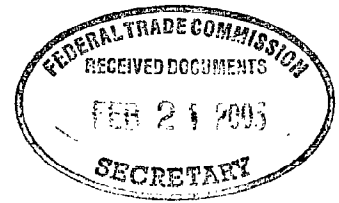


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



Public Version

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**RESPONSE OF COMPLAINT COUNSEL TO RAMBUS INC.'S OPPOSITION TO
COMPLAINT COUNSEL'S MOTION TO COMPEL**

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**I. Despite Rambus's Change in Position with Respect to Pre-1996 Discovery,
a Court Order Is Appropriate**

Complaint Counsel agrees with Rambus that, since Complaint Counsel prepared and filed its motion, the issue has been substantially narrowed to focus on the post-1996 time period. Rambus apparently reconsidered, and abandoned, its original position, that it was "entitled to assert fully the attorney-client privilege, and all other privileges, in this case." Letter from Gregory P. Stone to M. Sean Royall (Dec. 31, 2002) at 2. Rather, Rambus now has decided to permit questioning with respect to documents as to which Rambus had originally claimed privilege, but which Rambus had subsequently produced in the Infineon, Micron and Hynix litigations. Rambus apparently also has decided to permit witnesses other than those who were questioned in those litigations to testify on the same topics. Mem. in Opp. at 18. Complaint Counsel strongly disagrees, however, that no order is necessary even with respect to pre-June 1996 discovery. Mem. in Opp. at 1. Complaint Counsel notes that Rambus carefully remains silent with respect to any pre-June 1996 documents other than those actually produced in the Infineon litigation pursuant to Judge Payne's order. Complaint Counsel has been surprised by

the large volume of non-privileged material, apparently responsive to document requests issued in the private litigation, that was first produced to certain private litigants and to Complaint Counsel in mid-2002 (over a year after conclusion of the Infineon trial), or produced only in the past two months to Complaint Counsel alone. These late-produced materials include such central documents as: (1) e-mails among Rambus executives concerning Rambus's efforts to broaden its patents to cover technology used by JEDEC,¹ (2) e-mails among Richard Crisp, Rambus's primary representative at the JC-42.3 Subcommittee, and Rambus executives discussing the possibility of future patent litigation involving technologies being discussed within JEDEC,² and (3) e-mails from Richard Crisp to Rambus executives discussing whether to disclose Rambus's patents to JEDEC and reflecting Rambus's (and Rambus's lawyers') concerns regarding potential exposure against future litigation.³

In light of the significant volume of highly relevant material, including documents

¹ John Dillon, e-mail, June 16, 1994, R 233773 [Tab 1] (*** REDACTED

***); Richard Crisp, e-mail, September 23, 1995, R 233837 at R 233838 [Tab 2] (suggesting that Rambus "redouble our efforts to get the necessary amendments completed, the new claims added and make damn sure this ship is watertight before we get too far out to sea").

² Richard Crisp, e-mail, September 14, 1994, R 233785 [Tab 3] (*** REDACTED
***); Richard Crisp, e-mail,
October 25, 1994, R 234245 [Tab 4] (*** REDACTED
)]; Allen Roberts, e-mail, September 22, 1995, R 233835 [Tab 5] (REDACTED
***]

³Richard Crisp e-mail, September 23, 1995, R 233837 at R 233838 [Tab 2] ("we have not really made the [JEDEC] committees aware" of Rambus patents, suggesting that Rambus "re-evaluate our position relative to what we decide to keep quiet about, and what we say we have,"); Richard Crisp, e-mail, January 22, 1996, R 234662 at 234663 [Tab 6] ("I understand the concerns about the [JEDEC] patent policy and some potential exposure we could have in the event of a future litigation. . . . So in the future, the current plan is to go to no more JEDEC meetings due to fear that we have exposure in some possible future litigation.").

reflecting Rambus's efforts to broaden its patents to cover technology used by JEDEC and its plan to enforce such patents against the industry, that Rambus did not produce during the course of the Infineon litigation, Complaint Counsel submits that it is by no means clear that Rambus has produced all documents covered by Judge Payne's order and dated before June 17, 1996. Even with respect to the pre-June-1996 time period, Complaint Counsel respectfully submits that Rambus should not be permitted simply to assert that it has produced some documents in the prior litigation, but should be required to confirm, if necessary by conducting a follow-up search, that all documents covered by Judge Payne's order have been produced.

