UNITED STATES OF AMERICA



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A motion for reconsideration may be granted only "where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest injustice." *In re Rambus*, Docket 9303, 2003 FTC LEXIS 49 (March 26, 2003) (citing *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F. Supp.2d 1, 3 (D.D.C. 2002)). Upon review of Rambus's Request for Reconsideration, the Opposition thereto, and upon further reconsideration of the pertinent case law, it is apparent that the May 13, 2003 Order contains clear error of law regarding subject matter waiver.

In the *Infineon* litigation and the *Micron* litigation, Rambus was ordered, based on the

attorney work product privileges.¹ In both cases, the materials ordered to be produced were limited in scope to materials created and communications that occurred prior to June 1996. In the *Hynix* litigation, there was no judicial order compelling discovery.² Respondent asserts in this litigation, that rather than litigating the privilege issue a third time and facing a likely adverse.

The implied subject matter waiver rule is applied in light of its purpose: to prevent parties from gaining tactical advantage by using attorney-client privilege as both a sword and a shield. "When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter because 'the privilege of secret consultation is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former." In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982) (emphasis added). Subject matter waiver is "based on fairness considerations" and "aim[s] to prevent prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective disclosure during litigation of otherwise privileged information." In re von

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