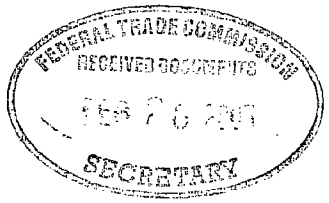

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

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

ORDER CONCERNING 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

Before me is 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. For the reasons set out below, the Motion is Granted.

In its Opposition Memo, Rambus concedes that Complaint Counsel is entitled to receive documents and conduct discovery consistent with the *Infineon* and *Micron* orders as well as the voluntary disclosures by Rambus in the *Hynix* litigation.[1] (Rambus Opp. at pp. 1-2). Based on

[1] While the disclosures by Rambus in *Hynix* apparently tracked the judicially compelled disclosures in *Infineon* and *Micron,* Rambus's disclosures to an adversary in *Hynix* are nonetheless voluntary. *Chubb Integrated Systems Ltd v. National Bank of Washington*, 103 F.R.D. 52, 63 n. 2, 67 (D.D.C. 1984)("Voluntary disclosure means the documents were not judicially compelled."); *see also In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 860 F.2d 844, 846-47 (8th Cir. 1988)(once privileged materials are turned over to an adversary, the confidential nature of the materials and the privilege as to third parties is waived even if the initial disclosure was subject to a confidentiality agreement). While the confidentiality agreement between Rambus and Hynix eliminated the need for judicial intervention, the bottom line is that through the agreement in *Hynix* Rambus tactically attempted to have its cake and eat it too by: (1) producing the discovery materials sought by Hynix without incurring (based on the results in *Infineon* and *Micron*) a probable third adverse ruling by the *Hynix* court; and (2) attempting to preserve the privileged nature of the documents it produced to

this concession, the sole issue I need to resolve is whether Complaint Counsel is entitled to conduct discovery as to Joint Electronics Device Engineering Council ("JEDEC") and computer random access memory ("RAM") patents and patent application related discussions and documents otherwise protected by the attorney-client or the attorney work product privileges that occurred or were generated after June 1996. The significance of this date is that this is when Rambus chose to cease participating in the JEDEC proceedings that were developing standards for RAM that would infringe on patents held or applied for by Rambus.

As indicated in my February 26, 2003 Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument, I believe that there is substantial evidence of record to establish that:

a. Rambus participated in JEDEC through June 1996;

b. Through this participation, Rambus knew or should have known the JEDEC standards for RAM, as developed through June 1996, would infringe on patents held or applied for by Rambus;

c. Rambus knew or should have known that these infringements could potentially lead to substantial licensing fees or damages for Rambus; and

d. Rambus, before it ceased participation in JEDEC in June 1996, failed to disclose the existence of the patents it either held or had applied for that could be infringed by the proposed JEDEC standards to the other JEDEC participants.

Hynix without judicial compulsion. While there is a different standard of analysis for the scope of the voluntary waiver of attorney-client privilege materials (quite broad once the confidential nature of the communication is disclosed) and the voluntary waiver of attorney work product materials (much narrower), *see Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981), I do not need to resolve this distinction here since I conclude that discovery of the post-June 1996 issues addressed in the Motion are subject to the crime-fraud exception and, therefore, not privileged without regard to waiver issue.

Even after Rambus left JEDEC in June 1996, it apparently continued to prosecute patents and patent applications that it knew or should have known from its participation in JEDEC could be of significant value to it. I conclude from these facts that Complaint Counsel has made a sufficient *prima facie* showing that Rambus was involved in an ongoing fraud post-June 1996 concerning the RAM patents it held and had applied for to permit discovery under the crime-fraud exception. *See In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997)("The government satisfies its burden of proof [for a *prima facie*] case if it offers evidence that if believed by the trier of fact would establish the elements of an ongoing . . . fraud.")(citation omitted).[2] Consequently, there is no reason why discovery under the crime-fraud exception must be limited only up to June 1996, the date when Rambus dropped out of JEDEC.[3]

ORDERED:

James P. Timony
Administrative Law Judge

February 28, 2003

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[2] A determination of whether a *prima facie* case of fraud is established can be made based on documentary evidence and sworn testimony, without a hearing. *In re Vargas*, 723 F.2d 1461, 1467 (10th Cir. 1983). My granting the instant Motion should not be construed as a signal that Complaint Counsel definitively has established that Rambus committed fraud.

[3] I believe the transcript excerpt from a hearing in *Infineon* discussed at pp. 10-11 of Rambus's Opposition Memo is inapposite to the resolution of this Motion. While counsel for Infineon appears not to have sought discovery after June 1996 under the crime-fraud exception, no comment by Judge Payne suggests that Infineon was foreclosed from doing so,