II. Rambus Has Waived Privilege with Respect to the Subject Matter Involved, Which Continues to the Present

Rambus's recent change in position still leaves unresolved the issue of the discovery of documents created, and testimony of witnesses with respect to communications and events occurring, after June 1996, regarding the same subject matter. Rambus's position is mistaken on three counts. First, Rambus's production of formerly privileged material to Hynix was voluntary; even if it was likely that a court ultimately would have compelled production, the simple fact is that no court did so. Second, the scope of Rambus's waiver of attorney-client privilege extends not just to the specific documents that were disclosed, but to the subject matter of what was disclosed; and the subject matter of Rambus's efforts to broaden its patents to cover JEDEC technology extends well beyond June 1996, when Rambus withdrew from JEDEC. Third, even if Your Honor were to consider the temporal scope of Judge Payne's order in determining the subject matter of the waiver, Rambus fails to establish that the April 6, 2001, conference on which it relies, in which Infineon and Rambus agree to the production of documents covering the

period from 1991 through June 1996, limits the scope of Judge Payne's order.

A. Rambus's Production to Hynix Was Voluntary, Even If A Court Order Was Likely.

Rambus argues that it has not waived attorney-client privilege with respect to the subject matter of any materials produced to Hynix because the production of such materials "was already required by prior court order." Mem. in Opp. at 4 (emphasis in original). Rambus misrepresents the nature of the court orders in the *Infineon* and *Micron* litigation. Nothing in either Judge Payne's order or Judge McKelvie's order required Rambus to produce copies of the documents, or the subsequent deposition testimony, to Hynix. Rather, Hynix filed a motion to intervene in the *Infineon* litigation and sought a court order to compel Rambus to produce the materials in question to it. Rambus could have litigated the issue against Hynix. Had it done so, it likely would have lost, and been ordered to produce the relevant material.⁴ The fact of the matter is, however, that it chose not to litigate. Instead, it made a voluntary decision to turn the pre-1996 portion of the material over to Hynix. The likelihood that Rambus would have lost, had it decided to litigate, in no way changes the fact that its decision to produce material to Hynix was a voluntary one. See, e.g., *In re Sealed Case*, 877 F. 2d 976 (D.C. Cir. 1989) (cited by Rambus in its Memorandum at 20) (refusing to distinguish between various types of voluntariness, short of *court-compelled* disclosure); *Chubb Integrated Sys.*, 103 F.R.D. 52, 63 n.2 (D.D.C. 1984) ("Voluntary disclosure means the documents were not judicially compelled"). Because Rambus was not compelled to produce the material in question to Hynix by any court order, its decision

⁴ Indeed, had Rambus decided to litigate the issue, it is likely that the court would have ordered Rambus to produce the materials to Hynix based on principles of collateral estoppel. This in no way changes the simple fact that Rambus chose not to litigate, but instead decided to produce the pre-1996 portion of the materials to Hynix without any court order.

to do so on its own volition waived any privilege that might otherwise have attached.

Rambus further argues that Rambus preserved its rights to reserve any privilege objections to Hynix's use of such documents, conditioning its disclosure on protections similar to those Judge Payne had set forth in its order. Mem. in Opp. 8-9. However, Rambus's voluntary production to Hynix "irrevocably breached" any remaining confidentiality that those materials may have had after the court ordered disclosure from Infineon. *Wichita Land & Cattle Co. v. Am. Fed. Bank*, 148 F.R.D. 456, 459 (D.D.C. 1992).

Although in the June 22, 2001, letter agreement Hynix had agreed that "Rambus's production of documents and deposition testimony under this agreement does not constitute a waiver of any privilege Rambus may otherwise assert in this litigation," any agreements or stipulations between Rambus and Hynix do not undo the destruction of privilege brought about by the act of disclosure: Rambus's voluntary disclosures destroyed the privilege, irrespective of any agreements between those parties that may have purported to preserve the privilege. *See Chubb Integrated Sys.*, 103 F.R.D. at 67, *see also In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F. 3d 289 (6th Cir. 2002)(disclosure to one adversary, despite bilateral agreements that disclosure would not constitute waiver of attorney-client or work product privilege, was an unconditional waiver of privilege vis-a-vis a third party adversary).

The very act of disclosure to Hynix destroyed the privilege vis-a-vis Complaint Counsel, and any conditions and agreements between Rambus and Hynix are ineffective, as a matter of law, to preserve Rambus's claims of privilege vis-a-vis Complaint Counsel. Because the documents at issue have been disclosed voluntarily to Rambus's litigation opponent, Hynix, and the subject matter has been the focus of extensive deposition testimony (which Rambus also

voluntarily disclosed or permitted to be disclosed to its litigation opponent), no privilege can remain, either as to the materials themselves or as to the subject matter.

