

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

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

**THIRD-PARTY INFINEON TECHNOLOGIES' REPLY IN SUPPORT OF ITS  
MOTION FOR CLARIFICATION OF THE AUGUST 2, 2002 PROTECTIVE ORDER**

Rambus now joins Complaint Counsel and Infineon in consenting to clarify the Protective Order to remove any perceived impediment to Rambus producing transcripts of its employees' FTC depositions in response to discovery requests in litigation between Rambus and Infineon pending in federal court in Richmond, Virginia ("the Richmond litigation"). Rambus Br. at 4. Infineon therefore requests that an Order reflecting this clarification of the Protective Order be entered immediately.

With respect to the FTC depositions of Rambus employees who happened to have left Rambus by the time of their depositions, Rambus's continued resistance is not well-taken. As an initial matter, these individuals are not true "third parties," in the sense that they have third-party information to protect. They were "Party" employees -- Rambus ex-employees deposed about activities at Rambus and represented by Rambus's counsel. Rambus's current outside counsel represented these former Rambus employees at their FTC depositions and continues to represent these former employees in discovery in the Richmond litigation with Infineon. Their FTC depositions focused (we understand) on the time they were at Rambus, and any confidential

information they revealed in their depositions is Rambus confidential information that would be fully protected by the protective order that binds Infineon in the Richmond case.

Moreover, for Rambus's lawyers to claim here that such former employees have "rights under the Protective Order [that] should not be modified without notice and a opportunity to be heard" is disingenuous at best. These former employees *have* been on notice -- through their counsel -- of Infineon's desire to clarify or modify the FTC Protective Order and obtain these transcripts *for months*. Were there any lingering ambiguity, Judge Payne made it perfectly clear when he said in April 2004 "[y]ou go move the FTC... to produce these things and [get] relief from the [FTC] 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... I mean employees and former employees." 4/27/04 Hearing Tr. at 93 - 94.<sup>1</sup> Because these former employees' counsel has been on notice at least since that hearing that such relief from the Protective Order would be sought -- and on notice well before April 2004 that Infineon was seeking these deposition transcripts -- those same lawyers cannot be heard now to argue that no such notice was given. They have had plenty of opportunities to be heard, including through a response brief to the instant motion.

Infineon respectfully requests that the Protective Order be modified in the very limited manner Infineon has proposed. Importantly, the proposed modification affects only a "Party" to this case and by its terms does not affect the rights of anyone else under the Protective Order other than Rambus, its employees, and ex-employees. Because no third-party rights or

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<sup>1</sup> Although Rambus has not told Infineon how many of its former employees were deposed in the FTC matter, Infineon believes that there are approximately 10 former employee depositions from the FTC matter, including primarily senior-level ex-employees.

obligations are implicated by the proposed change, the issue of providing notice of the modification to third parties in order that they might be heard on this matter is simply a red herring. Notice of the change can easily be provided through normal means of service. As noted, Complaint Counsel has consented to this modification.

### **ARGUMENT**

Rambus implies that its former employees deposed by the FTC are just like any other third-party witnesses. This is incorrect. Like the current Rambus employees, whose FTC depositions Rambus now consents to produce under a clarification of the Protective Order, these ex-employees

- (a) were deposed by the FTC because they were Rambus employees and were questioned about their time at Rambus.
- (b) were deposed by the FTC about confidential information that is Rambus confidential information.
- (c) were represented at the FTC depositions by the very same outside counsel that represents Rambus -- Munger Tolles and Gray Cary.
- (d) are still represented by Munger Tolles and/or Gray Cary, and Infineon could not contact them except through their lawyers, which are Rambus counsel.

Rambus further implies that these former employees have not been notified of Infineon's request for their FTC deposition transcripts or the proposed modification or clarification of the Protective Order to allow this to happen. This is also incorrect. Through their attorneys -- the very same attorneys that represent Rambus -- they have been on notice for months, and at least since the Richmond Court's April 2004 order that Infineon seek modification of the FTC Protective Order. At least one of these former employees was asked specifically for his FTC deposition transcript during his deposition in May 2004 in the Richmond case, and that request was met by objections from the Munger Tolles attorneys.

