BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC VERSION

In the Matter of **RAMBUS INC.,** **a corporation.**	**Docket No. 9302**

OPPOSITION BY RESPONDENT RAMBUS INC. TO COMPLAINT COUNSEL'S MOTION IN LIMINE REGARDING RAMBUS'S PATENT PROSECUTION EFFORTS AFTER JUNE 1996 AND NEIL STEINBERG'S OPINIONS REGARDING THE SCOPE OF RAMBUS'S PRIOR PATENT APPLICATIONS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Complaint Counsel's motion seeks to preclude Rambus from introducing any testimony

(i) Rambus's efforts after June 1996 to obtain patents covering some of the technologies incorporated into the JEDEC standards; and (ii) Mr. Steinberg's opinions regarding the scope of coverage of Rambus's patent applications pending before June 1996.

There is no basis for such a preclusion order. First, to the extent Complaint Counsel's motion purports to preclude Rambus from introducing testimony from non-attorneys as to Rambus's patent prosecution efforts, it is frivolous. That Rambus's patent prosecution activities involved some legal communications subject to privilege does not mean that Rambus's non-attorney witnesses can be precluded from testifying as to non-privileged facts concerning such activities.

Second, to the extent Complaint Counsel's motion is viewed as focusing on the testimony of Mr. Steinberg or other lawyers, it is also without merit. Mr. Steinberg's deposition testimony on the two topics identified in Complaint Counsel's motion was directed to his *initial* patent prosecution work before he joined Rambus as in-house counsel, and did not involve privileged communications or attorney work product. At Mr. Steinberg's and other witnesses' depositions, Rambus asserted privilege only as to questions concerning: (i) Mr. Steinberg's privileged communications with other attorneys who represented Rambus as outside counsel; and (ii) his work product and privileged communications during the time period *after* he became Rambus's Vice President of Intellectual Property, and assumed responsibilities for Rambus's litigation strategy.

Complaint Counsel draw inapt comparisons to cases where a party seeks simultaneously to use the privilege as both a sword and a shield, by placing in evidence some privileged

communications concerning a subject matter, while withholding other privileged communications about the same subject matter. These cases simply have no relevance here. Rambus has not affirmatively sought to use *any* privileged communications from Mr. Steinberg. Instead, Rambus has carefully and consistently made a distinction between privileged and non-privileged communications and opinions.

Complaint Counsel also rely on Second Circuit case law holding that, even where a party has not expressly sought to introduce some privileged communications in evidence, it cannot foreclose inquiry into such communications where they are essential to refute the privilege holder's contentions. These cases also fail to justify the relief Complaint Counsel seek. First, several courts have rejected the Second Circuit's view that a party's privileged communications can be subject to disclosure absent some affirmative act by the privilege holder to place them at issue. Second, even under the Second Circuit standard, Mr. Steinberg's privileged communications and work product would not be discoverable. Mr. Steinberg testified about the background to and genesis of his work prosecuting Rambus's patents in the late 1998/early 1999 time period, and Complaint Counsel cross-examined Mr. Steinberg on those topics. Rambus asserted privilege only as to Mr. Steinberg's privileged discussions with other attorneys and his communications and work product during the later, separate time period after he became an in-house Rambus attorney. Discovery of this information is by no means essential to testing the truth of his testimony concerning his state of mind and conduct when he began his patent prosecution efforts.

In maintaining protection over privileged communications and work product in Mr. Steinberg's deposition, Rambus drew the distinction properly drawn when a lawyer is deposed. Mr. Steinberg was permitted to testify as to his non-privileged discussions, conduct,

and thought processes, but not as to his privileged attorney-client communications or protected work product. At the hearing in this matter, Mr. Steinberg should similarly be permitted to testify as to non-privileged matters, and Complaint Counsel's motion should be denied.

II. FACTUAL BACKGROUND

The most important fact to be considered in considering the scope of Mr. Steinberg's testimony – one completely ignored by Complaint Counsel – is that Mr. Steinberg occupied different roles at different points in time.

In the Summer of 1998, Mr. Steinberg was interviewed for a possible engagement as Rambus's outside counsel. Mr. Steinberg testified fully to *all* questions concerning the meeting he had with Rambus to interview for this position, as well as his review of Rambus's [redacted] 51:18-52:3 **[Tab 1]**.[1] This testimony, of course, did not implicate any privilege concerns, because Mr. Steinberg was not counsel for Rambus at or before the time of this initial job interview.

In the August/September 1998 time frame, Rambus hired Mr. Steinberg as outside counsel [redacted] *Id.* at 25:8-10 [redacted] **[Tab 1]**. Mr. Steinberg testified that, in this position, he had "sole responsibility for the U.S. . . . preparation and prosecution [of patents]." *id.* at 27:11-16 **[Tab 1]**, and prosecuted the patents-in-issue in the Hynix, Infineon and Micron litigations. *Id.* at 61:14-62:16 **[Tab 1]**.

It is important to note that Mr. Steinberg's mental impressions at this time period was not protected by the work product doctrine. The federal work product rules apply only to work

[1]All of the deposition excerpts referenced in this memorandum are attached to the Declaration of Jacqueline M. Haberer, filed separately herewith. Some of the transcripts are confidential by virtue of their contents and therefore may not be filed in a public document pursuant to the Protective Order in this case, a copy of which is attached at Tab 2 to this memorandum.

product created "in anticipation of litigation." *See, e.g., In re Minebea Co., Ltd.*, 143 F.R.D. 494 (S.D.N.Y. 1992) ("Generally, work performed by an attorney to prepare and prosecute a patent application does not fall within the parameters of the work product protection. . . since the prosecution of [a] patent application is a non-adversarial, ex-parte proceeding. Thus, work done to that end is not 'in anticipation of' or 'concerning' litigation."). Accordingly, Rambus permitted Mr. Steinberg to testify to the thoughts and impressions that he formed in his role as prosecuting attorney for Rambus's patents.