B. Rambus's Forfeiture of Privilege Extends To The Entire Subject Matter and Is Not Limited to Judge Payne's Order

Rambus's Memorandum spends considerable effort arguing that Judge Payne's order was limited to the time period between December 1991 and June 1996, all the while failing to appreciate that the scope of waiver of privilege is the subject matter of the waiver, not any court order. In other words, quite simply, the scope of Judge Payne's order (even if it were limited in time) does not determine the subject matter with respect to which Rambus has waived its privilege. The subject matter of the disclosure, rather than the time period of Judge Payne's or Judge McKelvie's orders, determines the scope of Rambus's waiver of privilege.

A waiver of the privilege in an attorney-client communication extends "to all other communications relating to the same subject matter." *In re Sealed Case*, 877 F. 2d at 980-81 (quoting *In re Sealed Case*, 676 F. 2d 793, 809 (D.C. Cir. 1982)); see also *Chubb Integrated Sys.*, 103 F.R.D. at 63 ("Actual disclosure of each specific document in issue is not the only means by which a waiver can occur. Voluntary production of certain privileged documents implies a waiver of *all communications on the same subject.*") (emphasis added).

To determine the scope of the waiver of privilege at issue here, it is necessary to consider more carefully the specific subject matter at issue. Of the various topics regarding which Rambus voluntarily disclosed documents and testimony to Hynix, the primary subject matter for which post-1996 discovery is most important relates to Rambus's efforts to broaden its patent claims to cover matters pertaining to JEDEC standards. It is therefore necessary to consider

whether the subject matter of Rambus's efforts to broaden its patent claims is in any way limited to the pre-June 1996 time period, *i.e.*, the time up until Rambus withdrew from JEDEC, or whether that subject matter included post-June 1996 events, communications and documents.

The fundamental fact, ignored by Rambus in its Memorandum, is that Rambus's efforts to broaden its patents to cover JEDEC technology did not end in June 1996. Rather, Rambus actively continued to prosecute patent applications covering technology it had observed in JEDEC long after it withdrew from the organization. The success of Rambus's fraudulent scheme to extract royalties from companies manufacturing, selling or using JEDEC-compliant SDRAMs and DDR SDRAMs depended upon Rambus's continuing to prosecute patent applications before the Patent and Trademark Office, obtaining issued patents that it could assert against such companies, and then threatening to sue or in fact suing such companies for patent infringement. Only after successfully prosecuting patent applications and obtaining issued patents covering selected technologies incorporated in the JEDEC standards could Rambus monopolize the technology markets in question and collect monopolistic royalties. Thus, as found by Judge Payne in his Judgment as a Matter of Law, Rambus's fraudulent scheme involved a plan "to attend JEDEC, remain silent about its patent applications, obtain additional patent claims that covered JEDEC technology, and then assert those patents against JEDEC members whose products conformed to the JEDEC standard in order to obtain their assent to license agreements." *Rambus, Inc. v. Infineon Technologies AG*, 2001 WL 913972 (E.D. Va. August 9, 2001) at *17 (emphasis added). While Rambus's efforts to broaden its patents to cover the JEDEC technology started in 1992, not long after Rambus became a member of JEDEC, its efforts remained incomplete at the time it withdrew from JEDEC in June 1996, and it continued

its efforts after it left until, in 1999, it had a number of issued patents that it could assert against the industry.

Specifically, Rambus chose to produce to Hynix, its adversary in litigation, documents relating to meetings between Rambus's outside patent counsel, Lester Vincent, and various Rambus officers and employees, including Mr. Allen Roberts, Rambus's Vice President, and Mr. Richard Crisp, Rambus's primary representative at JEDEC, as well as testimony from various witnesses concerning such meetings. This evidence described in detail the extensive efforts of Rambus to broaden its pending patent applications to cover technologies being considered for adoption, and adopted, by JEDEC for inclusion into its standards.⁵ The evidence, consisting of testimony, e-mails, handwritten notes, and billing records, among other material, outlines the series of meetings and communications between various Rambus representatives and Lester Vincent from 1992 through late 1995 to develop claims, to be added to the pending Rambus patent applications, specifically directed at SDRAMs, future SDRAMs and other non-Rambus products, and based at least in significant part on information Rambus learned from attending JEDEC meetings.⁶ The evidence makes it possible to ascertain Rambus's intent to amend specific pending patent applications to cover programmable CAS latency, programmable burst length, on-chip PLL/DLL and dual edge clock technologies (among others) when used in JEDEC-compliant SDRAMs. This evidence also establishes that Lester Vincent and other attorneys working under his direction drafted amendments to certain of Rambus's pending patent

⁵ Complaint Counsel's Motion to Compel at 13-20.

⁶*Id.*

applications to add claims covering these technologies, and to prosecute these amended applications before the Patent and Trademark Office.

