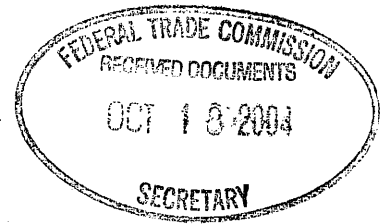


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



COMMISSIONERS: Deborah Platt Majoras, Chairman
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

PUBLIC

**COMPLAINT COUNSEL'S BRIEF REGARDING MOTION OF NON-PARTY
MITSUBISHI ELECTRIC CORP. TO ENFORCE PROTECTIVE ORDER**

Rambus has an interpretation of the Protective Order Governing Discovery Material in this case ("Protective Order") that it believes allowed it to treat Mitsubishi Electric Corp. ("Mitsubishi") documents as uncovered by that Protective Order. Rambus acted consistently with that interpretation, but apparently never told Mitsubishi of its interpretation until after it disclosed the documents to others. As a result, Mitsubishi effectively lost its ability to challenge Rambus's interpretation of the Protective Order and thus also lost its ability to control the distribution of its documents under the Protective Order. This treatment of third party documents is inconsistent with the intent of the Protective Order and impairs the Commission's ability to assure third parties that their documents will be protected in Commission litigation.

Some facts relating to this Motion do not appear to be in dispute. Rambus served Mitsubishi with a subpoena duces tecum on October 3, 2002. Motion of Non-Party Mitsubishi Electric & Electronics USA, Inc. to Quash Subpoena or in the Alternative for Protective Order

Ex. A. (10/28/2002). Rambus appended the Protective Order to that subpoena.¹ *Id.* On October 28, Mitsubishi filed a motion to quash the subpoena, arguing that it was improperly served, called for confidential documents, and was unnecessarily burdensome. Motion of Non-Party Mitsubishi Electric & Electronics USA, Inc. to Quash Subpoena or in the Alternative for Protective Order (10/28/2002) (“Mitsubishi Motion to Quash”). Mitsubishi also argued that the documents were beyond the control of Mitsubishi’s U.S. subsidiary and that the Japanese parent company had not been properly served. *Id.* Rambus opposed Mitsubishi’s Motion to Quash on various grounds. With respect to Mitsubishi’s concerns regarding confidentiality, Rambus stated that “the protective order entered in this case ameliorates Mitsubishi’s concerns.” Rambus Inc.’s Opposition to Motion of Mitsubishi Electric & Electronics USA, Inc. to Quash Subpoena or in the Alternative for Protective Order at 11-12 (11/8/2002). On November 12, ALJ Timony denied that motion, in a one page order, and gave Mitsubishi ten days to comply with the subpoena. Order Denying Motion of Mitsubishi Electric & Electronics USA, Inc. to Quash Subpoena or in the Alternative for Protective Order (11/12/2002).

It appears that after the denial of Mitsubishi’s Motion to Quash, Mitsubishi and Rambus entered into negotiations regarding what documents Mitsubishi should produce. Motion of Non-Party Mitsubishi Electric Corp. to Enforce Protective Order (April 8, 2004) (“Mitsubishi Motion to Enforce Protective Order”) Ex. 2 (“Letter from Steven M. Perry to Donald R. Harris (1/22/03)”), Ex. 3 (“Letter from Donald R. Harris to Steven M. Perry (1/28/03)”). They

¹ The Protective Order required that each party accompany all subpoenas duces tecum to third parties with a cover letter describing the rights of the third party under that order. Protective Order ¶ 3. It isn’t clear from Complaint Counsel’s files whether Rambus sent Mitsubishi such a letter.

concluded that negotiation by late January of 2003, and Mitsubishi produced documents to Rambus in February of 2003. *See* Mitsubishi Motion to Enforce Protective Order Ex. 4 (“Letter from Donald R. Harris to Steven M. Perry (3/17/2004)”). Apparently, none of the documents produced by Mitsubishi contained any confidentiality designation. Rambus used some of the Mitsubishi documents as exhibits in this case, and apparently also used some of the Mitsubishi documents in its private litigation against the DRAM manufacturers. *Id.* Rambus apparently provided no notice to Mitsubishi regarding its use of certain Mitsubishi documents either prior to its use in this case or in Rambus’s other cases.² *See* Mitsubishi Motion to Enforce Protective Order Ex. 5 (“Letter from Donald R. Harris to Gregory R. Stone (3/31/2004)”). Further, Rambus apparently gave no notice to Mitsubishi that it did not consider the Mitsubishi documents to be covered under the Protective Order. *See* Mitsubishi Motion to Enforce Protective Order Ex. 7 (“Letter from Donald R. Harris to Gregory R. Stone (4/6/2004)”).

