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1 THE COURT: Hello.

2 MR. HILL: Good afternoon, Your Honor.
3 This is Braxton Hill with Christian & Barton on
4 behalf of Rambus. We have all parties here for the
5 conference call.

6 THE COURT: All right. Record your
7 appearance, please, starting with counsel for the
8 plaintiff.

9 MR. HILL: This is Braxton Hill with
10 Christian & Barton on behalf of plaintiff, Rambus.

11 MR. STONE: Good afternoon, Your Honor.
12 This is Gregory Stone and one of my partners, Kelly
13 Klaus, at Munger, Tolles on behalf of the plaintiff,
14 Rambus.

15 MR. GUARAGNA: Good afternoon, Your Honor,
16 John Guaragna of Gray Cary for Rambus.

17 MR. RIOPELLE: Good afternoon, Brian
18 Riopelle from McGuire Woods for the defendant,
19 Infineon.

20 MR. DESMARAIS: And, Your Honor, it's John
21 Desmarais, Mike Stadnick and Steve Lever from

22 Kirkland & Ellis for Infineon, Your Honor, as well.

23 THE COURT: Is that it? Okay. Give your
24 name when you speak, please. The first motion is
25 Rambus's -- I mean Infineon's motion for leave to

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1 amend its Complaint. Who is speaking for Infineon?

2 MR. DESMARAIS: That would be John
3 Desmarais, Your Honor.

4 THE COURT: All right.

5 MR. DESMARAIS: Did you have a question or
6 do you want me to just make my argument?

7 THE COURT: Make your argument.

8 MR. DESMARAIS: Your Honor, the California
9 unfair competition statute allows for three types of
10 unfair competition. We have more than substantially
11 pled each of those three types individually.

12 The first is unlawful conduct. And in
13 light of the fact that we have a monopolization
14 claim in violation of Section 2, that is clearly
15 cognizable as unfair competition under California
16 law under the unlawful prong.

17 Separately, under the unfair prong of the
18 unfair competition, clearly, we have alleged facts
19 sufficient to proceed under the unfair prong. The

20 case law in California sets out that the analogous
21 provision of Section 5 of the FTC Act is what is
22 meant by the unfair prong of the unfair
23 competition.

24 And as we all know, the FTC has proceeded
25 through trial and is waiting for a decision for a

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1 violation of Section 5 of the FTC Act, the same
2 conduct that we're alleging is unfair here in this
3 case. So we clearly have pled and can prove an
4 unfair violation, the unfair prong of the unfair
5 competition.

6 Additionally, we can meet the third
7 alternative, which is fraudulent conduct. The
8 fraudulent conduct that satisfies the unfair
9 competition statute in California is not common law
10 fraud like the Federal Circuit addressed, but it is
11 any sort of scheme to defraud.

12 Clearly, based on the evidence we have of
13 Rambus's conduct, there can be no doubt after the
14 last jury trial that they certainly embarked on a
15 scheme to defraud and to dupe their competitors and
16 to defraud their RDRAM partners.

17 Now they may not have been successful in
18 that fraud, according to the Federal Circuit, but

19 there is certainly ample evidence that they embarked
20 on a scheme to defraud.

21 We only need to allege a theory of unfair
22 competition on any one of those three prongs,
23 unlawful, unfair or fraudulent, to survive a motion
24 to dismiss or to be allowed to amend. We can
25 satisfy in this case all three.

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1 Rambus makes much of the fact that we have
2 alleged in our pleadings their intentional document
3 destruction and litigation misconduct, and they say
4 that our claims fail because of California's
5 litigation privilege.

6 But they misunderstand the foundation of
7 the claim. The foundation of the claim is either
8 just set as unfair -- unlawful under Section 2
9 monopolization, unfair under Section 5 of the FTC
10 Act and fraudulent for Rambus's scheme to defraud.

11 The allegations in the amended pleading
12 relating to Rambus's intentional document
13 destruction and their litigation misconduct are
14 merely facts that we will attempt to prove that will
15 support the unfair competition. They are not
16 necessary for the unfair competition.

17 Now, Rambus cites cases that these facts
18 may not even be used, and that may be an issue that
19 we will have to address either at the summary
20 judgment stage or at a motion in limine stage as
21 what can be proved and what can't be proved as part
22 of the overall pleading and the overall case.

23 But even if all of those were excluded
24 based on evidentiary reasons, there is more than
25 ample evidence on the unlawful, unfair fraudulent

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1 prong. So, clearly, the claim is not futile and is
2 entirely warranted.

3 THE COURT: Mr. Desmarais, is
4 monopolization under the federal antitrust law a
5 crime?

6 MR. DESMARAIS: I think that it can --
7 we're, obviously, pursuing the civil remedy.

8 THE COURT: I understand that. My
9 question is whether it is a crime.

10 MR. DESMARAIS: I believe that it is, Your
11 Honor, but I really -- I have to confess I have not
12 looked at that question.

13 THE COURT: All right.

14 MR. DESMARAIS: But I believe that it is.

15 THE COURT: How do you deal with the

16 Cel-Tech decision where it says that prevailing
17 plaintiffs under an unfair trade practices -- Unfair
18 Practices Act claim are limited to injunctive relief
19 and restitution and they may not receive damages or
20 attorneys' fees, and to what extent does that render
21 your complaint futile, given that you've asked for
22 attorneys' fees and costs?

23 MR. DESMARAIS: Yes, Your Honor. We are
24 only -- we are only pursuing as a remedy for the
25 unfair competition claim an injunction against

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1 Rambus, as outlined in the pleadings, and
2 restitution of the amounts we spent for the Slater &
3 Matsil response to their unfair competition as we
4 did in the first trial.

5 We are not seeking damages in the
6 traditional sense. We are seeking only injunctive
7 relief and restitution.

8 THE COURT: But you ask for in your
9 Amended Complaint attorneys' fees, don't you?

10 MR. DESMARAIS: Attorneys' fees and costs
11 related to -- I'm looking at that now, Your Honor.
12 Right. That is not attorneys' fees as a measure of
13 damages. We are not seeking Infineon's attorneys'

14 fees in the case as a measure of damages.

15 THE COURT: In Cel-Tech on page 539, the
16 court says, plaintiffs may not receive damages, much
17 less treble damages, or attorneys' fees, citing the
18 Bank of the West v. Superior Court and Consumers
19 Union v. Fisher Development, Inc.

20 So to the extent that you're seeking
21 attorneys' fees and costs, it looks to me like that
22 your complaint is futile.

23 MR. DESMARAIS: I would agree with you,
24 Your Honor, that if the -- if the request for
25 attorneys' fees is solely predicated on the unfair

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1 competition, it's not likely to be awarded to us.
2 However, we have several arguments as to why we are
3 entitled to attorneys' fees beyond the unfair
4 competition claim in and of itself, Rambus's
5 litigation conduct, intentional conduct.

6 There is, you know, it's an exceptional
7 case under the patent act. There are several
8 arguments we intend to make that will entitle us to
9 our attorneys' fees, much like we made last time.

10 THE COURT: All right. Anything else?

11 MR. DESMARAIS: No, Your Honor.

12 THE COURT: Who is going to argue for the

13 defendants?

14 MR. KLAUS: Good afternoon, Your Honor.
15 This is Kelly Klaus from the Munger, Tolles firm.

16 THE COURT: Mr. Klaus, I don't know
17 whether it's been entered or not, but over the
18 weekend I approved your motion to appear pro hac
19 vice in this case.

20 MR. KLAUS: Thank you very much, Your
21 Honor. I appreciate that, and I appreciate you're
22 saying that before starting my argument.

23 Your Honor, when the Federal Circuit
24 decided this appeal back in January of last year,
25 the case was remanded with a fairly specific and

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1 fairly narrow mandate, which was for there to be
2 further proceedings on the patent infringement
3 claims under the revised claim construction and a
4 vacated award of attorneys' fees under Section 285
5 of the patent law.

6 The claim that Infineon proposes to amend
7 to add at this juncture under Section 17200 of the
8 California law would extend this case far beyond the
9 issues that would be raised under the patent claims
10 and under Section 285 and would take the case into

11 extensive discovery and proceedings.

12 THE COURT: Well, I need -- given that you
13 have the responsibility to document and explain that
14 statement, I'd ask that you do it now. What
15 discovery -- if this claim, amended claim, is
16 permitted to go forward, what discovery would be
17 required?

18 MR. KLAUS: Well, I think that, Your
19 Honor, at a minimum one thing that we would be
20 required to do would be to look at all of the
21 discovery that was taken in the FTC case related to
22 their claim under Section 5, which Infineon's
23 counsel has said basically overlap its proposed
24 claim under the unfairness prong of Section 17200.

25 THE COURT: So you'd have to look at the

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1 discovery taken in the FTC. Now, what is that? I
2 don't understand what that is. I know you all know,
3 but I wasn't involved in it. So can you explain to
4 me what that means?

5 MR. KLAUS: Well, in terms of the
6 substance of the matter or in terms of the volume
7 and -- in terms of the volume of discovery that was
8 taken, Your Honor, or both?

9 THE COURT: Both.

10 MR. KLAUS: Okay. I can speak -- I think
11 I can speak a bit to the substance. Mr. Stone, who
12 was present throughout the FTC proceedings I think
13 can speak to the volume better than I can of the
14 number of third parties that were subpoenaed.

15 But in sort of general terms, Your Honor,
16 the allegation that is proposed to be made here that
17 I understand from reading the proposed amendment is
18 that beyond showing that there was some sort of duty
19 to disclose patents or patent applications to JEDEC,
20 which, as I see it, page 7 of Infineon's reply, it
21 has been conceded that there was no evidence that
22 there was a failure to disclose patents and patent
23 applications that Rambus was required to disclose,
24 that there was some other conduct which amounted to
25 an abuse of the standard setting process.

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1 I believe that through the FTC proceedings
2 there was extensive discovery taken of various other
3 members of JEDEC, including Infineon, including
4 Hynix, including Micron, in terms of what their
5 conduct was relative to other members and to the
6 standard setting process itself.

7 And as the cases that we have --

8 THE COURT: You're doing a lot of talking,
9 Mr. Klaus, that is beyond what I intended to ask you
10 to talk about. So pardon me if I interrupt you.

11 I would like to know what you are talking
12 about in terms -- just bullet points, what you're
13 talking about that would have to be pursued in
14 discovery, what issues.

15 MR. KLAUS: One issue, Your Honor, is
16 whether or not -- what members understood their
17 obligations to be, what other members did or did not
18 disclose to JEDEC, how other members conducted
19 themselves in relation to the standard setting
20 process. That's just with respect to the conduct
21 within JEDEC.

22 There are also allegations, Your Honor, in
23 the Amended Complaint that relate to the adoption or
24 implementation of a document retention policy. And
25 under the unfairness prong of Section 17200 under

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1 California law, that can't be judged to be unfair or
2 unfair conduct without looking at what it is
3 relative to other participants in the same
4 marketplace.

5 And so I think we would need, in bullet
6 point format, to know what other JEDEC participants

7 did or did not have in the way of document retention
8 policies, at what point they do or do not suspend
9 them or modify them in certain ways to know what is
10 reasonable conduct among participants in this
11 marketplace.

12 THE COURT: All right.

13 MR. STONE: Your Honor, this is Greg
14 Stone. Could I interject on the discovery points if
15 you would permit me to?

16 THE COURT: The volume, is that what
17 you're going to talk about? You were present at the
18 FTC.

19 MR. STONE: Yes. I was going to speak
20 briefly to the volume issue if I might.

21 THE COURT: All right.

22 MR. STONE: And I confess at the outset a
23 bit of uncertainty about Mr. Desmarais's point
24 whether that -- we expect, as Your Honor knows, I
25 think we expect sometime this month to have a ruling

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1 from the Administrative Law Judge in the FTC
2 proceedings.

3 And I'm uncertain whether Mr. Desmarais
4 plans, if that ruling is adverse to Rambus, to

5 simply rely on that ruling in some fashion or
6 whether the goal is to retry the FTC case so that
7 they can retry a Section 5 violation.

8 Now, setting aside whether that's proper
9 just as a matter of law, the evidence that was
10 required to try it in the first instance took, as I
11 recall -- and I didn't bring exact figures. There
12 were deposition subpoenas served upon over ten
13 third-party companies and the production of hundreds
14 of thousands of pages of documents by those
15 parties.

16 There was the taking of third-party
17 depositions that I believe exceeded thirty-five
18 depositions. Perhaps I'm underestimating that
19 number. And the trial, although not every day a
20 full day, most days were a full day. The trial
21 encompassed about three and one-half months in order
22 to take the testimony, as I think we've reported in
23 prior pleadings.

24 Ultimately, the amount of exhibits taken
25 in that case and the pages of transcript that were

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1 generated made it the single longest trial ever
2 tried in the Federal Trade Commission.