One of these applications, Application No. 08/222,646, relating to dual edge clock technology, issued as U.S. Patent No. 5,513,327 while Rambus was still a JEDEC member. A second application, Application No. 07/847,692 which Rambus amended in June 1993 to add claims relating to on-chip PLL/DLL, remained pending in June 1996. After Rambus withdrew from JEDEC, Lester Vincent's law firm continued to prosecute the '692 application on behalf of Rambus, which eventually led to the issuance of U.S. Patent No. 5,657,481 in August 1997.

Certain other amendments to patent applications filed while Rambus was a member of JEDEC did not issue as patents and were abandoned, but after leaving JEDEC Rambus filed additional patent applications (based on its previous filings) with claims covering the same technologies. For example, Application Nos. 07/847,961, relating to programmable CAS latency and programmable burst length, and 08/469/490, relating to programmable CAS latency, pending while Rambus was a member of JEDEC, did not issue as patents and were abandoned. In February 1997, however, Lester Vincent's law firm filed, on behalf of Rambus, Application No. 08/798,525, specifically described as a continuation of the '961 and '490 applications, among others. The '525 application in turn was amended to add a claim covering programmable CAS latency. The '525 application issued as U.S. Patent No. 5,954,804. In late 1999 and 2000, Rambus asserted the '804 patent against Hitachi, Infineon, Micron and Hynix, and claim 26 of the '804 patent (covering programmable CAS latency) has been placed at issue by Rambus's experts in the *Infineon* and *Micron* litigations. Although Rambus produced to Hynix attorney-client communications describing Rambus's efforts to broaden its patents to cover programmable

CAS latency during the time when the '961, and later '490, applications were pending, Rambus has refused to produce documents on its on-going efforts to cover the identical technology in the '525 application.

Likewise, even after obtaining patents covering dual edge clock and on-chip PLL/DLL from applications pending while Rambus was a JEDEC member, Rambus continued to pursue additional patents with claims covering these technologies. For example, in November 1997, Lester Vincent filed, on behalf of Rambus, Application No. 08/979,127, containing claims covering dual edge clock technology. The '127 application was specifically stated to be a continuation of the '646 application, which had been filed while Rambus was a member of JEDEC and which also had claims covering dual edge clock technology. The '127 application issued as Patent No. 5,915,105, which Rambus later asserted against Hitachi, Micron and Hynix. Again, although Rambus has produced to Hynix attorney-client communications describing Rambus's efforts to broaden its patent application to cover dual edge clock technology during the time when the '646 application was pending, it has attempted to assert privilege with respect to precisely the same type of communications relating to its efforts to cover the same technology in its '127 application.

Thus, by 1999, as a result of its efforts while it was a member of JEDEC and afterwards, Rambus had succeeded in obtaining a number of issued patents covering programmable CAS latency, programmable burst length, on-chip PLL/DLL and dual edge clock technologies that it could assert against companies manufacturing, selling or using JEDEC-compliant SDRAMs and DDR SDRAMs. In late 1999, Rambus first asserted that JEDEC-compliant SDRAMs and DDR SDRAMs infringed its patents. Rambus carefully selected only the later-applied-for patents for

its infringement suits against Infineon and others, however, in a transparent attempt to try to isolate the patents it was enforcing from its earlier conduct while a member of JEDEC. Despite its efforts, Rambus cannot escape the fact that the efforts of Rambus officers and employees – working closely with and through outside patent counsel – to draft, file and prosecute applications, and ultimately to obtain issued patents, containing claims covering the use of programmable CAS latency, programmable burst length, on-chip PLL/DLL, dual edge clock, and other technologies in JEDEC-compliant SDRAMs and DDR SDRAMs, commenced while Rambus was a member of JEDEC and continued long after Rambus withdrew from JEDEC. In all likelihood, Rambus’s efforts to obtain patent claims covering technologies used in JEDEC-compliant SDRAMs and DDR SDRAMs continues to this very day. The actions of Rambus after it withdrew from JEDEC are inextricably linked to its plan to commit on-going fraud.⁷

Court decisions make clear that a waiver of privilege applies not just to particular documents that are disclosed or to the date or dates of the documents but rather to the entire subject matter of the waiver period. Courts have looked to whether the documents sought are “directly related” to the communications revealed. *See In re Sealed Case*, 877 F. 2d at 981.

