UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of	)	
	)	
RAMBUS INCORPORATED	)	Docket No. 9302
	)	
a corporation	)	
	)	

THIRD-PARTY INFINEON TECHNOLOGY'S MOTION
FOR CLARIFICATION OF THE AUGUST 2, 2002 PROTECTIVE ORDER

Third-party Infineon Technologies, AG and its affiliates ("Infineon") file this motion to clarify that the August 2, 2002 Protective Order (the "Protective Order") in this case does not prevent Rambus from disclosing its own "Discovery Material." Complaint counsel consents to this requested clarification or modification of the Protective Order, and it is fully supported by case law, the language of the Protective Order itself, a federal court order, and Rambus's behavior with other "Discovery Material"[1] under the Protective Order.

Infineon is litigating against Rambus in federal district court in Richmond, Virginia ("Virginia litigation") on issues closely related to those presented in this case. In that case, Infineon seeks FTC deposition transcripts of Rambus's own employees and ex-employees, taken by FTC staff ***after*** the FTC complaint was filed against Rambus -- investigational hearing transcripts are not at issue. Rambus has waffled on whether it will produce these transcripts in the

[1] Discovery Material is defined by the Protective Order as "deposition testimony, deposition exhibits, interrogatory responses, admissions, affidavits, declarations, documents produced pursuant to compulsory process or voluntarily in lieu thereof, and any other documents or information produced or given to one Party by another Party or by a Third Party in connection with discovery in this Matter." Protective Order at ¶ 1(m), attached at Tab A.

Virginia litigation, at first telling the Court in Richmond that it would produce them but then later refusing to do so because, Rambus claims, the Protective Order prevents their disclosure. The Court in the Virginia litigation has now ordered that these transcripts be produced to Infineon. The Court (Judge Payne) told Infineon that "[y]ou go move the FTC . . . to produce these things and [get] relief from the protective order and recite that this court specifically requests that all testimony of all Rambus employees be made available for use in these [Virginia] proceedings." 4/27/04 Hearing Tr. at 93, attached at Tab B.

Still, Rambus has not produced them nor -- tellingly -- has it to date granted its consent to any clarification or modification of the Protective Order that would end its arguments against such production. Neither has Rambus claimed these transcripts contain third party documents designated as confidential under the Protective Order but not marked as trial exhibits in this case or otherwise made available to Infineon in the Virginia litigation.[2]

Rambus has no excuses left. Rambus cannot block federal court-ordered discovery of materials located in its files simply because the requested materials happened to be disclosed in this matter. Case law is very clear that this is an improper use of a protective order, and that depositions taken in one litigation are subject to discovery in later litigations. To allow parties to FTC litigation to do otherwise would stunt the progress of follow-on private antitrust litigation that the FTC encourages. *See* FTC's Thomas B. Leary Addresses Class Action Litigation Summit, 6/26/03, available at http://www.ftc.gov/opa/2003/06/learyspeech.htm ("We depend on private litigation to supplement our efforts…"); FTC Policy Statement on Monetary Equitable Remedies in Competition Cases, 7/25/03 ("Moreover, the pendency of numerous private actions may tilt the

[2] Moreover, any confidential material they might contain would fall under the protective order entered in the Virginia litigation.

balance [in whether the FTC seeks monetary remedies] the other way, even if the violation is clear.").

To the extent there is any ambiguity in the Protective Order on this issue, Infineon requests that it be modified accordingly and as soon as possible.[3] Infineon asks the Commission to clarify that a party has the option to disclose its own deposition transcripts taken in the post-complaint phase of an FTC proceeding. Alternatively, Infineon proposes the following one sentence modification to the Protective Order to make this clear: "In addition, nothing contained in this Protective Order shall prevent any Party from disclosing its own Discovery Material outside this Matter, including post-complaint deposition transcripts of employees and former employees."

I. FACTUAL BACKGROUND

1. Infineon understands there are no investigational hearing (pre-complaint) transcripts for Rambus employees or ex-employees -- thus this request for clarification or modification covers only post-complaint FTC depositions.

2. The Virginia litigation, like this one, involves Rambus's deception and standard setting abuse at JEDEC in the 1990's in violation of antitrust laws, making these deposition transcripts relevant. The Rambus employees who were deposed by the FTC in this litigation are key witnesses in the Virginia litigation.