3 Similar amounts of discovery would be

4 required here simply on the issues raised by an
5 attempt to retry the Section 5 case. There are some
6 witnesses listed on Infineon's preliminary witness
7 list who were not witnesses in the FTC proceedings.
8 They would be added on on top of that if these
9 issues were to be pursued.

10 In addition, as Mr. Klaus pointed out, the
11 test under California law with respect to unfairness
12 of conduct is one that is measured against the
13 competitive environment rather than some objective
14 standard. And in that regard, a new issue is
15 interjected by Mr. Desmarais or Infineon's proposed
16 amendments, which is, namely, what is the conduct of
17 other companies with respect to their policies and
18 practices regarding document retention.

19 So all of those, I think, are issues that
20 would necessitate extensive discovery in this case,
21 that would be to some extent duplicative and some
22 extent on top of discovery that was taken in the FTC
23 case. And I think the period of time required to
24 try the case, even given a tight schedule and a long
25 trial date, would be significant, given the length

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1 of the trial that was conducted already.

2 I hope that's responsive to your desire to
3 sort of have me hit the bullet points and not go
4 into too much detail.

5 THE COURT: Were you counsel at the FTC?

6 MR. STONE: Yes, Your Honor, I was.

7 THE COURT: So you attended the whole
8 thing.

9 MR. STONE: I did.

10 THE COURT: All right.

11 MR. STONE: I missed one day.

12 THE COURT: Okay. And you had other
13 people at your firm, I assume, assisting.

14 MR. STONE: Yes, there were other people
15 at my firm that were there as well. Mr. Klaus was
16 not one of those, but there were others at my firm.

17 MR. KLAUS: I was not, Your Honor. And if
18 I could --

19 THE COURT: Just a minute, Mr. Klaus,
20 excuse me.

21 Did Rambus take discovery in that case,
22 these thirty-five depositions you're telling me
23 about, or did just the FTC do it or did both parties
24 do it or what?

25 MR. STONE: We took some depositions and

1 the FTC took some, Your Honor.

2 THE COURT: All right.

3 MR. STONE: I can't -- I apologize for not
4 having that list with me. I can't give you the
5 exact breakdown.

6 THE COURT: That's all right.

7 MR. STONE: We took deposition, for
8 example, of people like at IBM, and people at Intel
9 were deposed; IBM was deposed; Hewlett Packard had
10 witnesses deposed. So a number of third parties in
11 the industry had various witnesses deposed, and some
12 witnesses testified live at trial who had not been
13 deposed by either party.

14 THE COURT: Did that involve what Rambus
15 was doing at JEDEC as well as the document retention
16 or not?

17 MR. STONE: It did not involve the
18 document retention issues. Any of these third-party
19 depositions focused on what was JEDEC's policy; what
20 was JEDEC's practice; what were the expectations of
21 JEDEC members with respect to disclosures; what did
22 they disclose as evidence of their understanding of
23 what JEDEC expected or members expected and what did
24 Rambus do.

25 And there was also discovery into what

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1 these various companies knew about Rambus's
2 intellectual property and its business model and so
3 on.

4 And then there was also discovery directed
5 at the issue of what other -- whether there were any
6 other technologies that could have been utilized to
7 achieve the same speed that the Rambus inventions
8 allowed the companies manufacturing DRAMs to
9 achieve.

10 And so there were questions on what might
11 be generally described as alternative technologies
12 or noninfringing technologies.

13 All of that was -- depending on the
14 witness, all of those I think were topics that were
15 addressed in depositions. Probably no one
16 deposition addressed them all.

17 THE COURT: Yes, I'm sure that's true.

18 Well, other than what's already been done
19 in the FTC, what would have to be done by way of
20 discovery? It's already been done and you all know
21 about it from Rambus's side. And I assume there is
22 a record, and Infineon could get the record and
23 they'd be up to speed.

24 MR. STONE: One of the dilemmas we have,
25 Your Honor, is the discovery taken in the Federal

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1 Trade Commission action was not taken in
2 anticipation of being used as testimony at the trial
3 because the FTC allows nationwide service of process
4 to compel testimony at the hearing, and indeed
5 you're required to call witnesses live unless the
6 witness is unavailable, unavailable due to health
7 reasons or other extraordinary circumstances.

8 So almost all of the third-party testimony
9 was, with the exception of one witness, who was
10 quite ill, all of the testimony was taken at the
11 proceedings live. So the discovery that was taken
12 was taken in limited fashion intended to prepare
13 you, simply to prepare you to cross examine the
14 witness at trial, but not necessarily to obtain the
15 testimony in the fashion you might wish to elicit it
16 at trial.

17 So because of that limitation, many of
18 these depositions would need to be retaken in this
19 case in order to ensure that we had the testimony in
20 a usable fashion, perhaps even videotaped, so that
21 the jury and Your Honor would be able to watch it.

22 So in that regard, many of those
23 depositions would need to be retaken at least in
24 part.

25 THE COURT: Well, I don't think that would

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1 be necessary if you've got people where your
2 motivated to ask questions and you get them under
3 oath and you've had a deposition to prepare, and
4 then you have them under oath, I don't think
5 additional discovery would be required. But I
6 understand your point on that.

7 All right. Anything else that you all
8 have to say?

9 MR. STONE: I would say there are
10 additional witnesses who are now listed on
11 Infineon's witness list and witnesses who testified
12 at the FTC matter who were not deposed. And those
13 various third parties would need to be deposed as
14 well.

15 In addition, there were custodian of
16 records testimony from all of the companies who
17 produced documents in response to our subpoenas. We
18 were able to handle those documents through
19 stipulations with the Federal Trade Commission.

20 At the moment we don't know whether that's
21 something that would be possible to do here or not.
22 Most of these documents were produced to the FTC in
23 response to FTC subpoenas. They seemed satisfied

24 with the production, and we would need to determine
25 whether the discovery would need to be taken of

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1 those witnesses in order to lay a proper foundation.

2 THE COURT: All right.

3 MR. KLAUS: Your Honor, this is Mr.
4 Klaus. I will be brief in summarizing the other
5 arguments. In terms of why we'd have to undertake
6 this, we think that the various prongs --

7 THE COURT: Why you have to undertake
8 what?

9 MR. KLAUS: Why we'd have to undertake
10 this discovery.

11 THE COURT: Which discovery?

12 MR. KLAUS: I apologize, Your Honor, I did
13 not hear you.

14 THE COURT: Why you would have to
15 undertake what discovery?

16 MR. KLAUS: The discovery that we have
17 outlined in our papers and that Mr. Stone was
18 referring to, Your Honor.

19 THE COURT: Well, I don't think the
20 discovery that -- I don't think you've outlined
21 discovery in your papers very well. You've said

22 you'd have to take evidence about fairness and you'd
23 have to take something about document retention
24 policies. But I don't really understand what that
25 means other than in the most general sense.

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1 I do understand what Mr. Stone has said
2 about what was testified to and is available in the
3 record from the FTC proceedings.

4 What are the other things you're talking
5 about?

6 MR. KLAUS: Well, the other things that
7 we'd be talking about, Your Honor, were with respect
8 to the document retention issues.

9 THE COURT: Now exactly what would you do
10 on that score?

11 MR. KLAUS: Well, with respect to both
12 Infineon and with respect to other third parties
13 what their policies are and at what point their
14 policies are changed or modified.

15 THE COURT: Why do you need to know that
16 as -- what kind of people do you need to know that
17 as to?

18 MR. KLAUS: Well, I believe that at least
19 with respect to other DRAM manufacturers who are in
20 this marketplace.

21 THE COURT: Well, why would that be
22 relevant even? It's other people --

23 MR. KLAUS: I believe that it's relevant,
24 Your Honor, because one of the prongs of Infineon's
25 Section 17200 claim is that the policy that Rambus

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1 implemented, the timing that it implemented it,
2 rendered that an unfair business practice.

3 THE COURT: Right. Well, you wouldn't go
4 around deposing the world on what their document
5 retention policies would be. You would have to
6 depose somebody who's in this business who has a
7 patent program and is going establish a document
8 retention program on the eve of implementing its
9 patent suits.

10 You have to narrow it somewhat I think,
11 according to the allegations in the proceedings, I
12 mean in the Complaint. Wouldn't you see that as how
13 you would have to go about this?

14 MR. KLAUS: Well, I would agree with Your
15 Honor, it would not be a matter of deposing the
16 world.

17 THE COURT: Well, answer the other
18 question. Isn't that how you would have to go about

19 it, Mr. Klaus?

20 MR. KLAUS: I do think that it would have
21 to be tied to the allegations of the Complaint.

22 THE COURT: And it would have to be --
23 you'd have to find somebody similarly situated in
24 order to get evidence that would even be admissible,
25 don't you think?

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1 MR. KLAUS: I would agree with that, Your
2 Honor.

3 THE COURT: So who are those people?

4 MR. KLAUS: I'd say that most of the
5 participants in the DRAM industry here, including
6 Infineon itself, are in the business of applying for
7 and acquiring patents and licensing them and no
8 doubt contemplating litigation against prospective
9 licensees.

10 And so the analogy as between Rambus's
11 practices and the others is much closer than people
12 in unrelated lines of business who may not have a
13 patent program.

14 THE COURT: So you'd have to be DRAM
15 manufacturers, who have a patent program of some
16 kind in which they initiated a document retention
17 program in the course of or in anticipation of

18 litigation against those whom they would license
19 patents. That's essentially what we'd be looking
20 at; is that what you're saying?

21 MR. STONE: Your Honor, this is Greg
22 Stone, if I can interject. I think --

23 THE COURT: Mr. Stone, from now on one
24 person per issue. This isn't a tag-team match. Go
25 ahead. But this isn't a tag-team argument. We are

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1 doing it like it's in court. We are doing it for
2 your benefit, both of you, so that you don't have to
3 come here, and I believe Mr. Desmarais had a job --
4 I mean a hearing of some kind, and we're trying to
5 do it that way, but we are like in court. So we are
6 going to do it -- no tag teams.

7 MR. STONE: I appreciate that, Your Honor,
8 and I appreciate this one indulgence if I might.

9 Our understanding of the proper scope of
10 discovery might be slightly different than Your
11 Honor's, and I want to be clear about what I think
12 our understanding would be.

13 We think a company that faces the
14 potential for litigation, either as a plaintiff or
15 as a defendant, and has in place, either puts in

16 place or continues in place a document retention
17 program that would be involved in this industry,
18 that is someone whose standard of conduct would be
19 appropriate to be considered in terms of deciding
20 whether what Rambus did or did not do was fair,
21 would be a target of discovery.

22 So that would include not just companies
23 who are contemplating filing litigation. It's also
24 companies who are contemplating defending litigation
25 because the defense of litigation imposes upon one

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1 the same retention duties as the bringing of
2 litigation.

3 THE COURT: No, Mr. Stone, not really. It
4 does in concept. But in reality, the important
5 point is at what point do you anticipate initiating
6 litigation and at what point do you anticipate
7 defending litigation. And the two tests for those
8 particular components are somewhat different.

9 MR. STONE: Your Honor, I agree with you
10 that the timing at which one anticipates may occur
11 at a different point in time. But, nonetheless, I
12 do believe that there comes a point in time when
13 every defendant contemplates litigation, even if it
14 comes no sooner than the time that they've been

15 sued.

16 And the maintenance of a document
17 retention program beginning at that point in time or
18 the creation of one beginning at that point in time
19 or thereafter is a subject of discovery that would
20 be necessary in order to establish that Rambus's
21 program was consistent with the conduct of others in
22 this industry and fair by the standards set forth in
23 17200.

24 THE COURT: All right. I think maybe you
25 may have it a little closer to what reality is than

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1 what we started out with. I'm not sure that's the
2 exact parameter, but it's far more constricted than
3 you all started talking about or than is discussed
4 in your papers I think.

5 How voluminous it is, I don't know. How
6 difficult it is, I don't know. How many people do
7 you propose deposing on this issue if this Complaint
8 goes forward? Who is going to speak for Rambus?

9 MR. STONE: Your Honor, on the scope of
10 the discovery, I think it should be me, and this is
11 Mr. Stone.

12 THE COURT: All right.

13 MR. STONE: I think, Your Honor, we have
14 not -- I don't know that that's an issue I have sat
15 down and considered fully. But I think those
16 members of JEDEC who either obtained patents and
17 looked to either license or enforce those patents,
18 as well as those members of JEDEC who had previously
19 or since defended against patent litigation, that
20 would be a group that we would start with.

21 That's a group -- we wouldn't take them
22 all, I'm certain, because the membership at JEDEC at
23 most points in time is well over three dozen
24 members. So we wouldn't take them all. But,
25 certainly, some of them we would take in order to

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1 show ultimately the trier of fact that their
2 programs are the same in all material respects as
3 Rambus's.

