

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

*FILED*

JAN 29 2004

3 SAN JOSE DIVISION

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

4 HYNIX SEMICONDUCTOR, INC. )  
et al., )

C-00-20905-RMW

5 )  
6 Plaintiff, )

San Jose, CA

7 vs. )

January 16, 2004

8 RAMBUS, INC., et al., )

9 Defendants. )  
----- )

10 TRANSCRIPT OF PROCEEDINGS  
11 BEFORE THE HONORABLE RONALD M. WHYTE  
12 UNITED STATES DISTRICT JUDGE

13 A P P E A R A N C E S:

ORIGINAL

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1 San Jose, California

January 16, 2004

2 P R O C E E D I N G S

3 THE CLERK: Next matter. C-00-20905.  
4 Hynix versus Rambus. On for Defendant's motion  
5 for a protective order and/or order in limine  
6 regarding privileged documents produced under  
7 compulsion.

8 Counsel, state your names for the  
9 record, please.

10 MS. VAN KEULEN: Good morning, Your  
11 Honor.

12 Susan van Keulen, Ken Nissly, and Pat  
13 Lynch for Plaintiff Hynix.

14 THE COURT: Good morning.

15 MR. KLAUS: Good morning, Your Honor.

16 Kelly Klaus for Defendant Rambus.

17 THE COURT: Okay. Did everyone see the  
18 questions I listed? I would also add that I'm  
19 aware that to a large extent we discussed these,  
20 but these were particular issues that I wanted to  
21 hear some comment on.

22 MR. KLAUS: Sure, Your Honor. I did  
23 have questions.

24 THE COURT: Question 1 is really  
25 directed more to Hynix.

1                   2 is directed to both of you.

2                   3 is directed to both of you.

3                   4 is directed to both of you.

4                   5 is directed at both.

5                   And 6 is really directed against Hynix.

6                   MR. KLAUS: Very well, Your Honor. I  
7 actually was prepared to address those questions  
8 in the order that --

9                   THE COURT: You're certainly welcome to,  
10 but it's their motion. I'll let them go first.

11                   MS. VAN KEULEN: Thank you, Your Honor.

12                   MR. KLAUS: Oh, I'm sorry. It's our  
13 motion, Your Honor.

14                   THE COURT: Yeah. That's what I said.

15                   MR. KLAUS: Rambus's motion. Okay.  
16 Thanks. I'm sorry.

17                   As far as the second question, does  
18 sharing privileged documents with an adversary  
19 necessarily waive the privilege, it's our  
20 position as set forth in the papers that that is  
21 not an automatic waiver, that one has to look  
22 to --

23                   THE COURT: Well, you know, there seems  
24 to me to be a distinction between a situation  
25 where you turn over documents and you say I'm

1 going to let you see these documents and you sort  
2 of think that there might be some privileged  
3 stuff in there but maybe not, and you're saying  
4 but I'm giving you these on the agreement that  
5 I'm waiving no privilege by turning them over  
6 and, if there's something privileged in there,  
7 I'm maintaining that privilege in a situation  
8 where you know the documents are privileged and  
9 yet you turned them over pursuant to some  
10 non-waiver agreement.

11 I'm not sure -- I have some question in  
12 my mind as to whether a non-waiver agreement is  
13 any good in that situation.

14 MR. KLAUS: The question I think, Your  
15 Honor, is there are two separate circumstances.  
16 The first situation that you describe seems to  
17 parallel the facts of the Chubb case which is  
18 cited in both of the parties' papers, which is  
19 where you say I'll take my chances, I'll let you  
20 have open access to my files, and that's in the  
21 absence of any court order saying you have to  
22 produce them.

23 The circumstances here we think are a  
24 little different. The circumstances are that  
25 there had already been three -- I apologize, four

1 court rulings on whether these documents were  
2 subject to a privilege.

3 There was the original order. There was  
4 the original order in the Infineon case holding  
5 that the crime/fraud -- a prima facie case that  
6 the crime/fraud exception had been applied.  
7 There was a motion to reconsider which had been  
8 denied. There was a petition for a writ of  
9 mandamus to the Federal Circuit which had been  
10 denied. And there was also an order applying  
11 collateral estoppel in the Micron litigation.

12 So essentially several different courts  
13 had looked at this and had turned down the  
14 argument. And the question was going to be if  
15 Hynix presented its motion before the court in  
16 Virginia to intervene based on the same  
17 collateral estoppel principles that had been  
18 applied in Micron.

19 THE COURT: You mean intervene in  
20 Delaware?

21 MR. KLAUS: No. They had actually moved  
22 to intervene in the Infineon case which was  
23 pending in Virginia.

24 THE COURT: Right. Okay.

25 MR. KLAUS: But the argument that they

1 made was based on the same collateral estoppel  
2 principles. They said our claims are identical,  
3 the fraud that we're alleging is identical, we  
4 think we can show -- we think we can make exactly  
5 the same showing.

6 And the question is under those  
7 circumstances where every opportunity that a  
8 party has taken to try to challenge the privilege  
9 has been turned down and there are -- there are  
10 no apparent alternatives up through the point of  
11 trying to seek direct review of the underlying  
12 fraud ruling, which was done, which was  
13 successful on the merits, and which completely  
14 obliterated the factual predicate for the  
15 crime/fraud finding in the first instance. But  
16 in those circumstances before you can get to the  
17 appeal are you required to litigate litigate  
18 litigate the question over and over and over  
19 again.

20 THE COURT: Well, that's the purpose of  
21 my question anyway to Hynix.

22 MR. KLAUS: I'm sorry. So that we think  
23 that with the circumstance of turning the  
24 documents over with the production, with the  
25 letter that's the subject of a lot of discussion 6

1 in the parties' papers it wasn't simply a case of  
2 you've asked for these documents, we don't know  
3 whether they are privileged or not, we don't know  
4 what the outcome might be.

5 The situation was there is a motion. I  
6 think we all know what the outcome of the motion  
7 is going to be and without -- while reserving our  
8 rights we're giving you the documents rather than  
9 fighting what is likely a futile act.

10 The De la Jara case says that to  
11 determine whether or not there's been a waiver of  
12 the privilege you asked whether the party has  
13 done -- taken steps that are reasonable under the  
14 circumstances.