The parent application of the family of patents at issue in the current proceeding was referred to in Mr. Steinberg's deposition as the Farmwald/Horowitz application. [redacted] *Id.* at 55:21-56:6 **[Tab 1]** see also 67:11-70:7; 76:3-77:9; 84:12-17 **[Tab 1].** He explained that he did so in order to [redacted] *Id.* at 56:20-24 **[Tab 1]**. Mr. Steinberg testified [redacted] *Id.* at 79:5-81:15 **[Tab 1].** He also confirmed that, during this time period, he had no discussions with any Rambus employees concerning Rambus's prosecution of prior applications. *Id.* at 39:7-41:9; 45:3-46:6 **[Tab 1]**.[2]

In April 1999, Mr. Steinberg was hired by Rambus to take on in-house counsel position. *Id.* at 39: 4-6, in which he continued to have sole responsibility for prosecuting Rambus's new

[2] Mr. Steinberg and Mr. Vincent were properly instructed not to answer questions concerning their privileged communications concerning their legal representation of Rambus. Steinberg Tr. at 58:3-16; Vincent Tr. at 106:20-107:1, 109:17-20 **[Tab 7]**; Court's Memorandum

patent applications, and assumed responsibility for overseeing Rambus's patent litigation strategy. *Id.* at 43:19-44:22; 48:22-49:2 **[Tab 1]**. Beginning in this time period, Mr. Steinberg's mental impressions fell within the work product doctrine. Not surprisingly, most of the instructions cited in Complaint Counsel's motion relate to this latter time period, and involved questions asking Mr. Steinberg about: (i) specific communications he had with Rambus employees concerning the work he performed as Rambus's in-house counsel; and (ii) his work product during the time that he was Rambus's Vice President of Intellectual Property, and thus responsible for the company's litigation strategy.

Significantly, Complaint Counsel do not challenge a single instruction not to answer as improper. Indeed, at one point, when Mr. Steinberg pointed out that Complaint Counsel's questioning of his responsibilities as *in-house counsel* went [redacted] she responded, [redacted] *Id.* at 75:22-76:1. **[Tab 1]**.

III. ARGUMENT

A. There Is No Basis For A Preclusion Order Relating To Non-Attorney Witnesses.

Although the primary focus of their motion is Mr. Steinberg's anticipated testimony, Complaint Counsel's motion actually asks the Court for a broader preclusion order preventing Rambus's witnesses from testifying about Rambus's post-1996 patent prosecution efforts and Mr. Steinberg's opinions as to the scope of Rambus's patent coverage. Complaint Counsel's attempt to preclude Rambus from introducing testimony from non-attorney witnesses concerning their patent prosecution activities is specious.

Rambus's patent prosecution activities are factual events to which Rambus is entitled to introduce relevant non-privileged testimony. That these events involved some communications subject to the attorney client privilege does not mean that the entire subject

matter of Rambus's patent prosecution is somehow "off limits" in the proceeding. Instead, Rambus's non-attorney witnesses are free to testify to any non-privileged facts concerning Rambus's patent prosecution activities. *See Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*, 32 F.3d 851, 864 (3d Cir. 1994) ("Facts are discoverable, the legal conclusions regarding those facts are not.").

B. Rambus Is Not Seeking To Use The Privilege As Both A Sword And A Shield, And Thus A Preclusion Order Would Be Improper.

Even viewing the present motion as limited to Mr. Steinberg or other attorney witnesses, the law does not support the broad preclusion order sought here by Complaint Counsel. Information "within the scope of the attorney-client privilege [is] 'zealously protected.'" *Haines v. Liggett Group Inc.*, 975 F.2d 81, 90 (3rd Cir. 1992). Here, Rambus did nothing more than zealously protect the privilege with regard to certain communications and work product implicated by Complaint Counsel's questioning of Neil Steinberg, a former Rambus attorney. Not a single one of these privilege assertions has been challenged by Compliant Counsel as improper. Nor did Rambus selectively assert privilege, allowing Mr. Steinberg to testify as to some privileged communications while instructing him not to respond as to others. Nonetheless, Complaint Counsel maintain that the price Rambus must pay for its proper invocation of the privilege is to lose the ability to have Mr. Steinberg testify as to his patent prosecution efforts and his preliminary opinions about the scope of Rambus's patent coverage before he became in-house counsel for the company. As shown below, such a draconian result is not justified.

Complaint Counsel repeatedly recite the oft-repeated mantra that the attorney-client privilege cannot be used as both a sword and a shield. This phrase, however, generally refers to situations where a party selectively seeks to *introduce* some evidence of its privileged communications, while maintaining privilege over the remainder of such communications. In

such situations, courts recognize that the partial disclosure generally waives privilege as to the subject matter of the particular communication, and entitles the adversary to inquire as to related communications on that subject matter. *See Rhone-Poulenc*, 32 F.3d at 863 ("The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by *disclosing or describing an attorney client communication.*") (emphasis added); *Restatement (Third) of the Law – The Law Governing Lawyers,* § 80(1) (2002) ("The attorney-client privilege is waived for any relevant communication if the client asserts as a material issue in a proceeding that . . . the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct."); *Baltimore Scrap Corp. v. David J. Joseph Co.*, 1996 WL 720785 (D. Md. 1996) ("Because there is no evidence in the present case that BSC is relying upon communications with its counsel in the zoning matter as a sword to prove that defendants are not entitled to *Noerr- Pennington* immunity, I will not find that it has impliedly waived its privileged communications with counsel in the zoning litigation.").

