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

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RAMBUS	:
	:
Plaintiff,	:
	:
v.	: Civil No.
	: 3:00CV524
INFINEON TECHNOLOGIES, AG, ET AL	:
	: March 3, 2004
Defendant.	:
	:
-----	:

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

DIANE J. DAFFRON, RPR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT

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1           (The proceedings in this matter commenced via  
2 conference call at 4:00 p.m.)

3

4           THE COURT: Hello.

5           A VOICE: Hello, Your Honor. This is the  
6 Rambus/Infineon conference call.

7           THE COURT: All right. This Civil Action No.  
8 3:00CV524. I had called for a conference call because  
9 you-all are bombarding me with papers, many of which  
10 could be avoided if you would talk to each other.

11           So then Rambus has filed two motions to  
12 compel, neither of which has been responded to.  
13 Rambus has filed a motion to dismiss or for partial  
14 summary judgment as to 3 of Infineon's  
15 counterclaim.

16           And I'm not quite sure what the flurry of  
17 motions about expert reports is, to tell you the  
18 truth. You're going to have to tell me about that.  
19 We'll deal with that later.

20           So who's on the telephone for whom? Identify  
21 yourself, starting with counsel for the plaintiff, and  
22 then when you speak, if you would please give your  
23 name, so the court reporter will be able to know who's  
24 talking.

25           Starting with counsel for the plaintiff,

1 who's here?

2 MR. STONE: Your Honor, this is Gregory Stone  
3 appearing on behalf of Rambus. Also appearing this  
4 afternoon for Rambus is Kelly Klaus from Munger,  
5 Tolles & Olson, John Guaragna of Gray Cary, and Craig  
6 Merritt and Braxton Hill from Christian & Barton.

7 THE COURT: All right.

8 For the defendant?

9 MR. DESMARAIS: Yes, Your Honor. John  
10 Desmarais is on the line with Michael Stadnick from  
11 Kirkland & Ellis for Infineon, and Brian Riopelle is  
12 on the line, as well, for Infineon.

13 THE COURT: All right. You asked in your  
14 motion to compel depositions, Mr. Stone, for an  
15 immediate Rule 26(f) conference to deal with the issue  
16 of the taking of depositions, and I haven't finished  
17 reading entirely the motion to compel production  
18 pursuant to the fourth set of requests for production  
19 of documents and things, which was filed today, and  
20 the other motion to compel was filed on February --  
21 that's the one with respect to the depositions -- was  
22 filed on February the 27th. And I don't have any  
23 response to either of those motions, of course, and  
24 I'm not going to make you-all address the substance of  
25 them.

1           But, Mr. Desmarais and Mr. Stone, these are  
2 things that you have to talk about, and it's  
3 troublesome that, at least what's related in the  
4 opening pleadings, that Infineon is not talking.

5           MR. DESMARAIS: Your Honor, this is John  
6 Desmarais. I would like to address that because I do  
7 think that that paints a picture that's not entirely  
8 accurate.

9           THE COURT: Well, all right. I've read what  
10 they have to say, and I think since Mr. Stone wanted  
11 the call, I'll give him an opportunity to talk about  
12 that topic, and then you can respond. But I will say  
13 this, gentlemen, that if you-all can't find a  
14 comfortable place to meet and confer and discuss  
15 things like this, I can find you a place in the  
16 courthouse that may not offer you the same comfort,  
17 but you can work until you get it done. And I don't  
18 mean the lockup.

19           All right, Mr. Stone.

20           MR. STONE: Thank you, Your Honor. I would  
21 like, if I can, to respond to Your Honor's suggestion  
22 and the issues we raised in this fashion. I think  
23 that desp.

24           MR. DESMARAIS: Ite difficulties on our part  
25 in communicating with Mr. Desmarais, and despite, I

1 think, some long delay, which ultimately led us to  
2 file our motion in trying to discuss whether they  
3 would produce witnesses for deposition or not,  
4 fundamentally what we disagree on is the scope of  
5 discovery that Rambus should be permitted to take.  
6 And I think in a call that Mr. Desmarais and I had  
7 this morning right in advance of this call with Your  
8 Honor, it became clear that we have a disagreement on  
9 the merits, on the substance.

10           It is, without question, clear that further  
11 meeting and conferring might have narrowed that  
12 dispute, but we very much do have a dispute on the  
13 merits that I don't think we're able to resolve among  
14 ourselves.

15           I do think it's an issue that requires  
16 ultimately the Court to indicate whether the discovery  
17 we think that Rambus is entitled to to defend against  
18 the 17200 claim and to respond to the prayer for  
19 injunctive relief, which clearly invokes questions of  
20 current conduct and current possible harm and risk to  
21 the parties, is something on which we should be  
22 permitted discovery, and, if so, the extent of that  
23 discovery.

24           THE COURT: Well, have you outlined for  
25 Mr. Desmarais, Mr. Stone, topic by topic what

1 discovery you propose to take, and the way you want to  
2 take it?

3 MR. STONE: What I've tried to do, Your  
4 Honor, is I've outlined it on some e-mails to  
5 Mr. Desmarais, which are attached to my declaration in  
6 support of the motion to compel depositions. I think  
7 I've outlined in general terms in our moving papers in  
8 support of this motion and in support of the motion to  
9 compel production of documents why we think the  
10 breadth of the claim now asserted against us and the  
11 prayer for injunctive relief now sought justifies the  
12 discovery that we want to take.