15 THE COURT: Let's -- I know it's your  
16 view not this case, and probably in my view it's  
17 not this case, but let's assume that there had  
18 been no prior rulings and you turned over the  
19 documents to Hynix with an agreement that you  
20 weren't waiving the privilege.

21 Have you waived?

22 MR. KLAUS: As to Hynix, I think the law  
23 is fairly clear that had there been a stipulation  
24 on their part, had they said we will not assert  
25 waiver, the Dowd versus Calabrese case which we

1 had cited and Judge Greene was fairly clear in  
2 saying it, if that's what you signed up for,  
3 "you" in this case being Hynix, we're not going  
4 to let you challenge the privilege.

5 There would be a question as to whether  
6 third parties would be bound by that. That  
7 brings us closer to the Chubb case where there is  
8 an informal agreement, informal or formal between  
9 me and my litigation adversary to allow them to  
10 review it and we have the stipulation as to  
11 whether or not there's been a waiver of the  
12 privilege.

13 But there then is a question whether as  
14 against a third party here, and the cases quite  
15 frankly that have been decided on the issue seem  
16 to suggest that the answer is no, that that comes  
17 closer to being something on the order of a  
18 selective waiver of trying in a sense to have  
19 your cake and eat it, too, which brings you a  
20 little closer to the side of the line on  
21 privilege log trying to use the privileges as a  
22 sword and a shield.

23 THE COURT: All right.

24 MR. KLAUS: Turning to the -- unless  
25 Your Honor had any other questions on the second



1 point?

2 THE COURT: No. That's helpful.

3 MR. KLAUS: With respect to the third,  
4 is there an agreement to maintain privilege in  
5 the FTC and, if so, what are the terms. I will  
6 tell you I frankly don't know the answer to that  
7 question, Your Honor.

8 In preparing the motion and preparing  
9 for this argument I tried to find any evidence I  
10 could of what the terms of the agreement for the  
11 production to the FTC were.

12 THE COURT: Wasn't there -- I say this  
13 saying that my memory may be wrong on this, but I  
14 thought in your papers that you referenced, and  
15 there wasn't a cite to it, that there had been  
16 some protective order with respect to the FTC.

17 MR. KLAUS: That was my -- my second  
18 point, Your Honor, was going to be that to the  
19 extent we can determine anything about what the  
20 agreement was with the FTC the best evidence I  
21 have of it is what the FTC said in their papers.  
22 I believe it was Exhibit K, which was in our  
23 papers to their motion to compel where they said  
24 in a footnote that based on the discussions that  
25 took place before these documents were turned

1 over to the FTC, which happened at exactly the  
2 same time they were turned over to Hynix's  
3 counsel and against the same background and set  
4 of circumstances that the FTC was not taking the  
5 position that that was a waiver of the  
6 privilege.

7 On number 4, the question does the fact  
8 that no issue was apparently raised on appeal  
9 about the admissibility of the privileged  
10 documents constitute a waiver.

11 We don't think so. First of all, Rambus  
12 had tried to take an appeal to the FTC before the  
13 documents were produced. That was denied. At  
14 the point that they had been --

15 THE COURT: You don't mean the FTC, do  
16 you?

17 MR. KLAUS: My apologies. I believe  
18 this was in the Infineon case.

19 THE COURT: Right.

20 MR. KLAUS: That at the point at which  
21 those documents had been produced to Infineon and  
22 were introduced by Infineon, there was no basis  
23 we believe for challenging the fact that the  
24 documents were admitted in evidence.

25 We can only challenge the underlying

1 predicate for the basis that they should have  
2 been produced in the first place, which is what  
3 Rambus did and was ultimately successful.

4 THE COURT: Why couldn't you have  
5 challenged that on appeal saying that there was  
6 error because these documents should not have  
7 been available and they -- their admission --  
8 they are privileged documents and they shouldn't  
9 have been admitted?

10 MR. KLAUS: Well, as far as the question  
11 of -- I think there are two separate questions,  
12 Your Honor. One is whether it was error to admit  
13 them once they had been ordered produced.

14 The second question is whether it was  
15 error for them to have been ordered produced in  
16 the first place.

17 THE COURT: But you can get an order  
18 that requires production of documents and then  
19 certainly take the position at trial that those  
20 documents aren't admissible, can't you?

21 MR. KLAUS: And, in fact, that was --  
22 Rambus did have a running continuing objection  
23 based on the attorney-client privilege which had  
24 been overruled by the trial court. There was --  
25 that was in the April 20th, 2001 stipulated order 11

1 which is in the record as well.

2 But once Rambus was on appeal, once  
3 those documents had been admitted there wasn't a  
4 terrific basis for challenging the admission of  
5 them. The challenge really had to go to the  
6 underlying finding of fraud.

7 Number 35, that this fact that allegedly  
8 privileged documents were left unsealed in a  
9 public file following the Infineon trial  
10 constitute a waiver, the question whether or not  
11 to seal a court file is, of course, not -- it's  
12 not the parties', it's the court's.

13 And as to documents that are in a court  
14 file that have been shown to a jury that have  
15 been published, once those matters are in the  
16 public record it becomes much more difficult to  
17 try to persuade the court that those documents  
18 should somehow be sealed.

19 THE COURT: Why couldn't you -- why  
20 wouldn't it have been appropriate if you were  
21 concerned about the confidentiality of these  
22 documents to make application to the trial court  
23 after the Federal Circuit opinion and say, look,  
24 the Federal Circuit has basically gutted the  
25 fraud here that was the basis of the ruling that

1 the crime/fraud exception applies, these  
2 documents are privileged, we want them sealed?

3 MR. KLAUS: Well, the short answer is,  
4 Your Honor, that we have not done that. What we  
5 have done is there is actually briefing that is  
6 going on right now in Infineon on remand  
7 regarding the continuing validity of the  
8 crime/fraud ruling and that's at least what we're  
9 doing to this stage.

10 THE COURT: But right now I could go  
11 down there or Mr. Nissly could go down and open  
12 up the file and take these documents and make  
13 copies of these documents.

