

PUBLIC VERSION

**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 FILE A REPLY MEMORANDUM IN SUPPORT OF THEIR
MOTION TO COMPEL DISCOVERY RELATING TO SUBJECT
MATTERS AS TO WHICH RAMBUS'S PRIVILEGE CLAIMS WERE
INVALIDATED ON CRIME-FRAUD GROUNDS AND SUBSEQUENTLY
WAIVED**

I. INTRODUCTION

Complaint Counsel have sought leave to file a reply brief in support of their motion to compel privileged documents. Although Rambus does not in principle oppose Complaint Counsel's filing a reply brief, it objects to Section I.B of the reply brief on the ground that it improperly raises a new argument not raised in the Opening Memorandum – namely, a veiled suggestion that Your Honor should enter a crime-fraud ruling in this case broader than that entered by Judge Payne, which would encompass Rambus's patent prosecution activity after it withdrew from JEDEC.

Rambus also submits that, in light of the Federal Circuit's recent reversal of the fraud verdict in the *Infineon* litigation, Complaint Counsel have no valid ground for seeking further production of privileged documents from Your Honor on the basis of the crime-fraud exception. Rambus submits that the appropriate action for Complaint Counsel to take, in light of the Federal Circuit's ruling, would be to withdraw their present motion.

A. Complaint Counsel's Reply Memorandum Improperly Argues For An Independent Finding Of Crime-Fraud In This Proceeding.

Complaint Counsel's original motion was predicated on a fundamental factual error – Complaint Counsel's mistaken belief that Judge Payne had not placed any temporal limitation on the scope of his order requiring Rambus to produce privileged communications. *See* Opening Memorandum at 24 (“Judge Payne's orders were not limited to time frame”). In fact, Judge Payne had limited the scope of discovery into privileged information to the time period when Rambus was a member of JEDEC.

In its Opposition Memorandum, Rambus pointed out that, as a result of this limitation in Judge Payne's order, even assuming *arguendo* Complaint Counsel's

“subject matter waiver” argument was valid – which, for the reasons stated in Rambus’s Opposition Memorandum, it is not – the scope of the waiver necessarily would be limited to the subject matter defined by Judge Payne, namely, Rambus’s conduct during the time period it was a JEDEC attendee or member, or December 1991 through June 1996.

Stated differently, Judge Payne found there could be no fraud after Rambus withdrew from JEDEC because Rambus had no disclosure duty to JEDEC after leaving the organization. Just this week, the Federal Circuit has confirmed this to be the case.

Rambus Inc. v. Infineon Technologies, ___ F.3d ___, 2003 WL 187265, at * 16 (Fed. Cir., January 29, 2003) (holding that inquiry into time of Rambus’s disclosure duty turns on “whether Rambus *participated in JEDEC proceedings at a time when it had a duty to disclose*”) (emphasis added) [**Tab 1**].

The same result was reached in the *Micron* litigation. Like Complaint Counsel, Micron’s counsel initially asked Judge McKelvie to require Rambus to produce documents beyond those Judge Payne had ordered to be produced in the *Infineon* case. Also like Complaint Counsel, Micron’s counsel mistakenly argued to Judge McKelvie that “[n]either your order, nor Judge Payne’s order, had any time frame or geographic limitation.” November 7, 2001 Telephone Conference, *Micron v. Rambus*, at 34:7-9 [**Tab 2**].

Rambus’s counsel corrected the record, noting that “the time frame that was adopted in the *Infineon* case specifically was ordered to end in June 1996 and . . . post-June 1996 crime fraud documents . . . were never ordered to be produced, have never been produced, and are not the subject of any order of production now.” *Id.* at 37:10-11;

15-18 [Tab 2]. Unlike Complaint Counsel, Micron’s counsel thereupon acknowledged his mistake.

I will accept that correction, your Honor. Apparently, the information given to me about the time frame of the order was just flat wrong and I apologize for that mistake.

Id. at 37:23-38:1 [Tab 2].¹

In contrast to the candor evinced by Micron’s counsel, Complaint Counsel here try to gloss over their misrepresentation of Judge Payne’s crime-fraud ruling, now characterizing his limitation of that ruling to the time period before Rambus withdrew from JEDEC as merely a “pragmatic decision” rather than “a considered ruling.” Reply Memorandum at 13. Complaint Counsel suggest that, regardless of the time limitation Judge Payne actually imposed, the “subject matter” he truly intended to be covered by his order included *any* efforts by Rambus to broaden its patent claims, regardless when they took place. Accordingly, Complaint Counsel argues, this Court should authorize further intrusion into the attorney-client privilege with regard to Rambus’s efforts to broaden patent claims *after* withdrawing from JEDEC. *See id.* at 7-10.

