IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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MICRON TECHNOLOGY, INC. Plaintiff, v. RAMBUS INC., Defendant.	:	CIVIL ACTION
RAMBUS INC. Counterclaim Plaintiff, v. MICRON TECHNOLOGY, INC., MICRON ELECTRONICS, INC., and MICRON SEMICONDUCTOR PRODUCTS, INC., Counterclaim Defendants.	:	NO. 00-792 (KAJ)

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Wilmington, Delaware
Thursday, July 14, 2005 at 3:00 p.m.
STATUS CONFERENCE/MOTION HEARING

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BEFORE: HONORABLE KENT A. JORDAN, U.S.D.C.J.

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APPEARANCES:

RICHARDS, LAYTON & FINGER
BY: FREDERICK L. COTTRELL, III, ESQ.

and

Brian P. Gaffigan
Official Court Reporter

APPEARANCES: (Continued)

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(Los Angeles, California)

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P R O C E E D I N G S

(REPORTER'S NOTE: The following status conference was held in open court, beginning at 3:00 p.m)

THE COURT: Good afternoon. Please be seated.

MS. GRAHAM: Good afternoon.

THE COURT: Okay. This is a status conference in Micron vs. Rambus. We have a number of issues to

address. Why don't we start by going ahead and making sure who are the players in the courtroom. We'll start with some introductions there. Mr. Cottrell, I believe I know Mr. Powers but I don't know the other gentlemen at your table.

MR. COTTRELL: Yes, of course. For the record, Matt Powers and Joel Poppen who is in-house counsel at Micron.

THE COURT: How do you say your name, sir?

MR. POPPEN: Poppen. P-o-p-p-e-n.

THE COURT: Okay. Thank you.

Ms. Graham.

MS. GRAHAM: Yes. Good afternoon, Your Honor. With me today are Chuck Douglas from the Sidley Austin firm.

MR. DOUGLAS: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. GRAHAM: And Greg Stone who you met previously from the Munger Tolles firm and Mr. Douglas and Mr. Stone will be handling the matters today.

THE COURT: All right.

MS. GRAHAM: And John Danforth who is General Counsel and Vice President at Rambus.

THE COURT: All right.

MS. GRAHAM: And also Tom Cauley in the Sidley Austin firm.

MR. CAULEY: Good afternoon, sir.

THE COURT: Your name is?

MR. CAULEY: C-a-u-l-e-y.

THE COURT: Thank you.

All right. I know everybody has in mind some thing or things they'd like to accomplish today. Let me tell you the two things that I want to get done today. I want to lay to rest the argument about allegedly or assertedly privileged documents as to which we've had briefing and in camera submission documents. And I want to talk about case scheduling. And actually, I want to take the scheduling issue up first.

My understanding is that from the submissions that I received is that on the 12th, day before yesterday, you had a conference before Judge Whyte in the Hynix case, if I'm not mistaken. Rambus gets the ball on this because I take it that was it you having the conference and not these folks. Do you want to tell me what happened, Mr. Stone?

MR. STONE: I don't think anything happened, Your Honor, that affects the schedule. We had an earlier conference with Judge Whyte a couple weeks ago in which he set a trial schedule for the three phases that he has divided that case up into; and in our status conference statement, we set forth the trial schedule he adopted at that time. So the first trial being October 17th, the

last trial being in May of 2006, divided up sort of an evidentiary hearing on spoliation, the patent infringement case, Hynix being, the last phase in May being the Hynix affirmative claims against Rambus. So we have a trial schedule.

All we did yesterday, and I can go into more detail if you would like, is he heard argument on a request Hynix made for further review of backup tapes that had been recently discovered by Rambus which has been touched on in some of the papers we filed with you but we've never had the opportunity to address the discovery of those backup tapes directly with you. And I'm happy to, if there is time today and you are interested, sort of explain the background of that.

But yesterday, Hynix asked the Court to consider requiring Rambus to restore information from certain backup tapes. Rambus had voluntarily undertaken to restore it for a bunch of them, and there is a discussion of whether further backup tapes should be restored or not. And he took that matter, most of it was worked out in advance of the hearing and presented as agreed protocol to Judge Whyte, but there was one issue that was unresolved. He took that matter under submission.

THE COURT: All right. Take it as a given that I agree with something you said in your status report or I

understood you to say in your status report, which is I have been paying attention to what Judge Whyte is doing out there in the Northern District of California. And in that vein, is there anything that he said in the course of the hearing that disposed of or affects in any way the matters that we are to address today?

MR. STONE: Okay. Potentially in two respects, I think. One, as you know, he did trifurcate that case for trial, and I think you are aware of that. And I think that is something you would consider in deciding what sort of case management order to put in place here.

THE COURT: And in fact, you said a few moments ago he had scheduled an evidentiary hearing on spoilation. The other side characterizes that as a bench trial. Do you view that as a distinction without a difference or --

MR. STONE: He calls it, Judge Whyte calls it an evidentiary hearing. It's going to be tried to the Court and it could be dispositive of issues in the case. So is it an evidentiary hearing or a trial? They have claims that raised this as a defense. I think he thinks he is trying the defense, so in that sense I think it's a trial but I'm using his terms because that is what he's has chosen to use.

THE COURT: Okay. All right. Go ahead.

MR. STONE: The second thing that Judge Whyte has which I think bears directly on the issues that will be

argued today is he has under submission an argument that the documents that Rambus has recently discovered that it has marked on its privileged logs with an asterisk, and then Micron has identified on the privileged logs as falling within the scope of the subject matters of Judge Payne's 2001 order and they argued thus falling within the scope of Judge McKelvie's 2001 order. He has under submission the question as to whether or not those additional documents should be produced to Hynix.

So that one of the arguments Micron makes here today is that those additional documents that were within the scope of Judge Payne's 2001 order should be produced here, that very issue has been argued to Judge Whyte. And he took it under submission last week, I believe it was argued. So he does have that matter under submission as well.

I think those are the two issues. He does have in place and has held a number of hearings at which we've discussed the protocol for what Rambus will do with the backup media that it has discovered, which portions we'll resolve, which portions we don't. He is supervising that process and that was part of yesterday's hearing as well, but those issues may be relevant to Your Honor's handling of this case but I don't think they're directly raised by any of the motions today.

THE COURT: Okay. Who is going to be speaking to the issue of scheduling on your side of the courtroom?

MR. STONE: I will, Your Honor.

THE COURT: All right. Before I turn to you, Mr. Powers, let me go ahead and indicate you made a pitch in your status letter to say, if I understood it right, "judge, wait and see what Judge Whyte does." Did I understand that right?

MR. STONE: Yes, that pitch is made. That is I think one of the justifications for the schedule that we suggest Your Honor adopt is that we wait and see what happens in that case.

THE COURT: All right. Good enough.

Mr. Powers.

MR. POWERS: The only supplement I think to Mr. Stone's accurate statement of what happened yesterday, and I wasn't there, is that Judge Whyte as I understand it has said he will issue a ruling tomorrow on this privilege log question that Mr. Stone identified, if that is helpful to the Court.

THE COURT: That is helpful to know. And that is as to the additional documents. I mean everybody is agreement that he made a ruling on the earlier documents some time ago; correct?

MR. STONE: Okay. I think I have it in mind

straight. Judge McKelvie ordered certain documents produced here. Judge, those documents were voluntarily produced to Hynix in that case. Judge Whyte did not make an order on that. Judge Whyte did make an order on what Micron refers to as the spoliation documents which were also the subject of an order by Judge Payne. Those orders came out more recently in 2005.

THE COURT: Right.

MR. STONE: And so he does have an order on that subject. That issue is also before Your Honor.

THE COURT: All right. Thanks.

Let's talk about scheduling for a minute, Mr. Powers. Your opponents say, "hey, we've got a wonderful judge in the Northern District of California who is going to be looking at a lot of issues which are, you folks on the Micron side have also emphasized, in significant part overlapping with things before me." So the Rambus folks say "why don't you wait and see what he does." What is your problem with that?

MR. POWERS: Well, I think we have one problem that has two facets with that. Their suggestion as I understand it is that we wait until after the May 2006 third trial before any action is taken by this court. And as Mr. Stone stated, Judge Whyte has trifurcated his trials. The first up for all so far for Judge Payne and Judge Whyte

and we urge here should be spoliation because that unclean hands trial to the Court, not to the jury, would potentially resolve all matters and also potentially resolve a large numbers of the matters. It did so in Infineon before Judge Payne and it might do so here.

So principles of judicial economy and we think common sense suggest and support our request that this court follow the same sequence which Judge Payne has followed and which, at least in terms of which is first, and which Judge Whyte is following. That means a spoliation trial would be held first. We don't believe a spoliation trial need wait until after the patent infringement trial or Hynix's affirmative claims. If Your Honor wishes to have the benefit of Judge Whyte's rulings on the spoliation case, he clearly expects to have that ruling done before the January second phase of the trial because the spoliation case would obviously affect that.

So our suggest that is we hold spoliation trial here or at least schedule one for mid December or whenever Your Honor is available -- we don't know Your Honor's calendar -- rather than have nothing on the calendar because Micron's concern is that if we put nothing on the calendar and we wait until May, we will then not have an opportunity to be before Your Honor with any certainty for perhaps some extended time after that.

And, yes, something can change before Judge Whyte. That schedule may change. We can't control that. If Your Honor is resolute in stating that you do not want to have a trial on spoliation before Judge Whyte has a trial on spoliation -- I don't know if that is Your Honor's decision. You said you have to pay attention to what he does and I guess it would be helpful to us to know the parameters of what that means so we can understand what the ground rules are.

Our view is that we certainly don't need a decision on infringement, if Judge Whyte ever gets to that, for you to hold a spoliation trial. And we would like to get something on the calendar so that we're not waiting another year.

THE COURT: All right.

MR. POWERS: And if I may, one last point. One reason that this is all of acute relevance to Micron and others is highlighted by the debate about whether the DDR II claims, the so-called DKR two claims that they wish to add against us in the California case, DDR II, Rambus argues is a separate standard in which it did not participate. We argued to the contrary that it is simply an evolutionary standard from DDR I which is at issue in this case.