4 THE COURT: All right. I think I
5 understand your position. And that's the discovery
6 we're talking about that would have to be taken in
7 the case.

8 MR. STONE: Yes, Your Honor.

9 THE COURT: All right. I understand.
10 Well, given that you have a lot of discovery in the
11 FTC proceedings, how, if at all, are you

12 prejudiced? Somebody needs to address that aspect
13 of the Foman v. Davis test.

14 Who is going to address that?

15 MR. KLAUS: Your Honor, this is Mr. Klaus.
16 I will try to do that, and I will try to do that
17 without any tag teaming.

18 I think that with respect to the -- with
19 respect to the (unintelligible) and the discovery,
20 it would be very difficult to get the volume of
21 discovery in --

22 THE COURT: What now? I'm sorry, I just--
23 somehow the telephone system clipped you off in the
24 middle of something you were saying, Mr. Klaus.
25 Start that again.

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1 MR. KLAUS: I apologize, Your Honor.

2 THE COURT: No. It was the telephone
3 system I think. Go ahead.

4 MR. KLAUS: Okay. Thank you, Your Honor.
5 I believe that the volume of discovery would
6 threaten to push back the trial date that we have.

7 THE COURT: You need more preparation
8 time.

9 MR. KLAUS: I think that we would need

10 more preparation time.

11 THE COURT: Well, how much?

12 MR. KLAUS: A very high likelihood of
13 that.

14 THE COURT: And how much would you need?

15 MR. KLAUS: That I don't know because I
16 haven't --

17 THE COURT: All right. What other
18 prejudice are you talking about, just so I
19 understand your argument, the Foman v. Davis
20 prejudice.

21 MR. KLAUS: Well, I think there is the
22 prejudice from having to prepare to -- to prepare to
23 defend against those claims, Your Honor. And I
24 think that it is -- it seems particularly
25 inappropriate for those burdens to be undertaken now

□

30

1 when the facts upon which Infineon is relying for
2 its proposed amendment were all known to it well in
3 advance of the first trial in this matter.

4 THE COURT: Well, that has to do with
5 delay, I think, Mr. Klaus. I'm asking you now
6 really just about the prejudice aspect of Foman.
7 You're prejudiced because you need more time and
8 can't do it within the trial time. That is what I

9 really heard you say.

10 MR. KLAUS: Well --

11 THE COURT: Or before the trial.

12 MR. KLAUS: Yes, I believe that is the
13 prejudice, Your Honor --

14 THE COURT: All right.

15 MR. KLAUS: -- is having to face a new set
16 of allegations and in a sense a new and different
17 type of case than the one that was remanded by the
18 Federal Circuit within the time that we have left.

19 THE COURT: Well, the Federal Circuit made
20 a remand, but its remand order and decision didn't
21 talk about anything but the patent aspects of the
22 case. And, of course, there was no need to remand
23 for the fraud because they set aside the verdict as
24 to the fraud.

25 Are you taking the position that the only

□

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1 thing that can be tried is patent infringement, that
2 the only thing that can be litigated here is patent
3 infringement by virtue of that part of the Federal
4 Circuit's position that is -- where the remand
5 occurs.

6 MR. KLAUS: Yes, Your Honor, I believe

7 that the -- when the mandate from the Court of
8 Appeals is specific in terms of what the further
9 proceeding are to be on remand that there needs to
10 be a justification offered by a party in Infineon's
11 position to open up and to expand the case to
12 include new and different matters.

13 THE COURT: Well, now, wait a minute.
14 That really isn't what I asked you. I'm saying, are
15 you taking the position that the only thing that is
16 to be considered on remand is the issue of
17 infringement?

18 MR. KLAUS: It would be the issue of
19 infringement and the issue of (unintelligible) under
20 Section 285.

21 THE COURT: Wait a minute. Something
22 happened. I'm sorry, you were cut off right in the
23 middle of it, of your statement.

24 It would be the issue of infringement and
25 -- and then I missed what you were talking about.

□

1 MR. KLAUS: My apologies, Your Honor.

2 THE COURT: You don't have to apologize,
3 I'm sorry. You spend a lot of time apologizing.
4 You shouldn't apologize. It's a mechanical thing,
5 and it just takes up time. So I'm not offended.

6 All I'm doing is taking the opportunity to tell you
7 that I need to hear more clearly what you said
8 because some mechanical thing got to what you were
9 saying.

10 All right. Now, I heard what you said.
11 You said, yes, you think the only thing to be tried
12 is infringement and -- and then I lost what the
13 "and" was. Would you help me?

14 MR. KLAUS: Yes, Your Honor. It would be
15 the remand of the attorneys' fee award under Section
16 285.

17 THE COURT: And so there would be no
18 trying of any of the defenses that Rambus has; is
19 that your view?

20 MR. KLAUS: I believe that in terms of the
21 defenses that Infineon has --

22 THE COURT: I'm sorry, excuse me. It's
23 been a long day.

24 MR. KLAUS: Your Honor, I certainly don't
25 need an apology from you. I believe it would be the

□

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1 defenses that Infineon has because they had and have
2 -- because I believe those are encompassed within
3 the terms of the remand mandate of a claim for

4 patent infringement.

5 THE COURT: So all of Infineon's defenses
6 are to be tried as a consequence of the fact that
7 they're related to the infringement then; is that
8 your position?

9 MR. KLAUS: The defenses that were in the
10 case, and as we've said in our papers previously,
11 can be tried consistent with the Federal Circuit's
12 ruling and the law of the case.

13 THE COURT: I think I understand what
14 you're saying.

15 All right. Now, the next component is the
16 delay I believe of the Foman v. Davis. You've
17 discussed futility. You've discussed prejudice.
18 The next component is the delay in the bringing of
19 the counterclaim that they proffer.

20 What would you say as to that?

21 MR. KLAUS: Yes, Your Honor. As far as
22 delay, I believe the issue is that all of the facts
23 that Infineon relies on as support for its Section
24 17200 claim, under all three of the claims that
25 Infineon's counsel has outlined, were known to it

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1 well in advance of the first trial.

2 Certainly, the abuse of the standard

3 setting process was known to them. Certainly, the
4 existence and implementation of a document retention
5 policy at Rambus was know to Infineon. Certainly,
6 the assertions about interrogatory responses and
7 requests for admissions were known to Infineon.
8 They were raised and they were resolved by the Court
9 in its attorneys' fee award.

10 There are also allegations --

11 THE COURT: Well, now, wait a minute.
12 That wasn't known before the trial. It was known
13 after the first trial and while this case was then
14 on the way to the Federal Circuit. That part of it,
15 whatever was dealt with in the attorneys' fees
16 opinion, happened after the trial, not before it,
17 didn't it?

18 MR. KLAUS: Well, I believe that -- I
19 believe that a good deal of the information was
20 known before. I know that part of the attorneys'
21 fee award, Your Honor, was based on findings with
22 respect to the document retention policy that had
23 been explored in discovery as early, I believe, as
24 January of 2001.

25 THE COURT: Yes, I understand.

□

1 MR. KLAUS: Which was several months
2 before the trial.

3 THE COURT: I see.

4 MR. KLAUS: There are allegations in the
5 proposed amendment relating to the adequacy of
6 descriptions on Rambus's privilege log. And at
7 least with respect to approximately the first
8 thousand or so entries that are on Rambus's
9 privilege log, those entries were actually present
10 and Infineon had those before the initial trial of
11 the matter.

12 And in addition, the prior -- long before
13 the first trial of this matter, the Hynix plaintiffs
14 who, I think, as Your Honor is well aware, are
15 involved in one of the parallel lawsuits, had
16 actually filed a claim under Section 17200 based on
17 much of the same conduct; in particular, the alleged
18 abuse of the standard setting process by Rambus.
19 That complaint was filed in October of 2000.

20 So I think with respect to the delay
21 factor, I believe, Your Honor, that the record shows
22 that all of these facts were known, of which the
23 allegations are based, long before the first trial.

24 And as I saw in the reply paper by
25 Infineon, there was simply no attempt to excuse or

□

1 account for the delay or to explain why these claims
2 were not added prior to the first trial.

3 THE COURT: All right. I think I
4 understand. Mr. Desmarais.

5 MR. DESMARAIS: Yes, Your Honor. Speaking
6 first to the prejudice argument and additional
7 discovery, I think it bears noting that the claims
8 already in the case, the monopolization
9 counterclaim, the patent misuse claim, the equitable
10 estoppel claim and the unclean hands claim, are
11 going to address these issues.

12 So for Rambus to say they need additional
13 discovery to defend the unfair competition claim
14 doesn't make any sense. We're arguing -- the unfair
15 competition is based in part on the Section 2
16 monopolization claim.

17 We are already going to be proving at this
18 trial that Rambus engaged in monopoly conduct. It's
19 all the same proof. We're already proving in this
20 trial our patent misuse defense, which, again, it's
21 all the same proof.

22 We're already going to be proving in this
23 trial all of the JEDEC conduct because of our
24 equitable estoppel defense. And with respect to our
25 unclean hands defense, all the document destruction,

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37

1 spoliation, lying, discovery abuse, all of that
2 comes in under the unclean hands defense.

3 So it's all part of the case anyway. The
4 only thing the unfair competition charge does is it
5 gives us a new legal theory to apply to all that
6 same conduct.

7 The document retention is already going to
8 be in under the unclean hands. If Rambus needs
9 discovery to defend itself, it's going to have to do
10 that anyway to defend against the unclean hands.

11 If Rambus thinks it needs discovery to
12 defend against the Section 5 unfair competition,
13 well, they're going to need that same discovery to
14 defend the monopolization claim. And by the way,
15 they didn't do anything the first time to defend the
16 monopolization claim that required the expansive
17 discovery that they're saying now.

18 So to say that the unfair competition adds
19 something, from a discovery point of view, that the
20 claims already in the case don't address, I just
21 don't see that. I don't see it at all.

22 All the unfair competition claim does is
23 give us a new legal theory that fits directly with
24 the Federal Circuit's opinion. What the Federal
25 Circuit said when they reversed the actual fraud is

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1 they said, well, we have not found actual fraud.
2 Rambus's business assets are certainly called into
3 question by this conduct.

4 That falls squarely on California unfair
5 competition, and we ought to be allowed to prove
6 what the Federal Circuit said they found on this
7 record. So I just don't see the prejudice claim
8 whatsoever.

9 THE COURT: All right. Well, what about
10 the need to have discovery as Mr. Stone outlined,
11 Mr. Desmarais, about the issue of document
12 retention?

13 MR. DESMARAIS: To be frank, Your Honor, I
14 don't understand that for two reasons. One is, as I
15 said, we are already going to be proving their
16 document retention conduct under our unclean hands
17 defense, which is already in the case. So no matter
18 whether this new claim is added or not, that conduct
19 will be proved here. That's the first point.

20 The second point about whether Mr. Stone
21 wants to go take discovery of what other people are
22 doing to justify Rambus's own conduct, you know, I
23 don't believe that's justification.

24 And the reason I say that is because it's
25 not a question of what the scope of the policy was

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1 or what other people are doing. It's a question of
2 what Rambus did, when they did it, and what their
3 intent was. It's the timing and the execution and
4 what they destroyed specifically. This is conduct
5 specifically to Rambus.

6 Whether Micron might have destroyed some
7 documents or Samsung might have destroyed some,
8 maybe they did; maybe they didn't. But it's not
9 relevant to whether Rambus is guilty of unfair
10 competition. Maybe these other companies are too.
11 That doesn't excuse Rambus. Since when has that
12 been a defense?

13 So I certainly think that all discovery
14 ought to be shut down. I don't see any relevance to
15 it.

16 THE COURT: Is the question of what you're
17 required to do in respect of implementing a document
18 destruction or retention program a matter that is
19 governed by industry standards or is it a matter
20 that is governed by law, Mr. Stone?

21 MR. STONE: Your Honor, I think that with
22 respect to a claim, for example, of spoliation, I

23 think that's an issue where you might say that the
24 standard is one largely governed by law.

25 Where the question is one set forth by

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1 judging you against the standards of 17200, the
2 cases I think make clear that it is one that is also
3 governed by what the practice is.

4 THE COURT: What if the practice is half
5 the industry violates the law and the other half
6 doesn't, do you take the view that you can put in
7 illegal conduct as a defense?

8 MR. STONE: I think, Your Honor, that with
9 respect to a claim of 17200, if you actually had a
10 situation in which half the industry conducted their
11 practices of document retention in one fashion and
12 the other half conducted it in another fashion and
13 that you fell in one group or the other, that you'd
14 have a strong argument that your conduct was not
15 unfair when judged against the practices of the
16 competitive industry.