13 THE COURT: I understand that, and I have  
14 read those e-mails, and I have read both your  
15 declarations.

16 MR. STONE: I think --

17 THE COURT: But I really wasn't asking that,  
18 Mr. Stone. What I was asking is that once you did  
19 identify what areas you thought you were entitled to  
20 discovery on, have you told Mr. Desmarais specifically  
21 what depositions you want to take to address those  
22 areas?

23 MR. STONE: Yes, I think -- I told him the  
24 depositions we want to take, and it's our view that  
25 each of the deponents whose deposition we seek should

1 have, we believe will have, testimony that is not just  
2 likely to lead to something discoverable, but is  
3 testimony that will be admissible and used at the  
4 trial in this case on these issues.

5           So we tried -- given the amount of time, as  
6 Your Honor knows, that we have for discovery being  
7 limited, we tried in the outset to limit the number of  
8 witnesses whose depositions we thought we needed  
9 because we didn't have time to waste any time.

10           THE COURT: Yeah. All right.

11           MR. STONE: If I could, just one more thing,  
12 Your Honor. I do know it's difficult sometimes for  
13 the parties to conduct a hearing this way,  
14 telephonically, and these are the most critical issues  
15 pretrial in the case for Rambus.

16           I'm happy, if it would suit the Court's  
17 schedule, and these issues need to be resolved, to be  
18 in Richmond for a hearing tomorrow or Friday if that  
19 would work with the Court's schedule, to sit down in  
20 person to try to resolve the issues with Mr. Desmarais  
21 there. To the extent we can't resolve them, to bring  
22 them to Your Honor in as tight and concrete a fashion  
23 as possible.

24           THE COURT: Well, Rambus -- excuse me,  
25 Infineon needs to reply to the Rambus motions to

1 compel, I would think, as well. Before I can have a  
2 meaningful hearing, I think I need a reply, a response  
3 from Infineon.

4 When do you plan to file responses to these,  
5 Mr. Desmarais?

6 MR. DESMARAIS: To be perfectly candid, Your  
7 Honor, I don't know off the top of my head how many  
8 days I have, but I was planning to respond under the  
9 normal schedule for motions to compel.

10 Brian, do you know what that is?

11 THE COURT: Well, he knows that it's 11 days.

12 MR. DESMARAIS: Right.

13 THE COURT: But I don't know whether he's  
14 calculated it. I suspect all of you know it's 11  
15 days. You don't know what date that is; is that what  
16 you're saying?

17 MR. DESMARAIS: That's what I'm saying, Your  
18 Honor.

19 THE COURT: So does anybody know when the  
20 response dates are?

21 MR. RIOPELLE: I have calculated it. Let me  
22 go look up on my computer. This is Mr. Riopelle.

23 THE COURT: Look, if you had a paper  
24 calendar, you could do better than looking it up on  
25 the computer. I don't want to run either Rambus or

1 Infineon out of business, but I'm here to tell you  
2 that sometimes paper is just as good.

3 MR. RIOPELLE: Mr. Stone, do you know what  
4 day you served it on?

5 MR. STONE: Yeah, the response to their  
6 opposition to the motion to compel depositions would  
7 be due next Monday, Your Honor.

8 THE COURT: That's the 8th?

9 MR. STONE: That would be the 8th, yes. And  
10 their opposition to the motion that we filed today to  
11 compel production of documents would be due, I'm  
12 assuming, on the 14th.

13 THE COURT: Which is a Sunday.

14 MR. STONE: Which would make it the 15th.

15 THE COURT: All right.

16 You served them by hand, I take it.

17 MR. STONE: Yes. Everybody in this case is  
18 serving by hand on the lawyers in Richmond, and  
19 serving by overnight mail or by fax on the lawyers who  
20 are outside of Richmond.

21 THE COURT: All right. I guess what we need  
22 to do is have a little bit more expedited schedule,  
23 but I interrupted you, Mr. Desmarais, to put the ball  
24 in Mr. Stone's court first since he had filed these  
25 motions, and now if you'd like to address whatever it

1 is you want to address that I interrupted you.

2 MR. DESMARAIS: Yes, just a couple points,  
3 Your Honor. Thank you. I think that historically  
4 since Mr. Stone's entry in this case we have gotten  
5 along quite well, have not had a problem negotiating  
6 or dealing or exchanging. I'm not sure what happened  
7 this time, but I was in California with Mr. Stone's  
8 partners at depositions in San Jose in the room with  
9 them, and Mr. Stone and I were having a meeting to  
10 confer over the e-mail.

11 I told Mr. Stone my computer had crashed and  
12 I sent it back to New York. He continued to e-mail  
13 me. I had no access to e-mail. I was in a conference  
14 room with his partner. He never brought up the issue.

15 The first I heard is Mr. Stone saying I  
16 haven't responded to his e-mail in three days, and he  
17 files a motion to compel. And I hear about it -- you  
18 know, I've been in the conference room for a couple of  
19 days with his partner. Nobody said anything to me. I  
20 got no voice mail about it.