The world moves on. This case is now five and-a-half years old. We filed this case in 2000 to acquire

certainty about what directions the industry may go without fear of being accused of infringing Rambus's claims. If this is pushed off for another year and-a-half or two, which under Rambus's proposal is not outside the realm of possibility, if Judge Whyte's trial gets pushed off. I mean Judge Whyte could push off the trial because now they have to investigate another thousand backup tapes. There is a lot of uncertainty there.

THE COURT: Well, is there a lot of uncertainty there? I think you are stepping out a little far on that. My impression, from seeing the dispatch with which Judge Whyte has moved in this case and as is his reputation for moving other cases, is you've got a good, your opponents have a pretty solid schedule, things are going to move.

MR. POWERS: Well one issue could change that. And it's one of the things he heard argument on this week, which is how many of the backup tapes does Rambus have to go investigate? They've investigated an incredibly small number of the, north of thousand backup tapes that are out there. If Judge Whyte says, no, you have to go look at the thousands of tapes out there, one could easily imagine that October date slipping. I don't know. My crystal ball is no better than anybody else's. I do know we're five and-a-half years out. And I know under their proposed schedule, we're at least another year out, if not more. And that is

substantially prejudicial to Micron and the industry which needs a ruling some time on these claims.

THE COURT: Right. Now, when you say "a ruling some time on these claims," are the claims at issue here and the claims at issue in Hynix sufficiently the same? Talk to me about, you are taking what I take to be an impracticality pitch, which is some court some place has to give the industry some guidance, that is why this set of litigation was brought in different places.

MR. POWERS: At least ours. We can say that.

THE COURT: Yes. Looking at the Hynix litigation, if that moves forward, assume it goes all the way. Does it render that kind of guidance?

MR. POWERS: Certainly it may. And one of the debates we've been having in this case going forward is what affect will a decision by Judge Whyte, for example, on spoilation have on this case? And Rambus argues that you should wait to hear what he has to say but if it's against them it won't be binding. If you hold, for example, that it would be binding or Rambus admits that it would be binding, the logic for waiting for a decision is obviously greater.

Our concern is that we just want to get a date scheduled that makes sense, and if it has to slip because of some other event, that will be Your Honor's decision. If you set no date, there will be no date.

THE COURT: All right. I got your position.

MR. POWERS: That is our point.

THE COURT: Thanks. Does anybody from Rambus want to make any response?

MR. STONE: Just briefly, Your Honor. I think if we just look at the scenario, one of two things happens at the spoliation trial or hearing before Judge Whyte. He either finds that there has been spoilation and issues some form of sanctions, which I know Your Honor is aware could be various, but Hynix asks for termination of the case. If that case terminates, then we'll have an issue that will be addressed before Your Honor as to whether that decision collaterally estops Rambus from proceeding here with its claims and, if so, whether you should defer until the Federal Circuit has an opportunity to decide.

THE COURT: And let me ask you a question in that regard. One of the points that your opponents make is that, hey, those folks at Rambus, they settled the Infineon litigation before there could be a final judgment, thereby giving them an argument that it wasn't a final litigation decision by Judge Payne and they shouldn't have the benefit of that. That's the argument that I guess it was made by Hynix in front of Judge Whyte and Judge Whyte bought it. You know, I'm not saying he shouldn't have but he accepted the position you folks took.

Are we going to have Infineon Redux out there? Is there going to be another circumstance where if it goes against you, there is a quick settlement and then I hear "pay no attention to Infineon, pay no attention to Hynix?" I'm asking you maybe to step out further than you're willing to go but I'm trying to be sensitive to both sides' issues here with respect to practicalities of scheduling.

MR. STONE: I agree.

THE COURT: So what am I going to be dealing with if I say "wait, let's wait until we deal with Judge Whyte" and then what happens immediately after Judge Whyte is the curtain descends.

MR. STONE: Right. Let me not -- if I might, let me try to answer you this way. Let me not predict the future as to what will happen depending on what Judge Whyte does.

THE COURT: That's a fair position to take.

MR. STONE: Let me make this statement. Rambus is seeking to bring all of the litigation that has been filed in California before Judge Whyte, including a recently filed case against Samsung, including the DDR II case, all of those cases we're seeking to consolidate in front of Judge Whyte.

There are days when I think even though it's late in the game, this case may be is properly subject to a

1404(a) motion to take these issues before Judge Whyte for the very reason that we are seeking one forum in which to resolve these issues. It would make no sense for Rambus, which has all of these other cases lined up in front of Judge Whyte, if they get an adverse ruling from Judge Whyte in the first hearing, to think that he would not find in a bench trial that that same ruling applied in the other cases. That is a ruling which Rambus will have every incentive to seek final review of in the Federal Circuit or the Supreme Court if it were to lose that case.

So I think if you look at what Rambus is doing, instead of me predicting the future, because look at this scenario that is out there, we have a scenario in which Rambus is doing everything it can to consolidate all of these federal cases before Judge Whyte. Samsung filed a lawsuit, Mr. Powers represents them as well, against Rambus in the Eastern District. Rambus earlier sued them in California. We have moved, filed a motion to transfer venue of the Virginia case to California. We're seeking to put all of the cases in front of one judge whose decision on these issues is ultimately going to apply across the board, especially when what we're talking about is not trying different issues with different distinctions to a jury but trying essentially the same issue. There may be differences on some of these things that are more than nuance but maybe

not a lot more. We're going to try them all in front of the same court and I think we have every reason to expect the ruling he renders the first time through is going to apply down the line.

So Rambus has every incentive to take whatever decision he gives them and either proceed with the rest of their case or, if they lose, to take that as a final judgment up on appeal. Because, otherwise, it's just going to apply down the line.

THE COURT: Okay. Thanks, Mr. Stone.

MR. STONE: If I could just? Mr. Powers does raise the issue about the need for certainty. And in that regard, I did want to make one point. The patents at issue in this case all expired in the year 2010. Given the length of time of the appeals and so on, it is as likely that the interest of the industry are in not seeing this resolved until the patents expire as it is that Rambus wants to delay. Rambus wants these cases decided before 2010, at a point in time when it's patents remain valid. So I do think we're as interested or more interested than Micron and any others in the industry in getting the issued resolved promptly.

THE COURT: I'm glad no one is interested in delay. I'm happy to hear that.

Okay. Here is what I think is the right way for

us to proceed here. And I begin by answering Mr. Powers' question, "just what is it you mean when you say you are going to be paying attention to Judge Whyte?" It means I intend to wait and see what Judge Whyte does. And I agree that this thing ought to be dealt with in essentially the same manner that Judge Whyte has laid out. That is, I'm going to give Micron what it wants, which is the first thing we're going to do is we'll have a bench trial on unclean hands.

Now, the schedule on that is going to be some time in the early part of next year. I'm not in a position to tell you when precisely. I will be sensitive, however, to Rambus's trial schedule. I mean I'm not going to say, hey, let's get it done in February if Rambus's trial counsel is getting ready to do Phase II in front of Judge Whyte.

So my inclination is to schedule something for after the May trial but still try to get that in in the first half of '06. I'll work with my case manager. The reality is, I'm sure you find this. You know, you are all experienced lawyers. You try cases all over the country, maybe all over the world. I don't know what is happening in other places of the world. But I get the sense from talking to colleagues in other federal courts around the country that nobody is sitting on their hands. Everybody is pretty busy. I know I'm scheduled, sometimes double and triple

scheduled well into 2007. So I'm frank to say to you folks, I'm going to end up double scheduling you with somebody and we'll just have to try to manage the case the way that the air traffic controllers manage traffic over O'Hare and try to make space for you to land in the first half of '06, but the aim is going to be to get you in after Rambus is wrapped up with Judge Whyte because I don't think it's fair or necessary to jam them up with two trials, in two federal courts in that same period.

So having said that, you can plan generally for May. What is Judge Whyte's date?

MR. POWERS: It's the middle of May.

MR. STONE: I believe it's May 16th when we're scheduled to start, Your Honor.

THE COURT: Is it one or two weeks? How long of a trial? How long is the trial?

MR. STONE: I think he has it set down for potentially for three. He hasn't given us time limits on that case. He gave us time limits of the other two. He hasn't given us time limits on the third phase. I would guess it's a two-to-three-week trial as it currently is configured, although the issues to be tried in advance may simplify it.

THE COURT: And may eliminate it. And if your schedule changes, I mean if Judge Whyte has this unclean

hands case and makes a decision on it, that ends it. Of course, as I have said before, I intend to be kept closely informed about what going on in that litigation because if I can move it up, I'll move it up and we'll try the matter here or we'll, at a minimum, we'll get right at the matter of briefing whether there is collateral estoppel. We won't wait another six months to deal with that.

But it sounds to me as a practical matter that you have industry significant litigation occurring now in the Northern District of California that will answer important questions and a wonderful judge. And I don't want to be seen to be fawning all over him, but I can't say good enough things about Ron Whyte. He is a wonderful, wonderful jurist. You're so fortunate to be in front of him. And I would be a fool not to step back and say "what do you think Judge Whyte?" Because the respect for the man in my mind and, as far as I know, pretty uniformly across the federal judiciary is enormous. He is a wonderful judge. So I'm going to wait and see.

I'll try to then set you up. Hearing this is a two-to-three-week trial makes me back up. We're looking in June. If it happens sooner that your issues are resolved because of his rulings in the earlier phases, let me know and I'll move stuff up. And we'll get you done as soon as we can here. And I'll issue a short order in that respect.

It might actually be helpful if you two sides confer about what a form of order, giving effect to the sentiments I expressed here, ought to look like, because I may issue something which unintentionally leaves something unsaid or unaddressed that, with your greater understanding of the way all the parts of this machine are moving, you will think to address and can submit to me by way of stipulation for me to sign. All right?

All right. Now let's turn to the question of the motion to compel. And that is Micron's. So Mr. Powers, are you going to be addressing this?

MR. POWERS: Yes, I will. May I ask a question about scheduling?

THE COURT: Yes.

MR. POWERS: Do you wish now to schedule the other phases of the case so we have a placeholder in place or not?

THE COURT: No, I don't really want to do that. However, I think I ought to do that because your suggestion or your observation is correct that if we don't have a date we don't have a date and that means, perforce, things will get shoved back.

And I might regret doing this but if Judge Whyte thinks he can do it on that kind of schedule, darn it, I'm going to try to do it, too. So take that as a template when

you are talking about what to stipulate to. Okay? And send that form of order over. In all likelihood, you won't get that exact form back from me because I'm going to have to do something with the dates on my calendar. But if you give me something that roughly parallels that, it will give me a basis to work from.

