

[REDACTED]

Protective Order (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

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 (3/31/2004)”).

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

1 present has not been 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

~~Exhibit~~ Ramhus admitted its position in secret. Mitsubishi was entitled to expect

that distribution of the documents it provided would be limited by the Protective Order that

Ramhus sent with the subpoena. In fact, the papers filed by Ramhus in response to Mitsubishi's

§ 87(2)(b) "Material" outside of the Commission proceeding regardless of whether

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 ~~grant summary judgment, sufficient to hold that 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

~~is sufficient to hold that the documents are confidential. At this point Complaint Counsel cannot~~

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.

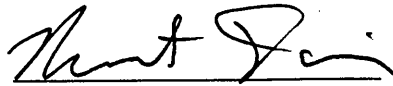
CONCLUSION

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

~~Denbury's subsequent use of its documents outside of the scope of the Protective Order~~

Respectfully submitted,



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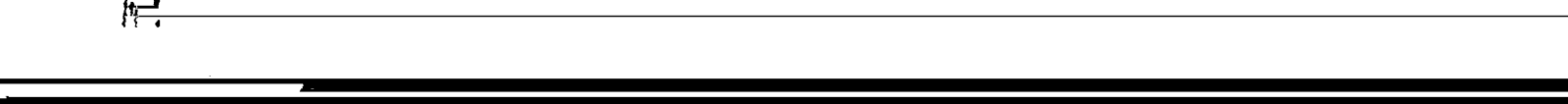
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ATTACHMENT A

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|------------|---------------------|
| MEUS0031 | MEUS2164 - MEUS2168 |
| [REDACTED] | [REDACTED] |



| | | |
|---------------------|-----------------------|------------|
| MEUS5167 - MEUS5186 | MEUS7615 - MEUS7617 | [REDACTED] |
| MEUS8356 - MEUS8400 | MEUS10443 - MEUS10449 | [REDACTED] |



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|-----------------------|------------|
| MEUS11512 - MEUS11513 | [REDACTED] |
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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 Responding Motion of New Party Mitsubishi Electric~~

~~Corn 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