21 I'm not sure why he proceeded in that  
22 fashion, but I do take issue that I did something  
23 wrong in not meeting to confer. Had I known there was  
24 a problem, if the lawyer across the table had just  
25 told me, or if I got a voice message, I would have

1 responded to it.

2 I'm not sure why Mr. Stone continued to use  
3 e-mail when I told him I didn't have my computer. But  
4 I think we can put this aside because I think this was  
5 a misunderstanding, and, historically, we've been  
6 meeting and conferring, and I have no doubt that we  
7 will continue to do so.

8 But I do agree with Mr. Stone's comments that  
9 we do have a fundamental disagreement on what is  
10 happening at this juncture in the case.

11 THE COURT: Right now, nothing. At least  
12 nothing that Rambus wants to do, if I read Mr. Stone's  
13 papers correctly.

14 MR. DESMARAIS: Well, Mr. Stone noticed 23  
15 depositions of Infineon employees and 18 depositions  
16 of third parties, all the companies in the industry.  
17 There's 18 parties, and he noticed 23 Infineon  
18 employees.

19 THE COURT: And 18 non-parties.

20 MR. DESMARAIS: Eighteen third parties,  
21 non-parties, and 23 employees, plus a 30(b)(6) of the  
22 company, plus Kirkland & Ellis and our other law firm,  
23 Slater and Matzel.

24 So in my view, and when I read what it is all  
25 about, Rambus wants to do over all that they did

1 before. So I said to Mr. Stone in the meeting to  
2 confer that we did have, I don't believe that's what  
3 is appropriate at this juncture in the case.

4 You're not allowed to redo those obligation  
5 issues or the attempt to monopolize issues or the  
6 fraud issues. Those are all old.

7 With respect to the new issues about whether  
8 Rambus destroyed documents intentionally and failed to  
9 produce documents, I don't see any reason why Rambus  
10 should be entitled to go out and depose 18 third  
11 parties to ask them whether they destroyed documents,  
12 too. That's not a defense.

13 So I'm not sure. I think Mr. Stone and I can  
14 meet and confer for a long time and never reach  
15 agreement on this issue. So in that respect I do  
16 agree with him.

17 THE COURT: Well, then, I suppose the thing  
18 to do is to frame the issues on the scope of discovery  
19 and get them to me and I'll deal with them.

20 MR. DESMARAIS: I think that's right, Your  
21 Honor.

22 THE COURT: I have this basic philosophy when  
23 you're talking. Where are you, Mr. Desmarais, in  
24 California or New York?

25 MR. DESMARAIS: I'm in New York right now.

1 We were at depositions when this issue broke, and I've  
2 since come home. So I'm now in New York.

3 THE COURT: Well, I think you need to talk  
4 about it and define what it is. Define for me.  
5 Certainly you can agree to define for me what it is on  
6 particular points that you want discovery on and  
7 identify what positions you have on those issues.

8 I'm not inclined to believe that we need to  
9 go into the kind of discovery I'm hearing being  
10 discussed. On the other hand, to have Rambus have to  
11 deal with the 17,200 claim, that is the one under  
12 California law for unfair practices, trade practices,  
13 without some discovery of at least part of what they  
14 have outlined in the papers that I have seen would  
15 just simply be wrong. I don't believe they have to do  
16 that.

17 I think they are entitled to defend  
18 themselves. But I suppose the thing that we're going  
19 to have to do is to get you to define promptly where  
20 you stand, and I'll hear you.

21 Now, I have had Monday morning open up.  
22 Actually, I'm sorry. It's gotten taken up since I  
23 just thought it was opened up. And I'm going to be  
24 out of town Wednesday, Thursday and Friday. I do have  
25 the 9th of March, which is Tuesday.

1                   Can you get your papers in, these motions,  
2 Mr. Desmarais, by Friday afternoon? That is March the  
3 5th.

4                   MR. DESMARAIS: To both motions, Your Honor?  
5 I haven't even seen the motion to compel yet.

6                   THE COURT: It says you haven't talked to  
7 them and you haven't -- you mean the motion to compel  
8 --

9                   MR. DESMARAIS: The documents.

10                  THE COURT: -- the documents. It says you  
11 haven't produced any documents, you haven't filed a  
12 response, and explains why the documents are relevant  
13 to particular issues. So I would think that in  
14 briefing the issues that are raised in these motions,  
15 you would frame the scope of discovery requests.

16                  Do you see that you would do that,  
17 Mr. Desmarais?

18                  MR. DESMARAIS: Yes.

19                  THE COURT: And, Mr. Stone, do you see that's  
20 the way to do it?

21                  MR. STONE: I do, Your Honor.

22                  THE COURT: All right. Well, if you do your  
23 briefing on some other schedule, I can't hear you on  
24 this until March the 16th, and time's a-wasting.

25                  MR. DESMARAIS: Could we get you the

1 responses Monday morning, Your Honor, and then meet  
2 with you on Tuesday?

3 THE COURT: I am very flattered by the  
4 perspicacity which you think that I have demonstrated  
5 by offering that schedule, Mr. Desmarais. That's kind  
6 of -- I was actually planning to read them over the  
7 weekend when I had a little time to reflect upon them.  
8 It wasn't that I was going to lollygag.