MR. STONE: On the scheduling in front of Your Honor, can I just add one other thing?

THE COURT: Sure.

MR. STONE: One thing I will ask Micron's counsel after we conclude the hearing is whether they're willing to stipulate that whatever record is developed before Judge Whyte at that evidentiary hearing can all just be brought here before Your Honor since it's going to be a bench trial and then we just supplement that record with any additional evidence that Micron wants to offer. One of the reasons for doing that is many of the witnesses may be all of the witnesses who will testify at that hearing are no longer employed by the parties, if they ever were. Some will be lawyers, it looks like. None of them are within the subpoena power of this court. They're almost within the subpoena power of the court in the Northern District so the testimony there will be live.

Many of them have not been deposed in this case so if we don't use the record developed in the Hynix case,

we'll have to then depose them here in this case, which seems unnecessarily burdensome. I understand Micron may want to some extent to depose some of the witnesses. In addition, simply because they'll think they can do a different job or a better job than Hynix's lawyers, but one of the issues to think about in scheduling is whether the record that is developed before Judge Whyte can simply be brought here.

THE COURT: I'll tell you what. You guys talk about that. I'm not going to get into that here. I'm certainly not going to say to Micron you have to accept the work performed on behalf of some different party. If they want to accept that and think it's in their interest to accept that, I'm open to the suggestion, but I'm not encouraging it or discouraging it. That's something for you guys to take up off-line; all right?

MR. STONE: Thank you.

THE COURT: Okay. Mr. Powers, I'll have you take the lectern. Let's talk about the motion to compel.

MR. POWERS: Thank you, Your Honor. This motion seeks an order compelling three categories of information. Some of them are documents, some of them are deposition testimony but roughly three categories. And the grounds fall into two or three bases, some of which apply to multiple categories, some only apply to some.

The first category of documents that is directly covered by a large number of the requests are spoliation documents and spoliation evidence, spoliation testimony.

The second, of course, relates to JEDEC's estoppel documents, documents that relate in some form to the underlying estoppel defense that will be tried in I guess the second phase of the estoppel defense and the antitrust claim.

The first ground which covers at least -- which covers both of those categories, the JEDEC estoppel evidence and the spoliation evidence is the crime fraud doctrine. And the important starting place on the crime fraud doctrine is that the standard is that we have to establish to Your Honor a prima facie case of attorney communications used in furtherance of an attempt to commit a crime or fraud; and the prima facie standard in our view is met by, alone, Judge Payne's findings after a full evidentiary hearing, after reviewing in camera over 4,000 documents, hearing testimony, making a decision, finding as a matter of fact that spoilation had occurred and issuing the hardest sanction one can issue: termination of the infringement case based on that.

THE COURT: Well, specifically address their argument that, yes, that all got thrown out.

MR. POWERS: Well, what got thrown out was not

that. What got thrown out even under their argument was the earlier fraud finding relating to JEDEC. Judge Payne's spoilation finding didn't get thrown out. That's the one that the day after it got settled, in order to try to avoid, as Your Honor put it, as their CEO said in the press, to avoid this perhaps collaterally estopping us elsewhere.

So their argument -- and it's important to be precise about it. Judge Payne has issued several rulings in his case relating to this issue. The first of them was a purely prima facie crime fraud ruling and their argument, Rambus's argument is that that ruling, and they claim Judge McKelvie's ruling in this court which ordered them to comply with Judge Payne's order, is now the basis for it, even though they have not moved for reconsideration, the basis for it is rebutted by the Federal Circuit finding of no fraud.

Let's stay with that path for a minute and forget for a minute the evidentiary hearing that Judge Payne conducted much later. Even on that path, their argument that Judge McKelvie's order and Judge Payne's earlier 2001 order are undercut ignores what the standard is. The standard is not that a fraud was completed successfully. The standard for the crime fraud doctrine is that you establish a prima facie case of an attempt to commit a fraud.

What the Federal Circuit held was not that there wasn't an attempt to commit a fraud. What the Federal Circuit held was that because they disagreed about some part of the standard of disclosure, that no actual fraud occurred. That is a very different question than what is at issue on the crime fraud doctrine with respect to the JEDEC documents.

But here we're talking about spoilation, not JEDEC for a minute. And on spoilation, Judge Payne actually got to the end game. This isn't a preliminary prima facie ruling. He also did that and they took a writ up on that and they lost. Then they tried it. He had a bench trial. And he lost, they lost.

It's difficult for me to understand how that alone with that extensive a record doesn't establish a prima facie case in this case. And we've summarized in the brief some of that evidence. Now, it was an extensive multi-day hearing with thousands of pages of testimony and hundreds of exhibits, and we've summarized what we think are some of the more salient points.

THE COURT: Now, let me interrupt you. Who is speaking to this issue from your side?

MR. STONE: I will.

THE COURT: Mr. Stone, it's going to be you?

MR. STONE: (Nodding yes.)

THE COURT: I'm sorry to have you speak from there but I'm going to have you stay right there. I want to you speak to those specific point that Mr. Powers has made which is, hey, all their arguments, they're tying their argument around the notion that the earlier ruling by Judge McKelvie was undercut, later reversed in the Federal Circuit but that has to do with the JEDEC estoppel issue of fraud. This is the spoilation. It's a separate basis. It was taken all the way.

Speak to me specifically about your response to Mr. Powers on this point and, most pointedly, on the assertion that that was taken not just to prima facie but to an end game and is done so you're ill positioned to say no prima facie case here.

MR. STONE: There is no collateral estoppel from the ruling Judge Payne made at the conclusion of the hearing that he held this year. Judge Whyte found that, I think that is clearly the law, and I don't hear Micron to say that they think there is collateral estoppel. I don't think they're disagreeing --

THE COURT: I don't hear them making the argument that you should now lose on an unclean hands defense without any further steps in this case.

MR. STONE: Or that he has made a binding finding that spoilation in fact occurred. His ruling

earlier, just like his ruling at the end, that there was a prima facie case to be made on spoilation and his ultimate conclusion that there was spoilation are all decisions which are not binding, not final and can't be applied against Rambus in this case.

THE COURT: That's what you need to talk to me about. When you say "can't be applied," your legal position is that having litigated this now in two courts, that has no legal effect at all? Am I understanding that right? It's got no -- it's as if it didn't happen? Maybe I should ask the question a different way. Does it have any effect?

MR. STONE: I agree with your earlier formation it has no legal effect. I don't mean to imply that's what you are saying.

THE COURT: I'm asking the question. I'm trying to understand the limits of your argument because if I understand you right, you're telling me, judge, as far as you're concerned, those things never happened. You have to look at this from the ground up, 100 percent as if nothing had ever happened in the Eastern District of Virginia or in the Northern District of California on this issue.

MR. STONE: Yes. On spoilation, our view is that you should do what Judge Whyte did, look at the issue independently, not arrive at a decision based on what Judge Payne concluded. There is no decision that binds you and no

decision that binds Rambus and you should look independently at whether the Micron has made out here a prima facie case of spoilation, and you should decide that based on the evidence they submit because you are not bound and Rambus is not bound by the earlier decisions.

THE COURT: And when you say the evidence they submit, I mean you folks gave me four volumes of documents.

MR. STONE: And the evidence that we submitted to you in camera.

THE COURT: Right.

MR. STONE: Yes. I don't mean to exclude that.

THE COURT: Right.

MR. STONE: And that is what Judge Whyte did.

Now, I acknowledge that Judge Whyte performed that independent review and came to a conclusion with which we disagree. I understand that the fact that he did that cannot be something you can wipe out of your mind. So, in essence, when you are asking does it have an effect, I recognize it has an effect but you need to look at the evidence, the facts, the law and come to your own conclusion. I'm sure you are entitled to find his order or his reasoning either persuasive or nonpersuasive, consider it or not consider it but you are not bound by it.

THE COURT: Beyond its legal reasoning, does it have any evidentiary effect? Is it of any moment that two

federal district judges in two separate cases looking at essentially, as I understand it, the same body of evidence, reach certain, in this respect, at least compatible results? Other than the sort of notion it might weigh in my mind in an abstract way, is it something that the law entitles me to look at and weigh in my decision?

MR. STONE: In our system of jurisprudence, it does not. Our system of jurisprudence requires there be finality to decisions before another court relies on the decision as such.

THE COURT: Let me press you a little bit here. In between no effect and preclusive effect, you see nothing. It's either preclusive or it's nothing. It's an on/off switch.

MR. STONE: Well, I do think it's -- I think to the extent that the Court can consider the reasoning in thinking about how you analyze it, that you're entitled and permitted to do that. So in that sense, if another court should decide a similar issue to the one that faces Your Honor, another District Court decides a matter of law, you make your own determination on that matter of law but you are entitled to consider what that other court does. You are not bound by it. You are free to disagree or agree. But the decision that our system of jurisprudence contemplates is that the decision you arrive it will be your

decision.

THE COURT: Okay.

MR. STONE: I think this is the same situation.

THE COURT: Thanks.

MR. POWERS: May I respond very briefly on that precise point, Your Honor?

THE COURT: Please.

MR. POWERS: I think it's important to distinguish between two separate arguments. One is a question of whether it is binding upon you. And the second is whether it is something that is relevant to your consideration of a prima facie case. And the issue that I think is getting lost in the absence of that distinction is that the crime fraud exception does not require you to decide the question of whether a fraud occurred. It only decides whether a prima facie case has been made out to that effect.

Neither side has found a case directly on the point that says a prior court's decision on the final issue or even the same issue is sufficient by itself to establish the prima facie case. We do not have a square on piece of authority for that. But the cases do, and those that we have cited to you, say that you are entitled to consider, whether they are persuasive or not, in your decision, prior judicial actions on relevant subject matter.

And it would be, to me, bizarre to say that a Federal District Court that had had a multi-day evidentiary hearing on the final question whether spoilation occurred, and it found that it did, not in a final binding sense where, which is now binding on the doctrine of collateral estoppel but he found it in fairly harsh terms and imposed a very harsh remedy because of it; it would be bizarre to me, if I were a Federal District Judge, to say that isn't relevant to me in deciding whether a prima facie case has been made.

