

asserts are privileged, granted Infineon's motion to compel production of certain documents. Specifically, the district court determined that (1) documents related to Rambus's document retention policy and litigation policy should be produced because

_____ and (2) alternatively, those

privileges should apply. And although we need not reach the district court's alternative determination regarding subject-matter waiver, we note our agreement with the concurrence-in-part, dissent-in-part that the district court properly used the waiver doctrine to require Rambus's disclosure of all but its pure opinion work-product documents. Additionally, Rambus's challenge to the in camera review conducted by the

district court is not convincing.

Accordingly,

IT IS ORDERED THAT:

- (1) Rambus's petition for a writ of mandamus, Misc. 772, is denied.
- (2) Rambus's previous petition, Misc. 762, is dismissed as moot.
- (3) Rambus's motion for leave to file a reply, with reply attached, is granted.

FOR THE COURT

United States Court of Appeals for the Federal Circuit

MISCELLANEOUS DOCKET NO. 700

IN RE RAMBUS, INC.,

Petitioner.

MISCELLANEOUS DOCKET NO. 772

IN RE RAMBUS, INC.,

Petitioner.

GAJARSA, Circuit Judge, concurring in part and dissenting in part.

Rambus, Inc. petitioned this court for a writ of mandamus asking the court to

inappropriate behavior, and concluded that Rambus's policy was neither criminal nor fraudulent, but that it had waived Rambus's work product privilege.

In its second opinion, the district court reviewed the facts surrounding Rambus's

document production in both the instant matter and a related matter in front of the Federal Trade Commission, and concluded that Rambus had disclosed selected documents describing its corporate document retention policy and the relationship between that policy and its litigation strategy. The district court then concluded that this selective disclosure acted to waive privilege for a broad category of documents from

Though the district court in its spoliation ruling, Infineon in its brief to this court opposing Rambus's petition, and the majority rely heavily upon this "broad discretion" to

But that Rambus has waived its privilege, none have pointed to a single instance of a

trial court waiving a party's privilege as a remedy for spoliation. The Fourth Circuit's most recent comment on the matter is that its "spoliation of evidence rule allows the drawing of an adverse inference against a party whose intentional conduct causes not just the destruction of evidence . . . but also against one who fails to preserve or produce evidence." Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 450 (4th Cir. 2004).

In an earlier discussion, the Fourth Circuit noted that

This circuit has addressed the spoliation of evidence rule in only one case

and held that it is a rule of evidence. . . . [There,] we approved the trial

" . . . [There,] we approved the trial

document retention policies. The district court's inability to define a clear separation,

~~part of common law fraud differentiating permissible policies from impermissible~~

policies, will open all corporations with document retention policies—likely meaning all

~~to the signing of affidavits with respect to these policies~~

The district court and both parties concede that the Fourth Circuit has never

exception; Fourth Circuit law does not extend waiver to opinion work product. Because we review factual findings for clear error, I see no reason to disturb any of the district court's factual findings. We should therefore have required Rambus to turn over all documents except for the few that the district court identified as opinion work product.

The majority, however, has chosen to force Rambus to turn over all documents by upholding the district court's ruling on spoliation. That ruling has no basis in the law, and is likely to have widespread negative consequences across the corporate world. I therefore respectfully concur in part and dissent in part.