Complaint Counsel’s attempt to place such a self-serving “spin” on Judge Payne’s ruling is misguided. Judge Payne’s limiting of the “subject matter” of court-compelled disclosure of privileged communications to conduct occurring while Rambus was a JEDEC member was not mere happenstance, as Complaint Counsel suggest. Instead, that

¹ Micron’s counsel then argued that, for “logical reasons,” Judge Payne’s order should be extended beyond Rambus’s JEDEC membership. *Id.* at 38:1-5 [Tab 2]. Judge McKelvie, however, determined that Micron would be entitled to such an extension only if it could independently demonstrate a showing of fraud sufficient to justify application of the crime-fraud exception beyond the scope of Judge Payne’s order. Because Micron had not done so, Judge McKelvie declined to order any additional discovery of privileged documents at the hearing. *See* Rambus’s Opposition Memorandum at 12-13, and Tab 9 attached thereto.

limitation was absolutely necessary given that Rambus's disclosure obligations were inherently limited to the time period it was a JEDEC member or attendee.

In moving to compel production of documents pursuant to the crime-fraud exception, Infineon itself realized that Rambus's duties to disclose could arise only from its membership in JEDEC, and thus focused on the time when Rambus was a JEDEC member or attendee. *See Infineon's Memorandum In Support Of its Motion To Compel Deposition Testimony And Documents, Rambus v. Infineon Technologies AG*, at 5 [

]²

In further recognition that any duty of disclosure to JEDEC necessarily ended with Rambus's withdrawal from JEDEC, Judge Payne granted Rambus JMOL on Infineon's fraud claim regarding DDR-SDRAM standards, which were developed by JEDEC after Rambus had left the organization. *See Rambus, Inc. v. Infineon Technologies AG*, 164 F.Supp.2d 743, 764, 777 (E.D. Va. 2001) (after noting that it was "necessary to recall that Rambus attended its last JEDEC meeting on December 6, 1995 and that Rambus formally withdrew from JEDEC by a letter dated June 17, 1996," court concluded that "Infineon failed to prove that Rambus had a duty to disclose pending patents relating to DDR SDRAM because Rambus *was not a member of JEDEC at the relevant time in which the DDR standard was under consideration.*")(emphasis added).

² This Memorandum was filed under seal pursuant to the Protective Order in the *Infineon* litigation. A copy of that protective order is attached hereto at Tab 4.

Thus, in arguing that discovery into privileged communications in *this* proceeding should extend to post-JEDEC communications, Complaint Counsel does not seek to apply Judge Payne’s ruling. Instead, Complaint Counsel seeks to replace the “subject matter” underlying Judge Payne’s ruling with a broader “subject matter” that would pull Rambus’s post-JEDEC patent activity within the scope of the purported fraudulent activity. *See* Reply Memorandum at 11 (“Rambus did not stop its on-going fraudulent scheme the moment it left JEDEC, and the temporal scope of the waiver should include the post-1996 time period.”); *id.* at 12 (“Rambus’s fraudulent scheme to file and prosecute patent applications and to obtain patents covering the technologies used by JEDEC did not stop when Rambus left JEDEC”).

The premise of Complaint Counsel’s argument – that Rambus could have committed fraud by failing to disclose information at a time when it owed no duty to make such disclosure – runs afoul of the most fundamental legal principles, namely, that mere silence does not constitute fraud, absent a duty to disclose. *Rambus Inc. v. Infineon Technologies, Inc.*, ___ F.3d ___, 2003 WL at 187265, * 11 (fraud based on omission of fact requires “duty to disclose”); *see also, e.g., Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478, 1483 (2d Cir. 1995) (“a concealment of fact supports a cause of action for fraud only if the non-disclosing party has a duty to disclose”); *In re Eashai*, 87 F.3d 1082, 1089 (9th Cir. 1996) (“Under common law, a false representation can be established by an omission when there is a duty to disclose.”). By suggesting that Rambus was committing fraud after its JEDEC disclosure obligations had terminated, Complaint Counsel seeks to fashion a fraud theory for this proceeding

that is not only materially different than that considered by Judge Payne in *Infineon*, but legally untenable.

Given the fundamental flaw in Complaint Counsel's argument, it is perhaps not surprising that they waited until this Reply Memorandum to raise it. In effect, Complaint Counsel are attempting, in a Reply Memorandum, to make the very showing that they had previously disavowed – namely, a showing that the application of the crime-fraud exception *in this case* should be broader than in the *Infineon* litigation. It is inappropriate for Complaint Counsel to attempt to make their case for broader application of the crime-fraud exception for the first time in a reply brief. *See, e.g., Tacka v. Georgetown University*, 193 F.Supp.2d 43, 49 (D.D.C. 2001) (court will not consider arguments raised for first time in reply brief).