THE COURT: Okay. There was one thing, Mr. Stone, that I had asked you in the course of my objectionably compound question that I want to go back to you. Answer the point made by Mr. Powers that what happened before the Federal Circuit was on a distinct matter, that the spoilation issue is separate and stands on its own, is not undercut by the reversal that occurred in the Infineon case before the Federal Circuit.

MR. STONE: I think Judge Whyte correctly found in his ruling that the reversal of the original jury verdict in Infineon renders that verdict of no effect, regardless of whether you appeal from each and every issue that underlaid that verdict or not. And that his prior ruling with respect to it being an exceptional case, awarding attorney fees, that prior ruling was in effect rendered a nullity by the

Federal Circuit's reversal of the judgment when it went back. So that there is no force from any of the preliminary rulings that Judge Payne made either prior to the first trial, at the conclusion of the first trial, or even later because there has been no finality, on the one hand, because of the reversal and, on the other hand, because the case was resolved.

THE COURT: All right.

MR. POWERS: I would only note, Your Honor, that the spoilation hearing --

THE COURT: *Happened after.*

MR. POWERS: -- happened after.

THE COURT: I'm with you.

MR. POWERS: So moving past the issue of a prima facie case being established by Judge Payne's rulings and Judge Whyte's rulings, both of whom took a great deal of care on that question, we have put a sampling of that evidence in front of you. We obviously don't have the benefit of what has been submitted in camera. But we have collected, in our opening brief and reply, extensive evidence of the crime fraud that supports piercing under the crime fraud exception.

That evidence begins with clear unmistakable, undeniable evidence that beginning in early 1998, if not before, that Rambus was specifically preparing for

litigation. In their words, they were getting battle ready and, according to them, it appears getting battle ready begins with having a shred day party where 20,000 pounds of documents get destroyed with pizza, beer and wine. And the documents that we have summarized show everything one could ask for a spoilation case. It shows knowledge that the documents are important for litigation. It shows an intent to destroy them so that they're not around for litigation. And I can't imagine requiring anything more for a prima facie case other than that which we have provided.

The testimony, the documents, even ones that survived, are truly shocking in many, many ways. And the quotations over and over again from their people show a cavalier disregard for the rules of preserving evidence down to the point of having those smily faces in e-mails that say, well, gee, maybe that survived our "document retention policy." It displays -- and that emoticon is in the e-mail by Richard Crisp. It displays an arrogance and an intent that you rarely find in a paper trail. And the idea that that evidence by itself does not establish a prima facie case to me seems unsupported.

The arguments that are made by Rambus are, first, that there is not specific evidence about a particular document that has been destroyed and the effect of that document on the case.

Well, the law of spoilation does not require that because obviously they didn't keep a log of what they destroyed. We know they destroyed tens of thousands of pages of documents. We know the categories included directly relevant subject matter, even core subject matter, attorney notes, inventor interviews, JEDEC related documents, licensing documents. All of those have been admitted in depositions or in documents. All of that is summarized in the initial brief. So the argument that we can't establish the significance of a particular document that they destroyed is both, in some ways, silly because obviously we can't, it's destroyed, and not our burden. What we can establish and have established from their own words is a conscious, deliberate widespread effort to destroy documents because they would be used against them in litigation. And that, by itself, establishes a prima facie case.

The second argument that they make is that there is not actually a crime and they seek to effectively neuter the law of both Delaware and California and argue that it is only a crime to spoiliate documents if it's just before it has to be produced. And Judge Whyte rejected that argument and we ask you to reject the argument on the same ground. That would neuter those laws and make them meaningless and Rambus has not cited binding authority to Your Honor that

would say that is what the policy you should follow.

Now, I guess Rambus makes another argument, and it's unclear whether they want to continue to make this argument, but they argue that we haven't made out a prima facie case because we haven't proven ultimately what affect the documents would have had. And that is sort of circular going back to the first argument that we haven't established the documents, but again that is not the legal standard.

The legal standard is have we shown a prima facie case of their deliberate destruction of documents, in this case, tens of thousands of pages, for the purpose with knowledge of the potential litigation, and even in our case, we've established, for the purpose of preventing those documents from being used in discovery.

They make a couple of other tertiary level arguments. They argue their lawyer at the time was an honorable, well experienced lawyer and therefore wouldn't have been involved in this. Well, that is not what the testimony shows. The testimony shows that their lawyers, inside lawyers and outside lawyers, were aware of the possibility of litigation, planning for litigation and participating directly in the destruction of documents. And as Judge Payne put it, when he was hearing, when he was conducting the evidentiary hearing, if all of this is true, somebody should go to jail. And in our view, it is true and

somebody should go to jail. But we don't have to prove that at this stage. All we have to do is prove a prima facie case.

There is a separate issue here, and I don't think we need to get there but I'll raise it because it's been briefed back and forth. The question of, wait, they brought in their first brief on this question to Your Honor, they filed a brief which they served on us in redacted form. That brief relied on this privileged information, some portion of it as a defense affirmatively to the question of whether they should be allowed, they should be forced to produce it. That, in our view, is plainly a waiver. They voluntarily used it, disclosed it to Your Honor for the purpose of defending themselves. And the law says, as I know you are familiar with, you can't use privileged information as a sword and a shield. They can't both offer a piece of it to you as a defense and then withhold the rest that may be incriminating. Yet that is what they did.

Their response is, first, well, we didn't waive it, we just gave it to the Court. Well, the Court is not one of the parties with whom production of a document maintains the privilege. They did not provide it to you for in camera review. They provided it to you for the purpose of making and supporting an argument and that is an affirmative injection.

The second argument that they make is that they then withdrew it and then submitted on the brief that didn't have that information which doesn't affect the fact they had earlier done so. In our view, that is a waiver and it's a subject matter waiver.

And they've done it not once but multiple times with regard specifically to the FTC PowerPoint presentation. You will recall the debate back and forth about whether that PowerPoint presentation was ever privileged. Rambus's position appears to be in their latest brief that that is just a collection of war stories by their outside lawyer. It was never privileged in the first place. Well, they declared it was privileged. They withheld it from production as privileged and yet now they're trying to say the fact that we use it affirmatively should not be considered a waiver because it was never really privileged at all. In fact, we don't have all of it but in fact it appears that a lot of it is probably privileged, based on what they described, not simply war stories by a lawyer but in fact a legal strategy. That is what it's titled.

Now, in our view, that evidence establishes far beyond a prima facie case and we would ask Your Honor to do what Judge Payne has done, what Judge Whyte has done and permit that discovery on an expedited basis. They have this information, they can produce it to us the day after

tomorrow because they've already collected it. And at least part of their position is they need a court order to produce it even though they produced it before because they don't want to be subject to another waiver argument that they produced it voluntarily here even though it has already been produced. So we're just waiting I think in those documents for the Court to order it so they're no longer subject to that waiver, that additional waiver argument.

THE COURT: All right. Thanks, Mr. Powers.

MR. STONE: Thank you, Your Honor. I think let me start with the spoilation documents, because that is I think where Mr. Powers spent most of his time, and see if I can respond both to some of the Court's questions and to the arguments that Mr. Powers has made. If we were to look, for example, to another proceeding and say that proceeding gives us the definitive resolution of whether or not there had been spoilation or a prima facie case of spoilation, we might as easily look at the three-month trial that Judge McGuire held where he concluded there had been no spoilation of any documents that were relevant to the proceeding and issued his initial decision, 300-plus pages in length to that very effect and we can point to that and say you should follow that decision where, after a full and fair hearing, the conclusion was there was nothing that was relevant to the case that had been spoliated. Micron asks you to follow

instead Judge Payne. That dilemma, two conflicting courts have looked at the same issues and come to different views after hearing evidence, is one of the reasons why this court needs to look at it independently.

How do you look at it? Well, if you step back for a minute, this all starts in 1998, at a point in time when Rambus had no document retention policy whatsoever. Employees kept what they felt they needed to keep, threw away what they felt they didn't need to keep or wanted to throw away. There was no policy in place. We know not from any privileged documents, we know from other testimony that is not privileged that on the advice of lawyers -- I'm not getting into the advice -- Rambus implemented a document retention policy. That policy was explained by Joel Karp (phonetic) to all of the employees of the company. His slides were not privileged, they had been mixed with slides that had been prepared by Dan Johnson. And in the first Infineon trial and in the first privilege log prepared earlier in this case, the totality of those slides were claimed to be privileged.

In the FTC proceeding, when I looked at those slides and sat down with Mr. Karp and figured out which ones were his, I concluded that his slides were not privileged, because he had shared them not as giving legal advice but explaining the document retention policy which was also not

claimed to be privileged. He used those slides in explaining the policy to everyone in the company. Those are the slides that were produced to the FTC. And Judge Payne, in thinking that that was a waiver of the privilege, for us to after-the-fact conclude that privilege had earlier wrongly been asserted, is simply wrong as a matter of law.

THE COURT: Yes, but he didn't -- Judge Payne ultimately didn't pin his decision about spoilation on waiver, did he?

MR. STONE: No. No, no, no. But he did pin his prima facie finding in part on that. That's all.

THE COURT: All right.

MR. STONE: I raise it only -- and I respond to Mr. Powers' argument there should be waiver here.

THE COURT: All right.

MR. STONE: So Rambus put in place a document retention policy. Mr. Karp used these slides and went around and educated everybody at the company on the policy; and the policy was, in pertinent respect here, looked for things to keep. Among other things that you have to keep, you have to keep disclosures regarding inventions. You have to keep inventor notebooks. You have to keep the things that are going to be pertinent to establishing the validity of our patents. You also have to keep all of the final contracts we negotiate. You don't have to keep the draft.

THE COURT: Well, let's try to cut through this because I don't hear your opponent saying, and having taken a look at the '98 memo about the documents retention policy, I don't think anybody is arguing that there was something nefarious about the document retention policy. It's what happened after the policy was in place, after there was a litigation, not just contemplated but strategized and carefully thought through and initial steps taken, while at the same time that there was shredding going on that is at the heart of their argument. So I don't hear them complaining that you had a policy.

MR. STONE: Okay. Let me address that.

THE COURT: Let's move past that but, you know, even before you do that, let me ask Mr. Powers to say something here because I want to you to address that specifically.

You spoke generally about documents showing knowledge and intent with respect to this destruction. I want you to, you know, lob your two or three best shots in that regard, pointing specifically at the documents because I want to get out of the general and into the specifics so that Mr. Stone can say, well, that really doesn't help you folks at Micron because of X, Y and Z. It's hard to respond to a generality so let's get specific for a minute here; all right?

