

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

PUBLIC

**In the Matter of
RAMBUS INC.,
a corporation.**

Docket No. 9302

**REPLY BRIEF IN SUPPORT OF RESPONDENT'S 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**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Until their opposition to Rambus's application,¹ Complaint Counsel's claim of entitlement to Rambus's attorney-client communications was tethered to Judge Payne's crime-fraud ruling and the jury's fraud verdict in the *Infineon* litigation. Thus, in their original motion to compel, Complaint Counsel argued that they should be granted the same discovery Judge Payne deemed appropriate in that case.² Then the Federal Circuit reversed the jury's fraud verdict in *Infineon*, and Complaint Counsel's rationale for obtaining Rambus's privileged communications came crashing down like a house of cards.

Or so one would have expected. On February 28, 2003, notwithstanding the Federal Circuit's decision, Judge Timony granted Complaint Counsel's motion to compel production of Rambus's privileged documents on the never-previously-asserted ground that Complaint Counsel had demonstrated a *prima facie* case of fraud in *this* proceeding. The rulings of the Federal Circuit and Judge Timony, made on virtually identical records, are fundamentally inconsistent. As a result

this proceeding. To force Rambus to forfeit its privilege under the foregoing circumstances would be an egregious miscarriage of justice. Rambus's motion for reconsideration should be granted and Judge Timony's decision reversed, or in the alternative, the issue should be certified for immediate interlocutory appeal.³

II. ARGUMENT

A. **Complaint Counsel Cannot Defend Judge Timony's Ruling On The Basis Of A Crime-Fraud Showing They Expressly Disclaimed Making In The Proceedings Below.**

Complaint Counsel defend Judge Timony's ruling primarily on the ground that he "had ample evidence at his disposal to support his ruling that a *prima facie* case for the application of the crime-fraud exception has been made."⁴ Opp. at 9. It was improper, however, for Judge Timony to rely on this ground, which Complaint Counsel specifically stated was pr14.25 0 TM2 al65this gr2Pro

statements from Complaint Counsel in limiting its opposition to Complaint Counsel's motion to the waiver issue. *See* Memorandum By Rambus Inc. In Opposition To Complaint Counsel's

Crime-Fraud Grounds And Subsequently Waived (“Order”), at 2. In so doing, he short-circuited Rambus’s due process right to be heard on the crime-fraud issue.

This is not, despite Complaint Counsel’s characterization, a simple discovery motion involving routine application of the attorney-client privilege and work product doctrine. In its Opening Brief, Rambus pointed out that federal courts have consistently recognized that due process requires that a civil litigant faced with a crime-fraud charge must be afforded a full and fair opportunity to defend its privilege, including a hearing. *See, e.g., Haines Liggett Group Inc.*, 975 F.2d 81, 97 (3d Cir. 1992) (“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, by evidence and argument, at the hearing seeking an exception to the privilege.”). Here, Rambus was undeniably deprived of that opportunity. Indeed, given Complaint Counsel’s clear statement that their motion was not based on applicability of the crime-fraud exception in this proceeding, Rambus was sandbagged. Rambus had no reason, prior to Judge Timony’s Order, even to suspect that the exception was at issue.

In attempting to circumvent Rambus’s well-established due process rights (which they remarkably refer to as elevating “form over substance,” *Opp.* at 20), Complaint Counsel rely on the case cited by Judge Timony, *In re Vargas*, 723 F.2d 1461, 1467 (10th Cir. 1983) (which Complaint Counsel did not even cite in support of their motion) involving grand jury proceedings.⁵ As Rambus explained in its Opening Memorandum, because of the compelling public interest in the secrecy of grand jury proceedings, courts sometimes allow the government to establish the crime-fraud exception without affording the investigative target an opportunity to be heard. Because of the importance of due process, however, such a procedure is permissible

⁵ Complaint Counsel also cite *In re September 1975 Grand Jury Term*, 532 F.2d 734 (10th Cir. 1976), another grand jury case.

only when necessary to further a compelling interest such as grand jury secrecy. *In re Sealed Case*, 151 F.3d 1059, 1075 (D.C. Cir. 1998). Here, no compelling interest justified Judge Timony's refusal to grant Rambus an opportunity to be heard on whether the crime-fraud exception applied in this proceeding. Judge Timony's unsolicited resolution of this issue without benefit of a hearing – or even, for that matter, oral argument – thus violated Rambus's due process rights, and was clearly improper.

C. Complaint Counsel Cannot Articulate A Fraud Theory That Remains Viable In Light Of The Federal Circuit's Decision.

In addition to being unfair, violative of due process, and based upon an unasserted ground, Judge Timony's ruling was simply wrong. The Federal Circuit's reversal of the fraud verdict in *Infineon*, issued after Complaint Counsel filed its motion to compel, eviscerated any basis for applying the crime-fraud exception against Rambus.

Complaint Counsel attempt to evade the inevitable consequences of the Federal Circuit's ruling for their crime-fraud assertion in two ways. Neither has merit.

