

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**In the Matter of**

**RAMBUS INC.,**

**a corporation.**

**Docket No. 9302**

**MOTION BY RESPONDENT RAMBUS INC. FOR LEAVE TO FILE  
A REPLY BRIEF IN SUPPORT OF ITS MOTION TO COMPEL  
SAMSUNG ELECTRONICS AMERICA, INC. TO PRODUCE  
CERTAIN DOCUMENTS WITHHELD ON PRIVILEGE GROUNDS**

Pursuant to Rule 3.22(c) of the Federal Trade Commission Rules of Practice For Adjudicative Proceedings, respondent Rambus Inc. respectfully requests leave to file a short reply brief in support of its Motion To Compel Samsung Electronics America, Inc. to Produce Certain Documents Withheld on Privilege Grounds. The proposed brief will address only those new arguments raised in the opposition brief jointly filed on December 23, 2002 by Infineon Technologies North America Corp., Hynix Semiconductor, Inc., Intel Corporation, and Micron Technology (collectively “the ADT Consortium Members”) and by Samsung.

DATED: December 26, 2002      Respectfully submitted,

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Gregory P. Stone  
Steven M. Perry  
Sean P. Gates  
Peter A. Detre  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue, 35<sup>th</sup> Floor  
Los Angeles, California 90071  
(213) 683-9100

A. Douglas Melamed  
IJay Palansky  
Kenneth A. Bamberger  
WILMER, CUTLER & PICKERING  
2445 M Street, N.W.  
Washington, D.C. 20037  
(202) 663-6000

Sean C. Cunningham  
John M. Guaragna  
Gray, Cary, Ware & Freidenrich LLP  
401 "B" Street, Suite 2000  
San Diego, California 92101  
(619) 699-2700

**REPLY BY RESPONDENT RAMBUS INC. IN SUPPORT  
OF ITS MOTION TO COMPEL SAMSUNG ELECTRONICS  
AMERICA, INC. TO PRODUCE CERTAIN DOCUMENTS  
WITHHELD ON PRIVILEGE GROUNDS**

**I. INTRODUCTION**

Respondent Rambus Inc. (“Rambus”) respectfully submits this reply brief in support of its Motion To Compel Samsung Electronics America, Inc. To Produce Certain Documents Withheld On Privilege grounds. This reply brief addresses the new issues raised in the opposition brief filed on December 23, 2002 by various members of the ADT Consortium.

**II. ARGUMENT**

**A. Neither The Case Law Nor The Declarations Submitted In  
Opposition To The Motion To Compel Support The Broad  
Claims Of A Joint Defense Privilege.**

The ADT Consortium Members assert in their opposition brief that the documents listed on the revised privilege log attached to the brief fall within four categories:

- (1) documents containing legal advice from the Sughrue Mion law firm, which firm had been retained jointly by the ADT Consortium Members (nos. 3, 9, 59, 84, 100, 103 and 109);
- (2) documents that contain “confidential communications related to draft contracts between the ADT member companies and third parties” (nos. 50, 53, 55, 57, 60, 61, 68, 106, 108 and 110);
- (3) documents containing advice provided by a Micron lawyer, Mr. Ashmore,

“regarding inviting participation by third parties in ADT . . . .” (nos. 93 and 98); and

- (4) documents that contain “communications relating to drafts of contracts among the ADT member companies” (nos. 6-8, 10-39, 49-51, 73, 84 and 90).

Opposition, pp. 6-11.

Rambus withdraws its motion to compel as to categories 1, 2 and 3, subject to the conditions described in section IIB, below. The documents falling within category 4, however, are not protected by any privilege and should be produced. The case law makes it clear that discussions among ADT Consortium Members about contracts that were being negotiated between the member companies themselves are not privileged. This is especially true given that the Sughrue firm was not involved in these communications and the documents apparently reflect only the views of the individual companies’ lawyers.

A similar issue was addressed in SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 513 (D. Conn. 1976). In that case, the District Court rejected a claim of joint privilege involving negotiations between two joint venturers about the renegotiation or dissolution of the joint venture. The District Court’s analysis is fully applicable here:

“The communications in question took place during protracted negotiations between joint venturers, but were not directed at advancing the joint interest vis-à-vis the rest of the world. Instead the parties were negotiating a business proposition between themselves. That the overall profitability of the joint enterprise was a general

consideration in which both parties' interests converged does not lessen the significance of their divergent interests.”

Id. (emphasis added).

In addition, none of the three declarations submitted with the opposition brief addresses the particular documents that fall within category 4 or explains why the parties' negotiation of a “business proposition between themselves” should be deemed privileged.

Id. Accordingly, the claims of privilege as to the category 4 documents should be overruled, and the documents should be ordered produced.

**B. The Implied Request To Intervene By The ADT Consortium Members Should Be Approved Only On Conditions.**

The joint opposition brief asserts that the various ADT Consortium Members share a “joint interest in maintaining the privilege” of documents reflecting the advice of counsel to the Consortium. While the ADT Consortium Members make no formal request to intervene under Rule 3.14, they necessarily seek such relief from Your Honor in order to present their views on these issues.

Under Rule 3.14, intervention may be permitted “upon such terms as are provided by law or as otherwise may be deemed proper.” Here, intervention should be conditioned upon terms that will expedite further proceedings and (hopefully) reduce the need for additional motion practice. Each of the ADT Consortium Members has received a subpoena for ADT-related documents. While some such documents have been produced, Rambus believes that none of the ADT Consortium Members has provided Rambus with a privilege log listing the ADT-related documents.

Given that almost 50% of the 112 ADT-related documents that Samsung logged were ultimately produced as non-privileged – but only after they had been withheld for months and only after Rambus filed a motion to compel – and given that it is clear from the joint opposition brief that each of the ADT Consortium Members is, in fact, withholding ADT-related documents on the basis of privilege claims, each Member should be ordered, as a condition of intervention, to provide Rambus with a complete and detailed ADT-related privilege log by no later than January 7, 2003.

DATED: December 26, 2002      Respectfully submitted,

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Gregory P. Stone  
Steven M. Perry  
Sean P. Gates  
Peter A. Detre  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue, 35<sup>th</sup> Floor  
Los Angeles, California 90071  
(213) 683-9100

A. Douglas Melamed  
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San Diego, California 92101  
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