UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC

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

APPLICATION FOR REVIEW OF THE FEBRUARY 28, 2003 ORDER GRANTING 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, PURSUANT TO RULE 3.23(b) OR, IN THE ALTERNATIVE, REQUEST FOR RECONSIDERATION OF THAT ORDER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Bhatnagar v. Surrendra Overseas Ltd.,

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Federal Statutes

Federal Regulations

I. INTRODUCTION

On February 28, 2003, Judge Timony issued an Order, and then some time later that same day issued a revised Order (a copy of which is attached at Tab A), granting 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 ("Motion").

provided in order to further that wrongdoing. In the instant case, Complaint Counsel were therefore required to make a *prima facie* showing that, after June 1996, Rambus was engaged in a fraud and that its attorneys provided legal advice to Rambus in furtherance of that fraud. Because this sho

Haines v. Liggett Group, Inc., 975 F.2d at 96-97. Although Rambus alerted Judge Timony to each of these three protections guaranteed to it by the Constitution (*See* Tab F at 15-16), he afforded Rambus none of them.

For these and other reasons described below, Judge Timony's Order must be reversed, either upon reconsideration by Your Honor or upon interlocutory review by the Commission.

III. FACTUAL BACKGROUND

On March 7, 2001, Judge Payne ruled in the *Infineon* litigation that Rambus forfeited its attorney-client privilege under the crime-fraud exception for various communications relating to patent applications on SDRAM between 1991 and the end of June 1996. (A copy of this order is attached at Tab C.) On April 4, 2001, the Federal Circuit denied a petition for mandamus challenging Judge Payne's crime-fraud 0 -2one of the5issio17T3vnfineon

Rambus, 318 F.3d at 1105.[6] The Court affirmed the grant of JMOL of no fraud on the DDR-SDRAM standard. *See id.* ("Because Infineon did not show that Rambus had a duty to disclose before the DDR-SDRAM standard-setting process formally began, the district court properly granted JMOL of no fraud in Rambus's favor on the DDR-SDRAM verdict.").

On February 28, 2003, his last day in office, Judge Timony granted the Motion and issued the three-page Order at issue here.[7] The Order explains that the Motion was granted because Judge Timony found that Complaint Counsel had "made a sufficient *prima facie* showing that Rambus was involved in an ongoing fraud post-June 1996." In granting the Motion, Judge Timony did not rely on the waiver argument, the sole ground asserted by Complaint Counsel in support of the Motion. There was no hearing on the Motion.

The Order first recites four facts in support of a *prima facie* showing of fraud warranting application of the crime-fraud exception for "[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 occurr

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.

Order at 2. Judge Timony then went on to find that "[e]ven 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." Order at 3. Based on these "facts," Judge Timony concluded 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. 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." Order at 3.

IV. ARGUMENT

That the Order grants the Motion on a ground not advanced by Complaint Counsel (and thus not briefed by Rambus), that it fails to disclose any factual basis for the existence of a duty to disclose patents or patent applications to JEDEC after Rambus ceased to be a member of JEDEC, that it utterly fails to account for, or even mention, the Federal Circuit's conclusive rejection of the fraud theory in *Infineon*, and the manifest injustice – of Constitutional moment – worked by the failure to afford Rambus the evidentiary hearing to which it is entitled, each,

Timony decided the Motion on a ground that was not briefed and which Complaint Counsel expressly stated that they were not arguing, and he did so without giving Rambus any notice of his intent to adopt this independent ground as the basis for the Order. The Order must, therefore, on this ground alone, be reversed.

B. Rambus Was Under No Duty To Disclose Patents Or Patent Applications After June 1996, And Thus There Could Be No Fraud After That Date.

Complaint Counsel allege that JEDEC members had a certain duty to disclose patents and patent applications. *See, e.g.*, Complaint at ¶ 24. Complaint Counsel further allege that, while a member of JEDEC, Rambus violated this duty. Complaint at ¶ 80. Complaint Counsel make no allegation that Rambus had a duty to disclose patents or patent applications to JEDEC after its membership in JEDEC came to an end in June 1996. In granting Rambus's motion for JMOL as to DDR-SDRAM, Judge Payne reached the same conclusion, holding that there was no duty to disclose once Rambus's membership in JEDEC ended. *Rambus*, 164 F. Supp. 2d at 765-67. Most recently, the Federal Circuit affirmed the grant of JMOL as to DDR-SDRAM, again making plain that Rambus had no disclosure duty under JEDEC's rules after its membership in JEDEC ended. *See Rambus*, 318 F.3d at 1105.