MR. POWERS: We'll do that. Do you want me to do that right now?

THE COURT: Yes.

MR. POWERS: Can you give me a couple minutes while Mr. Stone argues and I'll find the ones from the brief?

THE COURT: All right. Go for it, Mr. Stone. Say something that is not too interesting while he is looking for that.

MR. STONE: I have a really good argument.

No, I think the point Your Honor makes -- and let me just reformulate it as I understand it and then try to respond to it -- is this: If you have a proper document retention policy in place, not a nefarious one, one that on its face at least and as applied seems to be appropriate. At what point in time does a company have an obligation to impose a litigation hold which says we're going to set aside that policy and require retention above and beyond the retention that is contemplated by our policy? That I think is the question. And that depends on when is litigation imminent enough that you have to do it.

This almost always arises in the context of a defendant and a defendant doesn't generally anticipate litigation until somebody comes by and drops off the summons or maybe they call up in advance and say we're thinking of

suing you. Do want to pay us money now or do we have to go to court? So the question is when does a plaintiff who is contemplating litigation sufficiently with enough probability or certainty that they have to put in place a litigation hold.

And I argue here that that did not arise until the end of November of 1999. And here is why. And that leaves the shred day in 2000, following after I say that litigation was contemplated, and let me tell you why. The litigation at issue here involves the infringement of patents. For that litigation to have been imminent, five things had to happen:

First, Rambus had to have obtained issued patents. Without issued patents, there would be no litigation. You could contemplate it in the theoretical sense but you couldn't plan to file it because you didn't have the patents on which to file it.

Secondly, there had to be products out there that were being sold in the market that you felt required a license under your patents in order to be sold lawfully.

Thirdly -- this will not apply in every case but it applies in a case of a company like Rambus -- you need to have initiated licensing discussions because what we know was during this time frame, 1998-1999, Rambus was intent on licensing the industry to utilize its patents. It was not a

manufacturer, it was not making products, it was not trying to prevent competing products from being sold while it was able to sell just its products. So it needed to commence licensing discussions and it commenced those with Micron.

And then it needs for those licensing negotiations to fall apart. That is the fourth point. And the licensing negotiations fell apart here on the day or the day before Micron filed this lawsuit. That's the day on which the CEO of Micron wrote back and said I know I had agreed to schedule another meeting with the CEO of Rambus to meet with you and talk about licensing but instead we filed a lawsuit and that is how we decided to proceed. That is when the licensing negotiations fell apart.

THE COURT: Let me ask you two questions. First, do you have any legal authority at all to support this four-prong test construct that you are presenting to me?

MR. STONE: There is no case that I have found, Your Honor, that has looked at the elements that a plaintiff would have to show.

THE COURT: It's very unusual.

MR. STONE: Other than to say it has to be imminent. The probability has to be high. There has to be a certainty of litigation. It can't just be the mere possibility of litigation because for most companies, the

possibility of litigation exists all the time.

Take a company like IBM that has the greatest number of patents of any company in the U.S., I think. They have to always contemplate the possibility that they will be sued or that they will sue someone for patent infringement. Does that mean they can't destroy documents? Does that mean people can't have trash cans in their office because they have to retain everything given that possibility? The answer obviously is no. There has to be a higher level of certainty than just a mere possibility.

And the fifth element, and one that is very telling here, is for a plaintiff to expect, to really expect this kind of litigation. You have to have retained a lawyer to represent you in that litigation. And the testimony that has been developed in this case is that it was not until November of 1999 that Rambus held a so-called "beauty contest" and interviewed firms to select the firm that would handle its litigation and the first case was then filed in January of 2000.

THE COURT: Let me reiterate this then. Your position is that in order for a litigation hold to be required of the plaintiff in a patent infringement context, they have to have a patent on which they want to sue issued. They have to have basis for believing there is an infringing product then on the market. They have to have license

negotiations with the producer of that document. They had to have those negotiations break down, which, by your formulation, means the infringer walks away.

MR. STONE: Or I suppose Rambus could have walked away. In this case, that is not what happened.

THE COURT: And they have to have hired a lawyer to sue. All those things have to be in place before litigation hold kicks in.

MR. STONE: Yes.

THE COURT: Okay.

MR. STONE: Now, I want to indicate two points in that regard. Obviously, we can always look backwards in time and say, well, gosh, it was a possibility even then. You were contemplating it even then. You should have known then it was going to come to fruition; but if we do that, if we stand today and look back in time, we will see dozens of instances where it was contemplated and it never came to fruition.

So as a matter of policy, we have to think do we want to put in place a rule which says, once you start contemplating it; because that contemplation may over time become more serious because the mere speculation about litigation may over time harden into the actual filing; you have to, at the moment that first litigation is contemplated as a possibility, even if it's contemplated only as a last

resort, if licensing should fail, at that point you have to put in place the litigation hold. All those applications are significant.

THE COURT: Now, what did Judge Whyte say to you on this piece of your argument?

MR. STONE: Judge Whyte said based on his review of the documents he looked at in camera that he thought litigation was sufficiently, in the contemplation of Rambus at an earlier point in time, earlier than November of 1999, such that he didn't accept my date as the cutoff date. He doesn't say clearly, in my view, when he thinks it was contemplated but I think it is clear he didn't accept November 1999. He does suggest that, as best I can read it, that it's some time in the '98 time frame. Whether he says at the time they adopted the document retention policy or not I don't think is entirely clear.

THE COURT: I have something of a practical problem in questioning about documents that you submitted in camera, so why don't we try to confine ourselves to stuff that has been submitted by your opponent here. Do you have the examples you want to give, Mr. Powers?

MR. POWERS: I do, Your Honor.

THE COURT: Okay. Why don't you go ahead and give those?

MR. POWERS: Exhibit 46 from the exhibits that

we submitted in support of the motion is a direct link showing a to do list to get ready for litigation and one of them is organize the shred day.

Exhibit 43, again saying a list of action items to be done in relation to litigation, checks as done their, quote, document retention policy which --

THE COURT: Hold on just a second.

Exhibit 46. Let's do these one at a time. IPQ 3/99 goals. And you are pointing at what specifically about the shred day?

MR. POWERS: This is at in our brief. It's summarized at page 20.

THE COURT: Right.

MR. POWERS: And you will see the goal as G, organize the 1999 shredding party at Rambus as one of the to do items under IPQ 3/99 goals under Litigation Licensing Readiness, squarely showing --

THE COURT: Okay. I see what you are saying, yes.

MR. POWERS: -- squarely showing a link in their mind that one of the things they have to do to get, quote, battle ready or ready for litigation is shred their documents.

THE COURT: Right. All right. Go ahead.

MR. POWERS: Exhibit 43 is to similar effect.

This is the one where they check done under IP litigation relating to their document retention policy which they internally called their document destruction policy because of the way it was implemented.

THE COURT: And that is what paragraph you pointed me to or the entire thing?

MR. POWERS: On that one, it's the portion that checks it off as done when you are looking at the document, underneath where it relates to the document retention policy.

THE COURT: This is 43.

MR. POWERS: That is at page -- summarized at page 19, about two-thirds of the way down. The exact page number is 618.

THE COURT: All right.

MR. POWERS: Exhibit 41 is the instruction to destroy e-mail, quote, throw it away because it's discoverable.

THE COURT: Which number?

MR. POWERS: 41.

THE COURT: All right.

MR. POWERS: And if I may, there is one other that I think is significant, not because it deliberately shows, explicitly shows, as those do, a link between litigation and shredding but because it shows how pervasive

in the company it was. It's Exhibit 21, which a report to the board of directors. This is not a rogue action by one lawyer, this is a report to the board of directors that said our shredding day was a success.

Now, normally a board of directors would not be getting a report that they had a shred day unless that related to something important to the company. Shredding documents being a success, they managed to destroy documents is not normally something that a board of directors could be interested in. And the fact is that -- this is in late '98. The fact is that is exactly the same time the board of directors was specifically preparing for and contemplating litigation and getting presentations about litigation. And the idea that is at least at some point suggested by Rambus that this was not significant, that it was just a simple document retention policy that was put in place is belied by the fact that what was reported to the board is not that we kept all these documents. What was reported to the board at the time they are considering litigation is we destroyed all these documents.

THE COURT: All right. Mr. Stone.

MR. STONE: Thank you, Your Honor.

THE COURT: You have some specifics, I take it.

MR. STONE: I do and let me respond to it.

The testimony not submitted in camera, not

privileged, the testimony of witnesses such as Mr. Karp, Mr. Roberts, Mr. Crisp and others establishes a couple of reasons for the document retention policy that explain each of these three, the first three documents as well as the fourth.

One is that Rambus anticipated that it might some day be in litigation. And it was concerned at this point in time, 1998, about a couple of things. One: As the Court may recall, there was an ongoing investigation of Intel. Rambus thought because of its relationship with Intel that it might be subject to a third-party subpoena and have to produce documents. Rambus also recognized that part of its --

THE COURT: Hold on. That helps you?

MR. STONE: It does help me.

THE COURT: Okay.

MR. STONE: It does help me, and let me explain. Let me explain.

THE COURT: Rambus destroyed in another case?

MR. STONE: No. No, no, no.

THE COURT: Okay. Go ahead.

MR. STONE: Rambus also recognized that its licensing program that it was starting to implement, is thinking about implementing at that point in time might some day lead it to litigation with someone if they weren't

willing to license on the terms that Rambus thought reasonable. It contemplated the possibility that litigation would occur.

And it said to its employees on the -- said to its employees, "we need to make sure we keep the things that are important but we don't want to keep the things that aren't important because if we get involved in discovery or served with a subpoena, we're going to have to go through all of those documents to make sure we find ones that are important and that is a very expensive process. We have to hire lawyers. We're a very small company." And at that time, they were very small with very little income. "We have to hire all these lawyers to go through all these documents and you guys," referring to the engineers in particular, "are a bunch of pack rats and your cubes that you work in are filled to the ceiling with paper and you've got to get rid of all that stuff because we don't want to have to wade through it all if at some point in time we have to respond to discovery requests. So keep what is important and get rid of the rest and that includes your e-mail because e-mail is discoverable, too. So we don't want to have to go through all the e-mail, we want to get rid of the e-mail that is not important and keep the important stuff."