In most of the cases cited by Complaint Counsel, the privilege holder asserted an advice of counsel defense or otherwise expressly relied on *privileged* communications with its lawyers as evidence. *International Telephone & Telegraph Corp. v. United Telephone Co. of Florida*, 60 F.R.D. 177, 180 (M.D. Fla. 1973); *Boston Trade Academy Co. v. Superba*, 84 F. Supp.2d 521, 523 (W.D.N.C. 1999); *Mobile Oil Corp. v. Amoco Chemicals Corp.*, 779 F. Supp. 1429, 1485 n.43 (D. Del. 1991); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992). These cases are simply inapposite here, as Rambus is not asserting reliance on Mr. Steinberg's legal advice, and does not even intend to offer any of that advice into evidence.

C. Complaint Counsel Rely On A Second Circuit Rule That Has Been Disapproved In Other Jurisdictions.

The only cases cited by Complaint Counsel not involving an advice of counsel defense are *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991), and *Pereira v. United Jersey Bank*, 1997 WL 773716 (S.D.N.Y. 1997). In *Bilzerian*, the Second Circuit indicated that waiver could be required not only in situations where the privilege holder affirmatively made evidentiary use of privileged information, but also "when defendant asserts a claim that in fairness requires examination of protected communications." 926 F.2d at 1292 (emphasis added). *Pereira*, after reviewing Second Circuit district court cases applying *Bilzerian*, refined its holding to a rule that waiver may be found where a party makes factual assertions "the truth of which can only be assessed by examination of the privileged communication." *Id.* at 3-5 (emphasis added) (*quoting* [illegible] 1997)).

[illegible] criticized the notion that privileged communications may be at risk of disclosure even when the privilege holder has not affirmatively sought to rely on them. In *Rhone-Poulenc*, for example, the Third Circuit found that cases which "allowed the opposing party discovery of confidential attorney client communications in order to test the client's contentions" to be "of dubious validity." 32 F.3d at 864. Noting that legal "[a]dvice is not in issue merely because it is [illegible] added); *see also U.S. Fire Ins. Co. v. Asbestospray, Inc.*, 182 F.3d 201, 211 (3d Cir. 1999) (waiver inappropriate where party "did not assert any claim or take any affirmative step that placed advice of counsel at issue"); *Chamberlain Group v. Interlogix, Inc.*, 2002 WL 467153

'full and frank communication between attorneys and their clients.'") (*quoting Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)); *Beneficial Franchise Co., Inc. v. Bank One, N.A.*, 205 F.R.D. 212, 216 (N.D. Ill. 2001) (adopting *Rhone-Poulenc* standard to avoid situation where party "would be stripped of its privilege and left with the draconian choice of abandoning its claim and/or defense or pursuing and protecting its privilege," thus "exact[ing] too stiff a price" on privilege holder). Accordingly, were Your Honor not to adopt the Second Circuit rule, Complaint Counsel's motion should be denied on the ground that Rambus has not tried to make affirmative use of any of its privileged communications or protectable work product in the present proceeding.

Steinberg's Deposition Are Not Necessary To Contest His Testimony On

Second, even under the Second Circuit's strict waiver rule, it is simply not the case that the truth of Mr. Steinberg's anticipated testimony on the topics addressed by Complaint Counsel's motion can "only be assessed" by inquiry into privileged communications, and therefore Rambus should not be forced to choose between waiving the privilege and being precluded from calling Mr. Steinberg as a witness.

1. Post-June 1996 Patent Prosecution

With regard to Rambus's post-June 1996 patent prosecution activities, Mr. Steinberg's anticipated trial testimony is limited to the following non-privileged, background facts concerning the genesis of his patent prosecution work while he served as outside counsel to the company: (i) his retention for purposes of prosecuting new patent applications; (ii) [redacted]; (iii) [redacted]; and (iv) his

efforts to obtain additional patents for the company to cover unclaimed subject matter supported by the specification. Complaint Counsel cross-examined Mr. Steinberg on the foregoing topics. *See* Steinberg Depo. at 25:8-37:16; 39:4-40:16; 43:7-47:7; 48:22-50:12; 55:13-58:6 **[Tab 1]**.

Rambus's privilege assertions at Mr. Steinberg's deposition were limited to a broad question about any discussions he had with the law firm of Rambus's prior patent attorney, Lester Vincent. *id.* at 38:13-25 **[Tab 1]**, and questions about his work product and discussions with Rambus employees *after* he had become Rambus's in-house counsel. *Id.* at 50:13-51:16, 67:11-73:7. **[Tab 1]**.[3] Contrary to Complaint Counsel's representations, Mr. Steinberg *was* allowed to testify as to whether he had any discussions with Rambus employees about his prosecution of new patents as outside counsel, and he testified that he had no such discussions. *Id.* at 39:7-40:16; 45:3-46:8 **[Tab 1]**.[4]

Complaint Counsel's Memorandum suggests that Rambus's privilege assertions prevented them from obtaining answers to the following questions: "Did Steinberg discuss his new applications with Richard Crisp, the Rambus representative who had observed these

[3] The testimony at pages 67 through 73 clearly reflects the line properly drawn by Rambus in asserting the privilege – Mr. Steinberg was permitted to testify as to his analysis and review of particular patent claims in the late 1998, early 1999 time period when he acted as outside patent counsel, but not for the subsequent time period when he assumed litigation responsibilities as Rambus's in-house counsel.