The court in *Chiron Corp. v. Genentech, Inc.*, 179 F. Supp. 2d 1182, 1186 (E.D. Ca. 2001), stated, “where the law demands a waiver of privileges, *the scope of the waiver should not be unduly circumscribed*. Thus, the court is not inclined to view the scope of the waiver in this

⁷ Rambus is likely to argue, and ultimately may seek to introduce some form of unsubstantiated testimony, to the effect that its attempts to file relevant patent applications after June 1996 were entirely unrelated to their efforts before June 1996, and instead were the novel brainchild of a newly-hired patent attorney. The plausibility of such arguments is, to put it mildly, highly suspect. Additionally, however, efforts by Rambus to resist, on grounds of attorney-client or work product privileges, discovery of documents and contemporaneous events and communications relating to Rambus’s post-June-1996 efforts to broaden its patent applications to cover technologies used in JEDEC standards should, of course, preclude Rambus from introducing any such unsubstantiated testimony or asserting any such arguments in the future.

case in a fashion that would unfairly keep information from the fact finder which is both relevant and sufficiently related to the issues discussed in the [document that was disclosed].” *Id.* (emphasis added). The *Chiron* court went on to quote, ““The scope [of waiver] must be somewhat broad and is, in fact, a “subject matter” waiver – i.e. a waiver of all communications on the same subject matter.”” *Id.* (quoting *Micron Separations, Inc. v. Pall Corp.*, 159 F.R.D. 361, 363 (D. Mass. 1995)); see also *Minnesota Specialty Crops, Inc. v. Minnesota Wild Hockey Club, L.P.*, 210 F.R.D. 673 (D. Minn. 2002).

In *Chiron*, a patent infringement case, the defendant raised the advice of counsel defense. The defendant admitted that it waived attorney-client privilege for documents on that specific patent. However, the plaintiff argued, and the court agreed, that the defendant had to produce all documents pertaining to the same subject matter as the potentially infringed patent, including documents referencing another patent that patent counsel relied on in their analysis as well as documents referencing any other patents pertinent to the patent attorney’s opinion letter. The court interpreted “subject matter” very broadly and found that many of the documents sought by the plaintiff “serve[d] as a basis” for the opinion letter or were “too related” to the facts of the central patent and had to be produced. *Chiron*, 179 F. Supp.2d at 1187.

The court also interpreted the temporal scope of the waiver broadly. While the defendant argued that the waiver should be cut off at the time of the filing of the infringement action, the court found that “the better authority requires that all communication, both pre- and post complaint filing should be disclosed.” *Id.* at 1188. The court reasoned that this is not a one-time infringement but that the infringement was on-going and would continue through trial. Similarly,

in this case, 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-June 1996 period.

Other courts have recognized that the scope of waiver can extend to cover a transaction or a scheme as a whole. In *Glenmede Trust Co. v. Hutton*, 56 F. 3d 476 (3d Cir. 1995), the Third Circuit interpreted “subject matter” broadly to include documents pertaining to the entire transaction. The defendant company argued that it had waived its privilege only as to the tax advice and other advice set forth in an opinion letter when it asserted the advice of counsel defense. The company objected to production of its attorney’s entire file concerning services it received in connection with the transaction at issue. The court ordered production of the *entire* file. The Third Circuit found that the company’s waiver encompassed the documents concerning the entire transaction including internal law firm back-up documents to the opinion letter which included legal research and other file memoranda. “A review of these internal documents may lead to the discovery of admissible evidence regarding what information had been conveyed to the company about the structure of the buy back and the advice of counsel in that regard.” *Glenmede Trust Co.*, 56 F. 3d at 487. Several other courts have interpreted the scope of waiver in similarly broad terms. *See also In re: Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994) (emphasis added) (“Waiver extended to *all* conversations between the lawyer and him ‘relating to the same subject matter,’ specifically including documents in the case files. . . waiver of the privilege in an attorney-client communication extends to *all other communications* relating to the same subject matter.”). The court in *Naquin v. Unocal Corp.*, 2002 U.S. Dist. LEXIS 15722 (E.D. La. 2002) conducted a very fact-intensive inquiry and concluded that the scope of the waiver stood between defendant’s and plaintiff’s interpretation of “subject matter.”

Applying this precedent to the scope of Rambus's waiver of privilege, it is clear that the waiver extends to the entire subject matter of Rambus's efforts to broaden its patents to cover technologies used in JEDEC standards. By producing to Hynix documents and testimony relating to communications between Rambus officers and employees, on the one hand, and in-house and outside counsel, on the other, concerning Rambus's efforts to broaden its patents to cover the technologies used by JEDEC, Rambus has waived its rights to claim privilege with respect to this entire subject matter. Thus, Rambus's waiver of privilege extends to all communications on the subject, regardless of whether specific consultations took place before or after Rambus left JEDEC. 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; to the contrary, Rambus not only actively continued its efforts to broaden its patents, but it specifically selected the later-broadened patents to assert against manufacturers of JEDEC-compliant SDRAM and DDR SDRAM. Consequently, all communications that are part of this ongoing plan relate to the same subject matter, and the waiver of privilege extends to all such communications, regardless of time frame.