17 THE COURT: Even if the half that you're
18 talking about violated the law relating to when you
19 were obligated to keep documents?

20 MR. STONE: If it violated the law, I

21 think then you would be assessing the conduct under
22 the unlawful prong of 17200 rather than the unfair
23 prong. And I don't hear the argument here to be
24 that anything about Rambus's document retention
25 program was to be judged under the unlawful prong.

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41

1 It's being judged under the unfair prong.

2 And under that prong I think that the fact
3 that half of the industry conducts itself, using
4 your hypothetical, in the same fashion as you do, is
5 indeed a defense to that claim.

6 THE COURT: But your position then is, as
7 I understand it, is that if the conduct of part of
8 the industry is in violation of the law, it is still
9 admissible to show what's fair; is that right?

10 MR. STONE: Yes, Your Honor. But I think
11 the conduct of the industry, whether consistent or
12 inconsistent with the law, when judged under the
13 unfair prong, that the conduct of the industry is
14 admissible for that purpose of 17200.

15 THE COURT: I understand. I don't know
16 that I agree with it. In fact, I don't think I do
17 agree with it. I don't think the courts can be in
18 the business of measuring fairness about what's
19 unlawful, but we'll see.

20 All right. I interrupted your
21 presentation, Mr. Desmarais, to ask Mr. Stone a
22 question, and I have one more question for you, Mr.
23 Desmarais.

24 Is a claim brought under the Unfair
25 Practices Act a tort claim?

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42

1 MR. DESMARAIS: No, Your Honor.

2 THE COURT: It is not.

3 MR. DESMARAIS: That's right.

4 THE COURT: All right. What kind of claim
5 is it?

6 MR. DESMARAIS: It's statutory unfair
7 competition. It's a claim for injunctive relief.

8 THE COURT: It's not a tort with a limited
9 remedy.

10 MR. DESMARAIS: It is not -- in the case
11 law it is not characterized as a tort.

12 THE COURT: All right. Go ahead with your
13 presentation.

14 MR. DESMARAIS: In closing, Your Honor, it
15 is true that some form of unfair competition claim
16 could have been brought before. I can't argue that
17 it couldn't have been brought the first time.

18 THE COURT: Yeah, I would think --

19 MR. DESMARAIS: I point out in our reply
20 brief, had we brought the claim the first time, back
21 in January of 2001, which was the last time to
22 amend, Rambus would have had less time to prepare
23 its defense than this time. They're actually
24 benefited by us bringing it now.

25 But it is not true that all the facts were

□

43

1 known the first time. We have been given, as you
2 know, thirty-one boxes of additional documents now.
3 We have been given two thousand additional privilege
4 documents now.

5 We have been given all sorts of documents
6 relating directly to these issues that we didn't
7 know before. We have learned the scope of the
8 document destruction and document retention now only
9 for the first time.

10 We had, you know, our nose in the tent
11 last time right before the trial. You will recall,
12 we learned -- we began learning the scope of this
13 right before the trial when you pierced Rambus's
14 privilege last time and the documents started coming
15 in. We were only a week before the trial last
16 time.

17 For Rambus to say that we could have
18 amended, we would have had to amend the night before
19 the jury trial started. And at that point it was
20 not viewed as a sensible course of action. And then
21 we developed the record a little further in the
22 attorneys' fees after Rambus witnesses lied at the
23 trial.

24 But now coming back, in light of what's
25 happened now and in light of the new document

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44

1 production, in light of the new huge amount of
2 withheld documents, in light of the Federal Circuit
3 saying and instructing us, essentially, that this is
4 unfair business conduct, not common law fraud, in
5 light of all of those events, it would be incredibly
6 prejudicial to Infineon not to let us put the
7 appropriate legal theory on misconduct.

8 As I said, all the discovery and all the
9 testimony is coming into the case anyway. It's just
10 a matter of labeling it with the appropriate legal
11 theory.

12 And as I understand the Fourth Circuit
13 law, delay alone -- even though the delay in this
14 case I believe is excusable in light of the late

15 discovery -- delay alone is not sufficient if there
16 isn't bad faith, prejudice or futility. And I don't
17 think Rambus has carried its burden on any of those
18 three.

19 THE COURT: All right. I have heard your
20 arguments. I have considered the briefs. The
21 motion for leave to amend is granted. I will issue
22 an opinion on it later. But I think you need to
23 know where you're heading now. So I think that it's
24 preferable for you to know the end result, even
25 though you don't know the rationale yet.

□

45

1 MR. KLAUS: Your Honor, this is Mr. Klaus.

2 THE COURT: Yes, Mr. Klaus.

3 MR. KLAUS: Our time for pleading or for
4 moving to dismiss in response, would that be the
5 period of ten days under Rule 15(a)?

6 THE COURT: Sure.

7 MR. KLAUS: Okay.

8 THE COURT: No, that's not ten days. It's
9 the period of eleven days under the rules.

10 MR. KLAUS: It may be my misreading, Your
11 Honor. I thought that it was --

12 THE COURT: You're talking about the
13 Federal Rules of Civil Procedure.

14 MR. KLAUS: I'm sorry?

15 THE COURT: You're talking about the
16 Federal Rules of Civil Procedure.

17 MR. KLAUS: I'm looking at 15(a), Your
18 Honor.

19 THE COURT: Right.

20 MR. KLAUS: Which is, a party shall plead
21 in response to an amended pleading within the time
22 remaining for response or within ten days after
23 service of the amended pleading, whichever period
24 may be the longer. I suppose it depends on what day
25 we treat the amended pleading as having been served.

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46

1 THE COURT: Well, actually, was it
2 served?

3 MR. KLAUS: It was an exhibit to
4 Infineon's motion.

5 THE COURT: Well, but that was attached as
6 an example for the motion for leave to amend. Do
7 you accept service?

8 MR. KLAUS: We would except service, Your
9 Honor.

10 THE COURT: Effective when?

11 MR. KLAUS: Today.

12 THE COURT: All right. That's fine. It
13 will be deemed filed as of today. The clerk will be
14 so ordered to direct that it be filed.

15 And you want to file -- I believe the
16 scheduling order in this case says that you file
17 amended pleadings within fifteen days, doesn't it?
18 I believe that's what it says.

19 MR. KLAUS: I can check that, Your Honor.

20 THE COURT: Well, let's just fix a date.
21 When do you need to file your -- when do you want to
22 file your answer and your responsive pleadings?
23 That means motions as well. When do you want to do
24 that?

25 MR. KLAUS: I believe the last -- I would

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47

1 request the 17th of February, which is ten days,
2 plus the one day for the court holiday.

3 THE COURT: All right. February 17th, you
4 file your answer and any motions that you have in
5 respect of that Amended Complaint with that claim.

6 MR. DESMARAIS: Was that January 17th,
7 Your Honor?

8 THE COURT: February. January 17th is
9 already gone I think.

10 MR. DESMARAIS: I'm sorry, yes. I meant

11 February. Thank you.

12 THE COURT: You may have missed January.

13 So then you file your response, Mr. Desmarais --
14 what time do you want to file your response? He's
15 taking ten days. You know what his issues are.

16 MR. DESMARAIS: If I can look at the
17 calendar, how about if we have until February 27th.

18 THE COURT: What day of the week is that?

19 MR. DESMARAIS: That's a Friday.

20 THE COURT: All right. You all are going
21 to serve each other by hand or fax or whatever.

22 MR. DESMARAIS: Usually we do both.

23 THE COURT: Okay. Then the reply, any
24 motion, any reply to the motion you want to file,
25 Mr. Klaus, when?

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48

1 MR. KLAUS: I believe that we can do that
2 a week after, which according to my calendar, Your
3 Honor, would be Friday, I think, the 5th of
4 February.

5 MR. STONE: March.

6 MR. KLAUS: My apologies, Friday, the 5th
7 of March.

8 THE COURT: Okay.

9 MR. KLAUS: Your Honor, just one -- this
10 is Mr. Klaus, one point of clarification. Your
11 Honor I think said that we should file both an
12 answer and any motion.

13 THE COURT: That's correct.

14 MR. KLAUS: Okay.

15 THE COURT: That is the standard practice
16 here. That's the standard order that I issue, and
17 it's generally the standard practice here and has
18 been for years. Of course, under the rules you
19 don't waive any motion by filing an answer,
20 obviously.

21 MR. KLAUS: Thank you very much, Your
22 Honor.

23 THE COURT: All right. Now, the next
24 thing is the motion to compel. Now, I have read
25 these briefs, and I have looked at but not completed

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49

1 my study of some of these privileged documents
2 listed in the log.

3 And I don't have any idea who it was that
4 decided that preparing a privilege log like this
5 would be a good idea, but it's not. The privilege
6 log is inadequate.

7 The rules -- the pretrial order in this

8 case, the rules and my instructions to you were to
9 prepare something that would permit somebody to file
10 a claim that -- or to file a motion to compel, and
11 that simply hasn't been done. So the privilege log
12 is inadequate by any measure that I know of.

13 That rule was in effect here since
14 October 3, 2000. I think it's docket entry number
15 9. The same basic rule obtains, the Federal Rule of
16 Civil Procedure 26(b)(5). And I told you that it
17 had to be fulsome and this isn't.

18 And I can tell you that there are -- just
19 in the first several volumes, there are documents
20 which aren't even privileged and there is no claim
21 to privilege. There are documents listed as
22 privileged that went to a third party, that are
23 addressed to a third party.

24 I'm not going through all of the
25 situation, all of the details that I've found so

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1 far, and I haven't reviewed all of the documents.
2 But I am quite troubled by what I see, and it looks
3 to me like the document log is very inadequate.

4 Now, there is a section of the document
5 log that appears to be fairly adequately stated,

6 assuming that one knows who some of these people
7 are, and that is the section that deals with the
8 efforts to get foreign patents.

9 I don't remember the numbers, but there
10 are several -- I mean there is at least a hundred
11 and maybe more, but you can't tell that unless you
12 know who the people are.

13 And I'm not buying the decision in the
14 Jackson case, that just making an assertion complies
15 or satisfies the requirement that you demonstrate
16 who these people are. You have to do something
17 different.

18 And you better read, please, when you're
19 redoing your privilege claims, I want you to read
20 the Fourth Circuit law, which is very circumscribed
21 on privilege. There are, obviously, documents that
22 are described as privileged that the only reason
23 they're described as privileged are that a copy of a
24 document that went to an outside person went to a
25 lawyer or that went to executives within the company

□

51

1 went to a lawyer, not for the purpose of seeking
2 legal advice but just went there, no request for
3 legal advice.

4 The fact that somebody or some copy of

5 some document went to a lawyer does not render it
6 privileged under the Fourth Circuit law. So I don't
7 really want to go back and look at all your
8 documents and do a document-by-document review if I
9 don't have to.

10 I am in the process of continuing to
11 review the documents with respect to the allegations
12 about -- in other aspects of the case, and I'll
13 continue that effort. But I want you all to start
14 over again and do this document -- claim of
15 privilege right on these cases on these -- that are
16 on the log and drop out the ones that don't -- that
17 shouldn't be made.

18 Mr. Desmarais, you all have a problem,
19 too. The local rule and the orders that have been
20 entered require you to discuss things before you
21 file motions to compel. And there is nothing that I
22 did that I can recall that exempted you all from
23 that requirement as to the privilege log. And the
24 first thing you need to do is sit down and talk with
25 them a little bit.

□

52

1 So I think the motion to compel or the
2 motion to require them to produce all the documents

3 because the log is inadequate is not a right
4 remedy. Although, I will have to say this. It is a
5 harsh remedy and I know what all of the treatises
6 say, but we have been through this before, folks,
7 and you all know what the rule is here. And we have
8 had problems before, and I don't want them again.

9 So I'm not going to be forgiving. If the
10 next log is not adequate, the privilege falls. Is
11 that understood?

12 MR. STONE: This is Greg Stone, Your
13 Honor. Yes, it is.

14 THE COURT: Mr. Desmarais, before you
15 bring motions to compel, even on the tight schedule
16 that we're on, you go talk to people. That's an
17 obligation. It is the linchpin of proper case
18 management and proper procedure under our rules
19 here.

20 MR. DESMARAIS: That message is loud and
21 clear, Your Honor. It won't happen again. I
22 misread your order, and I should have inquired.

23 THE COURT: All right. Now, there is a
24 notebook of twenty-seven documents I believe or
25 twenty-four.

□

1 MR. STONE: I believe it's -- this is Greg

2 Stone, Your Honor. I believe it's twenty-seven.

3 THE COURT: Those documents are clearly
4 covered by the previous order, it seems to me, and
5 should have been produced. And there is no
6 demonstration of any kind about why they weren't
7 produced. And anybody who read them would know that
8 they were producible.