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[3] Rambus, through its use of "Shred Days" and as discussed in Complaint Counsel's appeal in this matter, has a sordid history of destroying evidence. *See* Appeal Brief of Counsel Supporting the Complaint, April 16, 2004 at 23-24 ("In the summer of 1998, Rambus implemented a 'document retention plan' that led on a single day, 'Shred Day 1998,' to Rambus collecting in burlap bags and shredding over 20,000 pounds of documents.") This history of evidentiary wrong-doing makes Infineon suspicious of Rambus's reading of the Protective Order and provides further justification for granting Infineon this relief quickly.

3. Infineon asked Rambus for the post-complaint deposition transcripts of its employees and former employees. After Rambus failed to produce the transcripts, Infineon raised the issue at a hearing on March 16, 2004. In response, Rambus told the Court in the Virginia litigation that it was "going to produce those," after it reviewed the transcripts for any third party confidential material. Rambus said to the Court it would "get on that quickly." 3/16/04 Tr. at 169, attached at Tab C. To date, Rambus has cited no third party confidentiality concerns with the transcripts, and on information and belief there are none.

4. Six more weeks went by with no word from Rambus. Despite its representation to the Court that Rambus would produce the transcripts, it failed to do so.

5. Infineon again raised the issue at another hearing in the Virginia litigation. On April 27, 2004, Rambus reversed itself, telling the Court it would not produce the transcripts because of the FTC Protective Order. In refusing to turn over the transcripts, Rambus's counsel (Gregory Stone, the same counsel that represents Rambus before the FTC) told the Court: "Your honor, the protective order in the FTC case provides that the depositions taken in that case . . . can be used only in connection with that proceeding." 4/27/04 Tr. at 92-93, Tab B. Mr. Stone did not tell the Court that it had a right to produce these transcripts under the Protective Order if it wanted to.

6. Judge Payne then ordered that these transcripts be produced. "You go ***move the FTC***, [counsel for Infineon], to produce these things and relief from the protective order and recite that ***this court specifically requests that all testimony of all Rambus employees be made available for use in these proceedings***, and that's it. I don't know what on earth kind of secrecy

they [the FTC] function under there, but it just simply can't be that they [Rambus employees] can make these statements and not have to live up to them." *Id*. at 93.[4]

7. After this hearing and the Court's Order, Infineon again asked for the transcripts in a letter to Rambus counsel sent on April 28, 2004. Rambus again refused to provide them. *See* April 28, 2004 letter from M. Kovner to G. Stone and response, attached at Tab D. Infineon then wrote to Rambus counsel on May 11, 2004, to notify Rambus that Infineon would be seeking this relief from the FTC, to ask for its consent for the proposed modification of the Protective Order, and to again ask whether there was any third party confidential information in the disputed transcripts. *See* 5/11/04 Letter from M. Kovner to G. Stone, attached at Tab E.

8. In a final attempt to avoid litigating this issue, Infineon sent Rambus and Complaint Counsel a copy of the Order it seeks to have entered pursuant to this Motion and asked whether they would consent to the proposed clarification. Complaint Counsel informed counsel for Infineon that they consented to the proposed clarification. Rambus has refused to consent and continues to take the view that the Protective Order precludes the production and use of FTC deposition transcripts of current and former employees outside of this case.

II. RAMBUS'S RELIANCE ON THE PROTECTIVE ORDER AS A SHIELD AGAINST DISCOVERY IN LATER LITIGATIONS IS CONTRARY TO LOGIC, CASE LAW, AND THE LANGUAGE OF THE PROTECTIVE ORDER ITSELF

Although Rambus told Judge Payne in the Virginia litigation that the FTC Protective Order prevents it from releasing the transcripts, case law and the Protective Order itself belie this

[4] Judge Payne later clarified his words to include both employees and former employees of Rambus. "Yes, I mean employees and former employees. Like Mr. Crisp, he's not a current employee." *Id*. at 94. On information and belief, Rambus represented and assisted its former employees at their FTC depositions, all of which focused on their tenure at Rambus.

position. "[P]rotective orders ordinarily restrict the use of information ***by the discovering, not the producing party*** in the litigation." *Alexander v. F.B.I.*, 186 F.R.D. 99, 101 (D.D.C. 1998).[5] It is improper for Rambus to "in effect suggest[] that this court should enjoin [it] from having access to [its] own files." *Id.*