14 MR. KLAUS: In fact, my understanding is  
15 that Mr. Nissly or someone working under  
16 Mr. Nissly's direction has done that. The  
17 difference, Your Honor, is that I believe that  
18 the subset of documents that we're talking about  
19 that were covered by the initial crime/fraud  
20 determination that were introduced and that were  
21 on the record in the Infineon trial are a  
22 relatively small subset of the total number of  
23 documents that are out there in the universe  
24 falling within the exception.

25 As to the relatively small number of

1 documents, I don't know the precise number. I  
2 believe it's something in the neighborhood of 15  
3 or so documents that were covered by Judge  
4 Payne's initial crime/fraud ruling that were  
5 introduced as evidence and that are in the public  
6 record.

7 As to that subset of documents, we  
8 understand that those documents are in Hynix's  
9 possession and we think that it probably is too  
10 late to take the position that we can have those  
11 back on the basis of attorney-client privilege.

12 Those documents I think would be covered  
13 by the second part of our motion, which is that  
14 to the extent that they have the documents we  
15 don't think they are relevant, any matters that  
16 remain in the case and shouldn't be permitted to  
17 come in under Rule 403.

18 Number 6, I believe which goes to both  
19 parties, how would Hynix be prejudiced by having  
20 to make the requisite showing of fraud before  
21 utilizing the documents further.

22 As to the remaining universe of  
23 documents that I have referred to, Your Honor,  
24 it's our position they wouldn't be prejudiced at  
25 all. It's not clear to us in light of the

1 Federal Circuit's ruling how it is that Hynix  
2 would be able to make a showing -- a prima facie  
3 showing that the crime/fraud exception to the  
4 attorney-client privilege applies because we  
5 think there's absolutely no basis for finding a  
6 breach of a duty to disclose which was the  
7 essential element of the Infineon court's ruling.

8 THE COURT: Okay.

9 MR. KLAUS: Thank you.

10 THE COURT: Thank you.

11 MS. VAN KEULEN: Good morning, Your  
12 Honor.

13 THE COURT: Good morning.

14 MS. VAN KEULEN: Shall we start with the  
15 first question?

16 THE COURT: That's fine with me.

17 MS. VAN KEULEN: The first issue  
18 obviously that the Court raised is what could  
19 Rambus have done in light of the orders that were  
20 out there before it called up Hynix and told them  
21 they were going to produce the documents to  
22 them. And, of course, there are two very obvious  
23 options.

24 One is to oppose Hynix's motion to  
25 intervene which was brought in the EDVA, in the

1 Eastern District of Virginia, based on Judge  
2 Payne's ruling on Infineon's showing. Rambus  
3 could have opposed that motion on the grounds  
4 that Hynix was not entitled to the documents  
5 based on Infineon's showing. They chose not to  
6 do that. They did not want to risk another  
7 adverse ruling in that court.

8 THE COURT: Yeah, but don't we encourage  
9 parties not to litigate when the answer is pretty  
10 obvious? I mean, if Judge Payne makes the ruling  
11 that the crime/fraud exception has been met, that  
12 ruling has been affirmed on appeal, to make  
13 Rambus go through the exercise of challenging the  
14 right to get those documents for another case, it  
15 seem to me that's maybe creating litigation where  
16 it shouldn't be created.

17 MS. VAN KEULEN: Applicable in all  
18 situations except where we're trying to protect  
19 the attorney-client privilege. The  
20 attorney-client privilege is a bar, it's a  
21 proscription on discovery, and the Weil case and  
22 the Columbia Health Care case from the Federal  
23 Circuit, Weil from the Ninth Circuit, and all of  
24 the cases that discuss privilege as cited in our  
25 briefs talk about how the fundamental core of



1 that privilege, of course, is confidentiality and  
2 it must be rigorously preserved and objected to.

3 They needed to fight this, production of  
4 those documents, every step of the way if they  
5 had any hope of limiting the effect of Judge  
6 Payne's ruling, but the fact is that when Judge  
7 Payne made that ruling in 2001 Rambus knew that  
8 once made that the privilege was lost because the  
9 confidentiality was gone as to all of the  
10 documents.

11 And when they took their writ to the  
12 Federal Circuit that's the argument that they  
13 made, we need this writ and we need it right now  
14 because once produced the privilege is lost as to  
15 everybody.

16 And when the Court raised the question  
17 this takes us down to the -- to the question  
18 about what -- whether or not the issue was raised  
19 on appeal we went back and looked at what had  
20 Rambus told the Federal Circuit. And there were  
21 two important submissions in that regard. Rambus  
22 made a petition for writ obviously accompanied by  
23 a motion to stay.

24 Now, those were confidential briefs, but  
25 there's just a legal argument with the

1 significant cite made by Rambus and that is in  
2 their petition that here without immediate review  
3 the privileged information will be forcibly  
4 disclosed and the privilege forever lost. And  
5 they cite Wright & Graham -- *Wright & Miller*  
6 *Federal Practice* and the General Motors case from  
7 the Eighth Circuit.

8 And they made that position again in  
9 their motion to stay, complying with the district  
10 court's order will forever destroy the privilege  
11 between Rambus and its attorneys concerning the  
12 five years of communications relating to  
13 prosecuting Rambus's patent.

14 THE COURT: What was argued with Judge  
15 McKelvie?

16 MS. VAN KEULEN: Judge McKelvie in  
17 Delaware?

18 THE COURT: Right.

19 MS. VAN KEULEN: In Delaware Micron  
20 brought that motion based on collateral  
21 estoppel.

22 THE COURT: Right.

23 MS. VAN KEULEN: And said because of the  
24 ruling with Judge Payne --

25 THE COURT: Right. What did Rambus

1 argue?

2 MS. VAN KEULEN: -- we're entitled to  
3 it.

4 And there Rambus I believe attempted to  
5 make a showing that it shouldn't apply, shouldn't  
6 carry over, but that was denied.

7 So but going back to the Court's  
8 question what could they do, obviously have  
9 opposed the motion to intervene, which they  
10 should have done, indeed which they are required  
11 to do to preserve -- to make any attempt to  
12 preserve the privilege.