C. The Scope of Judge Payne's Order Is Not Limited To Communications That Occurred Before Rambus Left JEDEC

Even if the court were to look to the scope of Judge Payne's order for guidance, Rambus has failed to establish that his order is limited to the pre-June-1996 time period. Rambus claims that the Infineon court clarified that the time period covered by its order consisted of December 1991 through June 1996. Rambus relies on to the transcript of a telephone conference held on April 6, 2001. The transcript indicates that it was not, however, a considered ruling that served

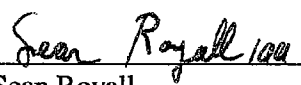
to limit the scope of the crime-fraud ruling, but rather a pragmatic decision, based on suggestion of counsel, with respect to solving a pressing discovery issue. The telephone conference occurred on a Friday, little more than two weeks before the start of trial. The parties were scheduled to begin depositions pursuant to Judge Payne's crime-fraud ruling the next Monday, but were still trying to sort out what documents should be produced for use at those depositions. Counsel for Infineon stated that he "would be content with documents from 1991 through the end of June of 1996." Counsel for Rambus agreed, and Judge Payne said Rambus should get those documents to counsel for Infineon right away so they could be used at the scheduled depositions. April 6, 2001, Conference, attached to Mem. in Opp., Tab 2, at 8:12-13. Indeed, Judge Payne's earlier statement that his order required Rambus to "produce *all* legal advice . . . about . . . the efforts of Rambus to broaden its patent to cover matters pertaining to JEDEC standards," *Id.* at 6:8-15 (emphasis added), is inconsistent with Rambus's view that Judge Payne limited the scope of his order at this time.

III. Conclusion

For the reasons stated herein, Complaint Counsel's Motion to Compel should be granted.

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Dated: January 28, 2003

DECLARATION

I, Melissa Kassier, am a paralegal employed at the Federal Trade Commission and am assigned to work on the Part III litigation *In the Matter of Rambus Inc.* The documents attached to this *Response of Complaint Counsel to Rambus Inc.'s Opposition to Complaint Counsel's Motion to Compel*, were prepared and assembled under my supervision. The documents are true and correct copies of documents submitted to the Federal Trade Commission.

Melissa Kassier, Paralegal

TYPE OR PRINT NAME AND TITLE



SIGNATURE

CERTIFICATE OF SERVICE

I, Beverly A. Dodson, hereby certify that on February 21, 2003, I caused a copy of the attached, *Response Of Complaint Counsel To Rambus Inc.'s Opposition To Complaint Counsel's Motion To Compel*, (public version) to be served upon the following persons:

by hand delivery to:

Hon. James P. Timony
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

and by electronic transmission and overnight courier to:

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Beverly A. Dodson

Exhibit 1
(redacted)

ome further thoughts regarding patent issues and a bit about SycLink

Subject: some further thoughts regarding patent issues and a bit about SycLink

Date: Sat, 23 Sep 1995 10:00:15 +0800

From: crisp@jupiter (Richard Crisp Travelling)

To: exec, tonyd

CC: crisp

One other thought I had regarding Tony's worst case scenario regarding estoppel:

The only thing lost is the ability to enforce our rights against those that can prove estoppel applies: in this case perhaps SyncLink. We do not have our patent invalidated. It is still enforceable on other devices.

Of course I am not convinced that estoppel applies either, as it apparently did not in the case of the Wang SIMM patent (JEDEC standard) nor did it with the 3COM patents (IEEE ethernet standard).

My feeling is that SyncLink is not and will not be viable hence it will not end up mattering from the perspective of directly taking our sockets. It is a obstacle to us furthering our Business Development goals of getting more DRAM licensees as it offers a glimmer of hope to the unfortunately clueless product planning people that they will not have to do a deal with the "Devil" (ie Rambus).

If this persists for much longer, it could materially interfere with our ability to bring up critical mass, capacity wise, to support main memory with some margin (protection against one or more partner bailing a la Fujitsu).

Tabrizi in a semi-intoxicated state told me in Las Vegas in March that his intent in pursuing SyncLink was to screw us up in the market. GM Han of Hyundai/Seoul was with us at the time as well as some Korean R&D guy who's name I unfortunately don't remember. I wanted to make sure each of you knew that he had told me this over dinner back at the Vegas JEDEC meeting.