9 And there is no demonstration of any kind
10 in your papers, Rambus, explaining why they weren't
11 produced, except they were just discovered. But
12 there is no recitation about why they were just
13 discovered. So that part of the motion to compel is
14 granted.

15 These documents that should have been
16 produced that are in the notebook that you all
17 supplied over here are all clearly called for under
18 the previous ruling and they are to be produced.

19 MR. STONE: Your Honor, this is Greg Stone
20 again. May I respond to that aspect by clarifying
21 one issue?

22 I understand your ruling. We had
23 identified those as documents that were covered by
24 the Court's prior crime-fraud order. I don't
25 disagree at all with your description of those

1 documents as falling within the scope of it.

2 And if it would make a difference to the
3 Court's ruling to explain why they were just
4 discovered, which was not an issue that we
5 understood to be a subject for briefing in the way
6 the issue was framed, we could put in the
7 explanation of why these were just discovered.

8 THE COURT: Well, you all have had a
9 chance to address it, Mr. Stone, and you should know
10 that that's part of the calculus. I don't know that
11 it makes much of a difference anyway. But all I was
12 saying is that there isn't any explanation in what
13 showing was made. But in any event, they need to be
14 produced and they should be produced right away.

15 MR. STONE: Your Honor, in that regard and
16 that's the issue I wanted to raise with you, we'd
17 ask if you would stay the effective date of your
18 order to allow us to evaluate whether, in light of
19 the Federal Circuit's ruling on the fraud questions,
20 whether this is an issue on which the Federal
21 Circuit would grant us extraordinary relief by
22 virtue of a writ.

23 THE COURT: Well, I think what you're
24 going to do is wait until I've finished with all
25 these before I do anything else.

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1 MR. STONE: I apologize.

2 THE COURT: I will tell you that I don't
3 read the Federal Circuit's order as vitiating the
4 basis upon which the crime-fraud ruling was made in
5 the first instance. I've read the cases and I've
6 read the opinion, and I don't read it as vitiating
7 that at all.

8 There was at the time a crime -- a scheme
9 to defraud that was shown, and the other requisites
10 of that relief were satisfied, as explained in the
11 order that's already been reviewed by the Federal
12 Circuit.

13 And, quite frankly, I think this argument
14 doesn't have any legal justification at all, and
15 nothing that you all have done explains in any way
16 why -- you haven't even addressed what Rambus has
17 demonstrated in its paper showing that the basic
18 ruling remains intact.

19 The mere fact you didn't -- that Rambus
20 didn't succeed, I don't think changes that basic
21 ruling or the other components of the ruling. And
22 that's been the only thing that you have essentially
23 argued. And it appears to me that that's the only
24 argument you're making. And I don't know whether
25 I'm going to stay it or not, but when the ruling is

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56

1 issued, you can move for a stay.

2 I also believe from what I have read that
3 all of the documents that were produced to Hynix and
4 the FTC there has been a waiver of the privilege on,
5 and those documents need to be produced.

6 One of the things that I don't yet
7 understand from looking at the privilege log is
8 whether there are other documents that fit within
9 the original ruling that should have been produced
10 but that were not.

11 There are documents that fit in the time
12 frame and that seem to relate to the topic on which
13 the crime-fraud decision was based, but I'm still
14 looking at that issue. And, again, we will have an
15 opinion on the issue, but I wanted you to know where
16 you stand on it so you can go ahead with whatever
17 else you're doing.

18 Now I'll hear arguments on the -- further
19 arguments on the motion to compel production of
20 documents relating to Rambus's document retention
21 policy at this time. I have read the papers.

22 Go right ahead, Mr. Desmarais.

23 MR. DESMARAIS: Yes, Your Honor. This is
24 John Desmarais.

25 The motion is founded, if you've read the

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57

1 papers you know, on the fact that Rambus before it
2 embarked on the litigations sought counsel from
3 several law firms, including the ones mentioned in
4 the papers, Cooley Godward, etcetera, on how to
5 implement the document destruction or document
6 retention policy.

7 In fact, lawyers from Cooley Godward
8 actually came to Rambus and helped in the
9 presentation of the document retention policy and
10 the instruction of the employees to destroy all the
11 documents and participated actively.

12 It seems clear under those facts that
13 Rambus's attorney-client privilege with its outside
14 counsel and with its internal counsel on the
15 implementation and execution of the document
16 retention/destruction policy ought to be grounds for
17 discovery.

18 And I believe in order to uncover the full
19 scope of what Rambus actually did here in its
20 attempt to hide its scheme to defraud, we need this
21 discovery in order to craft our spoliation charge
22 that we're going to ask Your Honor for and to craft

23 the adverse inferences that we're going to ask for
24 and the other remedies we're going to ask for as a
25 result of this conduct.

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58

1 Coupling that with the fact that it's not
2 just the document retention but Rambus's collection
3 and production in this case has been borderline
4 irresponsible. We just got thirty-one boxes of new
5 production directly related to these issues,
6 directly related to the scheme to defraud JEDEC,
7 directly related to the document production.

8 We just got, as you know, two thousand new
9 withheld documents that were never produced before.
10 They were never listed on the log before. Something
11 terribly wrong happened with Rambus's collection and
12 production with the Gray Cary firm and with their
13 other counsel, and we ought to be entitled to
14 explore why now thirty-one boxes of relevant
15 documents are coming out and why now two thousand
16 privileged documents are finally being listed as
17 withheld.

18 I think you may recall back before the
19 first trial --

20 THE COURT: What -- Hello. Is everybody
21 there still?

22 MR. STONE: Greg Stone, I'm still here,
23 Your Honor.

24 MR. DESMARAIS: I think you'll recall,
25 Your Honor, back before the first trial when

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59

1 Infineon discovered shortly before the trial that
2 there had been some documents that we hadn't
3 produced, Your Honor ordered Kirkland & Ellis to put
4 up a lawyer, and I put up my partner, Greg Arovas,
5 and he was subject to Rambus's questioning, and he
6 had to explain how we collected our documents and
7 how we produced our documents to show we didn't do
8 anything wrong, you know, that it was an oversight.

9 Rambus ought to be -- Rambus's delayed
10 production here is orders of magnitude beyond what
11 happened in the Infineon situation. We believe the
12 Gray Cary lawyers and any others lawyers that helped
13 Rambus collect and produce these documents ought to
14 be deposed. We ought to find out what happened, and
15 we ought to find out why we are hearing this stuff
16 now for the first time.

17 So in light of the spoliation, in light of
18 the attempt to cover up the JEDEC fraud and in light
19 of this woeful document production, we ought to

20 inquire into their --

21 THE COURT: Well, you're asking me to
22 compel production of documents though that relate to
23 the --

24 MR. DESMARAIS: It's two pronged, Your
25 Honor. It's documents that relate to the document

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60

1 retention/destruction policy.

2 THE COURT: Right, and that's different
3 than producing those documents. What theory do
4 you -- excuse me. That occurred at a different
5 time, according to the record here, than did the
6 decision to produce or not produce those documents
7 in litigation.

8 MR. DESMARAIS: Yes. There's two separate
9 things going on here, that's correct, Your Honor.
10 Maybe I should have broken them out. In the
11 document retention arena, we're talking about the
12 intentional spoliation and destruction of documents
13 and the cover up of the JEDEC scheme.

14 That happened in 1998, 1999 and 2000
15 between Rambus and its then outside counsel where
16 they were counseled on what the document retention
17 policy ought to be, how to implement it and what to
18 do.

19 That is a piercing of the attorney-client
20 privilege under the crime-fraud exception that we
21 would be asking for there, solely to documents
22 relating to the document retention and destruction
23 and the counsel Rambus received relating to document
24 retention and production.

25 THE COURT: All right. Now, what crime

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61

1 are you saying occurred? In other words, if you
2 have -- actually, as best I can construct the
3 privilege, it's really the crime-tort exception,
4 although the last time I dealt with it, we were
5 dealing with the tort of fraud.

6 So what tort or crime or fraud are you
7 talking about, whatever you're talking about?

8 MR. DESMARAIS: Well, if you wanted -- if
9 you wanted to label it a crime -- and I don't know
10 that we need to to get the relief that we're looking
11 for. But if you wanted to label it a crime, there
12 is a federal statute under Title 18 Section -- I
13 forget what it is -- 1500. I think Mike Stadnick
14 can help me if he's on the line -- but it's the
15 intentional destruction of evidence. That is a
16 crime.

17 It's a crime under the federal statute
18 under Title 18. But I don't know that we even need
19 to go there because the crime-fraud statute or the
20 crime-fraud exception to the privilege doesn't
21 require there to be a crime.

22 It is a loose standard to prevent, you
23 know, conduct of a kind, like fraud or a lawyer
24 counseling a client to do things that are on the
25 outskirts of acceptable conduct. It doesn't need to

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62

1 be a traditional crime or a traditional fraud.

2 But even if that were the requirement,
3 there is a federal statute directly on point that
4 says you can't destroy evidence.

5 THE COURT: The Fourth Circuit recently in
6 1998 in Hawkins articulated inter alia the privilege
7 that Rambus -- the showing Rambus has to make to
8 claim a privilege.

9 It applies only if, one, the asserted
10 holder of the privilege is or has sought to become a
11 client; two, the person to whom the communication
12 was made, A, is a member of the bar of a court or
13 his subordinate and, B, in connection with this
14 communication is acting as a lawyer; three, the
15 communication relates to a fact of which the

16 attorney was informed, A, by his client, B, without
17 the presence of strangers, C, for the purpose of
18 securing primarily either (i) an opinion on law or
19 (ii) legal services or (iii) assistance in some
20 legal proceeding and not, D, for the purpose of
21 committing a crime or tort and the privilege has
22 been, A, claimed and, B, not waived by the client.
23 That's Hawkins, 148 F.3d at 383.

24 Now, that seems to me to say that we need
25 to understand where -- what kind of effort or what

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63

1 kind of theory you are asserting to pierce the
2 attorney-client privilege, a crime or tort or fraud
3 or what.

4 So what's this statute you're talking
5 about?

6 MR. DESMARAIS: Yes. There's two theories
7 Your Honor. One is that the intentional destruction
8 of evidence in this particular situation right on
9 the eve of litigation can be an obstruction of
10 justice charge.

11 But even so, if you look at the cases
12 we've cited in our reply brief on page 9, in the
13 Blanchard case, they applied the crime-fraud

14 exception for bad faith litigation conduct. So they
15 say there --

16 THE COURT: For what; they applied for
17 what?

18 MR. DESMARAIS: Bad faith litigation
19 conduct. They say there that the term "crime-fraud"
20 -- and I'm reading from page 9 in our brief. The
21 term "crime-fraud" is a bit of a misnomer, as it is
22 clear many courts have recognized other situations
23 in which the exception might apply.

24 For example, some courts have applied the
25 exception to a lawyer's unprofessional behavior or

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64

1 unethical behavior or an intentional tort or even to
2 sanctionable conduct, including under Rule 11.

3 And it goes on to talk about so it's --
4 while the exception is called crime-fraud, it
5 doesn't necessarily need to be a crime or rise to
6 the level of a common law fraud.

7 THE COURT: Well, my question is, what are
8 you asserting as the predicate for this piercing? I
9 heard the statute on intentional destruction of
10 evidence. You say obstruction of justice.

11 MR. DESMARAIS: Obstruction of justice is
12 the phrase that I intended to use. I'm not sure

13 what I said.

14 THE COURT: Obstruction of justice.

15 That's what, 18 U.S.C. what?

16 MR. DESMARAIS: I must confess I don't
17 have the book in front of me. It's in the 1500
18 series.

19 THE COURT: Is that the same as the first
20 one you mentioned?

21 MR. DESMARAIS: Yes, Your Honor.

22 THE COURT: Okay. All right. And what
23 else?

24 MR. DESMARAIS: And the second prong is if
25 we want to make the argument that this bad faith

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65

1 litigation conduct is intentional hiding of evidence
2 and it's conduct that is, in the words of the
3 Blanchard court, unprofessional behavior of a lawyer
4 and it ought not to be privileged, it's sanctionable
5 conduct.

6 THE COURT: I suppose from your brief that
7 what you're saying is that lawyers who know that
8 litigation is underway -- I mean about to get
9 underway and there are plans to put it underway as
10 to particular people and on particular issues, that

11 the rule is you can't destroy documents under the
12 guise of establishing a document retention policy;
13 is that right?

14 MR. DESMARAIS: That's right, Your Honor.

15 And if you look at the other case we cite
16 on page 9 there, In re: St. Johnsbury Trucking, the
17 court says, we believe the principle served by both
18 the attorney-client privilege and the crime-fraud
19 exception is that communications in furtherance of
20 some sufficiently malignant purpose will not be
21 protected.