What Rambus does not tell the Commission is that Infineon had no way of providing notice to these ex-employees other than the way it did -- through their counsel -- the same counsel that represented them in depositions in the Richmond litigation with Infineon. *See* ABA Model Rule of Professional Conduct 4.2 (“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter...”). *See also In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 556, 561 (N.D. Ga. 1992) (discussing ABA Formal Opinion 91-359’s conclusion “that Rule 4.2 does not prohibit communications with former employees of a defendant corporation as long as the former employees are not *in fact* represented by the corporation’s attorney”) (emphasis in original).

In short, Rambus cannot hide behind the shield of “no notice provided” when Rambus counsel and counsel to these employees have known for months that Infineon sought these deposition transcripts and would be seeking to clarify or modify the Protective Order. Through their Munger Tolles attorneys, Rambus’s former employees have also had generous opportunities to be heard on this topic:

- They were **heard**, through their lawyers, at proceedings in Richmond, VA.
- They were **heard** in correspondence between counsel for Infineon and Rambus.
- They were **heard** in depositions when Munger Tolles refused again to provide the transcripts.
- They were **heard** in Rambus’s opposition to this motion.

Rambus’s argument that the Protective Order may not be clarified or modified because Rambus’s former employees have not been heard simply ignores all of these opportunities. Moreover, to the extent that the former employees have not made the views heard, their repeated

failure to complain about the proposed modification to the Protective Order after such notice was provided constitutes waiver.

Relatedly, it is a straw-man argument to assert, as Rambus does, that the Protective Order cannot be modified “without first providing notice to *all* of the third parties who were deposed in this action and allowing them an opportunity to be heard.” Rambus Br. at 5. (emphasis added) As Rambus knows, Infineon seeks only the deposition transcripts of Rambus’s employees and former employees and has sharply limited its requested relief accordingly. Infineon has not sought the Discovery Material of any other third-party participant in the FTC case. Thus, the proposed Order *only* clarifies or modifies the Protective Order to allow a “Party” -- and the only “Parties” in this case are Rambus and the FTC -- to disclose its own “Discovery Material” outside of this case, “including post-complaint deposition transcripts of employees and former employees.” (See Proposed Order attached to Infineon’s Motion.) *No* third party’s rights are implicated by such a modification.

Rambus’s argument that its former employees might have “expected that their deposition testimony would be used only in connection with this [FTC] proceeding,” is equally unavailing, Rambus Br. at 5. As Infineon noted in its opening brief, this reliance argument is undercut by the modification provisions in the current Protective Order. To the extent these ex-employees are covered by the Protective Order, they are covered by the provision that allows it to be clarified or modified. *See also Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th 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).

Finally, Infineon’s need for and rights to these Rambus employee deposition transcripts is not mitigated by the fact that Infineon may have also deposed these people. Their testimony in

FTC depositions is highly relevant in the Richmond litigation, both substantively and for potential impeachment purposes. It is telling that Rambus never argues these deposition transcripts are irrelevant to the litigation between Infineon and Rambus. They have not attempted that argument because they cannot. The former employees whose deposition transcripts Infineon seeks include, for example, Richard Crisp, Rambus's representative at JEDEC during all relevant times. They also include Anthony Diepenbrock, Rambus's in-house counsel at the time, who advised Rambus to withdraw from JEDEC, and Joel Karp, who was responsible for managing Rambus's patent portfolio. These depositions cover much of the same subject matter that is at issue in the Richmond litigation, and -- as the Court in that case has indicated -- Rambus should not be allowed to hide behind the FTC Protective Order in order to hide these transcripts from Infineon.

## CONCLUSION

Infineon respectfully requests that the Commission issue the Order attached to Infineon's Motion for Clarification of the August 2, 2002 Protective Order.

Respectfully submitted,

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John M. Desmarais  
KIRKLAND & ELLIS LLP  
Citigroup Center  
153 E. 53<sup>rd</sup> Street  
New York, New York 10022  
T: (212) 446-4800  
F: (212) 446-4900  
jdesmarais@kirkland.com

Mark L. Kovner  
KIRKLAND & ELLIS LLP  
655 Fifteenth Street, N.W.  
Washington, DC 20005  
T: (202) 879-5000  
F: (202) 879-5200  
mkovner@kirkland.com

*Attorneys for Infineon Technologies AG,  
Infineon Technologies North America Corp.,  
and Infineon Technologies Holding North  
America Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 2004, a true and correct copy of non-party Infineon Technologies, AG's REPLY BRIEF IN SUPPORT OF ITS 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, 35<sup>th</sup> 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.

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Mark L. Kovner