Also I am getting information that they are working on getting Motorola to join up, know also that Moto is intending to re-enter the DRAM business (historically everytime they do that, the bottom falls out of the DRAM business, btw). Some inside of Moto think that SycLink has merit (don't know who just yet, but working on getting a meeting set up), others have apparently raised the intellectual property question.

And of course TI is a prime mover (but at least Ramesh apparently is unconvinced that it is the way to go). Mitsubishi is also a mover in that area even though Nagasawa is apparently not involved (at least as of May it was solely confined in the US marketing org). Now we see that Samsung is joining up as well, although Peter Cheng says he is the only guy in the corporation really doing anything with it. I wonder what they are really doing in Korea?

So as you can see there several companies that are Rambus have-nots which are dedicating resources to SycLink, and at least one of our partners is moving in that direction as well.

Having said all of that, Tony brings up a good point regarding our patent position within the standards organizations. At the time we began attending JEDEC we did so to learn what the competition was working on and what sort of performance systems using that technology would be able to achieve and what sort of issues would arise when desiging with the devices (primarily SDRAM/SGRAM).

As time passed our reasons for attending JEDEC increased into gaining leads into who was working for what semiconductor company (contact points), and where they were putting their emphasis (as evidenced by what they promoted

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some further thoughts regarding patent issues and a bit about SyncLink

and or opposed). Later, the signalling issues basically replaced the SDRAM/SGRAM interest in that new things were being proposed as a function of the efforts at creating a viable module standard for the SDRAMs.

During the beginning of this period, we had no issued patents. We decided that we really could not be expected to talk about potential infringement for patents that had not issued both from the perspective of not knowing what would wind up being acceptable to the examiner, and from the perspective of not disclosing our trade secrets any earlier than we are forced to.

As time passed some of the patents issued and then we have not really made the committees aware of this fact except for once, when I did and then later was castigated for doing so.

It seems to me that we should re-evaluate our position relative to what we decide to keep quiet about, and what we say we have. It has been clear to me for some time that everyone that wants to know what we have issued will find out if they are willing to invest 10 minutes on the World Wide Web.

So we should tell the world what patents have issued (well at least JEDEC and perhaps SyncLink) to be clean on this. We should also redouble our efforts to get the necessary amendments completed, the new claims added and make damn sure this ship is watertight before we get too far out to sea. The next JEDEC meeting is in December. We can go to any IEEE SyncLink meeting we want to, but not the consortium meetings. IEEE meets about once per month, JEDEC, once per quarter typically. I think that pretty well lays out the timeline.
rdc

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Exhibit 3
(redacted)

Exhibit 4
(redacted)



Exhibit 5
(redacted)



FROM : Richard Crisp <crisp@jupiter>
TO : Geoff Tate <gtate@jupiter>, exec, andy, matt, dillon, crisp
CC :
BCC :
DATE = 01/22/1996
TIME : 11:05:56
SUBJECT : Re: samsung update meeting 96/1/22
ATTACHMENT
BODY :

At 2:07 AM 1/22/96, Geoff Tate wrote:

>**RICHARD**: Mr. Choi said he was very disturbed by a presentation
>mitsubishi gave at JEDEC in december, and that you were in attendance so
>you have it. he said they showed 3dram, sgram, wram, rambus, etc. for
>graphics and unified memory with the conclusion that #1 was 3dram, #2
>sgram, ... and last was rambus. they said they don't care about 3dram
>because it is sole source so it won't go anywhere even if he's right. but
>they think their 8M sgram die-size/bit is smaller than their 16M rdram
>die-size/bit so if rambus costs more it better outperforman sgram.
>Anyways, Richard, please get me a copy of it so I can review and decide how
>we respond. I said we'd send our analysis/explanation in a couple weeks
>(my action item to figure out what to do). I did point out that the real
>competitive test will happen soon when people can sit rambus systems next
>to sdram systems for games and pc's and see actual price and actual
>performance at the system level.

Geoff,

I am certain I gave you and the other executives copies of the
Mitsubishi/Forman presentation when I returned from the JEDEC meeting in
early December. If you don't remember receiving it and no longer have it, I
can give you another copy.

Basically what Forman did was create (contrive would be more accurate) an
artificial benchmark to compare various memories in 3D applications.

He did random 64Byte reads with a 100% page miss. He assumed a 500MB/sec
RDRAM and took the best timings available for all other drams.

Barth went non-linear (as did I) when he first saw the results. In fact, I
was not originally intending to attend the JEDEC meeting, but happened by
luck to have a meeting with Sam Chen/Steve Forman on the Friday preceeding
the JEDEC meeting and so Forman showed Craig and me what he was intending
to present at the end of our scheduled meeting. Craig really got upset with
the numbers, and especially got upset when Forman mentioned that they had
talked to "every GUI vendor" around and at least one big one (ATI) told him
that Rambus based designs are 15% bigger and perform more poorly. So Steve
felt empowered that he should go into JEDEC and slime us is my read. He was
told by me in the meeting that Craig and I had with him that I did not
think I would make the JEDEC meeting in December, so he decided apparently
to go ahead and present his unfair comparison. He was very surprised to see
me show up.