9 I want you to do that, to get this  
10 straightened out very quickly. I would have thought  
11 that you all could work it out. Particularly, I think  
12 I gave you some guidance in the motion to amend  
13 opinion about some of the discovery that had been  
14 mentioned as relevant in the briefing respecting that  
15 motion. And I still feel basically that way. I'll  
16 hear what you have to say about it.

17 Put what you-all have done aside for a  
18 moment. I want to address one of the things I wanted  
19 to talk about with you-all. And we'll get back then  
20 to the agenda that you all have. As you know from the  
21 opinion on the motions to compel filed by Infineon, I  
22 will begin to continue to review the documents  
23 tendered here by Infineon, I mean by Rambus, in  
24 camera.

25 As I explained in that opinion, I reviewed

1 approximately 10 volumes or so as part of the effort  
2 to assess the issue respecting the adequacy of the  
3 privilege log and the various issues that were  
4 presented in those briefs. But there are some 50  
5 volumes, I think, maybe 48 or something like that, so  
6 I have 38 left to go.

7           The last couple of volumes I reviewed were  
8 mostly documents that had cover sheets on them that  
9 said "produced in other cases," which Mr. Stone -- or  
10 "produced pursuant to court order," which Mr. Stone, I  
11 believe, told me meant they had already been produced  
12 somewhere else. And I don't intend to be looking at  
13 those documents.

14           I think as a result of the need to look at  
15 these documents for the reasons articulated, it  
16 probably is going to be the case that there's going to  
17 be some additional discovery permitted on the issue of  
18 document retention, etc., by Rambus as outlined in  
19 that opinion.

20           Therefore, I don't think that the 26th of  
21 March is a realistic discovery cutoff for that. And  
22 if you're going to have different periods, I don't  
23 think it's fair to give you different periods of  
24 discovery cutoffs for different issues because that's  
25 a very difficult way to take discovery, or at least it

1 was when I did it.

2 In addition to that, I have some doubts now  
3 whether, given what I understand Rambus thinks it  
4 wants to do in the way of defense, apart from those  
5 things which I said I was dubious of in the motion to  
6 compel opinion that was just issued, that Rambus needs  
7 some time to take that discovery as well. And I have  
8 some doubts whether a trial date on the 10th of May is  
9 possible.

10 Consistent with fairness to both of you, both  
11 sides, and even though I do intend that the  
12 proceedings be limited by the fact that we have  
13 already a lot of discovery that's been taken and that  
14 there's no need to pursue and start this case all over  
15 again just because it is back here on remand.

16 So what I'm thinking about is moving the  
17 trial date some, but not a great deal, and moving that  
18 would move the discovery cutoff. And that, in turn,  
19 fits into this discussion because it would give you a  
20 little more time to file briefs and to get things  
21 here. And I think that you need to, nonetheless, sit  
22 down and talk and try to get produced what it is you  
23 can get produced without having a decision from me  
24 about the scope of discovery.

25 To that end --

1           MR. DESMARAIS: Well, I think -- this is John  
2 Desmarais. I think those comments do help to move us  
3 forward. I think if we could have -- I don't think I  
4 would have a problem getting both briefs in to you by  
5 the 10th of March. That would give Mr. Stone and I  
6 some time to debate the scope a little bit before I  
7 just, you know, rushed to get briefs in. And then if  
8 we could have a conference with you the following  
9 week. You said you would be back the week of the  
10 15th. I think that schedule might work, especially if  
11 you are thinking of the March 26 discovery cutoff  
12 moving out a little bit. I think that might work.

13           THE COURT: Well, I was thinking, gentlemen,  
14 about moving the trial date a month to the middle of  
15 June.

16           MR. STONE: Your Honor, in that regard --

17           THE COURT: I know that you have some trip  
18 planned, Mr. Stone, and I do not intend to transgress  
19 on that, but I don't remember when it was.

20           MR. STONE: Yes, Your Honor. I am schedule  
21 to leave on July 9th.

22           THE COURT: Well, I have another trial, a  
23 class action trial, that begins on July 6th. so I have  
24 to be through by then anyway. And I don't envision  
25 this case taking more than two weeks.

1           MR. DESMARAIS: I think we can do it in two  
2 weeks, Your Honor. And my June is pretty open. I  
3 have no issues there.

4           MR. STONE: I have no I issues, Your Honor,  
5 either except that one constraint, which I know you  
6 have been very sensitive to, and I appreciate that.

7           THE COURT: Well, as of right now -- and  
8 that's the reason -- I know you think that I have been  
9 utterly indolent in not entering that pretrial order  
10 that you all were kind enough to deal with, but I have  
11 been wrestling with a number of these things in my  
12 mind as I have gone through the opinion that I've  
13 written, and what I think that process may or may not  
14 do to your case and to what happens in this case. So  
15 I haven't entered that pretrial order version or the  
16 amendment that you all tendered, I guess is what it  
17 really is, yet because as I was reflecting on these  
18 things, I perceived the need to talk with you about  
19 it.

20           And I'm inclined to say that the -- let's  
21 see. This is going to be -- this is going to be a  
22 cruel and unusual punishment, is that right, for some  
23 of our citizens? In other words, you still want a  
24 jury?