"[T]here is something unsettling about the notion that" Rambus "might forever be insulated from producing discovery in [the Virginia litigation], or other actions, by virtue of having once produced it in a protected fashion in the [FTC] case." *See Tucker v. Ohtsu Tire & Rubber Co., Ltd.*, 191 F.R.D. 495, 501 (D. Md. 2000) (modifying protective order to permit disclosure in subsequent litigation); *see also Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc.*, 92 F.R.D. 67, 69 (S.D.N.Y. 1981) (discrediting "the absurd tenet that a party can avoid discovery in one case merely because it disclosed the same material to an adversary bound by a protective order in another case"). Infineon "is entitled to know what defendants' personnel told [the FTC] under oath during recent questioning." *See Carter-Wallace*, 92 F.R.D. at 70 (discussing request for deposition transcripts allegedly covered by a protective order in a second antitrust case against the same defendant).

Production is especially appropriate where, as here, the disputed Discovery Material remains covered by confidentiality protections and might avoid the need for additional discovery. *See Carter-Wallace*, 92 F.R.D. at 70 (The "'speedy and inexpensive determination'" of the Virginia litigation "would be confounded by a requirement that [Infineon] conduct the same numerous, lengthy depositions… when the transcripts of the previous examinations… might

[5] Unless otherwise indicated, all internal citations have been omitted and any emphasis added.

indicate that certain witnesses need not be questioned and might help focus and thereby shorten the inquiry directed to others.").

The FTC Protective Order does not support a different interpretation or result. The Protective Order expressly permits disclosing materials bearing "Confidential" or "Restricted Confidential" designations to persons not parties to the FTC litigation:

- The list of persons to whom disclosure may be made ***may be expanded*** to include "such other person(s) authorized in writing by the Producing Party." The Protective Order at ¶ 7(h); and

- paragraph 10(b) permits any party to disclose Confidential or Restricted Confidential materials to ***any other person following notification*** and an opportunity to object.

Thus, to the extent these deposition transcripts contain confidential, business-sensitive information, Rambus may, under Paragraphs 7(h) and 10(b), produce such material to Infineon. To the extent these deposition transcripts contain some material that is not confidential to any Party or non-Party, there is even less justification for withholding it.

The Protective Order also contemplates modification, as is typical.[6] Specifically, paragraph 23 provides: "[e]ntry of the foregoing Protective Order is without prejudice to the right of the Parties or Third Parties to apply… for modification of any provision of this Protective Order." Because "counsel agreed to the terms of the protective order," and "[t]hat protective order explicitly provided that it was 'without prejudice to the right… to seek modification,'" Rambus "may not now be heard to complain when [Infineon] takes advantage of the modification provision." *See Kraszewski v. State Farm Gen. Ins. Co.*, 139 F.R.D. 156, 158-59 (N.D. Cal. 1991) (modifying protective order); *see also Olympic Refining Co. v. Carter*, 332 F.2d 260, 264 (9th

[6] *See, e.g.*, protective orders in *In the matter of California Pacific Medical Group*, Docket No. 9306; *In the matter of Aspen Technology Inc*., Docket No. 9310; *In the matter of Piedmont Health Alliance, Inc.*, Docket No. 9314; *In the matter of Telebrands Corp et al.*, Docket No. 9313, all of which contain modification provisions.

Cir. 1964) (reliance on protective order in antitrust case before government agency was insufficient to bar modification of protective order to allow use of discovery material in subsequent litigation).

III. RAMBUS'S RELIANCE ON THE PROTECTIVE ORDER AS A SHIELD AGAINST DISCOVERY CONTRADICTS A FEDERAL COURT ORDER

Judge Payne has twice asked that the FTC deposition transcripts of Rambus employees and former employees be made available to Infineon. The second time, after asking Infineon to move the FTC for Protective Order relief based on representations from Rambus counsel, Judge Payne said "… and recite that this court specifically requests that all testimony of all Rambus employees be ***made available*** for use in these proceedings… [y]ou make the motion and you recite therein that that's what we want." 4/27/04 Hearing Tr. at 93-94, Tab B.

Rambus has refused to consent to the filing of this motion with the FTC, and it has even refused to confirm to Infineon that there is no third party confidential information contained in the disputed transcripts. *See* 5/11/4 Letter from M. Kovner to G. Stone, Tab E. These actions contradict Judge Payne's order.