Mitsubishi claims it discovered a little over a year later that Rambus was using Mitsubishi documents outside of the FTC proceeding. *See* Letter from Donald R. Harris to Steven M. Perry (3/17/2004). In a letter dated March 17, 2004, counsel for Mitsubishi notified counsel for Rambus that Mitsubishi considered the documents it produced to be “Confidential Discovery Material” under the Protective Order. *Id.* Two weeks later, in a letter to counsel for Rambus, counsel for Mitsubishi repeated that designation and specifically requested that the Mitsubishi

² This apparent lack of notice regarding Mitsubishi’s documents contrasts with Rambus’s treatment of documents provided by Mitsubishi’s U.S. subsidiary, Mitsubishi Electric & Electronics USA, Inc. (MEUS), apparently in response to the same subpoena. On February 10, 2003, Rambus notified Mitsubishi’s counsel that it intended to use some MEUS documents at trial and provided a list of those documents should MEUS intend to seek *in camera* treatment at trial. *See* Ex. 1.

documents be treated as confidential discovery materials under the Protective Order. *See* Letter from Donald R. Harris to Steven M. Perry (3/31/2004). In a letter on April 2, 2004 Rambus replied, refusing to provide notice to Mitsubishi of any future use of Mitsubishi's documents and also refusing to make any efforts to retrieve any Mitsubishi documents that Rambus provided to those not allowed to view documents covered by the Protective Order. *See* Mitsubishi Motion to Enforce Protective Order Ex. 6 ("Letter from Gregory R. Stone to Donald R. Harris (4/2/2004)").

In support of those actions, Rambus made the following points in that letter:

- "[T]he voluntary production was not made in connection with or in response to a subpoena, or in lieu of responding to a subpoena, but simply in response to our letter request that the documents be provided for our use. Thus, the documents at no time came within the scope of the Protective Order...." *Id.* at 1.
- Counsel for Mitsubishi never asked that its documents be treated under the terms of the Protective Order. *Id.* at 2.
- The Protective Order "clearly does not impose any limitation on the use of documents that have not been designated as either Confidential or Restricted Confidential under the terms of that Protective Order." *Id.*

Mitsubishi's Motion raises two separate questions regarding the interpretation of the Protective Order: first, are the documents at issue "Discovery Material" as that term is defined in the Protective Order; and second, if the documents are "Discovery Material," are they confidential, as that term is defined in the Protective Order.³

³ Regardless of whether the documents are confidential, it appears that Rambus failed to provide the documents even the minimal protections accorded Discovery Material under the Protective Order. If the documents are Discovery Materials, Rambus apparently used those documents in violation of paragraph 2 of the Protective Order by providing them to third parties and using them for its own purposes in connection with its on-going private litigation without providing prior notice to Mitsubishi.

In Complaint Counsel's view, the documents produced by Mitsubishi are "Discovery Material" under the terms of the Protective Order. The Protective Order defines "Discovery Material" broadly to include "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 ¶ 1.m. It seems clear from the correspondence memorializing the negotiations between Rambus and Mitsubishi over the documents that Mitsubishi was to produce to Rambus, that both parties to the negotiations understood that Rambus requested the documents for use in this case.⁴ Thus, the documents appear to be either "documents produced pursuant to compulsory process or voluntarily in lieu thereof." It is difficult to understand how Mitsubishi, by arguing that production should not be compelled in a motion to quash and then negotiating a production after losing that motion, can implicitly waive its rights regarding the use of discovery materials under the Protective Order.⁵

⁴ For example, the correspondence from the parties contains the same reference line: "In Re Rambus Incorporated, FTC Docket No. 9302." See Letter from Steven M. Perry to Donald R. Harris (1/22/03); Letter from Donald R. Harris to Steven M. Perry (1/28/03).