25           MR. STONE: Yes, Your Honor.

1           THE COURT:  If we start on June the 14th,  
2   that gives you two weeks and three days in another  
3   week, and I would suggest what we will do is pick the  
4   jury on either the 10th or the 11th of June.  Let the  
5   jury have the weekend to get its life together, and  
6   then start bright and early the morning of the 14th.  
7   And one way or the other we will get the case tried.

8           Now, given the number of witnesses you-all  
9   were talking about deposing, are both of you still of  
10  the view that this can be done in two weeks?

11          MR. DESMARAIS:  This is John Desmarais, Your  
12  Honor.  I think it can be done in two weeks without  
13  much effort.

14          MR. STONE:  You know, assuming, Your Honor,  
15  that that sort of timing is more or less evenly split,  
16  that we each have a week, I would think that that's  
17  sufficient time.

18          THE COURT:  All right.  Yes, the idea, yes, I  
19  think you do have to have roughly even time.  I  
20  haven't thought about how to allocate it, and that's  
21  something we will deal with when we get a little  
22  closer to trial, but you do have to have what you need  
23  to put on your case.  Each of you have different kinds  
24  of cases, and I understand that, and I'm just looking  
25  at the overall picture.

1           What I think actually, as I reflect upon it,  
2    what I think we'll do is we will pick the jury on the  
3    10th of June, and we'll have all of the opening  
4    statements on the 11th of June. Then we'll start the  
5    evidence on the 14th of June. That will get some of  
6    the slow process out of the way before the 14th.

7           MR. DESMARAIS: That sounds good, Your Honor.

8           MR. STONE: That's fine, Your Honor.

9           THE COURT: All right. I'll try, when  
10   looking at the schedule, to maintain the same relative  
11   posture with respect to the discovery cutoff on the  
12   fact discovery. I don't see that what we have going  
13   here impacts anything with respect to expert  
14   discovery, and you should proceed on the schedule that  
15   you have set for yourselves and that you are, I know,  
16   following as respects expert discovery.

17           If that's so, then let's set for right now a  
18   briefing schedule on the motions to compel and the  
19   scope of discovery. And you said you could file when,  
20   Mr. Desmarais?

21           MR. DESMARAIS: If I could have until  
22   March 10, Your Honor, that would be much appreciated.

23           MR. STONE: Your Honor, in that regard, I  
24   don't have a problem with that date as long as --  
25   except I do think that our motion on the depositions

1 will sort of limit it. I think that Mr. Desmarais is  
2 going to raise the broader issue of the scope of  
3 discovery by Rambus. If we could have a chance to  
4 reply so that that issue is clearly framed for Your  
5 Honor, that's what I would like.

6 THE COURT: Yes.

7 MR. STONE: So as long as the hearing date  
8 gives us sufficient time to reply and for you to  
9 consider our reply, I have no problem with the 10th,  
10 if that would work out on the schedule.

11 THE COURT: I'm not sure it will. That's  
12 what I was looking at. I think, Mr. Desmarais, you  
13 file your briefs on the 8th, and you file any reply on  
14 the morning of the 11th by noon.

15 MR. STONE: Okay.

16 THE COURT: Then we'll have some time to look  
17 at them. I urge you to get deposed those people on  
18 whom you can get depositions. And when you're  
19 talking, I'd ask you to keep in mind sort of basic  
20 principles. There are some instructions respecting  
21 depositions and discovery or there are some comments,  
22 excuse me, in the opinion on the motion to compel that  
23 was issued last week, and I don't think that those  
24 thoughts would change.

25 It was a motion to amend, I'm sorry.

1 Mr. Goebbes reminded me. In the motion to amend. I  
2 made comments about discovery in addressing what  
3 Rambus contended it needed to do by way of discovery,  
4 and I don't see that -- I'll listen to anything you  
5 have to say, but right now I can't figure out how  
6 those views would change.

7           Also, I believe, Mr. Desmarais, in making the  
8 point that the California Business or Unfair Trade  
9 Practices Statute was different in considerable ways  
10 from other counts that were in the case, and the count  
11 that was litigated and dealt with by the federal  
12 circuit, you presented a theory of the case as to  
13 Count 15 that was relatively broad and that breadth,  
14 notwithstanding my own disquiet at what I perceive the  
15 California law to be on that topic, is sanctioned to  
16 some extent by California law, which I am obligated to  
17 apply.

18           And I think to the extent those issues are in  
19 play, and many of them are discussed rather fulsomely  
20 in these two motions to compel that Rambus has filed,  
21 those issues probably are going to be in play. Maybe  
22 I don't understand why they are not, but a lot of what  
23 Rambus says in its papers to date struck a responsive  
24 chord in me when I read them in preparation for  
25 today's call.

1           That, of course, was without the benefit of  
2 any input from your side. So I haven't made up my  
3 mind on the topic, but I will have to say there's a  
4 certain logic in what Mr. Stone said.

5           I do have this view on the whole issue of  
6 what I'll call reciprocal discovery on document  
7 retention, etc. I don't believe that this is a  
8 tit-for-tat situation because the record right now  
9 respecting document retention programs is far  
10 different as respects Rambus than it is with respect  
11 to Infineon.