THE COURT: Is there a document, an e-mail or something where somebody gave guidance to people about what

is --

MR. STONE: Yes.

THE COURT: Could you just generally sort of say to people "we don't want to go through discovery?"

MR. STONE: Mr. Karp's slides make this point quite clear. It's also clearly the theme of the document retention policy itself. It is clearly described in some of the documents that we have submitted to you in camera.

But setting aside the in camera ones, in the ones that are public, it's in the Karp slides, it's in the document retention policy itself and it's in the testimony of several of the witnesses, including Mr. Roberts and others who said we were told that because we would have to go through all this stuff, if we ever were involved in discovery, we should get rid of the stuff that wasn't important.

The other portion of what was happening at the time is this: Rambus was running out of space, and the reason for the later office move in December of 2000 is exactly that, space limitations. And they were saying to people you need to make space, physical space and computer space. And the testimony is clear that the reason for saying we have to clean up all this stuff, people are saving on the computer all the e-mails and the reason for putting in place a backup tape policy was they were running out of

space, running out of space in their computers and running out of space in the building. And they said to people we have to do a spring cleaning.

And the testimony of Melinda Kaufman, that is part of the hearing before Judge Payne and who was deposed who is head of, the number two in charge of Human Resources who ran the so-called shred days, Melinda Kaufman says it was a spring cleaning. We wanted people to get rid of junk. And the testimony of the witnesses has been, yeah, I threw an old pair of running shoes into the burlap bag. I threw phone books into the burlap bag. I threw pizza boxes into the burlap bag. I threw binders from conferences I attended because they wanted me to clean things up.

People were not throwing away important documents. Mr. Crisp's testimony was he kept all of his JEDEC materials except the publicly available JEDEC materials which would come out a monthly or every time they had a meeting, thick mailer which is available from JEDEC and anyone else with the minutes and then a whole stack of these technical proposals. He said I kept the stuff that was unique to me and I threw away the stuff which was readily available from others or publicly available.

THE COURT: Okay.

MR. STONE: So --

THE COURT: Let's take it I accept it people are

throwing away stuff, that some people threw away stuff like old running shoes which probably should have been thrown away. But address, if you would -- and don't get me wrong, I'm not asking you to cut off whatever else you want to tell me about the general assertion that there was a link between contemplated litigation and document destruction. But I asked Mr. Powers for some specifics because I want you to address those specifically.

MR. STONE: Yes.

THE COURT: So respond to the assertion that Exhibit 46 and Item 3G where it notes, on a document dated June 27th, '99, that part of the licensing and litigation readiness is to organize a shredding party at Rambus.

MR. STONE: Yes. Part of the licensing readiness and the risk of some day being involved in litigation was exactly that: Let's get in place a document retention policy and as part of that, let's have it implemented. And so as part of the implementation, they organized what they called a shred day.

Absolutely, in their mind, that one of the things they needed to do, because they were becoming a bigger player and they some day might be involved in litigation and they were going to go out and start licensing people and they recognized it was possible that failed licensing negotiations would result in litigation, that they needed to

get in place a document retention policy and part of that was to create a vehicle by which people could throw away the stuff that they didn't need to be keeping. And the way to do the throwing away was a shred day. And.

Why a shred day? Because Rambus had a lot of confidential information, some theirs and some third parties which they didn't want to throw in the trash. And there has been testimony from at least two witnesses about somebody that they called "Latham Larry" who they would see early in the mornings crawling through the dumpster outside their building on Latham Avenue -- Latham Street, I guess, and they named him Latham Larry. And he was a guy that would crawl through their dumpster.

They didn't want to throw stuff that might be confidentiality, Rambus confidential and third-party confidential, just into their dumpster so they shredded it, as many companies do, and they did it and the plan was to do it more frequently than what they did, but they had a spring cleaning that occurred once a year, once in '98, once in '99 and then in December of 2000 in connection with their move to a new office. And on each of those occasions, they said if you have stuff to throw away, put it in the burlap bag. We'll throw the burlap bags and all your junk into the shredding truck. It will be shredded. We don't have to worry about confidentiality concerns, and that is how you

can comply with your obligation to throw away the stuff that you don't need that is not important while still keeping the stuff that is important.

THE COURT: All right.

MR. STONE: And the report to the board was, part of this plan is it was a guy's assignment. One of the things you want to do is you have taken on as your checklist of things to do, I'm going to organize a document retention policy, I'm going to get it implemented. And he said it was a success, and it was important to the board because he was reporting to the board on meeting his objectives. That's the Exhibit 21. So it was important for him to say I've been doing the things I said I would do and so I should get a bonus at the end of the year. And by the way, I have freed up more space in the building that is not so sloppy any more. When you walk around, engineers' cubes are not overflowing with old pizza boxes and so on.

So that was exactly what they had undertaken to do and that's what they did. And they did see a link, the fact we didn't want to have to wade through all of these documents to find the important stuff that may matter in a case that we might get subpoenaed in or we might be involved in, so get rid of all the extra stuff so we don't have to go through it, we can't afford the expense. And that is clear not just from the in camera documents but from Joe Karp's

which he used in explaining the policy to company.

THE COURT: Okay.

MR. STONE: Okay. If I could.

THE COURT: I got another couple minutes for you, so pick your best shot here. Let me tell you that my intention is to wrap up argument on this in the next 10-to-15 minutes so I have a chance to talk to you about any other issues that we need to address.

MR. STONE: Okay. Then I'll make one more point on spoliation and then I'll move to the other issue.

The last point on spoliation is the law in the Third Circuit regarding the actual showing of an actual crime or fraud has to be furthered by the advice of the attorney. There has to be a crime and it's not enough to just show something close to that. And under the penal code in either Delaware or California, at the point in time that Rambus put its document retention policy in place, the litigation was not sufficiently imminent to constitute a crime. In that regard, the Ninth Circuit law of Judge Whyte applied Silvestri is different than the law in the Third Circuit.

THE COURT: Did not Judge Whyte say this is --

MR. STONE: He didn't say it was a crime, he said it would undermine the purpose of Penal Code 135, it would undermine the purpose. And he cited the Silvestri

case for that proposition. But I don't think he said and I don't think any court in California would say that it's an actual crime two years ahead in litigation to have thrown away a document that might some day be requested in that litigation, even if you know it some day it might be.

THE COURT: Even it you knew it were evidence, it would not be destruction of evidence?

MR. STONE: Well, it requires there to be actual litigation pending for there to be a crime and there is no litigation pending at this point in time.

THE COURT: Okay.

MR. STONE: Let me just turn to the issue of Judge Payne's order in and extending it here. There has been no showing ever made here other than the jury verdict in the Infineon case of any fraud. And Micron has not shown, either in 2001 or today, that any fraud was committed with respect to Micron.

Because it hasn't shown that, it's never made a prima facie crime fraud showing with respect to the JEDEC issue. And in fact, it could not make that showing. Because what was not known in 2001 but is known now are two important facts: Micron did not expect there to be disclosure of patents or patent applications of JEDEC. We know that because Micron had a number of patents and patent applications on the burst EDO device that was standardized

by JEDEC and they did not disclose that. And that was the testimony of Brett Williams at the FTC trial.

Secondly, they knew about Rambus's patents. We learned in connection with discovery in the FTC trial that a Mr. Weinstock, an executive at Micron, said I understand that Rambus thinks it's patents will cover all DDR. So there could be no fraud because there was no expectation of disclosure and there was no reliance.

Furthermore, the Federal Circuit said there was no fraud, couldn't have been a fraud because, first, arguably, no duty to disclose patent applications, according to the Federal Circuit. And we would prove here absolutely no duty to disclose patent applications, as Judge McGuire found. And, secondly, Rambus, in any event, had no patent applications that covered anything that was being discussed at JEDEC.

THE COURT: All right. Stop. I want to have Mr. Powers respond to this piece of your argument directly right now.

MR. POWERS: Your Honor, on the first point with regard to the supposedly new evidence, that does not disrupt a prima facie case. That is just them rearguing their side of a position. There is extensive evidence, all of which establishes that there is an expectation of disclosure. That is a mountain of evidence which we

presented to Judge McKelvie in a full day. There was, I think we were there five-six hours presenting that evidence to Judge McKelvie. And to come up and say, oh, we have one snippet of a piece of testimony from one Micron lawyer in an FTC case that shows there is no prima facie case, that is just going to be one of their arguments in response. It does not disrupt a prima facie case which is mountains of evidence.

The second is the same point with regard to that we had some awareness of Rambus's patents. That argument they may also have made to Judge McKelvie. Both of these are not new. This is just a new bit of evidence on an old argument. They are going to argue the evidence. That does not disrupt the prima facie case that Judge McKelvie found.

THE COURT: Which he found as to what?

MR. POWERS: JEDEC. This is the JEDEC issue.

THE COURT: Right. I just want you to be specific on the record.

MR. POWERS: Understood. This is not relating to spoilation. This is the JEDEC issue, which was the second part of the motion to compel asking for further compliance with Judge McKelvie's original '01 order.

THE COURT: Okay.

MR. STONE: This is, the argument that Mr. Powers refers to is set forth in the transcripts of

May 14th and May 16, 2001. And there is neither the mountains of evidence nor the hours and hours of argument that Mr. Powers refers to in those two transcripts. Rather, what Judge McKelvie said was I find significant the jury's verdict finding fraud. And there is no argument there that goes into the facts we now know and didn't know then that Micron did not disclose its patents or patent applications. And I'm not saying that that is a two wrongs make a right argument. I'm saying they didn't have an expectation there would be disclosures by JEDEC of patents or patent applications.

Secondly, the Federal Circuit ruled that Rambus didn't have any patent applications that read on anything that was being discussed to JEDEC. That is the law that applies in this case. That is the same as a claim construction ruling. They ruled on the scope of Rambus's patent applications and they've said it couldn't be a fraud.

So because of the no expectation, because there couldn't in any event be a fraud, and finally because Micron was well aware that Rambus was trying to obtain patents that would apply to these products, knowledge that was made apparent in an e-mail in 1997, we know that they were not without actual knowledge. But the Federal Circuit determination --

THE COURT: So your position is that because of

the Federal Circuit's ruling, there cannot ever be a finding about crime fraud exception applying to JEDEC documents?

MR. STONE: There could not be a finding that Rambus -- there has to be a crime or fraud underlying the piercing. What Micron argues is that Rambus's lawyers aided or furthered its effort to defraud JEDEC. First of all, they have to show it was an effort to defraud Micron.