⁵ Rambus asserts that Mitsubishi, after losing in its Motion to Quash, then produced its documents "[c]ompletely outside of the discovery process." Opposition of Rambus Inc. To Motion of Non-Party Mitsubishi Electric Corporation to Enforce Protective Order at 1. Rambus asserts that Mitsubishi did so because Mitsubishi wanted to maintain the position that the documents it holds in Japan were not subject to the jurisdiction of the a U.S. tribunal. *Id.* Mitsubishi denies that it took that position in its negotiations with Rambus. Mitsubishi Motion to Enforce Protective Order at 2. However, even if Rambus is correct, such production still seems to be "voluntary in lieu" of production pursuant to compulsory process. In any event, such a production appears to be "documents or information produced or given to one Party by another Party or by a Third Party in connection with discovery in this matter."

Furthermore, Rambus adopted its position in secret. Mitsubishi was entitled to expect that distribution of the documents it provided would be limited by the Protective Order that Rambus sent with the subpoena. In fact, the papers filed by Rambus in response to Mitsubishi's Motion to Quash imply that Rambus, at least at that time, believed that the documents would be covered by the Protective Order. Rambus Inc.'s Opposition to Motion of Mitsubishi Electric & Electronics USA, Inc. To Quash Subpoena or in the Alternative for Protective Order at 11-12 (11/8/2002) ("In any event, the protective order entered in this case ameliorates Mitsubishi's concerns."). Rambus may have been entitled to argue that the documents were not discovery material under the Protective Order. However, it was not entitled, in good faith, to treat those documents as being outside the Protective Order without telling Mitsubishi of its conclusions and allowing Mitsubishi its day in court before Rambus distributed those documents to whomever it pleased. If Rambus concluded that the documents produced by Mitsubishi were outside of the Protective Order because of a position taken by Mitsubishi in its negotiations with Rambus or because of an argument Mitsubishi made in its Motion to Quash, Rambus should have notified Mitsubishi of that position. Rambus's failure to do so threatens to sap Commission protective orders of any ability to assure third parties that the documents they produce will not be distributed to competitors.

Rambus's remaining justifications appear to misstate both the explicit terms of the Protective Order and the intent behind those terms. First, contrary to the assumption implicit in Rambus's April 2, 2004 letter, the Protective Order does not require third parties producing documents to "ask that its documents be treated under the terms of th[e] Protective Order." Further, contrary to the assertions of that letter, the Protective Order clearly prohibits a party

from using “Discovery Materials” outside of the Commission proceedings regardless of whether the documents are designated as Confidential or Restricted Confidential. Protective Order ¶ 2.

Those documents may also be confidential under the terms of the Protective Order. The Protective Order defines Confidential Discovery Material as “all Discovery Material that is confidential or proprietary information produced in discovery which is not generally known and which the Producing Party would not normally reveal to third parties or would normally require third parties to maintain in confidence.... Confidential Discovery Materials shall include non-public commercial information, the disclosure of which to Respondents or Third Parties would likely cause substantial commercial harm or personal embarrassment to the disclosing party.” Protective Order ¶ 1.n. Rambus argued in its Opposition to Mitsubishi’s current Motion that the Protective Order limits what comes under the category of Confidential Discovery Materials to documents that are designated as such by the producing party. But the Protective Order states that documents “*may* be designated either as Confidential Discovery Material or as Restricted Confidential Discovery Material.” *Id.* ¶ 4. The Protective Order does not require those designations for the documents to be so treated. If documents appear to contain “non-public commercial information, the disclosure of which to Respondents or Third Parties would likely cause substantial commercial harm or personal embarrassment to the disclosing party,” then those documents are confidential under the Protective Order regardless of whether they were so designated.

Despite this language in the Protective Order, Complaint Counsel recognizes that it is often difficult for a party to determine, in the absence of a designation, whether a third party’s documents contain confidential information. It may well be that, in the absence of a

confidentiality designation, and given the age and subject matter of the documents themselves, Rambus was entitled to assume that the documents were not confidential. On the other hand, the contents of the documents, combined with the statements made by Mitsubishi in its Motion to Quash, may be sufficient to have put Rambus on notice that the documents possibly contained confidential information.⁶ While Complaint Counsel believe that Rambus should have resolved any uncertainties by communicating with Mitsubishi before using any Mitsubishi documents in open court, Complaint Counsel also recognize that Mitsubishi's failure to designate documents as Confidential contributed to the current situation. At this point Complaint Counsel cannot determine whether Mitsubishi's designation of its documents as Confidential Discovery Material is appropriate. The documents are primarily Japanese language notes and memoranda apparently written by engineers at Mitsubishi in Japan during the 1990s. Complaint Counsel did not incur the substantial expense of having the documents translated, and Rambus has provided only partial, poor quality translations of a small number of selected documents. No Mitsubishi representatives were called upon to testify at deposition or at trial as to the nature of the information contained in the documents.