13 And, second, Your Honor, of course, they  
14 could have come to this Court. Hynix was making  
15 a motion in EDVA based on that ruling. Rambus  
16 could have come here and asked this Court  
17 essentially what it's asking for today, which is  
18 make Hynix make its own showing. But, again, not  
19 wanting to risk an adverse ruling, another  
20 parade, if you will, of the evidence in support  
21 of the prima facie showing that supported Judge  
22 Payne's ruling, instead Rambus's counsel calls  
23 counsel for Hynix and offers to produce the  
24 documents.

25 THE COURT: What if the agreement

1 between Hynix and Rambus had said something along  
2 the lines of "we've litigated this privilege  
3 issue and lost, we've challenged that on appeal  
4 or by way of writ, we lost, we think the court is  
5 wrong, but rather than unnecessarily litigate  
6 we'll agree to produce the documents to you, but  
7 if the -- we do not intend to waive the privilege  
8 by doing so and, if that ruling is overturned or  
9 set aside, we want the documents back"?

10 Would that have waived the privilege?

11 MS. VAN KEULEN: Well, really two  
12 important elements in that. One is could they  
13 preserve their rights to continue to object to  
14 Judge Payne's initial order, to continue to  
15 object that these documents were privileged on  
16 the grounds of attorney-client communication.

17 And that's the right that they did  
18 preserve in the June 22nd 2001 letter, letter  
19 agreement with Hynix. We still want to be able  
20 to argue this issue and turning the documents  
21 over to you, Hynix, is not going to act as a  
22 waiver of that argument wherever else we may  
23 assert it.

24 Remember that the Infineon proceeding is  
25 still ongoing at that time.

1 THE COURT: Right.

2 MS. VAN KEULEN: Those have not closed,  
3 and obviously they wanted to -- presumably at the  
4 time were considering raising it on appeal and  
5 wanted to keep that open. So they wanted to be  
6 able to make that.

7 So your first point, your first  
8 question, part of the question could they reserve  
9 that right to argue, yes, that's what -- and that  
10 is reflected in the letter agreement. But is it  
11 not a waiver, can they keep Hynix from using the  
12 documents somewhere down the road? No. You  
13 can't selectively waive attorney-client  
14 privilege.

15 THE COURT: So your view is -- let me  
16 just make sure I'm following it -- that if, for  
17 example, the Virginia court were now to say in  
18 some way that original order was wrong, there's  
19 no crime/fraud exception that's been shown here,  
20 you still get to use the document?

21 MS. VAN KEULEN: Yes. Because they  
22 voluntarily turned the documents over to Hynix  
23 and that, of course, brings us immediately to the  
24 June 22nd letter, the negotiations that led up to  
25 the letter and the subsequent production.

1 THE COURT: That letter is -- I don't  
2 know what it says. I find that letter very  
3 confusing or ambiguous.

4 Go ahead.

5 MS. VAN KEULEN: Okay. Well, and I can  
6 take the Court through the negotiation steps. We  
7 were there and involved in it, but what the  
8 letter says I would submit to the Court in its  
9 plain meaning is that Rambus can -- they can turn  
10 the documents over to Hynix.

11 The production in and of itself is a  
12 waiver. These are not privileged. They cannot  
13 claim the privilege as to these communications.  
14 They are giving them to a third party. They are  
15 giving them to an adversary, to Hynix.

16 And Hynix has the right to use them.  
17 Rambus can go on on appeal and do whatever they  
18 want to do on this issue, but Hynix has the right  
19 to use them unless, and this is the only  
20 exception, if the Federal Circuit provides  
21 otherwise. And the Federal Circuit didn't do  
22 that. The issue was not appealed.

23 THE COURT: Hypothetically what does  
24 that mean if the Federal Circuit does otherwise?

25 MS. VAN KEULEN: If Rambus had appealed

1 the crime/fraud ruling in its appeal to the  
2 Federal Circuit of the Infineon judgment and if  
3 the Federal Circuit had addressed specifically  
4 that ruling because when --

5 THE COURT: In other words, if the  
6 Federal Circuit had said documents A, B and C  
7 should not have been admitted because they were  
8 obtained on the basis of the crime/fraud  
9 exception and the showing was insufficient.

10 MS. VAN KEULEN: That's right. If the  
11 Federal Circuit -- if the issue of Judge Payne's  
12 prima facie ruling taking away the  
13 attorney-client privilege had been appealed and  
14 the Federal Circuit had addressed that, then that  
15 would be a different situation. And that's the  
16 situation that was allowed for in the letter and  
17 that going through the negotiations is attached  
18 to the declaration in support of our brief.

19 THE COURT: Yes. Part of the problem I  
20 see with I think it's your declaration is where  
21 you have the undisclosed intent of one of the  
22 parties, which I think is inadmissible. I mean  
23 before you can use someone's intent to interpret  
24 a document that intent has to be expressed.

25 MS. VAN KEULEN: We don't need to get -- 23

1 we don't need to go to any intent, expressions of  
2 intent because the letter itself, Your Honor,  
3 keeping in mind that this was initiated by  
4 Rambus, Rambus calls counsel for Hynix, counsel  
5 for Rambus calls counsel for Hynix and says we're  
6 going to turn the documents over to you and sends  
7 a draft letter which is Exhibit B to  
8 Mr. Nissly's -- excuse me, to Mr. Nissly's  
9 declaration, which says here's our first draft of  
10 a letter agreement, we're still working on it.

11 Then they send a second draft in the  
12 next day or two, which is Exhibit C to  
13 Mr. Nissly's declaration, which says here's the  
14 final draft and here's what they added: That  
15 Rambus's production of documents under this  
16 agreement does not constitute a waiver of any  
17 privilege Rambus may otherwise assert in this  
18 litigation.

19 THE COURT: What does that mean?

20 MS. VAN KEULEN: They are not agreeing  
21 to a subject matter waiver. They are not  
22 agreeing to a broad waiver of all attorney-client  
23 communications. They are turning over these  
24 documents which were the subject of Judge Payne's  
25 ruling.



1                   They are not forever waiving all  
2 attorney-client privilege in this case here in  
3 the Northern District of California. If they  
4 have other privileges to assert, they are holding  
5 on to that one.