22 So, again, it's not necessarily the
23 piercing. It's not necessarily limited to strict
24 crimes and strict fraud.

25 THE COURT: All right. Now, just so I

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1 understand, what law do you think applies here?

2 MR. DESMARAIS: The law of Virginia.

3 THE COURT: Why is that?

4 MR. DESMARAIS: For the document retention
5 and destruction that took -- now that I think about
6 that, that took place in California. But for the
7 document collection and production, it would be the
8 law of Virginia.

9 THE COURT: Well, what's the law on the

10 document -- I mean on the document retention program
11 on the eve of instituting litigation? Is that what
12 you were saying is covered by California law?

13 MR. DESMARAIS: Well, the conduct took
14 place in California, almost all of it, as far as we
15 can tell from the discovery we have. So I can see
16 an argument for the application of California law in
17 that regard.

18 However, they were destroying evidence to
19 be used in a Virginia proceeding. So I also could
20 see the application of Virginia law. To be
21 perfectly, frank, Your Honor, I don't know that I
22 know the --

23 THE COURT: Well, a predicate for that
24 would be if there had been no litigation instituted,
25 that, in fact, there was contemplated litigation in

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67

1 the Eastern District of Virginia then; is that
2 right?

3 MR. DESMARAIS: I would assume that that
4 would be the predicate. Otherwise, if there was no
5 contemplated litigation, then we wouldn't even be
6 talking about the impropriety of the document
7 retention policy in the first place, that's correct.

8 THE COURT: Is there anything else you
9 have to say on this aspect of your motion to
10 compel?

11 MR. DESMARAIS: No, Your Honor.

12 MR. HILL: Your Honor, this is Braxton
13 Hill. We have approximately thirty minutes left on
14 the reserved time of the conference call center.
15 Would this be a good juncture to request an
16 extension of that so we are not cut off midstream?

17 THE COURT: I suppose you could. I don't
18 know what we will need, but I don't see we're going
19 to need a whole lot more. I think being safe rather
20 than sorry is better. Do you want us to hang up and
21 call back or what?

22 MR. HILL: I think the conference call
23 service can extend time without the necessity for us
24 to hang up. So let me --

25 THE COURT: Why don't we quit talking and

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68

1 let you take care of this.

2 MR. HILL: Yes, Your Honor. Why don't I
3 go ahead and ask the operator to add thirty minutes
4 just to be save. Does that sound like a reasonable
5 amount of time?

6 THE COURT: Yes, I would think so.

7

8 (Discussion off the record)

9

10 THE COURT: All right, Mr. Stone.

11 MR. STONE: Thank you, Your Honor. This
12 is Greg Stone. Let me try to respond to the -- I
13 think the two separate points that were raised by
14 Mr. Desmarais's argument.

15 Let me go first to the legal advice Rambus
16 received in connection with implementation of a
17 document retention program and the effort to
18 establish whether that advice was somehow in
19 furtherance of a crime or fraud that would justify
20 piercing through the attorney-client privilege that
21 otherwise would protect those communications.

22 It goes without saying that in putting in
23 place a document retention program, including one
24 that involves the destruction of some documents,
25 even when done on the eve of litigation, is

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69

1 appropriate unless a showing can be made that the
2 documents that were intended to be destroyed were,
3 in fact, those that were reasonably anticipated
4 would be relevant to any litigation that was then

5 contemplated.

6 That's the first prerequisite showing
7 here. And Infineon has not shown that any documents
8 were either intended to be destroyed by Rambus or
9 were, in fact, destroyed by Rambus that were
10 relevant in any fashion to this litigation. Setting
11 aside whether or not this particular litigation was
12 then contemplated, there has been no showing here of
13 prejudice flowing from the implementation of a
14 document retention program.

15 So the first prong is one on which
16 Infineon has not made that showing. And indeed the
17 extensive production of documents by Rambus in
18 advance of the first trial, well in excess of
19 130,000 pages in advance of the first trial, and our
20 further production of documents here is compelling
21 evidence that all of the documents that were
22 relevant to this litigation were, in fact, retained
23 by Rambus.

24 Furthermore, the conduct by Rambus in
25 seeking legal advice prior to implementing a

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70

1 document retention program and then putting in place
2 a document retention program that was consistent or
3 in light of the advice that it received is

4 appropriate conduct to be taken.

5 And it's appropriate conduct both for the
6 advice of the lawyers and the clients to have
7 followed them. Thus, there was no crime or fraud
8 that was committed with the assistance of the
9 lawyers or without by putting in place this document
10 retention program.

11 To the extent we look to the law of some
12 jurisdiction to decide how to judge that conduct, we
13 need to look to the law of California, I believe,
14 because the company was headquartered in California;
15 the program was put in place in California, and
16 lawyers who were admitted to practice in California
17 were retained by the company and their advice was
18 sought.

19 And that would be -- I think the only
20 lawyers involved in that would be the lawyers at
21 Cooley Godward, as I understand the evidence here
22 and what has been argued today. And that's a law
23 firm principally headquartered in California.

24 So in that sense, we have a question of
25 whether under California law the conduct of putting

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71

1 in place the document retention program and then

2 caring out the program after it was in place in any
3 way constituted a crime or a fraud.

4 There has been no showing to date in the
5 papers Infineon filed that it was either a crime or
6 a fraud, and it's now been argued today for the
7 first time that it constitutes a violation of 18
8 U.S.C. Section 1500 et seq.

9 And I pulled that out while we were on the
10 brief break and took a look at it, and I don't
11 believe any of the provisions of 18 U.S.C. apply. I
12 think they apply, for instance, when you have been
13 informed of an ongoing criminal investigation and
14 then take steps at that time to destroy documents or
15 whether you have been served with a federal CID in
16 connection with an antitrust investigation and
17 destroy documents at that point.

18 I didn't find a provision in the general
19 section of the 1500s of 18 U.S.C. that would in any
20 way apply to implementing a document retention
21 program at a point in time when, let's assume, that
22 the point in time at which subsequent litigation was
23 at least a possibility, if not a probability.

24 So in that sense, I don't think they can
25 make the showing of crime, and they have made no

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1 showing of fraud that the implementation of a
2 document retention program was in any way intended
3 to further or, in fact, did further a fraud, either
4 a fraud on any party or a fraud on the court, both
5 of which I understood Mr. Desmarais to be referring
6 to in some regards, because here the documents that
7 are pertinent to this lawsuit have been retained

8 And that raises -- there is a separate
9 issue which I will address in a moment, which is how
10 do we deal with the fact that some of those
11 documents that were retained were not produced in
12 advance of the first trial.

13 But there has been no showing here that
14 the documents that should have been retained for
15 purposes of this trial were not retained or that the
16 document retention program that was put in place,
17 put in place quite openly, was not a program that
18 was put in place in good faith and with the
19 expectation that it would comply with a legal
20 obligation to retain relevant information.

21 THE COURT: Well, Mr. Stone, the first
22 thing you said was, is there a showing that the
23 documents that were destroyed were relevant to the
24 issues in the case. That's your first point I
25 believe.

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73

1 MR. STONE: Yes, Your Honor.

2 THE COURT: How is it that a party who has
3 evidence that documents were destroyed pursuant to a
4 program of this kind that has been demonstrated here
5 were or were not relevant to the case without
6 knowing what was destroyed?

7 Do you have any guidance under California
8 law as to that?

9 MR. STONE: Well, I think I can give some
10 guidance that I think would apply under California
11 law as well as other law, if I might, Your Honor.

12 The first one is, you would expect to be
13 able to point to documents that Rambus should have
14 had in its files that third parties had in their
15 files that Rambus did not produce.

16 For instance, we will, if these claims
17 proceed and it's necessary to do so, be able to show
18 you documents that we obtained from third parties
19 that should have been in Infineon's files and were
20 not produced to us by Infineon at any point in time
21 prior to the first trial.

22 THE COURT: Mr. Stone, wait a minute.
23 That's not really what I'm asking. I'm sorry.

24 I want to know how -- does Rambus have a
25 list or description of the documents that were

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74

1 destroyed in 1998, '99 and 2000 pursuant to the
2 document retention program? Is there a list or
3 description of them? That's what I was asking, and
4 I didn't ask it very well. So I'm sorry.

5 MR. STONE: Let me see if I can respond.
6 What Rambus has is the guidelines that were provided
7 to its employees about what to keep and what not to
8 keep. So we know that if the employees complied
9 with the guideline, we would know what they kept and
10 what they didn't keep.

11 We also have the testimony of the
12 employees as to what, in fact, they did keep and
13 what they didn't keep.

14 So we have both the factual testimony, the
15 direct testimony of employees as to what they kept
16 and what they didn't, and we have the guidelines
17 that were provided to the employees explaining to
18 them what they needed to keep and what they didn't
19 have to keep.

20 THE COURT: Now, has that been provided to
21 Infineon?

22 MR. STONE: Yes, Your Honor. There has
23 been testimony in this case prior to the first
24 trial, there has been subsequent testimony in

25 connection with the FTC case from employees, and the

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75

1 guidelines that were provided at the meetings that
2 Mr. Karp ran for all of the employees, all of the
3 guidelines that he provided at that time have been
4 provided to Infineon.

5 THE COURT: Well, excuse me just a minute,
6 Mr. Stone. Has anybody here given that to me?

7 MR. STONE: I believe they were attached
8 as exhibits to one of our briefs, Your Honor.

9 THE COURT: Maybe I don't recognize them.
10 What brief are you speaking of?

11 MR. STONE: It's an exhibit to our
12 opposition brief. It would have been the opposition
13 memorandum to Infineon's motion to compel production
14 of documents listed on the privilege log.

15 THE COURT: Wait a minute. Hold on. You
16 all have sent so much paper here, it's possible that
17 I don't appreciate what I have, but I'm trying to
18 look for it.

19 MR. STONE: Oh, I'm sorry, I gave you the
20 wrong one.

21 THE COURT: Where is this list of
22 documents that were -- or information about the
23 documents that were destroyed?

24 MR. STONE: I'm just trying to pull up
25 that exhibit number, Your Honor.

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76

1 MR. DESMARAIS: In the meantime, Your
2 Honor, if you'd look at Infineon's opening motion to
3 compel, opening brief, on page 4, we have catalogued
4 what we believe we have learned from the FTC case as
5 to the types of documents that were -- all directly
6 related to this case. They're bullet pointed on
7 page 4 of our opening brief.

8 MR. STONE: The exhibit is Exhibit Number
9 2, Your Honor, to our memorandum in opposition to
10 the motion to compel production relating to our
11 document retention collection.

12 THE COURT: All right. Hold on. Let me
13 get what I've got. Your opposition motion, right?

14 MR. STONE: Yes, our opposition papers,
15 Exhibit 2.

16 THE COURT: All right. Mr. Geobes has
17 gone to get me a copy of those exhibits.

18 All right. I understand what you're
19 saying. It's Exhibit 2 to the brief that was filed
20 on January 20, 2004, Rambus's memorandum in
21 opposition to Infineon's motion to compel relating

22 to document retention, collection and production; is
23 that right?

24 MR. STONE: Yes, Your Honor. And the
25 first part of that exhibit would be the declaration

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77

1 of Joel Karp, Federal Trade Commission matter,
2 followed by a memorandum that is dated July 22,
3 1998, to all Rambus employees, followed by a set of
4 the PowerPoint slides Mr. Karp utilized in his
5 meetings with Rambus employees.

6 THE COURT: All right. Go ahead.

7 MR. STONE: Okay. So those guidelines are
8 the first place we would look to see whether the
9 guidelines Rambus had in place were appropriate ones
10 when judged against the standards of California law
11 and practices of companies in the same field to the
12 extent we are looking to the practices of other
13 companies for purposes of 17200.

14 So putting in place a program and telling
15 everyone to follow certain guidelines and expecting
16 them and, in fact, the testimony being they did, in
17 fact, follow those guidelines is the first place we
18 would look for evidence of whether there is any
19 documents that we would expect that should have been
20 kept that were not, in fact, maintained.

21 And the evidence by looking at these, I
22 think you can see the guidelines are consistent with
23 what a company should be expected to retain even if
24 at that time they had anticipated this specific
25 litigation.

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78

1 THE COURT: Hold on just a minute, please
2 Mr. Stone, hold on. I'm going to put you on mute.

3

4 (Discussion off the record)

5

6 THE COURT: All right. Go ahead, Mr.
7 Stone. I'm not sure -- we have a bunch of exhibits
8 that came with various pleadings, but the one you
9 are referring to, I'm not sure we got. We are going
10 down and check the clerk's file just to make sure
11 that -- it may have been that it wasn't in the copy
12 we got.

13 MR. STONE: I do have a file stamped copy
14 of these exhibits. So I believe it made it at least
15 as far the clerk's office.

