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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
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11 In re: Third Party Subpoenas Issued to  
12 RAMBUS, INC., AND RAMBUS  
DELAWARE LLC

Case No. 14-mc-80293 EJD (NC)

13 INNOVATIVE DISPLAY TECHNOLOGIES  
14 LLC,

**ORDER RE: DISCOVERY**

15 Plaintiff,

Re: Dkt. No. 1

16 v.

17 ACER INC., ET AL.,

18 Defendants.  
19

20 Before the Court is Dell's motion to compel compliance with a subpoena issued to  
21 Rambus. Dkt. No. 1. Rambus asserts that certain documents Dell seeks are covered by  
22 the attorney-client privilege and the work-product doctrine. At a hearing held on  
23 November 17, 2014, the Court ordered Rambus to fix deficiencies on the face of its  
24 privilege log, produce a subset of documents discussed, and submit additional briefing  
concerning documents it asserts are covered by the work-product doctrine.

25 **I. Attorney-Client Privilege**

26 The attorney-client privilege protects from discovery "confidential  
27 communications between attorneys and clients, which are made for the purpose of giving  
28

1 legal advice.” *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011) (citation  
2 omitted). The privilege attaches when “(1) legal advice of any kind is sought (2) from a  
3 professional legal adviser in his capacity as such, (3) the communications relating to that  
4 purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently  
5 protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection  
6 be waived.” *Id.* (internal quotations omitted). The privilege is strictly construed. *United*  
7 *States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009). Thus, if the advice sought from the  
8 professional legal advisor is not legal advice, the privilege does not apply. *Richey*, 632  
9 F.3d at 566 (citation omitted).

10 A party can establish that the privilege applies through a privilege log. This log  
11 must contain at least: (a) the attorney and client involved, (b) the nature of the document,  
12 (c) all persons or entities shown on the document to have received or sent the document,  
13 and (d) the date the document was generated, prepared, or dated. *In re Grand Jury*  
14 *Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992); *AT&T Corp. v. Microsoft Corp.*, No.  
15 02-cv-0164 MHP (JL), 2003 WL 21212614, at \*2 (N.D. Cal. Apr. 18, 2003).

16 Here, both Rambus’ initial and amended privilege logs contain deficiencies. The  
17 amended log still lists documents that do not identify the attorney or law firm involved in  
18 the communication. Numerous entries also fail to indicate whether the document consists  
19 of an actual communication between attorney and client. *See, e.g.*, Dkt No. 14-5 at 38  
20 (Control Number RAMHCINT00008620 describes document “prepared at direction of  
21 counsel” and involving “Rambus’ overall corporate licensing and enforcement strategy,”  
22 but identifies non-attorney Laura Stark in the “From” column and “File” in the “To”  
23 column). Documents prepared at the direction of counsel may qualify for work product  
24 protection, but unless a document consists of a “confidential communication,” Rambus  
25 improperly asserts attorney-client privilege. *See* Rutter Group Prac. Guide Fed. Civ.  
26 Trials & Ev. Ch. 8H-B (“Only ‘confidential communications’ are protected. Thus clients  
27 cannot rest on the privilege to bar questions about facts known to them before they  
28 consulted with counsel or facts made known to them ‘between and after’ their

1 consultations with counsel.”).

2 Furthermore, merely sharing a document with counsel does not automatically make  
3 that document privileged. *See Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d  
4 284, 300 n.57 (5th Cir. 2010) (“[T]urning documents over to one’s lawyer does not  
5 automatically cloak those documents in attorney-client privilege.”); *United States v.*  
6 *Robinson*, 121 F.3d 971, 975 (5th Cir. 1997) (“It goes without saying that documents do  
7 not become cloaked with the lawyer-client privilege merely by the fact of their being  
8 passed from client to lawyer.”).

9 In other words, it is not good enough for Rambus to list a document that it shared  
10 with counsel in the privilege log as “privileged” on the basis of it being passed from client  
11 to lawyer; Rambus must provide an independent basis for why that document itself is  
12 covered by the attorney-client privilege or some other privilege.

13 In short, the Court orders Rambus to submit to Dell another amended privilege log  
14 in accordance with this order. Rambus must produce this privilege log to Dell within  
15 seven days. Otherwise, Rambus must also produce within seven days documents that fail  
16 to conform to the standards for attorney-client privilege outlined in this order.

## 17 **II. Work Product**

18 At the discovery hearing, the Court also ordered the following:

- 19 • Rambus must produce all documents not covered by the work-product  
20 doctrine created between 2009 and September 11, 2012 by November 18,  
21 2014.
- 22 • Rambus also brought up a subset of documents created by and for another  
23 entity before or in 2009. Rambus claims that though the documents are now  
24 in its possession, they are protected by the work-product doctrine because  
25 the entity that created them did so in anticipation of litigation. However,  
26 neither Dell nor Rambus has briefed this issue. Accordingly, Rambus must  
27 identify where these documents are in the privilege log, and submit to the  
28 Court a supplemental brief and declaration explaining why the Court should

1 not compel production of these documents. Rambus must submit this brief  
2 and accompanying declaration to the Court by Monday, November 24.

3 Dell's response is due Wednesday, November 26.

- 4 • Rambus may also submit additional briefing over the issue of whether or not  
5 the deposition of Laura Stark, Rambus' 30(b)(6) witness, establishes that the  
6 work-product privilege attaches to certain documents in Rambus' possession  
7 after September 11, 2012. Rambus must also submit this brief and any  
8 accompanying declarations to the Court by Monday, November 24. Again,  
9 Dell's response is due Wednesday, November 26.

10 IT IS SO ORDERED.

11 Date: November 21, 2014



12  
13 Nathanael M. Cousins  
14 United States Magistrate Judge  
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