6                   THE COURT: Couldn't that be interpreted  
7 as saying we're going to give you these  
8 documents, but we're not waiving any privilege  
9 that we have in this case by doing so?

10                   MS. VAN KEULEN: No, Your Honor, because  
11 the production itself is the waiver. They turned  
12 the documents over to us.

13                   THE COURT: So basically you're saying,  
14 and you may well be right, that if I turn over to  
15 you attorney-client privileged documents and you  
16 and I agree that the turning over does not  
17 constitute a waiver, it, in fact, does?

18                   MS. VAN KEULEN: As to third parties, as  
19 to anybody else.

20                   THE COURT: Disagreements between you  
21 and Hynix -- you and Rambus.

22                   MS. VAN KEULEN: And agreements --  
23 that's right. But that brings us to the  
24 selective waiver. Can you selectively waive as  
25 to this party but not that party, which, of

1 course, comes up in the Court's later questions,  
2 and the answer is, no, you cannot.

3 THE COURT: Who are you selectively  
4 waiving for here?

5 MS. VAN KEULEN: Well, under your  
6 scenario Rambus would be selectively -- or it's  
7 been waived in the Infineon case and now they  
8 don't want to waive it as to Hynix.

9 THE COURT: How did they waive it in  
10 Infineon?

11 MS. VAN KEULEN: Well, the  
12 confidentiality has been expunged from the  
13 documents. So they are no longer confidential.  
14 There is no attorney-client privilege  
15 production -- or protection there, excuse me.

16 THE COURT: Even if that order is  
17 wrong?

18 MS. VAN KEULEN: That's right. That's  
19 right. Once the order comes down, once the  
20 attorney-client privilege is removed there is no  
21 mechanism to go back and recapture. And that's  
22 the argument Rambus made to the Federal Circuit  
23 in support of its writ. Of course, that was the  
24 basis for its writ and that was denied.

25 THE COURT: Then in the appeal on the

1 merits to the Federal Circuit on the basic case  
2 they couldn't make that argument that the  
3 attorney-client privilege was erroneously waived.

4 MS. VAN KEULEN: Well, I think that they  
5 could have made the argument because the Federal  
6 Circuit said we're not reaching any issue on the  
7 merits. We're denying the writ and, of course,  
8 the standards for a writ are quite high.

9 THE COURT: Okay. Go ahead.

10 MS. VAN KEULEN: So they could have made  
11 it. They didn't make it. They did not even  
12 attempt to make it and it is not addressed by the  
13 Federal Circuit.

14 THE COURT: All right.

15 MS. VAN KEULEN: Just to complete on the  
16 negotiations on the letter, Your Honor, the very  
17 next exhibit on Exhibit D addresses the language  
18 about reserving the right to use it, that is,  
19 Hynix can use the documents regardless of what --  
20 what -- regardless of whether Rambus appeals the  
21 final decision.

22 And then Rambus comes back, well, with  
23 the language unless the Federal Circuit provides  
24 otherwise, which in this case they have not done  
25 because they did not appeal it, and it's

1           nowhere -- nowhere is the attorney-client  
2           privilege issue addressed in the Federal Circuit  
3           decision.

4                   THE COURT:   But the Federal Circuit's  
5           decision of vacating a merits decision based on  
6           the same type of alleged fraud that was used to  
7           get the documents is not otherwise decision by  
8           the Federal Circuit?

9                   MS. VAN KEULEN:   No, it's not, Your  
10          Honor, because that's separate and distinct from  
11          the prima facie ruling that Judge Payne made on  
12          the evidence made before him at that time.

13                   And it's important to note that this  
14          issue is being briefed before Judge Payne as we  
15          speak.   I believe Infineon has submitted its  
16          briefs and Rambus briefs are to be submitted and  
17          that this along with other discovery issues are  
18          set to be heard in the coming weeks because --

19                   THE COURT:   What is the issue before  
20          Judge Payne now in this briefing?

21                   MS. VAN KEULEN:   Is this very issue on  
22          an attempt to recapture the privilege for  
23          documents that were part of his original order.

24                   THE COURT:   But your position is it  
25          doesn't make any difference what Judge Payne said 28

1 as far as your ability to use the documents?

2 MS. VAN KEULEN: That's right. That  
3 will be maybe instructive as to what -- how Judge  
4 Payne views this issue and it's being briefed  
5 there because that matter goes back to trial on  
6 remand in May. But separate and distinct from  
7 that we have the voluntary waiver here in this  
8 court.

9 THE COURT: Okay.

10 MS. VAN KEULEN: Also, Your Honor, of  
11 course, after the Infineon action comes the FTC  
12 action. Now, the Federal Circuit decision came  
13 down almost a year ago in January of 2003.  
14 Discovery then is ongoing, is going at quite a  
15 pace at that time at the FTC and the issue there  
16 is there's a lot of briefing on privilege issues  
17 because there's an attempt to broaden the scope  
18 of the waiver.

19 So from the February through May 2003  
20 complaint counsel at the FTC and Rambus are  
21 briefing the privilege issues, that is, whether  
22 or not to broaden the scope, not this issue  
23 before Your Honor today.

24 THE COURT: Right. This covers '91 to  
25 '95, as I recall.

1 MS. VAN KEULEN: Exactly, exactly.

2 THE COURT: And the FTC was concerned  
3 about '96 on or something.

4 MS. VAN KEULEN: That's right. That's  
5 right. But what's important about those  
6 proceedings is again Rambus takes the position in  
7 its pleadings submitted there that it's not --

8 THE COURT: I've seen other people do  
9 it. It's the first time I've done it.

10 Go ahead.

11 MS. VAN KEULEN: Takes the position that  
12 those -- again the initial documents, the first  
13 round that were the subject of Judge Payne's 2001  
14 order the privilege is gone and cannot be  
15 recaptured. The focus is on the broader -- is on  
16 the broadening.

17 And the basis -- initially the first ALJ  
18 administrative law judge who had the case grants  
19 the expanded exception to the privilege based on  
20 the voluntary production to Hynix, based at least  
21 in part on the voluntary production to Hynix.

