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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

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DIANE J. DAFFRON, RPR _____
DATE

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