THE COURT: Help me out with a practical matter here. There is this JEDEC reasoning and there is this spoilation reasoning. Do they cover the same universe of documents?

MR. STONE: No, they're completely separate.

THE COURT: Completely separate documents. There is no overlap in that set of documents?

MR. STONE: No.

THE COURT: All right. Do you agree with that, Mr. Powers?

MR. POWERS: I agree with that, Your Honor.

THE COURT: All right. So you set the spoliation piece aside completely. You look at just at the JEDEC documents.

MR. STONE: Absolutely.

THE COURT: And there was an evidentiary hearing in front of Judge McKelvie; correct?

MR. STONE: Well, there was a hearing in front

of Judge McKelvie.

THE COURT: Was he presented with evidence as well as argument?

MR. STONE: Documents had been submitted. I don't think there was any -- no live testimony was taken, but he certainly had documents like Your Honor has documents today.

THE COURT: Okay. He made a ruling, a ruling I'll read, page 25. He says:

"I don't see it as a definitive decision on my part about whether there in fact has been fraud. At least as I understand, the rules of the case law is there is a sufficient showing to reasonably believe there is conduct that would warrant not finding the documents are protected from disclosure. So I think the better approach is to go ahead and order Rambus to produce the documents as we've defined them during the course of the telephone conference call."

MR. STONE: And we did. We produced all of those.

THE COURT: All right.

MR. STONE: The issue is, we produced, in response to his order, everything that we had produced in the Infineon case, which was what we understood to be his order. That they didn't produce, they have them. I'm not

seeking to reargue that issue today. But Micron says, well, you've discovered some documents that would fall within the scope of Judge Payne's order and you should produce those under Judge McKelvie's order. And we say, we read Judge McKelvie's order as, because it's based on the transcript, to order us to produce what we produced to Judge Payne.

THE COURT: Because of the belief that there was a fraud or prima facie evidence of a fraud based on the jury verdict which you say has been definitively and entirely made a premise not true by the Federal Circuit's ruling, right?

MR. STONE: We say this Court should not extend Judge Payne's ruling to newly discovered ruling or extend Judge McKelvie's results to newly discovered documents without taking into account the fact that there are changed circumstances.

THE COURT: Yes, and I just want to -- I mean I don't want to belabor this but I want to make sure I understand exactly the line of reasoning. The line of reasoning is the Federal Circuit said there couldn't have been a fraud. Your argument is the Federal Circuit said there wasn't any fraud here and, therefore, any underlying action or determination in the Infineon case couldn't be the basis for further production of documents. Judge McKelvie's ruling was pinned on that Infineon ruling about

fraud. Have I got you straight?

MR. STONE: Yes.

THE COURT: Okay. Then I just need Mr. Powers to give me two minutes on that.

If I'm understanding it right, the assertion is there could never be now, based on the Federal Circuit's ruling, any further extension of the ruling by Judge McKelvie. That is probably the wrong way to put it. That they're not trying to get back what you already got but it can't serve as a basis for getting additional documents.

MR. POWERS: That appears to be their position, Your Honor. And our response to that is twofold:

First, the Federal Circuit decision did not say there could not have been a fraud. What they said is under the particular evidence before them at that time, which did not include a lot of the evidence that now exists, that has come out in the FTC case and all the other evidence that has come out since then, because Judge Payne has pierced after this, after the jury verdict, there is a lot of new evidence that came out. So the idea that the Federal Circuit has held for all time as a matter of law there can be no fraud is simply untrue.

But, second, beyond that question, what the Federal Circuit held is under the facts of that case, as argued and as tried, the fraud verdict can't stand. That

does not mean there is not a prima facie case of fraud which is the standard of crime fraud doctrine. If there is a prima facie case of fraud, we should get the documents that establish that.

There are two categories of documents that are at issue here, I think it's important for clarity purposes to talk about them in two groups. One group is a group of documents. I think there are 46 of them that are exactly the same types of documents that they did produce to us. But they just found them later, they said. They produced them to Hynix.

MR. STONE: No, we did not.

MR. POWERS: My understanding is some of these documents were produced to Hynix and that that was argued to be a waiver. And they produced them to Infineon. That was my understanding. If it's wrong, Mr. Stone will correct me.

THE COURT: I think he just did.

MR. POWERS: Well there is a group of documents that they concede are in a privilege log that have been produced that they're just not giving to us. They're asterisks. They marked them on the log. And those documents are, in our mind, indistinguishable from the documents that have already been produced that were ordered to be produced and have been produced other than the fact that they say they found them later.

There is a second group of documents which are in our view equally producible which as I understand it were not produced in the *Infineon* case because Infineon's counsel agreed not to take them, and those are Documents A to foreign patent agents and foreign patent attorneys. They drew a line in that case which we have briefed here that we don't think is tenable to say we'll accept -- it wasn't a ruling by Judge Payne -- we'll accept only domestic communications. And that is what they produced in that case.

The evidence is clear they were tailoring patent applications all over the world, and they've been suing us all over the world, and so there is no defensible line between a waiver that has been found for U.S. patent agents and patent attorneys and foreign. So that is one category of documents which is different from the category that has already been produced.

The second category that is different is timeliness. They've produced not between -- not after 2000, for example, and not before 1996 on the basis that they think after 2000, if we're outside of JEDEC already, then it doesn't matter. And they can't be perpetuating the fraud. And we established in the papers that their preparation for the fraud kept long after that, and if there were documents before 1996 that were part of that, those should be

produced, too. There is no meaningful distinction. If you are committing a fraud, all the documents relating to that should be produced.

THE COURT: Okay. Mr. Stone, what did Judge Whyte have to say on this point? Or was this a point even pressed on him?

MR. STONE: One of the three points was pressed on Judge Whyte, and that is the -- if I could just go back to the first point. I'll take them in any order you like, but if I can go back to the first one which Mr. Powers described as the asterisk documents.

In the newly discovered backup media that Rambus discovered, there are some documents that are in fact within the scope of Judge Payne's order and would have been produced in 2001 had they been discovered at that time. That's why we asterisked them to make it clear. Those documents have not been produced. They were discovered after the Infineon case was resolved. They have not been produced to Hynix. They're the subject of a motion that Judge Whyte has under submission right now that I argued last week. And so the question of those asterisk documents, if we can call them that, that we've identified on our privilege logs from the new backup media, those asterisk documents are the subject of a pending motion under submission before Judge Whyte which we've argued here

should not be produced.

And Mr. Powers' argument makes my argument. He gets up and he says on the record before the Federal Circuit, the Federal Circuit held there was no fraud. And the record before the Federal Circuit was the record before this court when Judge McKelvie issued his 2001 order. They may want to try to make another record. I'm not saying that this court should not permit them to come in and try to say today, knowing all that we know today, we can show there was a crime fraud despite the Federal Circuit ruling, but on that record, there was no fraud and there can't be a prima facie case once there has been a final determination of no fraud.

THE COURT: I'll give you a chance.

MR. STONE: Let me go to his other two points. He wants to extend it to the foreign patent filings. There has never been contended there was an obligation to disclose foreign patents or foreign filings to JEDEC. Never been any contention to that regard. And, in fact, if you look at the patent lists, the JEDEC would circulate patents they have been told about, there are no foreign patents there with a couple of rare exceptions. Nobody understood that to be a disclosure. So whatever you do with your foreign filings is unrelated to any JEDEC expectation so there was no expectation of disclosure of foreign filings. There could be no

fraud.

It was an issue that was withdrawn and not argued before Judge Payne because the Infineon lawyers recognized that that argument wouldn't hunt. As Judge Payne would have put it, "that dog wouldn't hunt" because the JEDEC rules could not under any circumstances be read to extend that far.

This issue was argued before Judge McGuire in the FTC, and he rejected an effort to extend it to foreign patent filings, saying you couldn't do it. That leaves us Mr. Powers' third group of documents which is the effort to extend it in time. I think he has his dates wrong. He said nothing before '96 or after 2000 have been produced.

In fact, we produced prior to '96 but nothing after the date in 1996 when Rambus officially terminated its membership in JEDEC. And the reason was, there was -- once they terminated their membership in JEDEC, it could not be argued that they had any duty to disclose anything to JEDEC. And Judge Payne ruled, for example, there could be no fraud on JEDEC as to DDR II because Rambus had terminated its membership before DDR II was contemplated -- I don't mean DDR II, I mean DDR. DDR was not taken up at JEDEC until after Rambus had given up its membership. There could be no fraud. The Federal Circuit agreed with that ruling. This very issue, the temporal extension was also argued to Judge

McGuire and he rejected it because the duty expired when the membership ended.

THE COURT: So the only thing before Judge Whyte were, what, the asterisk documents?

MR. STONE: Yes, Your Honor. That is the only thing that is currently pending before him.

THE COURT: All right. I'll give you 30 seconds to wrap up. There is enough here we could hear you for a long time, and I just can't.

MR. STONE: I appreciate how much time you have given us. I'll wrap up in 30 seconds. They do argue in their papers there was a waiver because Rambus disclosed the documents that were produced here under court order, disclosed those same documents voluntarily to Hynix.

There are two cases which stand for the proposition that the extent of that disclosure, there is no subject matter waiver beyond the extent of the documents that were actually disclosed and I just want to cite you those two cases and then I will conclude.

In re: Claus Von Bulow at 828 F2d 94 and Akamai Technologies at 2002 Westlaw 1285126 out of the Northern District of California, 2002. Both stand for the proposition that disclosure of a group of documents where you can't show you disclosed just the good ones and not the bad ones. And it's pretty apparent here Rambus's disclosure

of documents that Judge McKelvie's order compelled and Judge Payne's order to compel were not just the good ones, they included plenty of the bad ones, that that subject matter waiver, if there is one to be found, is limited to those documents. So they can't extend that production beyond the scope of the production that they already have. So their waiver argument should also be rejected.

THE COURT: All right. Mr. Powers, I'll give you a couple minutes here and then we're done.

MR. POWERS: Conscious of Your Honor's timing here, I think most of the points I have made are already made. I'd like to only make only two points.

THE COURT: Okay.

MR. POWERS: One, the arguments that have been made to you on both JEDEC and spoilation are effectively arguing the merits but can't and don't disrupt the presence of a prima facie case in each case.