22 When the motion comes up for  
23 reconsideration and the second administrative law  
24 judge hears it he narrows it back to the  
25 documents which were initially the subject of

1 Judge Payne's ruling still leaving intact the  
2 voluntary production to Hynix.

3 Indeed his last word on the subject is  
4 what you get, complaint counsel, is what Rambus  
5 turned over to Hynix in June of 2001.

6 THE COURT: Was there any agreement  
7 between the FTC's counsel and Rambus with respect  
8 to the use of the '91 through '95 documents?

9 MS. VAN KEULEN: No, Your Honor, there  
10 was not. Only to the extent the same agreement  
11 that there was with Hynix, which was that the  
12 documents could be used in the proceeding without  
13 prejudice to Rambus to argue at some point that  
14 those would -- should be subject to a privilege.

15 Any rights that they thought they had  
16 they could argue that, but the documents were  
17 turned over to the FTC. They were used in the  
18 FTC proceedings all through discovery.

19 And keeping in mind the FTC public  
20 hearing was just this past summer, 2003. The  
21 Federal Circuit decision on fraud came down in  
22 January of 2003. In the summer of 2003 we have  
23 the FTC public hearing where these documents are  
24 used just in the last six, eight months. They  
25 are used. They are put in the public record.

1 They are shown to witnesses.

2 THE COURT: So you could go to the FTC  
3 and get the documents?

4 MS. VAN KEULEN: Not only could you go  
5 to the FTC and get the documents, Your Honor, but  
6 the administrative law judge's ruling is due down  
7 now here in the next few weeks within the next  
8 month and that will focus extensively on these  
9 documents and the implications and so forth.  
10 And, of course, that opinion will be published,  
11 widely published probably on the Internet as soon  
12 as it's available.

13 THE COURT: Unless I missed it there's  
14 no -- nothing in the record before me that  
15 tells -- shows me that a letter agreement was  
16 made between the FTC and Rambus; is that correct?

17 MS. VAN KEULEN: I believe that  
18 that's -- that that's correct. We know from  
19 Rambus that they state in their reply brief that  
20 the documents were produced to the FTC in the  
21 same framework as they were produced to Hynix,  
22 that is, in light of the rulings before Judge  
23 Payne and in the Micron case.

24 But what they don't address, of course,  
25 is the FTC hearing issue.



1 THE COURT: Okay.

2 MS. VAN KEULEN: I think we have  
3 addressed perhaps all but the last question.

4 THE COURT: Yes, the last two sort of.

5 MS. VAN KEULEN: And the last question  
6 is what about the documents in the public  
7 record. And, of course, that brings us right to  
8 the very practical aspect of an attempt -- this  
9 kind of attempt without -- there is no legal  
10 mechanism to go back and recast these documents  
11 as privileged.

12 THE COURT: Well, counsel indicates it's  
13 only a small subset that's on the public file.

14 MS. VAN KEULEN: Well, I don't think  
15 it's -- I don't believe it's so small. It's  
16 actually a number of documents that are part of  
17 the Infineon record, but, of course, the  
18 treatment of the documents applies to all of the  
19 documents whether or not one of the Infineon  
20 lawyers put it in the record or whether or not  
21 one of the FTC lawyers put it in the record. All  
22 the documents were the subject of the crime/fraud  
23 exception.

24 THE COURT: Yeah, but as far as you're  
25 physically going and getting them, they would

1 have to be in the public record for you to be  
2 able to get them from those files.

3 MS. VAN KEULEN: Well, to get the  
4 exhibits in the Infineon trial, yes. But we --  
5 of course, all the documents were produced.

6 THE COURT: No, no. What I mean is if I  
7 went down -- maybe I'm a bad example.

8 If one of the counsel here in the  
9 courtroom went down to Florida or Virginia,  
10 rather, they could only get the documents that  
11 were admitted at trial.

12 MS. VAN KEULEN: That's right.

13 THE COURT: Same with the FTC.

14 MS. VAN KEULEN: That's right. Except  
15 all of the documents have been produced pursuant  
16 to subpoenas to even other third parties. For  
17 example, there was a class action against Rambus  
18 and Hynix received a subpoena for all of the  
19 documents. This was the Holiday Matinee case in  
20 2002.

21 We told Rambus we got the subpoena, we  
22 are going to turn over everything, and Rambus  
23 agreed to that, and all those documents were  
24 produced to the third party.

25 THE COURT: You mean all the documents

1 that you got from Rambus that are attorney-client  
2 documents have been turned over to you by -- to  
3 another party with no objection from Rambus?

4 MS. VAN KEULEN: That's right, Your  
5 Honor. That's right. That's in the Holiday  
6 Matinee litigation. They were also turned  
7 over -- we got a subpoena from the FTC for all  
8 the documents that Rambus had provided to us in  
9 the litigation. They were all turned over to the  
10 FTC.

11 THE COURT: Okay. So they've been --  
12 all of the documents as a whole have been shifted  
13 throughout all of the various litigations, again,  
14 because the confidentiality is gone and cannot be  
15 recaptured. And, of course, there's no --  
16 counsel raised the point about trying to seal on  
17 the public record, but, again, there's no  
18 selective waiver.

19 You can't -- it can't be waived as to  
20 some and waived not as to other documents. So  
21 that attempt would be futile at this point in the  
22 proceeding.

23 THE COURT: How about number 6?

24 MS. VAN KEULEN: The last question, what  
25 prejudice to Hynix, and, of course, Your Honor,

1 the most obvious is that would put Hynix in a  
2 different position from all of the rest of the  
3 world, anybody else who wants the documents.

4 The privilege is gone. The confidential  
5 nature of Rambus's discussions with its counsel  
6 on these issues in this time frame is gone.

7 Those documents have been produced to third  
8 parties. They've been at the FTC. Some are in  
9 the public record in Infineon. Some and some  
10 others are in the public record at the FTC.

11 The fundamental nature of the privilege,  
12 confidentiality, has been completely expunged  
13 from these documents.

14 So to tell Hynix, well, you have to  
15 come here and make a separate showing puts Hynix  
16 in a worse position than any other member of the  
17 Press or any other litigant or anybody else with  
18 access to the documents of which there are many.

19 THE COURT: Of course, I suppose there  
20 would be nothing that would say that you couldn't  
21 get them from some third party that had them.