16 THE COURT: Well, it probably did, and
17 maybe we loss it. I don't know. But neither Mr.
18 Geobes or I remember seeing that particular

19 document. Although, we have a lot of other exhibits
20 that came with these papers and usually we get
21 them. So we will see. Go ahead.

22 MR. STONE: The second evidence I think we
23 would expect to look for if we wanted to see whether
24 documents that should have been maintained were, in
25 fact, not maintained is we would look to the

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79

1 testimony of the many witnesses who were deposed in
2 this case, all of whom were asked questions like,
3 well, tell us the kind of documents you wrote, what
4 things did you write down and so on at various
5 points in time, understanding both what they did as
6 a matter of practice and what they did as a matter
7 of specific recollection.

8 Despite all the testimony of the types of
9 documents that various witnesses indicated they
10 maintained as a matter of practice or they
11 maintained based on their specific recall, there's
12 no showing that any of those documents that should
13 have been maintained do not, in fact, still exist
14 and have not been produced to Infineon's counsel.
15 So that's the second piece of evidence we look at
16 after we look at the guidelines themselves.

17 And the third piece is we would look to

18 whether there is documents that third parties
19 maintained in their files that have been produced in
20 discovery but were not produced or maintained by
21 Rambus, and there has been no showing that any third
22 parties maintained documents that were not also
23 maintained by Rambus that are the type of documents
24 you would have expected Rambus to keep.

25 So there are three types of evidence, and

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80

1 I don't know whether I'm speaking now to something
2 that is limited to California law. I don't believe
3 I am. I think I'm speaking to what somebody would
4 ordinarily expect when they were trying to determine
5 whether a document retention program that had been
6 implemented had been implemented in a way that was
7 consistent with what others looking at it later
8 would expect them to have maintained.

9 So all three pieces of evidence in this
10 case point in favor of the conclusion or weigh
11 heavily in favor of the conclusion that Rambus
12 implemented a document retention program which was
13 appropriate at the time and was appropriate whether
14 litigation was later initiated or not and that that
15 program has been followed, and the documents that we

16 would expect a company to have maintained have, in
17 fact, been maintained and have now been produced.

18 And I think, although it wasn't anybody's
19 fault, they should have produced were produced
20 before. But I think with the additional production
21 now based on the documents that were discovered by
22 the company in connection with the FTC proceedings
23 and to some extent in connection with later
24 discovery, that is, after the Infineon trial,
25 discovery propounded by Micron and Hynix have now

□

81

1 been produced as well.

2 MR. DESMARAIS: Your Honor, this is John
3 Desmarais. I have some response.

4 THE COURT: Just a minute. I have gotten
5 the Karp declaration that was filed in the Trade
6 Commission and I'm looking at it. All right. I
7 think I understand this. And Mr. Karp was deposed
8 about this, was he?

9 MR. STONE: Yes, Your Honor.

10 THE COURT: All right. Let's see, where
11 were we?

12 MR. STONE: Well, I was -- I think I had
13 more or less completed my argument on the first
14 point, that is, whether the attorney-client

15 privilege with respect to the implementation of a
16 document retention program is aided by a showing of
17 crime-fraud. I think I had completed what I needed
18 to say on that point.

19 THE COURT: All right. Well, I still
20 don't understand what your position is about what
21 law applies, Mr. Stone, on that issue.

22 MR. STONE: I'm sorry, Your Honor.
23 California law applies with respect to the standard
24 by which we judge the propriety of the document
25 retention program and the advice given with respect

□

82

1 to it and the implementation of it.

2 In other words, in order to show that
3 there was some improper conduct that would rise to
4 the level of a crime or fraud, it would have to be
5 shown that that occurred under California law.

6 THE COURT: What if the evidence is that
7 there was contemplated litigation in the Eastern
8 District of Virginia, do you believe California law
9 would still apply?

10 MR. STONE: I do, with respect to
11 assessing whether or not there has been a crime or
12 fraud, I do.

13 THE COURT: I guess what I'm getting at is
14 a little different than what you're answering. The
15 briefing, as well as some of the decisional law in
16 the Fourth Circuit that deals with the privilege and
17 the vitiating of the privilege does not call it a
18 crime-fraud exception. Some of it does; some of it
19 does not. Some of the cases refer to it as a
20 crime-tort exception.

21 And I was asking whether -- if California
22 law limits it just to fraud, is that what you're
23 saying, and that's why you say we have to apply
24 California law?

25 MR. STONE: I'd say we have to apply

□

83

1 California law. The reason I say we have to apply
2 California law is to avoid the consequences that
3 sometimes would arise from conflicts of law rules
4 that would favor the law of the forum with respect
5 to judging conduct which occurred prelitigation.

6 And in that regard, I think it's important
7 that document retention programs falling into a
8 large category of conduct that clients follow on the
9 advice of lawyers all the time where the propriety
10 of their conduct and the adequacy of the advice they
11 receive should be judged by the law that governed

12 that relationship because, otherwise, before lawyers
13 could give advice on any particular issue, given the
14 possibility of litigation might later arise in any
15 of forty-nine other states and numerous other
16 foreign jurisdictions, that what they should do is
17 then have to check the law of all those
18 jurisdictions --

19 THE COURT: Well, what if you don't --

20 MR. STONE: -- (unintelligible) would be
21 consistent with the standards in each of those other
22 jurisdictions.

23 THE COURT: Well, what if you don't
24 contemplate jurisdictions in all forty-nine; you
25 contemplate it in one?

□

84

1 MR. STONE: Well, I think when you give
2 the advice as to what a California company should do
3 when you seek the advice of a California lawyer,
4 when you contemplate there could be litigation in
5 other jurisdictions later and, let's say, including
6 the possibility of litigation in the Eastern
7 District of Virginia, I think the advice you still
8 give should be judged against the standard of law
9 where you gave the advice.

10 Otherwise, every lawyer in every state
11 would need to seek counsel from lawyers in other
12 states where litigation might arise.

13 THE COURT: Be a lawyer's relief act.

14 MR. STONE: There's many of those already,
15 I think, Your Honor, but I agree, it would be
16 another one.

17 THE COURT: Let's see, under Rule 501 of
18 the rules of evidence, assuming there is nothing
19 else that applies by federal law, the privilege of a
20 witness, person, government, state or political
21 subdivision shall be governed by the principles of
22 the common law as they may be interpreted by the
23 courts of the United States in the light of reason
24 and experience.

25 However, in civil actions and proceedings

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85

1 with respect to an element of a claim or defense, as
2 to which state law supplies the rule of decision,
3 the privilege of a witness, person, government,
4 state or political subdivision shall be determined
5 in accordance with state law.

6 And I believe that that is generally not
7 confined to the law of the forum, if I remember that
8 right; that is, it's where the privilege is alleged

9 to attach. So that would be consistent with your
10 position. I understand.

11 All right. Go ahead. Anything else?

12 MR. STONE: I wanted to address the second
13 argument that had been made, which was the --
14 whether there should be discovery into the adequacy
15 of Rambus's document production, which was
16 supplemented to a significant amount after this case
17 was remanded.

18 THE COURT: Right.

19 MR. STONE: In that regard, I understand
20 there has been a desire to take discovery as to
21 that, and to the extent that that discovery is
22 consistent with the rulings of this Court and does
23 not improperly evade issues that are protected by
24 the privilege, just as that discovery was taken of
25 Kirkland & Ellis before, just as that discovery was

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86

1 taken of Rambus's attorneys before, I believe, and
2 just as we would expect to pursue such discovery
3 ourselves in connection with this case in
4 understanding the failure to timely produce on
5 Infineon's part, I think that discovery which
6 doesn't address issues on which I think any ruling

7 is required now, certainly doesn't address any
8 issues on which the privilege has yet been invoked
9 and tested, that kind of discovery is something I
10 understand Infineon to want to pursue, as do we.

11 THE COURT: So you believe that why Rambus
12 or Infineon produced documents after the remand is a
13 proper subject for discovery for both sides; is that
14 your point?

15 MR. STONE: Yes. I think, undoubtedly, if
16 we get into that discovery, it's an area which we
17 all need to tread cautiously because of the
18 possibility of running afoul of issue on which the
19 privilege would properly be invoked, but I think
20 that discovery was taken in the -- prior to the
21 first trial and I think the parties worked through
22 that successfully, and I expect that it will -- the
23 parties will work through it again this time.

24 THE COURT: So you actually take the view
25 that this motion is premature.

□

87

1 MR. STONE: Well, I think had we met and
2 conferred on it, we would have decided that no
3 motion needed to be filed on this issue, that both
4 parties had areas of inquiry that they were going to
5 pursue and the motion wouldn't have been brought.

6 So I think it's premature at the moment.

7 I can't say that disputes don't arise, but
8 on the other hand, I don't anticipate any particular
9 dispute arising with respect to this discovery.

10 THE COURT: All right. Are you finished,
11 sir?

12 MR. STONE: I am, Your Honor. Thank you.

13 THE COURT: Mr. Desmarais, do you have
14 something?

15 MR. DESMARAIS: Yes, just very briefly,
16 Your Honor. On page 4 of our opening brief we
17 outline what discovery has shown, content of the
18 documents that were destroyed, and the discovery is
19 from our case, but it is also from the FTC and it's
20 also from the Micron action.

21 So, in large part, it's stuff we didn't
22 have before. But it has been now discovered that
23 what was destroyed as a part of the document
24 destruction just before the litigation commenced was
25 documents relating to Rambus's participation in

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88

1 JEDEC, documents relating to Rambus's prosecution of
2 JEDEC related patents and patent applications by
3 both Rambus employees and Rambus's outside counsel,

4 documents relating to the relationship with Rambus's
5 patent applications and pending claims to what was
6 going on at the JEDEC standards, presentations to
7 Rambus's board of directors on intellectual property
8 issues, Rambus's SDRAM and DDR-SDRAM licensing
9 negotiations, invalidating prior art.

10 From their own documents they called the
11 art invalidated. Now the art has all been
12 destroyed. We don't know what it was.

13 General business files generated by key
14 Rambus personnel, including Richard Crisp, and
15 Rambus's founders, Farmwald and Horowitz, as well as
16 general business documents.

17 If you look at page 4 of our brief, we
18 give all the deposition cites from our case, from
19 the FTC case and from the Rambus case.

20 So responding to Mr. Stone's comment about
21 we don't know that relevant documents were
22 destroyed, that's absolutely contradicted by the
23 record in all three cases that Rambus employees have
24 now admitted that they destroyed documents that were
25 relevant to these litigations and relevant to

□

89

1 Infineon's defense.

2 THE COURT: All right.

3 MR. DESMARAIS: On the second point, we
4 talked about in my opening comments about the
5 crime-fraud from destruction of the documents, but
6 it's even more than that. I mean there is no doubt
7 that there was a scheme to defraud here, and the
8 Federal Circuit's decision hasn't change that.

9 All they said was it didn't arise to
10 actual fraud because Rambus wasn't successful. But
11 in light of the evidence presented at the first
12 trial, there is no doubt that Rambus was embarked on
13 a scheme to defraud. The document destruction was
14 an attempt to cover up the scheme.

15 And if you look at the cases we cite in
16 our reply brief on pages 10 and 11, the Duttle case
17 the Craig v. A.H. Robins case and the Sound Video v.
18 Video Shack, those cases hold that attorney
19 counseling and attorney advice in attempt to cover
20 up a scheme to defraud is in and of itself not
21 protected communications and is enough to pierce the
22 privilege.

23 And our third prong is that, in light of
24 Mr. Stone's comments and we commented on in our
25 brief about Mr. Karp testifying about the document

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1 retention policy and production of the documents is
2 already a waiver of the subject matter, and we ought
3 to be able to inquire further into the full scale.

4 So we have really three bases for the
5 piercing. One is that it's a crime/fraud in and of
6 itself because of the conduct on the outskirts of
7 fraud, an attorneys ought not to be counseling on
8 it.

9 Number two, it's an attempt to cover up
10 the fraud, and there's cases clearly saying when
11 you're covering up a fraud, that's not protected
12 communications. And, thirdly, inasmuch as Mr. Karp
13 has already testified to a portion of the substance
14 so that Rambus could defend itself, we ought to
15 inquire further on the full scope of subject matter
16 waiver.

17 THE COURT: But on the last point, I
18 thought Mr. Karp testified because I ordered him to.

19 MR. DESMARAIS: Not on the document
20 retention issue. That was voluntary.

21 THE COURT: It was?

22 MR. DESMARAIS: Yes. You ordered Mr. Karp
23 to testify on the JEDEC related fraud issues.

24 THE COURT: Right.

25 MR. DESMARAIS: The document retention

□

1 policy discovery was not as a result of the order,
2 as I understand it. It may have taken place after
3 you issued your piercing order. I don't remember
4 the date. But the subject matter of your piercing
5 would not have included the document retention
6 policy.