THE COURT: Well, answer the point that Mr. Stone has pressed repeatedly and which is, of course, in their papers that the record on which you want me to say there is a prima facie case of fraud is the record effectively since it's the same when it was Infineon.

MR. POWERS: It's -- I'm sorry. Go ahead.

THE COURT: I'm repeating what I understand their argument to be.

MR. POWERS: That is their argument.

THE COURT: Their argument, it's the same record and the Court of Appeals said no fraud. So if they said no fraud, perforce that means on that record there is no fraud, therefore no prima facie case of fraud.

MR. POWERS: It's not the same record in two respects. There was testimony in that case that wasn't present before Judge McKelvie. They had a trial which was after both Judge Payne and Judge McKelvie's order on which in some cases the Federal Circuit relied and there is evidence that Judge McKelvie had that was not being relied upon by the Federal Circuit.

So it's not the same record. They certainly overlap between them, but the issue that the Federal Circuit decided was not whether there could not be a fraud under the facts as they exist completely. They just looked at the record that was before them. And the issue there was whether there was a fraud under that verdict, whether that verdict stood not whether there is a prima facie case and there is.

THE COURT: Okay. I have your positions, and you will get -- thank you. You can go ahead and have a seat, Mr. Powers. And you will get a partial ruling out of me today. And that is, I'll grant the motion with respect to the spoilation documents. And the reason I'm going to

grant it is because I think, based both on the documents which are out there in the public, because Micron has them or at least they're out there sufficiently that your opponents have them, Rambus, there is a prima facie case that there was a crime and I reject the argument that destruction of evidence which is contemplated to be relevant to litigation which is fairly contemplated, that is, in this case, the record indicates, powerfully indicates that there was going to be litigation, it was planned, it was not just anticipated, it was being carefully thought out, developed, the strategies for it were being pursued aggressively and in that very context, there was the destruction of evidence or the destruction of documents which, by the record that is before me, one could conclude, and I'm not saying I do conclude, but one could conclude was known to be relevant to that case.

In short, the assertion that this wouldn't really have counted as a crime in Delaware or in California, I don't think holds water. I think it has to be viewed as behavior that would have, under the statute which is quoted to me in the briefing, be viewed as something which a prosecutor could well have taken note of and decided required serious consideration and perhaps prosecution. Whether that would have been a prosecutorial discussion or discretion that would have been exercised to actually pursue

it, I don't know. But the assertion that in order to be a crime, I take the Rambus argument to be almost you'd have to have proof at such a level of each element of the crime that you would be able not just to indict but to feel comfortable you could convict and that couldn't be the standard. We're talking about a prima facie case, which means there is enough of a bad aroma to prompt going further. To try to set up a wall that would say, no, you have to really scale the whole thing and make the whole case and not just at a civil level but at a criminal level strikes me as setting up an impossible standard.

There appears to be enough here to say they knew that this was evidence that would be important to valuable property rights and that they deliberately took steps to eliminate it. There is enough there. I've got to keep qualifying this. There is enough there to say, hey, you can keep looking at this. You can move past the initial barrier of the attorney-client privilege.

I emphasize I am not saying that Micron has proved this. I'm not saying that I'm persuaded that in an unclean hands trial that Rambus would lose. I'm most emphatically not saying that. I'm saying there is a prima facie case sufficient to void the attorney-client privilege as to the spoliation set of documents which both sides have agreed is a separate set of documents than the JEDEC

documents.

I reached that conclusion after myself having looked through the volumes that were given to me in camera for review by Rambus, some of which had extensive redactions. I thought that was interesting. I had many documents that were extensively redacted that were submitted, that were submitted to me for in camera review but nevertheless were redacted.

Despite that, going through the volumes and seeing the dates on specific IP updates, as I think how they categorized them, and looking at what those IP updates said, the assertion made by Rambus that really this didn't kick in until 2000 or the very end of '99 just doesn't hold up. There was enough of a link drawn there to make these documents, these spoilation documents discoverable.

Now, having said that, I made that determination, after myself conducting some in camera review as well as reviewing the documents provided to me and arguments made by Micron, I also want to say that I reject the argument that there is no evidentiary significance whatsoever to attach to the fact that two other courts looking at this reached a conclusion that there is a prima facie case. "Evidentiary" may be the wrong way to put it. It's persuasive authority on the same record. And that bolsters my own review and determination in this

regard.

So you are going to have to give up those spoilation documents since I determined there was destruction when litigation was planned and knowledge that that was the case and, therefore, a link showing prima facie showing intent and therefore spoilation.

I don't have to address the waiver argument and I'm not going there at all.

MR. STONE: I assume you will have a written order, but just so we're are clear on which documents, these will be the very same documents that Judge Whyte ordered us to produce in his January 31, '05 order so when we say spoilation documents we can agree?

THE COURT: That is the universe of documents. And I was specific about asking you folks about that because I want it clear that we all know what we're talking about. There is a set of documents which I understood to be a set that was a known universe of documents. And I guess I thought it was a known universe because two other courts have already looked at it. That's what I'm talking about.

MR. STONE: Then it's known to me, Your Honor.

THE COURT: And it ought to be known to the other side, too. All right?

MR. STONE: Okay.

THE COURT: And we'll get to the form of order

in a minute; all right?

As to the JEDEC documents, I'm reserving on that. And indeed I may very well call upon a Special Discovery Master to assist me in this regard, because whereas I believe the spoilation argument and the conclusion that flows from it to be fairly straightforward in light of the record here and in light of again when I take to be persuasive authority already developed in two other federal courts, the JEDEC arguments that have been made to me show that there is still a significant factual dispute about what it was that the Federal Circuit had as a record before it when it made a determination as opposed to what was the record before Judge McKelvie when he made his ruling in May of 2001 in this case and whether or not that factual distinction, if there is one, because there is a dispute about that, is such as to warrant a different legal conclusion and, therefore, I'm going to need some more development of a record about what the record is.

I hate to say that to you but that is what has to happen in order for me to understand what the ramifications are of multiple legal rulings. I feel like a little bit like I'm in an echo chambers. People were shouting five years ago and now I'm asked to sort out what the sound is five years later as it's bouncing off the walls still. And that is not a simple thing to do, which is why

I'm telling you, and I'm giving you a heads up on this. Given that you all have been fighting at some significant expense for five years, this ought not put too much fear in you, but it may end up putting a touch on your wallets because I may well have to bring somebody in to help sort through that record and that is something I'm going to give serious thought to.

You folks should think about what you think about that, okay? And talk to each other. And maybe actually you have a reaction now. It doesn't have to be set in stone. Do you have a reaction to that now, Mr. Stone? Mr. Powers?

MR. STONE: I think the factual record that we were trying to develop in a very short period of time today takes longer than we had today to develop and I think the only efficient way, given the constraints on the Court's time to do that is to have someone appointed to hear further evidence because I think there is further evidence they should hear, including considering the record that was here before and the record that the Federal Circuit had. I think that is a somewhat lengthy task and I think it's a task that should be performed. And I think given the Court's time constraints, it should be performed by someone that you select because I don't think we can ask the Court to bear that burden as well as the burden actually trying cases.

THE COURT: Mr. Powers, do you have a reaction?

MR. POWERS: If Your Honor wishes us to present that evidence to a Special Discovery Master, we'll be happy to do so. We believe when they see the record, they'll find a prima facie case.

THE COURT: All right. Well, I've got to give this a little more reflection, but that's the route I'm inclined to take because given how the next few months stack up, I'm concerned about being able to get to this with the dispatch necessary to keep this thing, to keep this train on the track and I want to keep it on the track.

Okay. Getting back to the form of order. I will ask the parties to submit and agreed-on form of order which does not constitute, and I'll make it clear on the record, any stipulation or surrender of rights by Rambus as to the positions they've preserved here in the event some day this all gets taken up and a higher authority tells me that I didn't know what the heck I was talking about, your record is safe. But I want your input nevertheless on the form of order that will give effect to the ruling I have given you orally today so it's clear what documents, everybody understands what the universe of documents are, they're identified in a manner that both sides feel comfortable is plain. All right?

If you would submit that to me at the same time

you submit the scheduling order, stipulation, that would be a help. How long do you think it would take to get that done, Mr. Powers?

MR. POWERS: Tuesday of next week?

THE COURT: Okay. Can that be done?

MR. STONE: I don't think we'll reach agreement by Tuesday of next week. Given the length of time it has taken us on this thing, I think we should allow more time than that.

THE COURT: How long do you think?

MR. STONE: I think we should allow two weeks but we should at least allow until the end of next week.

THE COURT: All right. I'll give you until Friday of next week, a week from tomorrow. All right. I'll look to get that in my office and I'll try to turn on both those things around for you promptly.

Now, recognizing it's the end of the day, is there any burning issue that's to get tabled while we're all here together, Mr. Powers?

MR. POWERS: No, Your Honor.

MR. DOUGLAS: Your Honor, I know it's late and I know this wasn't on your list of things to cover today, but we do have our two pending motions to lift the condition that was on Judge McKelvie's order back in February of 2002 and we do have a motion for leave to amend the complaint.

We've got extensive briefing. Rambus is interested in moving this along and trying to find a way to do it that is most efficient, most sensible. That condition, Judge McKelvie's order kind of stands in the way because it prevents us from filing the complaint in California on 14 different patents that are being asserted against some other defendants already. And it does prevent us from being able to amend this complaint so we could have four additional patents which would make this symmetrical with the Hynix case and have those four patents that were added there a couple years ago. So I don't know if Your Honor wants to do it on papers or wants us to come back. I'd be happy to do whatever you want, but it is important to Rambus to move forward.

THE COURT: All right. Point taken. Thanks.

I can tell you have looked generally at your papers and the reason I ordered the things today, the reason I took up what I took up today in the fashion I took it up is because I don't think I'm going to need additional argument on those points.

MR. DOUGLAS: That's fine, Your Honor. You asked if there was anything else burning. And it's smoldering, at best.

THE COURT: Right.

MR. DOUGLAS: We would like to move it forward.

THE COURT: Right. No, by all means. I fault you not at all for standing and reminding me those things are out there. But I don't think I'll be calling, asking you folks to fly back across country to talk about it. I think the arguments are sufficiently made in the papers that I can address them.

All right. I thank you one and all for your time today. We stand in recess.

(Proceedings end at 5:08 p.m.)