22 MS. VAN KEULEN: I'm sorry? Oh, that --  
23 well, yes, but then what's the point?

24 THE COURT: Right.

25 MS. VAN KEULEN: Then it truly becomes a 36

1 futile exercise.

2 THE COURT: Why shouldn't I wait on  
3 making a determination as to admissibility or 403  
4 issues until trial?

5 MS. VAN KEULEN: We believe that that  
6 would be the appropriate time to raise the  
7 issue. A question is why now, why is the issue  
8 being raised now. And if the Court would like a  
9 discussion of 403 points on these, I can  
10 certainly address that.

11 THE COURT: Well, I haven't even seen  
12 the documents.

13 MS. VAN KEULEN: But I will only say  
14 that they go obviously to Hynix's fraud claim, to  
15 its 17200 claim, which is not part of the  
16 Infineon case or the Micron case or at the FTC  
17 and, of course, our antitrust claims.

18 THE COURT: All right. Okay. Thank  
19 you.

20 MS. VAN KEULEN: Thank you, Your Honor.

21 THE COURT: Brief reply?

22 MR. KLAUS: Yes. Just a brief -- a few  
23 brief points, Your Honor.

24 The first is, if I understood Hynix's  
25 counsel's argument correctly, it is that once the 37

1 confidentiality is destroyed as between a client  
2 and the attorney under any set of circumstances  
3 once they are shown to an adversary no matter  
4 what the confidentiality is gone and the  
5 documents are no longer privileged.

6 That's frankly not -- not only is that  
7 inconsistent with Ninth Circuit law, the case of  
8 Transamerica and the Weil cases that we cite in  
9 our brief, it simply ignores the fact that one is  
10 required to look to the circumstances surrounding  
11 the production of the documents, which here we  
12 think it's fairly said were compelled.

13 I also didn't understand the argument  
14 even to be consistent with counsel's  
15 interpretation or at least the initial  
16 interpretation of the sort of gangly awkward  
17 sentence about "unless the Federal Circuit  
18 provides otherwise" because I thought what I  
19 heard Hynix's counsel say first was that in the  
20 event the Federal Circuit reversed the  
21 crime/fraud ruling then Rambus could come back  
22 and make an argument here.

23 If it's the case that a breach of  
24 confidentiality once made destroys the privilege  
25 forever, then that argument wouldn't make any

1 sense.

2 I am in agreement with you, Your Honor,  
3 that I -- I didn't write the June 22nd letter and  
4 it's very difficult to determine precisely what  
5 it means. I would say that with respect to what  
6 I thought was an alternative interpretation,  
7 which was that the purpose of the sentence was to  
8 ensure that no matter what the Federal Circuit  
9 said, on any aspect of the crime/fraud ruling  
10 that that would not affect Hynix's ability to use  
11 the documents.

12 I think that as we pointed out in the  
13 drafting history that was actually something that  
14 was suggested precisely by language that Hynix's  
15 counsel proposed and it was not ultimately  
16 adopted or incorporated into the letter.

17 With respect to the FTC proceedings, I  
18 believe Hynix's counsel said that Rambus had  
19 taken the position in its papers that the  
20 privilege was gone as to the 1991-to-1996  
21 documents.

22 I don't think Rambus's papers say any  
23 such thing. I think what they said was that  
24 there was no dispute and that, therefore, none  
25 of -- not one of the judge's rulings had to

1 address the question of the FTC's ability to  
2 access the '91-to-1996 documents.

3 And, in fact, the first decision that  
4 did, which was Judge Timony's first decision on  
5 the question, addressed this point in a footnote  
6 and said that the court wasn't resolving the  
7 question. It went on to discuss the question of  
8 a broader subject matter waiver for the  
9 1996-forward period.

10 THE COURT: But if those documents were  
11 provided to the FTC -- and apparently there was  
12 no specific protective order or written agreement  
13 between the FTC's counsel and Rambus about the  
14 production of those documents; right?

15 MR. KLAUS: My -- as I said, I am not  
16 aware of any written agreement. The only thing  
17 that I am aware of, Your Honor, the only thing  
18 we've been able to piece together is what the  
19 FTC's counsel said that it was not taking the  
20 position that its production to it was a waiver  
21 is the best sense that I have of what their  
22 understanding was.

23 THE COURT: What about the fact that  
24 Rambus apparently turned over the documents to a  
25 third party with your okay?



1 MR. KLAUS: I believe that what Hynix's  
2 counsel said was that Hynix turned the documents  
3 over to a third party. I have to frankly say,  
4 Your Honor, I'm not familiar with the Holiday  
5 Matinee litigation. This is the first time that  
6 I've heard about it is in the argument here and I  
7 don't believe there was anything in the record  
8 about the production.

9 I will say that what -- the essence of  
10 Hynix's position is is that because Hynix and  
11 Micron and Infineon have outstanding subpoenas to  
12 one another and have been exchanging documents  
13 back and forth pursuant to those subpoenas and  
14 did so all against the background of rulings  
15 which said that Rambus had effectively forfeited  
16 the attorney-client privilege as to those  
17 documents, where there have been several rulings  
18 in place that in a sense that really takes you to  
19 the De la Jara point that I raised earlier and  
20 that I believe was one of Your Honor's first  
21 questions to Ms. Van Keulen, which is how many  
22 times does a party have to litigate the issue and  
23 continue to bring it to the court.

24 It is Hynix's position that unless  
25 Rambus litigates it finally and conclusively in

1 every single circumstance, then it has to be  
2 deemed a waiver.

3 THE COURT: I find that argument a  
4 little bit extreme perhaps, but it would seem to  
5 me that at a minimum Rambus would have to have a  
6 written understanding with anybody that was given  
7 the documents and if you gave them to the FTC  
8 without some sort of agreement or -- and  
9 admittedly it's not in the papers, so I probably  
10 shouldn't consider it, but if they were turned  
11 over to Holiday after a call to you saying we've  
12 got the subpoena, then it seems to me you've  
13 clearly waived.

14 MR. KLAUS: Well, I would say two  
15 things. I would say two things in response, Your  
16 Honor. One is the question of what our -- I just  
17 can't address the Holiday Matinee litigation and  
18 I don't know, for example, whether if, in fact,  
19 there was a production made there was a  
20 requirement that those documents be treated with  
21 the same level of confidentiality that has  
22 been said we treat here. I just don't know. I'd  
23 be speculating there.

