

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 Infinion 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.

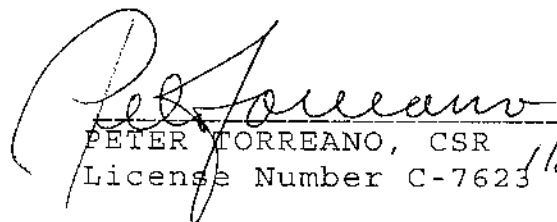
20 (Whereupon, the proceedings concluded.)
21

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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