First, Complaint Counsel assert that they are not bound by the Federal Circuit ruling because that ruling "was limited to the theory of fraud advanced by Infineon in that case. . . ." Opp. at 18. In their motion to compel, however, Complaint Counsel made quite clear that the *only* crime-fraud theory they then understood to be applicable in this proceeding was that asserted by Infineon:

[T]he *Infineon* court's [crime-fraud] order was clearly correct. In opposing application of the crime-fraud exception, Rambus's sole argument was that Infineon had not made a *prima facie* showing that Rambus engaged in a fraudulent scheme. This argument was never persuasive, but it is entirely unsupportable now that there has been an actual jury verdict that Rambus committed fraud, which was later upheld by the presiding federal district judge applying a clear and convincing evidence standard. Furthermore, the crime-

Motion to Compel Mem. at 4-5. With the *Infineon* fraud claim now having been discredited by the Federal Circuit, Complaint Counsel now frantically try to backpedal from their earlier admission. They argue that, in contrast to Infineon’s fraud theory, which they characterize as having been based on Rambus’s “mere silence,” the Complaint in this proceeding “support[s] a *prima facie* finding of fraud” by further alleging “an on-going pattern of conduct intended to mislead and deceive JEDEC members.” Opp. at 18.

Complaint Counsel’s attempt to craft a new fraud theory on the fly is unavailing. First, to the extent Complaint Counsel would now seek, after the time to amend the pleadings has passed, to change the theory of liability alleged in their Complaint (a theory, as shown below, expressly predicated upon Rambus’s alleged violation of JEDEC’s *disclosure* policies), any such action would necessarily be improper, as it would constitute an unauthorized and untimely attempt to amend the pleadings, and would greatly prejudice Rambus at this late stage of the proceeding.

Second, precisely because they are constrained by the allegations in their Complaint, Complaint Counsel fail to identify any purportedly fraudulent activity by Rambus other than the non-disclosures that underlay Infineon’s fraud claim. Thus, while citing case law for the non-controversial proposition that fraud liability may lie without an express duty to disclose where “the conduct at issue goes beyond silence, and includes conduct such as statements of half-truths,”⁶ Opp. at 18, Complaint Counsel do not identify any representations by Rambus that could be characterized as “half-truths” supporting a fraud determination in this proceeding. The “on-going pattern” of misleading and deceptive conduct by which they seek to distinguish their claims from Infineon’s consists merely of Rambus’s prosecution of patent applications and

⁶ The only case that Complaint Counsel cite for the broader proposition that mere “[o]missions or concealment of material information can constitute fraud” absent a disclosure duty is *United States v. Keplinger*, 776 F.2d 678, 697 (7th Cir. 1985). This case involves the specific elements of the federal mail fraud statute, and thus is inapposite to the antitrust claims here.

enforcement of the resulting patents against computer memory manufacturers. *Id.* at 2; 14-15;

16. Complaint Counsel does not, and cannot, explain how the non-communicative acts of prosecuting and enforcing patents could ever constitute a “half-truth” or otherwise support a finding of fraud.⁷

Finally, and not surprisingly given that their allegations were based on the same theory asserted by Infineon, Complaint Counsel’s purported new “fraud” theory is not “new” at all, as it was also asserted by Infineon:

Rambus’ fraud included not only its silence *and other misleading conduct* at JEDEC related to the development and adoption of the JEDEC SDRAM and DDR SDRAM standards, but also the *subsequent assertions of its patents* against JEDEC members such as Infineon who sell products based on these standards. Both Rambus’ conduct at JEDEC, and later assertions of its patents against JEDEC standard based products, were necessary for Rambus to profit from its fraudulent scheme.

Supplemental Opposition to Renewed JMOL, *Rambus v. Infineon*, [Tab 1] at 2 (emphasis added).

Further confirmation that Complaint Counsel’s fraud theory is simply a warmed-over version of the theory rejected in *Infineon* is provided by their description of the evidence supporting Judge Timony’s fraud ruling:

⁷ Nor do Complaint Counsel’s citations to their Complaint provide such a basis. Complaint, ¶ 2 (containing only vague and conclusory allegation of “other bad-faith, deceptive conduct” in addition to concealment of information); *Id.*, ¶ 54 (alleging that communications between Rambus JEDEC attendees and Rambus executives or patent counsel constituted “bad faith,” not that such communications – none of which were made to JEDEC – were fraudulent); *id.*, ¶ 71 (alleging that “Rambus’s very participation in JEDEC, coupled with its failure to make patent-related disclosures [in other words, Rambus’s silence while a JEDEC member, the conduct found not to constitute fraud in *Infineon*], conveyed a false and misleading impression”); ¶ 72 (alleging that Rambus did not “elect to make . . . disclosures”); ¶ 73 (alleging that Rambus JEDEC letter “said nothing” concerning Rambus’s patent position and “made no reference” to certain allegedly material facts); ¶ 76 (Rambus’s disclosure of an issued patent “did nothing to alert JEDEC’s members to” Rambus’s state of mind); ¶ 86 (“[m]ore important than what the June 1996 withdrawal letter said is what it failed to say”); ¶ 87 (further describing what the June 1996 letter allegedly “failed to disclose”).