[4] Complaint Counsel misleadingly cite two passages from Mr. Steinberg's deposition testimony [illegible] instructions not to answer that were later withdrawn. *See* Memorandum at 5, 6 & n.4. At pages 40 and 42 of his deposition transcript, Mr. Steinberg was initially instructed not to answer questions about communications with Joel Karp related to his patent prosecution work as outside counsel for Rambus. In fact, a few pages later, Mr. Steinberg was permitted to answer questions about such communications. Steinberg Depo. at 45:3-46:8 **[Tab 1]**. [redacted] *Id.* At 54:10-24. Immediately, thereafter, the instruction was withdrawn, and Mr. Steinberg answered a series of questions on the topic. *Id.* at 55:13-58:6 **[Tab 1]**.

Complaint Counsel also purport to rely on a question that Mr. Steinberg actually answered in [redacted]. *Id.* at 58:11-16 **[Tab 1]**.

technologies being presented at JEDEC and who had met with Vincent in an effort to draft patent claims covering the technologies? Did he discuss his new applications with Fred Ware, Allen Roberts, or any other Rambus employees who had been involved in the earlier efforts to draft claims to cover technologies presented at JEDEC?" Complaint Counsel Memorandum at 5.

In fact, for the relevant time period, when Mr. Steinberg was doing prosecution work as outside counsel, he answered these questions with a resounding, "No." Steinberg Depo. at 39:7-40:16; 45:3-46:8 **[Tab 1]**. In suggesting that Mr. Steinberg did not testify on this issue, Complaint Counsel misleadingly cite to questioning pertaining to the later time period when he was *in-house* counsel for Rambus. *See id.* at 51:4-16; 54:10-24; 50:12-17 **[Tab 1]** (prefacing this entire section of questioning with the comment, "Moving on to the time frame after you moved in-house at Rambus. . . .").[5]

Mr. Steinberg can be cross-examined concerning his state of mind when he began his prosecution work, including what his knowledge of Rambus's earlier work and the scope of its prior applications. Complaint Counsel are simply not permitted to inquire into Mr. Steinberg's privileged communications with Rambus's other lawyers, or his state of mind during the entirely separate time period, after April 1999, when he became in-house counsel for Rambus. *Tribune Co. v. Purcigliotti*, 1997 WL 10924, *6 (S.D.N.Y. 1997) (party "may be required to disclose its thoughts and knowledge, whether or not those were acquired in whole or in part from conversations with its attorneys. It is not required to disclose what was said between client and

[5] Complaint Counsel cite various documents on Rambus's privilege log relating to its post-1996 prosecution efforts, some of which were authored by or sent to Mr. Steinberg during the time he acted as outside patent counsel. Such documents clearly constitute privileged communications, and Complaint Counsel cannot [illegible] privileged information and his patent prosecution work unrelated to litigation. *See Cincinnati Ins. Co. v. [illegible]*, 109 F.R.D. 84, 88 (W.D.N.C. 2000) (holding that, even where attorney's testimony rendered work product discoverable, attorney-client privilege not waived where testimony did not place particular attorney-client communications in issue)

counsel.").

In sum, because inquiry into privileged communications and work product is not the "only" way for Complaint Counsel to assess Mr. Steinberg's testimony concerning the genesis of his prosecution work, a broad preclusion order disqualifying him from testifying on that topic is not appropriate. *Pippenger v. Gruppe*, 883 F.Supp. 1201, 1205 (S.D. Ind. 1994) (waiver "arises because the privileged communication is critically relevant to the disputed issue to be litigated given the nature of the claim or defense, and the protected communication is the *sole source of the evidence* on the disputed issue.") (emphasis added); *Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc.*, 111 F.R.D. 76, 81 (S.D.N.Y 1986) ("[I]t would be useful and convenient for [plaintiff] to obtain [defendant's] privileged material, and the substance of its confidential communications with its attorneys might reveal some of what [defendant] knew. *But those are not reasons to void the attorney-client privilege.*") (emphasis added).

E. Mr. Steinberg's Opinions Regarding The Scope Of Rambus's Prior Patents.

Even more attenuated is Complaint Counsel's argument for precluding Mr. Steinberg from testifying as to his opinion that Rambus's pending patent applications as of June 1996 did [redacted] issue was again limited to the opinions that he held prior to and during the time period when he served solely as outside counsel responsible for prosecuting Rambus's patent applications. Rambus's assertion of privilege on the issue of Mr. Steinberg's mental impressions was again properly limited to his privileged communications with other Rambus attorneys, and his impressions and opinions after he became in-house counsel for Rambus and assumed responsibility for Rambus's litigation activities. *See* Complaint Counsel Memorandum at 8-9 (*citing* Steinberg Depo. at 58:3-16; 67:11-73:7; 74:4-75:24; 76:3-78:12; 79:5-83:22) .

Complaint Counsel pose a series of questions that Rambus's privilege assertions purportedly precluded them from asking:

> [redacted] consult technical publications or trade literature to determine how the terms in the relevant claims are normally used in the field of the invention? Did he examine prior art? Did he discuss the scope of claim coverage with others at Rambus? Did he discuss the scope of claim coverage with Lester Vincent or members of Vincent's firm? Most importantly, why did he have any better basis to interpret the scope of the claims in the previously filed patent applications than members of Lester Vincent's firm, who had engaged in full and complete analysis at the time the claims were drafted and who had conducted the entire patent prosecution before the Patent and Trademark Office?