There appears to be no excuse, however, for Rambus's failure to accord the Mitsubishi documents confidential treatment after Mitsubishi clearly informed Rambus in its March 2004 letters that it designated the documents as Confidential Discovery Material. Nothing in the

⁶ It appears that Mitsubishi, in its Motion to Quash, may have put Rambus on notice that the documents called for under the subpoena were likely to be considered confidential. *See* Mitsubishi Motion to Quash at 14-17 ("Rambus seeks documents from MEUS that disclose agreements with its customers and licensors, pricing and cost data, order quantities and patterns, technology licensing terms, and other commercially sensitive details. This information is confidential and proprietary; furthermore, much of it is privileged. Producing this information would subject MEUS to risks both of economic harm and of legal liability.").

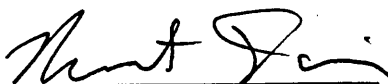
Protective Order provides that Mitsubishi waived its rights by not so designating its documents at the time of production. If Rambus believed that Mitsubishi's March 2004 designation was improper, its remedy was to file a motion challenging that designation and explaining why it is improper, not to disregard the designation and to continue to use Mitsubishi's documents in any manner it chose.

CONCLUSION

Mitsubishi requests a relatively limited remedy – that the Commission designate Mitsubishi's documents as "Discovery Materials" under the Protective Order and that Rambus be directed to advise Mitsubishi of all those who have received the documents from Rambus. If Mitsubishi is correct that Rambus has provided "Discovery Materials" to parties outside of the current proceedings, there is little hope that Mitsubishi can be made whole by a Commission remedy. The remedy requested by Mitsubishi appears to be within the realm of what is possible for the Commission to do under the circumstances, as it appears reasonably calculated to allow

Mitsubishi to determine whether it can correct for any past harm, and limit any future harm, from Rambus's apparent use of its documents outside of the scope of the Protective Order.

Respectfully submitted,



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October 18, 2004

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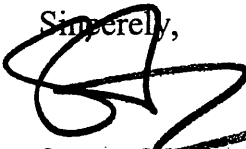
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Re: In the Matter of Rambus Inc., FTC Docket No. 9302

Dear Mr. Calkins:

This letter will constitute notice to Mitsubishi Electric & Electronics USA, Inc. ("MEUS"), pursuant to 16 C.F.R. § 3.45, that Rambus proposes to use the materials listed in attachment A hereto at the hearing in this matter. For your convenience, I have also enclosed a copy of section 3.45 and a copy of the materials listed in attachment A. Please notify us within 10 days if MEUS intends to seek *in camera* treatment for these documents, all of which were marked as deposition exhibits. Rambus reserves the right to serve additional notices pursuant to 16 C.F.R. § 3.45.

Please contact me if you have any questions regarding the foregoing.

Sincerely,

Steven M. Perry

SMP:ei
Enclosures
cc: Malcolm L. Catt, Esq.
Counsel for FTC (w/attachment A)

ATTACHMENT A

MEUS0031	MEUS2164 –MEUS2168
MEUS2781	MEUS4592 – MEUS4594
MEUS5167 – MEUS5186	MEUS7615 – MEUS7617
MEUS8356 – MEUS8400	MEUS10443 – MEUS10449
MEUS11512 – MEUS11513	

CERTIFICATE OF SERVICE

I, Lourine K. McDuffie, hereby certify that on October 18, 2004, I have caused a copy of the attached, *Complaint Counsel's Brief Regarding Motion of Non-Party Mitsubishi Electric Corp. to Enforce Protective Order*, to be served upon the following persons:

by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
Via Office of the Secretary, Room H-159
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

and by electronic transmission and overnight courier to:


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