

**PUBLIC**

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

**In the Matter of**

**RAMBUS INC.,**

**a corporation.**

**Docket No. 9302**

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 w468 Tc5 0 TD /u8s krs are 7 Twt isomer 199M Te24

documents should be produced forthwith.<sup>2</sup>

## 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

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). .

has torney. 224 d

**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

-

**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,

---

Gregory P. Stone  
Steven M. Perry  
Sean P. Gates  
Peter A. Detre  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue, 35<sup>th</sup> Floor  
Los Angeles, California 90071  
(213) 683-9100

A. Douglas Melamed  
Jay Palansky  
Kenneth A. Bamberger\*  
WILMER, CUTLER & PICKERING  
2445 M Street, N.W.  
Washington, D.C. 20037  
(202) 663-6000

Sean C. Cunningham  
John M. Guaragna  
Gray, Cary, Ware & Freidenrich LLP  
401 "B" Street, Suite 2000  
San Diego, California 92101  
(619) 699-2700

\* Admitted in MA and NY only



**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.

**By Facsimile and FedEx**

M. Sean Royall, Esq.

Federal Trade Commission

600 Pennsylvania Avenue, N.W.

Room H-Tj 40.pJifor delivery -13.5pss is 3fice of the addressee on December 10, 2002 in the