Complaint Counsel Memorandum at 8. The fact is, however, that only one of these questions, [redacted] representing Rambus, was ever asked at Mr. Steinberg's deposition, resulting in a privilege

assertion. Although Complaint Counsel asked Mr. Steinberg a few questions about the basis for the opinions he formed on his initial review of Rambus's patents, *see* Steinberg Depo. at 62:18-64:18, they simply failed to ask most of the questions they have, in hindsight, now come up with to support their preclusion motion.[6]

Many of the questions concerning the background to Mr. Steinberg's opinions appropriately can be asked at the hearing in this matter. As with the topic of Rambus's patent prosecution efforts, inquiry into *privileged* communications is not necessary for Complaint Counsel to be able to cross-examine Mr. Steinberg. Complaint Counsel's suggestion that privileged communications might be relevant does not justify a requirement that Rambus either waive the privilege or be precluded from presenting Mr. Steinberg's testimony. *Rhone-Poulenc*, 32 F.3d at 864 ("Relevance is not the standard for determining whether or not evidence should [redacted] issue."). Accordingly, Complaint Counsel are not entitled to the preclusion order they seek.

IV. CONCLUSION

For the reasons stated above, Complaint Counsel's motion should be denied.

[6] Complaint Counsel also again cite documents from Rambus's privilege log that they suggest are "likely to be directly relevant to the issue of what analysis Mr. Steinberg performed and what conclusions he reached." Complaint Counsel Memorandum at 13. First, Complaint Counsel fail to make any showing that these documents even relate to the subject matter of his opinion testimony, *i.e.*, the scope of coverage of the patents that had been issued to Rambus by the time he was engaged as outside counsel. *See, e.g.*, item no. 362 (Memo Regarding *Application* Serial No. 510,898). Second, as noted above, potential [redacted] privileged information to be fair game for discovery whenever it potentially might be relevant to some [redacted] Steinberg from testifying with regard to *non-privileged* matters.

DATED: April 17, 2003 Respectfully submitted,

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UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC VERSION

In the Matter of **RAMBUS INC.,** **a corporation.**	**Docket No. 9302**

PROPOSED ORDER

Upon consideration of Complaint Counsel's Motion *In Limine* Regarding Rambus's Patent Prosecution Efforts After June 1996 And Neil Steinberg's Opinions Regarding The Scope Of Rambus's Prior Patent Applications:

IT IS HEREBY ORDERED THAT Complaint Counsel's Motion is denied.

Dated: _____

_____
Stephen J. McGuire
Chief Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on April 17, 2003, I caused a true and correct copy of the public version of the *Opposition by Respondent Rambus Inc. to Complaint Counsel's Motion In Limine Regarding Rambus's Patent Prosecution Efforts After June 1996 and Neil Steinberg's Opinions Regarding the Scope of Rambus's Prior Patent Applications* (and the related *Proposed Order*) to be served on the following persons by hand delivery:

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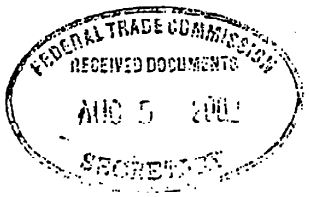
TAB 1

[NON-PUBLIC - CONTAINS RESTRICTED/CONFIDENTIAL MATERIAL PURSUANT TO PROTECTIVE ORDER]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of

a corporation.

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

DEFINITIONS

1. For the purposes of this Protective Order, the following definitions shall apply:

a. "Matter" means the matter captioned *In the Matter of Rambus Incorporated*, Docket Number 9302, pending before the Federal Trade Commission, and all subsequent appellate or other review proceedings related thereto.

b. "Commission" or "FTC" means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding

persons retained as consultants or experts for purposes of this Matter.

"Rambus" means Rambus Incorporated, a public corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4440 El Camino Real, Los Altos, California 94022.

d. "Party" means either the FTC or Rambus.

in this Matter; its associated attorneys; persons regularly employed by such law firms (including legal assistants, clerical staff, and information management personnel); vendors retained by such law firm to provide copying, graphic, and other similar litigation support services; and temporary personnel retained by such law firm to perform legal or clerical duties, or to provide logistical litigation support with regard to this Matter; provided that any attorney associated with

term Outside Counsel does not include persons retained as consultants or experts

g. "Producing Party" means a Party or Third Party that produced or intends to produce Restricted Confidential or Confidential Discovery Material to any of the

Material of a Third Party that either is in the possession, custody, or control of the FTC or has been produced by the FTC in this Matter, the Producing Party shall

Confidential or Confidential Discovery Materials shall be identified by the FTC by Third Party and the FTC shall provide the Respondent with contact information for each such Third Party. The Producing Party shall also mean the FTC for purposes of any document or material prepared by, or on behalf of, the FTC.

h. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a party to this Matter and their employees, directors, officers, attorneys, and agents.

i. "Disclosing Party" means a party to this proceeding that is disclosing or contemplating disclosing Discovery Material pursuant to this Protective Order.

j. "Expert/Consultant" means testifying or consulting experts who are retained to assist complaint counsel or Respondent's counsel in preparation for trial or to give testimony at trial.

k. "DRAM industry" means developers, suppliers, and licensors of dynamic random access memory chips and technology, as well as designers and manufacturers of personal computer equipment and parts that incorporate such chips or technology.

l. "Document" means the complete original or a true, correct and complete copy and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored or reproduced, and includes all drafts and all copies of every such writing, record or graphic that contain any commentary, notes, or marking whatsoever not appearing on the original. "Document" includes, but is

not limited to, every writing, letter, envelope, telegram, e-mail, meeting minute, memorandum, statement, affidavit, declaration, book, record, survey, map, study, handwritten note, working paper, chart, index, tabulation, graph, drawing, chart, photograph, tape, phono record, compact disc, video tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar organizer, desk pad, telephone message slip, note of interview or communication, or any other data compilation from which information can be obtained.

"Discovery Material" includes, without limitation, 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. Information taken from Discovery Material that reveals its substance shall also be considered Discovery Material.