Documents and testimony reviewed by Judge Timony establish

Complaint Counsel make no attempt to link any of Rambus's purported non-disclosures at JEDEC to the disclosure obligation articulated by the Federal Circuit. Instead, they continue to describe the JEDEC policy as requiring disclosure of any patents or applications "that might be involved in the work [JEDEC is] undertaking" – precisely the vague and amorphous standard that the Federal Circuit rejected. Opp. at 10. Complaint Counsel again must adhere to this now discredited position because their Complaint alleges that JEDEC's policy imposed a duty upon

In short, despite their attempt to deck out their fraud theory in new clothing, Complaint Counsel merely parrot the same non-disclosure theory that the Federal Circuit has already rejected in the *Infineon* case.

For all the reasons stated in the Federal Circuit's opinion, the evidence does not support a finding of fraud based on Rambus's failure to disclose its patent applications to JEDEC. Indeed,

Judge Timony's ruling on the ground of waiver. As explained below, Judge Timony's order is not defensible on that ground.

First, it is important to understand Complaint Counsel's waiver argument.⁹ In the *Infineon* litigation, Rambus was ordered to produce a set of privileged documents based upon Judge Payne's finding that the crime-fraud exception applied. Many of these documents were used as exhibits in the *Infineon* trial, and become part of the public record. Subsequently, in response to a motion to compel in the *Micron* litigation, Rambus argued that Judge Payne's ruling should not be extended to require production of these documents in other litigation. Rambus lost the motion, and was ordered to produce to Micron the same set of documents Judge Payne had ordered it to produce in *Infineon*.

A few months later, Rambus agreed to produce the exact same set of documents that previously had been produced in *Infineon* and *Micron* to both Hynix and Complaint Counsel. Complaint Counsel now argues that Rambus's production of these documents to Hynix (pursuant to agreement between the parties rather than court order) constitutes a broad subject matter waiver, justifying compelled production of *all* attorney-client communications involving Rambus's post-JEDEC patent prosecutions.

Complaint Counsel's argument is plainly overreaching and should be rejected. Even assuming *arguendo* that Rambus's production of documents to Hynix constituted a "subject matter" waiver (rather than what it was, given the earlier *Infineon* and *Micron* orders and the publication of many of the documents as trial exhibits in the *Infineon* case, *i.e.*, a *de facto* compelled production), that waiver was necessarily limited to the "subject matter" which Judge

⁹ A fuller response to Complaint Counsel's waiver argument is contained in Rambus's Memorandum Opposition to 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. See Tab F to Rambus's application.

Payne himself delineated, or communications from December 1991 through June 1996, when Rambus was at JEDEC. *See* April 6, 2001 Telephone Conference, *Rambus v. Infineon*, at 8:1-18 [Tab 3]. As Judge McKelvie explained in rejecting a similar request for broader disclosure in the *Micron* litigation, inquiring into communications beyond those dates could not be based merely on Judge Payne’s order, but would instead require a showing of an *independent basis* for further intrusion into Rambus’s privileged communications:

[T]o the extent that Micron wants to go beyond that . . . to expand it beyond the June ’96 date, under the theory that there’s no privilege and that Micron shouldn’t be bound by the time limitation set by Judge Payne I think Micron has to re-establish here, in front of me, a basis for finding no privilege, either under a theory similar to collateral estoppel and an expansion of that, or under a theory that they want to take it head-on and show, in this case, that I could reach the same conclusion Judge Payne did and expand the concept of an exception to the privilege and find that documents beyond June of ’96 are not protected.

November 7, 2001 Telephone Conference, *Micron v. Rambus*, at 43:3-8; 43:14-44:7 [Tab 4].

Determination of the scope of the crime-fraud exception is within the trial court’s discretion, and courts should err on the side of limiting compelled disclosure. *In re Grand Jury Subpoenas*, 144 F.3d 653, 663 (10th Cir. 1998)(“district courts should define the scope of the crime-fraud exception narrowly enough so that information outside of the exception will not be elicited. . . .”); *In re Richard Roe, Inc.*, 68 F.3d 38, 41 (2d Cir. 1995)(“The district court shall determine which, if any, of the documents or communications were in furtherance of a crime or fraud, as discussed above. If production is ordered, the court shall specify the factual basis for the crime or fraud that the documents or communications are deemed to have furthered. . . .”). Here, Judge Payne reasonably limited the permissible scope of discovery to the time period during which Rambus was alleged to have committed fraudulent non-disclosures, *i.e.*, the December 1991 through June 1996 time period when Rambus was a member of JEDEC. Judge

McKelvie, taking a separate look at the issue, determined that Judge Payne's definition of the scope of the exception was binding, and should be applied in the

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