12           So I would think that Rambus will have to  
13 make a showing that is somewhat different than that  
14 which I have seen so far in order to get into that  
15 kind of discovery. But, again you have some guidance  
16 in the recently issued opinion, and both sides are  
17 governed by the same rules of law, and if, in fact,  
18 there is some showing that permits a discovery of that  
19 sort with respect to Infineon, then the same rules  
20 will apply to Infineon as apply to Rambus.

21           Now, I hope that that will help you in  
22 arriving at a way that you can narrow the differences  
23 respecting your scope of discovery.

24           I have this question for you-all. What, if  
25 anything, happens in the FTC next? The administrative

1 law judge has made a document that Rambus has sent  
2 over here and given me a copy of. It's called an  
3 initial decision. What happens next?

4 MR. STONE: Your Honor, this is Greg Stone.  
5 Let me speak to that. The complaint counsel, the  
6 prosecutors, if you will, branch of the FTC for  
7 purposes of that decision, have filed a notice of  
8 appeal, and Rambus has the right to file a notice of  
9 cross appeal if it chooses to do so. That appeal will  
10 then be briefed and argued to the commission.

11 THE COURT: To the full commission?

12 MR. STONE: To the full commission. The  
13 timing on that is at the moment unsettled. The  
14 parties have agreed, essentially, on a briefing  
15 schedule that they will propose to the commission  
16 which the commission can either adopt or set their  
17 own. That proposal has not yet been submitted to the  
18 commission, and we don't yet have a firm briefing  
19 schedule from commission. But sometime in the next, I  
20 think I can safely say, sometime between now and the  
21 end of the year, and I think certainly before the very  
22 end of the year, the appeal would be argued to the  
23 commission under what has generally been their  
24 practice to date in terms of the timetable that it  
25 takes.

1           There's been some recent sort of different  
2           schedules for different cases that make it a bit  
3           harder to predict exactly what they will do here, but  
4           I feel fairly confident that there will be at least an  
5           argument sometime before the end of this calendar  
6           year.

7           At that point then commission has essentially  
8           as much time as they want. Historically, they have  
9           sometimes taken short periods of time and sometimes  
10          taken long period of time to issue their decision.

11          THE COURT: Well, it looked to me like -- I  
12          haven't read the decision, but I have been through it,  
13          its table of contents, and read the conclusion. It  
14          looks to me like there are a lot of issues.

15          MR. STONE: I think that's a fair statement,  
16          Judge.

17          THE COURT: All right. Now, the next thing  
18          I'd like to ask you about is what are the briefs and  
19          motions, I really haven't read those at this juncture,  
20          that deal with expert reports?

21          Rambus, you have something filed called a  
22          Memorandum in Support of a Supplemental Expert Report.  
23          Do you want to file one? Is that what that's all  
24          about?

25          MR. STONE: Well, Your Honor, you had told us

1 at one of the last hearings that if we wanted to file  
2 an expert report that addressed certain issues where  
3 we thought that the expert report was justified by the  
4 federal circuit's decision, that we should file a  
5 memorandum that explained why the expert's report on  
6 those issues was indeed justified by the federal  
7 circuit's opinion, and more specifically, by its  
8 Markman ruling, and how its Markman ruling differed  
9 from either the Infineon-proposed Markman  
10 interpretation, the Rambus-proposed interpretation, or  
11 Your Honor's ultimate ruling on that issue.

12 That was the reason for our memorandum.

13 THE COURT: Okay.

14 MR. STONE: Then other supplemental expert  
15 reports were filed by Infineon and by us that have  
16 become the subject of motions to strike portions or  
17 all of those reports, I think, on a theory, and  
18 Mr. Desmarais can correct me if I'm wrong, but I want  
19 to state it neutrally, that the parties are going  
20 beyond the scope of what Your Honor had said you would  
21 permit in terms of the retrial in that the parties  
22 have introduced new evidence or bases for opinions or  
23 new opinions in these expert reports, and that has  
24 resulted in some motions to strike to try to clarify  
25 the scope of what the expert testimony will be in this

1 case compared to the status of the expert reports  
2 prior to the first trial.

3 And I think that explains, in a general way,  
4 all of the expert filings that you have.

5 THE COURT: All right. I think I understand  
6 that. I just need to sort out. What I have in the  
7 way of separate motions at this time are Rambus'  
8 memorandum and motion in support of a supplemental  
9 expert report, Infineon's notice of service of  
10 supplemental reports. And then there's a motion by  
11 Rambus to strike parts of the McAlexander report and  
12 the supplemental report of Carlton.

13 And there is Infineon's motion to strike the  
14 industry royalty rates section of the report of  
15 Mr. Tease, and then there are some responses and  
16 supporting memos to those.

17 Hold on just one minute, please. Can I put  
18 you on mute? I have a problem that I have to sort out  
19 respecting a car that is in the shop, and I have to  
20 tell them what to do, apparently. If you'll hold on  
21 one minute.

22 (Brief recess.)

23 THE COURT: Hello?

24 MR. STONE: Yes, Your Honor.

25 THE COURT: I'm sorry. Okay. Are those the

1 motions that are filed on the expert areas now?

2 MR. STONE: There is an additional one.

3 Huber. I'm not sure if you mentioned that, Your  
4 Honor.

5 MR. RIOPELLE: This is Mr. Riopelle, Your  
6 Honor. There is an opposition to their motion to file  
7 a supplemental report that goes to one section of  
8 Huber's supplemental report.