"Confidential Discovery Material" means 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. These are materials which are referred to and protected by Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), Commission Rule of Practice § 4.10(a)(2), 16 C.F.R. § 4.10(a)(2), and Section 26(c)(7) of the Federal Rules of Civil Procedure, and

precedents thereunder. Confidential Discovery Material 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. The following is a nonexhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, product roadmaps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations and data (e.g., prices, volumes, or revenues); personal files and [redacted] information subject to confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; and proprietary consumer, customer or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Discovery Material. Notwithstanding anything herein, material will not be considered confidential if it is within the public domain.

o. "Restricted Confidential Discovery Material" is Confidential Discovery Material [redacted] current information that is highly sensitive (marketing plans, pricing plans, financial information, trade secrets, or documents of a like nature) and the disclosure of which to the designated in-house counsel identified in paragraph 8 would likely cause substantial commercial harm or personal embarrassment to the Disclosing Party. It is anticipated that this particularly restrictive designation should be

utilized for only a small number of documents. Such a designation shall constitute a representation by counsel for the Disclosing Party that the material is properly subject to restricted confidential treatment under this Order.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

2. 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.

3. The Parties in conducting discovery from Third Parties shall attach to such discovery requests a copy of this Protective Order and a cover letter that will apprise such Third Parties of their rights hereunder.

4. Discovery Material may be designated either as Confidential Discovery Material or as Restricted Confidential Discovery Material (i) by the Producing Party placing on or affixing to

the first page of a document containing such Restricted Confidential or Confidential Discovery Material in such manner as will not interfere with the legibility thereof, the notation

COUNSEL ONLY - FTC Docket No. 9302" (or other similar notation containing a reference to this Matter), or (iii) by any Party instructing the court reporter, with notice to all parties, within five (5) business days of the publication of the transcript to designate as "Confidential" or "Restricted Confidential" each page of the deposition transcript containing such Confidential Discovery Material. Pursuant to this provision all deposition transcripts shall be treated as Restricted Confidential Discovery Material until the expiration of five (5) business days after the publication of the transcript. Such designations constitute a good-faith representation by counsel for the Party or Third Party making the designation that the document or transcript constitutes or contains "Restricted Confidential Discovery Material" or "Confidential Discovery Material."

5. A Producing Party will use reasonable care to avoid designating any Discovery Material as "Confidential" or "Restricted Confidential" which is not entitled to such designation or which is generally available to the public.

6. All documents obtained by compulsory process or voluntarily from any Party or Third Party, all responses to requests for admissions, and all copies, extracts, and summaries thereof, and transcripts of any investigational hearings, interviews, or depositions that were obtained from this Party or this Order as adopted, shall be treated as Restricted Confidential Discovery Material for a period of twenty (20) days from the time notice of the intent to produce is given to the Producing Party. At the expiration of that time, this material shall be treated as Confidential Discovery Material unless otherwise designated by the Producing Party as either Restricted

Confidential Discovery Material or non-confidential.

7. Restricted Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone other than:

a. complaint counsel and the Commission, as permitted by the Commission's Rules of Practice;

b. Outside Counsel;

c. Experts/Consultants;

d. the Administrative Law Judge presiding over this matter and personnel assisting him;

e. court reporters involved in transcribing proceedings relevant to this matter;

f. judges and other court personnel of any court having jurisdiction over any appeal proceedings involving this Matter;

g. any author or recipient of the Restricted Confidential or Confidential Discovery Material (as indicated, for example, on the face of the document, record, or material); any individual who was in the direct chain of supervision of any author or recipient at the time the Restricted Confidential or Confidential Discovery Material was created or received; any employee or agent of the entity that created or received the document; or anyone representing an author or recipient of Restricted Confidential or Confidential Discovery Material in this Matter; and

h. such other person(s) authorized in writing by the Producing Party.

8. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone other than the persons listed in paragraph 7 and to two in-house

counsel for Respondent, provided that each signs a declaration in the form attached hereto as Exhibit "A," which is incorporated herein by reference. The designated in-house counsel for [redacted] Counsel.

9. Restricted Confidential or Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to an Expert/Consultant unless such Expert/Consultant agrees in writing:

a. to maintain the confidentiality of such Restricted Confidential or Confidential Discovery Material;

b. to return such Restricted Confidential or Confidential Discovery Material to complaint counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of the Expert/Consultant's assignment or retention, or upon the conclusion of this Matter;

c. [redacted] anyone, except as permitted by the Protective Order; and

d. to use such Restricted Confidential or Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

10. This paragraph governs the procedures for the following specified disclosures:

a. Disclosure to Experts/Consultants in the DRAM Industry

If any Party desires to disclose Restricted Confidential or Confidential Discovery Material

to any Expert/Consultant, who is not an FTC employee, and who, beyond his employment as an expert in this Matter, is an officer, director, or employee of any company the primary business of which is in the DRAM industry or who regularly consults with any company the primary business of which is in the DRAM industry regarding competitive decision making, or may otherwise have a financial or pecuniary interest, beyond that of a passive, minority investment, in any company the primary business of which is in the DRAM industry, the Disclosing Party shall notify the Producing Party of its desire to disclose such material. Such notice shall identify the specific Expert/Consultant to whom the Restricted Confidential or Confidential Discovery Material is to be disclosed. Such identification shall include, but not be limited to, the full name and [illegible] curriculum vitae of such Expert/Consultant identifying all other present and prior employers and/or firms in the DRAM industry for or on behalf of which the identified Expert/Consultant has been employed or done consulting work in the preceding four (4) years. To prevent the disclosure of Restricted Confidential or Confidential Discovery Material to such Expert/Consultant, the Producing Party must, within five (5) business days of receiving notice, file a motion with the Administrative Law Judge that includes a written statement of the reasons for the objection to disclosure. If the Producing Party files such a motion, the Disclosing Party shall not disclose the Restricted Confidential or Confidential Discovery Material to the identified Expert/Consultant absent a written agreement with the Producing Party or order of the Administrative Law Judge permitting the disclosure. If the Producing Party does not file such a motion, the Disclosing Party may disclose the Restricted Confidential or Confidential Discovery Material to the identified Expert/Consultant

without providing further notice.