IV. RAMBUS'S RELIANCE ON THE PROTECTIVE ORDER AS A SHIELD AGAINST DISCOVERY IS SELECTIVE AND UNDERCUT BY ITS USE OF "DISCOVERY MATERIAL" IN THE VIRGINIA LITIGATION

Rambus is using Infineon and Rambus "Discovery Material" for other purposes in the Virginia litigation when it suits its needs. Rambus's selective reliance on the Protective Order as a shield for only certain materials is another reason this motion should be granted.

For example, Rambus deposed Johann Harter, Infineon's Vice President for technology development for memory products on April 16, 2004 in the Virginia litigation. During that

deposition, counsel for Rambus used three documents that were produced by Infineon in the FTC matter but not in the Virginia litigation. These documents are governed by the Protective Order. Similarly, Rambus used third parties' confidential Discovery Material at the deposition of Gil Russell, a former Infineon employee. Finally, and most telling, Rambus counsel used the FTC deposition of former employee Richard Crisp -- one of the deposition transcripts now sought by Infineon that Rambus will not produce -- to help prepare Mr. Crisp for a supplemental deposition in the Virginia litigation.[7]

Rambus's selective use of its own "Discovery Material" and that of Infineon in the Virginia litigation reveals that Rambus does not believe its own interpretation of the Protective Order. A party cannot create Discovery Material and then claim it is obliged to hide it forever. Infineon's motion should be granted.

[7] These depositions are not attached as exhibits because, pursuant to a protective order entered in the Virginia litigation, they were designated "outside counsel eyes only."

V. CONCLUSION

For the foregoing reasons, Infineon respectfully requests that the FTC clarify any ambiguity in the Protective Order by issuing the attached Order containing the proposed modification.

Dated: May 25, 2004

INFINEON TECHNOLOGIES AG,
INFINEON TECHNOLOGIES
NORTH AMERICA CORP., and
INFINEON TECHNOLGIES
HOLDING NORTH AMERICA INC.

By Counsel:

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of	)	
RAMBUS INCORPORATED	)	Docket No. 9302
a corporation	)	

[PROPOSED] ORDER GRANTING NON-PARTY INFINEON TECHNOLOGY'S MOTION FOR CLARIFICATION AND/OR MODIFICATION OF THE AUGUST 2, 2002 PROTECTIVE ORDER

IT IS ORDERED THAT:

The August 2, 2002 Protective Order is clarified to mean that it shall not be used by any Party to avoid disclosing its own Discovery Material outside this Matter, including post-complaint deposition transcripts of employees and former employees.

In the alternative, IT IS ORDERED THAT:

Paragraph 2 of the August 2, 2002 Protective Order is hereby modified to include the bolded language below:

"Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose. Notwithstanding the foregoing, nothing contained in this Protective Order shall prevent the Commission from using any material produced as part of the investigation of this matter during either the precomplaint phase or postcomplaint phase, including any Discovery Material, to respond to either (i) a formal request or subpoena from either House of Congress or from any committee or subcommittee of the Congress, consistent with applicable law, including Sections 6(f) and 21 of the FTC Act; or (ii) a federal or state access request under Commission Rule 4.11(c), 16 C.F.R. § 4.11(c). Provided further that nothing herein shall limit the Commission's ability to use the Discovery Material in any other investigation, or administrative or judicial proceeding, in which event such material shall be subject to the protections accorded by sections 21(b) & 21(d)(2) of the FTC Act. **In addition, nothing contained in this Protective Order shall prevent any Party from disclosing its own Discovery Material outside this Matter, including post-complaint deposition transcripts of employees and former employees.**

By the Commission.

ISSUED: _____, 2004.

CERTIFICATE OF SERVICE

I hereby certify that on May __, 2004, a true and correct copy of non-party Infineon Technologies, AG's MOTION FOR CLARIFICATION OF THE AUGUST 2, 2002 PROTECTIVE ORDER was filed personally with the Secretary of the Federal Trade Commission and served on Gregory P. Stone, Munger, Tolles & Olson, LLP, counsel for Respondent Rambus Inc. at 355 South Grand Avenue, 35th Floor, Los Angeles, California 90071, and upon Geoffrey D. Oliver, counsel supporting the Complaint, at the Federal Trade Commission, 601 New Jersey Avenue, N.W., Washington, DC 20001 by facsimile and overnight delivery. The accompanying exhibits were filed personally with the Secretary of the Federal Trade Commission and served on the above-named counsel by overnight delivery.

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Mark L. Kovner