9 MR. HILL: Your Honor, this is Braxton Hill  
10 with Christian & Barton. There is also a reply in  
11 support of Rambus' motion to strike McAlexander and  
12 Carlton that is probably on its way to the courthouse  
13 now.

14 THE COURT: Okay. I was really talking about  
15 just the motions at this juncture. All right. We'll  
16 make a list of what we've got over here right now, and  
17 Mr. Goebbes will call Mr. Hill and Mr. Riopelle, and  
18 sort out and make sure we have everything at this  
19 juncture that's filed as of the end of the day, and  
20 we'll do that with you tomorrow, just so I understand.

21 I think I know roughly what's coming, but we  
22 ought to have a schedule to hear those also. For  
23 right now, I'll tell you what I'll do. I will go  
24 through these things, and I'll give you a schedule on  
25 those a little bit later. But for right now, we're

1 going to have a hearing on this discovery on the 16th  
2 of March, is that right, at nine o'clock in the  
3 morning?

4 MR. DESMARAIS: I'm sorry, Your Honor, what  
5 time did you say?

6 THE COURT: At six o'clock at nine in the  
7 morning. I'm sorry. It's been a long day. March the  
8 16th. The court reporter is having trouble  
9 transcribing that language.

10 March the 16th at nine o'clock in the  
11 morning.

12 MR. DESMARAIS: Yes.

13 THE COURT: All right. That's on the motion  
14 to compel, both of them, that I have.

15 We also have just filed when? When was this  
16 motion to dismiss Count 15 filed? That was filed on  
17 February 17. I have Infineon's opposition but no  
18 reply yet. Has the reply been filed?

19 MR. STONE: Your Honor, this is Greg Stone.  
20 I believe our reply is due this Friday of this week,  
21 and we plan to think file it then.

22 THE COURT: All right. Well, I'll thumb  
23 through those. I may try to deal with all this on the  
24 16th, but I'm not sure yet. I'll let you know after I  
25 look at it. All right.

1 MR. RIOPELLE: Your Honor, this is Brian  
2 Riopelle. I have a question on the scheduling.

3 THE COURT: Yes.

4 MR. RIOPELLE: The earlier pretrial schedule  
5 the parties had submitted had the summary judgment  
6 motions being filed on March the 12th and the limine  
7 motions being filed on March the 15th.

8 In light of Your Honor's comments today,  
9 should I assume those dates are going to move?

10 THE COURT: Well, what are the motions for  
11 summary judgment that you're anticipating filing?

12 MR. RIOPELLE: I'm not sure final decisions  
13 have been made, but, for example, at the hearing that  
14 we had on what issue remains in the case, you  
15 indicated, I believe, orally that you would entertain  
16 a motion for summary judgment on the willfulness claim  
17 and possibly also on claim 26 in the '804 patent.  
18 Those are the only two I can think of right off the  
19 top of my head, but there are also motions in limine.

20 THE COURT: Let's talk about the motions for  
21 summary judgment. So you anticipate motions for  
22 summary judgment on those issues?

23 MR. RIOPELLE: And I need Mr. Desmarais to  
24 chime in here, too.

25 MR. DESMARAIS: Yes, Your Honor. This is

1 John Desmarais. There are potential other issues that  
2 are equitable in nature to some of our defenses and  
3 those could be appropriate for summary judgment as  
4 well.

5 THE COURT: What equitable defense can you  
6 think of that a jury shouldn't decide? Let's reflect  
7 a little bit. Equitable defenses are quintessentially  
8 factual in nature, and I don't think you ought to  
9 spend a lot of time briefing, and I'm not going to  
10 spend a lot of time wrestling over, motions where  
11 there are factual issues to be decided, and those  
12 typically are of that sort.

13 Rambus, are you planning any motions for  
14 summary judgment?

15 MR. STONE: Yes, Your Honor.

16 THE COURT: Well, what are you talking about,  
17 Mr. Stone?

18 MR. STONE: Well, I suspect that we'll likely  
19 move for summary judgment with respect to  
20 infringement. We also are likely to move for summary  
21 judgment on monopolization as we indicated at the last  
22 hearing on the basis of the geographic market ruling  
23 from the prior trial. And whether or not we'd move  
24 with respect to all or a portion of the 17200 claim  
25 depends, I think, in part on how the parameters of

1 that claim are defined as a result of our motion to  
2 dismiss and as the discovery develops.

3 I suspect we will have some claim.

4 THE COURT: Well, you make sure this,  
5 Mr. Stone: If you have a motion for summary judgment  
6 on infringement, given the posture of this case and  
7 what I already know about the evidence in it, it  
8 better be good because I don't want to spend any time  
9 over something like that only to realize that it's  
10 really right back where we were with just a few little  
11 twists on it by virtue of the federal circuit's  
12 opinion. Maybe there's something there. Maybe  
13 there's not. But I don't really see that that would  
14 be a prudent move on your part.

15 MR. DESMARAIS: Your Honor, this is John  
16 Desmarais.

17 THE COURT: And I don't know about the other  
18 things. But, you know, both of you go back and look  
19 at summary judgment jurisprudence a little bit in this  
20 circuit. We're not back where we were before the  
21 trilogy was decided in 1986 by a long shot, but if  
22 there truly are factual disputes, our court of  
23 appeals, and to my knowledge, the federal circuit,  
24 tells us don't be deciding them. Leave them to the  
25 jury.