b. Disclosure to New Persons

If any Party desires to disclose a Producing Party's Restricted Confidential or Confidential Discovery Material to any person other than those referred to in paragraphs 7 and 8 of this Protective Order ("New Person"), the Disclosing Party shall inform the Producing Party of its desire to disclose such material. Such notice shall identify those materials sought to be disclosed with specificity (*i.e.*, by document control numbers, deposition transcript page and line reference, or other means sufficient to easily locate such materials), and the specific New Person (by name and business affiliation) to whom such material is to be disclosed. The Producing Party may object to the disclosure of the Restricted Confidential or Confidential Discovery Material within [illegible] Confidential Discovery Material to the New Person by providing the disclosing Party with a statement of the reasons for the objection. If the Producing Party objects within five (5) business days, the Disclosing Party shall not disclose the Restricted Confidential or Confidential Discovery Material to the New Person, absent a written agreement with the Producing Party or order of the Administrative Law Judge permitting the disclosure. If the Producing Party does not object to the disclosure of the Restricted Confidential or Confidential Discovery Material to the New Person within five (5) business days, the Disclosing Party may disclose the Restricted Confidential or Confidential Discovery Material to the identified New Person.

11. Challenges to Confidentiality Designations and Resolution of Disputes

A Party seeking to challenge a Producing Party's designation of materials as Restricted Confidential or Confidential Discovery Material or any other restriction contained

within this Protective Order, the challenging Party shall notify the Producing Party and all other Parties of the challenge. Such notice shall identify with specificity (i.e., by document control number, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The Producing Party may preserve its designation within five (5) business days of receiving notice of the confidentiality challenge by providing the challenging Party and all other Parties to this action with a written statement of the reasons for the designation. If the Producing Party timely preserves its rights, the Parties shall continue to treat the challenged material as Restricted Confidential or Confidential Discovery Material, absent a written agreement with the Producing Party or order of the Administrative Law Judge providing otherwise.

b. If any confidentiality issue arises and the parties involved have failed to resolve the conflict via negotiations in good faith, a Party seeking to disclose Restricted Confidential or Confidential Discovery Material or challenging a confidentiality designation or any other restriction contained within this Protective Order may make written application to the Administrative Law Judge for relief. Such application shall be served on the Producing Party and the other Parties to this action, and shall be accompanied by a certification that the meet and confer obligations of this paragraph have been met, but that good faith negotiations have, failed to resolve outstanding issues. The Producing Party and any other Parties shall have five (5) business days to respond to any such application. While an application is pending, the Parties shall maintain the pre-application status of the Restricted Confidential or Confidential Discovery Material. Nothing in this Protective Order shall create a presumption or alter the

change in designation.

12. Restricted Confidential or Confidential Discovery Material shall not be disclosed to [illegible] executed and transmitted to Respondent's counsel or complaint counsel, as the case may be, a declaration or declarations, as applicable, in the form attached hereto as Exhibit "A," which is incorporated herein by reference. Respondent's counsel and complaint counsel shall maintain a file of all such declarations for the duration of the litigation. Restricted Confidential or Confidential Discovery Material shall not be copied or reproduced for use in this Matter except to the extent such copying or reproduction is reasonably necessary to the conduct of this Matter, and all such copies or reproductions shall be subject to the terms of this Protective Order. If the duplication process by which copies or reproductions of Restricted Confidential or Confidential Discovery Material are made does not preserve the confidentiality designations that appear on the original documents, all such copies or reproductions shall be stamped "CONFIDENTIAL - FTC Docket No. 9302" or RESTRICTED CONFIDENTIAL - OUTSIDE COUNSEL ONLY - FTC Docket No. 9302," as appropriate.

13. The Parties shall not be obligated to challenge the propriety of any designation or [illegible] promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to persons not referred to persons otherwise [illegible] Confidential Discovery Material is produced without the legend attached, such document shall be [illegible]

complaint counsel and Respondent's counsel in writing that such material should be so designated

return promptly or otherwise destroy the unmarked documents.

14. Counsel for any Producing Party shall have the right to exclude from oral depositions (during periods of examination or testimony relating to Restricted Confidential or Confidential Discovery Material) any person not authorized to receive Restricted Confidential or Confidential Discovery Material.

15. The production or disclosure of any Discovery Material made after entry of this Protective Order which a Producing Party claims was inadvertent and should not have been

which the Producing Party would have been entitled had the privileged Discovery Material not inadvertently been produced or disclosed. In the event of such claimed inadvertent production or disclosure, the following procedures shall be followed:

a. The Producing Party may request the return of any such Discovery Material within twenty (20) days of discovering that it was inadvertently produced or disclosed (or inadvertently produced or disclosed without redacting the privileged content). A

Discovery Material and the basis for asserting that the specific Discovery Material (or portions thereof) is subject to the attorney-client privilege or the work product doctrine and the date of discovery that there had been an inadvertent production or disclosure.

b. If a Producing Party requests the return, pursuant to this paragraph, of any such

Discovery Material from another Party, the Party to whom the request is made shall return immediately to the Producing Party all copies of the Discovery Material within its possession, custody, or control including all copies in the possession of experts, consultants, or others to whom the Discovery Material was provided — unless the Party asked to return the Discovery Material in good faith reasonably believes that the Discovery Material is not privileged. Such good faith belief shall be based on either (i) a facial review of the discovery material or (ii) the inadequacy of any explanations provided by the Producing Party, and shall not be based on an argument that production or disclosure of the Discovery Material waived any privilege. In the event that only portions of the Discovery Material contain privileged subject matter, the Producing Party shall substitute a redacted version of the Discovery Material at the time of making the request for the return of the requested Discovery Material;

c. Should the Party contesting the request to return the Discovery Material pursuant to this paragraph decline to return the Discovery Material, the Producing Party seeking the return of the Discovery Material may thereafter move for an order compelling the return of the Discovery Material. In any such motion, the Producing Party shall have the burden of showing that the Discovery Material is privileged and that the production was inadvertent.