As Rambus noted in its Opposition Memorandum, a showing of crime-fraud in this case would necessarily require a detailed showing of the conduct alleged to constitute the fraud, *in camera* review of the documents for which discovery is sought, and a hearing at which Rambus could defend against the encroachment upon its privileged communications. This is precisely the showing that Complaint Counsel disclaimed any intention of making in this motion. Opening Memorandum at 4 (reserving right to argue for independent applicability of the crime-fraud exception in this proceeding until “a later time”). Rambus respectfully submits that Your Honor should not allow Complaint Counsel to sidestep the rigorous procedures necessary to expand Judge Payne's order by attempting to show, in a few conclusory paragraphs in a reply brief, that Your Honor should find there to be grounds for applying the crime-fraud exception to Rambus's post-

JEDEC activities. Instead, Your Honor should decline to consider the arguments set forth in Section I.B of Complaint Counsel's Reply Memorandum.

B. The Only Basis For Inquiry Into Rambus's Privileged Communications Was Eliminated By The Federal Circuit's Reversal Of The Fraud Ruling In *Infineon*.

As noted above, Complaint Counsel cannot use their Reply Memorandum to seek to expand upon Judge Payne's crime-fraud ruling in *Infineon*. Even more fundamentally, the basis for Judge Payne's own crime-fraud ruling has now been shown to have been fatally defective. Just this Wednesday, January 29, 2003, the Federal Circuit *reversed* the fraud finding in the *Infineon* case, finding that Rambus did not engage in any fraudulent conduct during the time it attended JEDEC. *Rambus*, ___ F.3d ___, 2003 WL 187265, at *11-19 (Fed.Cir. Jan. 29, 2003) [**Tab 1**]. Based upon this dramatic turn of events, Rambus submits that Your Honor should decline to allow yet further unjustified intrusions into Rambus's privileged communications, and certainly not without the requisite substantive examination of the underlying merits of the request, which Complaint Counsel have not sought to present in their motion.

In their Opening Memorandum, Complaint Counsel, rather than purporting to establish a basis for applying the crime-fraud exception in this proceeding, tethered their motion to the "subject matter" of Judge Payne's crime-fraud order in the *Infineon* case. *See* Opening Memorandum at 4 ("Complaint Counsel submits that Rambus is collaterally estopped from relitigating the issues decided by Judge Payne's March 7 and March 29, 2001 Orders. . ."). Complaint Counsel further argued that Rambus's contention that it had not engaged in a fraudulent scheme "is entirely unsupportable now that there has

been a jury verdict that Rambus committed fraud, which was later upheld by the presiding federal district court judge applying a clear and convincing standard.” *Id.* at 5.

Just two days ago, the foundation upon which Complaint Counsel based their claim to entitlement to additional privileged documents came crashing down. In an opinion issued January 29, 2003, the Federal Circuit *reversed* the fraud finding in the *Infineon* case, finding that Infineon “did not prove fraud associated with [the JEDEC standard, and that n]o reasonable jury could find otherwise.” *Rambus*, ___ F.3d ___, 2003 WL 187265, at *20 [Tab 1]. The Federal Circuit held that Rambus only had a duty to disclose patents or patent applications whose claims “read on” the standards being discussed at JEDEC, and concluded that Rambus did not have any such patents or applications at the time it was a member of JEDEC. *Id.* at *18 (“Infineon had to show by clear and convincing evidence that these undisclosed claims reasonably read on or over the particular standard by JEDEC”) [Tab 1]; *id.* at *20 (“Infineon did not show *any* expectation that the patents and applications identified by the district court covered the SDRAM standard”) (emphasis in original) [Tab 1]. By holding that the evidence did not support a finding of fraud, the Federal Circuit eliminated the very basis for allowing inquiry into Rambus’s privileged communications in the first place.

As a result of Judge Payne’s fraud ruling, Rambus has already suffered significant, irreversible harm to its rights to maintain its privileged communications in confidence. This damage should not be exacerbated by extending that ruling now that it has been demonstrated to have been erroneous.

In sum, without some showing of fraud, Complaint Counsel should not be permitted further to encroach upon Rambus’s privileged communications. Complaint

Counsel have made no showing that the crime-fraud exception properly could be applied in this case, and the finding of fraud in the *Infineon* case upon which Complaint Counsel rely has now been set aside. The only proper result, therefore, is for Your Honor to deny Complaint Counsel's motion, and deny further intrusion into Rambus's privileged communications.

II. CONCLUSION

For the reasons stated herein, Your Honor should deny Complaint Counsel's motion in part, and refuse to consider those arguments raised for the first time in Complaint Counsel's reply brief. Additionally, Your Honor should consider the effect of the recent decision by the Federal Circuit on the arguments raised by Complaint Counsel, and deny their Motion to Compel production of documents beyond those already produced pursuant to Judge Payne's order.

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Respectfully submitted,

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