1           Just because the rules provide a motion is  
2 not a warrant or a reason to file one of the  
3 permissible sort.

4           I'll say this: If that's what you-all have  
5 got on your minds, I think maybe right now you better  
6 keep to your schedule on summary judgment. I really  
7 am troubled by the notion that you all think that this  
8 is a case that's going to get decided on summary  
9 judgment.

10           I exempt from that whatever there is about  
11 Count 15 because that's all new to both of you.  
12 That's a different matter. I'll look at the schedule,  
13 but there's not going to be a lot of extension on it.

14           Yes, Mr. Desmarais?

15           MR. DESMARAIS: I just wanted some guidance  
16 from you on how you deal with equitable issues. You  
17 said it would go to the jury. So are you saying that  
18 we would present evidence to the jury and give the  
19 jury the decision, and you would evaluate the decision  
20 afterwards? Is that what you think?

21           THE COURT: Well, an equitable defense  
22 doesn't always mean it's something that I decide. An  
23 equitable defense, estoppel, really anticipates that a  
24 jury will be making the appropriate findings in most  
25 instances.

1           And I think you might want to take a look at  
2 that, and maybe I need to take a look at it, too, but  
3 I don't envision deciding a great deal of this case  
4 myself. I think the right to a jury trial, of course,  
5 doesn't encompass a right to jury trial on matters  
6 that are traditionally decided by the courts, but the  
7 mere fact that something is a defense of an equitable  
8 nature doesn't convert it into something that is not  
9 tried by the jury, I think is still the law.

10           So you-all can take a look at that. If you  
11 think differently, you can let me know about it.

12           All right. Anything else you-all need to do  
13 today?

14           MR. RIOPELLE: Your Honor, this is  
15 Mr. Riopelle again. I hear loud and clear your  
16 comment on summary judgment. I didn't know if you had  
17 any comments on the motions in limine date, which is  
18 the 15th of March.

19           THE COURT: Well, I think you better file  
20 what you know you're able to file on the 15th of  
21 March, and then we'll deal with other things later. I  
22 Realize we're going to require some additional  
23 discovery, and I'll move the discovery deadline by 30  
24 days.

25           We have moved the trial date by 30 days, but

1 I think the motions in limine, you go ahead and file  
2 them. And on motions for summary judgment, I'll sit  
3 down and look at the schedule a little bit more  
4 closely and maybe give a revised version of it within  
5 the next day or so, so you'll know how to proceed.

6 But for now, you don't have to file your  
7 summary judgment motions on March the 12th. We'll  
8 have some relief, but it's not going to be a  
9 significant relief.

10 All right. Anything else?

11 MR. STONE: One other thing, Your Honor.  
12 This is Greg Stone, if I might. You will see amongst  
13 our filings today that we filed a motion to stay a  
14 portion of your order compelling production for the  
15 purpose of permitting us to take a writ to the federal  
16 circuit on the basis for Rambus -- the legal advice  
17 underlying Rambus' document retention program, and we  
18 lay out there the reasons we need to take a writ,  
19 including we have exhausted our appellate relief such  
20 that our production of the documents would not be  
21 deemed a waiver as to those documents or to any other  
22 subject matter.

23 I had asked Mr. Desmarais if he would  
24 stipulate to a stay for the purpose of allowing us to  
25 prepare and file that writ, and I think he felt

1 constrained, to some extent, by the tight time  
2 schedule we were under, and he suggested that perhaps  
3 this is an issue we should bring to Your Honor for  
4 your resolution as to whether you would give us that  
5 stay.

6 In the meantime, in light of the schedule  
7 that you have announced for us today, I'd like at  
8 least to talk with Mr. Desmarais following this call  
9 and see if he would agree to that stay, and thus we  
10 wouldn't need to bring the issue for resolution to  
11 Your Honor. Perhaps rather than asking you to look at  
12 that motion right away, I could talk to Mr. Desmarais  
13 when we conclude this call, and then could let your  
14 clerk know whether we were able to work it out or  
15 would ask that you address that at your earlier  
16 convenience.

17 THE COURT: All right. But they have a right  
18 to reply to it if they don't agree to it.

19 MR. STONE: I agree to that, Your Honor.

20 THE COURT: I'll give them 11 days to reply  
21 to it, and we'll go forward and deal with it.

22 All right. Anything else that we need to  
23 deal with?

24 MR. STONE: No, Your Honor.

25 THE COURT: All right. Why don't you-all

1 make an effort to sit down and do some serious talking  
2 and see if you can't sort out some of these matters.

3 Thank you all very much.

4 MR. STONE: Thank you, Your Honor.

5 THE COURT: Bye.

6 MR. STONE: Bye.

7 (The proceedings were adjourned at 4:57 p.m.)

8

9 I, Diane J. Daffron, certify that the  
10 foregoing transcript is a correct record of the  
11 proceedings taken and transcribed by me to the best of  
12 my ability.

13

14

\_\_\_\_\_  
DIANE J. DAFFRON, RPR                      \_\_\_\_\_  
DATE

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