Basically I told Dave on Saturday morning following the meeting that I knew
we were going to get slimed at JEDEC and that I was worried about the
repercussions on the Asian DRAM companies whose JEDEC representatives a)
barely speak English and b) could not do a credible job of telling the guys
back at the factory what the significance was to the nubers presented. I
spoke up at the JEDEC meeting and challenged Steve on his numbers and
pointed out that in the meeting we had had with he and Sam on the previous
Friday that we had told him that his analysis was contrived and
not-representative of anything of significance. Our long time proponent,

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BODY :

Desi Rhoden, attempted to muzzle me, despite the fact that he permitted another to speak before me criticizing the same presentation on the basis of the relevance of the benchmark and questioning his motives since he was not really proposing anything: rather it appeared he was making a sales presentation for 3DRAM and presenting questionable data.

Even Kevin Kilbuck of Toshiba turned around to me and said something to the effect that "yes, you are the lowest performance and that is why Cirrus has designed you in" with great sarcasm. Kevin was not pleased to see this presentation at all. To the English speaking audience I would say a few saw what was going on, most were pleased to see Rambus humiliated best I can tell. I suspect all of the Asians went away thinking that Rambus claims are overly inflated and that Mitsubishi was speaking a great truth.

Forman's benchmark is hardly representative of a 3D application. The case he examined was a pathological case that is the worst possible operating condition for RDRAMs. His three channels were running in lockstep, he attempted no concurrency on the channel or channel to channel. He assumed every access was a miss despite the fact that clever designers can get a lot of performance out of the technology by working smart, which Forman is apparently not understanding or is intentionally trying to slime us. Whatever his motivation it appears that he was successful at a) causing some problems with our current licensee's relationship with us and b) casting doubts in the minds of those that are thinking about licensing but have not yet done so.

This is precisely one of the major benefits we get from going to JEDEC meetings. I understand the concerns about the patent policy and some potential exposure we could have in the event of a future litigation. However court opinions I have read on the subject of Equitable Estoppel and Laches give me the feeling that these issues can be avoided by careful planning and that we need to be able to attend to defend ourselves when attacked like we were last time, and we gain a lot of intelligence at the meetings.

It is easy for Mr. Taylor (of BSTZ) to say we should not go without really hearing all of the issues on both sides of the equation. He was told that we can get the information elsewhere, but on the other hand I have yet to see any of our partners do anything in the meetings that could be construed in any way to be helpful to us or even to tell us what is going on there.

So in the future, the current plan is to go to no more JEDEC meetings due to fear that we have exposure in some possible future litigation.

—Attached is an email from me to Barth in response to the one Barth sent to me after first seeing the presentation that I copied to Exec and to him (as well as others)—

At 2:54 PM 12/7/95, Rick Barth wrote:

>The claims of Mitsubishi were so ridiculous that I had to do the
>calculations:
>
>1996 - 10 x 7 x 16 x 75
>
>reality 2 channels - base 474 MB/s
> refresh 118 MB/s
> drawing 356 MB/s
>

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BODY : > 2 channels - concurrent 933 MB/s
> refresh 118 MB/s
> drawing 815 MB/s
>
>claimed RDRAM drawing 226 MB/s
> 3D-RAM drawing 560 MB/s
>
>1998 - 12 x 10 x 32 x 75
>
>reality 3 channels - concurrent 1549 MB/s (@533)
> refresh 393 MB/s
> drawing 1156 MB/s
>
> 3 channels - concurrent 2325 MB/s (@800)
> refresh 393 MB/s
> drawing 1932 MB/s
>
>claimed RDRAM drawing 705 MB/s
> 3D-RAM drawing 1120 MB/s
>
>Presumably they are claiming the best that the 3D-RAM can do. So are
>you going to put up your own slide at the next meeting (only with base
>parts @533 of course)?

His claims were based on an assumed 100% miss rate, 64byte xfers, and 128ns latency from beginning of packet. He assumed the multiple channels ran in lockstep which is totally bogus.

To be honest, I was actually thinking about making a slide of our analysis, but there is little point in doing so: it would only further alienate the JEDEC types from us. Forman got called on the spot on his numbers being bogus by me, and others asked him what the point was of his presentation. It looked strangely like a sales pitch for 3dram to me and to others.
rdc

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