16. If either Party receives a discovery request in another proceeding that may require the disclosure of a Producing Party's Restricted Confidential or Confidential Discovery Material, the recipient of the discovery request shall promptly notify the Producing Party of receipt of such

(10) business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the Producing Party of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any such order requiring production of Restricted Confidential or Confidential Discovery Material, or to subject itself to any penalties for non-compliance with any

addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 C.F.R. § 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

17. In the event that any Restricted Confidential or Confidential Discovery Material

to be filed with the Secretary of the Commission, the Secretary shall be so informed by the

until further order of the Administrative Law Judge; provided, however, that such papers may be furnished to persons or entities who may receive Restricted Confidential or Confidential Discovery Material pursuant to this Order. After filing any paper containing Restricted Confidential or Confidential Discovery Material, the filing Party shall file on the public record

a duplicate copy of the paper with the Restricted Confidential or Confidential Discovery Material deleted pursuant to Section 3.22(b) and 3.45(e) of the Commission's Rules of Practice. Further, if the protection for any such material expires, any Party may file on the public record a duplicate copy which also contains the formerly protected material.

18. This Order governs the disclosure of material during the course of discovery and does not constitute an *in camera* order as provided in Section 3.45 of the Commission's Rules of Practice ("Rule"), 16 C.F.R. § 3.45. If the Parties intend to introduce as evidence at trial any Confidential Discovery Material of a Party or Producing Party, the Disclosing Party must provide at least 10 days notice to the Producing Party, pursuant to 16 C.F.R. § 3.45(b). Any Party or Producing Party may move for *in camera* treatment of any Confidential Discovery Material. A motion for *in camera* treatment must meet the standards set forth in 16 C.F.R. § 3.45.

19. At the time that any Expert/Consultant or other person retained to assist counsel in the preparation of this action concludes participation in this action, such person shall return to counsel all copies of documents or portions thereof designated Restricted Confidential or Confidential Discovery Material that are in the possession of such person, together with all notes, memoranda, or other papers containing Restricted Confidential or Confidential Discovery Material. At the conclusion of this action, any subsequent proceedings based thereon, or any related actions, and upon request of the submitter(s), the Respondent shall return or destroy all documents obtained in these actions that contain or refer to Restricted Confidential or Confidential Discovery Material, other than trial transcripts and trial exhibits introduced into evidence (and, if destroyed, shall provide the submitter with an affidavit of destruction); provided, however, that privileged documents or attorney work product need not

be returned or destroyed. The FTC shall retain, return or destroy documents in accordance with the provisions of Rule 4.12 of the FTC's Rules of Practice, 16 C.F.R. § 4.12.

20. The provisions of this Protective Order, insofar as they restrict the communication and use of Restricted Confidential or Confidential Discovery Material, shall, without written permission of the Producing Party or further order of the Administrative Law Judge hearing this Matter, continue to be binding after the conclusion of this Matter.

21. This Protective Order shall not apply to the disclosure by a Producing Party or its Counsel of such Producing Party's Restricted Confidential or Confidential Discovery Material to such Producing Party's employees, agents, former employees, board members, directors, and officers.

22. Nothing in this Protective Order shall be construed to limit, restrict, or otherwise affect the ability of the parties to seek to modify this Protective Order by application to the Administrative Law Judge for good cause shown.

[redacted]

of this Protective Order.

ORDERED:

James P. Timony
Administrative Law Judge

Dated: August 5, 2002

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

RAMBUS, INC., a corporation.	Docket No. 9302

DECLARATION CONCERNING PROTECTIVE ORDER

GOVERNING DISCOVERY MATERIAL

I, [NAME], hereby declare and certify the following to be true:

1. [Statement of employment]

2. I have read the "Protective Order Governing Discovery Material" ("Protective Order") issued by Administrative Law Judge James P. Timony on August 5, 2002, in connection with the above captioned matter. I understand the restrictions on my access to and use of any

Restricted Confidential or Confidential Discovery Material (as these terms are used in the Protective Order) in this action and I agree to abide by the Protective Order.

3. I understand that the restrictions on my use of such Restricted Confidential or Confidential Discovery Material include:

a. that I will use such Restricted Confidential or Confidential Discovery Material only for the purposes of this proceeding, and hearing(s) and any appeal of this proceeding and for no other purpose;

b. [redacted]

c. that I will use, store, and maintain the Restricted Confidential or [redacted] protected status;

d. [redacted] promptly return all Restricted Confidential or Confidential Discovery Material, and all notes, memoranda, or other papers containing Restricted Confidential or Confidential Discovery Material, to complaint counsel or Respondent's Outside Counsel, as appropriate.

4. I am fully aware that, pursuant to Section 3.42(h) of the Commission's Rules of Practice, 16 C.F.R. § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions imposed by the Commission.

_____ Date: _____

Full Name [Typed or Printed]

_____

Signature