It is thus not surprising that the Order fails to identify any duty to disclose patents or patent applications that was imposed on Rambus after June 1996. There was no such duty. Judge Timony's silence on this point – his failure to state that Rambus had a duty to disclose patents or patent applications after June 1996 and his failure to identify the source of any such duty – speak volumes. In the absence of a duty to disclose there can be no fraud[10] and, in the

[10] The first element of fraud is "a false representation (or omission in the face of a duty to disclose)." *Rambus v. Infineon*, 318 F.3d at 1096 "A party's silence or withholding of information does not constitute fraud in the absence of a duty to disclose that information." *Id. See also Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.*, 68 F.3d 1478, 1483 (2d Cir. 1995) ("a concealment of a fact

D. Failure To Follow The Settled Procedure For Evaluating A Claim That The Crime-Fraud Exception Applies Denied Rambus Its Right To Due Process.

Determining whether a crime-fraud exception applies in a civil action requires a three-step analysis: (1) the tribunal first must determine whether the party challenging the privilege has made a sufficient factual showing that the crime-fraud exception applies to justify *in camera* review of the documents in question; (2) then, the tribunal must review the documents in question, *in camera*, in order to determine if, in fact, the privileged communications from attorney to client were in furtherance of a fraud; and, (3) finally, the party invoking the privilege – here, Rambus – "has the absolute right to be heard by testimony and argument" before the crime-fraud exception is applied. *Haines v. Liggett Group, Inc.*, *supra* at 96-97; *see also In re General Motors Corp.*, 153 F.3d 714, 716 (8th Cir. 1998) ("[T]he district court may not … compel production without permitting the party asserting the privilege, to present argument and evidence."); *In re Feldberg*, 862 F.2d 622, 626 (7th Cir. 1988) (Easterbrook, J.) (party asserting privilege should have opportunity to rebut evidence of crime or fraud); *Sigma-Tau Industrie Farmaceutiche Riunite, S.p.A. v. Lonza, Ltd.*, 48 F. Supp. 2d 16, 18-19 (D.D.C. 1999); *Laser Indus., Ltd. v. Reliant Tech., Inc.*, 167 F.R.D. 417, 431 (N.D. Cal. 1996). "The importance of the privilege … as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard." *Haines*, 975 F.2d at 97. The Third Circuit reasoned in *Haines* that the reliability of a crime fraud ruling could only be assured by committing the weighing of the evidence to the adversarial process. *Id.* Judge Timony committed clear error by refusing Rambus a hearing and choosing, instead, to weigh, on his own and without Rambus's input, the crime-fraud "evidence" referenced in the Order.

In the Order, Judge Timony sought to justify his failure to allow Rambus to be heard. He

heard by testimony and argument." *See In re M & L Business Machine Co., Inc.*, 167 B.R. 937, 942 (D. Colo. 1994) (quoting *Haines*). In relying on *Vargas*, Judge Timony clearly applied the wrong law, in the wrong situation and, not surprisingly, arrived at the wrong result. His failure to allow Rambus a hearing in accordance with the procedures outlines in *Haines* is reason enough to reverse the Order.

E. The Order Meets The Standard For Interlocutory Appeal To The Full Commission Set Forth In Rule 3.23(B).

There are two prongs to Rule 3.23(b). Interlocutory appeal to the Commission may be allowed only if (1) "the ruling involves a controlling question of law … as to which there is substantial ground for difference of opinion" and if (2) "an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." Both prongs are easily satisfied here.

1. The Questions Raised In This Application Are Controlling And There Is Substantial Ground For Difference Of Opinion.

As discussed above, the Order raises, but erroneously resolves, at least four questions of law.[13] Each of these questions is "controlling." Rule 3.23(b) borrows the "controlling" language of 28 U.S.C. § 1292(b), and "court interpretation of that statute is material." *In re BASF Wyandotte Corp.*, 1979 FTC LEXIS 77 at *2 n.1 (Nov. 20, 1979). The courts generally conclude that interlocutory appeal should be limited to "exceptional circumstances [that] justify a departure from the basic policy of postponing appellate review until after entry of a final

[13] The Commission can resolve each of these questions as abstract issues of law without reference to a trial record. These are exactly the kinds of questions that interlocutory appeal exists to resolve. *See Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 676-77 (7th Cir. 2000) (Posner, J.) (distinguishing "a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record" from a question of law requiring fact intensive review of a record, and holding that interlocutory appeal is provided to resolve these abstract issues of law in order to avoid "protracted, costly litigation").

is clear enough." *United States v. Philip Morris Inc.*, 314 F.3d 612, 621-22 (D.C. Cir. 2003); *see also* cases cited at n. 14. Similarly here, because of the irreparable injury that would flow from production of otherwise privileged materials, subsequent review would be an inadequate remedy. Further, since the issues raised