7 THE COURT: The order was dated March 7,
8 2001.

9 MR. DESMARAIS: Right. I'm looking for
10 the date of Mr. Karp's deposition. I don't know
11 that I have it in front of me here.

12 THE COURT: And it did not by its terms
13 address the document retention order at all.

14 MR. DESMARAIS: Right. So any testimony
15 by Mr. Karp on that issue would have been
16 voluntary. And they did it to try to defend
17 themselves, and, therefore, I ought to be able to
18 inquire on the full scope of that.

19 THE COURT: Is there anything else you all
20 have?

21 MR. STONE: Your Honor, this is Greg
22 Stone, if I could respond briefly.

23 THE COURT: All right.

24 MR. STONE: The points raised on page 4 of
25 Infineon's brief that Mr. Desmarais just sort of

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92

1 read through, those are arguments that were made by
2 complaint counsel. Those are not facts. They're
3 not supported by the evidence, and they are not
4 adopted by the Administrative Law Judge. They were
5 simply arguments.

6 There is no evidence that any of those
7 documents described in that list were, in fact, not
8 retained. To the contrary, we have seen time and
9 time again all of those documents were retained and
10 produced in this case, and you saw many of them in
11 evidence during the first trial.

12 So as to the first point, there has been
13 no showing that those documents were not retained.
14 That was just an argument that was never accepted,
15 argument made by the FTC.

16 THE COURT: Well, wait minute, Mr. Stone.
17 Let's think through what we're saying here.

18 They had a document retention program;
19 they destroyed documents pursuant to it. I think
20 it's up to you to indicate what documents were
21 destroyed pursuant to that program if you're
22 defending on the theory that the destruction was --
23 that all that was destroyed was that which is in the
24 document retention program.

25 Do you have -- I mean, what you're saying

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93

1 is that we just have to look to the program itself.

2 MR. STONE: No. We pointed to the
3 testimony of several witnesses. We pointed to
4 testimony of Mr. Barth, for example, and Mr. Hampel
5 in our brief to show that witnesses who were asked
6 these kinds of questions testified that they
7 retained anything that might be relevant to this
8 lawsuit.

9 So we have both the outlines of the plan
10 itself, the parameters that were laid down. We have
11 the testimony of Mr. Karp as to what he instructed
12 people to keep, based on his providing a seminar to
13 every employee at the company, at which he used the
14 PowerPoint slides that are part of our exhibit. And
15 we have the testimony of employees at the company
16 that they retained all the documents that might be
17 relevant to this litigation.

18 So I think we made that showing. We have
19 gone through it in our brief, and we have gone
20 through it in the exhibits to our brief to show that
21 the program that was put in place was appropriate
22 and that the program was followed by the employees.

23 THE COURT: All right. I understand.

24 Since it is your motion, Mr. Desmarais. You have
25 the last word.

□

94

1 MR. STONE: Your Honor, could I just on
2 the waiver, could I touch on that? This is still
3 Mr. Stone, if you'd give me one more instance on the
4 waiver point.

5 THE COURT: All right.

6 MR. STONE: That was first raised by
7 Infineon in their reply brief, which is why we --

8 THE COURT: That was what did you say?

9 MR. STONE: I'm sorry. That was first
10 raised in their reply papers, so we did not address
11 the waiver issue in our papers, but I can address it
12 now. And since Mr. Desmarais also just raised it,
13 I'd like to touch on it briefly.

14 If you look at Mr. Karp's testimony, you
15 will see that what Mr. Karp testified to was that he
16 sought and obtained the advice of lawyers. He
17 didn't go into the substance of the advice, and he
18 did not reveal the confidential communication,
19 merely the fact that he had obtained advice.

20 So without having revealed the
21 confidential communication, there is no waiver,
22 otherwise, by way of example, a privilege log would

23 be a waiver because it would reveal that you sought
24 legal advice.

25 And Mr. Karp's testimony is consistent

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95

1 with what I understand to be the sort of description
2 of a communication that you would expect to see on a
3 privilege log and it doesn't constitute a waiver.

4 THE COURT: All right.

5 MR. DESMARAIS: Your Honor, it's John
6 Desmarais. Just on that last point, what the Rambus
7 witnesses testified to, including Mr. Karp, is that
8 they have sought counsel from Cooley Godward and
9 other lawyers, and the document retention policy
10 that they have delivered is the result of that
11 counsel.

12 So it's more than what you see on a
13 privilege log. On a privilege log you see advice
14 regarding document retention. You wouldn't see the
15 content of the communication, which is what Mr.
16 Karp's (unintelligible) all the Rambus employees and
17 what Rambus is now using to try to defend itself.

18 THE COURT: All right. I think I have the
19 information that I need on this. I will give you
20 all an opinion with this when I give you the rest of

21 the opinions on all these issues.

22 In the meantime, you do have an opinion
23 that the privilege log is inadequate. How long will
24 it take you to redo the privilege log and do it
25 right?

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96

1 MR. STONE: Your Honor, if we could have
2 ten days, I'd appreciate it.

3 THE COURT: All right. Mr. Stone, I
4 really want somebody who understands the law of
5 privilege to review these documents. I sat down and
6 reviewed about five of the seventeen notebooks, and
7 I was taken aback by the extent to which the
8 descriptions did not match what the documents were.

9 In some instances, there was a description
10 and a document wasn't there. In some instances, the
11 description didn't even come close to matching what
12 the document was. In some instances a part of the
13 document was privileged, like a note, but the
14 document itself wasn't privileged because it was
15 third-party communications.

16 In some instances, the privilege is
17 claimed, apparently, from all I can tell looking at
18 the document, merely because a copy of it went to a
19 lawyer.

20 So I have to say that the log is
21 inadequate, and you can have ten days to file a
22 revised log. But if this one doesn't do the job,
23 then the privilege is going to be waived for that
24 reason just so we're clear about it.

25 We can't be -- you all have had a long

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97

1 long time to be doing these privilege logs. You all
2 knew, according to your theory, it was coming back.
3 So let's get it done right.

4 And I really think somebody of a senior
5 level needs to start reviewing everything that you
6 do in this privilege area so that we don't have this
7 problem anymore.

8 MR. STONE: I hear you loud and clear,
9 Your Honor.

10 THE COURT: And as soon as you get that
11 privilege log, Mr. Desmarais, I want you conferring
12 with these people.

13 MR. DESMARAIS: Yes, Your Honor.

14 THE COURT: And then we will go from
15 there. And then I will give you an opinion on all
16 of the other things we have dealt with today. Thank
17 you very much.

18 MR. STONE: Your Honor, could I inquire
19 just on a housekeeping matter?

20 THE COURT: Sure.

21 MR. STONE: We had lodged with Your Honor
22 a pretrial schedule.

23 THE COURT: Yes.

24 MR. STONE: And I think you still have
25 that. And we're just going forward and sort of

□

98

1 living by the terms as we submitted it to Your
2 Honor. But if there was anything that you thought
3 might change in that, if you could alert us to that
4 so that we could simply plan for it was my
5 housekeeping request.

6 THE COURT: That's on my housekeeping
7 list. I expect -- I hope I'll be finished with it
8 tomorrow.

9 MR. STONE: Okay. I appreciate that.

10 THE COURT: If not, it will be this week.

11 All right. Just one minute. There are
12 documents that because of the way you all have
13 addressed and briefed these things, we are kind of
14 having to root through a list and match them to a
15 document to figure out what to even look at, for
16 example, in the area of documents that you say

17 should have been produced or were produced in the
18 Hynix litigation.

19 Is there some way that you can send
20 somebody over here just with some simple flags and
21 mark these documents, color code them as to what
22 category they fit in respect of what we're talking
23 about so that I can review them quickly?

24 Do you understand what I'm saying at this
25 late hour, Mr. Stone or Mr. Hill?

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99

1 MR. STONE: I do understand what you're
2 saying, Your Honor. And let me just clarify, the
3 twenty-seven, of course, are in a separate binder.

4 THE COURT: Right. That's no problem.
5 That's easy to deal with. I've already been through
6 that.

7 MR. STONE: The other category you've
8 mentioned, those that were previously produced to
9 either Hynix or the FTC, I think that's going to
10 take us -- it will be -- we can give you a list or
11 we can give the list to Mr. Hill and Mr. Hill could
12 come over and flag those documents.

13 There shouldn't be very much of those.
14 And Mr. Guaragna is on the line, and he'll correct

15 me if I'm way off base, but I don't think there
16 should be very many.

17 THE COURT: Well, if there aren't many --
18 and these are documents that were previously
19 produced in Hynix.

20 MR. STONE: Yes. That category I think we
21 would come up with those numbers, and we could have
22 Mr. Hill come over and put a tag on the ones in the
23 binders that fall into that category.

24 THE COURT: Well, if they're not many, if
25 you'll give us a list. But these are document

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100

1 produced to Hynix and the FTC litigation.

2 MR. STONE: Yes.

3 THE COURT: And you're still claiming
4 privilege on. And how many of those approximately
5 are there?

6 MR. STONE: Mr. Guaragna, can you help me
7 with a number?

8 MR. GUARAGNA: This is John Guaragna for
9 Rambus. I believe that is in the order of 15 to 20
10 documents, Your Honor.

11 THE COURT: Okay. Can you give me a list
12 of those?

13 MR. GUARAGNA: We will, Your Honor.

14 THE COURT: I don't need you to come over
15 here and flag them. I think we can do that if I
16 have a list by your document numbers.

17 Now, there was one whole set of documents
18 that were missing in somebody's brief. What was
19 it?

20 MR. GEOBES: It's one document.

21 THE COURT: I thought it was a whole range
22 of numbers between number 6 and number 7.

23

24 (Discussion off the record)

25

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101

1 THE COURT: Document 1698 is not in our
2 book. It falls between book 5 and 6 or 6 and 7. It
3 falls between book 6 and 7, according to the
4 numbering system you put on those books, and it's
5 mentioned in Infineon's motion to compel in number
6 one, paragraph one, and that's 1698 and it's not
7 there.

8 Now, I don't know -- and then document
9 2000 -- excuse me, 2606 it seems to be very
10 misdescribed and maybe it's not the right document.

11 Hold it. Hold it. 1046 is missing. 1698

12 and 2606 seem to be misdescribed. Check that and
13 see if we need other documents there and get us --
14 what is it, 1046, see if you can get 1046 over here,
15 please.

16 MR. STONE: 1046, and then the two numbers
17 that are misdescribed is 1698 --

18 THE COURT: And 2606. They're not just
19 two -- they're the two in that paragraph that we
20 happen to know about. There were a good many of
21 them in the review that I did that I'm not going
22 through in the first four or five volumes that were
23 misdescribed, but I'm not going into those.

24 These are ones I want to see, if you could
25 see where we stand on that. Is there anything else

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102

1 we need them to identify for us any better than they
2 have?

3 MR. STONE: Your Honor, I think I can
4 answer one of the questions right now.

5 THE COURT: Okay.

6 MR. STONE: The 1046, which was Infineon's
7 number, would be in the binder at 1114, based on
8 that cross-indexing privilege log that we gave you
9 in a separate binder.

10 THE COURT: All right. I see. 11 what?

11 MR. STONE: It would be 1114 I believe.

12 THE COURT: Those paragraphs that we are
13 talking about in the motion are Infineon numbers?

14 MR. STONE: Yes, Your Honor.

15 THE COURT: All right. I see. All
16 right. Well, that will help us. We can get that.

17 All right. Thank you all. Is there
18 anything else we need?

19 MR. STONE: I believe that's it, Your
20 Honor, at least for the Rambus side.

21 MR. DESMARAIS: That's it for Infineon's
22 side, Your Honor.

23 THE COURT: All right. Thank you very
24 much. I'll give you an opinion as promptly as I
25 can. Thank you very much.

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103

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2 (The proceedings were adjourned)

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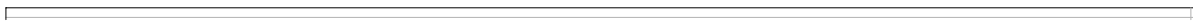
4 I, Sandra M. Beverly, certify that the
5 foregoing transcript is a correct record of the
6 proceedings taken and transcribed by me to the best
7 of my ability.

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Sandra M. Beverly, RPR

Date



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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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RICHMOND DIVISION

- - - - -
 RAMBUS, INC., :
 :
 Plaintiff :
 :
 -vs- : CIVIL ACTION
 : NO. 3:00CV524
 INFINEON TECHNOLOGIES AG, et al., :
 :
 Defendants : February 2, 2004
 - - - - - 5:00 p.m.

TRANSCRIPT OF CONFERENCE CALL
 BEFORE THE HONORABLE ROBERT E. PAYNE
 UNITED STATES DISTRICT JUDGE

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 UNITED STATES DISTRICT COURT

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