, hereby certify that the electronic copy of Rambus Inc.'s Motion To Compel Samsung Electronics America, Inc. To Produce Certain Documents Withheld On Privilege Grounds accompanying this certification is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with the Secretary of the Commission on December 10, 2002 by other means.

Dated: December 9, 2002

/s/
Steven M. Perry