24 As I say, with the FTC it's my  
25 understanding that the production that was made,

1 that the documents were treated as confidential  
2 by the FTC. I believe Ms. Van Keulen is correct  
3 that there were documents that were published on  
4 the public record at the FTC trial. I don't know  
5 frankly how many more of them there were than  
6 there were at the Infineon trial.

7 I think that ultimately the -- if the  
8 question comes down to -- I don't think there's a  
9 need to sort the documents out document by  
10 document by document at this hearing or on this  
11 motion. If there was a ruling that documents  
12 which have not been published publicly are still  
13 protected by the privilege and should be  
14 returned, then the parties could between  
15 themselves sort out which documents were and were  
16 not on a list that would fall within the scope of  
17 that.

18 I will just say briefly, Your Honor, on  
19 the 403 and the prejudice point it doesn't seem  
20 to me that there's any unfairness to Hynix from  
21 having to litigate the fraud question. Hynix's  
22 counsel has said that they would be treated as --  
23 put in a worse position than everyone else in the  
24 world with respect to those documents.

25 I think that's a bit of an

1           overstatement. I think Hynix was able to  
2           effectively take advantage and have a free ride  
3           on the basis of a prima facie showing that it's  
4           never had to make that it's our contention they  
5           can't make in light of the Federal Circuit  
6           ruling. And for them to now say that they would  
7           be put into a worse position when they  
8           effectively took the sweet of the original  
9           crime/fraud ruling without having to take the  
10          bitter of it once the predicate for it is  
11          reversed on appeal seems to put them in something  
12          of a better position.

13                   THE COURT: Okay. Thank you. I'll send  
14          out a ruling shortly.

15                   MS. VAN KEULEN: Your Honor, just a  
16          procedural point?

17                   THE COURT: Yeah.

18                   MS. VAN KEULEN: If I may. As the Court  
19          raised the issue on the -- or raised a question  
20          about what Rambus said or told to the Federal  
21          Circuit, I'd like to submit their -- both the  
22          petition for immediate stay and their petition  
23          for writ.

24                   Now, these are confidential documents  
25          and if they are made -- put in the record, they

1 will need to be sealed.

2 THE COURT: Those are petitions to the  
3 FTC?

4 MS. VAN KEULEN: No. I'm sorry. To the  
5 Federal Circuit on its petition for writ where  
6 Rambus takes the position that Judge Payne's  
7 order, once it's given effect, the privilege and  
8 confidentiality --

9 THE COURT: Those are confidential  
10 documents. Don't you have to get a ruling from  
11 Judge Payne that they can be used?

12 MS. VAN KEULEN: No. These were to  
13 the -- these were to the Federal Circuit.

14 THE COURT: Oh. If they are  
15 confidential, I can't --

16 MS. VAN KEULEN: And they are stamped  
17 "confidential."

18 THE COURT: But I can't rule on somebody  
19 else's confidentiality order, can I?

20 MS. VAN KEULEN: I believe, Your Honor,  
21 that the Court can -- we could file these here.  
22 We could have put these in our request for  
23 judicial notice and -- but filed under seal.

24 THE COURT: Why? Where do I get the  
25 right to see those documents if they are

1 confidential?

2 MS. VAN KEULEN: Well, I don't -- they  
3 are not confidential as to the Court, Your  
4 Honor. They are confidential as to publication,  
5 but the Court can use them. They were given to  
6 us by Rambus. They are produced to us by  
7 Rambus. This is part of their pleadings from  
8 both the Infineon action and the Federal  
9 Circuit.

10 THE COURT: But do you think that ~~if~~ I  
11 sign a protective order as to documents and say  
12 they are confidential for this litigation only,  
13 for example, that you can deliver them to Judge  
14 McKelvie, for example -- well, I can't do that  
15 any more, but to Judge McKelvie if he were still  
16 there in Delaware in a case he has and mark them  
17 confidential?

18 MS. VAN KEULEN: If they are filed under  
19 seal, then they are only for the Court. The  
20 confidential nature is as to no public  
21 expulsion. But I'd simply offer it and if the  
22 Court doesn't want to accept them --

23 THE COURT: One, I don't think I need  
24 them. Two, I'm a little -- I'm not confident  
25 that I agree with your statement.

1 MS. VAN KEULEN: Okay. Well, if the  
2 Court doesn't feel that they need those in  
3 addition, then that's fine.

4 The only other point is in response to  
5 the Court's question about the confidentiality,  
6 whether or not there's a confidentiality  
7 agreement in the production to the FTC, is --  
8 responding to that is when we went back and  
9 checked and found the Holiday Matinee production,  
10 which is memorialized in a series of letters  
11 between counsel for Hynix, Holiday Matinee, and  
12 Rambus and, if the Court would like, we can  
13 supplement that and provide it to the Court  
14 today.

15 THE COURT: I'll let you know if I want  
16 that.

17 MS. VAN KEULEN: Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. KLAUS: Thank You, Your Honor.

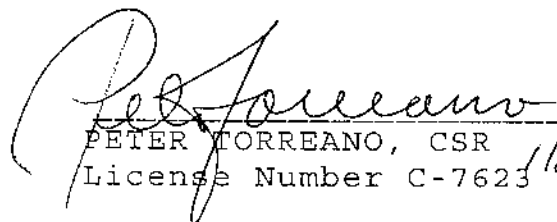
20 (Whereupon, the proceedings concluded.)  
21

22 ----oOo----

CERTIFICATE OF REPORTER

I, Peter Torreano, Official Court Reporter of the United States District Court for the Northern District of California, 280 South First Street, San Jose, California, do hereby certify:

That the foregoing transcript is a full, true and correct transcript of the proceeding had in *Hynix Semiconductor, Inc. v. Rambus, Inc.*, Case Number C-00-20905-RMW, dated January 16, 2004; that I reported the same in stenotype to the best of my ability, and thereafter had the same transcribed by computer-aided transcription as herein appears.

  
PETER TORREANO, CSR  
License Number C-7623 1/29/04